IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 14-CV-101
COMPETITIVE ENTERPRISE INSTITUTE, *et al.*
Appellants,

and

No. 14-CV-126
NATIONAL REVIEW, INC.,
Appellant,
v.

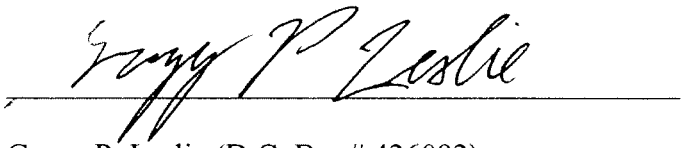
MICHAEL E. MANN, Ph.D.,
Appellee.

Nos. 14-CV-101,
14-CV-126 (consolidated)

MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 28 OTHER MEDIA ORGANIZATIONS FOR LEAVE TO FILE MEMORANDUM AS *AMICI CURIAE* IN RESPONSE TO ORDER TO SHOW CAUSE

Pursuant to D.C. App. R. 29, the above-named amici move for leave to file the attached brief in response to the court's March 26, 2014, order to show cause why this interlocutory appeal should not be dismissed. All parties have consented to the filing of this brief.

Respectfully submitted,



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I hereby certify that on April 22, 2014, a copy of the foregoing motion was served by electronic mail with the parties' written consent upon:

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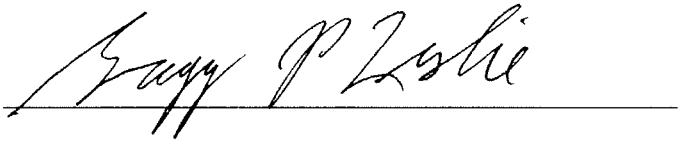

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Nos. 14-CV-101 and 14-CV-126 (consolidated)

DISTRICT OF COLUMBIA COURT OF APPEALS

COMPETITIVE ENTERPRISE INSTITUTE, *ET AL.*

and

NATIONAL REVIEW, INC.

Defendants–Appellants,

v.

MICHAEL E. MANN,

Plaintiff–Appellee.

On Appeal from the Superior Court for the District of Columbia

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BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 28 OTHER MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANTS, SUPPORTING A FINDING OF JURISDICTION

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[1] Bruce D. Brown, Executive Director of the Reporters Committee for Freedom of the Press, was formerly listed as one of the counsel for Competitive Enterprise Institute, *et al.* He did not participate in the preparation of the amicus brief of the Reporters Committee or in this appeal on behalf of appellants.

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STATEMENT OF INTEREST

Pursuant to D.C. App. R. 29, the Reporters Committee for Freedom of the Press, through undersigned counsel, respectfully submit this brief as amicus curiae in support of appellants Competitive Enterprise Institute, *et al.* and National Review. Pursuant to D.C. App. R. 29 (a), this brief is filed with the consent of all parties.

Media organizations have an interest in ensuring anti-SLAPP statutes remain effective tools in protecting free speech. While all citizens who choose to speak out on public affairs benefit from anti-SLAPP statutes, which aim to deter the use of litigation to silence speech, news organizations have an even greater interest in ensuring that these statutes provide meaningful relief. It is news organizations that choose every day to venture into the thick of public controversy to make sure citizens are fully informed about their world. This engagement with important issues makes the news media more liable to be drawn in to court, particularly when a controversial figure decides to use litigation as a weapon to counter thorough reporting.

The amicus parties are: The Reporters Committee for Freedom of the Press, Advance Publications, Inc., Allbritton Communications Company, American Society of News Editors, Association of Alternative Newsmedia, The Association of American Publishers, Inc., Dow Jones & Company, Inc., First Amendment Coalition, Freedom of the Press Foundation, Gannett Co., Inc., Investigative Reporting Workshop at American University, The McClatchy Company, MediaNews Group, Inc., d/b/a Digital First Media, The National Press Club, National Press Photographers Association, National Public Radio, Inc., NBCUniversal Media, LLC, The New York Times Company, News Corp, Newspaper Association of America, North Jersey Media Group Inc., Online News Association, POLITICO LLC, Reuters America LLC, The Seattle

Times Company, Society of Professional Journalists, Student Press Law Center, Time Inc., The Washington Post. Each is described more fully in Appendix A.

DISCLOSURE STATEMENT

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

Allbritton Communications Company is an indirect, wholly owned subsidiary of privately held Perpetual Corporation and 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.

