STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. CUM-20-63

JOHN THURLOW,
Plaintiff–Appellant

v.

ZAKIA CORIATY NELSON & ROSS NELSON,
Defendants–Appellees

On Appeal from the Superior Court (Cumberland County)

AMICI CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 14 MEDIA ORGANIZATIONS

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INTRODUCTION

Strategic lawsuits against public participation, or "SLAPPs," are meritless legal claims that chill the exercise of First Amendment rights. While SLAPPs lack merit, defendants are often forced to spend substantial amounts of time and financial resources defending against them; and the mere threat of expensive, protracted litigation, alone, can discourage civil discourse.

To combat this troubling trend, 30 states and the District of Columbia have adopted what are known as "anti-SLAPP" laws, which typically provide a number of mechanisms to lower the costs and other burdens of defending against baseless lawsuits arising out of speech on matters of public concern. *See* Austin Vining & Sarah Matthews, *Introduction to Anti-SLAPP Laws*, Reporters Comm. for Freedom of the Press, https://perma.cc/9VWJ-4SXC. Maine's anti-SLAPP statute, 14 M.R.S. § 556, provides "a means for the swift dismissal of such lawsuits early in the litigation as a safeguard on the defendant's First Amendment right to petition." *Gaudette v. Davis*, 2017 ME 86, ¶ 4, 160 A.3d 1190. To that end, a defendant facing a SLAPP may bring a special motion to dismiss the suit which "may be advanced on the docket and receive priority over other cases." 14 M.R.S. § 556.

This Court has solicited amicus briefs regarding potential changes to this Court's interpretation of Maine's anti-SLAPP law. *See* Notice of Invitation to File Amicus Briefs: Law Court Invites Amicus Briefs on Anti-SLAPP Suits, State of

Maine Supreme Judicial Court (Apr. 30, 2021), https://perma.cc/WS2B-BN76 (hereinafter the "Invitation"). As members and representatives of the news media, amici are frequently the targets of SLAPPs designed to punish and deter constitutionally protected newsgathering and reporting activities.[1] Amici thus write to emphasize the benefits of robust anti-SLAPP protections, which safeguard the right to engage in speech on matters of public interest without fear of being subjected to the expense, harassment, and disruption of meritless litigation.

In response to the questions posed by the Court in its Invitation, amici first urge the Court to find that 14 M.R.S. § 556 does not violate a party's right to a trial by jury under the Maine or U.S. Constitutions. The right to a jury trial is not violated "when a judge determines that by reason of law or because of an absence of any material fact issue, judgment should be entered for one side or another." *Roemer v. Crow*, 993 F. Supp. 834, 837 (D. Kan.), *aff'd*, 162 F.3d 1174 (10th Cir. 1998). And, to the extent a court is asked to make pretrial factual determinations in deciding a special motion to dismiss under the statute, such determinations mirror those routinely undertaken by courts in deciding motions to dismiss or motions for summary judgment. *See, e.g.*, M.R. Civ. P. 56(b).

Next, amici urge the Court not to limit the definition of "petitioning activity" under 14 M.R.S. § 556 to only those "petitions or statements . . . involved in the

[1] Full descriptions of the amici are included below as Appendix A.

determination or adjudication of zoning or other land development disputes." Invitation at 2. Limiting the scope of protected activity under Maine's anti-SLAPP statute would be contrary to the plain language and legislative intent of 14 M.R.S. § 556, and would further narrow a statute that is already less protective of First Amendment expressive activity than the majority of other anti-SLAPP statutes around the country.

Finally, amici urge the Court against implementing a process similar to that adopted by the Massachusetts Supreme Judicial Court in *Blanchard v. Steward Carney Hospital, Inc.*, 75 N.E.3d 21 (Mass. 2017), which would permit a non-moving party to avoid dismissal under 14 M.R.S. § 556 by establishing that the suit is not a SLAPP. Adopting such a framework would effectively create an end-run around the anti-SLAPP statute and would undermine the legislature's aim "to provide additional protection to the right to petition." *Gaudette*, 2017 ME 86, ¶ 22, 160 A.3d 1190.

ARGUMENT

I. Anti-SLAPP statutes, including 14 M.R.S. § 556, protect and encourage the exercise of First Amendment freedoms.

A. Anti-SLAPP statutes provide substantive protections against frivolous lawsuits aimed at chilling speech.

Anti-SLAPP statutes guard against a serious threat to constitutionally protected speech and expressive activity: the potentially exorbitant costs of meritless

lawsuits. From a practical standpoint, SLAPPs are effective means to deter and punish speech primarily because they force a defendant to expend time and money disposing of the litigation, whether by defending against the claims in court or pursuing a settlement with the plaintiff.

