ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY SHERROD,
Appellee,

v.

No. 11-7088
Appeal from 11-CV-00477-RJL

ANDREW BREITBART and
LARRY O'CONNOR,
Appellants.

APPELLANTS' CORRECTED JOINT RESPONSE IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, FOR SUMMARY AFFIRMANCE

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I. INTRODUCTION.

Appellants Andrew Breitbart and Larry O'Connor ("Appellants") are the first parties to seek appellate review in this Circuit of an order denying a motion to dismiss pursuant to the District of Columbia's recently enacted Anti-SLAPP Act of 2010, 58 D.C. Reg. 741 (the "Anti-SLAPP Act"). SLAPP stands for "Strategic Lawsuits Against Public Participation" and the District of Columbia Council enacted this legislation to create a mechanism for the early evaluation of libel and other claims that threaten the Constitutionally protected right of free expression on public affairs and to protect defendants against onerous, expensive discovery and trial on claims that lack merit.

This interlocutory appeal presents multiple issues of first impression in this Circuit including: (1) Does this Court have jurisdiction to review denial of an Anti-SLAPP Act motion to dismiss (the "Motion to Dismiss") as a collateral order; (2) Is the Anti-SLAPP Act applicable in a federal diversity action;[1] (3) Whether the Anti-SLAPP Act applies to matters pending as of its effective date; and (4) Whether the District Court properly denied the Anti-SLAPP Motion in a minute order without issuing a written opinion where the moving parties contend the allegedly defamatory speech at issue constitutes protectable opinion (particularly where a public official

[1] Mrs. Sherrod states that she "assumes for purposes of this motion that" the Anti-SLAPP Act applies in federal court, however, she "disputes" that it does, as she argued to the District Court. Thus, this is an issue that will need to be addressed in full briefing on this appeal.

stated that she would like to "get back" at the defendant and "shut down" his website).

Respondent Shirley Sherrod seeks summary dismissal purportedly because this Court lacks jurisdiction to consider the appeal as a collateral order (issue no. 1, above). In the alternative, she contends that if this Court does have jurisdiction, summary affirmance is warranted because the Anti-SLAPP Act only applies "prospectively" to actions filed after its effective date (issue no. 3, above). Because both issues are ones of first impression in this Circuit, Respondent's motion must be denied. *See D.C. Circuit Handbook of Prac. & Internal Proc. VIII.G* ("Parties should avoid requesting summary disposition of issues of first impression for the Court."), and ("A motion for summary affirmance should be filed when the appeal presents no issues of first impression, the facts are relatively uncomplicated, and oral argument is unlikely to add significantly to the decisional process. It is very unlikely that the Court will grant summary affirmance if the appeal involves an issue of first impression . . .").

Mrs. Sherrod's motion also must be denied on its merits. The First, Fifth and Ninth Circuits all have found that the denial of an Anti-SLAPP motion to dismiss is immediately appealable as a collateral order. Mrs. Sherrod fails to disclose or address much of this authority. Instead, she relies solely on one outlier, minority-view case that held to the contrary. The majority position aligns with prior holdings of this Circuit finding that certain rights that otherwise might not be reviewable, such as the right not to stand trial, are properly considered on appeal prior to final judgment.

Indeed, it is hard to imagine any value of a higher order that would justify collateral review than Constitutionally protected free speech concerning public figures and issues of public importance and concern.

Mrs. Sherrod offers a second, purported "retroactivity" argument, but it is also without merit. The Anti-SLAPP Act did not substantively change the law on defamation or the other claims pleaded in the Complaint. Rather, it is a procedural law and the District of Columbia courts repeatedly have held that such laws apply to pending cases. Not surprisingly, virtually every court in the other jurisdictions that have addressed this issue have held that Anti-SLAPP statutes do apply to pending cases.

The Court should consider the appeal after it has the benefit of the full record, briefing and oral argument, as well as the submissions of those *amici* who intend to seek leave to file briefs on the issues raised in the District Court.

