**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 MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY AFFIRMANCE

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## CERTIFICATE AS TO PARTIES

Pursuant to this Court's Circuit Rules 27(a)(4) and 28(a)(1)(A), Plaintiff-Appellee Shirley Sherrod states as follows concerning the parties to this case:

**(A) Parties and *Amici***

Appellants: Defendants Andrew Breitbart and Larry O'Connor.

Appellee: Plaintiff Shirley Sherrod.

Intervenors: None.

*Amici*: None.

Although Defendants-Appellants Andrew Breitbart and Larry O'Connor concede that this Court lacks jurisdiction to review the District Court's interlocutory order denying their ***Rule 12(b)(6)*** motion to dismiss, they nonetheless contend that the collateral-order doctrine allows them to appeal anyway simply because they asserted the ***very same grounds for dismissal*** in a "special" ***Anti-SLAPP*** motion to dismiss. On this basis, Defendants informed the District Court that it had lost jurisdiction over all aspects of this case and refused to participate in ongoing discovery proceedings. Because Defendants are wrong on each of these scores, Plaintiff-Appellee Shirley Sherrod moves to dismiss this appeal for lack of jurisdiction so that this case—and discovery—can properly resume below.

Like Rules 12(b) and 56 of the D.C. and Federal Rules of Civil Procedure, the D.C. Anti-SLAPP Act of 2010 provides a mechanism for pretrial dismissal in certain cases ***if*** the law and the facts of the case otherwise provide a basis to do so. In particular, the Act states that "[a] party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim." D.C. Code § 16-5502(a). If the moving party "makes a prima facie showing that the claim at issue arises from an act" within the statute's scope, then discovery is stayed and the burden shifts to the opposing party to "demonstrate[] that the claim is likely to succeed on the merits." *Id.* § 16-5502(b). If the opposing party does not meet this standard, the claim is

dismissed and the court may award the moving party "the costs of litigation, including reasonable attorney fees." *Id.* § 16-5504(a).

None of these "special" features provides an affirmative ground for dismissal (such as the "opinion" defense Defendants actually asserted in each of their motions as the ***sole*** basis for dismissal). None amounts to a true "right not to stand trial," as required for immediate appeal under the collateral-order doctrine. *Will v. Hallock*, 546 U.S. 345, 351 (2006). And none justifies Defendants' transparent effort to circumvent the Supreme Court's repeated admonition that "the 'small class' of collaterally appealable orders" must be kept "narrow and selective in its membership." *Id.* at 350. Although Defendants would like this Court to recognize a new, categorical right to immediate appellate review that would throw open the Court's doors each and every time the District Court below denies an Anti-SLAPP motion, there is no basis to do so—and for good reason. The final-judgment rule would not be much of a rule at all if any and every supposed "advoca[te] on issues of public interest" could immediately appeal an ***otherwise unappealable*** ground for dismissal simply because he included a carbon copy of his argument in a "special" motion to dismiss. But that is ***precisely*** what Defendants hope to do here.

Alternatively, what the Act's "special" features ***do*** provide is a settled basis for summary affirmance if this Court ultimately concludes that it has jurisdiction.

Defendants do not dispute that the Anti-SLAPP Act was not in effect when Plaintiff filed her Complaint, and they cannot reasonably dispute that its application would have substantive consequences (by heightening Plaintiff's threshold burden and by allowing an award of fees and costs). Nevertheless, Defendants contend that the statute applies retroactively here. Defendants are wrong on this score, too. Because the Act does not clearly state that it is retroactive, it cannot apply to Plaintiff's pending case as a matter of longstanding D.C. law. On this threshold basis alone, the District Court's denial of Defendants' Anti-SLAPP motion was entirely proper, and this Court should summarily affirm that decision if it does not otherwise dismiss this appeal for lack of jurisdiction.[1]

## FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of Defendants' publication of the blog post *Video Proof: The NAACP Awards Racism–2010*, in which they used deceptively edited video clips and false written statements to assert that Plaintiff racially discriminated against a white farmer in her position as a USDA official. Although the blog post purported to publish "video proof" of Plaintiff's discrimination, the short video clips that Defendants embedded were, in truth, edited excerpts from a much longer speech by Plaintiff demonstrating exactly the opposite. Compl. ¶ 3 (Ex. 1). In

[1] Although Plaintiff disputes that the Act can apply on its terms in federal court given the breadth of Rules 12 and 56, *see Hanna v. Plumer*, 380 U.S. 460, 473 (1965), she assumes for purposes of this motion that it does, as Defendants assert.

particular, the unabridged speech described how Plaintiff, while working for a non-profit group in 1986, helped a white farmer who otherwise almost certainly would have lost his farm. *Id.* Defendants, however, drew false support from the edited video clips to assert (among other falsehoods) that they were "video evidence of racism coming from a federal appointee and NAACP award recipient" given that "Mrs. Sherrod admits that in her federally appointed position, overseeing over a billion dollars ... [s]he discriminates against people due to their race." *Id.* ¶ 4.

Because Defendants used the Internet to publish the edited video and false statements to a worldwide audience, news of the blog post spread quickly. Media outlets across the country immediately and repeatedly aired the misleading video clips and echoed Defendants' defamatory claims. Within hours, Plaintiff's supervisors at USDA demanded her resignation. Eventually, the NAACP published the full video of Plaintiff's speech, leading to apologies from senior government officials and the news media. Defendants, however, have not apologized and instead stand by their false statements. Indeed, the blog post remains accessible on Mr. Breitbart's website to this day. Defendants' defamatory conduct has caused enduring damage to Plaintiff's reputation, as well as emotional distress and financial damages from the loss of her employment at the USDA.

On February 11, 2011, Plaintiff filed her Complaint in the Superior Court for the District of Columbia against Defendants and the unidentified individual (sued

as JOHN DOE) who provided the video clips to them, alleging claims for defamation, false-light invasion of privacy, and intentional infliction of emotional distress. On March 4, 2011, Defendants removed the case to the District Court.

On April 18, 2011, Defendants jointly filed two motions in response to the Complaint. First, they filed a Rule 12(b) motion to dismiss or, in the alternative, to transfer. *See* Defs.' Rule 12(b) Mem. (Ex. 2). As relevant here, the Rule 12(b)(6) section of the motion argued that the ***textual*** statements in the blog post were "non-actionable opinion" and thus failed to state a claim. *Id.* at 28-44. The motion did not, however, challenge the defamatory nature of the deceptively edited video clips themselves, which independently defamed Plaintiff, cast her in a damaging false light, and intentionally inflicted emotional distress. Compl. ¶¶ 45, 93(a).

Second, Defendants filed a motion to dismiss based on the Anti-SLAPP Act, even though the Act did not become effective until March 31, 2011—nearly two months after Mrs. Sherrod filed her complaint. *See* Defs.' Anti-SLAPP Mem. (Ex. 3). Defendants asserted that the Act applied retroactively and that it applied in federal court under the *Erie* doctrine. They also asserted that Plaintiff's claims were within the statute's scope. But with respect to Plaintiff's likelihood of success on the merits, Defendants simply "incorporate[d] the relevant sections of Defendants' Rule 12(b)(6) Motion herein." *Id.* at 7. They did not seek dismissal on any other ground. *See id.* at 2.

Plaintiff opposed both motions. As to the Anti-SLAPP motion, Plaintiff explained that the Act did not retroactively apply to her pending claims because the Act contained substantive elements but not the corresponding clear language required to overcome the presumption against retroactivity as a matter of D.C. law. And with respect to both motions, Plaintiff argued that she had more than adequately alleged her claims against Defendants, whose defamatory video clips and false written statements were not "opinions." After oral argument, the District Court denied the two motions on July 28, 2011. *See* July 28, 2011 Orders (Ex. 4).