The U.S. Supreme Court warned of litigation's potential chilling effect in its 1964 decision *New York Times Co. v. Sullivan*, cautioning that "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." 376 U.S. 254, 279 (1964). Such self-censorship "dampens the vigor and limits the variety of public debate." *Id.*

SLAPP plaintiffs exploit the judicial process in the manner described in *Sullivan* to chill speech on matters of public concern. They impose legal costs on the defendant with the aim of forcing the defendant to abandon petitioning activity and refrain from exercising constitutional rights in the future. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970–71 (9th Cir. 1999). As one court has explained: "Persons who have been outspoken on issues of public importance targeted in [SLAPPs] or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined." *Gordon v. Marrone*, 590

N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992), *aff'd*, 616 N.Y.S.2d 98 (N.Y. App. Div. 2d Dep't 1994).

To combat the silencing effect of SLAPPs, anti-SLAPP statutes—including Maine's—provide a mechanism for the prompt dismissal of meritless claims, often also providing a temporary stay of discovery while a dismissal motion is pending, and thus enabling defendants to avoid unnecessary legal expense. *See, e.g.*, 14 M.R.S. § 556 (providing that "[a]ll discovery proceedings are stayed upon the filing of the special motion" to dismiss "except that the court . . . for good cause shown, may order that specified discovery be conducted"). Many anti-SLAPP statutes further discourage plaintiffs from filing SLAPPs by requiring or permitting courts to order plaintiffs to pay a prevailing defendant's attorney's fees and costs. *See, e.g.*, *id*. ("If the court grants a special motion to dismiss, the court may award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters.").

These mechanisms work in concert to relieve defendants facing SLAPPs from the financial and other burdens of defending the suit, thus helping to protect the free exchange of ideas and to encourage individuals' full participation in public discourse and debate.

B. 14 M.R.S. § 556 provides a mechanism for the prompt dismissal of lawsuits that threaten a defendant's right to petition.

Consistent with these principles, 14 M.R.S. § 556 permits a defendant facing a SLAPP to bring a special motion to dismiss which "may be advanced on the docket and receive priority over other cases." *Id.*

Courts currently follow a multi-step process in deciding a special motion to dismiss under 14 M.R.S. § 556. *See Gaudette*, 2017 ME 86, ¶¶ 16–18, 160 A.3d 1190. First, the moving party must establish "as a matter of law[] that the claims against [the moving party] are based on [his or her] exercise of the right to petition pursuant to the federal or state constitutions." *Id.* ¶ 8 (citations and quotation marks omitted). If the moving party fails to meet this burden, the special motion to dismiss is denied. *Id.* If the burden is met, however, the non-moving party must then "establish, through the pleadings and affidavits," prima facie evidence that the moving party's petitioning activity was devoid of any reasonable factual support or any arguable basis in law and that the moving party's petitioning activity caused actual injury to the non-moving party. *Id.* ¶ 17 (citing *Nader v. Me. Democratic Party*, 2012 ME 57, ¶ 16, 41 A.3d 551). Under this prima facie standard, "production of some evidence is enough to satisfy th[e] burden." *Camden Nat'l Bank v. Weintraub*, 2016 ME 101, ¶ 11, 143 A.3d 788. It is "a low standard that does not depend on the reliability or the credibility of evidence, all of which may be considered at some later time in the process." *Id.* (citations and quotation marks

omitted). If the non-moving party fails to make such a prima facie showing with respect to any or all of the petitioning activities at issue, then the special motion to dismiss is granted with respect to those petitioning activities. *Gaudette*, 2017 ME 86, ¶ 17, 160 A.3d 1190.

Prior to the Court's 2017 decision in *Gaudette*, if the non-moving party *did* establish a prima facie case with respect to any or all of the petitioning activities at issue, the special motion to dismiss would be denied with respect to those activities. Recognizing, however, that the prima facie standard established in *Nader* may result "in a pronounced dilution of the Legislature's apparent objective in enacting the anti-SLAPP statute—the prompt dismissal of lawsuits that threaten a defendant's right to petition," *id*. ¶ 14, the Court in *Gaudette* added a further procedural step to be applied in the event the non-moving party establishes a prima facie case with respect to any or all of the petitioning activities at issue. *Id*. ¶ 18. The special motion to dismiss is not automatically denied but rather, on motion by either party, the court may "permit[] the parties to undertake a brief period of limited discovery, the terms of which are determined by the court after a case management hearing." *Id.* An evidentiary hearing is conducted at the end of the limited discovery period where it is the non-moving party's burden "to establish, by a preponderance of the evidence, each of the elements for opposing the dismissal on anti-SLAPP grounds for which [it] successfully made out [its] prima facie case." *Id.* "If neither party requests

discovery and/or the evidentiary hearing," the court will determine whether the non-moving party has met its burden "by a preponderance of the evidence" based on "the parties' submissions in seeking and opposing the special motion to dismiss." *Id.*

