No. 19-11794-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NIKLESH PAREKH,

Plaintiff-Appellant,

v.

CBS CORPORATION AND
BRIAN CONYBEARE,

Defendant-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida
Case No. 6:18-cv-00466-PGB-TBS

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 33 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANT-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, counsel certify that, in addition to the persons listed in the certificate of interested persons filed by the parties, the following persons (amici curiae, their parent corporations, publicly held corporations that own 10% or more of the stock, and their counsel) have an interest in the outcome of this case.

1. Alden Global Capital
2. ALM Media, LLC
3. The Associated Press
4. Atlantic Media, Inc.
5. BlackRock, Inc. (BLK)
6. Bluestone Financial Ltd.
7. Brechner Center for Freedom of Information
8. Brown, Bruce D.
9. BuzzFeed
10. California Capital Equity, LLC
11. Canfield, Peter C.
12. Capitol News Company
13. Chatham Asset Management, LLC
14. Courthouse News Service

15. The Daily Beast Company LLC
16. The E.W. Scripps Company (SSP)
17. The First Amendment Foundation
18. First Look Media Works, Inc.
19. Florida Press Association
20. Fox Television Stations, LLC
21. Gannett Co., Inc. (GCI)
22. Hearst Corporation
23. IAC/InterActiveCorp (IAC)
24. Inter American Press Association
25. Investigative Reporting Workshop at American University
26. Investigative Studios
27. Jones Day
28. Kincaid, Meredith C.
29. The McClatchy Company (MNI)
30. The Media Institute
31. MediaNews Group Inc.
32. MPA - The Association of Magazine Media
33. Nant Capital LLC
34. National Broadcasting Company

35. National Freedom of Information Coalition

36. National Press Photographers Association

37. NBCUniversal Media, LLC

38. The New York Times Company (NYT)

39. News Media Alliance

40. POLITICO LLC

41. Radio Television Digital News Association

42. Reporters Committee for Freedom of the Press

43. Society of Environmental Journalists

44. Society of Professional Journalists

45. Soon-Shiong, Patrick

46. Syracuse University

47. TIME USA, LLC

48. Townsend, Katie

49. Tribune Publishing Company (TPCO)

50. Tully Center for Free Speech

51. Twenty-First Century Fox, Inc. (TFCF and TFCFA)

52. University of California, Berkeley

53. University of Florida College of Journalism and Communications

54. Vanguard Group, Inc.

55. Vogus, Caitlin

56. Vox Media, LLC

57. Weeks, Lin

Dated: February 3, 2020

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STATEMENT OF IDENTITY OF AMICI CURIAE

The Reporters Committee for Freedom of the Press and 33 other media organizations, through undersigned counsel, respectfully submit this brief as amici curiae in support of Defendant-Appellees. Amici curiae and their members or their affiliates gather and report news, and produce and distribute motion pictures and television news programs, throughout the United States, including in Florida. As representatives of the news media, amici or the news organizations or journalists they represent are frequently the target of strategic lawsuits against public participation ("SLAPPs"). Accordingly, amici have an interest in ensuring that the fee-shifting provisions of anti-SLAPP laws are properly applied in federal court so that newsgathering, reporting, and other First Amendment-protected activities remain shielded from frivolous federal lawsuits.

Amici curiae are the Reporters Committee for Freedom of the Press, ALM Media, LLC, The Associated Press, Atlantic Media, Inc., Brechner Center for Freedom of Information, BuzzFeed, Courthouse News Service, The Daily Beast Company LLC, The E.W. Scripps Company, The First Amendment Foundation, First Look Media Works, Inc., Florida Press Association, Fox Television Stations, LLC, Gannett Co., Inc., Hearst Corporation, Inter American Press Association, Investigative Reporting Workshop at American University, Investigative Studios, The McClatchy Company, The Media Institute, MediaNews Group Inc., MPA -

The Association of Magazine Media, National Freedom of Information Coalition, National Press Photographers Association, The New York Times Company, News Media Alliance, POLITICO LLC, Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, TIME USA, LLC, Tribune Publishing Company, Tully Center for Free Speech, and Vox Media, LLC.