American Society of News Editors is a private, non-stock corporation that has no parent.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

The Association of American Publishers, Inc. is a nonprofit organization that has no parent and issues no stock.

News Corporation, a publicly held company, is the indirect parent corporation of Dow Jones. No publicly held company owns 10% or more of Dow Jones' stock.

First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

Freedom of the Press Foundation does not have a parent corporation, and no publicly held corporation owns 10% or more of the stock of the organization.

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.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

The McClatchy Company is publicly traded on the New York Stock Exchange under the ticker symbol MNI. Contrarius Investment Management Limited owns 10% or more of the common stock of The McClatchy Company.

MediaNews Group, Inc. is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

National Public Radio, Inc. is a privately supported, not-for-profit membership organization that has no parent company and issues no stock.

Comcast Corporation and its consolidated subsidiaries own 100% of the common equity interests of NBCUniversal Media, LLC.

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.

News Corporation has no parent company and no publicly held company owns more than 10 percent of its shares.

Newspaper Association of America is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

North Jersey Media Group Inc. is a privately held company owned solely by Macromedia Incorporated, also a privately held company.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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

Reuters America LLC is an indirect, wholly owned subsidiary of Thomson Reuters Corporation, a publicly held company. No publicly held company owns 10% or more of the stock of Thomson Reuters Corporation.

The Seattle Times Company: The McClatchy Company owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

Society of Professional Journalists is a non-stock corporation with no parent company.

Student Press Law Center is a 501(c)(3) not-for-profit corporation that has no parent and issues 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.

WP Company LLC d/b/a The Washington Post is a wholly owned subsidiary of Nash Holdings LLC. Nash Holdings LLC is privately held and does not have any outstanding securities in the hands of the public.

SUMMARY OF THE ARGUMENT

The District of Columbia enacted the anti-SLAPP statute, D.C. Code §§ 16-5501 *et seq.* (2011), to prevent claims based on speech about matters of public interest from advancing past the initial stages of litigation unless the plaintiff can demonstrate a likelihood of success on the merits. Michael Mann, a climate scientist, sued defendants for defamation regarding statements they made on blog posts about the controversy surrounding Mann's research methods and data. Defendants moved to dismiss Mann's complaint under the D.C. anti-SLAPP statute. The D.C. Superior Court denied the motions, prompting this appeal.

This brief takes no position on the merits of the case; rather, it urges this court to find that denials of anti-SLAPP motions are immediately appealable. This decision would be consistent with at least three federal circuits and two state high courts, which have found that anti-SLAPP statutes are meant to confer immunity and that the right not to be exposed to the costs and delays of litigation will be irreparably lost if denials of motions to dismiss under the anti-SLAPP law are not immediately appealable. Furthermore, the high rate at which judgments for libel plaintiffs are overturned and the important role appellate courts play in reviewing defamation cases justify prompt appellate review.

ARGUMENT

I. The right to avoid litigation of meritless claims against speech on a matter of public interest, as provided by the D.C. anti-SLAPP statute, will be irreparably lost if denial of a motion is not immediately appealable.

This court has not yet issued a published opinion determining whether interlocutory orders denying anti-SLAPP motions are immediately appealable. However, other jurisdictions have found that interlocutory orders denying anti-SLAPP motions must be immediately appealable to preserve the very rights conveyed to defendants under similar statutes.

A. Three federal circuit courts have found, under the collateral order doctrine, that anti-SLAPP statutes fall within the small class of interlocutory orders that are immediately appealable.

Because of the lack of precedent from this court on the appealability of denials of motions to dismiss under the anti-SLAPP law, it is appropriate to look to other jurisdictions for guidance, particularly when the law is based on similar laws in other states. Report on Bill 18-893, "Anti-SLAPP Act of 2010," Council of the District of Columbia, Committee on Public Safety and the Judiciary (Nov. 18, 2010), at 4 ("Committee Report") ("[This bill] follows the model set forth in a number of other jurisdictions . . . ."). In fact, the U.S. District Court for the District of Columbia has looked to other jurisdictions for guidance when this issue has surfaced. *See, e.g.*, *Boley v. Atlantic Monthly Grp.*, No. 13–89, 2013 WL 3185154, at *3 (D.D.C. June 25, 2013) ("Where appropriate, then, the Court will look to decisions from other jurisdictions . . . for guidance in predicting how the D.C. Court of Appeals would interpret its own anti-SLAPP law."); *Abbas v. Foreign Policy Grp., LLC*, No. 12–1565, 2013 WL 5410410, at *3 (D.D.C. Sept. 27, 2013).