II. Maine's anti-SLAPP statute is not unconstitutional.

In its invitation, the Court asks whether it should declare 14 M.R.S. § 556 unconstitutional on the grounds that it provides "no effective way to preserve the non-moving party's right to a jury trial" given that a special motion to dismiss under 14 M.R.S. § 556 "may be granted based on pretrial factual determinations made by the court." Invitation at 2. Although courts may be required to make certain pretrial factual determinations when deciding a special motion to dismiss under the statute, the nature of these determinations do not violate the constitutional right to a jury trial, as the right is not implicated where there is no genuine issue of fact or where judgment may be rendered as a matter of law. For the reasons described herein, the Court should uphold the constitutionality of 14 M.R.S. § 556.

A. The right to a jury trial is not violated where a court finds no genuine issue of material fact or law.

Article I, Section 20 of the Maine Constitution and the Seventh Amendment to the U.S. Constitution provide for a right to trial by jury in civil cases. This right is not absolute, however, and does not extend "to frivolous complaints or cases without merit." *Judd v. Furgeson*, No. 01-cv-4217 JBS, 2012 WL 5451273, at *4 (D.N.J. Nov. 5, 2012); *see also Bill Johnson's Rests., Inc. v. Nat'l Labor Relations*

Bd., 461 U.S. 731, 743–44 (1983) (finding that the right of access to courts does not extend to frivolous lawsuits that lack a "reasonable basis" or are "based on insubstantial claims"). SLAPPs, by their very definition, are meritless claims that chill the exercise of First Amendment rights and thus do not implicate the constitutional right to a jury trial.

Moreover, courts have long recognized that the right to a jury trial is not violated "when a judge determines that by reason of law or because of an absence of any material fact issue, judgment should be entered for one side or another." *Roemer*, 993 F. Supp. at 837. For example, under federal and state procedural law, a court may render a judgment dismissing a complaint for failure to plead facts sufficient to state a valid claim. *See* Fed. R. Civ. P. 12(b)(6); M.R. Civ. P. 12(b)(6). Similarly, an award of summary judgment does not violate the right to a trial by jury where there is no genuine issue of material fact for a jury to decide. *See Calvi v. Knox Cty.*, 470 F.3d 422, 427 (1st Cir. 2006) ("[A] grant of summary judgment does not compromise the [constitutional] jury trial right because that right exists only with respect to genuinely disputed issues of material fact."); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) (recognizing that summary judgment does not violate the constitutional right to a jury trial).

Indeed, just as "summary judgment's role is to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually

required," *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794 (1st Cir. 1992), the purpose of anti-SLAPP statutes "is to act as a procedural screen for meritless suits," *Lee v. Pennington*, 2002-0381, p. 7 (La. App. 4 Cir. 10/16/02), 830 So. 2d 1037, 1043, *writ denied*, 2002-2790 (La. 1/24/03), 836 So. 2d 52. For these reasons, courts have recognized that requiring a plaintiff to make a prima facie showing that its claim is legally sufficient in order to defeat a special motion to dismiss does not violate the plaintiff's right to a jury trial. *Id.* (finding that requiring a plaintiff "to show a probability of success of his claim before a jury (i.e., the merits) . . . does not bar anyone with a valid claim from pursuing his case through the judicial process" (quotation marks omitted)); *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 867, 44 Cal. Rptr. 2d 46, 53 (1995) (holding that California's anti-SLAPP statute "does not violate the right to a jury trial" by requiring a plaintiff "whose cause of action is subjected to [a] special motion to strike simply to demonstrate by affidavit a prima facie case").

Indeed, courts in only two states—Washington and Minnesota—have found their respective anti-SLAPP statutes to violate the constitutional right to a jury trial. *See Mobile Diagnostic Imaging, Inc. v. Hooten*, 889 N.W.2d 27, 35 (Minn. Ct. App. 2016); *Davis v. Cox*, 351 P.3d 862, 864 (Wash. 2015), *abrogated on other grounds by Maytown Sand & Gravel, LLC v. Thurston Cty.*, 423 P.3d 223 (Wash. 2018). In both such cases, the analysis turned on the court's finding that the applicable burden

of proof necessary to defeat a motion to dismiss under the statute exceeded that required under a constitutionally permissible summary judgment standard. Specifically, both states' laws included statutory language requiring that the non-moving party make a showing by "***clear and convincing evidence***" of the sufficiency of its claim. *See* Wash. Rev. Code § 4.24.525(4)(b) (emphasis added); Minn. Stat. Ann. § 554.02, subd. 2(3) (emphasis added). Because the Washington and Minnesota courts found the "clear and convincing evidence" standard to present a heightened evidentiary burden as compared to that of a motion to dismiss or motion for summary judgment, they concluded that the statutes violated the non-moving party's right to a jury trial. *See Mobile Diagnostic Imaging*, 889 N.W.2d at 31–33; *Davis*, 351 P.3d at 866–67, 869.

