ORAL ARGUMENT NOT YET SCHEDULED

No. 11-7088

United States Court of Appeals for the District of Columbia Circuit

SHIRLEY SHERROD,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

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

PLAINTIFF-APPELLEE'S REPLY IN SUPPORT OF HER MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY AFFIRMANCE

Thomas D. Yannucci, P.C.
Michael D. Jones
Thomas A. Clare, P.C.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Plaintiff-Appellee Shirley Sherrod

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If this Court notes but one thing about Defendants' brief, it should be this: They do not cite the D.C. Anti-SLAPP Act even once, nor do they discuss its provisions. Defendants simply insist that the Act must provide immunity and must apply retroactively because some ***other*** court construing some ***other*** statute found immunity or allowed retroactivity in some ***other*** case. The ultimate problem with that argument, as Plaintiff explained in her motion, is that those courts were wrong and those statutes were different. But the more fundamental question for Defendants is this: If ***this*** Act plainly provides immunity, and if ***this*** Act clearly applies retroactively, why not cite the relevant provisions? To ask that question is to answer it, for even a cursory review of the D.C. Anti-SLAPP Act shows that it does not support Defendants' position.

The Act's terms are straightforward: If the defendant shows it applies, the plaintiff must "demonstrate[] that [her] claim is likely to succeed on the merits." D.C. Code § 16-5502(a)-(b). If she does not, the claim must be dismissed and the court may award the defendant fees and costs. *Id.* § 16-5504(a). These provisions do not provide immunity. They do not provide a right not to stand trial. But they would have retroactive effects on pending cases. That is why these provisions do not appear in Defendants' brief, and that is why their appeal must fail.

At bottom, Defendants' assertions here exemplify why "§ 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a

jaundiced eye." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994). For all their cries of "first impression" and pleas for more briefing,[1] their appeal boils down to this: They filed motions to dismiss arguing ***solely*** that their defamatory statements "constitute[] protectable opinion"; the District Court disagreed; and now Defendants want this Court's view. Defs.' Resp. 1. That is it. No immunity. No right not to stand trial. Just a transparent, baseless effort to turn the routine denial of a motion to dismiss into immediate interlocutory review. This appeal should be dismissed or the District Court's order summarily affirmed.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS INTERLOCUTORY APPEAL.

The Court's jurisdictional inquiry can begin and end with a few simple points. Defendants do not dispute that the sole ground for dismissal they offered below was the non-actionable opinion defense asserted in their Rule 12(b)(6) motion to dismiss and incorporated into their Anti-SLAPP motion. *See id.* They do not dispute that the District Court's orders denying those motions were not final decisions. And they do not dispute that their ultimate goal here is to have this

[1] These pleas are a red herring, as Defendants have nothing more to say on these threshold issues. They simply want to present their unappealable "opinion" defense to the Court. This appeal therefore should be dismissed now—something both the Supreme Court and this Court (as recently as this year) have done in the past. *See, e.g.*, *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 264 (1982) (per curiam) (summarily dismissing first-impression collateral-order appeal for lack of jurisdiction); *United States v. Monzel*, 641 F.3d 528, 531-32 (D.C. Cir. 2011) (granting motion to dismiss despite "multiple issues of first impression").

Court comb the "full record" so it can review their opinion defense. *See id.* at 3. This appeal should end right there: for there is nothing in or about the D.C. Anti-SLAPP Act that transforms Defendants' unappealable opinion defense into a proper subject for interlocutory review under the collateral-order doctrine.

A. Defendants Have Not Established Unreviewability.

The key point here is that the collateral-order doctrine requires Defendants to establish a right not to stand trial, but the Anti-SLAPP Act provides no such thing. It allows a defendant to file a motion to dismiss, procedurally identical to a Rule 12(b)(6) motion to dismiss, that would require the plaintiff to "demonstrate[] that [a] claim is likely to succeed on the merits" or face the prospect of paying the defendant's fees and costs. D.C. Code §§ 16-5502(b), 16-5504(a). Defendants do not dispute that these are the Act's essential terms. Nor do they point to any section of the Act that purports to provide immunity or a right not to stand trial.

