IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRADLEE DEAN and YOU CAN RUN BUT YOU CANNOT HIDE INTERNATIONAL Plaintiffs, v. NBC UNIVERSAL (NBC), MSNBC and RACHEL MADDOW, Defendants.	)	Civil Action No. 1:12-cv-00283 (RJL)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIAL MOTION TO DISMISS PURSUANT TO D.C. ANTI-SLAPP ACT OF 2010 AND MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(6)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

***** Sources principally relied upon are marked with an asterisk.

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In support of their special motion to dismiss pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5502, and motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants NBC Universal, MSNBC and Rachel Maddow (collectively "NBCUniversal") respectfully submit this Memorandum of Points and Authorities.

INTRODUCTION

This lawsuit, dressed as an action for defamation and false light, is Bradlee Dean's attempt to silence and denounce NBCUniversal parties for what he perceives to be its "leftist, socialist, activist 'gay rights', pro-choice, pro-government and anti-religious" views. Dean, the founder of You Can Run But You Cannot Hide International, is an outspoken opponent of homosexuality who has been publicly criticized for his vitriolic remarks. The comments that have engendered the largest outcry are those he made on a May 15, 2010 radio show. On that occasion, Dean stated that Muslims "seem to be more moral than even the American Christians do" after noting that "Muslims are calling for the execution of homosexuals in America." These assertions drew press attention and prompted public scrutiny and condemnation of local and national political candidates for their affiliation with Dean. Rachel Maddow, host of The Rachel Maddow Show on MSNBC, was among those to report and comment on Dean's statements and these affiliations. Dean challenges statements made on August 2010 and May 2011 broadcasts of the show.

The First Amendment protects Maddow and NBCUniversal's reporting on Dean. Not only should the Complaint be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, the District of Columbia's Anti-SLAPP Act counsels in favor of prompt dismissal of

meritless claims, such as the ones here, aimed at silencing debate and criticism on issues of public concern. As the broadcasts incontestably addressed an issue of public interest – political candidates and their controversial affiliations and views on homosexuality – *the only way* Dean's claims survive dismissal under the Anti-SLAPP Act at this stage is if he can carry the heavy burden of demonstrating he is "likely to succeed on the merits."

Dean's expected challenge to the validity and applicability of the Anti-SLAPP Act should fail. The Act falls squarely within the D.C. Council's legislative authority to grant substantive protections against meritless claims targeted at protected speech, and squarely within the class of substantive state laws applied by federal courts sitting in diversity. As this Court recently recognized, "the legislative history make[s] clear that the D.C. Anti–SLAPP Act is substantive." *Sherrod v. Breitbart et al.*, --- F. Supp. 2d ---, 2012 WL 506729, at *1 (D.D.C. Feb. 15, 2012) (Leon, J.). Indeed, this litigation is the best argument for why the Act must be applied. The Act is vital if the kind of blatant forum-shopping Plaintiffs have engaged in here – dismissing the Superior Court Action on the eve of argument of dispositive motions and refiling the identical action in federal court expressly to take advantage of a decision by a judge of this district declining to apply the Act – is to be avoided.

Under either standard – failure to state a claim or the Anti-SLAPP Act's likelihood of success – the Complaint cannot survive for three principal reasons:

One, the broadcasts truthfully reported on Dean's May 15th statements. Those broadcasts re-played original audio of Dean speaking on the May 15th radio show. Dean does not – and cannot – allege that he did not make those controversial statements. The fact that NBCUniversal broadcast the essence but not the entirety of what Dean said during that radio

show, as he now protests, does not change this analysis. Dean bears sole responsibility for the consequences of his words, however much he may try to distance himself from the backlash.

Two, the commentary or rebuke Maddow offered about Dean's statements was classic opinion and rhetorical hyperbole, and thus, cannot be actionable as a matter of law. As Dean is entitled to his opinions, however objectionable, so too is Maddow entitled to hers.

Three, the fair comment privilege protects Maddow's commentary. The broadcasts featured Dean's actual statements and clearly indicated the source of those statements. Viewers were free to make up their own minds as to whether they agreed with Maddow's remarks.

With this lawsuit – his second – Dean seeks to move one step closer in his self-described mission to stop the "radical gay agenda." The law does not permit him to use the judicial process in this fashion. It is axiomatic that, to state and prove a claim for defamation or false light, Dean must show that NBCUniversal made statements of fact that are both false and defamatory. Unable to demonstrate either, his claims must be dismissed as a matter of law.

FACTUAL BACKGROUND

Plaintiffs Bradlee Dean and YCR

Bradlee Dean ("Dean") is the founder and front-man of You Can Run But You Cannot Hide International ("YCR"), a Minnesota-based organization which defines its mission as "restor[ing] Judeo-Christian and family values to society" (Compl. at ¶ 2) and "reshaping[ing] America by re-directing the current and future generations both morally and spiritually through education, media, and the Judeo Christian values found in our U.S. Constitution." (Declaration of Laura R. Handman ("Handman Decl."), Ex. 1.)

The channels through which Dean and YCR have embarked on this mission are varied. From 2009-2011, Dean hosted a two-hour syndicated radio show called the Sons of Liberty on

The Patriot radio network. (*Id.*) After The Patriot cancelled Dean's show in approximately May 2011 (following a show in which Dean likened President Obama to Osama Bin Laden (Handman Decl., Exs. 2, 3)), Dean continued to broadcast Sons of Liberty using a call-in telephone number and as a podcast available on the Internet (Handman Decl., Ex. 4). As detailed on the YCR website, Plaintiffs' message is also communicated through a high school assembly program that preaches its message in schools; street teams; Junkyard Prophet, a rock-and-roll band (for which Dean is the drummer); Dean's blog on the YCR website; and a DVD documentary series entitled *My War*, which is sold on the YCR website for $99.99. (Handman Decl., Exs. 1, 5.)[1]

The topics on which Dean and YCR proselytize include their interpretations of the Constitution and the intent of the Founding Fathers, alcoholism, abortion and drug use. Frequent targets of Dean's writings and speeches are "Hollywood and the moral decline of our nation" and "lies in the media." (Handman Decl., Ex. 1.)

A favorite of Dean's talking points, and the one for which he has received the most attention, is the subject of homosexuality. On this topic, he has gone on the offensive, consistently and fervently denouncing homosexuality as a violation of the laws of this country, of nature, and of God. For example, Dean made the following remarks on his radio show:

- January 2010: Dean admonished President Obama for appointing Sharon Lubinski, who is openly gay, as a U.S. Marshal in Minnesota and Minnesota Governor Tim Pawlenty for letting the appointment happen on his "watch." Citing Leviticus 18:22, Dean proclaimed homosexuality to be against the law and also declared Congressman Barney Frank to be a suspected pedophile trying to pass an illegal Hate Crimes Bill. (Handman Decl., Exs. 6A, 7.)

[1] The submitted materials are proper evidence for the purpose of the Anti-SLAPP analysis, and are also appropriate matters of judicial notice. *See, e.g., Washington Post* v. *Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (judicial notice of newspaper articles); *Hamilton* v. *Paulson*, 542 F. Supp. 2d 37, 52 n. 15 (D.D.C. 2008) (judicial notice of website). The Court also may consider information incorporated by reference in the Complaint without converting this motion to dismiss to one for summary judgment. *See EEOC* v. *St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997), *aff'd*, 254 F.3d 315.

- May 2010: Dean denounced homosexuality as an "abomination" and against the laws of nature and expressed agreement with Malawi's imprisonment of a homosexual couple, exclaiming that "they are very moral, they uphold the laws." (Handman Decl., Exs. 6B at 0:20, 8.)

- October 2010: Discussing a recent spate of school suicides, Dean declared homosexuals "criminals" who "operate in darkness where their Father operates" (presumably referring to Satan), and homosexuals are "playing the victims" in that they are "blaming their stance as the reason that young homosexuals are committing suicide because of the schools' intolerance to the lifestyle of homosexuality." He also warned: "Mark my words, justice is coming." (Handman Decl., Ex. 6C at 0:40, 1:25, 8:00; recording also available at http://minnesotaindependent.com/71860/bradlee-dean-lgbt-advocates-aim-to-use-anti-gay-bullying-efforts-to-go-after-kids.)

- November 2010: Dean labeled homosexuality a "mental illness" and represented without reproach that Thomas Jefferson had advocated punishing homosexuality with castration. (Handman Decl., Exs. 6D, 9.)

Dean's written words are similarly polemical. In a blog entitled "Homosexual Marriage: My position, You Win, I rest my case," posted June 4, 2011, Dean writes about the "illegal" gay agenda: "Radical homosexuals want to re-educate America by teaching people of all ages to hate the laws that expose their crimes" and "[r]adical leaders are using the homosexual communities as a political battering ram to overthrow all sense of right and wrong." (Handman Decl., Ex. 10.) In April 2011, he penned a similar idea, identifying the "homosexual agenda" as at the root of the nation's problems. (Handman Decl., Ex. 11.)