B. 14 M.R.S. § 556 does not violate the constitutional right to a jury trial.

Maine's anti-SLAPP statute stands in stark contrast to the Washington and Minnesota statutes held unconstitutional. Nowhere in the statutory language—or in case law interpreting the statute—is a "clear and convincing evidence" burden of proof required. Rather, a plaintiff opposing a special motion to dismiss under the second step of the *Gaudette* framework (and in what was the final step of the *Nader* framework) need provide only prima facie evidence to support a claim that the defendant's exercise of the right of petition is devoid of any reasonable factual support or arguable basis in law and that the defendant's acts caused actual injury to

the responding party. Far from clear and convincing evidence, prima facie proof is "a low standard that does not depend on the reliability or the credibility of evidence." *Camden Nat'l Bank*, 2016 ME 101, ¶ 11, 143 A.3d 788 (citations and quotation marks omitted). Moreover, "[a]s with all motions to dismiss," when evaluating an opposition to a special motion to dismiss pursuant to 14 M.R.S. § 556, "a court is permitted to infer that the allegations in the nonmoving party's pleading and factual statements in affidavits in its response to a special motion to dismiss are true." *Id*. Thus, as this Court recognized in *Nader*, "a plaintiff able to meet this low standard" and present "some evidence that the defendant's petitioning activity was devoid of factual or legal support and caused actual injury" can avoid dismissal of his or her claim "[e]ven when faced with conflicting evidence from a defendant." 2012 ME 57, ¶ 35, 41 A.3d 551 (citation and quotation marks omitted).

To the extent that a court is required to make pretrial factual determinations that the plaintiff has presented prima facie evidence that the moving party's exercise of its right of petition "was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party," 14 M.R.S. § 556, such determinations mirror those routinely undertaken by courts in ruling on other pretrial, dispositive motions. *See, e.g.*, M.R. Civ. P. 56 (requiring "a motion for summary judgment and opposition thereto" to be "supported by statements of material facts" with judgment to be rendered "if the

pleadings, depositions, answers to interrogatories . . . admissions . . . [and] affidavits . . . show that there is no genuine issue as to any material fact . . . and that any party is entitled to a judgment as a matter of law"); *see also Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016) (holding that, in order to survive a motion to dismiss for failure to state a claim for defamation, a court must find that the complaint "allege[d] facts sufficient to give rise to a reasonable inference" that the disputed statement was false and "made 'with knowledge that it was false or with reckless disregard of whether it was false or not'" (quoting *Sullivan*, 376 U.S. at 280)); *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 599 (9th Cir. 2010) (likening an opposition to a motion to strike under California's anti-SLAPP statute to "a demurrer or motion for summary judgment in reverse . . . [requiring] the plaintiff to demonstrate that he possesses a legally sufficient claim which is substantiated, that is, supported by competent, admissible evidence" (citations and quotation marks omitted)).

Thus, under the first two steps of the *Gaudette* analysis, the court is not required to make pretrial factual determinations which would violate the non-moving party's right to a jury trial. *See, e.g.*, *Lee*, 830 So. 2d at 1043; *Lafayette Morehouse*, 37 Cal. App. 4th at 867.

Moreover, although the evidentiary burden under the third step of the current *Gaudette* framework shifts from a prima facie standard to a preponderance of the

evidence standard, this does not render the statute unconstitutional. For example, both this Court and the U.S. Supreme Court have recognized that in ruling on a motion for summary judgment, "the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 254 (1986); *Tucci v. Guy Gannett Publ'g Co.*, 464 A.2d 161, 166 (Me. 1983) (holding that, in a defamation action where the applicable burden of proof was "convincing clarity," a plaintiff's motion for summary judgment "should be granted only, if upon viewing the evidence most favorably to the plaintiff, there exists no genuine issue of fact from which a jury could reasonably find with 'convincing clarity' that defendants acted with actual malice"). Indeed, in the majority of civil cases, a court's summary judgment inquiry "unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson*, 477 U.S. at 252; *see also In re Estate of Davis*, 2001 ME 106, ¶ 11 n.5, 775 A.2d 1127 (citing favorably to *Anderson* and affirming a trial court's application of a preponderance of the evidence burden of proof in granting an award for summary judgment).

