ORAL ARGUMENT NOT YET SCHEDULED

No. 11-7088

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY SHERROD,
Plaintiff-Appellee,

v.

ANDREW BREITBART AND LARRY O'CONNOR,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Case No. 11-CV-00477 (Hon. Richard J. Leon)

BRIEF OF *AMICI CURIAE* MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

All parties and *amici* appearing in this Court, rulings under review, and related cases are listed in the Briefs for Defendants-Appellants Lanny Davis, *et al.*, Defendants-Appellants Larry O'Connor, *et al.*, and Intervenor-Appellant the District of Columbia, except for additional *amici curiae* Advance Publications, Inc., Fox Television Stations, Inc., The McClatchy Company, The Newspaper Association of America, Pro Publica, Inc., Time, Inc., and Tribune Company and additional *amicus curiae* in *Sherrod v. Breitbart*, American Civil Liberties Union.

STATUTES AND REGULATIONS

District of Columbia's Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq* and the Report on Bill 18-893, "Anti-SLAPP Act of 2010," Council of the D.C. Committee on Public Safety and the Judiciary (Nov. 18, 2010) ("Committee Report") are reproduced in the addendum to the Briefs for Defendants-Appellants and Intervenor-Appellant. The orders in *Dean v. NBCUniversal Media, LLC*, No. 2011-CA-006055-B, at 3 (D.C. Super. Ct. June 25, 2012) (Memorandum and Order) and the Feb. 8, 2012 Order are attached in the Addendum here.

CORPORATE DISCLOSURE STATEMENT

Under Circuit Rule 29(b), Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, and Circuit Rule 26.1, undersigned counsel for *amici curiae* certify that, to the best of our knowledge and belief:

Advance Publications, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Atlantic Media, Inc. is a privately held, integrated media company, and no publicly held corporation owns 10% or more of its stock.

News Corporation, a publicly held company, is the indirect parent corporation of Dow Jones & Company, Inc. ("Dow Jones"), and Ruby Newco LLC, a subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. No publicly held company owns 10% or more of Dow Jones' stock.

Fox Television Stations, Inc. is a wholly owned, indirect subsidiary of News Corporation, a publicly held company. No publicly held company owns 10% or more of News Corporation stock.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company holds 10% or more of its stock.

Hearst Corporation is a diversified, privately held media company. No publicly held company owns 10% or more of its stock.

The McClatchy Company is a publicly traded Delaware corporation. Contarius Investment Management Limited owns 10% or more of the stock of The McClatchy Company.

NBCUniversal Media LLC is indirectly owned 51% by Comcast Corporation and 49% by General Electric Company, which are both publicly traded. Neither Comcast Corporation nor General Electric Company has a parent company, and no other publicly held company owns 10% or more of their stock.

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

Newspaper Association of America is a non-stock corporation with no parent corporation, and no publicly held corporation owns 10% or more of any form of interest in the Newspaper Association of America.

NPR, Inc. has no parent company and does not issue stock.

POLITICO LLC is a wholly owned subsidiary of privately held Capitol News Company, LLC.

Pro Publica, Inc. ("ProPublica") is a Delaware nonstock, nonprofit corporation.

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

Time Inc. is a wholly owned subsidiary of Time Warner Inc., a publicly traded corporation. No publicly held corporation owns 10% or more of Time Warner Inc.'s stock.

Tribune Company is a privately held company.

WP Company LLC d/b/a *The Washington Post* is a wholly owned subsidiary of The Washington Post Co., a publicly held corporation. Berkshire Hathaway, Inc., a publicly held company, has a 10% or greater ownership interest in The Washington Post Co.

WJLA-TV and NewsChannel 8 operates as a division of Allbritton Communications Company. Allbritton Communications Company is an indirect, wholly owned subsidiary of privately held Perpetual Corporation and is the parent company of entities operating ABC-affiliated stations in the following markets: Washington; Harrisburg, Pa.; Birmingham, Ala.; Little Rock, Ark.; Tulsa, Okla.; and Lynchburg, Va.

Under Circuit Rule 26.1(b), the general nature and purpose of the Media Amici is to gather and disseminate the news, and to advocate for robust First Amendment protections for journalists and the news media.

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GLOSSARY

"SLAPP" stands for Strategic Lawsuits Against Public Participation.

"Act" or "Anti-SLAPP Act" stands for the District of Columbia's Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq*.

CERTIFICATE OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Hearst Corporation ("Hearst") is one of the nation's largest diversified media and information companies. Its major interests include the following: ownership of 15 daily and 36 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany* (N.Y.) *Times Union*; hundreds of magazines around the world, including *Esquire Magazine*, *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E, History and ESPN; significant holdings in the automotive, electronic, media/pharmaceutical and financial information industries, Internet and marketing services businesses, television production, newspaper features distribution and real estate.

Hearst Communications, Inc. is indirectly owned by Hearst Corporation. Hearst Communications, Inc. and its reporter, Mark Warren, are defendants-appellees in *Farah v. Esquire Magazine, Inc.*, No. 1:11-cv-1179 (RMC), in which Judge Rosemary M. Collyer applied the D.C. Anti-SLAPP Act to a diversity case in federal court and dismissed under both the Act and Federal Rule of Civil Procedure 12(b)(6).

Farah v. Esquire Magazine, Inc., 2012 WL 1970897 (D.D.C. June 4, 2012), *appeal docketed*, No. 12-7055 (D.C. Cir. June 15, 2012).

NBCUniversal Media, LLC ("NBC") is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC owns and operates WRC-TV NBC4 in Washington, D.C. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline NBC" and "Meet the Press."

NBC, along with MSNBC and Rachel Maddow, are defendants in libel actions currently pending in both D.D.C. and D.C. Superior Court where they moved to dismiss under both the D.C. Anti-SLAPP statute, and Fed. R. Civ. P. 12(b)(6) and Super. Ct. Civ. R. 12(b)(6), respectively. *Dean v. NBCUniversal*, No. 2011-CA-006055-B (D.C. Super. Ct. filed July 27, 2011), *appeal pending*, No. 12-cv-1177 (D.C. Ct. App.).

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, newspapers in over 20 cities, and weekly

business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers.

Atlantic Media, Inc., headquartered in the District of Columbia, is a privately held, integrated media company that publishes *The Atlantic*, *National Journal* and *Government Executive*. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at federal, state and local levels. *The Atlantic* was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, WSJ.com, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine and, through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires, as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

Fox Television Stations, Inc. ("Fox") owns and operates 27 television stations throughout the United States, including the stations WTTG and WDCA located in Washington, D.C. The 27 stations have a collective market reach of nearly 40 percent

of U.S. households. Each of the 27 stations also operates Internet sites offering news for that local market. Fox Television Stations, Inc. and its former reporter filed a successful special motion to dismiss in state court based on the D.C. anti-SLAPP statute. *Lehan v. Fox Television Stations, Inc.*, 2011 D.C. Super. LEXIS 14 (Nov. 30, 2011).

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including *USA TODAY*, as well as hundreds of non-daily publications. In broadcasting, the company operates WUSA-Channel 9 in D.C. and 22 other television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

The McClatchy Company publishes 31 daily newspapers and 46 non-daily newspapers throughout the country, including the Sacramento Bee, the Miami Herald, the Kansas City Star and the Charlotte Observer. The newspapers have a combined average circulation of approximately 2.2 million daily and 2.8 million Sunday.

NPR, Inc., headquartered in the District of Columbia, is an award winning producer and distributor of noncommercial news programming. A privately supported, not for profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 269 member

stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information.

