Nos. 14-cv-101 & 14-cv-126

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

COMPETITIVE ENTERPRISE INSTITUTE, *et al.*,

Defendants–Appellants,

v.

MICHAEL E. MANN,

Plaintiff–Appellee.

On Appeal from the Superior Court
for the District of Columbia
No. 2012 CA 008263 B
Natalia M. Combs Greene, *Trial Judge*
Frederick H. Weisberg, *Trial Judge*

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AS *AMICUS CURIAE*, SUPPORTING APPELLANTS ON THE ISSUE OF APPEALABILITY

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Pursuant to Rule 28(a)(2)(B), *amicus* American Civil Liberties Union of the Nation's Capital states that it is a nonprofit District of Columbia membership corporation, that it has not issued stock or debt securities to the public, that it has no parents, subsidiaries, or affiliates that have issued stock or debt securities to the public, and that it has no parents, subsidiaries, or affiliates in which any publicly held corporation holds stock.

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of the Nation's Capital is the Washington, D.C., affiliate of the American Civil Liberties Union (ACLU), a nonprofit membership organization dedicated to protecting and expanding the civil liberties of all Americans, particularly their right to freedom of speech. The ACLU of the Nation's Capital played a leading role in supporting passage of the D.C. Anti-SLAPP Act, and, having represented defendants in several SLAPP suits, is familiar with the intimidating effect such lawsuits can have on free speech.

Pursuant to D.C. App. R. 29 (a), this brief is filed with the written consent of all parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

The D.C. Council passed the Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq*. (the "Act"), to curb strategic lawsuits against public participation ("SLAPPs"). SLAPPs may appear to be typical tort cases for defamation, tortious interference with business opportunities, intentional infliction of emotional distress, and the like, but in fact they are filed for the purpose of punishing or intimidating those who speak on matters of public interest in a manner the

plaintiff does not desire. *See* Report on Bill 18-893, the "Anti-SLAPP Act of 2010," Council of the District of Columbia, Committee on Public Safety and the Judiciary (Nov. 18, 2010), at 2, 4 (the "Committee Report"). The "goal of [SLAPP] litigation is not to win the lawsuit," but to intimidate advocates "into silence." *Id.* at 4. In a SLAPP suit, "*litigation itself* is the plaintiff's weapon of choice," forcing a person who has spoken out on public issues to spend time and resources in his or her defense. *Id.* (alterations and internal quotation marks omitted).

The Council sought to counter the "chilling effect" that SLAPPs have on free speech. *Id.* at 1. To that end, it created a mechanism whereby SLAPPs will be quickly dismissed, sparing speakers from the expense and anxiety associated with litigation that might limit their further expression and chill the expression of others. D.C. Code § 16-5502. As relevant to this case, the Act permits a defendant to file a "special motion to dismiss" a claim that arises from the defendant's advocacy on issues of public interest. *Id.* § 16-5502(a). Once a defendant makes a *prima facie* showing that the claim arose from such advocacy, the claim is to be dismissed with prejudice, *id.* § 16-5502(d), "unless the responding party [the plaintiff] demonstrates that the claim is likely to succeed on the merits," *id.* § 16-5502(b).

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

Amicus submits this brief to address an issue that is critical to the effective functioning of the Act: the immediate appealability of decisions denying special motions to dismiss.

This Court should hold that the trial court's order denying defendants' special motion to dismiss the amended complaint motion is a collateral order subject to immediate appeal because it presents questions of law, conclusively decided, that are separate from the underlying merits of plaintiff's claims and because the order is effectively unreviewable after judgment. That conclusion is supported by precedent from the Supreme Court, this Court, and other appellate courts, and in particular by cases holding that orders denying claims of qualified immunity may be reviewed as a collateral orders. Collateral order review in this case also is supported by decisions in the First, Second, Fifth, and Ninth Circuits holding that denials of anti-SLAPP motions under similar state laws are subject to immediate appeal.

ARGUMENT

I. The D.C. Anti-SLAPP Act Was Enacted so that Abusive and Costly Lawsuits Instituted to Suppress Speech Would be Nipped in the Bud

A. The D.C. Anti-SLAPP Act is Part of a Growing Movement to Deter and Punish SLAPPs

In a seminal study about twenty-five years ago, two professors at the University of Denver identified a widespread pattern of abusive lawsuits aimed at suppressing speech on public issues. They dubbed these cases "Strategic Lawsuits Against Public Participation," or "SLAPPs." *See* George W. Pring and Penelope Canan, SLAPPS: GETTING SUED FOR SPEAKING OUT (Temple University Press, 1996).

