ORAL ARGUMENT SCHEDULED FOR MARCH 15, 2013

CASE NO. 11-7088

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

SHIRLEY SHERROD,
Plaintiff-Appellee,

v.

ANDREW BREITBART AND LARRY O'CONNOR,
Defendants-Appellants.

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

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

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GLOSSARY

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

PRELIMINARY STATEMENT

An anti-SLAPP act that is not construed to provide interlocutory review is not worthy of its name. Unless defendants are able to have their cases heard at appellate courts on an immediate interlocutory basis when the trial court has refused to dismiss, the public policy behind enacting these rigorous protections for free speech will be eviscerated. In most cases, federal courts of appeal have responded to this need for prompt resolution of SLAPP cases – and to the underlying policy objectives behind the new laws – by properly asserting jurisdiction over appeals of anti-SLAPP motions under the collateral order doctrine. Any other judicial procedure would make the legislative determination that certain defamation cases deserve immunity from trial to protect the Constitution wholly meaningless. This Court should join its sister circuits and implement the D.C. Anti-SLAPP Act (the "Act") to require collateral review when motions under the law are denied.

None of the purported procedural hurdles raised by Plaintiff Shirley Sherrod precludes application of this important public policy to this case. The D.C. Council expressed a clear intent that the Act applies to pending cases and, in any event, the rights under the Act afforded to speakers such as Andrew Breitbart and Larry O'Connor ("Defendants") do not change the effect of past conduct and thus the statute does not require any purported retroactive application. Nor should this Court create a circuit split and refuse to apply the Act in federal court under the *Erie* doctrine as Sherrod suggests – a ruling that would run counter to nearly every court,

including all courts of appeal, that have addressed this issue. The District Court also is not entitled to any deference for its erroneous ruling on the timeliness of the anti-SLAPP motion. That bizarre ruling cannot be squared with its two previous orders expressly granting Defendants extensions to file a motion, such as the anti-SLAPP motion, in response to the Complaint.

Libel plaintiffs relish the chance to be in front of an appellate court. It gives them a chance to do what they claim the defendant did not do – tell their story the way they believe it should be told. That Sherrod would focus virtually her entire brief on one procedural nit after another, rather than argue why the law of defamation entitles her to recovery and vindication, exposes the central problem with her case: There is no case. Therefore, in order to realize the objective of the Act to dispose of meritless libel actions at the earliest possible instance, this Court, upon finding that it has jurisdiction and the Act applies, should dismiss Sherrod's action rather than remand to the District Court as she insists. O'Connor should not be subjected to further delay in the resolution of this case because the District Court failed to consider his opinion defense not just once but twice – first when it adjudicated the anti-SLAPP motion and second when it responded to this Court with its Statement of Reasons to explain why it denied the motion. It would waste judicial resources to let an obviously deficient claim survive simply to give the District Court a third chance at addressing the legal question raised by this motion. A remand would chill First

Amendment rights and defeat the purpose of the new anti-SLAPP protections to shield speakers on matters of public concern from litigation like Sherrod's.

SUMMARY OF ARGUMENT

The order denying Breitbart and O'Connor's anti-SLAPP motion should be reversed and the case dismissed because the statements at issue are non-actionable opinion. This order is appealable under the collateral order doctrine because: (1) the SLAPP motion invokes an immunity which makes it "effectively unreviewable on appeal from final judgment"; (2) the motion presents a pure question of law completely separate from the merits because it asks the Court to determine whether the complaint alleges a provably-false statement of fact, not whether the defendants "actually committed the relevant tort." *Henry v. Lake Charles Am. Press*, 566 F.3d 164, 175 (5th Cir. 2009); and (3) the appeal "conclusively decides" the question at hand because if the motion is granted, the case is dismissed. The statute applies to this case because the D.C. Council was clear that the Act would benefit defendants in pending suits. Breitbart and O'Connor exercised the immunity provided by the Act prospectively, and the Act does not impair any rights enjoyed by Sherrod before the statute's enactment. Anti-SLAPP statutes apply in federal court under *Erie* as nearly every court that has addressed this issue has found, including all the courts of appeals, because they provide SLAPP defendants with substantive rights to quickly terminate meritless litigation. Finally, the anti-SLAPP motion was timely filed within the timeframe set by the District Court.

ARGUMENT

I. Sherrod's claims must be dismissed because Defendants' statements about her NAACP speech are constitutionally-protected opinion

The purpose of anti-SLAPP laws is to ensure that a libel plaintiff with a meritless claim cannot avoid her day of reckoning by prolonging the life of a case that should be rejected at the outset. In libel cases, questions of opinion are decided as a matter of law, and every piece of information that is necessary to dismiss the challenged statements in Sherrod's complaint is already before this Court, making remand unnecessary.