The First, Fifth, and Ninth Circuits relied on the collateral order doctrine, *see Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), in finding that the anti-SLAPP statutes in Maine,[2] Louisiana,[3] and California,[4] respectively, required the right of immediate appeals to preserve the purpose of the statutes. *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009 (9th Cir. 2013) (reaffirming *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003)); *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009). The collateral order doctrine permits immediate appeal of interlocutory orders "that are [(1)] conclusive, [(2)] that resolve important questions separate from the merits, and [(3)] that are

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[2] Me. Rev. Stat. tit. 14, § 556 (1999) (amended 2012).
[3] La. Code Civ. Proc. Ann. art. 971 (1999) (amended 2012).
[4] Cal. Civ. Proc. Code § 425.16 (West 1992) (amended 2011).

effectively unreviewable on appeal from the final judgment in the underlying action." *DC Comics*, *supra*, 706 F.3d at 1013 (brackets in original).

The Ninth Circuit held that the first two criteria of the collateral order doctrine were clearly satisfied. *Id.* Analyzing the third criterion, the court held that the California anti-SLAPP statute, based on the language of the statute and the legislative history behind it, was meant to confer immunity and not merely a defense against liability. *Id.* Immunity from suit is unreviewable on appeal from final judgment; therefore, the third criterion of the collateral order doctrine was met. *Id.* The Ninth Circuit noted that the protection of the right to free speech embedded in the anti-SLAPP statute requires "particular solicitude within the framework of the collateral order doctrine." *Id.* at 1016. The court further noted that "[t]he California legislature's determination, through its enactment of the anti-SLAPP statute, that such constitutional rights would be imperiled absent a right of interlocutory appeal deserves respect." *Id.*

The First Circuit also found that the first two criteria of the collateral order doctrine were met before concluding that the rights created by the Maine anti-SLAPP statute were akin to immunity and therefore unreviewable on appeal from final judgment. *Godin*, *supra*, 629 F.3d at 84-85. Looking at a Maine court's decision granting interlocutory review, the court found that "lawmakers wanted to protect speakers from the trial itself rather than merely from liability." *Id.* at 85.

The Fifth Circuit analyzed each criterion of the collateral order doctrine, ultimately finding that interlocutory orders denying an anti-SLAPP motion fall under the "small class" of orders that are immediately appealable. *Henry*, *supra*, 566 F.3d at 173-81. Regarding the third criterion, the court found that anti-SLAPP statutes "provide defendants the right not to bear the costs of fighting a meritless defamation claim" and are therefore unreviewable on appeal from

final judgment. *Id.* at 177-78. "[I]mmunity is not simply a right to prevail, but a right not to be tried," and that right is lost if the case proceeds to trial. *Id.* at 177. Echoing the Ninth Circuit, which held that free speech protections should be given greater import under the collateral order doctrine, *DC Comics*, 706 F.3d at 1016, the Fifth Circuit noted that the importance of protecting First Amendment rights "weighs profoundly in favor of appealability," *Henry*, *supra*, 566 F.3d at 180. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

B. At least two states have found that anti-SLAPP statutes create immunity from suit, a right that is irreparably lost if denials of anti-SLAPP motions are not immediately appealable.

Maine and Massachusetts[5] have likewise held that denial of anti-SLAPP motions are immediately appealable, even though neither of their statutes explicitly provides for that right. *Morse Bros. v. Webster*, 772 A.2d 842 (Me. 2001); *Fabre v. Walton*, 781 N.E.2d 780 (Mass. 2002). Both courts focused their analyses on whether the right in question will be irreparably lost if denials of motions to dismiss under anti-SLAPP laws are not immediately appealable, which is essentially the third element of the collateral order doctrine. *Morse Bros.*, *supra*, 772 A.2d at 847; *Fabre*, *supra*, 781 N.E.2d at 784.

