STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NUMBER CUM-20-63

JOHN THURLOW,
PLAINTIFF/APPELLANT

v.

ZAKIA CORIATY NELSON and ROSS NELSON,
DEFENDANTS/APPELLEES

ON APPEAL FROM THE CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MAINE FOUNDATION AND PROFESSOR JEFFREY THALER IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI

The American Civil Liberties Union of Maine Foundation ("ACLU of Maine") is a nonprofit, nonpartisan organization founded in 1968 to protect and advance the civil rights and civil liberties of all Mainers. The ACLU of Maine strives to ensure that rights guaranteed and secured by the Maine and United States Constitutions, including the right to petition, are protected.

Professor Jeffrey Thaler is a Professor of Practice at the University of Maine School of Law. He was a participant in the original national study that developed the concept of Anti-SLAPP (Strategic Litigation Against Public Participation) motions; was the co-author of Maine's original Anti-SLAPP statute, 14 M.R.S. § 556 (1995); was legal counsel in several early Maine cases involving SLAPP issues; was co-author of a 2008 Maine Bar Journal article on Anti-SLAPP litigation;[1] and regularly teaches law students about Section 556 and its caselaw.

Professor Thaler and ACLU of Maine (jointly, "amici") believe that their experience and perspective will assist the Court in resolving the disputed issues and the five questions promulgated by the Court on April 30, 2021 for briefing.

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[1] *See John G. Osborn & Jeffrey A. Thaler*, Maine's Anti–SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning, 23 Me. Bar J. 32, 37 (2008).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici adopt the Statement of Facts and Procedural History as set forth in the Brief of Defendant-Appellees.

STATEMENT OF THE ISSUES

1. Should 14 M.R.S. § 556 be declared unconstitutional because there is no effective way to preserve the non-moving party's right to a jury trial given that a special motion to dismiss may be granted based on pretrial factual determinations made by the court?

   Suggested Answer 1: No.

2. Should the Court 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, *see, e.g. Morse Bros. Inc. v. Webster*, 2001 ME 70, ¶ 10, 772 A.2d 842?

   Suggested Answer 2: No.

3. Should the Court adopt a process similar to that adopted by the Massachusetts Supreme Judicial Court in *Blanchard v. Steward Carney Hospital*, 75 N.E. 3d 21 (Mass 2017) to allow the non-moving party to avoid dismissal by establishing that the suit is not a SLAPP suit?

   Suggested Answer 3: No.

4. 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 v. Davis*, 2017 ME 86, 160 A.3d 1190, and revert to the two-step process announced in *Nader v. Maine Democratic Party*, 2012 ME 57, 41 A.3d 551?

   Suggested Answer 4: Yes.

SUMMARY OF THE ARGUMENT

The Defendant-Appellees here, Zakia Coriaty Nelson and Ross Nelson (the "Nelsons"), are precisely the sort of "petitioners" that the Maine Anti-SLAPP statute, 14 M.R.S. § 556, was designed to protect. The Nelsons believed that the Plaintiff-Appellant, John Thurlow ("Thurlow")—the former principal of their son's school—did not take sufficient action to protect their son from future bullying, as is required by Maine law. *See* 20-A M.R.S. §6554 (prohibiting bullying on school grounds and assigning responsibility to school administrators to develop and enforce policies protecting students against bullying). Acting on this belief, the Nelsons wrote a letter to the Chair of the Scarborough Education Board, Kelly Murphy, in an attempt to get adequate support for their son. Thurlow has sued the Nelsons solely for that protected petitioning activity.

Maine's Anti-SLAPP statute is constitutional and is necessary to protect those who exercise of their First Amendment right to petition, as the Nelsons did here. In order to protect this right, the statute imposes a low burden on plaintiffs that does not

violate their right to a jury trial, and which enables the court to dismiss suits that are in conflict with the First Amendment quickly. However, while the statute itself is constitutional as drafted, the process adopted by the Law Court in *Gaudette v. Davis*, 2017 ME 86, 160 A.3d 1190, has led to confusion, and it should be rescinded.