The New York Times Company is a leading global multimedia media news and information company, which publishes The New York Times, the International Herald Tribune, and The Boston Globe and operates NYTimes.com, BostonGlobe.com, Boston.com, and related properties.

The Newspaper Association of America ("NAA") is a non-profit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for almost 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

POLITICO LLC is a nonpartisan, Washington, DC metropolitan-based news organization that produces a newspaper and multiple websites covering politics and public policy.

ProPublica is an independent, non-profit newsroom that produces investigative journalism in the public interest. In 2010, it was the first online news organization to win a Pulitzer Prize. In 2011, ProPublica won the first Pulitzer awarded to a body of

work that did not appear in print. ProPublica is supported primarily by philanthropy and provides the articles it produces free of charge, both through its own website and to leading news organizations selected with an eye toward maximizing the impact of each article.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Time Inc. is the largest magazine publisher in the United States. It publishes over 90 titles, including *Time*, *Fortune*, *Sports Illustrated*, *People*, *Entertainment Weekly*, *InStyle* and *Real Simple*. Time Inc. publications reach over 100 million adults, and its websites, which attract more visitors each month than any other publisher, serve close to two billion page views each month.

Tribune Company operates broadcasting, publishing and interactive businesses, engaging in the coverage and dissemination of news and entertainment programming. On the publishing side, Tribune publishes eight daily newspapers – Chicago Tribune, Hartford Courant, Los Angeles Times, Orlando Sentinel (Central Florida), The (Baltimore) Sun, The Daily Press (Hampton Roads, Virginia), The Morning Call (Allentown, Pa.), and South Florida Sun-Sentinel. On the broadcasting side, it owns

23 television stations, a radio station, a 24-hour regional cable news network and "Superstation" WGN America.

WP Company LLC publishes *The Washington Post*, one of the nation's leading newspapers, as well as a website (washingtonpost.com) that attracts an average of more than 19 million unique visitors per month.

WJLA-TV and NewsChannel 8 operates as a division of Allbritton Communications Company. Allbritton Communications Company is the parent company of entities operating ABC-affiliated television stations in the following markets: Washington, D.C.; Harrisburg, Pa.; Birmingham, Ala.; Little Rock, Ark.; Tulsa, Okla.; and Lynchburg, Va. In Washington, it operates broadcast station WJLA-TV, and the 24-hour local news service, NewsChannel 8, and the news websites WJLA.com and TBD.com. An affiliated company operates the ABC affiliate in Charleston, S.C.

By motions filed on August 10, 2012 and September 24, 2012, the Media Amici have sought, respectively, leave to file this brief and to add additional amici. The Appellants, Intervenor District of Columbia and Amicus Public Citizen have consented. Appellee Sherrod did not consent and Appellee 3M Co. opposed the August 10, 2012 motion for leave but not the addition of *amici*. Media Amici's motions are pending.

CERTIFICATE UNDER FEDERAL RULE OF APPELLATE PROCEDURE 29(C)(5)

Undersigned counsel for *amici curiae* hereby certify that no party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person, other than the *amici curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

The District of Columbia's Anti-SLAPP Act of 2010 (the "Act"), D.C. Code § 16-5501 *et seq.*, was enacted to encourage the swift and efficient dismissal of "Strategic Lawsuits Against Public Participation" ("SLAPPs") – actions filed "not to win the lawsuit but punish the opponent and intimidate them into silence."[1] It requires plaintiffs to show, at the very outset in cases arising out of speech on matters of public interest, a likelihood of success on the merits, before subjecting defendants to burdensome and unnecessary litigation. The First, Fifth, and Ninth Circuits and numerous district courts across the country agree that anti-SLAPP statutes apply in federal diversity actions. Contrary to the holding in *3M Co. v. Davis*, and consistent with courts across the country, the Act's heightened protection should, and indeed must, be applied in diversity actions as the substantive law of D.C.

Media Amici, 18 leading news organizations, and related professional associations, gather and disseminate news in the District, and have headquarters, bureaus, or broadcast stations here. They often defend claims in diversity and, thus, would be substantially affected by any decision on whether the Act applies. Two Media Amici have cases pending in D.C. that could be directly affected by

[1] Report on Bill 18-893, "Anti-SLAPP Act of 2010," Council of the D.C. Committee on Public Safety and the Judiciary (Nov. 18, 2010) ("Committee Report") at 4.

the outcome and others have successfully invoked the Act and analogous anti-SLAPP laws. Media Amici do not address the merits of the underlying appeals. Rather, they will present how, in practice, the remedies provided under anti-SLAPP laws comfortably exist "side by side" with Rules 12 and 56, providing critical protection to the media disseminating news and information on issues of public concern.

Anti-SLAPP statutes are rooted in the central wisdom of *New York Times v. Sullivan*: burdensome civil litigation has as much or more of a chilling effect on public debate as criminal prosecution. 376 U.S. 254, 277 (1964) ("The fear of damage awards ... may be markedly more inhibiting than the fear of prosecution under a criminal statute."); *id.* at 279 ("[C]omparable 'self-censorship[]'" occurs when "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so").

Accordingly, this Circuit has long prescribed that, "[i]n the First Amendment area, summary procedures are even more essential." *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966). In a libel case brought by a professor against syndicated columnists appearing in *The Washington Post*, this Court foresaw the "concern that a freshening stream of libel actions, which often

seem as much designed to punish writers and publications as to recover damages for real injuries, may threaten the public and constitutional interest in free, and frequently rough, discussion." *Ollman v. Evans*, 750 F.2d 970, 996-97 (D.C. Cir. 1984) (en banc) (Bork, J., concurring). *See Coles v. Washington Free Weekly*, 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."); *Myers v. Plan Takoma*, 472 A.2d 44, 50 (D.C. 1983) ("In this area, perhaps more than any other, the early sifting of groundless allegations from meritorious claims made possible by a Rule 12(b)(6) motion is an altogether appropriate and necessary judicial function."). The D.C. Anti-SLAPP Act's protections are consistent with this mandate and apply in federal diversity actions.

THE ANTI-SLAPP ACT SHOULD APPLY IN FEDERAL COURT

A. D.C.'s Anti-SLAPP Act Broadly Applies to Claims Against the Media That Target the Exercise of Free Speech on Issues of Public Interest

In urging the adoption of the Act, based on similar statutes across the country,[2] the Council recognized that SLAPP suits "have been increasingly utilized over the past two decades as a means to muzzle speech"; "[s]uch cases are often

[2] *See* Committee Report at 1 (Act "follows the model set forth in a number of other jurisdictions").

without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect ...." Committee Report at 1.

The goal of the Act was thus to ensure that defendants, including the media, "are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." *Id*. at 4. The Act provides media 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's central feature functions as a qualified immunity[3] requiring that "[i]f a party filing a special motion to dismiss ... makes a prima facie showing that the claim ... arises from an act in furtherance of the right of advocacy on issues of public interest," then the court must grant the motion "unless the responding party demonstrates that the claim is likely to succeed on the merits ...." D.C. Code § 16-5502(b).

Unlike Rules 12 and 56, the Act does not apply to all claims, but rather *only* to claims based on statements made "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law," and also to "[a]ny other expression or

[3] *See* Committee Report at 4 (Act follows "the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions").

expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." *Id.* § 16-5501(3).