A defining feature of SLAPPs is that "winning is not a SLAPP plaintiff's primary motivation." *Blumenthal v. Drudge,* Civ. No. 97-1968, 2001 WL 587860, at *3 (D.D.C. Feb. 13, 2001). "[L]ack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective." *Id*. (quoting *Wilcox v. Superior Court,* 33 Cal.

Rptr. 2d 446, 450 (1994)). As the D.C. Council recognized:

> [T]he goal of the litigation is not to win the lawsuit but to punish the opponent[s] and intimidate them into silence. As Art Spitzer, Legal Director for the ACLU, noted in his testimony, "[*l*]*itigation itself* is the plaintiff's weapon of choice."

Committee Report at 4 (third alteration and emphasis in original). The Committee further explained the need for the bill:

> Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantial[] amount of money, time, and legal resources [to defending the lawsuit]. The impact is not limited to named defendants['] willingness to speak out, but prevents others from voicing concerns as well. To remedy this[,] Bill 18-893 . . . incorporat[es] substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

Committee Report at 1.

Recognizing that SLAPPs are an abuse of the judicial system, a growing number of states have enacted anti-SLAPP legislation. "[A]s of January 2010 there are approximately 28 jurisdictions in the United States that have adopted anti-SLAPP measures." Committee Report at 3; *see also* The Public Participation Project, *State Anti-SLAPP Laws*, http://www.anti-slapp.org/your-states-free-speech-protection/ (summarizing and linking to anti-SLAPP statutes in 28 states, Guam, and D.C.) (last visited April 18, 2014). In general, these statutes permit defendants to obtain pre-discovery dismissal of a lawsuit if it meets the statute's definition of a SLAPP, and to recover attorney's fees from the plaintiff. The District of Columbia statute follows this model.

B. The Adoption of the D.C. Anti-SLAPP Act

In June 2010, D.C. Councilmembers Mary Cheh and Phil Mendelson introduced Bill 18-893, the "Anti-SLAPP Act of 2010." Committee Report at 4. The bill was modeled on the "Citizen Participation Act of 2009," H.R. 4364 (111th Cong., 1st Sess.), which had been

introduced in 2009 but not enacted. *See* Committee Report at 4 ("As introduced, this measure closely mirrored the federal legislation introduced the previous year.").[1] After a public hearing, the committee adopted several strengthening amendments, *compare* Committee Report, Attachment 1 (Bill 18-893 as introduced) *with id*., Attachment 4 (Committee Print). In particular, the Committee expanded part of the definition of what is protected by the Act, from:

> Any other conduct in furtherance of the exercise of the constitutional right to petition the government or the constitutional right of free expression in connection with an issue of public interest.

Bill 18-893 as introduced, § 2(1)(B), to:

> Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

Bill 18-893, Committee Print, § 2(1)(B).

This amendment was suggested by the ACLU, which explained that the original definition was

> backwards – it requires a court *first* to determine whether given conduct is protected by the Constitution *before* it can determine whether that conduct is covered by the Anti-SLAPP Act. But if the conduct is protected by the Constitution, then there is no need for the court to determine whether it is covered by the Anti-SLAPP Act: a claim arising from that conduct must be dismissed because the conduct is protected by the Constitution. And yet the task of determining whether given conduct is protected by the Constitution is often quite difficult, and can require exactly the kinds of lengthy, expensive legal proceedings (including discovery) that the bill is intended to avoid.
>
> . . . This should not be necessary, as the purpose of an anti-SLAPP law is to provide broader protection than existing law already provides.

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[1] The text of H.R. 4364 is online at https://www.govtrack.us/congress/bills/111/hr4364.

The parties and the court below assumed that the D.C. Act was modeled on the California statute, perhaps because that is the most litigated anti-SLAPP law in the nation. But *amicus* is aware of no factual basis for that assumption, and the Committee Report makes clear that it is not true. The California statute is far from a model, the D.C. Act is different from the California statute in important respects, and there is no reason to believe the Council intended the D.C. courts to look especially to California for guidance on the meaning of the D.C. Act.