II. THE ANTI-SLAPP ACT.

The Anti-SLAPP Act was passed by the D.C. Council on December 7, 2010, signed on January 18, 2011, published in the D.C. Register on January 28, 2011, and—after the mandatory Congressional review period—became effective on March 31, 2011. Respondent therefore either knew or should have known before she filed her lawsuit on February 11, 2011, that the Anti-SLAPP Act could and would apply to her claims.

The Anti-SLAPP Act's legislative history demonstrates that it was intended to apply to precisely this type of action. According to the report of the Council on the District of Columbia Committee on Public Safety and the Judiciary (the "Committee Report"):

> Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Such lawsuits, often referred to as strategic lawsuits against public participation—or SLAPPs—have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. 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 substantially [sic] amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well. To remedy this [sic] Bill 18-893 follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.[3]
>
> (emphasis added).

The Act's express purpose is to ensure that citizens "are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." *Id.* The "Fiscal Impact Statement—'Anti-SLAPP Act of 2010,'" which was submitted to the District of Columbia Council before it issued the Committee Report

[3] Council of the District of Columbia, Committee on Public Safety and the Judiciary Committee Report, "Report on Bill 18-893, Anti-SLAPP Act of 2010" (Nov. 18, 2010), available at http://www. dccouncil .washington.dc.us/images/00001/20110120184936.pdf, attached as **Exhibit 1.**

and is attached to it, informed the Council that "[i]f effective, the proposed legislation could have a beneficial impact *on current* and potential *SLAPP defendants*." Ex. 7 to Special Motion at 25 (emphasis added). The Committee also "agree[d] with and support[ed] a suggested provision that would grant an immediate right to appeal from an order denying a special motion to dismiss." The Council later removed the suggested provision solely to address limitations on legislation affecting District of Columbia courts imposed by the Home Rule Act. *Id.* at 7.

III. SUMMARY OF BACKGROUND FACTS.

This is a textbook SLAPP suit. Appellant Breitbart is a well-known, outspoken journalist who created and operates several Internet websites, including BigGovernment.com, a site focused on government, politics and other matters of public concern. Appellant O'Connor edits and publishes news content on BigGovernment.com and other Breitbart websites. On March 27, 2010, while she was a high ranking United States Department of Agriculture official, Respondent gave a public, videotaped speech at a NAACP event.[4] The central, predominant themes of Respondent's 43-minute speech were race and race relations. During one part of her speech, Respondent told her audience how she had denied her full assistance to a

[4] Mrs. Sherrod delivered her speech just weeks after members of the NAACP had publicly condemned the Tea Party for engaging in and tolerating racist behavior. This accusation touched off a public and, at times, heated debate between NAACP and Tea Party supporters over issues of race and race relations which lasted well into July 2010. There can be no dispute that these were public issues of significant importance.

white farmer because of his race, and how months later she decided to give him further assistance.

On July 19, 2010, Mr. Breitbart posted a 1,400-word opinion piece on BigGovernment.com (the "Blog Post") which (i) summarized the relevant contextual and background facts, (ii) described the contents of two video excerpts of Mrs. Sherrod's speech which were embedded in the Blog Post, and (iii) provided comment, criticism and opinions about the speech contained in the video excerpts.[5] The Blog Post also criticized the NAACP for condemning purported Tea Party racism while, at the same time, it was tolerating what Mr. Breitbart saw as racism within its organization.[6]

For reasons that remain unclear to this day (but will certainly be the subject of extensive discovery should this case not be dismissed), Mrs. Sherrod agreed to resign from the USDA within hours after the Blog Post became the subject of media attention. In the days following her resignation, Mrs. Sherrod began to publicly

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[5] The Blog Post contained two video excerpts from Mrs. Sherrod's speech, and noted that Mrs. Sherrod, by her own words, had admitted to the NAACP audience that she had failed to give "the full force of what [she] could do" to a white farmer who came to her for help, and instead sent him to a white lawyer, "one of his own kind." Mr. Breitbart disclosed that she subsequently helped the farmer, but offered his opinion that this was a "racist tale" and "hardly the behavior of the group now holding itself up as the supreme judge of another groups' racial tolerance."