What Defendants offer instead is selected legislative history. Defendants note that a few D.C. Councilmembers said in a committee report that they viewed the Act's motion to dismiss as a means to "allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP." Defs.' Resp. 4.[2] Those same four Councilmembers further explained that they "support[ed] a suggested provision that would [have] grant[ed] an immediate right to appeal" from D.C.

[2] Citation and quotation omitted, and emphasis added, unless otherwise noted.

Superior Court, but they ***abandoned*** the provision because Congress has limited the D.C. courts' appellate jurisdiction through the Home Rule Act. *Id.* at 5.[3]

Legislative history, however, cannot create a right that the statute itself does not provide (immunity or otherwise). For as this Court recognized long ago, it has "no authority to enforce principles gleaned solely from legislative history … [with] no statutory reference point." *Int'l Broth. of Elec. Workers v. NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987) (emphasis omitted). This "cardinal principle," *id.*, makes particular sense here given that the Court must "view claims of a 'right not to be tried' with skepticism," *Digital Equip.*, 511 U.S. at 873. If skepticism means anything, it means the Court cannot accept a claim to ***statutory*** immunity where (as here) the claimant ***does not even cite the statute***.

That leaves Defendants with *Batzel* and *Henry*.[4] As Plaintiff explained in her motion, *Batzel* erred when it cast aside its obligation to scrutinize claims of

[3] Although Defendants do not explain the purported significance of this legislative history (given that it does not discuss immunity), they presumably offer it to imply that the D.C. Anti-SLAPP Act fits *Batzel*'s reasoning. That proposition is far from certain since Defendants offer no reason to conclude that Councilmembers who abandoned a right to appeal in light of the jurisdictional limitations codified in the Home Rule Act would now support Defendants' effort to upend the similar jurisdictional limitations codified in the final-judgment rule. Ultimately, though, this history just highlights *Batzel*'s basic error, for a claim to "expeditious[]" dismissal does not justify *Cohen* review. *See Digital Equip.*, 511 U.S. at 871-73.

[4] Although Defendants also rely on *Hilton v. Hallmark Cards* and *Godin v. Schenks*, Defs.' Resp. 11-12, *Hilton* simply followed *Batzel*, and *Godin*'s holding would make this appeal moot. *Godin* held only that a defendant may appeal the

immunity with a jaundiced eye and instead acquiesced to the defendants' effort to twist a statutory right to appeal into something "in the nature of an immunity." *See* Defs.' Resp. 10. Defendants do not, because they cannot, defend *Batzel*'s reasoning under the collateral-order doctrine as set forth by the Supreme Court. It requires a ***true*** right not to stand trial, not something "in the nature of" it.[5]

Next, Defendants cite the Fifth Circuit's opinion in *Henry*, which followed *Batzel* and thus made the same fundamental mistakes. Indeed, as Defendants' block quote points out, *Henry* strained to find "a right not to stand trial" even though it acknowledged that Louisiana's anti-SLAPP statute "does not provide a defense to liability." Defs.' Resp. 12. But that makes no sense: all immunities

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district court's conclusion that Maine's anti-SLAPP statute did not apply under *Erie*—but it declined to hold that a defendant could appeal an order denying the motion on the merits. 629 F.3d 79, 84 (1st Cir. 2010). If this Court were to do the same (which it should not), the District Court's rejection of Defendants' opinion defense would stand and their Anti-SLAPP motion would still be denied.