The May 15, 2010 Sons of Liberty Broadcast

The views Dean expressed about homosexuality on the May 15, 2010 Sons of Liberty radio show are at the heart of this matter. Talking to a call-in listener "Kelly" about the constitutionality of sodomy laws, Dean stated:

> That's right. What they're trying to do is they're trying to scare people into submission to accept the poor victims that just can't help themselves from working death and sin in every sense of the word. They're lawless people, and they're playing with the fire

> that's going to burn them. As a matter of fact, I was just going to call for the next point that I was going to talk about here, Kelly, was that Muslims are calling for the execution of homosexuals in America. This was just released yesterday, and it shows you that they themselves are upholding the laws that are even in the Bible of the Judeo-Christian God but they seem to be more moral than even the American Christians do, because these people are livid about enforcing their laws. They know homosexuality is an abomination. And I continuously reach out to the homosexual communities on this radio show, Kelly, and I warn them, "Listen, which ones love?" You know, here you have Obama condemning it behind the backs of the homosexuals, but to their faces he's promoting it. Because he's the one that said that he would never, no matter which way the winds go, Obama said, he is not going to condemn or go against the Muslim nation. He's also the guy that said we're no longer a Christian nation, we're a Muslim nation. He better back up. As a matter of fact folks, we just posted a picture of Obama, and it says right over the top of his head "In God We Trust," and I said, "Somebody better talk to Obama." So check that out on sons-of-liberty-radio-dot-com, sons-of-liberty-radio-dot-com. But back to the point – the homosexuals, they need to listen. See, what we have – I say this to my gay friends out there – the ones that continuously nit-pick everything I say in their defense and for their eternal destination – Hollywood is promoting immorality, and God of the Heavens in Jesus' name is warning you to turn from the wrath to come, yet you have Muslims calling for your execution. If America won't enforce the laws, God will raise up a foreign enemy to do just that. That's what you're seeing today in America. Read Leviticus 26[2], America. But, anyways, I don't mean to be so long-winded, Kelly.

(Handman Decl., Exs. 6E at 1:04, 12, 38.)

In the weeks that followed, Dean's comments were widely denounced on the internet by journalists and bloggers. (Handman Decl., Ex. 13 ("GOP-linked punk rock ministry says executing gays is 'moral'"); Ex. 14 ("Tom Emmer finesses Bradlee Dean's sympathy for

[2] Chapter 26 of the book of Leviticus in the Bible (King James version) discusses rewards and punishment for one's adherence or lack thereof to the commandments. The text includes: "…ye shall be slain before your enemies: they that hate you shall reign over you; and ye shall flee when none pursueth you" (26:17), "I will also send wild beasts among you, which shall rob you of your children, and destroy your cattle, and make you few in number" (26:22), "I will bring a sword upon you, that shall avenge the quarrel of my covenant…" (26:25) and "Ye shall perish among the heathen…" (26:38). (Handman Decl., Ex. 31.)

executing gays"); Ex. 15 ("...this radio personality says Muslim law is better than US law in that it provides death for gays"); Ex. 16 ("…listening to the rest of the show will help the reader understand that this statement is in perfect context…One is reminded of the same sort of rhetoric coming from anti-gay voices in Uganda where they are trying to pass the 'kill the gays' bill…"); Ex. 17 ("Dean actually appears to be saying that the persecution of a sector of the population whose lifestyle he disagrees with is 'moral' and simply 'enforcing' God's law."); Ex. 18 ("On a May 15 radio show, the ministry's front man, Bradlee Dean, applauded the call of some Muslim's for violence against gay people."). A number of these sources provided readers with an audio link to the approximately five-minute statement quoted above. (Handman Decl., Exs. 13, 15, 17.)

Following a highly-controversial prayer that Dean gave at the Minnesota state legislature on May 20, 2011, in which he was criticized for questioning President Obama's Christianity, Dean's comments were again highlighted by several media outlets, including CBS, ABC, the Star Tribune and City Pages. (Handman Decl., Exs. 19-23; *see also* Compl. at ¶ 8 (alleging "scores of other media outlets and publications…[that] stated that Plaintiffs advocated the execution of gays and lesbians.")

Public Debate Surrounding Dean's Statements

Dean's anti-gay tirades have been highlighted because of his support by and affiliation with local Minnesota and national politicians.

Tom Emmer was the unsuccessful Republican nominee for Minnesota governor in 2010. During the course of the race, Emmer was criticized for his opposition to same-sex marriage and support of a constitutional marriage amendment outlawing same sex-marriage. (Handman Decl., Ex. 24.) In May 2010, it was reported that Emmer's campaign committee had made a 2008

monetary donation to YCR and that Emmer had made a 2010 appearance on the Sons of Liberty radio program. (Handman Decl., Ex. 25.) Shortly thereafter, it came to light that retail stores Target and Best Buy and manufacturing company 3M had made significant financial contributions to MN Forward, a Minnesota-based political action group that endorsed and funded Emmer's campaign efforts. (Handman Decl., Exs. 24, 26, 27.)

Consumers reacted strongly to Target's support of Emmer, citing Emmer's anti-gay politics, (Handman Decl., Exs. 24, 28, 29), evidenced in part by his connection to Dean and YCR. (Handman Decl., Exs. 26, 27, 30.) Dean's May 15th comments featured prominently in the controversy. In a July 2010 story, for example, ABC News reported on Target customers who vowed never again to shop at the store because of its seeming support of Emmer and of a boycott that had been organized. (Handman Decl., Ex. 26.) The story went on to say that Emmer had stated the "controversial rock band 'You Can Run But You Cannot Hide,' were 'nice people' following band member Bradlee Dean's reported comments that Muslim countries that support execution of gays are 'more moral than even the Christian Americans.'" Similarly, a posting on Change.org that discussed Target's support of Emmer commented "Emmer, after all, gave money to a Christian ministry in Minnesota, You Can Run But You Cannot Hide, whose founder has said gay people are sick, they are pedophiles, and that countries that kill gay people are moral." (Handman Decl., Ex. 30.) Tens of thousands of letters were sent to Target's headquarters and several Facebook pages were launched to protest the company. (*Id.*; *see also* Handman Decl., Exs. 28, 29.)

Then-presidential candidate Michele Bachmann's affiliation with Dean and YCR prompted similar coverage. Reports, from as early as 2009, revealed that Bachmann led a prayer for YCR in 2006 in which she prayed for the ministry to multiply ten-fold and delivered a video

address at a 2009 YCR fundraiser in which the My War documentary premiered. (*E.g.*, Handman Decl., Exs. 7, 32-34.)

The NBCUniversal Broadcasts

The Rachel Maddow Show, hosted by progressive journalist Rachel Maddow, is a primetime television program on MSNBC which airs at 9 p.m. five nights a week. Over the course of the hour show, Maddow reports on news events and provides colorful commentary and opinion on current political and social issues, often inviting guest commentators and hosts to join her in the discussion. As had several other media outlets, The Rachel Maddow Show covered Dean's affiliations with political candidates in its August 9, 2010 broadcast ("the August 2010 Broadcast") and its May 11, 2011 broadcast ("the May 2011 Broadcast").

A portion of the August 2010 Broadcast was devoted to discussing the then-approaching election for Minnesota governor to fill the position soon to be vacated by Tim Pawlenty, who was running for President. (Handman Decl., Exs. 35 (transcript of August 2010 broadcast) at pp. 8-9, 36 (DVD of same).) Maddow discussed each of the candidates in the race in turn, including Tom Emmer. Maddow reported that Target and Best Buy's support of Emmer sparked nationwide boycotts of the stores, and that Emmer's affiliation with Dean and YCR was at the center of the backlash. (*Id.* at 8.) To explain why Emmer's association with Dean was controversial, an audio clip of statements Dean made on the May 15th radio show was broadcast, with the words synchronously appearing on the screen as follows (quotation marks appearing as displayed during the broadcast):

> "Muslims are calling for the execution of homosexuals in America."
>
> "…they themselves are upholding the laws that are even in the Bible of the Judeo-Christian God but they seem to be more moral than even the American Christians do, because these people are

> livid about enforcing their laws. They know homosexuality's an abomination."
>
> "If America won't enforce the laws, God will raise up a foreign enemy to do just that. That's what you're seeing today in America."

Each above-quoted passage was displayed on a separate screen. The words "Source: May 15, AM1280 The Patriot" and the Sons of Liberty emblem appeared with each quote. (*Id.*)

After Dean's May 15 statements were played on the broadcast, Maddow stated that Dean had said "quote, 'We have never and will never call for the - we have never and will never call for the execution of homosexuals,' which is nice." While Maddow read Dean's statement, the words "We have never and will never call for the execution of homosexuals" were simultaneously displayed on the screen and YCR's website was prominently displayed in the background, indicating that the website was the source for that statement. The statement had been posted on the website in June, several weeks after Dean's May 15th broadcast and the ensuing controversy. (*Id.*)

Maddow immediately went on to say: "But of course, he does still consider 'the gay' to be an abomination and he has some other stuff that he said about the homosexuals which maybe is a little problematic given that he has been given money by a candidate for Republican governor." She then played another audio clip of additional statements Dean made on the May 15th radio show, with the words synchronously appearing on the screen as follows:

> "Here's the bottom line. They play the victim when in fact they're the predator. On average, they molest 117 people. On average, they molest 117 people before they're found out. How many kids have been destroyed? How many adults today have been destroyed because of crimes against nature? How many people have been violated because of that?"

Again, the words "Source: May 15, AM1280 The Patriot" and the Sons of Liberty emblem appeared on the screen with the quote. (*Id.*)

Maddow concluded this portion of her broadcast commenting on the Emmer-Dean relationship:

> "117 precisely. He counted. Now, it's no surprise that a conservative anti-gay candidate for office and a conservative anti-gay ministry have ties. Conservative anti-gay politics are nothing new. What's new, however, is that the politicians are giving money to the bands, homophobic bands, but bands nonetheless. So why would a candidate for office, any office, make such a donation? Isn't it meant to be the other way around? Don't bands raise money for candidates not vice versa? Mr. Emmer's explanation is quote, 'These are nice people.' Good night."

(*Id*. at 8-9). The full video of the August 2010 Broadcast is located on the MSNBC website at www.msnbc.msn.com/id/26315908/vp/38633909#38633909.