Amici have filed an accompanying motion for leave to file this brief pursuant to 11th Cir. R. 29-1 and Federal Rule of Appellate Procedure 29(a)(3). Appellees consent to the filing of this brief; appellant states that he does not consent.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici declare: (i) no party's counsel authored the brief in whole or in part; (ii) no party or party's counsel contributed money intended to fund preparing or submitting the brief; and (iii) no person, other than amici, their members and their counsel, contributed money intended to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUES ADDRESSED BY AMICI CURIAE

Whether the district court erred in applying Florida's anti-SLAPP statute to award attorney's fees and costs to Defendant-Appellees.

SUMMARY OF THE ARGUMENT

Strategic lawsuits against public participation, or "SLAPPs," are meritless legal claims intended to chill the exercise of First Amendment rights. SLAPP plaintiffs intend that the targets of their mendacious complaints will settle to avoid the time and expense of protracted litigation, retract true statements, or be deterred from speaking or publishing about the litigant going forward. To combat this troubling trend, 30 states and the District of Columbia have adopted so-called "anti-SLAPP" laws, which typically provide a number of different mechanisms to lower the costs and other burdens of defending against meritless lawsuits aimed at chilling speech in connection with a public issue.[1] One such vital mechanism is fee-shifting.

Florida's anti-SLAPP statute, Fla. Stat. § 768.295, provides for the recovery of fees expended in successfully defending against suits brought against a person for exercising the "constitutional right of free speech in connection with a public issue." The statute defines this category of speech expansively to include a vast array of expression, including statements made before a governmental entity or statements made in a "play, movie, television program, radio broadcast,

[1] Austin Vining and Sarah Matthews, *Introduction to Anti-SLAPP Laws*, Reporters Committee for Freedom of the Press, https://perma.cc/9VWJ-4SXC.

audiovisual work, book, magazine article, musical work, news report, or other similar work." Fla. Stat. § 768.295(2)(a). Under the statute,

> [a] person . . . may not file . . . any lawsuit . . . against another person without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue[.]

Id. § 768.295(3). A party facing a SLAPP can "move the court for an order dismissing the action." *Id*. § 768.295(4). And upon a determination of the motion, "[t]he court shall award the prevailing party reasonable attorney fees and costs in connection with a claim that an action was filed in violation of this section." *Id*. § 768.295(4).

That is precisely what happened here. Plaintiff-Appellant sued Defendant-Appellees over a television news report. ECF No. 104 at 2-3. Because the lawsuit was without merit, Defendant-Appellees: (i) moved the court to dismiss the suit for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), *see id.* at 1, 4; and (ii) moved the court to award the reasonable attorney's fees to which they were entitled. *See id.* at 4; Fla. Stat. § 768.295(4). The district court heard Defendant-Appellees' motion and granted dismissal because Plaintiff-Appellant had not stated any claim for which the court could plausibly grant relief. *See* ECF No. 104 at 4, 9-10; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The district court also awarded

Defendant-Appellees, the prevailing party, the reasonable attorney's fees they were entitled to under Florida's anti-SLAPP statute. *See* ECF No. 104 at 10.

The district court was correct to apply the Florida anti-SLAPP statute's fee-shifting provision. The provision is substantive state law, and it does not conflict with the Federal Rules of Civil Procedure.[2] Moreover, if this Court holds that the state-law fee-shifting provision does not apply in federal court, Florida SLAPP plaintiffs will simply file their meritless lawsuits in this circuit's federal trial courts, and chill constitutionally protected speech.

ARGUMENT

I. The Florida anti-SLAPP statute's fee-shifting provision does not conflict with the Federal Rules of Civil Procedure.

Federal courts exercising diversity jurisdiction ask two questions in sequence to determine whether to apply a state law like the one in question. *First*, does a Federal Rule of Civil Procedure "answer[] the question in dispute"? *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). "If it does, it governs—[state] law notwithstanding—unless it exceeds statutory authorization or Congress's rulemaking power." *Id*. "The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to

[2] Hereinafter the "Federal Rules" or "Rules."

control the issue before the Court." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980).