The Massachusetts high court held that the right to avoid "the harassment and burdens of litigation" is similar to government immunity in that the right is lost if the defendant is forced to litigate a case beyond its initial stages. *Id.* Not only did the high court find that defendants *may* immediately appeal the denial of an anti-SLAPP motion, *id.*, but an appellate court held defendants *must* immediately appeal the interlocutory order or they lose their right to appeal after final judgment. *Wendt v. Barnum*, 2007 Mass. App. Div. 93, 96 (App. Div. 2007). In *Wendt*, a

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[5] The Massachusetts anti-SLAPP statute can be found at Mass. Gen. Laws ch. 231, § 59H (1994) (amended 1996).

defendant fully litigated his case after his anti-SLAPP motion was denied, and then he appealed the anti-SLAPP order along with other claims of error. 2007 Mass. App. Div. at 93-97. The judge dismissed the anti-SLAPP appeal as moot because the defendant failed to appeal the interlocutory order immediately after it was issued. *Id.* at 96.

Much like the Massachusetts high court and the First, Fifth, and Ninth Circuits, the Maine high court found that anti-SLAPP statutes create a right to avoid the "cost and delay of litigating [a] claim," and forcing a defendant to continue litigation is the "precise harm that the statute seeks to prevent." *Morse Bros.*, *supra*, 772 A.2d at 848; *see also Schelling v. Lindell*, 942 A.2d 1226 (Me. 2008). The court noted that the statute was "designed to protect certain defendants from meritless litigation," as indicated by its provisions offering an expedited hearing on the motion and temporarily switching the burden of proof to the plaintiff. *Id.* Ultimately, the court held that not immediately hearing an appeal of the denial of an anti-SLAPP motion would result in the "loss of a substantial right." *Id.*

Like the anti-SLAPP statutes in California, Louisiana, Maine, and Massachusetts, the D.C. anti-SLAPP statute confers a right to avoid the costs and harassment of meritless litigation – a right that will be lost if it is not immediately appealable. *See* D.C. Code §§ 16-5501 *et seq.* The D.C. anti-SLAPP statute is crafted to forestall litigation. *See id.* Much like the statute in Maine, *see Morse Bros.*, *supra*, 772 A.2d at 848, the D.C. statute requires the court to hold an expedited hearing on the special motion to dismiss and shifts the burden to the plaintiff to prove likelihood of success on the merits. D.C. Code §§ 16-5502 (b), (d), -5503 (b). Furthermore, it permits the court to award the costs of litigation to a party who prevails on an anti-SLAPP motion, another deterrent to litigation. § 16-5504 (a). D.C. lawmakers recognized that the unique problem with SLAPP lawsuits "is that the goal of the litigation is not to win the lawsuit

but punish the opponent and intimidate them into silence." Committee Report at 4. The anti-SLAPP statute, then, is a remedy to the litigation itself. This brief takes no position as to whether the underlying merits of this case fall within that class of "intimidating" SLAPP suits; rather, this brief focuses on the importance generally of immediately appealing denials of anti-SLAPP motions. Just as the court in *Godin* stated, "lawmakers wanted to protect speakers from the trial itself rather than merely from liability." 629 F.3d at 85. As the First, Fifth, and Ninth Circuits have found, along with the high courts of Maine and Massachusetts, requiring a party to continue litigation before appealing the denial of an anti-SLAPP motion results in irreparable injury – the exact injury the statute was meant to guard against.

C. Contrary decisions of other courts indicating there is no right to immediately appeal the denial of anti-SLAPP motions are distinguishable because the D.C. anti-SLAPP statute provides immunity.

The Ninth Circuit distinguished between California's anti-SLAPP statute, *Batzel*, *supra*, 333 F.3d 1018, and Oregon's, *Englert v. MacDonell*, 551 F.3d 1099 (9th Cir. 2009), and Nevada's, *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795 (9th Cir. 2012), finding that appeals of anti-SLAPP motions are immediately appealable under California law but not under Oregon or Nevada law. California lawmakers intended to confer immunity, whereas Nevada's and Oregon's lawmakers did not, the court held. *See Metabolic Research*, *supra*, 693 F.3d at 801. In response to *Metabolic Research*, the Nevada legislature amended its statute so that denials of anti-SLAPP motions are immediately appealable. S.B. 286 (Nev. 2013) (amending Nev. Rev. Stat. § 41.637).

Like California lawmakers, D.C. lawmakers intended to confer immunity from suit in the D.C. anti-SLAPP statute. The statute is silent as to whether interlocutory orders are immediately appealable, but the legislative history has much to say.