In the alternative, should this Court find that the evidentiary burden under step three of the *Gaudette* framework requires a court to make pretrial factual determinations beyond those made at summary judgment, the appropriate remedy is not to declare the statute unconstitutional—particularly where, as here, the statutory

language is silent with respect to the applicable burden of proof, unlike the statutes struck down in Washington and Minnesota. *See* 14 M.R.S. § 556. Rather, as contemplated by questions 4[2] and 5[3] of the Invitation, the Court may remedy any perceived constitutional infirmity by, for example, eliminating the third step of the *Gaudette* framework, or amending the existing third step in a manner consistent with the standards of M.R. Civ. P. 56.[4]

Because Maine's anti-SLAPP statute does not require a court to make pretrial factual determinations that would violate a non-moving party's right to a jury trial, the Court should uphold the constitutionality of the statute.

III. The Court should not limit the scope of petitioning activity protected under 14 M.R.S. § 556.

Amici further urge the Court not to limit the definition of "petitioning activity" under 14 M.R.S. § 556 to "petitions or statements submitted to legislative, executive or judicial bodies involved in the determination or adjudication of zoning or other land development disputes." Invitation at 2. Contrary to Plaintiff-Appellant's

[2] Should the Court abandon its recent attempt to balance the rights to petition and for access to the courts through the three-step process defined in *Gaudette* and revert to the two-step process announced in *Nader v. Maine Democratic Party*, 2012 ME 57, 41 A.3d 551?

[3] If the three-step *Gaudette* framework is retained, what, if any, modifications to any of the steps should be made?

[4] In keeping with the concerns raised by this Court in *Gaudette*, however, to the extent the Court finds the preponderance of the evidence standard improper, amici urge the Court to employ the latter of the two options. Because the prima facie burden of proof adopted in *Nader* is a low standard, it threatens to undermine the legislative intent of the statute. Providing an option for limited discovery and an evidentiary hearing with respect to those claims for which the plaintiff establishes a prima facie case helps to offset this risk and is consistent with the policies underlying the statute.

arguments, the plain language of the statute demonstrates the Maine legislature's intent to protect a broad range of petitioning activity. Moreover, the statute is already narrower than most with respect to the forms of expressive activity it covers. Limiting the scope further would run counter to the growing national trend in favor of stronger anti-SLAPP protections.

A. Narrowing the definition of "petitioning activity" would be contrary to the plain language of the statute.

Under Maine's anti-SLAPP statute, a party may bring a special motion to dismiss "civil claims, counterclaims or cross claims" that "are based on the moving party's exercise of the moving party's right of petition under the Constitution of the United States or the Constitution of Maine." 14 M.R.S. § 556. A party's "exercise of its right of petition" is defined as (1) "any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding;" (2) "any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding;" (3) "any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding;" (4) "any statement reasonably likely to enlist public participation in an effort to effect such consideration;" or (5) "any other statement falling within constitutional protection of the right to petition government." *Id.*

Plaintiff-Appellant argues that—based on the Court's reference to a quotation from a Massachusetts Supreme Judicial Court decision interpreting Massachusetts' anti-SLAPP law—Maine's anti-SLAPP statute "was intended to address citizen objectives in land development projects." (Blue Br. 18–19.) *See Morse Bros. v. Webster*, 2001 ME 70, ¶ 10, 772 A.2d 842 ("The typical mischief that the [anti-SLAPP] legislation intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects." (quoting *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 940 (Mass. 1998))).

As a preliminary matter, the *Duracraft* quotation cited by Plaintiff-Appellant concerns Massachusetts' anti-SLAPP statute, not Maine's. More importantly, however, the *Morse Bros*. court did not rely on the language from *Duracraft* in its interpretation of the Maine anti-SLAPP statute. Rather, it was referenced in connection with citations from cases around the country as an example of the type of meritless lawsuit that anti-SLAPP statutes were designed to combat. *Morse Bros.*, 2001 ME 70, ¶ 10, 772 A.2d 842. There is nothing in *Morse Bros.* to suggest that the Maine legislature intended Maine's anti-SLAPP statute to apply only to petitioning activity involving land development projects. Indeed, this Court's subsequent decision in *Gaudette* found that the legislature's "apparent objective" in enacting 14 M.R.S. § 556 was to ensure "the prompt dismissal of lawsuits that threaten a defendant's right to petition." 2017 ME 86, ¶ 14, 160 A.3d 1190.