Sherrod's claims fail because she cannot make out even the first step of her cause of action by showing the existence of a provably-false statement of fact. The loose, rhetorical characterizations of Sherrod's NAACP speech as "racist" and "discriminatory" are protected opinion regardless of the methodological framework this Court applies. There is one statement that is manifestly incorrect, however – Sherrod's claim that O'Connor did not seek dismissal over all the published statements, including the publication of the video from her NAACP speech. He did, and dismissal of the entire complaint is now warranted.

A. The Defendants did not state that Sherrod had violated the law

Sherrod does not contest O'Connor's central point that the default rule in libel jurisprudence concerning the word "racist" is that it is not actionable. After decades of overuse as a rhetorical attack its meaning has been diluted to the point where the

term has a generous hyperbolic usage but not a verifiable one. *See* O'Connor Br. 22-23. In fact, Sherrod incorporates O'Connor's own articulation of this norm – that the label has been "hurled about so indiscriminately that it is no more than a verbal slap" – into her own brief, and she does not reject it. *See* Sherrod Br. 59.

Rather than take on a losing battle over the actionability of name-calling, Sherrod tries to turn the Blog Post into something it is not – an allegation that she broke laws. With reciprocal charges of "racism" and other kinds of moral scolding routinely flying back and forth across the American political spectrum with hardly anyone raising an eyebrow, Sherrod writes that the "problem" with Defendants' publication was that they "did not *just* call" her a "'racist.'" *Id.* (emphasis added). They "went *far beyond*" that, she claims, by "falsely assert[ing] that she violated the law." *Id.* at 60 (emphasis added).

But Breitbart and O'Connor did no such thing. In the context of a highly-charged debate between the NAACP and the Tea Party over racial attitudes, they dressed-down Sherrod for confessing in public, while she was a federal official, that she once treated a white farmer differently from a black farmer based on skin color alone. In calling her confession "racist" and "discriminatory," the Blog Post did not in any way define Sherrod as a lawbreaker. No "laws" are even mentioned in the post for her to have violated. The lines that Defendants believed Sherrod crossed were not legal and verifiable but they were inherently open to subjective evaluation.

Taken as a whole, the Blog Post and Breitbart's post-publication question on Twitter asking whether Sherrod would be held "accountable" do not convert rhetoric and rhetorical questions into actionable factual assertions; rather, they are "invit[ing] the public to ask." *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1096 (4th Cir. 1993). "This invitation, rather than a libel, is the paradigm" of the free expression protected by the First Amendment. *Id.* *See*, *e.g.*, *Partington v. Bugliosi*, 56 F.3d 1147, 1157 (9th Cir. 1995) (question did not "impl[y] a false assertion of fact"); *Beverly Hills Foodland v. Beverly Hills Foodland, United Food & Commercial Workers Union*, 39 F.3d 191, 195-96 (8th Cir. 1994) (question "was not a false statement of fact, nor could it reasonably be read as such"); *Phantom Touring, Inc. v. Affiliated Publ'ns,* 953 F.2d 724, 730 (1st Cir. 1992) (question "reasonably could be understood only as [the author's] personal conclusion about the information presented, not as a statement of fact").

Almost all of the precedent Sherrod cites relating to the actionability of the words "racist" or "racism" are defamatory meaning cases, not opinion cases. *See* Sherrod Br. 59 n.14 (citing *Afro-American Publ'g v. Jaffe,* 366 F.2d 649, 655 (D.C. Cir. 1966)); Sherrod Br. 61 (citing *Taylor v. Carmouche,* 214 F.3d 788, 793 (7th Cir. 2000)). This Court has never cited its 1966 decision in *Jaffe* as precedent on opinion. In *Jaffe*, the Court's inquiry into defamatory meaning was post-trial, and the fact-finder had already determined that an anecdote used in a newspaper article that was the subject of the lawsuit – that the plaintiff had told a columnist that African-Americans living in the neighborhood near his store were of low intelligence – was not true. *Jaffe,* 366

F.2d at 653. Here, Sherrod's own words are the indisputable factual predicate for Defendants' statements of opinion.

Similarly, in *Taylor,* a paralegal complained "in general terms" to a city attorney that her supervisor was "racist." 214 F.3d at 790. The Seventh Circuit found the statement actionable because "a person who makes an *unsupported* defamatory statement may be penalized without offending the first amendment." *Id.* at 793 (emphasis added). Here, the Blog Post is well-supported by reference to the video excerpts – and the conclusion that the excerpts are evidence of racism can either be accepted or rejected because it is a subjective evaluation of actual statements made by the plaintiff. *See O'Brien v. City of Saginaw,* 2011 WL 8143, *5 (E.D. Mich. Jan. 3, 2011) ("[O]ne cannot prove a person is a racist or not a racist ... with the same objective confidence that one can prove a person lied under oath.").