Second, if no Federal Rule answers the question in dispute, would "failure to apply the state law [ ] lead to different outcomes in state and federal court and result in inequitable administration of the laws or forum shopping"? *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1349 (11th Cir. 2018) (quoting *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1358 (11th Cir. 2014) (internal quotation marks omitted)); *see Hanna v. Plumer*, 380 U.S. 460, 467 (1965) ("[I]t would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court."); *see also Erie R. Co. v. Tompkins*, 304 U.S. 64, 74–75 (1938) (equal protection and uniform administration of the law are impossible where rights "vary according to whether enforcement was sought in the state or in the federal court").[3]

These questions are analyzed below. Their answer, in short: Because the fee-shifting provision found in Florida's anti-SLAPP statute is a substantive

[3] These two questions are sometimes referred to as the *Hanna* test; the balancing in the second question is sometimes referred to as an *Erie* analysis. Federal courts sitting in diversity are charged with applying *state substantive*, but *federal procedural* law; state law that answers a question controlled by the Federal Rules or that would not cause forum shopping is said to be procedural. *See generally Harris*, 756 F.3d at 1357.

entitlement to fees under state law, it applies regardless of whether a libel plaintiff files his claims in state or federal court.

A. The Federal Rules do not address whether dismissal of a SLAPP can support an award of attorney's fees.

The question in dispute is whether the dismissal of Appellant's complaint supports a grant of Appellees' motion for fees. The Federal Rules do not answer this question. The Eleventh Circuit has consistently found that district courts sitting in diversity should apply fee-shifting provisions of other state laws. *See, e.g.*, *Trans Coastal Roofing Co. v. David Boland, Inc.*, 309 F.3d 758, 760 (11th Cir. 2002) ("Since Boland's claim for attorneys' fees sounds in state law and reaches us by way of federal diversity jurisdiction, we apply the substantive law of Florida, the forum state."); *see also All Underwriters v. Weisberg*, 222 F.3d 1309, 1311 (11th Cir. 2000) ("This court . . . has consistently held that "this right to attorneys' fees is applicable in federal courts sitting in Florida.") (collecting cases); *McMahan v. Toto*, 256 F.3d 1120, 1132 (11th Cir. 2001); *Blasser Bros. v. N. Pan-Am. Line*, 628 F.2d 376, 386 (5th Cir. 1980)[4] ("This right to attorneys' fees is applicable in federal courts sitting in Florida."); *Schilling v. Belcher*, 582 F.2d 995,

[4] "[D]ecisions of the United States Court of Appeals for the Fifth Circuit (the 'former Fifth' or the 'old Fifth'), as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit." *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

1003 (5th Cir. 1978) ("Because this is a diversity case, the validity of the fee award must be tested under Florida law.").

This is consistent with Supreme Court precedent contrasting the propriety of applying state law for fee-shifting in diversity cases with the impropriety of awarding fees in federal question cases without congressional authorization. In *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), the Court held that, although federal courts are limited in their ability to assess fees in federal question cases, "[a] very different situation is presented when a federal court sits in a diversity case." 421 U.S. at 269, 260 n.31. Specifically:

> "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." . . . Prior to the decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court held that a state statute requiring an award of attorneys' fees should be applied in a case removed from the state courts to the federal courts . . . . The limitations on the awards of attorneys' fees by federal courts deriving from the 1853 Act were found not to bar the award. We see nothing after *Erie* requiring a departure from this result.

Id. at 260 n.31.

The Eleventh Circuit has adhered to this guidance and applied state fee-shifting provisions in diversity cases. *See Horowitch v. Diamond Aircraft Indus., Inc.*, 645 F.3d 1254, 1259 (11th Cir. 2011) ("[A] statute allowing for the recovery of attorney's fees . . . generally applies in federal court so long as it does not

conflict with a valid federal statute or rule. . . . We find no conflict between this fee-shifting provision and any federal law. Accordingly, we conclude that both the [Florida Deceptive and Unfair Trade Practices Act] and its fee-shifting provision are substantive for *Erie* purposes." (citations omitted)); *Shelak v. White Motor Co.*, 636 F.2d 1069, 1072 (5th Cir. 1981) (applying state law to attorney's fees question in diversity jurisdiction case); *United States ex rel. Garrett v. Midwest Const*. Co., 619 F.2d 349, 352–53 (5th Cir. 1980) (same); *Schilling v. Belcher*, 582 F.2d 995, 1003 (5th Cir. 1978).