In a telling chronology, Defendants then sought interlocutory review of the two orders using two different procedures. First, with respect to the denial of their Rule 12(b)(6) motion, Defendants filed a motion for § 1292(b) certification—conceding that the "12(b)(6) Motion [was] not appealable as a matter of right … as a collateral order or otherwise." *See* Defs.' § 1292(b) Mem. at 2 (Ex. 5). Nevertheless, Defendants sought certification hoping that this Court would analyze the supposedly "full, fair and complete record" presented to the District Court—"consisting of public news accounts of the events that preceded publication of the alleged defamatory statements; the entire published Blog Post; two video excerpts embedded in the Blog Post; and the entire 43-minute video of [Mrs. Sherrod's] speech"—to determine whether "the statements at issue are protected opinion" when "viewed with full consideration of [their] full context." *See id.* at 2, 3.

Plaintiff opposed § 1292(b) certification, explaining (among other things) that § 1292(b) does not permit the fact-intensive review Defendants had in mind for this Court. The District Court has not yet ruled on Defendants' § 1292(b) motion.

Second, as to the denial of their Anti-SLAPP motion, Defendants asserted that the District Court's order could be appealed as of right and should be "considered concurrently with and incident to" their Rule 12(b)(6) motion, *id.* at 1, 2, since the Anti-SLAPP motion merely "incorporate[d] the relevant sections of Defendants' Rule 12(b)(6) Motion" as the sole basis for dismissal, *see* Defs.' Anti-SLAPP Mem. at 7. On August 26, 2011, Defendants filed their Notice of Appeal and have since refused to recognize the District Court's ongoing jurisdiction and proceed with discovery—claiming instead (in contrast to their position before this Court that they are seeking "collateral" review) that their Notice of Appeal divested the District Court of all jurisdiction to adjudicate any aspect of this case. Defs.' Rule 16 Opp'n at 1-2 (Ex. 6). This motion follows.

## ARGUMENT

### I. THE COURT LACKS JURISDICTION OVER THIS INTERLOCUTORY APPEAL.

Congress strictly limited appeals as of right to appeals from "final decisions of the district courts." 28 U.S.C. § 1291. Thus, a party ordinarily "is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital*

*Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). The District Court's order here was not final because it permitted the case to proceed, *id.* at 867, and thus this Court lacks jurisdiction to hear this appeal.

Defendants nevertheless contend that the order denying their Anti-SLAPP motion is immediately appealable under the collateral-order doctrine—despite the Supreme Court's repeated admonition that "the 'small class' of collaterally appealable orders" must be kept "narrow and selective in its membership." *Will*, 546 U.S. at 350. To meet their burden, Defendants must show that orders denying motions under the Anti-SLAPP Act "are sufficiently important and collateral to the merits [such] that they should nonetheless be treated as final." *Id.* at 347. This, in turn, requires Defendants to establish that this class of orders satisfies the collateral-order doctrine's "stringent" requirements: (1) the orders must be "effectively unreviewable on appeal from a final judgment," (2) they must resolve an "important issue completely separate from the merits" of the case, and (3) they must "conclusively determine the disputed question" decided by the district court. *Id.*[2] Because orders denying motions under the D.C. Anti-SLAPP Act do not satisfy any of these three requirements, Defendants' appeal must be dismissed.

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

### A. Orders Denying D.C. Anti-SLAPP Motions Are Reviewable After Final Judgment.

First and foremost, orders denying Anti-SLAPP motions are not "effectively unreviewable" because they "can be adequately vindicated on appeal from final judgment." *See Digital Equip.*, 511 U.S. at 869. This unreviewability requirement is rigorous and is satisfied only if two conditions are met. First, immediate appeal must be necessary to preserve "an asserted right" that "would be destroyed if it were not vindicated before trial." *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498-99 (1989). This means a true "right not to stand trial" must be at stake—***not just a claim for pretrial dismissal***. *See Digital Equip.*, 511 U.S. at 871-73. Second, even if a true claim to immunity is threatened, appeal still is not permitted unless it is also necessary to preserve "some particular value of a high order." *Will*, 546 U.S. at 352. "The crucial question, however, is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009).