Testimony of the American Civil Liberties Union of the Nation's Capital on Bill 18-893 at 5 (September 17, 2010) (emphasis in original; footnote omitted).[2] The amendment exemplifies the Council's intent to provide maximum protection for speech on public issues, even beyond what the First Amendment protects.

The Council adopted the Anti-SLAPP Act in late 2010. After congressional review, it became effective on March 31, 2011.

C. The Purpose and Operation of the D.C. Anti-SLAPP Act

In urging the Council to adopt Bill 18-893, the Committee on Public Safety and the Judiciary emphasized that the bill was intended to remedy the "nationally recognized problem" of abusive lawsuits against speech on public issues by providing defendants "with substantive rights to expeditiously and economically dispense of litigation" that qualified as a SLAPP – in other words, to nip such lawsuits in the bud. Committee Report at 4. The substantive right was accurately described as providing "immunity" for those who engage in speech on issues of public interest. *Id*.

The basic operation of the Act is straightforward, establishing a lower substantive standard for motions to dismiss: if a claim in a lawsuit "arises from an act in furtherance of the right of advocacy on issues of public interest," then that claim is subject to a "special motion to dismiss," which must be granted unless the plaintiff can show that he or she "is likely to succeed on the merits." D.C. Code § 16-5502.

The Act does not define the term "likely to succeed on the merits," presumably because it is a common phrase in the law with a well-understood meaning. *See, e.g., Barry v. Washington Post Co*., 529 A.2d 319, 320-21 (D.C. 1987). The Superior Court's discussion of the term is

[2] The ACLU's written testimony is reproduced in the Committee Report at Attachment 2.

more confusing than enlightening; its conclusion that the phrase means "'a standard comparable to that used on a motion for judgment as a matter of law,'" Order of July 19, 2013, at 10 (quoting *Boley v. Atlantic Monthly Group*, 950 F. Supp. 2d 249, 257 (D.D.C. 2013) (in turn quoting *Price v. Stossel*, 620 F.3d 992, 1000 (9th Cir. 2010) (construing California law))) is difficult to understand and has no apparent relationship to the concept of likelihood.

While *amicus* takes no position on whether Professor Mann demonstrated that he was likely to succeed on the merits, it seems clear that the Superior Court simply failed to apply the statutory standard – first when it applied the unrelated standard quoted above, and again when it "[v]iew[ed] the alleged facts in the light most favorable to plaintiff, as the court must on a motion to dismiss." Order of Jan. 22, 2014, at 4 & 5. While the latter standard is the proper standard on an ordinary motion to dismiss, where the question is whether the plaintiff has stated a claim upon which relief can be granted, the whole point of the Anti-SLAPP Act's "special motion to dismiss" is to apply a different standard. *Amicus* cannot see how the "likely to succeed on the merits" standard will have any teeth if courts apply the standards applied by the Superior Court in this case.

The special motion to dismiss must generally be granted prior to discovery, D.C. Code § 16-5502(c)(1), "[t]o ensure [that] a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish." Committee Report at 4. Thus, claims arising out of speech on issues of public interest are not barred, but plaintiffs who seek to pursue such claims need to have their proof – or at least a fair amount of it – in hand *before* they file suit; fishing expeditions are not permitted. The court can, however, permit limited, "targeted discovery," if it appears that such discovery "will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome." D.C. Code § 16-5502(c)(2).

In that regard, we note that the qualifier in the Committee Report characterizing SLAPPs as being "*often* without merit," Committee Report at 1 (emphasis added), is meaningful. Not every SLAPP is necessarily meritless. Some might prove to have merit if fully litigated, but the Council made a public policy decision that the value protecting of free speech on issues of public interest outweighs the value of allowing every possibly meritorious tort claim to be fully litigated.

It was entirely proper for the Council to make that decision. Within constitutional boundaries, tort law is subject to legislative control. For example, in 1977 the D.C. Council abolished the torts of breach of promise, alienation of affections, and criminal conversation. *See* D.C. Code § 16-923. Likewise, "the legislature is free to abolish the common law tort of defamation" if it is so advised. *Johnson v. Federal Express Corp*., 147 F. Supp. 2d 1268, 1277 (M.D. Ala. 2001). The greater power to abolish a tort includes the lesser power to preclude or, as here, limit its application in particular circumstances. Here, the Council limited the application of common law torts in cases involving speech on matters of public interest.