This finding is in keeping with the plain text of 14 M.R.S. § 556, which encompasses a broad range of petitioning activity not limited to zoning or land development disputes. In drafting and enacting the definition of the "exercise of [the] right of petition," the Maine legislature demonstrated its intent to protect defendants from lawsuits that threaten to chill the right to petition the government "under the Constitution of the United States or the Constitution of Maine." 14 M.R.S. § 556. Courts have long held that the text of a statute, if plain on its face, should be controlling. *See, e.g.*, *First Union Nat'l Bank v. Curtis*, 2005 ME 108, ¶ 8, 882 A.2d 796 ("In ascertaining the Legislature's intent we first determine the statute's plain meaning."). And it is plain that the right to petition the government under both the U.S. and Maine Constitutions extends beyond matters involving the redress of zoning or land development grievances.

To the extent that the Maine legislature intended to limit the type of petitioning activity protected under the statute solely to "petitions . . . involved in the determination or adjudication of zoning or other land development disputes," Invitation at 2, it may pass legislation amending the statute to do so. In the absence of any evidence of such intent, however—and in the face of clear statutory language to the contrary—this Court should not interpret the statute so as to narrow its plain language.

B. 14 M.R.S. § 556 is less protective of First Amendment expressive activity than most anti-SLAPP statutes and should not be narrowed further.

Although the definition of "a party's exercise of its right of petition" under 14 M.R.S. § 556 encompasses a broad range of petitioning activities, the overall scope of Maine's anti-SLAPP statute is narrower than that of most anti-SLAPP statutes around the country, as it applies only to those claims arising from an exercise of the right of petition. By contrast, the majority of anti-SLAPP statues—20 out of 31—extend not only to the right of petition, but also to other expressive activities protected by the First Amendment,[5] such as the right of free speech on matters of public concern. *See, e.g.,* Cal. Civ. Proc. Code § 425.16 (applies to lawsuits filed in connection with "any act . . . in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue"); Conn. Gen. Stat. Ann. § 52-196a (applies to lawsuits based on a party's exercise of its right of free speech, right to petition the government, or right of association under the U.S. or Connecticut Constitutions).

[5] *See* Ark. Code Ann. § 16-63-504; Cal. Civ. Proc. Code § 425.16; Colo. Rev. Stat. § 13-20-1101; Conn. Gen. Stat. Ann. § 52-196a; D.C. Code Ann. § 16-5501; Fla. Stat. Ann. § 768.295; Ga. Code Ann. § 9-11-11.1; 735 Ill. Comp. Stat. Ann. 110; Ind. Code Ann. § 34-7-7-5; Kan. Stat. Ann. § 60-5320; La. Code Civ. Proc. Ann. art. 971; Nev. Rev. Stat. Ann. § 41.650; N.Y. Civ. Rights Law § 76-a(1) (McKinney); Okla. Stat. Ann. tit. 12, § 1432; Or. Rev. Stat. Ann. § 31.150; R.I. Gen. Laws Ann. § 9-33-2; Tenn. Code Ann. § 20-17-104; Tex. Civ. Prac. & Rem. Code Ann. §§ 27.003(a), 27.010(b); Vt. Stat. Ann. tit. 12, § 1041; and Va. Code Ann. § 8.01-223.2.

Because the statutory language of Maine's anti-SLAPP statute addresses only those claims arising from the exercise of the right of petition, Mainers already lack the benefits of a robust anti-SLAPP statute—one which provides a mechanism for the prompt dismissal of costly, meritless lawsuits that chill other forms of First Amendment activity, including reporting by members of the news media on matters of public concern. Indeed, in *Gaudette v. Mainely Media, LLC*, this Court held that "[u]nless a newspaper is petitioning on its own behalf, the newspaper is not exercising its own right of petition" for purposes of Maine's anti-SLAPP statute, 2017 ME 87, ¶ 15, 160 A.3d 539. As a result, members of the news media in Maine often lack the level of anti-SLAPP protections afforded to journalists in other jurisdictions—protections that would permit them to report on matters of public interest without fear of being subjected to the expense, harassment, and disruption of retaliatory litigation. *See, e.g.*, *Kieu Hoang v. Phong Minh Tran*, 60 Cal. App. 5th 513, 274 Cal. Rptr. 3d 567 (2021) (ordering trial court to grant journalist's motion to strike under California's anti-SLAPP statute); *Pack v. Truth Publ'g Co.*, 122 N.E.3d 958 (Ind. Ct. App. 2019) (affirming trial court's entry of summary judgment after newspaper moved to dismiss defamation claim pursuant to Indiana's anti-SLAPP law); *Paterno v. Superior Court*, 163 Cal. App. 4th 1342, 78 Cal. Rptr. 3d 244 (2008) (ordering trial court to enter order denying plaintiff's discovery motion against journalist pursuant to California's anti-SLAPP statute).