[5] Defendants try to rehabilitate *Batzel* by claiming that the California Supreme Court rejected immunity under California's anti-SLAPP statute only in the context "of a release or other types of contracts affecting speech." Defs.' Resp. 14. That is not correct. Although *Navellier* construed the California anti-SLAPP statute in that context, its holding that the statute "neither constitutes—nor enables courts to effect—any kind of 'immunity'" was not so limited. The California Supreme Court confirmed as much one year later when it cited *Navellier* the same way Plaintiff did. *See Jarrow Formulas v. LaMarche*, 74 P.3d 737, 743-44 (Cal. 2003).

must first be defenses, even if not all defenses are immunities. *Henry* simply saw what it wanted to see, and like *Batzel*, applied anything but a jaundiced eye.[6]

The Ninth Circuit recognized these points in *Englert* and, for this and other reasons, declined to follow its own *Batzel* decision. *See Englert v. MacDonell*, 551 F.3d 1099, 1104-05 (9th Cir. 2009). *Englert* understood that *Will* "significantly clarified" the unreviewability standard and "again made clear that the 'mere avoidance of a trial' was insufficient to invoke the collateral order doctrine." *Id.* at 1105. *Englert* thus held "that the Oregon anti-SLAPP statute fail[ed] the *Will* test at the threshold because it was not intended to provide a right not to be tried" but merely "a right to have the legal sufficiency of the evidence underlying the complaint reviewed by a *nisi prius* judge" before trial. *Id.* That was precisely correct there, and it is precisely correct here. Defendants cannot establish otherwise by their own *ipse dixit*.

Nevertheless, believing they have established immunity, Defendants turn to *Digital Equipment* for the purported proposition that "there is little room for the judiciary to gainsay" the importance of a right not to stand trial "embodied in a

[6] Although Defendants cite a few lines of *dicta* from *McNair Builders, Inc. v. Taylor* to imply that the D.C. Court of Appeals blessed *Henry*'s holding, it did no such thing. Rather, *McNair* recognized that *Will* and *Mohawk* "significantly refined the analytical framework" of the collateral-order doctrine and thus refused to allow interlocutory appeal from an order denying ***absolute immunity***, overruling a prior case that had allowed such appeals. 3 A.3d 1132, 1142 (D.C. 2010).

constitutional or statutory provision entitling a party to immunity from suit." Defs.' Resp. 16. This is no more than *dicta*. Indeed, the Supreme Court has since clarified that only four "rights not to stand trial" are appropriate for immediate review—presidential immunity, governmental qualified immunity, Eleventh Amendment immunity, and double jeopardy—because (and only because) they implicate some ***governmental*** "value of a high order" such as "honoring the separation of powers" or "preserving the efficiency of government and the initiative of its officials." *Will*, 546 U.S. at 352-53. No such governmental interest is threatened by making a private Anti-SLAPP movant await final judgment for his appeal. And if Defendants were correct that there is no conceivable "value of a higher order that would justify collateral review than Constitutionally protected free speech," Defs.' Resp. 3, then First Amendment defenses (including the one Defendants asserted in their Rule 12(b)(6) motion) would have been appealable before the Anti-SLAPP Act—but Defendants admit they were and are not.

Finally, Defendants try to distinguish the denial of an Anti-SLAPP motion from "contractual cases" like *Digital Equipment* by asserting that "[t]hese cases are far different from those concerning Constitutionally protected free speech." *Id.* at 16. This just shows again that Defendants misunderstand the Act. Although it requires the defendant to show that the "***claim*** aris[es] from an act in furtherance of the right of advocacy on issues of public interest," D.C. Code § 16-5502(a), the

defenses he may assert to show that the plaintiff is not "likely to succeed on the merits" are not limited, *id.* § 16-5502(b). A judgment bar (as in *Will*) could be asserted and would become appealable. A settlement agreement (as in *Digital Equipment*) could be asserted and would become appealable, too. This is the critical point, and this is what makes the Act a Trojan Horse at the threshold of the Court. This Court should not invite it in.