[6] The two video excerpts in the Blog Post of Respondent's speech were taken verbatim from the video of the entire speech (i.e., not one of Plaintiff's own words was omitted, added or reordered), therefore, Mrs. Sherrod's contention that video excerpts were "deceptively edited" is false.

threaten Mr. Breitbart with litigation. On July 22, 2010, she vowed on live television to sue ***and silence*** Mr. Breitbart because she did not like the views he expressed:

> *KIRAN CHETRY, CNN ANCHOR: Again, you got to hear the whole thing in context. Would you consider a defamation suit against Andrew Breitbart?*
>
> *SHERROD: I really think I should. You know, I don't know a lot about the legal profession**, but that's one person I'd like to get back at**.*
> . . . . . .
>
> *CHETRY: **Would you like his site to be shut down**?*
>
> *SHERROD: **That would be a great thing. Because I don't see how that advances us in this country. I don't see how that helps us, at a time when we have many, many minority groups in this -- many, many ethnic groups I guess is what I mean to say -- in this country, at a time when we should be trying to look at how we can make space for all of us in this country, so that we can all live and work together. He's doing more to divide us.***[7]

On February 11, 2011, Mrs. Sherrod sued Mr. Breitbart and Mr. O'Connor in the District of Columbia Superior Court for defamation, false light, and intentional infliction of emotional distress.[8] Appellants removed the action to federal court and then filed a motion to dismiss under the Anti-SLAPP Act. The motion was denied by the District Court without a written opinion.[9] Appellants timely appealed.

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[7] Transcript of CNN American Morning (July 22, 2010), available at http://transcripts.cnn.com/ TRANSCRIPTS/1007/22/ltm.01.html, attached as **Exhibit 2.**

[8] Respondent also sued an unnamed (and, currently, unserved) fictitious "John Doe" defendant for defamation and other torts, contending that he transmitted video of her speech to Mr. Breitbart and Mr. O'Connor.

[9] Appellants also filed a concurrent motion to dismiss pursuant to FRCP 12(b)(6), which the District Court denied in a minute order, without issuing a written opinion.

IV. ARGUMENT.

A. Respondent's Motion Improperly Seeks Summary Disposition Of First Impression Issues.

Summary disposition is not appropriate where, as here, the appeal presents issues of first impression. *Am. Petroleum Institute v. U.S. Enviro. Protection Agency*, 72 F.3d 907 (D.C. Cir. 1996) (explaining that attorneys with considerable "skill and experience" should have known that there was "zero chance of [the D.C. Circuit] allowing a motion for summary reversal in a matter" of substantial "novelty and complexity"); *D.C. Circuit Handbook of Prac. & Internal Proc. VIII.G.* ("Parties should avoid requesting summary disposition of issues of first impression for the Court."). Research has not revealed a single case in which the D.C. Circuit granted summary disposition in a case of first impression where the Court is required to interpret a newly enacted statute that protects important interests, such as First Amendment rights. *Am. Petroleum Institute*, 72 F.3d at 914 (stating that the D.C. Circuit was unable to find a case in which it granted summary reversal "remotely approaching the magnitude" of a matter that required it to review newly enacted EPA regulations under the Clean Air Act).[10]

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[10] The recent cases in which this Court has granted summary affirmance have - - without exception - - required the Court to apply well-established legal principles such as *res judicata*, see, e.g., *Middlebrooks v. Medstar Health, Inc.*, No. 11-7003, 2011 WL 4920695 (D.C. Cir. Sept. 27, 2011), Title VII of the Civil Rights Act of 1964, see, e.g., *Pueschel v. Nat'l Air Traffic Controllers Ass'n.*, No. 11-7038, 2011 WL 4920860 (D.C. Cir. Sept. 27, 2011), the political question doctrine, see, e.g., *Keanu v. Obama*, No. 11-5142, 2011 WL 4917030 (D.C. Cir. Sept. 26, 2011), or - - as in the case of *Walker v.*

B. The Majority Of Other Circuits Hold That Anti-SLAPP Motions Are Appealable As Collateral Orders.

Three other Circuits have considered the same jurisdictional issue of first impression presented in this appeal. Of the five substantive opinions that have been issued, four hold that the denial of an Anti-SLAPP motion to dismiss is immediately appealable as a collateral order in federal court.