Finally, in *Puchalski v. Sch. Dist. of Springfield, see* Sherrod Br. 60 n.14, the trial court emphasized the "authority that characterizing someone or something he has said as 'racist' is *not* alone actionable." 161 F. Supp. 2d 395, 408 n.7 (E.D. Pa. 2001) (emphasis added). The only reason the statements at issue went "beyond" opinion in that case is because a defendant was alleged to have attributed to a high-school football coach the uttering of a racial epithet – a wholly different situation from the facts here where there is *no* dispute over what Sherrod said and she merely complains that Defendants' *characterization* of her remarks was not fair.

B. The characterizations of Sherrod's publicly available speech are supportable interpretations of her own words

Of all the self-serving, inaccurate claims by Sherrod in her brief, one statement above all sticks out: her assertion that the full text of her remarks to the NAACP was not available to the public until "[e]ventually, the NAACP released the unabridged video of [her] speech." Sherrod Br. 16. *See also id.* at 61 (referring to the "full video of Mrs. Sherrod's speech [being] released to the public"). In fact, the complete video of Mrs. Sherrod's speech was *always* available to the public. The NAACP did not control access to the video; the local cable station in Georgia was the publisher. And that station, as Sherrod's complaint inadvertently concedes, was a source for anyone who wanted to "obtain a copy of the full, unedited tape." *See* Compl. ¶ 68 (JA041).

The significance of this fact is brought home in Sherrod's effort to distinguish *Moldea v. New York Times*, 22 F.3d 310 (D.C. Cir. 1994) (*Moldea II*), as controlling authority requiring the dismissal of her action. First, she claims that the "supportable interpretation" standard of *Moldea II* "applies only" if the challenged statements are "'evaluations of a literary work.'" Sherrod Br. 63. This bald pronouncement is demonstrably incorrect. First, the Court in *Moldea II* never limited its holding in this way. Two years later, in fact, in *Washington v. Smith*, 80 F.3d 555, 556-57 (D.C. Cir. 1996), this Court applied the "supportable interpretation" test of *Moldea II* to a sports column to affirm dismissal of a libel action. In this circuit alone, *Moldea II* has also been applied to letters to the editor, *see Matusevich v. Telnikoff*, 877 F. Supp. 1, 4-5

(D.D.C. 1995), and a newspaper article, *see Novecon v. Bulgarian-American Enterprise Fund*, 977 F. Supp. 45, 52 (D.D.C. 1997). *See also Guilford Transp. Indus. v. Wilner*, 760 A.2d 580, 583, 588-89, 591 (D.C. 2000) (applying "supportable interpretation" standard to newspaper column). The notion that *Moldea II* would apply to each of these genres of expression but not to the supportable interpretations in a blog post commenting on the speech of a public official is ludicrous, to say the least. Second, Sherrod claims that *Moldea II* is distinguishable because in cases involving literary works "the reader has access to *all* of the facts" whereas here the reader "did not have access to all of the facts; instead readers only knew about the facts *Mr. Breitbart and Mr. O'Connor* … chose to disclose." Sherrod Br. 64 (emphasis in original).

But the fact is the public *did* have and *always had* access to all the facts before the NAACP chose to release *its* copy of the speech as Sherrod admits. *See* Compl. ¶ 68 (JA041). This Court in *Moldea II* did not require *The New York Times* to publish along with its review of *Interference* the entire text of the book. Nor were Defendants required to post the entire text of Sherrod's speech (even had they had it at the time). Defendants did what *Moldea II* commands – they supported their interpretation of her speech as "racist" and "discriminatory" with references to her own words in which not a single phrase was deleted, reordered, or added. Just as any reader could buy a copy of *Interference*, any reader who wanted to know more about Sherrod could obtain the full NAACP speech.

Sherrod's citation to cases that examine the falsity element of a libel claim, *see*

Sherrod Br. 67, again shows her missing the point. This is an opinion case where there are no factual statements to prove false. Sherrod tries to state as a fact that the "unabridged speech explains that [she] did *not* discriminate against" the white farmer. Sherrod Br. 61 (emphasis in original). But that's simply not a fact. Whether or not she "discriminated" against the white farmer or was "racist" when she first refused to give him her full help and then decided that his poverty, not his race, should guide her – a change of heart fully captured in the Blog Post – depends on one's point of view and is not provably true or false.

At the end of the day, when it came to letting race direct her dealings with the white farmer, Sherrod's own words show that she was for it before she was against it. Her complaint is not with the portion of the speech that Defendants posted, which ends with her realizing that need trumps race, but with what they thought about this portion. They found the real meaning in her admission that she was once "for it" whereas she wanted the take-away message to be that she had learned to be "against it." In this debate, who wins and who loses is a matter of opinion.