This court has long recognized the importance of interpreting a statute through the lens of its legislative history. *A.R. v. F.C.*, 33 A.3d 403, 405 (D.C. 2011) ("When interpreting a statute, the judicial task is to discern, and give effect to, the legislature's intent."); *Grayson v. AT&T Corp.*, 15 A.3d 219, 238 (D.C. 2011) (en banc) ("In interpreting statutes, judicial tribunals seek to discern the intent of the legislature and, as necessary, whether that intent is consistent with fundamental principles of law."); *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 754 (D.C. 1983) ("This court has found it appropriate to look beyond the plain meaning of statutory language in several different situations."). While the court must look first at the plain language of the statute, *Peoples Drug Stores*, *supra*, 470 A.2d at 753, "the words [of a statute] 'cannot prevail over strong contrary indications in the legislative history . . . .'" *Grayson*, *supra*, 15 A.3d at 238 (quoting *Citizens Ass'n of Georgetown v. Zoning Comm'n of the District of Columbia*, 392 A.2d 1027, 1033 (D.C. 1978)).

Lawmakers originally included a provision granting a defendant the right of immediate appeal but later removed it solely because they thought the provision might exceed their authority, based this court's decision in *Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010); *see* Committee Report at 7. Even after lawmakers removed the provision, the report noted that the "Committee agrees with and supports the purpose of this provision." *Id.*

There is no need here, as in past cases, for this court to interpret ambiguous language or attempt to extrapolate the lawmakers' intent. D.C. lawmakers clearly intended the anti-SLAPP statute to include the right to immediately appeal the denial of a special motion to dismiss. The D.C. anti-SLAPP statute is distinct from the Oregon and Nevada statutes, *see Metabolic Research*, *supra*, 693 F.3d at 801; *Englert*, *supra*, 551 F.3d at 1105-06, as the intent to ensure immediate appeal and confer immunity is clear in D.C.'s legislative history. As this court noted

in *Grayson*, "the words [of a statute] 'cannot prevail over strong contrary indications in the legislative history . . . .'" 15 A.3d at 238. Yet this court need not go so far as to seek "contrary" legislative history. The statute may be read together with the legislative history to form a coherent interpretation, absent contradiction.

The clear intention of the D.C. lawmakers to permit immediate appeals leads to a single conclusion: the statute confers immunity from litigation, and that right is irreparably lost if the denial of an anti-SLAPP motion is not immediately appealable.

II. The important role appellate courts play in reviewing defamation cases and the frequency with which judgments for libel plaintiffs are overturned justify prompt appellate review.

At its heart, this case is about getting an action before an appellate court promptly, so that the purpose of an anti-SLAPP motion – avoidance of litigation over non-meritorious claims about speech on issues of public interest – is not frustrated. Such appellate review has even greater import in light of the role appellate courts often play in preserving First Amendment rights and supports the interest in allowing interlocutory appeals.

The importance of searching appellate review in defamation cases has long been established. *See Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 685-86 (1989); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505 (1984). Because of "[o]ur profound national commitment to the free exchange of ideas," *Connaughton*, *supra*, 491 U.S. at 686, and the Court's fear that "decisions by triers of fact may inhibit the expression of protected ideas," *Bose Corp.*, *supra*, 466 U.S. at 505, the Supreme Court has held that appellate judges must independently review trial court findings of defamation, *Bose Corp.*, *supra*, 466 U.S. at 505.

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the

> Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold . . . .

Bose Corp., *supra*, 466 U.S. at 511.

This heightened appellate review has had a significant impact on the number of defamation decisions overturned or modified. Between 1980 and 2011, defamation plaintiffs won 58.7 percent of their cases at trial, but defendants who appealed were able to reverse or modify nearly 70 percent of those decisions. *See MLRC 2012 Report on Trials and Damages*, Media L. Resource Center, Feb. 2012, at 36 tbl.1, 74 tbl.12A (reporting that 145 out of 215 cases that were appealed, or 67.4 percent, were reversed or modified).

The D.C. anti-SLAPP statute was enacted so that defendants in cases involving speech on issues of public interest could quickly have meritless claims dismissed before litigation costs became too burdensome, acting as a punishment in itself. Committee Report at 4. Given that nearly 70 percent of defamation decisions that defendants appeal are overturned or reversed, *see MLRC 2012 Report on Trials and Damages*, *supra*, it is imperative to permit immediate appellate review of denials of anti-SLAPP motions. It is not only burdensome on the parties but a waste of the court's limited time and resources to allow a defamation claim to linger in a lengthy and costly litigation that ultimately leads to an appeals process it is not likely to survive.

CONCLUSION

For the reasons given above, as well as those given in the response of the appellant, the court should accept jurisdiction to hear an appeal of the denial of appellants' anti-SLAPP motions.