The Act provides for a stay of discovery absent a showing that targeted discovery will defeat the motion and not be unduly burdensome. *Id.* § 16-5502(c). It also provides for expedited hearing on the special motion to dismiss, for the issuance of a ruling as soon as practicable after the hearing, and if the motion to dismiss is granted, the complaint be dismissed with prejudice. *Id.* § 16-5502(d). Successful defendants may be entitled to costs and attorney's fees. *Id.* § 16-5504(a).

In just the brief life of the D.C. law, five anti-SLAPP cases in the District have involved claims against the media about matters of public interest, including Media Amici Hearst, NBC, and Fox. *See Farah v. Esquire Magazine, Inc.*, 2012 WL 1970897 (D.D.C. June 4, 2012) (claims brought by "birther" activists against Esquire Magazine and journalist who posted satirical blog item lampooning plaintiffs' book doubling down on "birther" claims after President Obama released his long-form birth certificate, dismissed under both the D.C. Anti-SLAPP Act and Rule 12(b)(6)), *appeal docketed*, No. 12-7055 (D.C. Cir. June 15, 2012); *Dean v. NBCUniversal*, No. 2011-CA-006055-B (D.C. Super. Ct. filed July 27, 2011), *appeal pending*, No. 12-cv-1177 (D.C. Ct. App.) & *Dean v. NBCUniversal*, No.

1:12-cv-00283-RJL (D.D.C. filed Feb. 21, 2012) (anti-SLAPP motion filed against lawsuits by public figure Christian rocker and syndicated radio show host against NBC and MSNBC television show host Rachel Maddow for broadcasts discussing political candidates, their views on homosexuality and their controversial and highly-publicized associations with certain individuals, including plaintiffs); *Snyder v. Creative Loafing, Inc.*, No. 2011-CA-003168-B (D.C. Super. Ct. filed Apr. 26, 2011) (voluntary dismissal of Redskins owner Dan Snyder's libel suit against Washington City Paper over column that criticized Snyder's management of the Redskins, before anti-SLAPP motion could be fully briefed and decided); *Lehan v. Fox Television Stations, Inc.*, 2011 D.C. Super. LEXIS 14, at *3-4 (Nov. 30, 2011) (granting SLAPP motion dismissing libel claims over news report that plaintiff earned excessive overtime, finding he failed to show "likelihood of success" of proving falsity or fault); *Sherrod v. Breitbart*, 843 F. Supp. 2d 83 (D.D.C. 2012), *appeal docketed*, No. 11-7088 (D.C. Cir. Aug. 29, 2011) (denying defendant's anti-SLAPP motion as untimely and before Act's effective date, in action against bloggers commenting on allegations of racism by public official).

B. The Anti-SLAPP Act's Substantive Protections Apply in Diversity Actions

Courts across the country are virtually unanimous that anti-SLAPP statutes provide substantive protections that can be invoked in federal diversity cases. The one notable exception is the *3M* decision on review in this appeal. 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) (applying Maine statute and effectively overturning *Saint Consulting Grp., Inc. v. Litz*, 2010 WL 2836792 (D. Mass. July 19, 2010) and *Turkowitz v. Town of Provincetown*, 2010 WL 5583119 (D. Mass. Dec. 1, 2010)).

Under *Erie*, federal district courts sitting in diversity generally apply the substantive law of the state in which the district court sits, and the Federal Rules of Civil Procedure generally govern procedure. *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*, 685 F.3d 1102, 1107 (D.C. Cir. 2012). For *Erie* purposes, D.C. law, as passed by the Council and approved by Congress, is considered state law. *Burke*, 685 F.3d at 1107 n.4.

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's "'scope'" is "'sufficiently broad to control the issue before the court.'" *Burke*, 685 F.3d at 1107-08 (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980)); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1451 (2010) (Stevens, J., concurring); *see Godin*, 629 F.3d at 86-88 (applying this standard under *Shady Grove* to a challenge under the

Federal Rules to applying Maine's anti-SLAPP statute). If so, the Federal Rule is given effect provided the rule does not "abridge, enlarge or modify any substantive right" as required by the Rules Enabling Act, 28 U.S.C. § 2072. *Shady Grove*, 130 S. Ct. at 1449-50 (Stevens, J., concurring).

In evaluating whether the Federal Rule is "sufficiently broad," *Walker*, 446 U.S. at 749-50, this Circuit looks at whether the Federal Rule and District law "'can exist side by side, ... each controlling its own intended sphere of coverage without conflict.'" *Burke*, 685 F.3d at 1108 (quoting *Walker*). Under the Rules Enabling Act, 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 (Stevens, J., concurring).[4]

Second, if the federal rule is not so broad as to control the issues, then the court analyzes whether the state law should be applied in light of the twin aims of

[4] This Court applies Justice Stevens' formulation of the first part of the test and Justice Scalia's formulation from Section II-A of *Shady Grove* as functional equivalents, and the Federal Rules neither "control the issue" nor "answer[] the question in dispute" here. *Compare Godin*, 629 F.3d at 86 (applying Stevens standard) *with 3M Co. v. Boulter*, 842 F. Supp. 2d 85, 94 (D.D.C. 2012) (applying Scalia standard). *See Burke*, 685 F.3d at 1107-08. But in applying the second part of the test addressing the Rules Enabling Act, the *3M* decision erred in holding that the Federal Rule is valid if it "really regulates procedure" taken from Section II-B of Justice Scalia's plurality opinion, rather than the controlling Stevens concurrence. *3M*, 842 F. Supp. 2d at 110. *See* D.C. Appellant's Br. 15-18, 40-42; Davis Appellants' Br. 48-52.

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; *Burke*, 685 F.3d at 1108. Using this analysis, the Anti-SLAPP Act should apply in federal diversity actions.

1. Every Circuit Court to Face the Question Has Concluded that Anti-SLAPP Statutes Apply in Diversity Cases

Every circuit court to face the question has concluded that anti-SLAPP statutes apply in federal diversity cases because they supplement, rather than supplant, Rules 12 and 56. 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 963, 972 (9th Cir. 1999) (internal citation omitted); *cf. Burke*, 685 F.3d at 1108 (quoting *Walker*, 446 U.S. at 752) (D.C.'s expert rule can be applied "simultaneously" with the Federal Rule, and thus "'can exist side by side'").

The court in *Lockheed* 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. 190 F.3d at 972. "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); *Hilton v. Hallmark Cards*, 599 F.3d 894, 900 n.2 (9th Cir. 2010); *Gardner v. Martino*, 563 F.3d 981, 983 (9th Cir. 2009) (affirming dismissal of claims against broadcast defendants under Oregon statute); *Batzel v. Smith*, 333 F.3d 1018, 1025-26 (9th Cir. 2003).

Most recently, the First Circuit determined 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 the Maine anti-SLAPP statute "is only addressed to special procedures for state claims based on a defendant's petitioning activity" and thus it "does not seek to displace the Federal Rules or have Rules 12(b)(6) and 56 cease to function." *Id.* at 88. Indeed, "Rules 12(b)(6) and 56 do not purport to apply only to suits challenging the defendants' exercise of their constitutional petitioning rights." *Id.* Rather, "Maine itself has general procedural rules which are the equivalents of Fed.R.Civ.P. 12(b)(6) and 56," further "support[ing] 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 Am. Press, L.L.C.*, 566 F.3d 164, 168-69 (5th Cir. 2009) (applying Louisiana anti-SLAPP statute to newspaper defendant).