The Rachel Maddow Show revisited Dean's statement on May 11, 2011. (Handman Decl., Exs. 37 (transcript of May 2011 broadcast), 36 (DVD of same).) A significant portion of the May 11 Broadcast was allotted to a discussion of the Republican 2012 presidential candidates, who had recently participated in a televised debate. (*Id.* at 1-7.) The question raised by the broadcast's discourse was whether Republican candidates were continuing to campaign on social issues despite the Republican Party's stated intention to remain focused on issues related to fiscal conservatism. Maddow voiced the opinion that "all of the Republican presidential contenders…even the most unlikely ones, are crusading really hard on social issues." (*Id.* at 2.) In support of her point, Maddow played an audio recording of statements made by presidential candidate Newt Gingrich about gay rights and abortion. The audio of Mr. Gingrich was followed by an audio recording of Lou Engel, who had been connected to Mr. Gingrich, stating,

in part: "six hundred thousand men died on the battlefields of America, for the bloodshed of 50 million babies." Maddow then commented:

> "Mr. Gingrich is not the only Republican presidential contender to turn towards the social conservatism – the part of social conservatism that is that radical and bloodthirsty. Republican Congresswoman Michele Bachmann of Minnesota, for example, will reportedly share the stage next month at a Tea-Party nominating convention for president and vice president, with an activist named Bradlee Dean."

(*Id.* at 3.)

Following this remark, Maddow played the same audio recording of Dean's May 15th statements that played during the August 2010 Broadcast. Again, the words and the source of the recording were simultaneously displayed on the screen. Maddow introduced the audio of Dean's statements with "maybe [] you remember Bradlee Dean, like Lou Engel, calling for an upping of the bloodshed in America's culture wars." (*Id.*) After it played, she remarked "Foreign enemies rising up against America because Christians aren't doing the job of killing the gays. Whether the Beltway will acknowledge it or not, this is what it's like to compete for the Republican presidential nomination this year in 2011." (*Id.* at 4.)

Maddow continued her commentary about the presidential election and the "culture war" issues that impacted the race. For example, after discussing another candidate's views on abortion, Maddow stated: "Republicans sold the Beltway this line that there wasn't going to be any culture war this year. So, the media apparently did not bother to hire any culture war correspondents. But this war is underway…it's not too late to start covering it." (*Id.* at 5.) Maddow's dialogue with a guest commentator about whether culture war issues were passé rounded out the broadcast. Nothing more was said about Dean.

The full video of the May 2011 Broadcast is located on the MSNBC website at www.msnbc.msn.com/id/26315908/vp/42999239#42999239.

Procedural History

Dean and his lawyer appeared at a press conference in New York on July 29, 2011 to announce their commencement of a lawsuit in the Superior Court of the District of Columbia. (Handman Decl., Ex. 39.) A complaint alleging defamation and false light was filed the same day in Superior Court, naming NBC Universal, Inc., MSNBC, Rachel Maddow and the Minnesota Independent and its reporter, Andy Birkey, as defendants ("the Superior Court Action").[3] (Handman Decl., Ex. 41 (Compl., *Dean v. NBC Universal et al.*, Case No. 2011 CA 006055 B (Zeldon, J.))).

NBCUniversal moved to dismiss the complaint in the Superior Court Action pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq.*, and pursuant to Superior Court Civil Rule 12(b)(6). *See* NBCUniversal's Mem. in Supp. of Mot. To Stay Or In The Alternative For An Order Extending Time To Answer Or Respond To The Compl. and Accompanying Handman Decl. ¶ 7. ("Decl. in Supp. of Mot. to Stay") [Dkt. 2-3]. In opposition to NBCUniversal's motions, Plaintiffs asserted that the Council of the District of Columbia had exceeded its legislative authority under the District of Columbia Home Rule Act in enacting the Anti-SLAPP Act, and therefore, the Anti-SLAPP Act is invalid. (*Id.* ¶ 8.) Given Plaintiffs' challenge to the Act, the District of Columbia intervened in the Superior Court Action for the limited purpose of defending the validity of the Anti-SLAPP Act. (*Id.* ¶ 10.) The Superior Court thereafter converted NBCUniversal's motions into a motion for summary judgment and set a date for oral argument. (*Id.* ¶ 11.)

Over seven months after commencement of the Superior Court Action, and merely a few days before oral argument on NBCUniversal's dispositive motions to dismiss, Plaintiffs

[3] Plaintiffs failed to serve The Minnesota Independent, resulting in its dismissal from the action. Defendant Birkey filed a motion to dismiss for lack of personal jurisdiction, which was granted.

improperly dismissed that action to file a virtually identical complaint in this Court ("the Complaint"). [4] Plaintiffs admitted to forum shopping, taking this action expressly because they believed a federal court would be unlikely to apply the protections of the D.C. Anti-SLAPP Act. (*Id.* ¶¶ 13-14; *see also* Handman Decl., Ex. 42 ("The Complaint has been refiled in the U.S. District Court for the District of Columbia due to the Court's recent decision in *3M v. Boulter*, 11-cv-1527 (RLW)").)

As set forth in NBCUniversal's Motion To Stay Or In The Alternative For An Order Extending Time To Answer Or Respond To The Complaint and Accompanying Memorandum, Declaration and Exhibits [Dkt. 2], NBCUniversal has moved in Superior Court to vacate Plaintiffs' voluntary dismissal as procedurally improper on the grounds that the Superior Court had converted NBCUniversal's dispositive motions into a motion for summary judgment and, therefore, dismissal was only appropriate upon court order. NBCUniversal further urged that a dismissal be denied and the pending dispositive motions be adjudicated in Superior Court or the dismissal be subject to conditions. The Superior Court, after review of NBCUniversal's motion to vacate and Plaintiffs' opposition thereto, confirmed by written Order dated March 30, 2012 that it had converted NBCUniversal's dispositive motion into a motion for summary judgment. *See* NBCUniversal's Notice of Supplemental Authority [Dkt. 8]. As of the date of this filing, NBCUniversal's motion to vacate is fully submitted and pending. Thus, NBCUniversal is filing the instant Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act of 2010 and Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) at this time to preserve the timeliness of such

[4] Given the procedural history of the Superior Court Action and Plaintiffs' sudden and improper dismissal of that action, the Superior Court has not ruled on Plaintiffs' challenge to the validity of the Anti-SLAPP Act. Nor has any other judge in the D.C. Superior Court or the D.C. District Court yet ruled on the Anti-SLAPP Act's validity under the Home Rule Act. *See, e.g.*, *3M Co. v. Boulter*, --- F. Supp. 2d ---, 2012 WL 386488, at *22 (D.D.C. Feb. 2, 2012).

motions, but respectfully renews its request for a stay of these proceedings until a final disposition of the Superior Court Action.

The Complaint

While styled as an action for defamation and false light, the Complaint reads as a political tirade against NBCUniversal and its on-air hosts, especially Maddow, for their support of liberal causes and their alleged "attacks" on Congresswoman Bachmann, who is notably *not* a plaintiff in this action. The boundaries of the Complaint are nebulous and the charges bizarre. Plaintiffs allege, for example, that:

- "Congresswoman Michele Bachmann is regularly and maliciously disparaged, defamed and held in a false light on many other NBC and MSNBC cable shows, including but not limited to the broadcasts of television hosts Chris Matthews, Ed Schultz, and Lawrence O'Donnell….[B]y destroying Plaintiffs, Defendants Maddow, MSNBC and NBC sought to destroy Bachmann, a Christian conservative presidential candidate who they despise and hate for her religious and political beliefs." (Compl. at ¶ 11.)

- "Defendants NBC and MSNBC pride themselves on their marketing of anti-religious beliefs and their disparagement of people of faith, as they have sought to woo secular, atheist, leftist oriented viewer markets, given Fox News' domination of the politically conservative/libertarian/religious markets which they have had difficulty cultivating." (*Id.* at ¶ 11.)

- "[A]ttacking and harming Plaintiffs and Congresswoman Michele Bachmann is also a cleverly crafted marketing strategy, furthered by the rabid leftist, pro-'gay rights', secular and anti-religious views and broadcasts of its political commentators like Maddow." (*Id.* at ¶ 11.)

Plaintiffs' accusations that are actually germane to Dean, however, are generally that NBCUniversal represented that Dean and YCR advocated for the execution of gays, thereby defaming and showing Dean and YCR in a false light. (*Id.* at ¶¶ 9-10.) Plaintiffs do not allege, in this Complaint or at any time in response to the dispositive motions in Superior Court, that Dean did not *make* the statements that were attributed to him during those broadcasts. They do,

nevertheless, seek to hold Defendants responsible for death threats Dean has allegedly received "from gay activists" and for damages in excess of $50,000,000. (*Id.* at ¶¶ 11, 14.)

Plaintiffs have been quite candid about their reasons for bringing suit against NBCUniversal. In the intense media campaign Plaintiffs embarked on to promote the filing of their claims, Larry Klayman, Plaintiffs' lawyer delighted: "You can't just say whatever you want…This is going to cost MSNBC hundreds of millions of dollars and will probably end the career of Rachel Maddow." (Handman Decl., Ex. 40.) And in an interview, Dean was queried "What do you hope comes out of this lawsuit." (Handman Decl., Ex. 6F) (www.youtube.com/watch?v=UGiWRdxpGmQ). In addition to "justice," Dean acknowledged "that's my objective, is the stopping of this radical gay agenda." (*Id.* at 5:44.)

ARGUMENT

The Complaint should be dismissed with prejudice pursuant to both the District of Columbia Anti-SLAPP Act of 2010 and Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below in Section III, Plaintiffs are unable, as a matter of law, to state a claim under Federal Rule of Civil Procedure 12(b)(6), let alone meet the Anti-SLAPP Act's heavier burden of demonstrating that the claims are likely to succeed on the merits.

I. PLAINTIFFS' CLAIMS ARE SUBJECT TO AN ANTI-SLAPP MOTION

A. The District Of Columbia Anti-SLAPP Statute Broadly Applies To Claims That Target The Exercise Of Free Speech About Issues Of Public Interest.

The District of Columbia Anti-SLAPP Act of 2010 was enacted to encourage the swift and efficient dismissal of precisely the types of claims Plaintiffs bring here. D.C. Code § 16-5502. In urging the adoption of the Act, the Council's Committee on Public Safety and the Judiciary recognized with some dismay the growing use of lawsuits aimed to punish or prevent

the expression of opposing points of view, commonly referred to as strategic lawsuits against public participation, or SLAPPs:

> Such lawsuits…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.