Respectfully submitted,

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APPENDIX A: DESCRIPTION OF AMICI

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.

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, the 24-hour local news service, NewsChannel 8 and the news website WJLA.com. An affiliated company operates the ABC affiliate in Charleston, S.C.

With some 500 members, American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Dow Jones & Company, Inc., a global provider of news and business information, is the publisher of *The Wall Street Journal*, *Barron's*, MarketWatch, Dow Jones Newswires, and other publications. Dow Jones maintains one of the world's largest newsgathering operations, with 2,000 journalists in more than fifty countries publishing news in several different languages. Dow Jones also provides information services, including Dow Jones Factiva, Dow Jones Risk & Compliance, and Dow Jones VentureSource. Dow Jones is a News Corporation company.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

Freedom of the Press Foundation is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a

variety of avenues, including public advocacy, legal advocacy, the promotion of digital security tools, and crowd-funding.

Gannett Co., Inc. is an international news and information company that publishes more than 80 daily newspapers in the United States – including *USA TODAY* – which reach 11.6 million readers daily. The company's broadcasting portfolio includes more than 40 TV stations, reaching approximately one-third of all television households in America. 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 Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The McClatchy Company, through its affiliates, is the third-largest newspaper publisher in the United States with 30 daily newspapers and related websites as well as numerous community newspapers and niche publications.

MediaNews Group's more than 800 multi-platform products reach 61 million Americans each month across 18 states.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. 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 285 member stations that 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 10 years of archived audio and information.

NBCUniversal Media, LLC 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 News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline NBC" and "Meet the Press."

The New York Times Company is the publisher of *The New York Times*, *The Boston Globe*, and *International Herald Tribune* and operates such leading news websites as nytimes.com and bostonglobe.com.

News Corp is a global, diversified media and information services company focused on creating and distributing authoritative and engaging content to consumers throughout the world. The company comprises leading businesses across a range of media, including: news and information services, digital real estate services, book publishing, digital education, sports programming and pay-TV distribution.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: *The Record* (Bergen County), the state's second-largest newspaper, and the *Herald News* (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County's premiere magazine. All of the newspapers contribute breaking news, features, columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

POLITICO LLC is a nonpartisan, Washington-based political journalism organization that produces a series of websites, video programming and a newspaper covering politics and public policy.

Reuters, the world's largest international news agency, is a leading provider of real-time multi-media news and information services to newspapers, television and cable networks, radio stations and websites around the world. Through Reuters.com, affiliated websites and multiple online and mobile platforms, more than a billion professionals, news organizations and consumers rely on Reuters every day. Its text newswires provide newsrooms with source material and ready-to-publish news stories in twenty languages and, through Reuters Pictures and Video, global video content and up to 1,600 photographs a day covering international news, sports, entertainment, and business. In addition, Reuters publishes authoritative and unbiased market data and intelligence to business and finance consumers, including investment banking and private equity professionals.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-Republic*, *Walla Walla Union-Bulletin*, *Sammamish Review* and *Newcastle-News*, all in Washington state.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Student Press Law Center ("SPLC") is a nonprofit, nonpartisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

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.

WP Company LLC (d/b/a The Washington Post) publishes one of the nation's most prominent daily newspapers, as well as a website, www.washingtonpost.com, that is read by an average of more than 20 million unique visitors per month.