To date, the district court in *3M* is the only D.C. district court to conclude that the D.C. Anti-SLAPP Act does not apply in federal diversity cases. *See 3M*, 842 F. Supp. 2d 85 (D.D.C. 2012) (Wilkins, J.). Judge Wilkins held that the Act conflicts with Rules 12 and 56 and thus cannot be applied in federal court. *Id.* at 96. The court reasoned, that under the Act "a court must grant the special motion to dismiss even where matters outside the pleadings are considered, and even where the plaintiff has or can raise a genuine issue of material fact on its claim." *Id.* at 102. Yet, as conceded by Judge Wilkins, that decision is contrary to the overwhelming weight of authority on this issue. [5]

2. Anti-SLAPP Statutes in Practice Supplement, Rather than Supplant, Rules 12 and 56

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

[5] *See* cases cited in O'Connor Appellant's Br. 40 n.29; Davis Appellants' Br. 29-30.

meet the special rules" that the District has "created to protect such petitioning activity against lawsuits." *Godin*, 629 F.3d at 89. Media Amici have found through experience that anti-SLAPP statutes work in concert with, rather than contravene, Rules 12 and 56. *See, e.g.*, *id.* at 90 & n.17 ("Some [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.").

For instance, *Farah v. Esquire Magazine* presents no conflict between the Act and the Federal Rules, where the D.C. District Court applied both Rule 12(b)(6) and the Act to a libel claim brought by architects of the "Birther Movement" (a group of highly vocal critics of the President who assert that he is not a naturally-born citizen and, therefore, not eligible to hold office) against Hearst (the publisher of esquire.com) and Esquire's journalist for a satirical mock news report on Esquire's Politics Blog that poked fun at Plaintiffs' book, "Where's the Birth Certificate? The Case that Barack Hussein Obama is Not Eligible to be President," which was published several weeks *after* President Obama released his long-form birth certificate evidencing that he was born in Hawaii. Finding the suit "fits entirely" within the scope and purpose of the Act, the court easily dismissed the case simultaneously under *both* the SLAPP statute *and* 12(b)(6) as "satiric commentary," protected by the First Amendment. *Farah*, 2012 WL 1970897, at

*7-9. Applying the standard in *Twombly* and *Iqbal*, and relying simply on the pleadings, materials incorporated by reference, and "historical, political, or statistical facts," in internet postings appropriate for judicial notice under Federal Rule of Evidence 201(b), the court found the claims were not likely to succeed and failed to state a claim. *See id.* at *5, *7-9, *11 & n.4, 5-6 (considering the blog post labeled "humor," Esquire's long history of satire and humor on issues of public interest, posts where plaintiff admitted an hour after the Esquire post that it was a "parody," and posts showing plaintiffs' background at the forefront of the "birther" movement). The *Farah* court expressly declined to follow the *3M* decision, choosing to follow *Godin*, the other circuits, and the *Sherrod* decision, which found that the Act "is substantive … or at the very least, has substantive consequences." *Id.* at n.10.[6] *See* discussion *infra* at 19-27.

Federal courts in other jurisdictions also routinely consider anti-SLAPP motions based on issues of law using a standard consistent with Rule 12(b)(6). *See, e.g.*, *Louisiana Crisis Assistance v. Marzano-Lesnevich*, 827 F. Supp. 2d 668, 680 (E.D. La. 2011) ("When ruling on a special motion to strike which mounts a legal challenge to a plaintiff's complaint, there is nothing in the text of the

[6] In *dicta*, the *Sherrod* 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 was that the Act was substantive and, therefore, not retroactive. *Sherrod*, 2012 WL 506729, at *2.

[Louisiana anti-SLAPP statute] to necessarily require a court to evaluate the motion under standards different from Federal Rules 8 or 12"), *recon. granted in part on other grounds*, 2012 U.S. Dist. LEXIS 94248 (E.D. La. July 9, 2012); *Card v. Pipes*, 398 F. Supp. 2d 1126, 1136-37 (D. Or. 2004) (granting author's Rule 12(b)(6) and Oregon anti-SLAPP motion against libel and intentional infliction of emotional distress claims because plaintiff failed to state a claim based on his statements made to the *N.Y. Post* and republished on the *Post* website). *Cf. Satkar Hospitality Inc. v. Cook County Bd. of Review*, 2011 WL 4431029, at *5-7 (N.D. Ill. Sept. 21, 2011) (dismissing – based on anti-SLAPP defense raised in Rule 12(c) motion – hotel owner's libel and false light claims against television station and political blog reporting that hotel owner received favorable tax rulings after making campaign donations to state representatives).

For example, a California federal court dismissed invasion of privacy claims under California's anti-SLAPP and Rule 12(b)(6) based on the Associated Press' publication of unaltered photographs of Navy SEALs allegedly mistreating Iraqi prisoners, because the complaint failed to allege offensiveness or a reasonable expectation of privacy. *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1140, 1149-50 (S.D. Cal. 2005). The *L.A. Times* published an article that questioned plaintiff's claims in a published biography, that he was at the liberation of Dachau as an American officer, had found Nazi documents, and had developed

revolutionary teaching methods. *Thomas v. L.A. Times Commc'ns L.L.C.*, 189 F. Supp. 2d 1005, 1009 (C.D. Cal. 2002), *aff'd*, 45 F. App'x 801 (9th Cir. 2002). After plaintiff sued for defamation, the court granted defendants' special motion to strike, "akin to a Rule 12(b)(6) motion to dismiss," holding that no reasonable juror could find that defendants intended to convey the impression that plaintiff lied about his past. *Id.* at 1010.

Media defendants often attach matters outside the pleadings to provide the statements in suit, political background, or other critical context – material that does not conflict with the Federal Rules. *See, e.g.*, *Marzano-Lesnevich*, 827 F. Supp. 2d at 678 ("[B]ecause the burdens and standards imposed under [Louisiana's anti-SLAPP statute] as interpreted by Louisiana courts directly correspond with the burdens and standards of Rule 56," the anti-SLAPP statute "does not 'directly collide' with Rule 56."); *Rogers v. Home Shopping Network*, 57 F. Supp. 2d 973, 976 (C.D. Cal. 1999) (anti-SLAPP "motion may assume that the plaintiff has stated a claim but assert that the plaintiff cannot support that claim with evidence, analogous to" Rule 56).

In these cases, the anti-SLAPP motion acts, not in conflict, but consistent with Rule 56 motion. For example, in *Dean v. NBCUniversal*, the D.C. Superior Court converted the Rule 12(b)(6) motion into a motion for summary judgment when the NBC parties' special motion to dismiss under the Act and Rule 12(b)(6)

motion were supported by "matters outside the pleading" – the affidavit of counsel and forty exhibits consisting of recordings, videos, websites, newspaper articles that provided the allegedly defamatory statements and context for the claim. June 25, 2012 Memorandum and Order, at 3. Just as under Federal Rule 12(d), the Superior Court notified the parties under the analogous Superior Court Rule 12(b) that it was considering matters outside the pleadings and converting the Rule 12(b)(6) motion to a motion for summary judgment, and gave the parties "an opportunity to present all material made pertinent to Defendants' motion for summary judgment ...." Feb. 8, 2012 Order.