Should this Court further narrow the scope of Maine's already narrow anti-SLAPP statute to encompass only the exercise of the right of petition in zoning and land development matters, Maine would be a significant outlier.[6] Indeed, the growing national trend is toward *more* expansive anti-SLAPP protections. For example, the state of New York—whose anti-SLAPP statute previously applied only to lawsuits involving parties seeking public permits, zoning changes, or other entitlements from a government body—expanded its statute in 2020 to extend to cases involving "any communication in . . . a public forum in connection with an issue of public interest" or "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest." N.Y. Civ. Rights Law § 76-a(1)(a)(1)–(2) (McKinney); *see also* Vining & Matthews, *supra*.

Similarly, in 2019, Tennessee expanded its anti-SLAPP protections to protect against lawsuits "filed in response to a party's exercise of the right of free speech, right to petition, or right of association." Tenn. Code Ann. § 20-17-104(a). Previously, the statute applied only to statements made to governmental agencies.

[6] Of the 31 currently enacted anti-SLAPP statutes, only three contain restrictions that are arguably similar to the development scope proposed in the Court's Invitation. *See* 27 Pa. Stat. and Cons. Stat. Ann. §§ 7707, 8301–03 (applies to individuals petitioning the government about environmental issues); Del. Code Ann. tit. 10, § 8136 (applies to persons who "applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission"); Neb. Rev. Stat. Ann. § 25-21, 243(1) (same as Delaware). If this Court were to narrow the scope of 14 M.R.S. § 556 as proposed in the Invitation, it would be one of only four states with a limited anti-SLAPP application of this kind.

Tenn. Code Ann. § 4-21-1003(a). Also in 2019, Colorado enacted its first anti-SLAPP statute, becoming the thirty-first jurisdiction to do so. *See* Vining & Matthews, *supra*. The statute provides a mechanism for early dismissal of claims arising from the exercise of a defendant's right of petition or free speech in connection with a public issue. Colo. Rev. Stat. § 13-20-1101(3)(a). The enactment of Colorado's statute follows similarly robust anti-SLAPP laws recently passed in Connecticut and Kansas. *See* Conn. Gen. Stat. Ann. § 52-196a (2019) (adopted in 2017); Kan. Stat. Ann. § 60-5320 (adopted in 2016).

Limiting the scope of Maine's anti-SLAPP statute further would thus not only run counter to the plain language and legislative intent of 14 M.R.S. § 556, but would remove protections available to Maine defendants against all but a small subsection of meritless suits targeting First Amendment expressive activity—protections which are available to defendants in other jurisdictions.

IV. The Court should not adopt a process to allow a non-moving party to avoid dismissal under 14 M.R.S. § 556 by establishing that the suit is not a "SLAPP."

The third question posed by the Court in its Invitation queries whether the Court should "adopt a process similar to that adopted by the Massachusetts Supreme Judicial Court" in *Blanchard*, 75 N.E.3d 21, "to allow the non-moving party to avoid dismissal by establishing that the suit is not a 'SLAPP' suit." Invitation at 2. Amici urge the Court not to adopt such a procedure.

Like Maine's anti-SLAPP statute, Massachusetts' law requires that a special movant "demonstrate that the nonmoving party's claims are solely based on its own petitioning activities." *Blanchard*, 75 N.E.3d at 38. If the moving party can make such a showing, the burden shifts to the non-moving party to demonstrate "that the special movant's petitioning activities . . . lack a reasonable basis in fact or law." *Id.* If the non-moving party can make such a showing, the special motion to dismiss will be denied; if it cannot, the motion will be granted. *See* Mass. Gen. Laws Ann. ch. 231, § 59H. *Blanchard*, however, adds an alternative means of relief for the non-moving party, affording it an opportunity to defeat the special motion even when it has failed to meet the statutory burden established by the Massachusetts legislature. Specifically, under *Blanchard*, the plaintiff may defeat the motion by demonstrating "in the alternative" that the plaintiff's "primary motivating goal in bringing its claim, viewed in its entirety" was not to interfere with the defendant's petition rights. *Blanchard*, 75 N.E.3d at 38.