B. Defendants Have Not Established Separateness.

Separate and apart from the foregoing, Defendants appeal also must be dismissed because they have not established that orders denying Anti-SLAPP motions are completely separate from the merits. Indeed, Defendants say nothing about the Anti-SLAPP Act on this score. Instead, they simply note *Batzel*'s circular assertion that 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." Defs. Resp. 10 (emphasis omitted). That is a distinction without a difference: a court cannot determine whether a claim is meritless—or whether it is "likely to succeed on the merits," D.C. Code § 16-5502(b)—***without*** evaluating the merits. And as Plaintiff explained in her motion, that is precisely what Defendants have in mind here. They hope this Court will review the "full record" to determine whether their

textual statements were nonactionable opinion. Defs.' Resp. 3. The collateral-order doctrine, however, does not permit that sort of fact-intensive review.

C. Defendants Have Not Established Conclusivity.

Defendants also do not address their burden of establishing conclusivity. Again, they simply note that *Batzel* found Anti-SLAPP denials "conclusive as to whether the anti-SLAPP statute required dismissal." *Id.* at 10. But if that were sufficient, the conclusivity requirement would often be a dead letter, since district courts ordinarily do not revisit decided motions. This is why *Cohen* requires conclusivity as to the "disputed question," not the disputed motion. *See, e.g.*, *United States v. Cisneros*, 169 F.3d 763, 768 (D.C. Cir. 1999). Here, that disputed question is whether Defendants' opinion defense has merit. Defendants do not dispute that the District Court may consider that question again, and thus they have not established conclusivity. This appeal therefore should be dismissed.

II. IN THE ALTERNATIVE, THE COURT SHOULD SUMMARILY AFFIRM THE DISTRICT COURT'S ORDER.

Though they devote most of their response to asserting that the Anti-SLAPP Act confers substantive immunity, when it comes to retroactivity, Defendants turn on a dime to argue that the very same statute "merely creates a new mechanism to evaluate the sufficiency of [] claims at the outset of a case." *Id.* at 19. Defendants do not explain this obvious contradiction. Rather, they simply return to their

familiar mantra that "[c]ourts in other jurisdictions" have applied ***their*** anti-SLAPP statutes to pending cases. *Id.* at 18.[7]

Under the D.C. law governing the interpretation of ***this*** Act, however, ***any*** substantive effect renders the law inapplicable because only a ***purely*** procedural statute may be applied to a pending case (absent an express legislative showing to the contrary). *Bank of Am., N.A. v. Griffin*, 2 A.3d 1070, 1076 (D.C. 2010). Defendants do not dispute that the Act's burden-altering and attorneys'-fees provisions would have substantive effects; indeed, they freely admit that the Act affects "substantive rights." Defs.' Resp. 20. And though Defendants assert that the Act did not change "the legal consequences of any facts alleged in the Complaint" or the law of defamation, *id.* at 19, that is beside the point, *see*, *e.g.*, *Lindh v. Murphy*, 521 U.S. 320, 327 (1997) (new burden-altering statute did not apply to pending case even though it did not affect the law governing underlying Confrontation Clause claim). The Act purports to change the consequences of Plaintiff's decision to file her lawsuit. It thus cannot apply to her claims.

CONCLUSION

For the foregoing reasons, Plaintiff's motion should be granted.

[7] Defendants do not explain the reasoning behind these decisions, though it is the reasoning that matters. *Tobias*, for example, held that the Utah anti-SLAPP statute's attorneys'-fees provision ***would have impermissible retroactive effects*** but applied the statute because it "explicit[ly]" provided that it should apply to "continued" claims. *Anderson Dev. Co. v. Tobias*, 116 P.3d 323, 337 (Utah 2005).

Dated: November 14, 2011

Respectfully submitted,

/s/ Thomas D. Yannucci, P.C.

Thomas D. Yannucci, P.C.
Michael D. Jones
Thomas A. Clare, P.C.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

Counsel for Plaintiff-Appellee Shirley Sherrod

CERTIFICATE OF SERVICE

Pursuant to this Court's Circuit Rule 25(c), I hereby certify that on this 14th day of November, 2011, I electronically filed the foregoing Plaintiff-Appellee's Reply in Support of Her Motion to Dismiss or, in the Alternative, for Summary Affirmance with the Court by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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