Similarly, a federal court granted a special motion to strike under California's anti-SLAPP statute against soccer star David Beckham's defamation and intentional infliction of emotional distress lawsuit against the publisher of *In Touch Weekly* over an article reporting on his alleged tryst with a call girl. *Beckham v. Bauer Publ'g Co.*, 2011 WL 977570 (C.D. Cal. Mar. 17, 2011), *appeal pending*, Nos. 11-55441, 11-56010 (9th Cir.). The publisher moved to strike the lawsuit under the anti-SLAPP statute and provided as part of the motion not only affidavits, but transcripts of a taped interview with the source for the article. The district court stayed discovery and then granted the publisher's motion to strike, finding that the statements in the article concerned a person in the public eye, and a "topic of widespread, public interest." *Id.* at *1. The court further found, based on

the evidence outside the pleading, that plaintiff had not demonstrated a probability of prevailing on the merits because plaintiff was unlikely to prove that the publisher acted with actual malice when it published, since at that time it had the "interview[] [of] the woman who claims to have had the encounter with" Beckham, had given Beckham an opportunity to respond, and had other evidence showing that plaintiff could not show as a matter of law that the media published with actual malice. *Id.*

An Indiana district court dismissed a suit brought by a Canadian prescription drug distributor under Indiana's anti-SLAPP statute consistent with Rule 56 standards, on the grounds that defendant's news report on the safety and legality of pharmaceuticals involved a matter of public interest, was broadcast without serious doubts as to the truth, and was substantially true or not defamatory. *See CanaRx Servs. v. LIN TV Corp.*, 2008 U.S. Dist. LEXIS 42236, at *11-13, *18-26 (S.D. Ind. May 29, 2008). Another Indiana federal court found that Rule 56 and the anti-SLAPP statute do not conflict because "the issue may be phrased as whether the undisputed facts show no genuine issue of material fact on the constitutional defense." *Containment Tech. Group v. American Soc'y of Health Sys. Pharmacists*, 2009 WL 838549, at *1-2, *8 n.2 (S.D. Ind. Mar. 26, 2009) (dismissing defamation action against an academic journal and authors who tested

and criticized the plaintiff manufacturer's product purporting to safely store injected prescription drugs).

A federal district court in Louisiana dismissed a doctor's libel and false light suit against Media Amici ProPublica and the *New York Times* over a Pulitzer Prize-winning article about alleged euthanasia of patients by hospital staff during Hurricane Katrina, entitled "Strained by Katrina, a Hospital Faced Deadly Choices." *Armington v. Fink*, 2010 WL 743524, at *1, *5 (E.D. La. Feb. 24, 2010). The court held that the anti-SLAPP statute did not conflict with Rule 56, the article involved a matter of public interest, and even limited discovery could not rebut media defendants' showing there was no negligence or substantial falsity in publishing the reports. *Id.* at *1, *3, *5.

Similarly, a federal court applied Washington State's anti-SLAPP statute in dismissing misappropriation and right of publicity claims against the producers of the Academy Award-nominated documentary film *Sicko*. *Aronson v. Dog Eat Dog Films*, 738 F. Supp. 2d 1104 (W.D. Wash. 2010), *recon. denied*, 2010 U.S. Dist. LEXIS 105025 (W.D. Wash. Sept. 28, 2010). Plaintiff sued for use of a short home video clip in which plaintiff's image and voice appeared for 17 seconds in the movie. The court first held that the documentary about the U.S. healthcare system fell squarely within the scope of the statute as discussion of matters of public concern. *Id.* at 1111-12. Considering not only pleadings but affidavits

supporting and opposing the claims as permitted by the statute, the court held that plaintiff failed to show a likelihood of prevailing because the documentary was not only an expressive work, but the use of his likeness was published on a matter of public interest, and therefore immune from liability under both state statute and the First Amendment. *Id.* at 1112-13.

These federal courts harmonized special motions to dismiss under substantially similar anti-SLAPP statutes with Rules 12(b)(6) and 56. In each of these, claims that were dismissed were disposed of with prejudice as they would under Rules 12 and 56, because they did not survive First Amendment challenge as a matter of law. This Court should follow the First, Fifth and Ninth Circuits and numerous district courts and apply the Act, which is modeled after statutes universally found to apply in federal courts.

3. The Anti-SLAPP Act Is Part of D.C.'s Framework of Substantive Rights and Remedies

The Federal Rules do not conflict with the Act because, like analogous SLAPP statutes nationwide, it provides substantive speech protections, and the Federal Rules should be "reasonably [] interpreted to avoid" abridging, enlarging, or modifying substantive rights. *Godin*, 629 F.3d at 87 (quoting *Shady Grove*, 130 S. Ct. at 1452) (Stevens, J., concurring); *accord id.* at 89 n.16 (quoting *Shady Grove*, 130 S. Ct. at 1441 n.7) (Federal Rules should be read "'to avoid substantial variations [in outcomes] between state and federal litigation'")). Even if the Court

found a conflict, the Act should still apply under the Rules Enabling Act, because "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)).

Like Maine's law, the Act "provides substantive legal defenses to defendants and alters what plaintiffs must prove to prevail." *Id.* at 89. As D.C. district courts have recognized, the Act's "legislative history make clear that the D.C. Anti-SLAPP Act is substantive." *Sherrod*, 2012 WL 506729, at *1 ("Indeed, the first sentence of the Committee Report emphasizes the legislative intent to create new substantive rights for defendants in SLAPP suits."). Recognizing that the Act "'incorporates substantive rights with regard to a defendant's ability to fend off a lawsuit filed by one side of a political or public debate aimed to punish the opponent or present the expression of opposing points of view'" *Farah*, 2012 WL 1970897, at *6, *quoting approvingly Sherrod*, 2012 WL 506729, at *1 (citation omitted), the *Farah* court found that "[i]t was certainly the intent of the D.C. Council and the effect of the law—dismissal on the merits—to have substantive consequences." *Id.* at *11 n.10. To that end, D.C. created substantive

"immunity to individuals engaging in protected actions." Committee Report at 1, 4.

Media Amici find the anti-SLAPP statutes have substantive, speech-protective consequences at several critical points: preventing litigation, preventing unnecessary burdens during litigation, and expediting or preventing appeal. First, Media Amici are often subject to threats of litigation from the subjects of their stories, threats which may prevent an important story from being published if only to avoid the cost of litigation.[7] But in jurisdictions where media defendants can cite would-be plaintiffs to anti-SLAPP statutes and the potential for attorney's fees and costs if the court finds their litigation meritless, plaintiffs who aim to use litigation to intimidate tend to back down, with the result that a story on a matter of public interest is published and the court's docket is reduced. *See* Robert D. Richards, *A SLAPP in the Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs & Consumer Gripe Sites*, 21 DePaul Art, Tech. & Intell. Prop. L. 221 (Spring 2011) (explaining

[7] *See, e.g.*, Eriq Gardner, *Marty Singer Breaks Down the Art of the Cease-and-Desist Letter: The Superlawyer Threatened New York Magazine Over a 2011 Article About Brett Ratner*, Hollywood Reporter, http://www.hollywoodreporter.com/thr-esq/marty-singer-brett-ratner-new-york-magazine-letter-350616 (posted 8:30 PM PDT July 18, 2012); Daniel Miller, *Diary of Tom Cruise's Lawyer: 10 Days, 200 Phone Calls and 30 Letters: Bert Fields Reveals What Went Down from the Time Katie Holmes Filed for Divorce Until the Settlement – and Beyond*, Hollywood Reporter, http://www.hollywoodreporter.com/thr-esq/tom-cruise-divorce-bert-fields-lawyer-350481 (Posted 8:30 PDT July 18, 2012).

that after plaintiffs review the anti-SLAPP statute "[i]n most cases now you can just persuade them not to file the action at all").