ARGUMENT

A. Background History of Maine's Anti-SLAPP Statute.

In 1982, a large Maine power company sued a citizens group and its public relations firm, in Kennebec County Superior Court, for statements made during an ongoing statewide referendum campaign to be voted on in the November 1982 general election. *See Maine Yankee Atomic Power Co. v. Maine Nuclear Referendum Committee*, No. CV-82-487 (Me. Super. Ct. January 18, 1983) (summary judgment for Defendants,). The lawsuit was filed a month before the vote, claiming defamation and seeking damages and other relief. Defendants moved for summary judgment, which was granted on January 18, 1983. *See id.*, No. CV-82-487, (Order granting summary judgment for defendants). Additionally, the power company was ordered to pay attorneys' fees incurred by the defendants. Amici Thaler was the attorney for the defendants, but at that time had not heard of the concept of SLAPP litigation.

Two years later, University of Denver Law School Professor George Pring and University of Denver Sociology Professor Penelope Canan created the Political Litigation Project, sponsored by the National Science Foundation. They initiated the

first nationwide study of SLAPP lawsuits. Then, in 1985 or 1986, Professor Pring called Thaler in Maine to obtain information concerning the 1982 litigation. This is when Thaler first learned of the study of SLAPPs.

In 1989, Professor Pring and Professor Canan each presented and published articles on the legal and sociological issues involved with SLAPPs, as well as presented analysis on the data collected by their project about 228 SLAPP suits around the United States. *See* Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Env.L.Rev. 3 (1989); Canan, *The SLAPP From A Sociological Perspective*, 7 Pace Env.L.Rev. 23 (1989). Amici will discuss these studies in more detail below.

In the fall of 1994, an encounter between Thaler and then-State Representative Fred Richardson of Portland led to a discussion of other instances of civil suits chilling protected activities. Rep. Richardson mentioned that some of his constituents, who had been questioning a possible land development in Portland, had been sued by the developer. Thaler mentioned his familiarity with the Anti-SLAPP concept, and Richardson expressed interest in possibly bringing that to Maine. Thaler then helped Rep. Richardson draft H.P. 576, "An Act Protecting a Citizen's Right of Petition under the Constitution." LD 781 (117th Maine Legis. 1995). The bill was referred to the Judiciary Committee; Richardson was the sponsor.

A hearing was held on March 29, 1995 by the Judiciary Committee, whose Chairs were Senator S. Peter Mills and Representative Sharon Anglin Treat, both experienced attorneys. Rep. Richardson testified in support of the bill; nobody

testified opposition. The 1989 Pring article was provided to the Committee. The only amendment to the bill was changing "shall" to "may," in the fifth paragraph, as to a court's award of costs and reasonable attorney's fees to a successful moving party for SLAPP dismissal. On April 10 and 13, 1995 the bill was unanimously voted ought to pass as amended by the Committee. It was reported that way to the House on April 24, 1995. It was approved by the full Legislature and signed by the Governor into law.

In January of the following year, Professors Pring and Canan published their book *SLAPPs: Getting Sued For Speaking Out* (Temple University Press). At the book's beginning, the authors wrote, quoting from *New York Times v Sullivan*, 376 U.S. 254, 270 (1964): "As a nation, we have prided ourselves on having, in the U.S. Supreme Court's words, 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" Pring and Canan, *SLAPPs: Getting Sued For Speaking Out* (Temple Univ. Press 1996) 2-3. Then, in May 1998, a detailed interview of Pring about SLAPP litigation trends was published by the Multinational Monitor. *SLAPPing Back for Democracy: An Interview with George Pring,* 19 Multinational Monitor 3 (May 1998), (https://www.multinationalmonitor.org/mm1998/98may/interview.html).

Next, in 1999, Thaler represented a Defendant who was the Executive Director of a national trade association, and who had presented testimony during a hearing before the Maine Board of Environmental Protection. The claims against her arose from that testimony and related statements to the press about a fuel additive to

gasoline. A SLAPP Motion to Dismiss was successfully filed on her behalf. The Cumberland County Superior Court, in a 17-page opinion, found that the defendant and her statements fell within the scope of the statute, and that plaintiffs had failed to demonstrate actual injury. *See Millett, et. al. v. Atlantic Richfield*, No. CV-98-555 (Maine Super. Ct. Aug. 30, 1999). That decision was not appealed to the Law Court.