II. This Court Has Jurisdiction of This Appeal Under the Collateral Order Doctrine

This Court has jurisdiction to hear appeals from "final orders and judgments of the Superior Court," pursuant to D.C. Code § 11-721(a)(1). A final order is an order that resolves the case on the merits, "so that the court has nothing remaining to do but to execute the judgment or decree already rendered." *In re Estate of Chuong*, 623 A.2d 1154, 1157 (D.C. 1993) (en banc). The denial of a motion to dismiss is therefore generally not appealable under that standard. *Heard v. Johnson*, 810 A.2d 871, 876 (D.C. 2002). "Under the collateral order doctrine, however, a ruling such as the denial of a motion to dismiss may be appealable if it has a final and irreparable effect on important rights of the parties." *Finkelstein, Thompson &*

Loughran v. Hemispherix Biopharma, Inc., 774 A.2d 332, 339 (D.C. 2001) (internal quotation marks omitted). In *Stein v. United States*, 532 A.2d 641, 643 (D.C. 1987), this Court adopted the Supreme Court's collateral order doctrine, which "recognized a 'small class' of appealable, albeit non-final, orders," as described in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny.

For this Court to have jurisdiction to review a non-final order pursuant to the collateral order doctrine, "the ruling must satisfy three requirements: (1) it must conclusively determine a disputed question of law, (2) it must resolve an important issue that is separate from the merits of the case, and (3) it must be effectively unreviewable on appeal from a final judgment." *McNair Builders, Inc. v. Taylor,* 3 A.3d 1132, 1135 (D.C. 2010) (internal quotation marks omitted); *accord Will v. Hallock*, 546 U.S. 345, 349 (2006). Whether a claim raised by a non-final order is subject to immediate review under the collateral order doctrine "is to be determined for the entire category to which [the] claim belongs." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

As explained below, a Superior Court order denying a special motion to dismiss satisfies the *Cohen* criteria and is therefore a collateral order subject to immediate appeal. This conclusion follows directly from the Supreme Court's jurisprudence, and in particular from its cases holding that appellate courts may review under the collateral order doctrine a denial of a claim of qualified immunity. It is also in accord with the majority of appellate decisions addressing whether denials of motions filed under anti-SLAPP statutes in other states are collateral orders.

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

As noted above, the D.C. Council sought to confer on a defendant targeted by a SLAPP suit a substantive right to be free from suit, and it likened the Act's protection to the "absolute or qualified immunity" that other states had provided. Committee Report at 4. In practice, a defendant's right under the Act is more akin to qualified immunity. A defendant does not enjoy "complete protection from suit" at the outset, as would be the case with absolute immunity. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (describing the nature of absolute immunity for certain government officials, such as legislators engaging in legislative functions); *District of Columbia v. Jones*, 919 A.2d 604 (2007) (holding D.C. Mayor entitled to absolute immunity in lawsuit for defamation, invasion of privacy, and intentional infliction of emotional distress). Rather, a defendant enjoys immunity from suit under the Act only after making a *prima facie* showing that the claim arose from the defendant's advocacy on an issue of public interest, and then only if the plaintiff fails to demonstrate a likelihood of success on the merits. D.C. Code § 16-5502(b). That immunity thereafter protects the defendant from the expense and intimidation of litigation proceedings, not just from liability after judgment.

The immunity conferred by the Act is therefore comparable to the qualified immunity accorded most government officials in the performance of their duties. Under the qualified immunity doctrine, officials are shielded from suit for violating individuals' federal constitutional or statutory rights so long as the officials' "conduct does not violate clearly established federal constitutional or statutory rights of which a reasonable person would have known." *Young v. Scales*, 873 A.2d 337, 341 (D.C. 2005) (citing *Wilson v. Layne*, 526 U.S. 603, 609 (1999)). Like successful SLAPP movants, once government officials prevail under this

threshold analysis, they have "'an entitlement not to stand trial or face the other burdens of litigation.'" *Id*. (quoting *Saucier v. Katz*, 533 U.S. 194, 200 (2001)).