Under Section 16-5504(a), the court "may" allow the moving party to recover costs and attorneys' fees when it prevails in its anti-SLAPP motion. This statutory fees provision does not supplant or conflict with Rule 11, which is designed to deter frivolous litigation generally. Fed. R. Civ. P. 11(c). The Act's fee provisions are part of the bundle of substantive remedies designed to reduce the burden of litigation on the exercise of free speech. *See Sherrod*, 2012 WL 506729, at *1 n.4 ("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.") (citing *Godin*, 629 F.3d at 85 n.10; *Lockheed*, 190 F.3d at 971-72).

Second, if a plaintiff files suit, making an anti-SLAPP motion mitigates the chilling effect on the media's speech during the litigation. Initially, the Act forces a plaintiff to take an honest look at the merits early on because, in response to defendant's ant-SLAPP motion filed 45 days from service of the complaint, he will have to demonstrate a likelihood of success at the risk of attorney's fees and costs if he fails. D.C. Code § 16-5502(a)-(b). *See, e.g.*, Bruce E.H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse & Democracy*, 87 Wash. L. Rev. 495, 503 (June

2012) (the "particularly important" mechanism "requires the plaintiff to come forward early in the case to demonstrate that the claims are viable, and if they are not viable, the court must dismiss the claims before the defendant is bogged down in expensive litigation"). The Act is also fundamentally fair to litigants with meritorious cases, because their claims will survive an anti-SLAPP motion with fees awarded if the motion is frivolous or intended to unduly delay. *Id.* § 16-5504(b).

The Act protects against litigation targeted at protected speech by imposing a heightened burden – likelihood of success – and imposing it earlier. "[I]t is long settled that the allocation of burden of proof is substantive in nature and controlled by state law." *Sherrod*, 2012 WL 506729, at *1 n.4 (citing *Godin*, 629 F.3d at 89). Indeed, whether because of the evidentiary burden, the prospect of paying attorney's fees if the SLAPP motion were granted or other reasons, the plaintiff in *Snyder v. Creative Loafing, Inc.* voluntarily dismissed the lawsuit before the SLAPP motion could be fully briefed or decided.[8] The Act expedites the court's finding that the suit is not viable, although it provides no hard deadlines for the court. *See* Committee Report at 6 ("the legislation provides a defendant to a SLAPP with substantive rights to have a motion to dismiss heard expeditiously").

[8] Paul Farhi, *Redskins Owner Daniel Snyder Drops Lawsuit Against Washington City Paper*, Wash. Post (Sept. 10, 2011), http://www.washingtonpost.com/sports/redskins-owner-dan-snyder-drops-lawsuit-against-washington-city-paper/2011/09/09/gIQA3hf1IK_story.html.

The Act also creates a presumption that discovery should be stayed while the motion is pending to protect SLAPP defendants from the chilling effect of unnecessary discovery. *See* Committee Report at 4 (stay of discovery is intended "[t]o ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish."). Much like Federal Rule 56(d), the plaintiff may show that targeted discovery would defeat the motion and would not burden speech. D.C. Code § 16-5502(c)(2). *See, e.g.*, *Albergo v. Immunosyn Corp.*, 2011 WL 197580, at *3, *5, *7 (S.D. Cal. Jan. 20, 2011) (granting SLAPP motion on two counterclaims, while allowing discovery essential to opposing anti-SLAPP motion on other counterclaims).

Absent a conflict with the Federal Rules, federal courts honor the discovery stay provided under state anti-SLAPP laws. *See, e.g.*, *Price v. Stossel*, 620 F.3d 992, 999 (9th Cir. 2010) (approving district court's denial of discovery, noting that, "[u]nder California law, discovery is automatically stayed when a defendant files an anti-SLAPP motion, unless the opposing party can demonstrate 'good cause'"). Federal courts have applied California's mandatory SLAPP stay where: (1) the facts have been "developed through discovery or similar prior proceedings" sufficient for Rule 56; (2) "the parties agree"; or (3) "the only issue presented ... is an issue of law" under Rule 12(b)(6). *Davis v. Elec. Arts Inc.*, 2011 WL 2621626, at *3 (N.D. Cal. July 5, 2011) (citation omitted).

Even where contentious factual issues arise, federal courts have carefully circumscribed discovery out of concern for "the policy considerations supporting California's anti-SLAPP statutory scheme, and in particular, the statute's goal of 'early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation.'" *Id.* at *5. Even before the Act, this Circuit often stayed or limited discovery in First Amendment cases to avoid an undue burden on the freedom of speech,[9] so the result should be the same here. *See Farah*, 2012 WL 1970897, at *11 n.7 (noting that court granted a discovery stay under the Anti-SLAPP Act).

Third, the Act reduces the burden on speech of an appeal. If the motion is granted, plaintiffs may forego or dismiss any appeal to avoid the imposition of

[9] *See Weyrich v. New Republic, Inc.*, 235 F.3d 617, 625 (D.C. Cir. 2001) (explaining in defamation action brought against *The New Republic* that "[w]e are mindful that trial courts are understandably wary of allowing unnecessary discovery where First Amendment values might be threatened" and therefore "the District Court may in its discretion limit discovery to the threshold issue of falsity, thereby delaying and possibly eliminating the more burdensome discovery surrounding evidence of 'actual malice'"); *White v. Fraternal Order of Police*, 909 F.2d 512, 517 (D.C. Cir. 1990) (affirming order staying discovery in libel case pending resolution of summary judgment motion); *McBride v. Merrell Dow & Pharms.*, 717 F.2d 1460, 1466-67 (D.C. Cir. 1983) ("Even if many [libel] actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship.... [S]uits – particularly those bordering on the frivolous – should be controlled so as to minimize their adverse impact upon press freedom. It is, therefore, appropriate that discovery be limited initially to the extent feasible to those questions that may sustain summary judgment."), *on remand*, 613 F. Supp. 1349, 1352 (D.D.C 1985), *aff'd in relevant part*, 800 F.2d 1208, 1210 (D.C. Cir. 1986).

attorney's fees and costs. *See Lehan*, 2011 D.C. Super. LEXIS 14 (plaintiffs did not appeal after anti-SLAPP motion granted); *Armington v. Fink*, No. 10-30264, ECF No. 00511110053 (5th Cir. May 13, 2010) (plaintiff voluntarily dismissed appeal in exchange for defendants not seeking attorney's fees). If the motion is denied, SLAPP defendants may seek an interlocutory appeal under the collateral order doctrine that permits appeals where, as here, the statutory protection would be lost if interlocutory review were not available. *See Godin*, 629 F.3d at 84-85; *Henry*, 566 F.3d at 178; *Hilton*, 599 F.3d at 900; *Batzel*, 333 F.3d at 1024-26. While the D.C. statute does not explicitly provide for an interlocutory appeal, the legislative history makes clear[10] that the absence of such a provision in no way indicates a legislative intention not to afford interlocutory appeal as part of the Act's substantive bundle of rights.[11]

The Act, as a whole and each of its elements, "is part of a State's framework of substantive rights or remedies" that should be applied in diversity cases in federal court. But whether the federal courts apply each element of the Act, be it the stay, expedited hearing, or permits interlocutory appeal, the core components –

[10] The Council dropped a provision for interlocutory appeal because of a D.C. Court of Appeals case that is no longer good law holding that such a provision might violate the Home Rule Act. *Stuart v. Walker*, 6 A.3d 1215, 1216-17 (D.C. 2010), *vacated*, 2010 D.C. App. LEXIS 697 (D.C. July 8, 2011), *Super. Ct. order affirmed by equally divided court*, No. 09-cv-900 (D.C. Order Feb. 16, 2012).