In *Batzel v. Smith*, 333 F. 3d 1018 (9th Cir. 2003), the Ninth Circuit held that the denial of a California anti-SLAPP motion is directly appealable in federal court. The court recognized the collateral order doctrine established "a narrow class of decisions" that were appealable prior to final judgment. The Ninth Circuit found that Anti-SLAPP denials fit all three parts of the test set forth by the United States Supreme Court in *Digital Equip. Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 868 (1994) (acknowledged by Respondent, see Motion, pp. 7-8).

First, the denial of the motion "is conclusive as to whether the anti-SLAPP statute required dismissal" because "if an anti-SLAPP motion to strike is granted, the suit is dismissed . . . if the motion to strike is denied, the anti-SLAPP statute does not apply and the parties proceed with the litigation." *Id.*

Washington, 627 F.3d 541 (D.C. Cir. 1980), cited by Respondent in her motion for summary affirmance - - review an administrative record to determine whether an agency's decision was arbitrary and capricious. Each of these cases is fundamentally different in character from the instant matter; none involves a matter of first impression concerning a newly enacted statute.

Second, the "denial of an anti-SLAPP motion resolves a question separate from the merits" because its purpose "is to determine whether the defendant is being forced to defend against a meritless claim. The anti-SLAPP issue therefore exists separately from the merits of the defamation claim itself." *Id.* (emphasis added).

Third, "because the anti-SLAPP motion is designed to protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression," denial of an Anti-SLAPP motion is unreviewable on appeal from a final judgment:

> If the defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, a decision by this court reversing the district court's denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression. Thus, ***a defendant's rights under the anti-SLAPP statute are in the nature of an immunity. They protect the defendant from the burdens of trial, not merely from ultimate judgments of liability***.

Id. (emphasis added).[11]

More recently, in *Hilton v. Hallmark Cards*, 580 F. 3d 874, 880 (9th Cir. 2009), the Ninth Circuit noted the general rule that courts only have jurisdiction over final judgments, but then found that "the collateral order doctrine, however 'entitles a party to appeal not only from [ordinary final judgments] . . . but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a

[11] Respondent erroneously suggests the US Supreme Court's subsequent decision in *Will v. Hallock*, 546 U.S. 345, 352-53 (2006) overruled the holding in *Batzel*. As discussed below, of the four Anti-SLAPP decisions rendered since *Will*, three have found jurisdiction under the collateral order doctrine.

healthy legal system . . . nonetheless be treated as final." *Digital Equip. Corp.,* 511 U.S. at 867, 114 S. Ct. 1992 (internal citations and quotation marks omitted). The court concluded that denials of special motion to strike under California's anti-SLAPP statute fall into this narrow class. *Id.*[12]

In *Henry v. Lake Charles Am. Press, LLC*, 566 F. 3d 164 (5th Cir. 2009), the Fifth Circuit held that denial of a Louisiana Anti-SLAPP motion is directly appealable as a collateral order in federal court, explaining that the purpose of the Louisiana Anti-SLAPP statute (Article 971) is:

> [T]o free defendants from the burden and expense of litigation that has the purpose or effect of chilling the exercise of First Amendment rights. ***Article 971 thus provides a right not to stand trial,*** as avoiding the cost of trial is the very purpose of the statute. In other words, Article 971 does not provide a defense to liability; defendants remain liable for actual acts of defamation and other torts. But it does provide defendants the right not to bear the cost of fighting a meritless defamation claim. ***If an Article 971 motion is erroneously denied and unappealable, then the case proceeds to trial and this right is effectively destroyed***.

Id. at 178. (emphasis added).