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APPENDIX C: EXCERPTS FROM MLRC 2012 REPORT ON TRIALS AND DAMAGES

MLRC Media Law Resource Center
BULLETIN
2012 Issue No. 1 February 2012

MLRC 2012 REPORT ON TRIALS AND DAMAGES

SUMMARY TABLE OF CONTENTS

IV. MLRC 2010-11 STUDY OF TRIALS AND DAMAGES

A. CASES AND TRIALS[8]

Table 1: Number and Results of All Cases

Year	Cases	Default P Wins	Trials	Hung Juries	Verdicts	No. P Wins	No. D Wins	% D Wins
1980	25		25		25	19	6	24.0%
1981	22		22	1	21	15	6	28.6%
1982	43	2	41	1	40	26	14	35.0%
1983	23		23		23	11	12	52.2%
1984	29		29		29	20	9	31.0%
1985	26		26		26	18	8	30.8%
1986	34		34		34	24	10	29.4%
1987	17		17	1	16	4	12	75.0%
1988	32		32		32	19	13	40.6%
1989	17		17		17	9	8	47.1%
1990	19		19		19	13	6	31.6%
1991	27		27		27	13	14	51.9%
1992	13		13		13	8	5	38.5%
1993	26		26	3	23	12	11	47.8%
1994	19		19	1	18	11	7	38.9%
1995	9		9		9	7	2	22.2%
1996	18		18		18	12	6	33.3%
1997	26	2	24		24	13	11	45.8%
1998	20	1	19		19	12	7	36.8%
1999	19	1	18		18	11	7	38.9%
2000	18	4	14		14	8	6	42.9%
2001	17		17	1	16	8	8	50.0%
2002	8	2	6		6	1	5	83.3%
2003	19		19	2	17	9	8	47.1%
2004	16	1	15	1	14	6	8	57.1%
2005	18	2	16		16	8	8	50.0%
2006	15		15		15	6	9	60.0%
2007	9	2	7	1	6	2	4	66.7%
2008	8	2	6		6	3	3	50.0%
2009	9		9		9	6	3	33.3%
2010	9		9		9	4	5	55.6%
2011	9		9		9	7	2	22.2%
1980-89	268	2	266	3	263	165	98	37.3%
1990-99	196	4	192	4	188	112	76	40.4%
2000-09	137	13	124	5	119	57	62	52.1%
2010-11	18		18		18	11	7	38.9%
1980-2011	619	19	600	12	588	345	243	41.3%

[8] For the purposes of this study, a "case" is a proceeding in an American court against a media defendant that is not settled or dismissed on motion prior to a hearing before a trier of fact; a case that is contested through to a verdict on liability is a "trial." *See also* Appendix C, p. 127, *infra*.

Table 1 Analysis

There have been exactly nine trials a year for the past 3 years: 2011, 2010 and 2009. This is consistent with a long-term decrease in the number of trials that MLRC has documented in previous editions of this REPORT. As the table shows, there were 266 trials (not including defaults)[9] in the 1980s, an average of roughly 27 per year. In the 1990s, this dropped to 192 or an average of about 19 per year. From 2000 to 2011, there were 137 trials averaging roughly 11 per year.

Although the 2010 defense victory rate (55.6%) was in line with the average rate during the first decade of the 2000's (52.1%), this figure dropped dramatically in 2011, with defense counsel prevailing at trial in only 2 out of 9 cases (22.2%), the lowest defense win rate since 1995. In the combined 2010-11 study years, the defendants prevailed in 38.9% of trials, close to the 30-year average of 41.3%.

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[9] Some notes about this chart: Defaults were not recorded prior to 1998, but are now added as they are discovered. They are excluded from all other tables.

Twelve trials ended in hung juries: *Cramlet (I) v. Multi-Media Program Prods.*, (D. Colo. 1981); *Braun (I) v. Flynt*, (W.D. Tex. 1982); *MacDonald v. McGinniss*, (C.D. Cal. 1987); *Eidson v. Berry*, (Ga. Super. Ct. 1993); *Lugo (I) v. Inside Edition* (Cal. Super. 1993); *Masson (I) v. The New Yorker*, (N.D. Cal. 1993); *Benson v. Phila. Daily News*, (Pa. C.P. 1994); *Nannicola v. Warren Newspapers, Inc.*, (Ohio C.P. 2001); *Hewan v. Fox News Network*, (E.D. Ky. 2003); *Weaver v. Clear Channel Comm'ns* (D. Idaho 2003); *Popovich (I) v. Daily News Publ'g Co.* (Pa. Ct. C.P. 2004); *Mandel (II) v. Boston Phoenix, Inc.*, (D. Mass. 2007). There were also four mistrials for other reasons: *Downing v. Abercrombie & Fitch*, (C.D. Cal. 2002) (plaintiff misconduct), *dismissed* (C.D. Cal. 2004) (settled); *Jarosak v. Blayer*, 64D01-9911-CP-2450 (Ind. Dist. Ct. 2004) (plaintiff's counsel ill); *Tuttle v. Marvin*, (D. S.C. 2005) (plaintiff's counsel ill); and *Anderson v. Gannett Co., Inc.* (Fla. Cir. Ct. 2004) (two jurors dismissed, leaving no alternates).