[11] *See* Davis Br. at 24-25; *see* Public Citizen Amicus Br. at 17-19.

the immunity from suit absent a showing of likelihood of success and attorney's fees – are critical to the District's substantive protection of speech on matters of public interest.[12]

4. Applying Anti-SLAPP Act in Federal Court Serves *Erie's* Twin Aims

Applying 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; *Burke*, 685 F.3d at 1108-09; *Walko Corp. v. Burger Chef Sys.*, 554 F.2d 1165, 1170-71 (D.C. Cir. 1977); *see also Godin*, 629 F.3d at 92 (noting that declining to apply anti-SLAPP law 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 Act's heightened burden 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.*, *Lockheed*, 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."); *Armington*, 2010 WL 743524, at *3 n.2 (applying Louisiana anti-

[12] *See, e.g., Metabolife Int'l v. Wornick*, 264 F.3d 832, 845, 850 (9th Cir. 2001) (applying anti-SLAPP special motion to strike and attorney's fee provision, but not discovery stay).

SLAPP statute to claim against ProPublica and *N.Y. Times* in part because "its application will ensure that defendants, whether in diversity or not, will be protected from meritless defamation claims and the resulting fishing expeditions that might chill the exercise of their speech rights").

There is no better evidence of forum shopping than what, in fact, happened in *this* jurisdiction as a direct result of the district court decision in *3M v. Davis*. Plaintiffs in *Dean v. NBCUniversal* 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 NBC's dispositive motions – for the admitted purpose of pursuing their claims in federal court precisely because they assumed the Act would not be applied. *See* No. 1:12-cv-00283-RJL, ECF No. 5-1 (D.D.C. filed Feb. 21, 2012) (plaintiffs' notice of voluntary dismissal in D.C. Superior Court states: "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. Davis*, No. 11-cv-1527 (RLW)(D.D.C.)"). *See also Forras v. Rauf*, No. 1:12-cv-282, ECF No. 2-3 (D.D.C. filed Mar. 22, 2012) (same). The *Erie* twin aims can only be served if the Act's protections apply in diversity jurisdiction.

CONCLUSION

Media Amici respectfully request that this Court reverse the district court's holding in *3M Co. v. Davis* and hold the D.C. Anti-SLAPP Act applies in federal actions arising under the court's diversity jurisdiction.

September 24, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(5)-(7)

This brief complies with the type-volume limitation of Circuit Rule 32(a)(2)(A) because it contains 6,982 words, excluding the parts of the brief exempted by Circuit Rule 32(a)(1), as determined by the word-counting feature of Microsoft Word.

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/s/ Laura R. Handman
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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing will be made electronically via the CM/ECF system upon the following counsels of record this 24th day of September, 2012:

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ADDENDUM

THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

BRADLEE DEAN, *et al.*,	)	
	)	
Plaintiffs,	)	Case No. 2011 CA 006055 B
	)	Judge Joan Zeldon
v.	)	
	)	
NBC UNIVERSAL (NBC), *et al.*,	)	
	)	
Defendants.	)	

ORDER

The Court has been reviewing Defendants' Motion to Dismiss and the Special Motion, Plaintiffs' Opposition, Defendants' Reply and the Intervenor's Brief in Support of the Validity of the Anti-SLAPP Act of 2010. At this point, the Court is considering treating the Motion to Dismiss as a motion for summary judgment under Superior Court Civil Rules 12(b) and 56 in light of the Handman Affidavit with its numerous exhibits.

Consequently, the Court, pursuant to Civil Rule 12(b), is affording the parties (other than the Intervenor) an opportunity to present all material made pertinent to Defendants' motion for summary judgment, including any additional memorandum of law that they wish the Court to consider by no later than midnight February 21, 2012. The new hearing date for this case is February 24, 2012, at 1:00 p.m. in a courtroom to be announced.

It is **SO ORDERED** this 8th day of February, 2012.

Joan Zeldon

Joan Zeldon
Senior Judge
(Signed in Chambers)

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THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

BRADLEE DEAN, *et al.*,	)	
	)	
Plaintiffs,	)	Case No. 2011 CA 006055 B
	)	Judge Joan Zeldon
v.	)	
	)	
NBC UNIVERSAL (NBC), *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

The Court has before it (1) Defendants' Motion to Recover Attorneys' Fees and Costs (hereafter "Defendants' Motion"), dated and filed May 7, 2012, (2) Plaintiffs' (combined) Motion for Reconsideration, Opposition to Defendants' Motion to Recover Attorneys Fees, and Cross Motion for Sanctions, dated May 23, 2012 (hereafter "Plaintiffs' Combined Motion"), (3) Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motions for Reconsideration and Sanctions, filed June 4, 2012, (4) the Court's Orders docketed June 6 and June 12, 2012, (5) Plaintiff's Reply[1] (filed June 11, 2012), (6) the Supplemental Affidavit of Laura R. Handman filed June 18, 2012, and (7) Plaintiffs' Reply to Defendants' Supplemental Affidavit, filed June 22, 2012. The Court will grant Defendants' Motion to Recover Attorneys' Fees and Costs in part and deny Plaintiffs' Motion for Reconsideration and Cross Motion for Sanctions for the reasons set forth below.

[1] Plaintiffs have no right to file a Reply because Superior Court Civil Rules do not authorize the filing of a Reply. The correct procedure would have been for Plaintiffs' counsel to file a Motion for Leave to File a Reply, with the proposed Reply attached as an exhibit to the Motion. However, for the sake of completeness in the record, the Court has considered Plaintiffs' Reply.

Background

Defendants' submitted their Motion pursuant to an order of this Court, entered April 23, 2012, which also vacated a Notice of Dismissal that Plaintiff had filed on February 21, 2012.[2] The motive for Plaintiffs' effort to abandon this action seven months after it was filed is to pursue the same claims against the same Defendants in the U.S. District Court for the District of Columbia. *See Dean v. NBC Universal*, 12 cv 00283-RJL.

Plaintiffs wish to discontinue this case and to pursue the same matter in Federal Court because, at the time they filed the praecipe of dismissal, there had been at least one decision by a District of Columbia federal judge holding that D.C. Code § 16-5501, *et seq.*, the District's "Anti-SLAPP Act"[3] violated the Federal Rules of Civil Procedure, and thus was unavailable to a defamation defendant sued in Federal Court.[4] Notwithstanding the fact that this Court was proceeding to address first Defendants' converted Motion for Summary Judgment, Plaintiffs' counsel did not want to have the Anti-SLAPP issue "hanging over our head." Status Hearing of February 17, 2012.

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[2] The reasons the Court vacated the Praecipe of Dismissal, which was docketed by the Clerk's Office without any ruling by the judge, are set forth in the April 23, 2012 Order. The explanation need not be repeated in this Memorandum and Order.

[3] SLAPP stands for Strategic Lawsuits Against Public Participation.

[4] *See 3M Co. v. Boulter*, Civil No. 11-1527(RLW), 2012 WL 386488 (D.D.C. Feb. 2, 2012) (Wilkins, J.) (finding Anti-SLAPP law to be procedural, and therefore inapplicable to a federal court sitting in diversity under *Erie*). *But see Sherrod v. Breitbart*, Civil Case No. 11-477 (RJL), 2012 WL506729, *1 (D.D.C. Feb. 15, 2012) (Leon, J.) (finding the Anti-SLAPP Act to be "substantive—or at the very least, ha[ve] substantive consequences"), *and Farah v. Esquire Mag., Inc.*, Civil Action No. 11-cv-1179 (RMC), slip op. at 11, n.10 (D.D.C. June 4, 2012) (Collyer, J.) (citing *Sherrod*) ("The Court finds the [substantive] view persuasive. It was certainly the intent of the D.C. Council and the effect of the law—dismissal on the merits—to have substantive consequences."). (The Court notes that Mr. Klayman and Ms. Handman represent the parties—plaintiffs and defendants, respectively—in the *Esquire Magazine* case.)