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[12] Respondent argues that because Appellants also filed a Motion to Dismiss under FRCP 12(b)(6) asserting the same arguments set forth in the Anti-SLAPP motion, and requested that the District Court certify its ruling denying that motion for appeal, this somehow renders the Anti-SLAPP motion "not separate from the merits" and renders the appeal improper. (Motion, p. 15). In *Hallmark*, however, the appellant moved to dismiss under both California's Anti-SLAPP act and Rule 12(b)(6), and the Ninth Circuit expressly rejected the argument that this rendered the ruling on the Anti-SLAPP statute unreviewable. The fact that Appellants sought relief under Rule 12(b)(6) in addition to the newly-enacted SLAPP statute has no bearing upon the validity of the appeal.

Most recently, in *Godin v. Schencks*, 629 F. 3d 79 (1st Cir. 2010), the First Circuit held that the district court's ruling that the Maine Anti-SLAPP statute did not apply in federal court was directly appealable as a collateral order, as it "would be effectively unreviewable on appeal from a final judgment." *Id.* at 84-85. The court also concluded, along with virtually every other court that has addressed this issue, that the Anti-SLAPP statute applied in federal court. *Id.* at 90-92.

In contrast to these cases, the court in *Englert v. MacDonnell*, 551 F.3d 1099 (9th Cir. 2009) held that Oregon's anti-SLAPP statute was not directly appealable because, in its view, the anti-SLAPP statute "served the same purpose as a motion for summary judgment." *Id.* at 1102. In particular, the court based its ruling on the fact that the Oregon statute did not provide for an immediate state court appeal from an order denying the motion. *Id.* at 1105-06. However, the court acknowledged that Oregon law did not determine the availability of appellate review in federal court. *Id.* at 1107.

The *Englert* decision was noted in *Henry* at 566 F. 3d 183, *Godin* at 629 F. 3d 84, and *Hilton* at 580 F. 3d 880, and each court declined to follow it. In so ruling, each of these courts conclusively reasoned that an Anti-SLAPP motion is not equivalent to a motion to dismiss or a motion for summary judgment. In addition, the *Henry* court criticized the reasoning that the lack of a state court appellate remedy in the statute had any bearing upon whether an Anti-SLAPP statute was reviewable as a collateral order in ***federal court***:

> Like Oregon's anti-SLAPP statute, Article 970 does not include a provision expressly authorizing immediate appeal. But the practice of the Louisiana courts appears to allow immediate appeals through writs of supervision. In any event, . . . Article 971 creates a right not to stand trial, and denial of this right is therefore 'effectively unreviewable.'"

Henry at 566 F. 3d 183 (internal citations omitted).

Significantly, just last year, in *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132 (D.C. 2010), the District of Columbia Court of Appeals discussed the federal collateral-order doctrine and cited *Henry*, describing it as an example of a federal circuit court finding "another public interest worthy of protection on interlocutory appeal, that of enforcing a statute that 'aim[s] to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights . . .'" *Id.* at 1138.

Mrs. Sherrod ignores all of this authority, instead arguing that "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 in light of the applicable standard of review," citing *Englert*. (Motion, p. 9-10). She then contends that "there is certainly nothing in the Act that supports Defendants' effort to distinguish their Anti-SLAPP motion from their Rule 12(b)(6) motion such that they can circumvent the final-judgment rule." (Motion, p. 13). These exact arguments have been considered and rejected by *Batzel*, *Hilton*, *Henry*, and *Godin*. *Englert* is simply wrong and contrary to the better-reasoned majority view.

Mrs. Sherrod also claims that the Anti-SLAPP Act cannot effect immunity as a matter of law. She cites *Navallier v. Sletten*, 52 P.3d 703 (Cal. 2002), for the purported

proposition that "the Anti-SLAPP statute neither constitutes—nor enables courts to effect—any kind of immunity." Her selective quote is incomplete and entirely misleading. In *Navallier*, the plaintiff brought an action for breach of contract and fraud, alleging that the defendant breached a release of claims provision in an agreement by filing counterclaims in the plaintiff's federal lawsuit. The defendant filed an Anti-SLAPP motion, which was denied. On appeal, the California Supreme Court explained that a defendant "who in fact has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP's statute's protection in the event he or she later breaches that contract" and thus California's anti-SLAPP statute does not constitute "any kind of immunity ***from breach of a release or other types of contracts affecting speech***." Thus, the holding in *Navallier* is limited to contractual claims, does not contradict *Batzel*, and is entirely irrelevant to this action.