Five years later, the litigation of *Maietta Construction, Inc. et al v. Theodore Wainwright and David Lourie*, No. CV-02-594 (Maine Super. Ct. Aug. 13, 2003), arose after Wainwright had retained Attorney David Lourie over concerns that Maietta was violating the conditions of an agreement Wainwright had made with the City of South Portland involving land that Wainwright had sold to the City. Lourie was asked by his client to investigate the situation, to write to the Mayor and members of the City Administration regarding his client's concerns, and to request an investigation. It was also alleged that Lourie had discussed his client's concerns with some newspaper reporters. Plaintiffs sued both Lourie and his client for a variety of tort claims, seeking compensatory and punitive damages. Attorney Lourie was represented by Thaler, who filed a Special Motion to Dismiss. The Superior Court found that, based upon evidence in the record, "there was arguably a legitimate basis for Wainwright to bring his concerns to the attention of the City of South Portland and to the press. As a result, Defendant Lourie had a valid reason to help his client express his concerns to a government body as well as to the press." *See id.* at 5. As to attorney fees, the Court awarded them to Lourie, finding that because Lourie was sued in his capacity as

attorney/agent for his client, it appeared that "Plaintiffs were attempting to intimidate or silence an attorney who was representing a client with potentially legitimate concerns". *See id.* at 8.

Plaintiffs did not appeal the Superior Courts rulings as to Lourie, but did appeal as to Wainwright; Wainwright cross-appealed as to the denial of an award of attorney's fees to him. The Law Court unanimously found that the landowner's writing letters to city council, mayor, and newspapers was petitioning activity protected by anti-SLAPP statute, and that the company had failed to establish that former landowner had no legitimate basis for petitioning city to enforce deed restrictions. However, the Court split 4-3 in ruling that the lower court had acted within its discretion in denying attorney's fees to Wainwright while granting such fees to Lourie. *See Maietta Construction, Inc. v Wainwright*, 2004 ME 53, 847 A.2d 1169 (2004).

Finally, in 2008 Thaler and a colleague published in the Maine Bar Journal an article discussing Maine's Anti-SLAPP law and surveying the jurisprudence around it. *See* John G. Osborn & Jeffrey A. Thaler, Maine's Anti–SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning, 23 Me. Bar J. 32 (2008). In the article, the authors first wrote:

> An open, democratic society is noisy—deliberately and necessarily so. Our country's founders and the overwhelming majority of subsequent leaders have agreed that a little chaos is a small price to pay in order to maintain a flourishing marketplace of ideas and to protect the exercise of our constitutional rights to free speech and to

> petition government for redress of our grievances—true bulwarks of our democratic society.

Id. at 32.

After discussing the trend of SLAPP lawsuits, the authors went on to explain how the Anti-SLAPP protections had come to Maine:

> In the late 1980s, state legislatures, in response to rising concern over the impact of SLAPPs on First Amendment rights, began enacting anti-SLAPP legislation aimed at protecting those rights against the chilling effect that such lawsuits engendered. In 1995, the Maine legislature joined the movement, enacting 14 M.R.S.A. §556, entitled An Act Protecting a Citizen's Right of Petition under the Constitution. Although Section 556 remained largely dormant in its early years, activity under that statute has recently increased dramatically. This article will discuss the statute itself, its judicial development, and the various legal and policy issues that remain open under the current state of the law."

Id. at 36.

Since 2008, this Court has continued to address Section 556 issues, and it is the intent of Amici in this brief to help reconcile the caselaw with the historic purpose and underpinnings of the statute.

B. 14 M.R.S. § 556 is constitutional and does not infringe on the non-moving party's right to a jury trial.

Maine's Anti-SLAPP Statute, 14 M.R.S. § 556, is constitutional because the imposition of a burden on the non-moving party to "show[] that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any

arguable basis in law" is not an effective denial of the right to a jury trial. *See* 14 M.R.S. §556. The law is properly understood as a procedural mechanism "designed to weed out meritless claims or lawsuits and prevent stale claims from being brought." *See Nader v. Maine Democratic Party*, 2012 ME 57, ¶ 41, 41 A.3d 551, 564 ("Nader I"), *abrogated by Gaudette*, 2017 ME 86, ¶ 41, 160 A.3d 1190 (Silver and Jabar, J.J., concurring). The Anti-SLAPP statute is a valid and necessary tool to protect the right of citizens to petition under the state and federal constitutions from meritless lawsuits that chill protected speech and petitioning activity. Freedom of speech and the right to petition the government are enshrined in the First Amendment to the United States Constitution. SLAPP suits threaten public discourse and discourage free speech by targeting those who speak out on matters of public importance.