C. The Defendants sought dismissal of all of the published statements, and they are ripe for dismissal

Sherrod's strange contention that Breitbart and O'Connor did not file anti-SLAPP and Rule 12(b)(6) motions that would fully dispose of the case, *see* Sherrod Br. 66-67, hardly deserves dignifying. Her argument seems to be that the Defendants sought dismissal over the six statements on the Blog Post *she identified* as actionable in

Count I of her Complaint, *see* Compl. ¶ 94 (JA049-050), but failed to ask the District Court to dismiss allegations of defamation over a separate count she did not bring alleging a separate cause of defamation relating to the video excerpts that consisted of her own words in which not a single phrase was added, removed, or reordered.

Not only is the predicate of her argument bogus but Breitbart and O'Connor could not have been more clear that the protections accorded to the Blog Post belonged to the *entire* post, including to the embedded video. For example, in their anti-SLAPP motion, they note that Sherrod's defamation, false light and emotion distress counts "arise from the statements made in the July 19, 2010 article posted on BigGovernment.com (the 'Blog Post') and from two excerpts of Sherrod's March 27, 2010 speech embedded in the Blog Post. Because Sherrod was a public official at the time Breitbart published the Blog Post and segments of her speech, and further because Breitbart's comments and Sherrod's speech itself relate to issues of public concern, Sherrod's claims fall squarely within the Anti-SLAPP Act." Memo. in Support of Anti-SLAPP Motion [Dkt. 24] at 4-5 (JA197-198).

This Court has the authority to review the actionability of the allegedly actionable statements in Sherrod's complaint and dismiss the case in its entirety as O'Connor has requested. O'Connor Br. 53. In cases raising First Amendment issues, an appellate court has an obligation to "make an independent examination" of the record to ensure that there is no "forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984). This requirement "reflects a

deeply held conviction that judges … must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 510-11. That the District Court failed to address the merits of Sherrod's libel claims does not preclude this Court from dismissing her complaint based on its own evaluation of the insufficiency of her pleading to overcome the constitutional protections for expressions of pure opinion. *See also Chapin*, 993 F.2d 1087 (protecting news coverage under the fair report privilege when the trial court did not reach the issue).

II. Sherrod offers no compelling reason to deny interlocutory review of the anti-SLAPP motion under the collateral order doctrine

The issue presented in this appeal – whether, as a matter of law, the challenged statements in the Blog Post are provably-false assertions of fact – satisfies the finality concerns of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and all other requirements of the collateral order doctrine. This Court will be undertaking a procedure that is routine in the analogous area of qualified immunity under 42 U.S.C. § 1983. It will be deciding an abstract question of law that is conceptually distinct from the merits of Sherrod's claim, and now that the D.C. Anti-SLAPP Act has created immunity-like provisions for libel defendants, this question of law, like similar questions in § 1983 jurisprudence, is appealable through the collateral order doctrine.

A. The order is "effectively unreviewable on appeal from final judgment"

Sherrod contends that O'Connor cannot meet the "unreviewability" prong of the *Cohen* test because the anti-SLAPP motion is "just a claim for pretrial dismissal."

Sherrod Br. 24. Sherrod is wrong because the District of Columbia statute, like statutes in other jurisdictions including California, Louisiana and Maine, confers immunity from both liability *and* suit, even where, like here, the statute does not expressly use the term "immunity."

In enacting the D.C. anti-SLAPP statute, the D.C. Council explicitly provided "a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation" and avoid a "costly and long legal battle." *See* Report on Bill 18-893, "Anti-SLAPP Act of 2010," Council of the District of Columbia, Committee on Public Safety and the Judiciary (Nov. 18, 2010) ("Council Report") at 4, 24 (Addendum 13, 33). It compared the Act's protection to the "absolute or qualified immunity" that other states had provided "to individuals engaging in protected actions." Council Report 4 (Addendum 13). In providing that protection, the D.C. Council declared that it sought to prevent the chilling effect of SLAPPs on advocacy in the public interest by "ensuring that advocates do not err on the side of silence instead of participating in public debate." Public Citizen/ACLU Br. 11 (citing Council Report 1, 4 (Addendum 10, 13)). The "right not to be tried" is precisely what the D.C. Council intended to confer through the statute.[1]

In considering other anti-SLAPP statutes with analogous purposes, courts of

[1] The immunity conferred by the D.C. statute differentiates anti-SLAPP motions from the typical Rule 12 and Rule 56 motions that would not otherwise be appealable under the collateral order doctrine.

appeals have held that the unreviewability requirement is satisfied because immediate appeal is necessary to preserve the immunity (which would be "'effectively lost if a case is erroneously permitted to go to trial,'" *id.* (quoting *Liberal v. Estrada*, 632 F.3d 1064, 1074 (9th Cir. 2011))), and to protect a particular value of a high order – to counter the "chilling effect" that SLAPP suits have on First Amendment rights. *See* Council Report 1 (Addendum 10).