Anti-SLAPP statutes have been enacted by more than twenty-five states and the District of Columbia. Broadly stated, their avowed purpose is to provide protection at an early stage of civil defamation actions for defendants who claim that their allegedly defamatory statements regarding plaintiffs were made in exercise of their constitutional right of free speech regarding an issue of public interest. Among other provisions, most of these statutes set out an expedited procedure to consider the question of the availability of such a defense, and require the plaintiff to demonstrate a likelihood of success on the merits to keep the court from dismissing the action.

Plaintiffs' claims in this case are for alleged defamations that occurred during MSNBC broadcasts of The Rachel Maddow Show on August 9, 2010, and May 11, 2011. The Rachel Maddow Show, televised nationally five days a week during prime time, is about politics from a liberal perspective. It is not a straight news show in the traditional sense; rather, the show is a running commentary about what is happening in the political realm. Consequently, the District's Anti-SLAPP Act presumably would have facial application to the present case.

On September 9, 2011, Defendants filed a Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act of 2010 and Motion to Dismiss Pursuant to Superior Court Civil Rule 12 (b)(6). On October 7, 2011, Plaintiffs' counsel moved for an extension of time to respond to the motions, and a few days later opposed both motions to dismiss. Both sides filed additional papers, but no Anti-SLAPP Motion hearing was set for 2011 because Plaintiffs' counsel, Larry Klayman, Esq., was living in California and informed the Court that health problems required him to forego travel. During this time, numerous conferences on the record were held via telephone, and a hearing on the record by phone was held on January 24, 2012, also to accommodate Mr. Klayman.

Eventually, the Court set the hearing on Plaintiffs' Anti-SLAPP motion for February 23, 2012. However, because Defendants' motions had been accompanied by an affidavit with numerous attachments from Defendants' counsel that presented material outside the pleadings, the Court converted the pending motion to dismiss into one for summary judgment.[5] This was the posture of the case when, on February 21, 2012, Plaintiffs filed with the Clerk a praecipe purporting to unilaterally dismiss the action—obviously without prejudice.

[5] *See* Court Order dated April 23, 2012, for a full recitation of the facts leading up to the conversion of the Motion to Dismiss to a Motion for Summary Judgment.

On February 27, 2012, Defendants filed a Motion to Vacate Plaintiffs' February 21, 2011 Notice of Dismissal. On April 23, 2012, this Court vacated the notice of dismissal, reinstated the action and entered an order that conditioned a voluntary dismissal of the Complaint without prejudice upon Plaintiffs' payment of reasonable attorneys' fees and costs to cover what cannot be applied to the subsequent lawsuit covering the same claims. *See Thoubboron v. Ford Motor Co.*, 809 A.2d 1204, 1211 (D.C. 2002).

Discussion of Pending Motions

It is appropriate to first focus on Plaintiffs' Motion for Reconsideration because if the Court were to enter an Order providing what is requested by Plaintiffs, they would not be required to pay any fees or costs in connection with their intended discontinuance of their case before this Court without prejudice.

Plaintiffs' motion claims that they seek to dismiss this action "to avoid parallel claims that would have required both parties to needlessly waste the time and expense required to litigate the same claim in two courts." Pls. Combined Mots. at 1. Before Plaintiffs filed the same case in the Federal District Court, there was no risk of a "needless waste of time and expense" owing to the same claim being asserted in two different courts. It is only the filing of the second action by Plaintiffs in the Federal Court (seven months after they filed this Superior Court case) that created any risk of a "waste of time and expense" that might result from the same claims being litigated before two different courts.

To speak plainly, the Court cannot credit Plaintiffs with their purported reason for seeking to discontinue the action in this Court. In this context, the Court finds that Plaintiffs' accusations that the Defendants' conduct in this litigation is "a bad faith attempt to further harm

Plaintiffs" or that Defendants are engaging in "underhanded and extreme methods of delaying and raising the cost of this litigation"[6] to be a gross and transparent distortion of the record. It is Plaintiffs—not Defendants—who have created the possibility of increased time and expense arising out of duplicate actions, and the certainty that some of the time and expenses that Defendants have experienced, unless reimbursed by Plaintiffs, would be wasted.[7]

Plaintiffs are reminded that the Court's Order conditioning the grant of an Order of Dismissal without prejudice upon payment of certain attorneys' fees and costs was carefully limited to avoid any of the charges allowed by the Court being for work that can be used in the federal action. If Plaintiffs now wish to pursue their claim in a forum they believe is likely to give them a more favorable outcome than what they believe they may obtain from this Court, they may do so. However, their decision to change forums seven months later gives rise to a concomitant obligation to make that change "on their own dime," and not on that of the Defendants, who undoubtedly will continue to fight this dispute before the Federal Court with considerable costs.[8] This Court's Order of April 23, 2012, requiring Plaintiffs, as a condition of dismissal without prejudice, to pay the additional costs for work that cannot be used in the federal case is eminently fair and reasonable. It will not be modified.

Turning now to Defendants' Motion, the Court finds that with only a few exceptions, the requested fees and costs are reasonable. From Defendants' perspective, this case involves a

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[6] Pls.' Combined Mots. at 2.

[7] The Court notes that *Plaintiffs* would raise the cost of the Superior Court litigation by deposing attorneys about timesheets submitted to this Court.

[8] Plaintiffs argue that they have "few resources" and that "it would be a manifest injustice to assess punitive damages and attorneys' fees and costs" against them. However, they have created this "problem" for themselves by choosing to litigate before this Court for seven months and then changing to what they apparently perceive to be a more favorable forum. Having created this dilemma, they cannot reasonably be excused for the consequences of their actions. Moreover, the purpose of the Court's order to pay reasonable attorneys' fees and costs is not to punish but to compensate and to avoid having the Court's processes be used by a party so as to unnecessarily increase the costs of litigation.

serious attack on their First Amendment rights. They had every right to retain distingu ished counsel to defend them. The Laffey Index rates that Defendants' lead counsel has used to justify Defendants' fee request are very reasonable. The Court notes that Defendants did not even request fees for corporate in-house counsel, who did much of the work.

The only requested fee for work that the Court will disallow is twenty minutes spent on August 16, 2011, to "find and send sample corporate disclosures and proposed orders to Ms. Talbert." Plaintiffs have informed the Court that the same corporate disclosure form was used in the federal action, and consequently, the Court will disallow this particular request.

The only costs disallowed are the two $20-each taxi costs requested for ground transportation in October 2011 and November 2011.

Wherefore, it is this 25th day of June, 2012, hereby

ORDERED, that Defendants' Motion to Recover Attorneys' Fees and Costs in hereby **GRANTED IN PART**; and it is further

ORDERED, that Plaintiffs shall pay Defendants $24,625.23 in attorneys' fees and costs within thirty days of the docketing date of this Order; and it is further

ORDERED, that the case will remain open until August 3, 2012, because a failure to pay these Court-ordered costs will lead to a dismissal with prejudice; and it is further

ORDERED, that Plaintiffs' Motion for Reconsideration and Cross Motion for Sanctions is **DENIED**.

Joan Zeldon
Senior Judge
(Signed in Chambers)

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