No Federal Rule controls this inquiry into whether fees can (or must) be awarded to the prevailing party on a Rule 12(b)(6) motion to dismiss claims challenging the exercise of free speech on a matter of public concern. Rule 11 is most arguably relevant to the issue, but rather than answering the question posed in this case, it exists side-by-side with the Florida fee-shifting provision.[5] This

[5] Rule 11 provides for sanctions, including reasonable attorney's fees, when an attorney or party violates the requirement that a pleading, motion, or other paper presented to the court:

> (1) [] is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

Court's recent decision in *Showan v. Pressdee*, 922 F.3d 1211 (11th Cir. 2019) demonstrates why Rule 11 does not control this inquiry. In *Showan*, the Court considered whether a prevailing party in a diversity jurisdiction case should have been able to obtain attorney's fees under a Georgia law that allowed for recovery of fees and other compensatory damages where the opposing party had presented a frivolous claim or defense. *Id.* at 1222–23. The prevailing party argued that the Georgia law should govern, while the opposing party argued that Rule 11 controlled. *Id.* at 1223. The Court held that "Rule 11 answers the question whether *punitive sanctions* should be imposed" for submitting a filing that violates Rule 11's certification standards—"in contrast [the Georgia fee-shifting provision] compensates prevailing parties for litigation costs and other injuries endured because of an opposing party's decision to present meritless or bad-faith claims or defenses." *Id.* at 1224–25. Thus, "[t]he remedy created by [this Georgia fee-shifting provision] is more akin to a state-law claim for attorney's fees," which "are unequivocally substantive for *Erie* purposes." *Id.* at 1225. The same logic

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> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11.

applies here, where the Florida provision awards "reasonable attorney fees and costs in connection with a claim that an action was filed" "without merit and primarily because [the defendant] has exercised the constitutional right of free speech in connection with a public issue." Fla. Stat. § 768.295(3), (4).

B. This Court and its sister circuits have applied state anti-SLAPP fee-shifting provisions in cases sitting in diversity.

This Court has previously affirmed a decision of a district court that awarded fees under California's anti-SLAPP statute. Specifically, the Court wrote:

> Dr. Tobinick also argues that the District Court erred in awarding fees under the California anti-SLAPP statute. He argues, briefly, that the anti-SLAPP statute violates the *Erie* doctrine and various constitutional amendments and rules of civil procedure. However, we already affirmed the District Court's decision on the merits to grant Dr. Novella's special motion to strike under the California anti-SLAPP statute. *See Tobinick*, 848 F.3d at 943–47. And under that statute, "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Cal. Code Civ. Proc. § 425.16(c)(1).

Tobinick v. Novella, 884 F.3d 1110, 1119 (11th Cir. 2018).[6] The Court should do the same for the Florida law now at issue.

[6] As this Court has noted, the Court did not reach the merits of the *Erie* issue in its 2018 decision in *Tobinick*, holding (in an earlier appeal) that plaintiff had raised the issue for the first time on appeal and therefore waived the argument. *See Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1349 (11th Cir. 2018). However, in the earlier appeal, the Court did observe, albeit in dicta, that "[t]he district court acted reasonably in applying California's anti-SLAPP statute to the state law Claims." *Tobinick v. Novella*, 848 F.3d 935, 944 (11th Cir. 2017).

Several other appellate courts have addressed, in varying depth, whether state anti-SLAPP fee-shifting provisions should be applied in federal diversity jurisdiction cases. In *Adelson v. Harris*, the Second Circuit considered the trial court's dismissal and fee award of a defamation action law against the National Jewish Democratic Counsel and several of its members for statements made online and in a press release under Nevada's anti-SLAPP law. 774 F.3d 803, 805 (2d Cir. 2014). The court wrote that applying the state fee-shifting provision was "unproblematic":

> While our Circuit has not previously examined the issue, the specific state anti-SLAPP provisions applied by the district court—immunity from civil liability . . . , and mandatory fee shifting, *id.* § 41.670—seem to us unproblematic. *Cf. Ferri v. Ackerman,* 444 U.S. 193, 198, 100 S.Ct. 402, 62 L.Ed.2d 355 (1979) ("[W]hen state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law."); *Cotton v. Slone,* 4 F.3d 176, 180 (2d Cir.1993) ("Attorney's fees mandated by state statute are available when a federal court sits in diversity."). Each of these rules (1) would apply in state court had suit been filed there; (2) is substantive within the meaning of *Erie,* since it is consequential enough that enforcement in federal proceedings will serve to discourage forum shopping and avoid inequity; and (3) does not squarely conflict with a valid federal rule.