No such right to avoid trial is at stake when a motion to dismiss under the D.C. Anti-SLAPP Act is denied. Indeed, the Act itself does not provide a right to dismissal *per se* at all. Rather, Anti-SLAPP motions are like Rule 12(b)(6) and Rule 56(a) motions in that they merely provide a vehicle to assert some ***independent*** ground for dismissal in light of the applicable standard of review. *See*

*Englert v. MacDonell*, 551 F.3d 1099, 1102 (9th Cir. 2009) (no appeal from orders denying motions under Oregon's similar anti-SLAPP statute because the act "does not alter the substantive law of defamation" and the motion "serves the same purpose as a motion for summary judgment"). For motions under the Anti-SLAPP Act, the standard of review is likelihood of success on the merits. D.C. Code § 16-5502(b). But that standard does not make an order denying the motion immediately appealable—just as Rule 12(b)(6) and Rule 56(a) motions are not appealable merely because they ask whether the plaintiff stated a claim or whether the defendant is entitled to judgment as a matter of law. *See Digital Equip.*, 511 U.S. at 873; *Oscarson v. Office of the Senate Sergeant at Arms*, 550 F.3d 1, 2 (D.C. Cir. 2008) ("[D]enials of motions to dismiss are generally not reviewable.").

What matters for collateral-order purposes are the ***affirmative defenses*** at issue in the case, not the type of pretrial motion used to assert them. *See Will*, 546 U.S. at 350-53. Because the Anti-SLAPP Act focuses on "act[s] in furtherance of the right of advocacy on issues of public interest," D.C. Code § 16-5502(a), movants most often will point to the First Amendment, as Defendants did here. But the First Amendment generally does not trigger a right to collateral-order appeal because the potential defenses it provides can be reviewed effectively after final judgment—as the Supreme Court demonstrated yet again just last term. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1214 (2011) (affirming ***post***-trial reversal of

verdict against protestors who asserted First Amendment defense throughout district court proceedings); *see also United States v. Hsia*, 176 F.3d 517, 526 (D.C. Cir. 1999) (explaining that the First Amendment does not provide "rights to avoid trial altogether"); *Swint v. Chambers County Comm'n*, 514 U.S. 35, 43 (1995) ("An erroneous ruling on liability may be reviewed effectively on appeal from final judgment."). Defendants' admittedly ***unappealable*** "opinion" defense did not become appealable simply because they "incorporate[d] the relevant sections of [their] Rule 12(b)(6) Motion" into their Anti-SLAPP motion to dismiss. *See* Defs.' Anti-SLAPP Mem. at 7.

The foregoing shows that the few cases on which Defendants rely to justify this appeal were wrongly decided. *See, e.g.*, *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003). *Batzel* concluded that orders denying California anti-SLAPP motions are "effectively unreviewable" because, unlike the D.C. statute, the California statute expressly provided for interlocutory appeal in state court so that defendants could avoid the costs of litigation if successful on appeal. *See Batzel*, 333 F.3d at 1025. According to the Ninth Circuit, this amounted to a "substantive immunity from suit" under California law, *id.*, even though the Supreme Court of California had explained less than a year earlier that "***the anti-SLAPP statute neither constitutes—nor enables courts to effect—any kind of 'immunity***,'" *see Navellier v. Sletten*, 52 P.3d 703, 712 (Cal. 2002). As a result, *Batzel* is wrong for

at least two reasons: it erred as a matter of California law—and then built on that error to recognize as a matter of federal law a loose notion of implied immunity based ***solely*** on the avoidance of litigation burdens that ***directly*** conflicts with the Supreme Court's repeated insistence that the costs and burdens of litigation do not "allow[] the immediate appeal of a pretrial order." *Lauro Lines*, 490 U.S. at 499.[3]