Committee Rpt. on Bill 18-893 (Nov. 18, 2010) at 1.

The goal of the District's Anti-SLAPP Act, in line with similar legislation across the United States, was thus to ensure that defendants "are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." *Id*. at 4. The Act provides defendants to a SLAPP "with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest." *Id*.

The Act mandates, in relevant part:

> (b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code § 16-5502 (b).

The Act provides for a stay of discovery, an expedited hearing on the special motion to dismiss and for the issuance of a ruling as soon as practicable after the hearing. *Id.* § 16-5502 (c), (d). If the motion to dismiss is granted, the complaint shall be dismissed with prejudice. *Id.*

§ 16-5502 (d). Defendants that are successful are entitled to costs and attorney fees upon an appropriate showing.[5]

The import and intent of these provisions are clear: To be entitled to the substantive immunity from suit conferred by the Act, defendants need only demonstrate that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest. Once such a showing is made, the Act *requires* that the claim be dismissed with prejudice unless Plaintiff satisfies the heavy burden of demonstrating the claim is likely to succeed on the merits.

B. Plaintiffs' Claims Fall Within The Scope Of The Anti-SLAPP Statute Because They Arise From An Act In Furtherance Of The Right Of Advocacy On Issues Of Public Interest.

Once movants show that the claims are covered by the Anti-SLAPP Act, the burden shifts to Plaintiffs, requiring them to demonstrate that they are likely to succeed on the merits of each of their claims. Movants' burden is easily met here. There can be no doubt that the Anti-SLAPP Act was designed to address Plaintiffs' current abusive, and even predatory, use of the judicial system. As evidenced on the very face of the Complaint, Plaintiffs have made their objective in bringing this suit transparent: to silence their critics and bring attention to their cause, to discourage criticism of former Presidential candidate Michele Bachmann, Compl. at ¶¶ 5, 6, 11, and to condemn and punish NBCUniversal for what Plaintiffs view as "leftist, socialist, activist 'gay rights', pro-choice, pro-government and anti-religious" ideals, Compl. at ¶ 11. The active media campaign in which Plaintiffs engaged after filing these claims only affirms this conclusion. Plaintiffs' attorney, Larry Klayman, proclaimed in a CBS radio interview that Maddow was "trying to destroy [Michele] Bachmann" and "[t]his will probably

[5] D.C. Code § 16-5504(a). If this Court grants NBCUniversal's Special Motion to Dismiss, it will file a separate motion setting forth the fees and costs incurred and requesting an award of fees.

end the career of Rachel Maddow." (Handman Decl., Ex. 40.) And Dean readily declares his objective to include the stopping of the "radical gay agenda."[6] (Handman Decl., Ex. 6F at 6:45.)

The Complaint sets forth two bases for relief against NBCUniversal: (1) defamation and (2) false light. Both claims arise from the statements made during the August 2010 and May 2010 broadcasts of The Rachel Maddow Show. Compl. at ¶¶ 9-10. Thus, to be entitled to the protection bestowed by the Act, NBCUniversal need only show that the statements made during the broadcasts were in furtherance of the right of advocacy on issues of public interest. This is easily done.

Defamation and related claims against media defendants like NBCUniversal are by their very nature subject to anti-SLAPP protection.[7] That the August and May broadcasts were communications to members of the public in connection with an issue of public interest is clear and needs little analysis. Those broadcasts discussed current political candidates, their views on homosexuality and their controversial and highly-publicized associations with certain individuals, including Dean. Moreover, Dean is a public figure. In addition to the prolific news attention he has garnered for his affiliation with certain political candidates – including a

[6] In light of these and other comments, Plaintiffs' choice of defendants is unsurprising. Despite Plaintiffs' admission that the allegedly defamatory statements were made by "numerous media outlets in DC and throughout the United States" and "scores of other media outlets and publications," the only individuals named as Defendants in either the Superior Court or this lawsuit are Rachel Maddow, who is, according to the Complaint, "a committed and also proud lesbian," and Andy Birkey, whom Plaintiffs named as a defendant and identified in the Superior Court Action as "a gay activist" (Compl. at ¶ 5; Handman Decl., Ex. 41 at ¶ 8).

[7] *See, e.g.*, *Henry* v. *Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168-69 (5th Cir. 2009) (applying Louisiana Anti-SLAPP statute to newspaper defendant); *Aronson* v. *Dog Eat Dog Films, Inc.*, 2010 WL 4723723, at *1 (W.D. Wash. Nov. 16, 2010) (applying Washington Anti-SLAPP statute to documentary film); *Hall* v. *Time Warner, Inc.*, 153 Cal. App. 4th 1337, 1347 (Cal. Ct. App. 2007) (statute applied to claims arising from broadcast of television program); *Seelig* v. *Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 807-08 (Cal. Ct. App. 2002) (applying statute to radio talk show hosts); *Lafayette Morehouse, Inc.* v. *Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 864 (Cal. Ct. App. 1995) (applying statute to newspaper and its reporters).

prominent feature in *The New York Times*[8] – he boasts on his website that he "hosts a nationally syndicated radio show…and has been highlighted as a top story in various newspapers and magazines across the nation." (Handman Decl., Ex. 1.) Plaintiffs concede the same in the Complaint, describing Dean as "renowned." Compl. at ¶ 2. In short, the challenged speech concerned matters of public interest involving elected officials and high profile public figures. Accordingly, Plaintiffs' claims are subject to a special motion to dismiss under the Act.

C. The Anti-SLAPP Statute's Substantive Protections Apply In A Diversity Action.

Courts across the country are clear that anti-SLAPP statutes provide substantive protections that can be invoked in federal diversity cases. Indeed, those "federal appellate courts that have addressed whether they must enforce these state anti-SLAPP statutes in federal proceedings have concluded that they must." *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010).

Under the Supreme Court's decision in *Erie*, federal district courts sitting in diversity jurisdiction generally apply the substantive law of the state in which the district court sits, and the Federal Rules of Civil Procedure generally govern procedural matters. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Hanna v. Plumer*, 380 U.S. 460, 465 (1965); *Burke v. Air Serv Int'l, Inc.*, 775 F. Supp. 2d 13, 19 (D.D.C. 2011) (Kennedy, J.). For *Erie* purposes, the laws of the District of Columbia, as passed by the Council and approved by Congress, are considered state laws. *See Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 360-61 (D.C. Cir. 1983) (*Erie* doctrine does not strictly apply to diversity cases in the District of Columbia, but federal courts apply it by analogy).

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[8] *See* Serge F. Kovaleski, *Michele Bachmann And the Making Of an Acolyte*, N.Y. Times, Sept. 25, 2011, at ST1, *available at* http://www.nytimes.com/2011/09/25/fashion/michele-bachmann-and-the-making-of-an-acolyte.html.

The test for whether a Federal Rule of Civil Procedure precludes application of a state law in a diversity action is two-fold. First, the court must determine whether the Federal Rule is "'sufficiently broad' to 'control the issue' before the court, 'thereby leaving no room for the operation' of" the state law. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1451 (2010) (Stevens, J., concurring) (quoting *Walker v. Armco Steel Corp*., 446 U.S. 740, 749–50 (1980)); *see also Godin*, 629 F.3d at 86–88 (applying this standard under *Shady Grove* to a challenge under the Federal Rules to the application of Maine's Anti-SLAPP Act).[9] If so, the federal rule is given effect if the rule itself complies with the Rules Enabling Act, 28 U.S.C. § 2072, which provides that the Federal Rules may not "abridge, enlarge or modify any substantive right." *Id.* at 1449-50 (Stevens, J., concurring). In evaluating whether the federal rule is "sufficiently broad to control the issue before the court," *Walker*, 446 U.S. at 749–50, the critical question is not "whether the state law at issue takes the form of what is traditionally described as substantive or procedural," but, rather, "*whether the state law actually is part of a State's framework of substantive rights or remedies*." *Shady Grove*, 130 S. Ct. at 1449 (emphasis added) (Stevens, J., concurring). Second, if the federal rule is not so broad as to control the issues raised, then the court analyzes whether the state law should be applied in light of the twin aims of *Erie*: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id*. at 1448 n. 2 (Stevens, J., concurring); *Hanna*, 380 U.S. at 468;

[9] Because Justice Stevens provided the fifth vote for the decision in *Shady Grove*, some courts have treated his concurrence as providing the operative standards on the theory that when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). *Compare Godin*, 629 F.3d at 86 (applying Stevens formulation) *with Boulter*, 2012 WL 386488, at *7 (applying Scalia standard, which turns on whether the rule "answers the question in dispute"). The difference is largely immaterial here, because the Federal Rules neither "control the issue" nor "answer[] the question in dispute."

see also Diffenderfer v. U.S., 656 F. Supp. 2d 137, 139 (D.D.C. 2009) (Leon, J.) (applying state law where failing to do so "would subvert *Erie*'s twin aims-reducing forum-shopping and avoiding the inequitable administration of laws"). Using this analysis, the Anti-SLAPP Act should be applied to dismiss Plaintiffs' claims.

1. The Anti-SLAPP statute is part of D.C.'s framework of substantive rights and remedies.

As this Court has recognized, the Anti-SLAPP Act's "legislative history make clear that the D.C. Anti–SLAPP Act is substantive." *Sherrod*, 2012 WL 506729, at *1 (Leon, J.) ("Indeed, the first sentence of the Committee Report emphasizes the legislative intent to create new substantive rights for defendants in SLAPP suits."). The District of Columbia explicitly intended to create "*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," a substantive "immunity to individuals engaging in protected actions." Committee Report at 1, 4 (emphasis added); *see also id.* at 6 ("the legislation provides a defendant to a SLAPP with substantive rights to have a motion to dismiss heard expeditiously"). The Act also alters the burden of proof to further protect parties from meritless litigation targeted at protected speech. This Court recently noted that "'it is long settled that the allocation of burden of proof is substantive in nature and controlled by state law,'" and "where a statute provides provisions for attorneys' fees and costs for the prevailing party – as the D.C. Anti–SLAPP provides –other courts have held that such statutory provisions are substantive in nature." *Sherrod*, 2012 WL 506729, at *1 n. 4 (citing *Godin*, 629 F.3d at 85 n. 10, 89; *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 971–72

(9th Cir. 1999)). As such, the Act "is part of a State's framework of substantive rights or remedies" that should be applied in diversity cases in federal court.