Id. at 809 (citations omitted).

The Ninth Circuit too has repeatedly held that state anti-SLAPP fee shifting provisions should be applied by federal trial courts sitting in diversity, in cases involving both California and Oregon statutes. *See Graham-Sult v. Clainos,* 756

F.3d 724, 751 (9th Cir. 2014) ("State law governs attorney's fees awards based on state fee-shifting laws, like California's anti-SLAPP statute."); *Northon v. Rule*, 637 F.3d 937, 938 (9th Cir. 2011) ("[W]e hold that Oregon state law governs the award of attorneys' fees on appeal in this case. State laws awarding attorneys' fees are generally considered to be substantive laws under the *Erie* doctrine and apply to actions pending in federal district court when the fee award is 'connected to the substance of the case.'" (citation omitted)); *see also United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.,* 190 F.3d 963, 972–73 (9th Cir. 1999) (holding in part that the attorneys' fee provision in California's anti-SLAPP statute protects substantive rights and applies in federal court).

Likewise, the First Circuit in *Godin v. Schencks* held that Maine's anti-SLAPP statute, including its provision that "allows courts to award attorney's fees to prevailing defendants," should be applied by the district courts of that circuit. 629 F.3d 79, 81, 91 (1st Cir. 2010). With respect to the fee-shifting issue, the *Godin* decision was premised in the broader proposition that state fee-shifting provisions are substantive, not procedural.[7] *Id*. at 89 n.15 (stating that the Maine anti-SLAPP law "allows courts to award attorney's fees and costs to a defendant

[7] In *Godin*, the First Circuit also held that the special motion to dismiss provision in Maine anti-SLAPP statute is substantive and applicable in federal court. 629 F.3d at 89. However, the First Circuit's holding that the Maine anti-SLAPP's fee-shifting provision is substantive was independent from its holding regarding the special motion to dismiss provision. *Godin*, 629 F.3d at 89 n.15.

that successfully brings a special motion to dismiss, a statutory element we have previously determined to be substantive") (citations omitted).

C. Neither the holding nor the reasoning of this Court's *Carbone* decision bears on this case.

This Court's decision in *Carbone* addressed a different issue than that presented here. In *Carbone*, CNN moved the district court to strike Carbone's complaint under the Georgia anti-SLAPP law. *Carbone*, 910 F.3d at 1347. The district court denied CNN's motion, and held that the motion-to-strike provision of Georgia's law conflicted with Rules 8, 12, and 56. *Id.* The issue in *Carbone* was limited to the *dismissal mechanism* by which a SLAPP defendant brings its anti-SLAPP claim. *See id.* at 1345 ("We consider whether the motion-to-strike procedure created by the Georgia anti-SLAPP statute applies in a federal court sitting in diversity jurisdiction."). The fee-shifting provision of the Georgia law was not at issue. Because the holding in *Carbone* was limited to a non-analogous provision of a different state's statute, it has little relevance and no precedential value to the case now before this Court.

Beyond *Carbone's* holding, the reasoning the Court undertook to decide that appeal is not relevant here. In *Carbone*, the dismissal mechanism in the Georgia anti-SLAPP law was defined by a burden-shifting that required the plaintiff to show "a probability" that he would prevail on his claim. If he could not establish that probability, the claim would be struck. *Id.* at 1348; O.C.G.A. § 9-11-

11.1(b)(1). The district court held that Georgia's motion-to-strike provision conflicted with the Federal Rules. *See Carbone*, 910 F.3d at 1348.[8] The district court reasoned that prevailing against CNN's anti-SLAPP motion imposed a different burden of proof on Carbone than that he would face in opposing a 12(b)(6) motion to dismiss, because a plaintiff facing a Rule 12(b)(6) motion only need show a claim for which the court could plausibly grant relief. Fed. R. Civ. P. 12(b)(6); *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570. This Court affirmed the district court's holding and reasoned that the Georgia motion-to-strike provision raised an issue already answered by the Federal Rules. The question to be answered in *Carbone* was, as defined by this Court, "[W]hether Carbone's complaint states a claim for relief supported by sufficient evidence to avoid pretrial dismissal." *Carbone*, 910 F.3d at 1350. Because this Court held that question was answered by Rules 8, 12, and 56 in a way that conflicted with the Georgia statute, the Federal Rules governed. *Id.*; *see Shady Grove*, 559 U.S. at 398, 401; *Walker*, 446 U.S. at 749–50.