The qualified immunity conferred by the Act is also similar to qualified immunity for government officials in that, in both cases, courts engage in a threshold immunity analysis that is separate from the underlying merits of a plaintiff's claim. A court applies a two-step test to determine whether a government official is entitled to qualified immunity. Although the analytical order may vary, *see Pearson v. Callahan*, 555 U.S. 223, 236 (2009), a court first usually asks whether "the facts alleged show the [official's] conduct violated a constitutional [or statutory] right," *Saucier*, 533 U.S. at 201. If the answer is yes, the court then determines "whether the right was clearly established" at the time of the alleged violation. *Id*. Thus, the qualified immunity analysis does not determine whether a defendant did, in fact, violate the law, just as a determination on a SLAPP motion under the Act does not determine whether a defendant did, in fact, commit a tort against the plaintiff. Rather, it focuses on the separate legal question of whether a right to be free from the burdens of litigation exists given a certain set of facts.

The Act's provision for qualified immunity also has goals comparable to those motivating qualified immunity for government officials. Qualified immunity for officials is intended to avoid "'the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 816). It seeks to ensure, among other things, that officials facing a choice about whether to take a particular course of action do "not err always on the side of caution because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (internal quotation marks

omitted); *accord Young v. Scales*, 873 A. 2d at 341 (officials "'should not be hindered by the threat of civil liability from attempting to perform their duties to the best of their abilities,' as long as they are not violating clearly established constitutional or statutory rights.") (quoting *District of Columbia v. Evans*, 644 A.2d 1008, 1016 (D.C. 1994)). Analogously, the Anti-SLAPP Act aims to eliminate the chilling effect that SLAPPs have on advocacy in the public interest, ensuring that advocates do not err on the side of silence instead of participating in public debate. *See* Committee Report at 1, 4.

Moreover, both the qualified immunity doctrine for officials and the qualified immunity conferred by the Act share the goal of sparing defendants the burden of participating in litigation and, therefore, place a premium on early immunity determinations. Thus, under the Act, there exists a rebuttable presumption against discovery after an anti-SLAPP motion is filed, and the court must hold an expedited hearing on the motion. D.C. Code § 16-5502(c), (d). Likewise, "it is important to resolve the [qualified] immunity question at the earliest possible stage in litigation. Otherwise, the privilege 'is effectively lost if a case is erroneously permitted to go to trial.'" *Young v. Scales*, 873 A.2d at 341 (quoting *Saucier*, 533 U.S. at 200-01).

An order denying qualified immunity for government officials on legal grounds is immediately reviewable under the collateral order doctrine. *See Ashcroft v. Iqbal*, 556 U.S. 662, 673-74 (2009); *Fulwood v. Porter*, 639 A.2d 594, 595 n.1 (D.C. 1994); *Young v. Scales,* 873 A.2d at 341 (reviewing denial of defendant's motion for summary judgment based on qualified immunity). *See also District of Columbia v. Pizzulli,* 917 A.2d 620, 624-25 (D.C. 2007) (collecting cases in which this Court held that denials of motions to dismiss based on claims of immunity were immediately appealable). Likewise here, denial of the special motion to dismiss,

resulting in denial of the qualified immunity afforded under the Act, should be immediately appealable.

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

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

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

The first *Cohen* criterion for allowing an immediate appeal of a collateral order asks whether the order "conclusively determine[s] a disputed question of law." *McNair Builders*, 3 A.3d at 1135. The Superior Court's order denying the special motion to dismiss made a conclusive determination on that motion, thereby allowing the litigation to proceed. *See Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (holding that a court conclusively denied a motion to strike under California's anti-SLAPP law because, after denial, the "statute does not apply and the parties proceed with the litigation"); *see also Makaeff v. Trump University, LLC*, 736 F.3d 1180, 1182 (9th Cir. 2013) ("the anti-SLAPP statute asks . . . whether the claims rest on the SLAPP defendant's protected First Amendment activity and whether the plaintiff can meet the substantive requirements [the statute] has created to protect such activity from strategic, retaliatory lawsuits.") (Wardlaw, J., concurring in denial of rehearing en banc); *Liberty Synergistics Inc. v. Microflo Ltd.,* 718 F.3d 138, 147-48 (2d Cir. 2013). The order therefore meets *Cohen*'s first criterion.