Every Circuit Court to face the question has concluded that state anti-SLAPP statutes apply in federal diversity cases. In *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, the Ninth Circuit held that the anti-SLAPP statute "can exist side by side" with the Federal Rules, "each controlling its own intended sphere of coverage without conflict." 190 F.3d at 972 (internal citation omitted). The court illustrated its point with an example, explaining that a *qui tam* plaintiff "after being served in federal court with counterclaims … may bring" an anti-SLAPP motion and recover fees if successful. *Id.* "If unsuccessful, the litigant remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment." *Id.* The court "fail[ed] to see how the prior application of the anti-SLAPP provisions will directly interfere with the operation of Rule 8, 12, or 56," leading it to conclude that there is no "direct collision" between the laws. *Id.* It noted that the appellee had not "identified any federal interests that would be undermined by application of the anti-SLAPP provisions," while "California has articulated the important, substantive state interests furthered by the Anti-SLAPP statute." *Id.* at 973; *see also Northon v. Rule*, 637 F.3d 937, 938-39 (9th Cir. 2011) (applying Oregon Anti-SLAPP statute in federal court); *Hilton v. Hallmark Cards*, 599 F.3d 894, 900 n. 2 (9th Cir. 2010) ("[W]e have long held that the anti-SLAPP statute applies to state law claims that federal courts hear pursuant to their diversity jurisdiction.").

Most recently, the First Circuit determined that that the Maine anti-SLAPP statute could be applied in federal court even though it has "both substantive and procedural aspects." *Godin*, 629 F.3d at 89. In *Godin*, Chief Judge Lynch concluded that:

> Section 556 [the Maine anti-SLAPP statute] is only addressed to special procedures for state claims based on a defendant's petitioning activity. …Section 556 does not seek to displace the Federal Rules or have Rules 12(b)(6) and 56 cease to function. In addition, Rules 12(b)(6) and 56 do not purport to apply only to suits challenging the defendants' exercise of their constitutional petitioning rights. Maine itself has general procedural rules which are the equivalents of Fed.R.Civ.P. 12(b)(6) and 56. That fact further supports the view that Maine has not created a substitute to the Federal Rules, but instead created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities.

Id. at 88; *see also Henry* v. *Lake Charles American Press, L.L.C.*, 566 F.3d 164, 168-69 (5th Cir. 2009) (Louisiana anti-SLAPP statute applied in federal court). The substantial weight of federal district court authority likewise has determined that state Anti-SLAPP statutes may be applied in diversity actions.[10]

To date, the only D.C. district court judge to yet opine on this issue has concluded that the D.C. Anti-SLAPP Act does not apply in federal diversity cases. *See 3M Co. v. Boulter*, --- F. Supp. 2d ---, 2012 WL 386488 (D.D.C. Feb. 2, 2012) (Wilkins, J.). Yet, as discussed above and conceded by Judge Wilkins, that decision is contrary to the

[10] *Trudeau v. ConsumerAffairs.com, Inc.*, 2011 WL 3898041 (N.D. Ill. Sept. 6, 2011) (Illinois statute); *Nguyen v. County of Clark*, 732 F. Supp. 2d 1190, 1192 (W.D. Wash. 2010) (Washington statute); *Balestra-Leigh v. Balestra*, 2010 WL 4280424 (D. Nev. Oct. 19, 2010) (Nevada statute); *Russell v. Krowne*, 2010 WL 2765268 (D. Md. July 12, 2010) (Maryland statute); *Bible & Gospel Trust v. Twinam*, 2008 WL 5245644 (D. Vt. Dec. 12, 2008) (Vermont statute); *USANA Health Sciences, Inc.* v. *Minkow*, 2008 WL 619287, *1-3 (D. Utah Mar. 4, 2008) (applying California anti-SLAPP statute in district court in the 10th Circuit); *Card v. Pipes*, 398 F. Supp. 2d 1126, 1136-37 (D. Or. 2004) (Oregon statute); *Buckley v. DIRECTV, Inc.*, 276 F. Supp. 2d 1271, 1275 n.5 (N.D. Ga. 2003) (Georgia statute).

overwhelming weight of authority on this issue.[11] Moreover, "[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *See J.S. v. District of Columbia*, 533 F. Supp. 2d 160, 162 n. 3 (D.D.C. 2008) (quoting 18-134 Moore's Federal Practice-Civil § 134.02[1][d] (2006)). As this Court also has determined, "the legislative history make clear that the D.C. Anti–SLAPP Act is substantive." *Sherrod*, 2012 WL 506729, at *1 (Leon, J.).[12]

The Act's substantive protections provide "a mechanism for a defendant to move to dismiss a claim on an entirely different basis: that the claims in question rest on the defendant's protected petitioning conduct and that the plaintiff cannot meet the special rules" that the District has "created to protect such petitioning activity against lawsuits." *Godin*, 629 F.3d at 89. The Act "provides substantive legal defenses to defendants and alters what plaintiffs must prove to prevail." *Id*. And "a Federal Rule 'cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.'" *Id.* at 87 (quoting *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring)). NBCUniversal thus respectfully submits that this Court should follow the First, Fifth, and Ninth Circuits and numerous district courts and

[11] The *3M* decision and this Court's decisions in *Breitbart* have been appealed to the D.C. Circuit Court of Appeals. Motions to dismiss those appeals are pending. *See Sherrod v. Breitbart*, Case No. 11-7088 (filed Aug. 29, 2011); *3M Company v. Boulter*, Case No. 12-7012 (filed Feb. 22, 2012).

[12] In *dicta*, this Court indicated that, "if" the Court had not found the Act to be substantive, but had, instead, found it to be purely procedural and, therefore, retroactive, as defendants had urged, the Act would not apply under the *Erie* doctrine. But this was presented as a counterfactual. The holding in *Breitbart* was that the Act was substantive and, therefore, not retroactive. *Sherrod*, 2012 WL 506729, at *2.

apply the Act, which is modeled after statutes universally found to apply in federal courts. This is especially true in this case because the grounds on which NBCUniversal's SLAPP motion is based allow the Court to resolve the motion on the pleadings alone. *See id.* at 90 (noting that "[s]ome [SLAPP] motions, like Rule 12(b)(6) motions, will be resolved on the pleadings," while others "will permit courts to look beyond the pleadings to affidavits and materials of record, as Rule 56 does").

2. Application of the Anti-SLAPP Statute in federal court serves *Erie's* twin aims.

Application of the Act's protections in federal court also will serve the "twin aims of *Erie*" – avoiding inequitable administration of the laws and discouraging forum shopping. *See Hanna*, 380 U.S. at 467-68; *Walko Corp. v. Burger Chef Sys., Inc.*, 554 F.2d 1165, 1170–71 (D.C. Cir. 1977); *see also Godin*, 629 F.3d at 92 (noting that declining to apply the Anti-SLAPP Act in federal court "would thus result in an inequitable administration of justice between a defense asserted in state court and the same defense asserted in federal court"). If plaintiffs are subject to the heightened burden of proof set forth in the Act if they file their case in Superior Court, but avoid being subject to those standards if they file in federal court, that result would encourage precisely the type of forum shopping that *Erie* was designed to avoid. *See, e.g.*, *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 a significant incentive to shop for a federal forum."). There can be no better evidence of forum shopping than what, in fact, happened in *this* litigation. Plaintiffs have attempted to abandon an identical action in the Superior Court – seven months after its commencement, after extensive briefing, and on the veritable eve of oral arguments on

NBCUniversal's dispositive motions – for the admitted purpose of pursuing their claims in federal court precisely because they assumed the Anti-SLAPP Act would not be applied. *See* Handman Decl., Ex. 42 (Plaintiffs' Notice of Voluntary Dismissal Without Prejudice in the Superior Court Action ("The Complaint has been refiled in the U.S. District Court for the District of Columbia due to the Court's recent decision in *3M v. Boulter*, 11-cv-1527 (RLW))). The *Erie* twin aims can only be served if the Act's protections apply in diversity jurisdiction federal court proceedings.

II. OUTSIDE THE ANTI-SLAPP CONTEXT, DISMISSAL FOR FAILURE TO STATE A CLAIM IS "PARTICULARLY APPROPRIATE" FOR LAWSUITS THAT TARGET PROTECTED SPEECH

Whether or not the Court is inclined to grant NBCUniversal's anti-SLAPP motion, the case can and should be dismissed for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(6) and 8.

"A court may dismiss a complaint or any portion of it for failure to state a claim upon which relief may be granted." *Parisi v. Sinclair*, --- F. Supp. 2d. ---, 2012 WL 639280, at *1 (D.D.C. Feb. 28, 2012) (Leon, J.) (citing Fed. R. Civ. P. 12(b)(6)). "To survive a motion to dismiss, a complainant must 'plead [ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id*. (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief 'requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Molina-Aviles v. Dist. of Columbia*, 2011 WL 2783853, at *2 (D.D.C. June 23, 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Rule 8(a) requires an actual showing and not just a blanket assertion of a right to relief." *Id.* (citing *Twombly*, 550 U.S. at 555 n. 3). In addition, "a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that

is 'plausible on its face.'" *Id.* at *3 (quoting *Twombly*, 550 U.S. at 570). "[T]he Court 'need not accept inferences drawn by plaintiff[ ] if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations.'" *Parisi*, 2012 WL 639280, at *1 (quoting *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)).