For example, the California anti-SLAPP statute declares simply that "it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." Cal. Code Civ. Proc. § 425.16. No express declaration was necessary for courts interpreting the California statute to find that "a defendant's rights under the anti-SLAPP statute are in the nature of immunity," *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003), nor is one required here.[2] Just six days ago, the Ninth Circuit reaffirmed the holding in *Batzel*, emphasizing that the immunity from suit that is recognized in *Batzel* is "imbued with a significant public interest." *DC Comics v. Pacific Pictures Corp.*, No. 11-56934, 2013 WL 119716, *4 (9th Cir. Jan. 10, 2013) (citation

[2] Neither *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 755 & n.5 (D.C. 1983) nor *Carter v. State Farm Mut. Auto. Ins. Co.*, 808 A.2d 466, 472 (D.C. 2002), Sherrod Br. 30, suggest otherwise because there is no question that the D.C. anti-SLAPP statute meant to confer immunity on SLAPP defendants. Moreover, neither case stands for the proposition that a statute must contain "magic words" where the plain meaning is otherwise clear.

omitted). Indeed, the *DC Comics* panel stated, "it would be difficult to find a value of a 'high[er] order'" than the "constitutionally-protected rights to free speech and petition that are at the heart" of anti-SLAPP statutes, and held that "[s]uch constitutional rights *deserve particular solicitude within the framework of the collateral order doctrine*." *Id.* (emphasis added) (citation omitted).

The decisions in *Metabolic* and *Englert* holding that denials of anti-SLAPP motions under the Nevada and Oregon statutes do not satisfy this part of the *Cohen* test do not help Sherrod. In concluding that the Nevada statute "does not furnish its citizens with immunity from trial," the court in *Metabolic* relied on the Nevada statute's express statement that it provides immunity from "civil liability" (as opposed to immunity from suit) and that Nevada law precludes interlocutory appeals absent statutory authority. *Metabolic Research v. Ferrell*, 693 F.3d 795, 801 (9th Cir. 2012) ("In Nevada, 'where no statutory authority to appeal is granted, no right exists.'" (citation omitted)). District of Columbia law differs significantly on these issues.

First, unlike the Nevada statute, the immunity provided by the D.C. Anti-SLAPP Act is not limited only to "civil liability." It provides "a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation" and avoid a "costly and long legal battle." Council Report 4, 24 (Addendum 13, 33). Second, the drafters of the D.C. law stated that they "agreed with" and "supported the purpose" of an interlocutory appeal provision (Council Report 7 (Addendum 16)). Unlike Nevada law, the District of Columbia has well-

developed jurisprudence allowing interlocutory appeals under *Cohen*, including in defamation actions involving assertions of immunity from suit, a distinguishing – and controlling – fact Sherrod conveniently ignores. *See District of Columbia v. Pizzulli*, 917 A.2d 620 (D.C. 2007) (permitting interlocutory appeal under *Cohen*).

Nor is this case like *Englert v. MacDonell*, 551 F.3d 1099, 1105 (9th Cir. 2009), in which a Ninth Circuit panel found that Oregon's legislature "did not view such a remedy as necessary to protect the considerations underlying its anti-SLAPP statute." In contrast, the D.C. Council, as noted above, "agreed with" and "supported the purpose" of interlocutory appeal but was precluded from enacting it due to provisions in the "Home Rule Act" that limit the D.C. Council's control over the District's court system. Council Report 7 (Addendum 16).[3] But those restrictions do not prohibit either the D.C. courts or the federal courts from construing the right to an interlocutory appeal under *Cohen.*[4]

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[3] Sherrod's reliance on *Int'l Broth. of Elec. Workers v. NLRB,* 814 F.2d 697, 712 (D.C. Cir. 1987), Sherrod Br. 28 n.5, is misplaced because the Court is not being asked to "enforce" a substantive "principle" governing agency action based "solely" from legislative history, but rather to glean from the D.C. Council Report, among other sources, the intent to create an immunity.

[4] Sherrod notes that the D.C. Court of Appeals in *McNair Builders v. Taylor*, 3 A.3d 1132 (D.C. 2010) dismissed an interlocutory appeal from the denial of a motion invoking the judicial proceedings privilege. Sherrod Br. 28 n.6. In doing so, however, the court determined that "the interest protected by the judicial proceedings privilege [does not] approximate the public's interest in the full exercise of First Amendment rights to free speech." *Id.* at 1139. Its reference to *Henry,* which found "another public interest worthy of protection on interlocutory appeal, that of enforcing a

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This Court should follow the Ninth and Fifth Circuits in holding that an order denying an anti-SLAPP motion is effectively unreviewable on appeal from final judgment. *See Hilton v. Hallmark Cards*, 580 F.3d 874, 880 (9th Cir. 2009); *Henry*, 566 F.3d at 181; *Batzel*, 333 F.3d at 1024-26.