The U.S. Supreme Court has described the First Amendment right to petition—"to freely inform the government" of our wishes—as one of "the most precious of the liberties safeguarded by the Bill of Rights." *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961); *see also United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). In the Court's words:

> [T]he whole concept of representation depends upon the ability of the people to make their wishes known to their representative. To hold that government retains the power to act in this representative capacity and yet hold, at the same time, that people cannot freely inform the government of their wishes would ... be particularly unjustified."

Noerr, 365 U.S. at 137. The Court went on to note that "[t]he very idea of government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.*

In order to safeguard the fundamental right to petition, the U.S. Supreme Court has developed an immunity doctrine that applies to political and legal petitioning activity, commonly referred to as the Noerr-Pennington Doctrine. *See id.*; *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). This immunity "protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes...," *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 402 (2011) (Scalia, J. concurring in the judgement in part and dissenting in part), and it includes petitioning to all types of government entities —legislatures, administrative agencies, and courts. While this doctrine was originally developed in the anti-trust context, courts have extended the immunity to other areas, including immunity from state tort actions.

One of the most important expansions came in *NAACP v. Claiborne Hardware*, in which the U.S. Supreme Court expanded the application of Noerr-Pennington doctrine to petitioning activity concerning civil rights, immunizing the organizers of a boycott from liability stemming from activities that resulted from their protected petitioning activity. *See e.g. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (First Amendment protected against a civil conspiracy claim by white merchants

whose businesses were being boycotted); *see also Rownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155 (3d Cir.1988) (defendants were immune from conspiracy liability for damages resulting from inducing official action to decertify a nursing home).

In furtherance of the concerns recognized by the Supreme Court in the post-*Claiborne Hardware* cases, and recognizing SLAPPs as both an abuse of the judicial system and a threat to petitioning activity, a majority of states has enacted anti-SLAPP legislation; as of January 2021, approximately 30 jurisdictions in the United States have anti-SLAPP measures. *See* Austin Vining and Sarah Matthews, Introduction to Anti-SLAPP laws, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (https://www.rcfp.org/introduction-anti-slapp-guide). In general, these statutes permit the defendants in SLAPP suits to obtain pre-discovery dismissal of the case against them if it meets the statute's definition of a SLAPP, together with attorney's fees from the plaintiff. The Maine statute follows this model. Several of these Anti-SLAPP statutes have faced, and survived, constitutional challenges on this same ground, with courts finding that the statutes do not unconstitutionally infringe on a non-moving party's right to a jury trial.

For example, the Rhode Island Anti-SLAPP statute, Rhode Island General Law § 9-33-2, essentially codifies the Supreme Court's language in *Noerr* and *Pennington*. R.I. Gen. Laws § 9-33-2. The statute requires the non-moving party to demonstrate that the moving party's petitioning activity was "(1) objectively baseless in the sense that

no reasonable person exercising the right of speech or petition could realistically expect success in procuring such government action, result, or outcome," and that it was "(2) subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects." *Id.* In 1996, the Supreme Court of Rhode Island upheld the law against a constitutional challenge. *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996). The court determined that this burden on the non-moving party did not violate their constitutional right to trial by jury. *See id.* at 60.

Similarly, the Supreme Court of Nevada recently held that Nevada's Anti-SLAPP law was constitutional and that it did not violated the constitutional right to a jury trial. *See Taylor v. Colon*, 136 Nev. Adv. Op. 50, 482 P.3d 1212 (2020). Under the Nevada statute, the moving party must first show by a preponderance of the evidence that the claim is based upon a "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." Nev. Rev. Stat. Ann. § 41.660. The burden then shifts to the non-moving party to demonstrate "with prima facie evidence a probability of prevailing on the claim." *Id.* The court determined that this procedure does not require courts to make findings of fact, does "not interfere with the jury's ability to make findings of fact as to a plaintiff's underlying claim . . ." and merely "function[s] as a procedural mechanism, much like summary judgment, that allows the court to summarily dismiss claims with no reasonable possibility of success." *Taylor v. Colon*, 136 Nev. Adv. Op. 50, 482 P.3d 1212, 1216 (2020). In applying the Anti-SLAPP law, "[t]he court does