The D.C. Circuit has long instructed that "[i]n the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate." *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966). Although *Keogh* involved summary judgment, its reasoning is equally relevant when applied to motions to dismiss. *See also Coles v. Wash. Free Weekly, Inc.*, 881 F. Supp. 26, 30 (D.D.C. 1995) ("Given the threat to the first amendment posed by nonmeritorious defamation actions, it is particularly appropriate for courts to scrutinize such actions at an early stage of the proceedings to determine whether dismissal is warranted.").

Dismissing the case pursuant to the anti-SLAPP Act will best honor the District's intent to create a substantive immunity for individuals engaging in protected actions, deter litigation designed to chill speech rather than address any legitimate grievance and ensure that NBCUniversal can recover the cost of defending against this *second* meritless lawsuit. NBCUniversal respectfully suggests that the action be dismissed *both* pursuant to the Anti-SLAPP Act and for failure to state a claim.

III. PLAINTIFFS CANNOT STATE A CLAIM, LET ALONE DEMONSTRATE THE CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS

The Supreme Court teaches that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 50 (1988). "[T]he courts in the

District of Columbia have been vigilant in upholding those principles." *Carpenter* v. *King*, 792 F. Supp. 2d 29, 35 (D.D.C. 2011); *see also Lane* v. *Random House, Inc.*, 985 F. Supp. 141, 149 (D.D.C. 1995) (recognizing "judicial disposition in favor of open and unobstructed" speech). Plaintiffs cannot even establish the first element of a defamation claim – that NBCUniversal made any false statement of fact about Dean or YCR. Because Plaintiffs are barred from pleading false light as an end-run around defamation, they also are unable to succeed on a claim for false light.

A. Plaintiffs' Claims Based On the August 2010 Broadcast Are Barred By The Applicable Statute Of Limitations.

As an initial matter, to the extent that Plaintiffs attempt to base any claims on the August 2010 broadcast, those claims are time-barred. Plaintiffs allege that the August 2010 Broadcast occurred "[o]n or about August 9, 2010." (Compl. at ¶ 9.) The applicable statute of limitations period for defamation and false light claims is one year. *See* D.C. Code § 12-301(4) (setting one-year limitations period for libel and slander); *Mittleman v. U.S.*, 104 F.3d 410, 415-16 (D.C. Cir. 1997) (holding false light claims that are thoroughly intertwined with defamation claims are barred by one-year statute of limitations for defamation claims). Plaintiffs filed this action on February 21, 2012, a full six months after the limitations period for claims arising from the August 2010 Broadcast.

B. Plaintiffs Cannot State A Claim For Defamation, Because They Fail To Identify Any False Statements Of Fact.

Although Plaintiffs fail to identify the alleged defamatory statements with specificity, it appears that Plaintiffs are alleging that NBCUniversal made the following statements:

- "[Dean] and YCR had advocated the execution of gays" (Compl. at ¶ 9);
- "Plaintiffs advocated using foreign enemies against America because Christians aren't doing the job by killings gays and lesbians'" (*Id*. at ¶ 10); and

- "[P]ersons like Bachmann and Plaintiffs, and Republicans like Bachmann, are 'bloodthirsty' and were calling for the 'upping of the bloodshed in America's culture wars'" (*Id*. at ¶ 10).

To prevail on a defamation claim, plaintiff must prove: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) the defendant published the statement without privilege to a third party; (3) the requisite degree of fault; and (4) the statement was actionable as a matter of law or that it caused plaintiff special damages.[13] *See, e.g., Ye* v. *Holder,* 644 F. Supp. 2d 112, 117 (D.D.C. 2009); *Stark* v. *Zeta Phi Beta Sorority, Inc.*, 587 F. Supp. 2d 170, 175 (D.D.C. 2008). The burden of proving the statement is false rests squarely on the plaintiff. *Carpenter,* 792 F. Supp. 2d at 34; *Lane*, 985 F. Supp. at 151. Plaintiff must prove falsity by a preponderance of the evidence. *Klayman v. Segal*, 783 A.2d 607, 613 (D.C. 2001). It is an *absolute defense* to a defamation claim if the statements are substantially true. *E.g.*, *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991); *Klayman*, 783 A.2d at 613; *Carpenter*, 792 F. Supp. 2d at 34.

Moreover, the law of defamation is concerned only with "material[ ]" falsity, *Weyrich* v. *New Republic, Inc.*, 235 F.3d 617, 627 (D.C. Cir. 2001), meaning that errors "effect[ing] no material change in meaning" cannot give rise to liability, *Masson*, 501 U.S. at 516. Thus, "so long as the substance, the gist, the sting, of the libelous charge [was] justified," the publication must be deemed substantially true, even if the defendant "cannot justify every word of the

[13] Plaintiffs can point to no allegedly defamatory or false statements made by NBCUniversal "of and concerning" Plaintiff YCR. As the record indicates, the statements at issue relate solely to the re-broadcasts of and commentary about the statements Dean made during the May 15 radio show. In the District of Columbia, "[d]efamation is personal ... [a]llegations of defamation by an organization and its members are not interchangeable. Statements which refer to individual members of an organization do not implicate the organization." *Jankovic* v. *Int'l Crisis Grp.*, 494 F.3d 1080, 1089 (D.C. Cir. 2007) (citations omitted). For this independent reason, YCR's claims should be dismissed in their entirety. *See, e.g., Coles*, 881 F. Supp. at 30 (defamatory statement must be "of and concerning" plaintiff).

alleged defamatory matter." *Id.* at 516-17 (citations and internal quotation marks omitted). In other words, an alleged defamation is "not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* at 517 (citation omitted). These alleged statements do not give rise to defamation liability.[14] They are addressed in turn below.

1. **"[Dean] and YCR had advocated the execution of gays"**

Plaintiffs allege, without identifying a specific statement, that the August 2010 Broadcast "represented that [Dean] and YCR had advocated the execution of gays." Compl. at ¶ 9. Those words *are not used* in either the August 2010 or May 2011 Broadcasts. Despite Plaintiffs' conclusory allegations, a review of the broadcasts reveals that neither NBCUniversal nor Maddow ever made the assertion that Dean or YCR had advocated for the actual execution of homosexuals. Indeed, while under no obligation to do so, Maddow quoted Dean as later saying that "[w]e have never and will never call for the execution of homosexuals." *See id.*

The broadcasts replayed audio of Dean speaking on his Sons of Liberty radio show. While the audio played, an accurate transcription of Dean's words was displayed on the screen. Accurately repeating Dean's own words cannot be the basis for a defamation claim, no matter how regrettable or politically problematic Dean later found his words to be. "A party's accurate

[14] It is unclear from the face of the Complaint whether Plaintiffs also intended to base a claim for defamation or false light on MSNBC's alleged disparagements of Dean's "physical appearance, [] first name and [] profession as a heavy metal entertainer and []standing in the community." (Compl. at ¶ 9.) Plaintiffs have failed to allege the specific content of these alleged statements, or what about those statements was defamatory or false in the Complaint (or even in the Superior Court Action motion papers). Therefore, any claims based on these alleged statements should be dismissed as matter of law. *See Leo Winter Assocs. v. Dep't of Health & Human Svcs.*, 497 F. Supp. 429, 432 (D.D.C. 1980) (dismissing as a matter of law complaint that was "devoid of specific defamatory comments"). Moreover, there was nothing false or defamatory about Maddow's comments, and Maddow's comments are protected opinion. *See Coles*, 881 F. Supp. at 32 (recognizing "evaluative statements of taste" cannot be defamatory).

quoting of another's statement cannot defame the speaker's reputation since the speaker himself is responsible for whatever harm the words might cause." *Cf. Thomas* v. *Pearl*, 998 F.2d 447, 452 (7th Cir. 1993). The truth of the matter is that Dean did in fact say what was attributed to him – a fact he does not deny – so he cannot now claim or demonstrate the requisite falsity to support a defamation claim. "The fact that the statement is true, or in this case accurately quoted, is an absolute defense to a defamation action." *Id.*; *see also Dall* v. *Pearson*, 246 F. Supp. 812, 813 (D.D.C. 1963) (granting summary judgment in libel action where newspaper's account of plaintiff's testimony was substantially true).

That NBCUniversal did not broadcast the entirety of Dean's radio show does not render the Broadcast false, let alone materially false. NBCUniversal was not required, nor can it have been expected, to quote the entirety of Dean's self-described "long-winded" comments. (Handman Decl., Exs. 6E at 2:55, 38.) The law recognizes "the practical necessity to edit and make intelligible a speaker's perhaps rambling comments." *Masson*, 501 U.S. at 515. Because of obvious space limitations, news commentators '"will express themselves in condensed fashion without providing what might be considered the full picture.'" *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 582-83 (D.C. 2000) (quoting *Ollman* v. *Evans*, 750 F.2d 970, 986 (D.C. Cir. 1984)); *see also Thomas*, 998 F.2d at 452 (rejecting claim that plaintiff was put in false light because quotes were not published in their entirety). Even a deliberate alteration of a plaintiff's quotation is not false unless a party has made a material change in the meaning of a quotation. *Masson*, 501 U.S. at 517. Plaintiffs do not allege, much less demonstrate, such material change in this Complaint or in the dozens of pages filed in the Superior Court.