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

Cohen's second criterion asks whether the order "resolve[s] an important issue that is separate from the merits of the case." *McNair Builders*, 3 A.3d at 1135. The answer is yes.

The question whether a plaintiff has shown that he or she "is likely to succeed on the merits" of course requires looking at the merits, but it presents a separate issue. *See, e.g., Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164, at 181-82 (5th Cir. 2009) (reviewing under the collateral order doctrine whether a plaintiff had shown a probability of success on the merits); *Batzel v. Smith*, 333 F.3d at 1026 (same); *Liberty Synergistics,* 718 F.3d at 148-150; *Makaeff v. Trump University*, 736 F.3d at 1185 ("while the inquiry on the motion to [dismiss] may glance at the merits, its central purpose is to provide an added statutory protection from the burdens of litigation that is unavailable during the ultimate merits inquiry.") (Wardlaw, J., concurring in denial of rehearing en banc).

A determination that the district court's order raises separable issues also follows from the Supreme Court's case law on qualified immunity for government officials. In *Mitchell*, the Supreme Court discussed at length why a denial of qualified immunity based is separable from the underlying merits of a claim that a plaintiff's rights were violated. In so doing, it relied heavily on the fact that "qualified immunity is in part an entitlement not to be forced to litigate." 472 U.S. at 527. From that fact, the Court concluded that "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-28; *see also id.* at 528-29 ("[T]he Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue."); *accord Iqbal*, 556 U.S. at 672 ("a district-court order denying qualified immunity conclusively determines that

the defendant must bear the burdens of discovery; is conceptually distinct from the merits of the plaintiff's claim; and would prove effectively unreviewable on appeal from a final judgment. As a general matter, the collateral-order doctrine may have expanded beyond the limits dictated by its internal logic and the strict application of the criteria set out in *Cohen*. But the applicability of the doctrine in the context of qualified-immunity claims is well established; and this Court has been careful to say that a district court's order rejecting qualified immunity at the motion-to-dismiss stage of a proceeding is a final decision . . . .") (alterations, citations, and internal quotation marks omitted).

Likewise, the Act confers on SLAPP defendants a substantive right to dispense with SLAPP suits expeditiously and avoid the burdens of litigation, extending what the Council referred to as a "qualified immunity to individuals engaging in protected actions." Committee Report at 4. Under *Mitchell* and its progeny, *see, e.g.*, *Behrens v. Pelletier*, 516 U.S. 299, 306, 313 (1996), questions regarding the application of that immunity are clearly separable from the underlying merits.

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

To meet *Cohen*'s final criterion, an order "must be effectively unreviewable on appeal from a final judgment." *McNair Builders*, 3 A.3d at 1135. But the loss of a "right to prevail without trial" is not by itself sufficient to satisfy this criterion. *Will,* 546 U.S. at 349. Rather, "'some particular value of a high order' must be 'marshaled in support of the interest in avoiding trial.'" *McNair Builders*, 3 A.3d at 1137 (quoting *Will*, 546 U.S. at 352). "'That is, it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is "effectively" unreviewable if review is to be left until later.'" *Id*. (quoting *Will*, 546 U.S. at 353).

Nevertheless, the Supreme Court has made clear that the burden of showing a substantial public interest is minimal when a constitutional or statutory right of immunity is involved. "[T]here is little room for the judiciary to gainsay [the] 'importance'" of such a right; where one is concerned, "irretrievable loss can hardly be trivial." *Digital Equipment Corp.*, 511 U.S. at 879 (alterations and internal quotation marks omitted). In this case, D.C. law confers a statutory right of immunity from suit that establishes the importance of the interest at stake. As the legislative history of the Act states, the D.C. Council intended to confer substantive rights that give advocates a limited immunity from suit. *See* Committee Report at 4. The Council also indicated that it considered immediate appellate review critical to the Act's effectiveness, stopping short of expressly creating a right to interlocutory appeal only because it believed itself without authority to do so. *Id.* at 7 (citing *Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010), *subsequently vacated*, 30 A.3d 783 (D.C. 2011)). The legislative history of the Act, therefore, strongly indicates that the Council intended to confer a right of immunity from suit, not simply immunity from liability, and believed that immediate appeal was an integral component of protecting that right and serving the important public interest that the Act aimed to protect.[3]