B. This appeal will resolve a pure legal question completely separate from the merits

This appeal presents an important question that is completely distinct from the merits – whether Breitbart and O'Connor must bear the brunt of defending themselves from Sherrod's attempt "to get back at" them for exercising their free speech rights when, as a matter of law, they did not publish a provably-false statement of fact. As the D.C. Anti-SLAPP statute confers immunity-like protections on speakers, the separateness of this inquiry for purposes of *Cohen* is akin to the separateness of pure legal questions related to qualified immunity in § 1983 cases appealed through the collateral order doctrine. For decades, the Supreme Court has found such abstract questions of law "conceptually distinct" from the merits of the underlying claims. *See Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (holding that a denial of qualified immunity, to the extent it turns on a question of law, is an appealable collateral order). Furthermore, following this well-established body of law, two sister courts of appeals have held that the separateness requirement is satisfied in

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statute that aim[s] to curb the chilling effect of meritless tort suits on the exercise of
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anti-SLAPP cases. *See Henry*, 566 F.3d at 175; *Batzel*, 333 F.3d at 1025. Sherrod offers no persuasive reason why this Court should create a circuit split on this issue that would also contradict *Mitchell* and its progeny.

The Fifth and Ninth Circuits have held that the question raised by special motions to dismiss under the anti-SLAPP statutes in Louisiana and California, respectively, are separate from the merits because they ask whether a defendant must "'be[] forced to defend against a meritless claim,'" not "whether the defendant actually committed the relevant tort." *Henry*, 566 F.3d at 175 (quoting *Batzel*, 333 F.3d at 1025). "[I]ssues of immunity," such as those under the D.C. Anti-SLAPP Act, are "decided prior to trial and then not normally revisited," and thus "the immunity determination is tangential to the merits of the underlying case." *See id.* at 176.

As a result, whether an anti-SLAPP motion should be granted to vindicate the right not to stand trial when, as a matter of law, no provably-false statement of fact was published "'exists separately from the merits of the defamation claim.'" *Id.* at 175 (quoting *Batzel*, 333 F.3d at 1025); *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009). Sherrod argues that the reasoning of *Batzel* is circular "and would render the collateral-order doctrine's requirement of separateness a dead letter." Sherrod Br. 36-37. But this argument fails to take into account, as *Henry* explained, that the issue is whether a defendant must defend against a meritless claim when a pure question of

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First Amendment rights" is therefore not mere *dicta*. *Id.* at 1138.

law can decide the case, not whether "the defendant actually committed the relevant tort," 566 F.3d at 175, which is what would be heard upon appeal of a final judgment on a full factual record.

Sherrod's other response, that collateral order appeals are unavailable in fact-bound qualified immunity cases under *Johnson v. Jones*, 515 U.S. 304 (1995), while a general statement of the doctrine, misses the point. This case is not fact-bound. Sherrod has never identified – at the trial court or in this Court – what additional facts are necessary for resolution of the opinion issues raised in the anti-SLAPP motion. Whether Defendants published provably-false factual assertions in characterizing Sherrod's speech as "racist" and "discriminatory" is a pure legal question separate from the merits of her claim that is ready for resolution by this Court under the collateral order doctrine.[5]

C. The order "conclusively decides the question" on the SLAPP statute

Sherrod's argument that the order denying Breitbart and O'Connor's anti-SLAPP motion is not "conclusive" is unsupported by the law. As the Fifth Circuit recognized in *Henry*, an order denying an anti-SLAPP motion "satisfies any concerns regarding conclusivity" because it is "conclusive as to whether the [anti-SLAPP

[5] Contrary to Sherrod's claims, Sherrod Br. 35-36, the Defendants appropriately incorporated certain legal argument addressed in the Rule 12(b)(6) motion into their anti-SLAPP motion to spare the court repetitive briefing, not because an anti-SLAPP motion duplicated the Rule 12(b)(6) motion in purpose or effect.

statute] mandates dismissal of the suit." 566 F.3d at 173-74. Sherrod mischaracterizes the appeal of an anti-SLAPP motion when she states that it is no different than the appeal of a Rule 12 or a Rule 56 motion that typically is not subject to interlocutory review. Sherrod Br. 39. She fails to recognize that anti-SLAPP appeals are different because of the immunity conferred by anti-SLAPP statutes even if they address some of the legal issues.

Sherrod also argues that Breitbart and O'Connor should have sought review through certification under 28 U.S.C. § 1292. While they sought certification of the District Court's order denying their motion to dismiss under Rule 12(b)(6), they sought review of the order denying their anti-SLAPP motion under the collateral order doctrine because a right of appeal under that doctrine has been recognized by the First, Fifth, and Ninth Circuits. In light of the immunity established by the D.C. anti-SLAPP statute, it logically followed that interlocutory review should be available in this Circuit as well. Sherrod has not cited any authority that requires a party to move under § 1292 if it is entitled to review of an order under 28 U.S.C. § 1291 and the collateral order doctrine.