C. The Anti-SLAPP Motion Is Appealable As A Collateral Order Under The Pre-Existing Case Law In This Circuit.

The Supreme Court and this Court have applied the collateral order doctrine in other similar contexts, such as where a defendant seeks an appeal to vindicate a "particular value of a high order" in support of his right ***not to stand trial at all***. *Will v. Hallock*, 546 U.S. 345, 352-53 (2006) (explaining that an order that denies an asserted right to avoid the burdens of trial "that would imperil a substantial public interest" is effectively unreviewable from a final judgment"). Such values include, among others: "alleviating the consequences of the Government's superior position"

to "subject an individual to embarrassment, expense, and ordeal . . . compelling him to live in a continuing state of anxiety" in the double jeopardy context; *id.* (citing *Abney v. U.S.*, 431 U.S. 651, 661-62 (1977)), *see also Khadr v. U.S.*, 529 F.3d 1112 (D.C. Cir. 2008), and "the threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service" when a qualified immunity claim was at issue; *Will,* 546 U.S. at 352 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Wuterich v. Murtha*, 562 F.3d 375 (D.C. Cir. 2009) (finding collateral order review appropriate under the Westfall Act because its purpose is to spare government employees the burdens of litigation, including discovery). Similar values are invoked when defendants seek to vindicate their rights not to be sued under the doctrine of sovereign immunity, *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837 (D.C. Cir. 2008), and the Speech and Debate Clause of the U.S. Constitution, *In re Grand Jury Subpoenas*, 571 F.3d 1200 (D.C. Cir. 2009).

In each of these similar circumstances, the defendant invoked a policy "embodied in a constitutional or statutory provision entitling a party to immunity from suit," and in such contexts "there is little room for the judiciary to gainsay its importance." *Digital Equip.*, 511 U.S. at 867 (1994). Applying the collateral order doctrine where an Anti-SLAPP motion to dismiss has been denied is entirely consistent with these underlying policy considerations, which is in stark contrast to the contractual cases relied upon by Mrs. Sherrod, most of which concern private,

monetary claims. These cases are far different from those concerning Constitutionally protected free speech regarding public figures and issues of public importance. *See, e.g., McNair Builders, Inc. v. Taylor*, 3 A.3d 1132, 1138 (D.C. 2010) (explaining that an Anti-SLAPP motion is as an example of "another public interest worthy of protection on interlocutory appeal, that of enforcing a statute that 'aim[s] to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights . . .'").

Mrs. Sherrod argues that denial of a special motion to dismiss under the Anti-SLAPP Act is not reviewable on appeal purportedly because the Anti-SLAPP Act's immunity from suit is not an issue of sufficient public importance to warrant collateral-order review. Each of the cases she cites is inapposite and distinguishable. For example, in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994), collateral-order review was not appropriate when it was based upon a ***privately negotiated settlement*** rather than "a constitutional or statutory provision entitling a party to immunity from suit." In *Lauro Lines, S.R.I. v. Chasser*, 490 U.S. 495 (1989), the collateral-order doctrine did not apply on an appeal of a forum selection clause, because "an entitlement to avoid suit is different in kind from an entitlement to be sued only in a particular forum." Respondent also cites cases that denied collateral-order review of an order requiring disclosure of attorney-client privileged material, *Mohawk Indus., Inc. v. Carpenter*, __ U.S. ___, 130 S.Ct. 599 (2009); an order that turned on a fact-specific finding regarding the jurisdictional and timeliness requirements of the Congressional Accountability Act, *Oscarson v. Office of the Senate Sargeant-at-Arms*,

550 F.3d 1 (D.C. Cir. 2008); an order denying class certification, *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); and an order imposing Rule 37 discovery sanctions on the U.S. government. *Banks v. Office of the Senate Sargeant-at-Arms*, 471 F.3d 1341 (D.C. Cir. 2006). Since none of these appeals sought to vindicate a constitutionally or statutorily granted right not to be sued, they are not analogous and do not govern whether this Court has jurisdiction over the instant appeal.