Dean's statements were relayed in the order in which he said them. No words were deleted or altered to change the meaning of any statement. The parts of his statement that were

not broadcast would not have cast Dean in a more flattering light (and even if they did, that is not the basis for a defamation suit). For example, Dean's remark that homosexuals are "playing with the fire that's going to burn them,"(Handman Decl., Ex. 6E at 1:15), or his warning that "God of the Heavens in Jesus' name is warning you to turn from the wrath to come, yet you have Muslims calling for your execution" (*id.* at 2:45), would not have altered the "gist" or "sting" of what was, in fact, broadcast. In fact, the audio link to Dean's full approximate five-minute statement was available on several internet sites before the August 2010 Broadcast, and the commentary on those sites unequivocally condemned Dean's full statement. *See* Handman Decl., Ex. 13 ("GOP-linked punk rock ministry says executing gays is 'moral'"); Ex. 15 ("…he believes Muslim countries who kill gays for being gay have the moral high ground over the USA"); Ex. 17 ("Dean actually appears to be saying that the persecution of a sector of the population whose lifestyle he disagrees with is 'moral' and simply 'enforcing' God's law"). The parts of Dean's statements that were not included thus in no way created a substantially inaccurate picture of his statements and, therefore, cannot form the basis of a defamation claim. *See White* v. *Fraternal Order of Police,* 909 F.2d 512, 525 (D.C. Cir. 1990).

Plaintiffs complain that NBCUniversal did not also include in its May 2011 Broadcast that Dean had stated publicly, weeks after his original broadcast and after the resulting backlash, that he did not advocate for the execution of gays. Yet, nothing in the law imposes such a responsibility. When evaluating such claims, "[c]ourts must be slow to intrude into the area of editorial judgment, not only with respect to choice of words, but also with respect to…omissions from new stories." *Coles,* 881 F. Supp. at 33 (quotation omitted); *see also White,* 909 F.2d at 525 ("Newspaper reporters should not be required to report the results of investigative journalism with a precision establishing an exhaustive, literal picture of what transpired.").

Moreover, publishers and reporters do not commit defamation merely by publishing what may be considered one-sided information or by not offering the subject an opportunity to respond. *See McFarlane* v. *Esquire Magazine*, 74 F.3d 1296, 1307 (D.C. Cir. 1996) (citing *Westmoreland* v. *CBS, Inc*., 601 F. Supp. 66, 68 (S.D.N.Y. 1984) (The "law does not require the publisher to grant his accused equal time or fair reply.")); *cf. Provisional Gov't of Republic of New Afrika* v. *ABC, Inc*., 609 F. Supp. 104, 108 (D.D.C. 1985) (dismissing defamation claim to extent it was based on media defendant's lack of coverage and noting "the Court is unaware of any constitutional doctrine which imposes an affirmative duty on the media to report about the activities of any individual"). Nor are journalists required to credit self-serving, after-the-fact disclaimers or denials, "however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir. 1977)

The reality is that Plaintiffs seek to hold NBCUniversal responsible for the consequences of Dean's own words, apparently on the theory that he did not *really* mean what he said on air. Saddling NBCUniversal with culpability for the inferences a listener may draw from Dean's own words would undermine the uninhibited discussion of matters of public concern and the principles of the First Amendment. *See Guilford*, 760 A.2d at 601. When, as here, a defendant conveys materially true facts, the plaintiff cannot establish defamation or hold the defendant responsible for the inferences that may be drawn from those facts. *See White*, 909 F.2d at 520 ("[I]f a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established."); *Coles*, 881 F. Supp. at 31 ("That the truth carries a negative implication does not give the Plaintiff a meritorious defamation cause of action.").

The absurdity of what Plaintiffs attempt to accomplish here is best illustrated by the chronology of relevant facts. Dean was a topic of discussion in the May 2010 Broadcast in part because his affiliation with a gubernatorial candidate was among the catalysts for boycotts of two national retail stores. Thus, by the time Dean was first discussed on The Rachel Maddow Show, he already was at the center of a public debate over the interpretation and intent of his words. The reference to him on the show was in reaction to, not the cause of, the controversy about what he said.

2. **'"Plaintiffs advocated using foreign enemies against America because Christians aren't doing the job by killing gays and lesbians."'**

This statement, although in quotes in the Complaint (Compl. at ¶10), is nowhere in either broadcast. Thus, Plaintiffs cannot demonstrate the statement was made at all, let alone that it was false and defamatory.

What Maddow did say during the May 2011 Broadcast, immediately after the audio clip of Dean's comments aired (in which he said "Muslims are calling for the execution of homosexuals in America …. If America won't enforce the laws, God will raise up a foreign enemy to do just that") was simply "foreign enemies rising up against America because Christians aren't doing the jobs of killing the gays. Whether the Beltway will acknowledge it or not, this is what it's like to compete for the Republican presidential nomination this year in 2011." Maddow's statement is protected commentary under the First Amendment.

The First Amendment provides protection for statements that cannot reasonably be interpreted as stating actual facts about an individual. *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *CACI Premier Tech., Inc.* v. *Rhodes*, 536 F.3d 280, 293 (4th Cir. 2008); *Guilford*, 760 A.2d at 599-600. If it is plain that a speaker is expressing a subjective view or opinion, interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of

objectively verifiable facts, the statement is not actionable. *E.g.*, *Guilford*, 760 A.2d at 597; *Mar-Jac Poultry, Inc.* v. *Katz*, 773 F. Supp. 2d 103, 121-22 (D.D.C. 2011); *Washington* v. *Smith*, 893 F. Supp. 60, 62 (D.D.C. 1995).

Whether a statement is capable of a defamatory meaning, or rather whether it can be interpreted as stating provably true or false facts about an individual, is a question of law. *Kreuzer* v. *George Washington Univ.*, 896 A.2d 238, 248 (D.C. 2006); *Washington*, 893 F. Supp. at 61. In evaluating these matters, courts should "'err on the side of non-actionability.'" *Washington*, 893 F. Supp. at 65 (quoting *Liberty Lobby, Inc.* v. *Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988)).

Context is critical to an analysis of whether, as a matter of law, a statement can be reasonably interpreted as stating facts about an individual as opposed to an expression of opinion. This is a broad inquiry and includes not merely an examination of the full text in which the statement appears, but the forum in which the words were presented and the social and political climate in which they were uttered. *See Ollman*, 750 F.2d at 983; *Lewis* v. *McTavish*, 673 F. Supp. 608, 610 (D.D.C. 1987) ("[C]ourts should look to the broader social context in which a statement is made."). The D.C. Court of Appeals' analysis in *Klayman* is instructive. Larry Klayman challenged the dismissal, under Super. Ct. Civ. R. 12(b)(6), of his complaint alleging defamation and false light invasion of privacy against *The Washington Post* and an individual. Klayman had contended that a statement published in *The Post* was defamatory because it "falsely caused [him] to appear so bent on publicity for himself that he is insensitive to the murder of innocent children." *Klayman*, 783 A.2d at 609. The court concluded that "when read in context, a reasonable person of ordinary intelligence would not understand the fair and natural meaning of the statement in question to be that Mr. Klayman is insensitive to the murder

of innocent children. Thus, as a matter of law, the statement is neither reasonably capable of defamatory meaning, nor does it place Mr. Klayman in a highly offensive light." *Id.*; *see also Carpenter*, 792 F. Supp. 2d at 34 ("The alleged defamatory statement is not considered in isolation but rather must be examined in the context in which it appeared.").

Moreover, certain types of speech by custom or convention – such as a political commentary – signal to listeners that what is being heard is not likely to be an assertion of fact but rather rhetoric and expressions of opinion. *Ollman*, 750 F.2d at 983; *see also Moldea* v. *New York Times Co.*, 22 F.3d 310, 313 (D.C. Cir. 1994) (recognizing short-sightedness in "failing to take account of the fact that the challenged statements were evaluations of a literary work which appeared in a forum in which readers expect to find such evaluations"). For example, the reasonable reader who reads a column on the editorial page should be fully aware that the statements are not hard news as may be found in other parts of the paper. *Guilford*, 760 A.2d at 582-83; *Carpenter*, 792 F. Supp. 2d at 35. Rather, readers should "expect the columnists will make strong statements, sometimes phrased in a polemical manner that would not be considered balanced or fair elsewhere in the newspaper." *Guilford*, 760 A.2d at 583 (internal quotation omitted); *Carpenter*, 792 F. Supp. 2d at 35; *see also Moldea*, 22 F.3d at 315 (recognizing that, in context of book review, critics must be given "constitutional breathing space" appropriate to genre); *Washington*, 893 F. Supp. at 63-64 (concluding "that readers of sports preview magazine understand that considerable portion of the magazine's content is subjective opinion" and that tone and language reinforces subjective nature of article).

Applying those concepts here, Maddow is well-known as a liberal journalist who hosts a primetime political commentary television show – or, as the Complaint describes her, a "political broadcaster" with a "leftist political ideology." Compl. ¶¶ 4-5. Much like readers of a

newspaper editorial, viewers of The Rachel Maddow Show expect Maddow to offer opinionated and polemic commentary and to use "loose, figurative" language that expresses a definite point of view. It is through this lens, in this atmosphere of "charged political debate," that her statements must be viewed. *Cf. CACI*, 536 F.3d at 304 (Duncan, J., concurring in judgment) ("The medium of talk radio is one in which hyperbole and diatribe reign as the preferred tools of discourse. Such expression, though not infrequently caustic and offensive, nevertheless enjoys robust First Amendment protection.").

Maddow's comments were offered immediately after Dean's statements were replayed and were a "caustic" appraisal of those statements and thus entitled to First Amendment protection. *New York Times Co*. v. *Sullivan*, 376 U.S. 254, 269 (1964). She did not purport to be offering additional facts not known to the viewers, but rather a "harsh description" and critique of Dean's words in light of their pertinence to a presidential election campaign. *See Thomas* v. *News World Commc'ns*, 681 F. Supp. 55, 63 (D.D.C. 1988). As it is clear that Maddow was expressing a "subjective view, interpretation, a theory, conjecture, or surmise" her statement is not actionable. *E.g*., *Guilford*, 760 A.2d at 597; *Washington*, 893 F. Supp. at 62.

3. "Bloodthirsty" and "calling for an upping of the bloodshed in America's culture wars"

Plaintiffs also decry Maddow's use of the terms "bloodthirsty" and "calling for an upping of the bloodshed in America's culture wars." These phrases cannot be defamatory as a matter of law.