Indeed, this Court has recognized that "'[t]he denial of a motion that asserts an immunity from being sued is the kind of ruling that is commonly found to meet the requirements of the collateral order doctrine and thus [to] be immediately appealable,'" *McNair Builders*, 3 A.3d at 1136 (quoting *Finkelstein*, 774 A.2d at 340). And it has specifically pointed to the immunity provision of an anti-SLAPP statute as a "public interest worthy of protection on interlocutory appeal." *Id*. at 1138. As the Ninth Circuit noted earlier this year, "[i]t would be difficult to find

[3] The Council's intent in this regard was discussed at some length by counsel and the Court during the oral argument in *Doe v. Burke*, No. 13-cv-83 (argued January 29, 2014). The decision in that case may, therefore, be relevant to the issue before the Court in this case.

a value of a higher order than the constitutionally-protected rights to free speech and petition that are at the heart of California's anti-SLAPP statute. Such constitutional rights deserve particular solicitude within the framework of the collateral order doctrine." *DC Comics v. Pacific Pictures Corp*., 706 F.3d 1009, 1015-16 (9th Cir. 2013) (alterations and internal quotation marks omitted). *Accord Godin v. Schencks*, 629 F.3d 79, 84 (1st Cir. 2010) ("[T]his [anti-SLAPP] appeal raises an important issue of law because the issue raised is weightier than the societal interests advanced by the ordinary operation of final judgment principles.") (internal quotation marks omitted).

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

Likewise, in holding that a denial of a special motion to dismiss under Nevada's anti-SLAPP statute was not a collateral order, the court in *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795 (9th Cir. 2012), focused on the fact that the Nevada law did not, "implicitly or otherwise, confer[] an immediate right to appeal," *id.* at 801, and instead defined the right as one through which a person "is *immune from civil liability*," not from suit or trial, *id.* at 802

(emphasis in original). *Metabolic*, like *Englert*, viewed these facts as evidence "that the Nevada legislature did not intend for its anti-SLAPP law to function as an immunity from suit." *Id.* In its recent decision, the Ninth Circuit emphasized that its decisions in those cases "depend[ed] on the particular feature s of each state's law," *DC Comics*, 706 F.3d at 1016, and noted that Oregon's anti-SLAPP statute had subsequently been amended to provide for a right of immediate appeal. *Id*. at 1016 n.8.

In this case, although the D.C. Act does not use the term "immune," the legislative history of the Act focuses on protecting advocates not just from liability, but from litigation itself, the real "weapon of choice" in SLAPP suits. Committee Report at 4 (internal quotation marks omitted). Moreover, the legislative history makes clear that the District of Columbia "agree[d] with and support[ed]" the availability of immediate appellate review, but that the Council believed itself without authority to authorize it legislatively. *See* Committee Report at 7.

By providing a statutory right of qualified immunity from suit, the Act furthers the substantial public interest of protecting those who engage in issue advocacy from the time, expense, and anxiety associated with lawsuits intended to intimidate them into silence. As a result, post-judgment review of a denial of a D.C. anti-SLAPP motion provides no remedy if "the defendant ha[s] been compelled to defend against a . . . claim brought to chill rights of free expression." *Batzel*, 333 F.3d at 1025; *see also Mitchell*, 472 U.S. at 526 (recognizing in the context of qualified immunity for government officials that the right to avoid trial, and even pre-trial matters where possible, is "effectively lost if a case is erroneously permitted to go to trial").[4]

[4] While the defendants in this particular case may not be intimidated by this lawsuit, that does not change the analysis, because appealability under the collateral order doctrine is determined on a categorical basis. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. at 868.

Because the denial of the anti-SLAPP motion in this case meets all three *Cohen* criteria, it is a collateral order over which this Court has jurisdiction under D.C. Code § 11-721(a)(1).

CONCLUSION

For the foregoing reasons, this Court should hold that it has jurisdiction over this appeal.

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2014, a copy of the foregoing Brief of the American Civil Liberties Union of the Nation's Capital, as *Amicus Curiae* Supporting Appellants on the Issue of Appealability, was served on the attorneys listed below by First Class mail, postage prepaid. Courtesy copies were also served via electronic mail on each of the attorneys listed below.

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