In all events, however, *Batzel* and its progeny do not help Defendants here because the D.C. Anti-SLAPP Act ***does not*** provide for interlocutory appeal in the D.C. courts. *See Englert*, 551 F.3d at 1106 (distinguishing *Batzel* because Oregon's anti-SLAPP statute did not provide for interlocutory appeal, eliminating the linchpin of *Batzel*'s reasoning). Thus, to follow the *Batzel* cases here, this Court would have to make an even greater inferential leap: concluding that the D.C. Anti-SLAPP Act provides an implied immunity from suit even though it does not provide for interlocutory appeal—and even though the District of Columbia surely could have provided an ***express*** immunity for "act[s] in furtherance of the right of advocacy on issues of public interest" if that was what it had in mind. *Cf., e.g.*, D.C. Code § 1-301.42 (expressly providing immunity). It did not.[4]

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[3] Defendants also rely on *Henry v. Lake Charles American Press, L.L.C.*, which followed *Batzel* and concluded that Louisiana's anti-SLAPP act also provided an immunity-like "right not to stand trial" because avoiding the costs of trial was "the very purpose of the statute." *See* 566 F.3d 164, 178 (5th Cir. 2009).

[4] Even if the Anti-SLAPP Act did provide immunity, its protection still would not be "important" enough for collateral-order purposes. *See Will*, 546 U.S. at 351-52.

The key point here is one the Supreme Court has repeatedly emphasized. "Those seeking immediate appeal … naturally argue that any order denying a claim of right to prevail without trial satisfies the [unreviewability] condition. But this generalization is too easy to be sound and, if accepted, would leave the final order requirement of § 1291 in tatters." *Will*, 546 U.S. at 351. To guard against this result, "§ 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye, for virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Swint*, 514 U.S. at 43. The jurisdiction of the courts of appeals, however, "should not, and cannot, depend on a party's agility in so characterizing the right asserted." *Digital Equip.*, 511 U.S. at 872.

There is nothing in the D.C. Anti-SLAPP Act that makes its "special" motion to dismiss jurisdictionally different than the traditional Rule 12(b)(6) motion that is available in every case. And there is certainly nothing in the Act that supports Defendants' effort to distinguish their Anti-SLAPP motion from their Rule 12(b)(6) motion such that they can circumvent the final-judgment rule. To the contrary, both motions asserted precisely the same "opinion" defense—the one

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Although the Supreme Court has allowed interlocutory appeals in limited circumstances to address certain claims of immunity, it did so to "preserv[e] the efficiency of government and the initiative of its officials" or to protect some other "high order" ***governmental*** interest. *See id.* at 346. No similar governmental interest is at stake when an Anti-SLAPP motion is denied. *See id.* at 353.

"set forth in Defendants' concurrently filed [Rule 12(b)(6)] motion to dismiss" and "incorporate[d]" into their Anti-SLAPP motion. *See* Defs.' Anti-SLAPP Mem. at 7. Because the D.C. Anti-SLAPP Act does not provide immunity or any other "right not to stand trial," Defendants' appeal must await final judgment.

### B. Orders Denying D.C. Anti-SLAPP Motions Do Not Resolve An Issue Completely Separate From The Merits.

The second *Cohen* factor requires Defendants to demonstrate that orders denying Anti-SLAPP motions "resolve an important issue completely separate from the merits of the action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The reason for this requirement is straightforward: "allowing appeals of right from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts." *Id.* at 476. Accordingly, collateral-order appeals are not permitted if the class of orders at issue "involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 469.

Orders denying Anti-SLAPP motions are not "completely separate from the merits" because they involve at least one of two questions that are inextricably intertwined with the facts of the particular case: (1) whether the plaintiff's claim arises "from an act in furtherance of the right of advocacy on issues of public

interest," D.C. Code § 16-5502(a); and (2) whether the plaintiff's claim "is likely to succeed on the merits," *id.* § 16-5502(b). Both questions require the court to determine "the legal classification of a congeries of facts" that are "bound up with the merits" of the plaintiff's claim; but such "fact-related determinations do[] not comport with *Cohen*'s theory of appealability." *See Oscarson*, 550 F.3d at 3-6.