not make any findings of fact" but instead decides "whether a plaintiff's underlying claim is legally sufficient." *Id.* The right to a jury trial is therefore, still available, because a plaintiff can proceed to a jury trial upon making the requisite showing under the second prong of the statute, and a "plaintiff who has failed to meet this burden would not have been entitled to a jury trial, even absent an anti-SLAPP motion to dismiss." *See id.*

Also, California courts have upheld the state's anti-SLAPP law requiring the non-moving party to "establish[] that there is a probability that [they] will prevail on the claim." *Lafayette Morehouse, Inc. v. Chron. Publ'g Co.*, 44 Cal. Rptr. 2d 46 (Cal. App. 4th 1995) *rehearing denied*, *review denied*, *cert. denied* 519 U.S. 809; *see also* Cal. Civ. Proc. Code § 425.16. California's Anti-SLAPP statute only requires the trial court to determine whether the plaintiff stated and substantiated a legally sufficient claim. *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal.4th 1106, 81 Cal.Rptr.2d 471, 969 P.2d 564, 574-75 (Cal. 1999). The court California held that its law, properly applied, did not violate the non-moving party's right to a jury trial because it merely requires them to support the existence of a prima facie case by affidavit in order to avoid dismissal. *See id.*

Maine's Anti-SLAPP statute's requirement that the non-moving party demonstrate 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, is no more

onerous than the burdens imposed on non-moving parties under the constitutionally-valid Nevada, California, and Rhode Island laws. The showing required under 14 M.R.S. § 556 is also a prima facie case, which is a "low standard that does not depend on the reliability or credibility of evidence." *Camden Nat. Bank v. Weintraub,* 143 A.3d 788, 793 (Me. 2016) (*quoting* Nader I, 41 A.3d 551, 562 (Me. 2012)) It requires "only some evidence on every element of proof necessary to obtain the desired remedy." *Id.* Non-moving parties are not denied access to a jury trial because they simply need to meet the low standard required by the statute to proceed. This standard does not unconstitutionally infringe on the right to a jury trial; instead, it is a procedural mechanism that diminishes meritless cases and protects the right of Maine's citizens to petition the government.

The Seventh Amendment right to a jury trial does not guarantee that every litigant will get an opportunity to present their case before a jury. There are numerous procedural barriers that any litigant must clear before they reach a jury, and in fact, very few cases are ever presented to a jury. *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 Yale L.J. 522 (2012) (reviewing the lengthy and distinguished history of the jury trial in light of its rapid disappearance). Maine's Anti-SLAPP law does not create a standard any more burdensome than summary judgement or the heightened pleading standards required for certain types of cases. *See Bean v. Cummings*, 2008 ME 18, ¶ 12, 939 A.2d 676, 680 (recognizing a heightened pleading standard in civil perjury cases); *Bell Atlantic Corporation v. Twombly*, 550 U.S.

544 (2007) (requiring plaintiffs to state factual allegations with greater particularity when cases present a high risk of "abusive litigation").

Most importantly for the Court's analysis here, Maine's Anti-SLAPP law does not permit the trial court to weigh evidence. It provides for "gatekeeping judicial determinations" that "prevent submission of claims to a jury's judgment without violating the Seventh Amendment." *See Tellabs, Inc. v. Makor Issues & Rights, LTD*, 551 U.S. 308, 327 n.8, 329 (2007) (holding that statute requiring plaintiff in securities litigation to "demonstrate that it is more likely than not that the defendant acted with scienter," and judge to weigh competing inferences from alleged facts in adjudicating motion to dismiss, does not violate Seventh Amendment). The right to a trial only exists with respect to disputed issues of fact, and therefore the statute, which only requires a prima facie showing by the non-moving party to continue, does not violate this constitutional right. *See, e.g., Fid. & Deposit Co. of Md. v. United States*, 187 U.S. 315, 319-20 (1902) (grant of summary judgment does not violate the Seventh Amendment).