[8] Notably, CNN had also moved the district court to dismiss Carbone's complaint under Rule 12(b)(6). The district court also denied that motion—meaning that, unlike in this case, the plaintiff in *Carbone* had at least stated a plausible claim for relief in the eyes of the district court. *See Carbone v. Cable News Network, Inc.*, No. 1:16-CV-1720-ODE, 2017 WL 5244176, at *8 (N.D. Ga. Feb. 15, 2017) ("[D]rawing all inferences in favor of Plaintiff, he has met the pleading standard to maintain a claim for defamation under Georgia law.").

In contrast, in the case now before this Court, Defendant-Appellees moved to dismiss Plaintiff-Appellant's claims not under a unique state-law anti-SLAPP procedure, but rather under Rule 12(b)(6). ECF No. 104 at 4.[9] The district court, in considering CBS's motion to dismiss, accepted every factual allegation in Appellant's complaint in the light most favorable to him, resolved all doubts as to the sufficiency of the complaint in his favor, and afforded him additional leeway as a *pro se* plaintiff. *See* ECF No. 104 at 4; *see also Iqbal*, 556 U.S. at 678; *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1483 (11th Cir. 1994); *Tennyson v. ASCAP*, 477 F. App'x 608, 609–10 (11th Cir. 2012). Indeed, Appellant needed to show only that

[9] Amici are aware of the circuit split on a broader question—not implicated by this case—of whether anti-SLAPP statutes, when used for their dismissal provisions, should be applied in federal courts. While the First (*Godin*, 629 F.3d 79 (applying Maine law)), Second (*Adelson*, 774 F.3d 803 (Nevada law), and Ninth Circuits (*e.g. Newsham*, 190 F.3d 963 (California law)) have held that federal courts should apply these state statutes, the D.C. Circuit (*Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015) (declining to apply D.C. law)), Fifth Circuit (*Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019) (Texas law); *but see Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 169 (5th Cir. 2009) (applying Louisiana law)), and Tenth Circuit (*Los Lobos Renewable Power, LLC v. Americulture, Inc*, 885 F.3d 659 (10th Cir. 2018) (New Mexico law)) have each held that at least one state's anti-SLAPP law, when used to dismiss claims, should not be applied by their district courts. However, even if the dismissal provision of the Florida anti-SLAPP law *were* at issue in this case, amici contend that it should apply in federal court. Florida's statute states that a SLAPP defendant "may move the court for an order dismissing the action," Fla. Stat. § 786.295, and thereby functions side-by-side with Federal Rules 8, 12, and 56; it does not impose a different burden on SLAPP plaintiffs than they would otherwise face. The Florida anti-SLAPP fee-shifting provision likewise does not require plaintiffs to demonstrate more than plausibility to carry their cases beyond pleading.

his claims were plausible, but could not do so. The difference in posture of the two cases and the state laws is clear—*Carbone* is neither controlling of, nor particularly analogous to, this case.

II. This Court should affirm the district court's decision because applying state anti-SLAPP fee-shifting provisions uniformly in state and federal court will protect valuable speech and prevent forum shopping.

The Florida legislature adopted its anti-SLAPP statute in service of a valuable goal: "to protect the right in Florida to exercise the rights of free speech in connection with public issues . . . as protected by the First Amendment to the United States Constitution." Fla. Stat. Ann. § 768. Indeed, in creating the statute, the Florida legislature found that:

> Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as unconstitutional, but often not before the defendants are put to great expense . . . .
>
> [T]he threat of *financial liability, litigation costs*, . . . and other personal losses from groundless lawsuits seriously affects . . . individual rights.

Ch. 2000-174, § 1, Laws of Fla. (emphasis added).

The fee-shifting mechanism of anti-SLAPP laws is an important part of protecting those rights both for the news media and the public at large. For example, in *Tobinick*, the plaintiff brought a lawsuit after his use of the drug Enbrel to treat Alzheimer's disease was criticized in two articles written and posted online by the defendant. The Court awarded the defendant $36,186 under California's anti-SLAPP fee-shifting provision after determining that the contested

claims were made in furtherance of free speech (as required by the California statute). *See Tobinick v. Novella*, 207 F. Supp. 3d 1332, 1341 (S.D. Fla. 2016), *aff'd,* 884 F.3d 1110 (11th Cir. 2018); *Tobinick v. Novella*, 108 F. Supp. 3d 1299, 1308 (S.D. Fla. 2015) (applying California anti-SLAPP statute).