D. APPELLATE RESULTS

Table 12A: Appeals From Verdicts – Defendants' Appeals[41]

	Verdicts for P	Awards After Motions	Settled Prior to Appeal		No Appeal		Appeals Pending		Award Modified On Appeal		Award Affirmed on Appeal		Disposition Unknown	
1950	19	17	1	5.9%					16	94.1%				
1951	15	14							9	64.3%	5	35.7%		
1952	26	19							11	57.9%	8	42.1%		
1953	11	9							8	88.9%	1	11.1%		
1954	20	16			2	12.5%			8	50.0%	6	37.5%		
1955	18	17	1	5.9%	1	5.9%			11	64.7%	3	17.6%	1	5.9%
1956	24	21			2	9.5%			10	47.6%	9	42.9%		
1957	4	4			1	25.0%			2	50.0%	1	25.0%		
1958	19	16	2	12.5%	2	12.5%			7	43.8%	4	25.0%	1	6.3%
1959	9	8			3	37.5%			2	25.0%	3	37.5%		
1960	13	12	4	33.3%	2	16.7%			2	16.7%	2	16.7%	2	16.7%
1961	13	11	1	9.1%	2	18.2%			6	54.5%	1	9.1%	1	9.1%
1962	8	6	1	16.7%	1	16.7%			3	50.0%	1	16.7%		
1963	12	11	2	18.2%	3	27.3%			4	36.4%	1	9.1%	1	9.1%
1964	11	10			1	10.0%			6	60.0%	3	30.0%		
1965	7	7	1	14.3%	2	28.6%			1	14.3%	3	42.9%		
1966	12	11			3	27.3%			4	36.4%	3	27.3%	1	9.1%
1967	13	12	3	25.0%	1	8.3%			6	50.0%	2	16.7%		
1968	12	11	2	18.2%	2	18.2%			6	54.5%	1	9.1%		
1969	11	11			3	27.3%			6	54.5%	2	18.2%		
2000	8	5							3	60.0%	2	40.0%		
2001	8	8	2	25.0%	1	12.5%			3	37.5%	2	25.0%		
2002	1	1									1	100.0%		
2003	9	8	2	25.0%	3	37.5%			2	25.0%	1	12.5%		
2004	6	5							3	60.0%	2	40.0%		
2005	8	8	1	12.5%	4	50.0%			1	12.5%	2	25.0%		
2006	6	5	1	20.0%	1	20.0%			2	40.0%	1	20.0%		
2007	2	2	1	50.0%					1	50.0%				
2008	3	2	1	50.0%	1	50.0%								
2009	5	5	1	20.0%	2	40.0%			2	40.0%				
2010	4	3	1	33.3%	1	33.3%	1	33.3%						
2011	7	4			1	25.0%	3	75.0%						
1950-59	165	141	4	2.8%	11	7.8%			84	59.6%	40	28.4%	2	1.4%
1960-69	112	102	14	13.7%	20	19.6%			44	43.1%	19	18.6%	5	4.9%
2000-2009	57	49	9	18.4%	13	26.5%			17	34.7%	11	22.4%		
2010-11	11	7	1	14.3%	2	28.6%	4	57.1%						
1950-2011	345	299	28	9.4%	45	15.1%	4	1.3%	145	48.5%	70	23.4%	7	2.3%

[41] Case status as of Jan. 17, 2012. The percentages are based upon those plaintiffs verdicts that at least survived in part following post-verdict motions. This table includes the directed verdict for plaintiff in *Kerrick v. Monitt*. *See* n. 13, *supra*.

"Awards after motions" are number of awards that survived – either intact or in reduced form – after post-verdict motions.

"No appeal" includes cases not ripe for appeal (trial verdict not formally entered, post-verdict motions pending).

"Awards modified on appeal" refers to any successful or partially successful appellate ruling for the defense, and thus includes not only full reversals on appeal, but also to cases in which appellate courts have granted full or partial remittitur or remand to defendants.

Table 12A Analysis

The share of awards modified on appeal has dropped from 59.6 percent in the 1980s, to 43.1 percent in the 1990s, to 34.7 percent in the 2000s.

The difference in the percentages of awards modified on appeal can largely be found in the rise of percentages of cases not appealed at all and those that have settled prior to appeal. There has been a consistent increase in both of those options from the 1980s to the 2000s. The percentage of cases not appealed has risen from 7.8 percent in the 1980s, to 19.6 percent in the 1990s, to 24.5 percent in the 2000s. Post-trial settlements have risen from 2.8 percent in the 1980s, to 13.7 percent in the 1990s, to 18.4 percent in the first decade of the 2000s.

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2014, a copy of the foregoing motion was served by electronic mail with the parties' written consent upon:

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