According to the long-recognized principle of constitutional scrutiny, "if a serious doubt of constitutionality is raised, it is a cardinal principle that [a] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Consistent with this maxim, the statutory language of 14 M.R.S. § 556 can be construed in manner that allows the court to avoid a finding of constitutionality. *See Hometown Properties, Inc.*

v. Fleming, 680 A.2d 56 (R.I. 1996) ("In keeping with this long-recognized principle of constitutional scrutiny, we shall, in construing statutory language, adopt that interpretation that allows us to avoid a finding of unconstitutionality. We are of the opinion that such a construction not only is possible but is also warranted in this instance." (citation omitted)). Amici urge this court to uphold the constitutionality of 14 M.R.S. § 556.

C. <u>This Court should not 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.</u>

There is no basis in the origins or purposes of Section 556, or the Constitution, for the possible narrowing of protection to only zoning or other land development disputes. First, the 1989 Pring study that was in the 1995 Judiciary Committee's record established the following:

> A. To qualify as a SLAPP, the case had to be:
>
> **1.** a civil complaint or counterclaim (for monetary damages and/or injunction),
> **2.** filed against non-governmental individuals and/or groups,
> **3.** because of their communications to a government body, official, or the electorate,
> **4.** on an issue of some public interest or concern."

Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Env.L.Rev. 3, 7-8 (1989).

Pring documented a wide range of SLAPP suits touching on various areas of important public concern: suits by police, teachers, and other public officials and employees against their critics; suits by landlords against tenants reporting problems to city health authorities; suits by businesses against consumers reporting problems with their products or services; and suits by dumps, toxic waste incinerators, bars, and other less than- attractive enterprises against their homeowner groups. *See id.* at 13-15.

In contrast, nothing in the legislative record supports the notion that the definition of petitioning activity under 14 M.R.S. § 556 is or should be limited to petitions or statements submitted to legislative, executive or judicial bodies involved in the determination or adjudication of zoning or other land development disputes.

Moreover, Professor Canan—the co-founder with Professor Pring of the Political Litigation Project in 1984—published a companion article to the 1989 Pring article, in the Pace Environmental Law Review, which contained data from their initial national study. Canan, *The SLAPP From A Sociological Perspective*, 7 Pace Envtl. Law Rev. 23 (1989). Those data further demonstrate why the answer to the Court's second question must be no.

For her study, Professor Canan reviewed the actions of 1,873 parties—1,464 individuals and 409 groups—who had spoken out on matters of public concern to a government agency or official; most often, these communications were directed to executive branch officials at a local level. *See id.* at 25. These individuals and groups either provided information that challenged the viability of a proposed new economic

venture that required some sort of government approval (such as a license or permit), or they commented on the performance of a public servant. *See id.* As a general matter, Professor Canan found that the critiques fit into at least one of four categories: 1) environmental concerns (e.g. threats to wilderness, natural areas, or endangered species); 2) neighborhood concerns as part of a "not in my backyard stance" in siting controversies over dumps, toxic waste disposals, mines, quarries, half-way houses for the mentally disturbed, restaurants, or bars; 3) as disgruntled consumers or tenants; or 4) as opponents of urban or suburban development. *See id.* Professor Canan noted that the public servant cases typically involved criticism of police officers, public school teachers, city councilmembers, or other government officials, "who turned out not to appreciate citizens having an opinion about their performance." *Id.*

Professor Canan further documented that the most frequent suit filers were real-estate developers, property owners, police officers, alleged polluters, business owners, and state and local government agencies. *See id.* at 26. The 1,873 parties surveyed by Professor Canan were sued, in turn, by 654 other parties (423 individuals and 231 groups), "whose self-declared primary interest was economic, occupation, or industrial." *Id.* This interest could be further delineated into four basic concerns: 1) retaliation against the successful opposition to a project or programs; 2) chilling future opposition to projects or programs; 3) intimidation of opponents to a project or

program during the course of debate; 4) using the courts to impose an economic cost on opposition to a program or project. *See id.* at 30.