A refusal to apply anti-SLAPP fee-shifting provisions in federal court would significantly affect members of the news media and others who regularly engage in public debate and speech on matters of public concern. Those currently protected under anti-SLAPP statutes would be forced to carefully consider the risks of voicing opinions on controversial topics. This would result in a chilling effect upon expression inconsistent with the First Amendment. "Persons who have been outspoken on issues of public importance targeted in such [SLAPP] suits 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 Dept. 1994).

The application of anti-SLAPP statutes has proved important to the news media. For example, in 2010, a consulting firm (ChemRisk) hired by BP to assess the effects of the Deepwater Horizon oil spill on cleanup workers brought a defamation suit against two co-authors of an article that appeared on Huffington Post. *Cardno ChemRisk, LLC v. Foytlin*, 476 Mass. 479, 480 (2017). Among

other things, the article pointed out that ChemRisk had previously been retained by PG&E in the cover-up of drinking water contamination that later became the basis for the movie *Erin Brokovich*. *Id.* at 482. The Supreme Court of Massachusetts held that the trial court had erred in not dismissing the action under the anti-SLAPP statute of that state. *Id.* at 480. Similarly, in *Lee v. Pennington*, 830 So. 2d 1037 (La. App. 4 Cir. 2002), plaintiff Lee sued several television stations and a newspaper for defamation and violations of his right of privacy after the outlets aired and published stories on Lee's arrest on multiple rape charges. *Id.* at 1040. The Court of Appeal of Louisiana held Lee's defamation claim "wholly without merit," and found no evidence to support the privacy claim, as the reporting covered a matter of public record. *Id.* at 1045. The court also held that the trial court had "erred by not awarding Defendants their reasonable attorney fees and costs" under the Louisiana anti-SLAPP statute.

SLAPP plaintiffs will be rewarded for bringing nuisance suits in federal court if district courts do not apply Florida's fee-shifting provision. Failing to award Florida SLAPP targets the fees to which they are substantively entitled would have damaging, unintended consequences. In order to avoid the possibility of shifted fees, a plaintiff could bring its lawsuit in, or transfer it to, federal court. *See Newsham*, 190 F.3d at 973 ("Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims

would have a significant incentive to shop for a federal forum."); *Godin*, 629 F.3d at 92 ("[W]ere [Maine's anti-SLAPP law] not to apply in federal court, the incentives for forum shopping would be strong: electing to bring state-law claims in federal as opposed to state court would allow a plaintiff to . . . circumvent any liability for a defendant's attorney's fees or costs."). The effect of this forum-shopping would be an increased burden on federal courts as they will inevitably see an increase in frivolous litigation specifically designed to chill constitutionally protected speech by imposing time and financial expense on the target of the SLAPP.

In addition to encouraging such forum shopping, a disparity in constitutional safeguards between state and federal courts would contradict our nation's history of robust protections for speech and a free press. *See Roth v. United States*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (An "'untrammeled press [is] a vital source of public information,' . . . and an informed public is the essence of working democracy."). Recognizing that SLAPP targets are entitled to their reasonable

attorney's fees under Florida law will ensure libel plaintiffs do not choose a federal court instead of a state one merely to avoid the Florida anti-SLAPP statute.

CONCLUSION

For the foregoing reasons, amici urge the Court to affirm the judgment of the district court awarding Appellees their fees under Fla. Stat. § 768.295.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations contained in Federal Rule of Appellate Procedure 29(a)(5) because, excluding the portions exempted by Rule 32(f), the brief contains 4,822 words, as determined by the Microsoft Word program used to prepare it.

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Dated: February 3, 2020

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CERTIFICATE OF SERVICE

I certify that on February 3, 2020, I electronically filed the foregoing brief with the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. Defendant-Appellees in this case are registered CM/ECF users, and service upon them will be accomplished by the appellate CM/ECF system. I further certify that on February 3, 2020, a true and correct copy of the foregoing has been served via U.S. mail and also provided via electronic mail to:

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