III. Sherrod improperly seeks to apply a "retroactivity" analysis to the anti-SLAPP statute creating an immunity that Defendants have exercised prospectively

Sherrod's claim that the D.C. Anti-SLAPP Act does not apply "retroactively" is irrelevant because the D.C. Council unambiguously stated that the Act would benefit defendants in pending suits. Moreover, the Act creates a new substantive immunity

for Breitbart and O'Connor that they exercised prospectively; it does not operate retroactively to impair any rights Sherrod possessed prior to its enactment.

There is no dispute that a newly-enacted statute applies to all pending cases when the D.C. Council includes "a clear legislative showing" of such intent. *Bank of America, N.A. v. Griffin*, 2 A.3d 1070, 1076 (D.C. 2010). Here, the "Fiscal Impact Statement—'Anti-SLAPP Act of 2010'" unambiguously expresses the Council's understanding that "[i]f effective, the proposed legislation could have a beneficial impact on *current* and potential SLAPP defendants." (Addendum 34) (emphasis added). Sherrod attempts to diminish this statement as supposedly uninformative legislative history, Sherrod Br. 47-48, but fiscal impact statements are not so easily dismissed. Under the Home Rule Act, the District of Columbia is subject to significant congressional oversight, and the Council is required to explain the fiscal impacts of its acts to Congress. D.C. Code § 1-206.02(c)(3).

In order to satisfy this statutory duty, the Council expressly "*adopt[ed] the fiscal impact statement in the Council Report* as the fiscal impact statement required by … [the] Home Rule Act" into the anti-SLAPP statute itself. District of Columbia Anti-SLAPP Act, Bill No. 18-893, Engrossed Original at § 7 (Addendum to Reply Brief "Reply Addendum" at 4). By expressly adopting the fiscal impact statement into the Act's statutory text, there can be no question that the statement expresses the Council's clear intent that the Act apply for "current … SLAPP defendants." *Cf. In re W.M.*, 851 A.2d 431, 441 (D.C. 2004) (finding that a Council Report that was not

even expressly adopted by statute allowed the court definitively to "discern the purposes and intent of the legislation").

Sherrod's claim that the phrases "[i]f effective" and "could" renders the Council's "adopt[ed]" statement unduly conditional is nonsensical. Sherrod Br. 47-48. The Council's conditional language simply recognized that there was no certainty the legislation would be enacted. *Cf. Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 147 (D.C. Cir. 2012) (recognizing the uncertain nature of legislative action). Under Sherrod's strained interpretation, the D.C. Council would be questioning whether the Act would benefit not only current but also future SLAPP defendants – an absurd proposition.

The Act's applicability to pending cases is plain on its face, which explains why the court in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999), applied the California anti-SLAPP statute enacted in 1993 to claims that were first asserted in 1991 with little explanation. Sherrod attempts to distinguish *Newsham* by noting that the 1991 claims were "reinstated" after appellate review, but that fact is irrelevant since the claims in *Newsham*, like the claims here, were *served* before the applicable Anti-SLAPP statute became effective and the court did not find applying the statute to be a "retroactive" application. *Id.*

In *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 356 (Ct. App. 1995), the court held that the California anti-SLAPP statute applied to pending suits because the special motion to dismiss mechanism it created "does not change the legal effect of

past conduct," which is consistent with the criteria for retroactivity in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994). Contrary to Sherrod's assertion, the *Robertson* court's reliance on the procedural aspects of the California statute does not undercut O'Connor's position – supported by all of the *amici* – that the D.C. law has substantive rights akin to immunity. As the D.C. Attorney General aptly noted, "[t]he Act's protections touch on procedural issues, which they must since they are targeted at the evil the Council sought to address – the abuse of the court system to silence speech on topics of public interest." D.C. Gov't Br. 16.

IV. There is no "Catch-22" that precludes applying the D.C. Anti-SLAPP Act in federal court under *Erie*

Because the Anti-SLAPP Act does not require retroactive application and because it creates a substantive immunity from suit, there is no purported "Catch-22" that "doom[s]" the anti-SLAPP motion for O'Connor. Sherrod Br. 49-50. As Sherrod herself recognizes, federal courts have applied state anti-SLAPP statutes "precisely because the court[s] concluded that the relevant statute was substantive." Sherrod Br. 53.[6]

Although Sherrod and the District Court agree that the statute creates

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[6] Sherrod's contention that O'Connor's and the *amici's* conception of *Erie* (which happens to be shared by every court of appeal that has addressed this issue) would allow a defendant to file anti-SLAPP motions to dismiss under Federal Rule 12(b)(6) is simply wrong and ignores the substantive rights conferred by the anti-SLAPP statute – rights that Sherrod herself has recognized. Sherrod Br. 50-52.