The average amount sought in damages in such cases was $9 million, and the most common cause of action was defamation. *See id.* at 26. Most of the time, the defendants ultimately prevailed after an average of 36 months of litigation and the involvement of multiple levels of courts. *See id.* And, the chances of a defendant prevailing substantially increased (from 67% to 82%) if they raised a "petition clause" as a defense. *See id.*

As Professor Pring pointed out in a 1998 interview, the "typical SLAPP suit" looks like either a real-estate suit involving property owners and landowners; a suit against public interest groups, such as environmentalists, consumer advocates, and women's rights groups; or—what Professor Pring called "the ultimate SLAPP"—suits where government officials and employees "turn on the taxpayers and citizens for whom they work." *SLAPPING Back for Democracy: An Interview with George Pring*,"19 Multinational Monitor Number 3 (May 1998), (https://www.multinationalmonitor.org/mm1998/98may/interview.html).

A wide variety of circumstances are addressed by Anti-SLAPP motions, and neither the legislative record nor the data support limiting the applicability of the law to a narrow subset of petitioning activity. First Amendment doctrine does not recognize any such distinction, and the chilling impact of SLAPP suits on all

petitioners is equally real. Therefore, this Court should answer its second question in the negative.

D. The Court should not adopt a process similar to that adopted by the Massachusetts Supreme Judicial Court in *Blanchard v. Steward Carney Hospital* to allow the non-moving party to avoid dismissal by establishing that the suit is not a SLAPP suit.

As discussed in Section E, *infra*, amici believe that the Court should abandon the three-step process defined in *Gaudette,* 2017 ME 86, 160 A.3d 1190 and revert to the two-step process announced in *Nader I*. This will substantially accomplish the same goal that Massachusetts sought to achieve in *Blanchard v. Steward Carney Hospital*. Because Maine's Anti-SLAPP statute is constitutional as drafted, the Court should not rewrite the statute to improve upon the legislature's work.

E. This Court should abandon the three-step process defined in *Gaudette v. Davis*, and revert to the two-step process announced in *Nader v. Maine Democratic Party*.

The three-step process adopted by the Court in *Gaudette* should be abandoned, and instead this Court should revert to the two-step process defined in *Nader I*. While the language of the Anti-SLAPP statute is constitutional, the process adopted in *Gaudette*, that increased the burden on plaintiffs, has generated much confusion and should be reconsidered. In *Gaudette*, the court discussed at length the need to balance the First Amendment right to petition against the right to a jury trial. *See Gaudette*, 2017 ME 86, ¶6, 160 A.3d 1190. While Anti-SLAPP laws are a critical mechanism for

protecting the right to petition, Maine's statute needs to be interpreted and applied in a way that does not bar litigants with meritorious lawsuits from accessing courts.

As discussed above, the language of 14 M.R.S. § 556 itself does not have this effect, and in fact has no bearing on the non-moving party's right to a jury trial. The same is true Court's two-step process under *Nader I*. However, as Justice Jabar observed in his dissent in *Gaudette*, the Court's current process imposes a higher burden on the defendant and contravenes the purpose of the Anti-SLAPP statute, to "expedit[iously] consider[] . . . a plaintiff's allegations and minimize litigation costs associated with meritless suits," *See id.,* ¶ *27* (Jabar, J. dissenting) (citing *Bradbury v. City of Eastport*, 2013 ME 72, ¶ 18, 72 A.3d 512), by adding limited discovery and evidentiary hearings to the process. In sum, the added process under *Gaudette*, which the statute does not explicitly call for, has the potential to unconstitutionally infringe upon the plaintiff's right to a jury trial.

In contrast, the process announced in *Nader I*, which hews more closely to the language in the statute, permits the moving party to file a special motion to dismiss and then establish that the Anti-SLAPP statute applies because it is their petitioning activity at issue. *See Nader v. Maine Dem. Party* ("*Nader II*"), 2013 ME 51, ¶ 12 n.9, 66 A.3d 571; *Morse Bros.*, 2001 ME 70, ¶ 19, 772 A.2d 842 (the defendant must establish that "the claims against [him] are based on [his] exercise of the right to petition pursuant to the federal or state constitutions."). This burden may be satisfied through pleadings and affidavits. If the moving party fails to meet this burden, the court must

deny the special motion to dismiss and need not review any opposition by the non-moving party. *Nader I*, 2012 ME 57, ¶ 15, 41 A.3d 551.