Defendants' Anti-SLAPP motion illustrates the point. Though their Rule 12(b)(6) motion "plainly [was] not separate from the merits," *see Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1133 (D.C. Cir. 2004), their Anti-SLAPP motion merely "incorporate[d]" its "relevant sections" to assert exactly the same argument, Defs.' Anti-SLAPP Mem. at 7. Both motions thus asked the District Court to analyze the extensive allegations in the Complaint—and a wide array of facts beyond the Complaint—to conclude that Plaintiff failed to state a claim because the textual statements in the blog post were "nonactionable opinion." *Id.* Defendants confirmed as much when they sought § 1292(b) certification of the order denying their Rule 12(b)(6) motion, suggesting that the two orders below should be "considered concurrently" on appeal since both would require this Court to analyze the supposedly "full, fair and complete record" to determine whether Defendants' statements were protected opinion when "viewed with full consideration of [their] full context." *See* Defs.' § 1292(b) Mem. at 2, 3.

The typical Anti-SLAPP movant in federal court likely will follow a similar path, asserting the same defense in both a Rule 12(b)(6) motion and a corresponding Anti-SLAPP motion. And for both motions, the issues that arise "will substantially overlap factual and legal issues of the underlying dispute, making such determinations unsuited for immediate appeal." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988). This Court has already recognized as much for Rule 12(b)(6) motions, *see Kilburn*, 376 F.3d at 1133, and it should reach the same commonsense conclusion for Anti-SLAPP motions. Because this Court's jurisdiction is limited to issues that are "completely separate from the merits," it thus lacks jurisdiction to determine whether a claim "is likely to succeed on the merits." D.C. Code § 16-5502(b).

### C. Orders Denying D.C. Anti-SLAPP Motions Are Not Conclusive.

Finally, Defendants must establish that orders denying Anti-SLAPP motions "conclusively determine the disputed question" decided by the district court. *Livesay*, 437 U.S. at 468. This *Cohen* requirement saves appellate courts from resolving questions that ultimately become moot—perhaps because the district court subsequently revised its ruling, the issue did not affect final judgment in a manner warranting reversal, or the party that lost the ruling prevailed on the merits. *See, e.g.*, *United States v. Cisneros*, 169 F.3d 763, 768 (D.C. Cir. 1999); *Banks v. Office of Senate Sergeant-At-Arms*, 471 F.3d 1341, 1344-45 (D.C. Cir. 2006).

Anti-SLAPP motions implicate each of these concerns because the "disputed question" at hand (the plaintiff's ability to succeed on the merits) inevitably will recur throughout the district court proceedings. This case again is illustrative. Although the District Court rejected Defendants' assertion that the statements in their blog post were nonactionable opinion, they presumably believe that the District Court can revisit that issue later in the case. *See Cisneros*, 169 F.3d at 768 (dismissing appeal where the district court's "underlying rationale would remain subject to revision and reconsideration in light of the evidence produced at trial," even if the denial of the motion to dismiss itself would not). Moreover, Defendants stated in their Anti-SLAPP motion that they were not "seeking to dismiss any claim in Plaintiff's complaint" on the grounds of "actual malice," though they would assert that purported defense later in the case. *See* Defs.' Anti-SLAPP Mem. at 2. If the District Court were to agree with Defendants on that ground, this Court might never be asked to address their "nonactionable opinion" arguments. *See Cisneros*, 169 F.3d at 768. But that is the point of *Cohen*'s conclusivity requirement—to ensure that this Court does not waste its time prematurely addressing evolving inquiries like these.