substantive rights ("or at the very least, has substantive consequences," Statement of Reasons at 4 (JA412)), Sherrod now makes the contradictory claim that the statute conflicts with Rules 12 and 56 of the Federal Rules of Civil Procedure and thus cannot be applied in federal court under the *Erie* doctrine. Citing *3M v. Boulter*, Sherrod contends that the "Federal Rules at issue are 'sufficiently broad' and do not permit application of the D.C. Anti-SLAPP Act." Sherrod Br. 51. As all of the *amici* agree, *3M* was "wrongly decided" and, significantly, each of Sherrod's arguments has been rejected time and again by courts across the country, including by the First, Fifth and Ninth Circuits. *See* Public Citizen/ACLU Br. 20-27; DC Gov't Br. 3-28; Media *Amici* Br. at 11-28. She makes no attempt to distinguish the Ninth Circuit holding that there is no "direct collision" between the Federal Rules and the anti-SLAPP statute because "there is no indication that Rules 8, 12, and 56 were intended to occupy the field with respect to pre-trial procedures aimed at weeding out meritless claims," *Newsham*, 190 F. 3d at 972 (quotations omitted), or the First Circuit's conclusion that neither Rule 12(b)(6) nor Rule 56 "on a straightforward reading of its language was meant to control the particular issues" under the anti-SLAPP statute. *Godin v. Schencks*, 629 F.3d 79, 86 (1st Cir. 2010).

Similarly, the Act's requirement that dismissal be with prejudice does not, as Sherrod contends, "exacerbate[]" any conflict with Rule 41. Sherrod Br. 52. As *amici* have noted, Rule 41 "'sets forth nothing more than a default rule for determining the import of a dismissal' when not otherwise specified by a court. … Rule 41 plainly

does not preclude a district court from entering a dismissal with prejudice where required by the terms of the statute creating the cause of action." Public Citizen/ACLU Br. 26.

Finally, Sherrod makes no effort to address the "twin aims of *Erie*" – avoiding inequitable administration of the laws and discouraging forum shopping. *See Newsham*, 190 F.3d at 973 ("Plainly, if the Anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have significant incentive to shop for a federal forum.").

As the media *amici* stated:

> There is no better evidence of forum shopping than what, in fact, happened in this jurisdiction as a direct result of the district court decision in *3M v. [Boulter]*. Plaintiffs in *Dean v. NBC Universal* attempted to abandon [their] action in the Superior Court – seven months after its commencement, after extensive briefing, and on the veritable eve of oral arguments on NBC's dispositive motions – for the admitted purpose of pursuing their claims in federal court precisely because they assumed the Act would not be applied. … The Erie twin aims can only be served if the Act's protections apply in diversity jurisdiction.

Media *Amici* Br. 28 (*see* addendum to brief with the relevant filings in the *Dean* matter).

Neither Sherrod nor the court in *3M* has provided a sufficient basis for ignoring the well-established authority from courts across the country that anti-SLAPP statutes can and should be applied in federal court under *Erie*.

V. <u>Defendants timely filed their anti-SLAPP motion</u>

Sherrod's claim that this Court should "defer" to the District Court's decision to rewrite its previous orders unambiguously extending Breitbart and O'Connor's deadline to "answer, move, or otherwise plead" is meritless. (JA057).

The Statement of Reasons does not mention or acknowledge – much less interpret – the two orders granting the extensions. The District Court's omission cannot be considered an "interpretation" entitled to any deference. Instead, the orders' directive that Breitbart and O'Connor may "answer, move, or otherwise plead" unambiguously covers all pleadings or motions including one under the D.C. Anti-SLAPP Act. But even if there was an interpretation, an appeals court need not give deference where the "record cannot be squared with the district court's interpretation" of the order. *Cross v. Bragg*, 329 Fed. App'x 443, 457 (4th Cir. 2009) (refusing to accord deference to the district court's extension order).

The District Court's failure to give effect to the two orders granting extensions of time cannot be squared with the record. The orders are broad on their face and were consented to by Sherrod. The District Court entered the first order on March 15, 2011 – 56 days after the Act was signed – and the second order on April 12, 2011 – 13 days after the Act became effective. Neither the District Court nor Sherrod can claim ignorance of the new law or legitimately argue that the expansive language of the orders expressly extending the time to file a motion would not encompass a Special Motion to Dismiss explicitly authorized by D.C. Code § 16-5502.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in O'Connor's opening brief and in the *amicus curiae* briefs, the judgment of the District Court should be reversed and the complaint dismissed in its entirety with prejudice under the D.C. Anti-SLAPP Act with attorneys' fees and costs under the Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,940 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

/s/ Mark I. Bailen

30th day of January, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2013, I caused a copy of the foregoing Final Reply Brief of Appellant-Defendant Larry O'Connor for Reversal of the District Court's Order, which was filed via CM/ECF this same day, to be served via CM/ECF on all filers registered in this case.

/s/ Mark I. Bailen