The First Amendment provides protection for "rhetorical hyperbole, a vigorous epithet" and "loose, figurative, or hyperbolic language." *Milkovich*, 497 U.S. at 17, 21; *Guilford*, 760 A.2d at 589. This safeguard is necessary to ensure that public debate does not suffer "for lack of 'imaginative expression' … which has traditionally added much to the discourse of our Nation."

Milkovich, 497 U.S. at 20; *Guilford*, 760 A.2d at 589; *Novecon, Ltd.* v. *Bulgarian-American Enter. Fund*, 977 F. Supp. 45, 51 (D.D.C. 1997).

In evaluating whether a statement is non-actionable rhetorical hyperbole or loose, figurative language, the D.C. Circuit has emphasized the importance of context "because it is in part the *settings* of the speech in question that make their hyperbolic nature apparent, and which helps determine the way in which the intended audience will receive them." *Moldea*, 22 F.3d at 314. This principle is well illustrated by *Thomas* v. *News World Commc'ns.* In *Thomas*, antiwar demonstrators claimed they were defamed by negative editorials in several newspapers. The Court stressed that the challenged statements publication:

> in a forum whose traditional function is broadly understood to be the communication of opinion, compel the conclusion that the language of the *Times'* harsh descriptions of plaintiffs was being used in a metaphorical, exaggerated or even fantastic sense… The broad social and political context in which [the] statements appeared also lends to their definition as opinion rather than fact. The editorials at issue reflect the fact that *The Washington Times* has adopted a political position contrary to plaintiffs'…

Id. at 63-64 (internal citations and quotation marks omitted). The court concluded that a reasonable reader was not likely to construe the newspaper's comments that plaintiffs were "garbage" or "bums" "as anything other than opinion expressed through exaggerated rhetoric." *Id*. at 64. The court instructed that the terms used by the paper to criticize plaintiffs must be understood in context as "loose, figurative" language that expresses opinion. "In this atmosphere of charged political debate, even the newspaper's descriptions of plaintiffs as 'insane' persons and as 'pitiable lunatics' reflects opinion and not fact – exaggerated epithet, not factual allegation." *Id.*

Plaintiffs' claims suggest that they are urging the Court to interpret these statements in the most literal of senses, namely that Maddow was saying that Dean was in fact eager for the

shedding of blood or violence. Yet, neither the context in which the statements were made, the language that was used, the forum in which they were expressed, or the political atmosphere in which they landed demand such a literal interpretation.

Initially, these statements cannot be viewed in isolation. Rather the broadcast must be considered as whole, in the sense in which it would be understood by the viewers to whom it was addressed. *E.g.*, *Klayman*, 783 A.2d at 613. Throughout the May 2011 Broadcast, Maddow made repeated references to a "culture war," making it unequivocally clear she was not speaking of an actual violent physical confrontation but rather political conflict based on conflicting social values. *See* Handman Decl., Exs. 35, 36-A ("The media did not bother to hire any culture war correspondents" and "All of these people who are sort of seen as non-culture warriors…going hard line on culture war."). Interpreting Maddow's comment to mean that Dean was calling for the actual shedding of blood in a political conflict based on conflicting social values is nonsensical.

What's more, given the format of The Rachel Maddow show and the overarching political setting, "bloodthirsty" and "bloodshed" are precisely the kind of "rhetorical hyperbole" and "loose, figurative or hyperbolic language" that viewers would understand to be expressions of Maddow's opinion intended to spark debate and discussion. *See Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282-83 (1972) (finding "scab" and "traitor" not actionable in context of union publication); *Weyrich*, 235 F.3d at 625 ("[A]rticle's suggestion that appellant's behavior exhibited 'paranoia' is rhetorical sophistry, not a verifiably false attribution in fact of a 'debilitating mental condition'…"); *Lane*, 985 F. Supp. at 150-51 ("[g]uilty of Misleading the American Public" is rhetorical hyperbole as it does not "state actual facts about an individual" that can be proven true or false); *see also CACI*, 536 F.3d at 301-02 (finding talk radio host's

characterizations of "hired killers" and "torture" to be non-actionable "exaggerated rhetoric intended to spark the debate about the wisdom of the use of contractors in Iraq").

Indeed, these terms are too imprecise and susceptible to differing interpretations to be proven true or false, and therefore, cannot be defamatory as matter of law. *See Ollman*, 750 F.2d at 981; *Thomas*, 681 F. Supp. at 63. Whether or not someone is "bloodthirsty" is no more susceptible to objective proof of truth or falsity than whether someone is "dangerous" or a "fascist," and, as such, is clearly a matter of protected opinion. *See Kamalian* v. *Reader's Digest Ass'n, Inc.*, 814 N.Y.S.2d 261, 262-63 (N.Y. App. Div. 2006) (identification of plaintiff as "dangerous doctor" was non-actionable opinion); *Buckley* v. *Littell*, 539 F.2d 882, 893-94 (2d Cir. 1976) (language such as "fascist," "fellow traveler of fascism" and "radical right" held to be "so debatable, loose and varying, that they are insusceptible to proof of truth or falsity").

Moreover, although Dean claims his statements did not condone violence, it is possible that someone hearing Dean label Muslims, who "are calling for the execution of homosexuals," "more moral than even the American Christians" and citing Leviticus could disagree – in spite of his post-hoc disclaimer. This is especially true when considered together with Dean's other statements. *See, e.g.*, Handman Decl., Ex. 6B, 6C, 6D (calling homosexuality an "abomination" and a "sickness", praising a country for imprisoning homosexuals, and noting without reproach that Thomas Jefferson advocated castration for homosexuals). A "supportable interpretation" of Dean's comments was that, at least, they had the potential to incite violence or other, less physical, animosity against the homosexual community. *Moldea*, 22 F.3d at 311, 317 (statement that there was "too much sloppy journalism" in a review was a "supportable interpretation" of facts that were principally true or supported by statements of opinion); *see Washington v. Smith*, 80 F.3d 555, 557 (D.C. Cir. 1996) (coach's win/loss record "open to different interpretations by

reasonable persons"); *see also CACI*, 536 F.3d at 296 (defendants offered "rational interpretations" of military reports assigning responsibility for abuse at Abu Ghraib).

This conclusion is not merely theoretical – the interpretation of and public backlash against Dean's statements *that occurred before the first August 2010 Broadcast*, is evidence enough. For example, on July 28, 2010, ABC News reported on "band member Bradlee Dean's reported comments that Muslim countries that support execution of gays are 'more moral than even the American Christian,'" which helped to fuel a boycott of retailer Target. Handman Decl., Ex. 26; *see also, e.g.*, *id.* Ex. 14 (noting on May 25, 2010 that "Tom Emmer finesses Bradlee Dean's sympathy for executing gays"). When addressing a public controversy, such as the one involving Dean, the First Amendment provides "breathing space for journalists to criticize and interpret the actions and decisions of those involved." *Guilford*, 760 A.2d at 589 (quoting trial court).

4. Maddow's commentary is also protected by the Fair Comment Privilege

The fair comment privilege is also applicable to Maddow's statements about Dean. The common law privilege of fair comment applies where the reader or listener "is aware of the factual foundation for a comment and can therefore judge independently whether the comment is reasonable." *Lane*, 985 F. Supp. at 150 (citing *Milkovich*, 497 U.S. at 30 n. 7). Fair comments are not actionable in defamation "[b]ecause the [listener] understands that such supported opinions represent the [speaker's] interpretation of the facts presented, and because the [listener] is free to draw his or her own conclusions based upon those facts...." *Moldea*, 22 F.3d at 317 (citation omitted); *Lane*, 985 F. Supp. at 150. In the District of Columbia, the fair comment privilege can be invoked even if the underlying facts are not included with the comment. *Fisher* v. *Washington Post Co.*, 212 A.2d 335, 338 (D.C. 1965) (relying on *Sullivan* v. *Meyer*, 141 F.2d

21 (D.C. Cir.), *cert. denied*, 322 U.S. 743 (1944)). Rather, the factual foundation must only be known or readily available to the audience. *Id.*

Application of the privilege here is straightforward. Dean's May 15th Sons of Liberty radio show is readily available to the public and was available on YouTube on May 18, 2010, three days after he made those statements. *See* Handman Decl., Ex. 12 (printout of YouTube posting of Dean's statements, showing upload date of May 18, 2010). Moreover, an accurate audio recording of Dean's statements was broadcast for viewers. While the broadcast played, the source of the statement was prominently displayed on the screen. A viewer whose interest was sparked by the broadcast could view Dean's statements and determine whether to agree with Maddow's opinion and interpretation. *See Lane*, 985 F. Supp. at 150-51 (finding statements protected by fair comment doctrine because books on which opinion was based were available to public). The inclusion of the underlying facts, directly in the form of the accurate quotation and indirectly in the form of a reference to the source of the statement, *more* than complies with the criteria for applying the fair comment privilege to any opinion Maddow offered of those statements. *See id*.; *Fisher*, 212 A.2d at 338 (holding statements about gallery's placement of art were protected by fair comment privilege).

C. The False Light Claim Fails For The Same Reasons As Does The Defamation Claim.

"When a false light claim is based upon the same factual allegations as a defamation claim, the two are analyzed identically." *Parisi*, 2012 WL 639280, at *2 n. 1 (citing *Blodgett v. Univ. Club*, 930 A.2d 210, 223 (D.C. 2007)). As demonstrated, Plaintiffs have not stated a claim for defamation, let alone demonstrated they are likely to succeed on the merits of a defamation claim. Their false light claim, which is based on the same factual allegations as the defamation

claim, need "not be addressed separately," *Parisi*, 2012 WL 639280, at *2 n. 1, and should be dismissed as well.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Complaint be dismissed with prejudice pursuant to the D.C. Anti-SLAPP Act of 2010 and pursuant to Federal Rule of Civil Procedure 12(b)(6).

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Respectfully submitted,

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