The bottom line here is that this Court can effectively review the District Court's Anti-SLAPP order ***after*** the factual record on which it was based has been fully developed, ***after*** Defendants have exhausted their opportunities to convince

the District Court that they are entitled to dismissal, and ***after*** final judgment has been entered (if the Anti-SLAPP order still matters to Defendants at that time). And just as surely, there is no basis to apply "the blunt, categorical instrument of § 1291 collateral order appeal"—which allows ***any and every*** unsuccessful Anti-SLAPP movant to seek immediate review—given that a precise mechanism for discretionary review remains available under § 1292(b). *See Digital Equip.*, 511 U.S. at 883. Because the District Court's order was not a final decision or an immediately appealable collateral order, this appeal should be dismissed.

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

If, however, the Court concludes that it has jurisdiction, it nevertheless should summarily affirm the District Court's order because it is clear that Defendants' Anti-SLAPP motion was properly denied. *See Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1980) (summary affirmance proper where merits "are so clear as to justify expedited action"). It is undisputed that the Act was not effective until March 31, 2011—nearly two months after Plaintiff filed her claims. And because the Act would substantively affect the consequences of filing those claims, it cannot apply to this case under settled precedent because it lacks the clear legislative mandate necessary to permit that result.

Under District of Columbia law (as under federal law), "statutes are to be construed as having only a prospective operation, unless there is a clear legislative

showing that they are to be given a retroactive or retrospective effect." *Bank of America, N.A. v. Griffin*, 2 A.3d 1070, 1076 (D.C. 2010); *see also id.* at 1073 n.7 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)). Any statute that does not "pertain ***only to procedure***" is subject to this rule, so a court may not apply a statute that "affect[s] the substantive rights of litigants" in pending cases unless there is a "clear legislative showing" that it should. *Id.* at 1076.

Here, the Anti-SLAPP Act plainly affects the substantive rights of litigants like Plaintiff. In particular, the Act purports to heighten a plaintiff's burden at the threshold, requiring her to "demonstrate[] that [her] claim is likely to succeed on the merits." D.C. Code § 16-5502(b). It also allows the trial court to award a prevailing defendant "the costs of litigation, including reasonable attorney fees." *Id.* § 16-5504(a). Indeed, as described above, these "special" features are what distinguish an Anti-SLAPP motion from a traditional motion to dismiss. And although these features do not make an order denying an Anti-SLAPP motion appealable, they do mean that the Act cannot apply to pending claims. *See, e.g.*, *Lindh v. Murphy*, 521 U.S. 320, 327 (1997) (statutory amendment altering "standards of proof and persuasion in a way favorable" to one party "affect[ed] substantive entitlement to relief" and thus did not apply to pending case); *Judicial Watch, Inc. v. Bureau of Land Mgmt.*, 610 F.3d 747, 750 (D.C. Cir. 2010) (new

statutory attorneys'-fees provision did not apply to pending case because it "attach[ed] new legal consequences" to opposing party's prior litigation conduct).

The point here is straightforward. When Plaintiff filed her Complaint on February 11, 2011, she had no threshold obligation to demonstrate that her claims were "likely to succeed on the merits" before discovery began. D.C. Code § 16-5502(b). Rather, she only had to allege "a short and plain statement of [her] claim[s]," which she did. *See* Fed. R. Civ. P. 8(a)(2). Nor did she face the prospect of paying Defendants' "costs of litigation, including reasonable attorney fees," if the District Court concluded that her claims lacked merit. *See* D.C. Code § 16-5504(a). The Anti-SLAPP Act changed that, and in doing so, it substantively altered the consequences of Plaintiff's decision to file her Complaint. Because the Act does not clearly state that it should have this retroactive effect, it does not apply to this case. Accordingly, the District Court properly denied Defendants' Anti-SLAPP motion to dismiss on retroactivity grounds—just as it properly rejected the "opinion" defense identically asserted in both threshold motions to dismiss. The District Court's Anti-SLAPP order thus should be affirmed.

## CONCLUSION

For the foregoing reasons, this appeal should be dismissed for lack of jurisdiction or, in the alternative, the District Court's order should be affirmed.

Dated: October 21, 2011

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Pursuant to this Court's Circuit Rule 25(c), I hereby certify that on this 21st day of October, 2011, I electronically filed the foregoing Plaintiff-Appellee's 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.