In *Gaudette*, the Court retained the process from *Nader I* but added an additional step. Instead of automatically denying the special motion to dismiss if the non-moving party meets their prima facie burden, the court established an "additional procedural component whereby, on motion by either party, (1) the court permits the parties to undertake a brief period of limited discovery, . . . and (2) at the conclusion of that limited discovery period, the court conducts an evidentiary hearing." *Gaudette*, 2017 ME 86, ¶18, 160 A.3d 1190. In this step, the non-moving party must establish by a preponderance of the evidence that the "defendant's petitioning activity was devoid of factual support or an arguable legal basis and that the petitioning activity caused the plaintiff actual injury" for "each of the elements for opposing the dismissal on anti-SLAPP grounds for which he successfully made out his prima facie case." *Id.* If neither party requests discovery or an evidentiary hearing during this step, the court still determines whether the non-moving party met this burden by a preponderance of the evidence by only considering the parties' previous submissions.

Gaudette imposes a burden on the non-moving party that is higher than was contemplated by or is called for under 14 M.R.S. § 556, and higher than the burden imposed under other Anti-SLAPP laws around the country that have survived constitutional challenges. Determining whether a party has made out a *prima facie* case is a question of law, which can be appropriately determined by a judge at any stage in

a proceeding and which does not implicate the right to a jury trial. But, once the court starts down the road of evaluated facts themselves, the proceeding begins to look more like the sort that implicates the right to a jury trial. As Justice Jabar noted in his dissent in *Gaudette*, asking the the trial court to "hold an evidentiary hearing and to weigh evidence" is not part of the scheme erected by the legislature, and it puts the trial court on constitutionally shaky ground. *See* Gaudette, 2017 ME 86, ¶ 33, 160 A.3d 1190 (Jabar J. dissenting).

Further, in a 2016 case interpreting the almost identical Massachusetts anti-SLAPP law, the U.S. District Court for the District of Massachusetts praised the Law Court's decision in *Nader I*, and determined that by requiring non-moving parties "to make more than a prima facie showing that [the] petitioning activities had no reasonable basis in fact or law, it would necessarily impinge on the parties' Seventh Amendment right to a jury trial," because "it would require this Court to make factual findings and credibility determinations that the Constitution reserves to a properly constituted jury of the people." *Hi-Tech Pharms., Inc. v. Cohen*, 208 F. Supp. 3d 350, 355 (D. Mass. 2016). Increasing the burden to a preponderance of the evidence at this stage would require the court to make credibility determinations about the parties' submissions to the court. *See id.* at 355 ("Indeed, to determine whether Hi-Tech has demonstrated, by a preponderance of the evidence, that Cohen's petitioning conduct lacked any reasonable basis in law or fact, this Court would have to decide which of the affidavits submitted by the parties in connection with the special motion to

dismiss it believed."). These functions should be reserved for the finder of fact and are not proper for the court to consider here. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.").

For these reasons, this Court should revert to the process established in *Nader I* to ensure that the procedure under 14 M.R.S. § 556 is constitutional, and furthermore reflects both Anti-SLAPP history dating back almost 40 years, as well as the Maine Legislature's intent to protect people from meritless suits to chill speech and petitioning activity and expeditiously stop meritless suits. In short, requiring trial courts to engage in the third-step of *Gaudette* requires judges to take on a fact-finding role that could potentially violate the non-moving party's right to a jury trial.

CONCLUSION

For the foregoing reasons, amici ACLU of Maine and Professor Thaler respectfully request that this Court uphold the constitutionality of Maine's Anti-SLAPP statute, 14 M.R.S. § 556; not limit the statute's applicability to petitions or statements submitted regarding zoning or other land development disputes; not adopt a process similar to that adopted by the Massachusetts Supreme Judicial Court in *Blanchard* allowing the non-moving party to avoid dismissal by establishing that the suit is not a SLAPP suit; and revert to the two-step process that was set forth in *Nader I*.

Respectfully submitted, June 22, 2021,

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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 Jeffrey Thaler and ACLU of Maine by emailing a pdf copy of said brief to Appellant and Counsel for Appellee, and by depositing two copies of said brief to them by U.S. mail, first class, at their respective addresses:

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