The Court should not adopt such a procedure. First, the procedure would be difficult to administer because it would require the court to evaluate an array of vague, malleable factors. Under *Blanchard*, "the motion judge, in the exercise of sound discretion, is to assess the totality of the circumstances pertinent to the nonmoving party's asserted primary purpose in bringing its claim." *Id.* at 39. Such circumstances may include whether "the lawsuit was commenced close in time to

the petitioning activity" and whether "the anti-SLAPP motion was filed promptly"; the "centrality of the challenged claim"; "the relative strength of the nonmoving party's claim"; "evidence that the petitioning activity was chilled"; and "whether the damages requested by the nonmoving party . . . burden the moving party's exercise of the right to petition." *Blanchard v. Steward Carney Hosp., Inc.*, 130 N.E.3d 1242, 1250–51 (Mass. 2019).

Second, the *Blanchard* procedure is unsupported by the text of Maine's anti-SLAPP law. 14 M.R.S. § 556 does not identify any such loophole that would permit meritless lawsuits targeting protected petitioning activity to survive an anti-SLAPP motion.

Third, the *Blanchard* framework undermines the legitimate purpose of Maine's anti-SLAPP law by inserting a new *mens rea* element. The time and financial burdens associated with defending against frivolous lawsuits arising from a defendant's petitioning activity chill and deter future speech on matters of significant public interest. For this purpose, Maine's anti-SLAPP statute was enacted to "provide a means for the swift dismissal of such lawsuits early in the litigation as a safeguard on the defendant's First Amendment right to petition." *Gaudette*, 2017 ME 86, ¶ 4, 160 A.3d 1190. Permitting a SLAPP plaintiff to defeat a special motion to dismiss under Maine's anti-SLAPP statute based on the plaintiff's adjudged subjective intent would effectively create an end-run around the

protections of the anti-SLAPP statute. Any plaintiff who could not meet its burden to establish a prima facie case, *id.* ¶ 17, could nevertheless defeat a special motion to dismiss merely by showing, in the alternative, that interfering with the defendant's petition rights was not the "primary motivating goal in bringing its claim." Setting so low a bar for defeating a special motion to dismiss conflicts with the legislature's "demonstrated . . . intention to grant strong protection to petitioning activity, and . . . perhaps stronger protection . . . than [to] the competing right to seek relief from the court." *Id*. ¶ 15. Application of the *Blanchard* framework would be difficult to administer, would conflict with the text of 14 M.R.S. § 556, and would effectively obviate the anti-SLAPP protections afforded to Maine defendants by the state legislature. Therefore, the Court should not adopt the *Blanchard* procedure.

CONCLUSION

For the foregoing reasons, amici respectfully ask that this Court: (1) uphold the constitutionality of 14 M.R.S. § 556; (2) decline to limit the definition of "petitioning activity" to petitions or statements submitted to legislative, executive or judicial bodies involved in the determination or adjudication of zoning or other land development disputes; and (3) decline to adopt a process to allow the non-moving party to avoid dismissal by establishing that the suit is not a SLAPP.

Respectfully submitted,

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APPENDIX A
STATEMENT OF IDENTITY OF AMICI CURIAE

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The International Documentary Association ("IDA") is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, based at the School of Communication 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 Maine Freedom of Information Coalition is a nonprofit that unites the Maine Press Association, the Maine Association of Broadcasters, the New England First Amendment Coalition, the Maine Library Association, the League of Women Voters, the Maine Writers and Publishers Alliance, former public employees, and private individuals in the goal of educating all Mainers, from individual citizens to educators, students, the media, legal professionals, public and business officials, about their rights and responsibilities as citizens of our democracy. The Coalition aims to broaden knowledge and awareness of the First Amendment and state laws aimed at assuring public access to government proceedings and government records.

The Maine Press Association, founded in 1864, is a non-profit statewide association of newspapers. It consists of six daily, thirty-four weekly, and three digital newspapers across Maine. The Association's purposes include improving the conditions of journalism and journalists by promoting and protecting the principles of freedom of speech and of the press and the public's right to know.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA – The Association of Magazine Media, ("MPA") is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA's membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

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 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.

New England First Amendment Coalition is a non-profit organization working in the six New England states to defend, promote and expand public access to government and the work it does. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its

members include lawyers, journalists, historians and academicians, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know in our region. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The News Media Alliance is a nonprofit organization representing the interests of digital, mobile and print news publishers in the United States and Canada. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic

journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

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.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on June 22, 2021, he caused to be sent by email and regular U.S. mail a copy of the above Brief of Amici Curiae Reporters Committee for Freedom of the Press and 14 Media Organizations, by: (1) emailing a pdf copy of said brief to Plaintiff-Appellant, appearing *pro se*, and to counsel for Defendants-Appellees; and (2) by depositing two copies of said brief to them by U.S. mail, first class, at their respective mailing and email addresses at:

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