D. There Is No Basis To Summarily Affirm Prior To Reviewing The Full Record And Briefs On These Issues Of First Impression.

As a last ditch effort, Mrs. Sherrod makes a brief plea for the Court to summarily affirm the district court's minute order, arguing that the Anti-SLAPP Act cannot apply "retroactively" and that the District Court properly denied the motion on this basis. Mrs. Sherrod is wrong and her position is contrary to all of the courts in other jurisdictions that have ruled on this issue. In any event, the District Court did not issue any written order stating any reasons for denying the motion, on "retroactivity" grounds or otherwise. Even if it had, however, summary affirmance would not be appropriate because this, too, is an issue of first impression.

Moreover, this is not an issue of "retroactivity" and Mrs. Sherrod confuses the issue by using that misnomer. Courts in other jurisdictions overwhelmingly have applied Anti-SLAPP statutes to pending cases because Anti-SLAPP statutes are procedural in nature. Respondent readily concedes that "procedural" statutes apply to

pending cases, as set forth in *Montgomery v. District of Columbia*, 598 A.2d 162 (D.C. 1991) and its progeny.

Courts in California and elsewhere have consistently held that Anti-SLAPP statutes apply to pending cases. *See Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 352 (1995) ("[T]he statute applies to actions which accrued before its effective date because it does not change the legal effect of past conduct."); *American Dental Ass'n v. Khorrami*, 2004 WL 3486525, *9 (C.D. Cal Jan. 26, 2004) (applying an amendment to California's Anti-SLAPP statute to pending case in federal court); *Nguyen v. County of Clark*, 732 F. Supp. 2d 1190 (W.D. Wa. 2010) (applying Washington's Anti-SLAPP statute to pending case in federal court); *Shoreline Towers Condominium Ass'n v. Gassman*, 404 Ill. App. 3d 1013, 1022-23 (2010) (applying Illinois' Anti-SLAPP statute); *Anderson Development Co. v. Tobias*, 116 P. 3d 323, 336 (Utah 2005) (applying Utah's Anti-SLAPP statute to claims which were filed prior to enactment). Mrs. Sherrod ignores these cases even though Appellants cited them to the District Court.

There is no basis to interpret the D.C. Anti-SLAPP Act any differently. A statute is retroactive "if it changes the legal consequences of acts completed before its effective date." *Nixon v. D.C. Dep't of Employment Servs.*, 954 A.2d 1016, 1022 (D.C. 2008). The Anti-SLAPP Act changes neither the legal consequences of any facts alleged in the Complaint nor the law on defamation or the Complaint's other claims. It merely creates a new mechanism to evaluate the sufficiency of those claims at the outset of the case.

The legislative history of the Act further supports the procedural nature of the statute. Although the Committee Report references "substantive" rights, it is clear that the substantive rights are actually the creation of expedited procedures for disposing of SLAPP suits. Specifically, the Committee Report states:

> Bill 18-893 adds new provisions in the D.C. Official Code to provide an expeditious process for dealing with [SLAPPs] . . . . Specifically, the legislation provides a defendant to a SLAPP with substantive rights to have a motion to dismiss heard expeditious, [and] to delay burdensome discovery while the motion to dismiss is pending . . . .

Indeed, it is not unusual that a procedural act would affect substantive rights - - "most procedural rules do." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010). The Supreme Court considers whether a law "really regulates procedure," *i.e.* "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id.* The legislative history of the Anti-SLAPP Act clearly suggests that the Council viewed it as being remedial. ("In June 2010, legislation was introduced to remedy this nationally recognized problem here in the District of Columbia.") Remedial statutes have retroactive effect, *see Edwards*, 588 A.2d at 1147, and thus, so does the Anti-SLAPP Act.

V. CONCLUSION.

For the reasons set forth herein, Appellants respectfully submit that the Motion to Dismiss must be denied.

Dated: November 3, 2011.

Respectfully submitted,

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