No. 15-14889

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EDWARD LEWIS TOBINICK, M.D., ET AL,
Plaintiffs-Appellants,

v.

STEVEN NOVELLA, M.D.
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida; Case No. 9:14-CV-80781
The Honorable Robin L. Rosenburg

PROPOSED BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 24 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANT-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1 and 28.1(b), undersigned counsel certifies that, in addition to the persons and entities identified in the briefs submitted to date in this appeal, the following have an interest in the outcome of the case:

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The Center for Investigative Reporting, *Amicus Curiae*

The E.W. Scripps Company, *Amicus Curiae*

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The News Guild – CWA, *Amicus Curiae*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 28.1(b), *amici* disclose as follows:

The Reporters Committee for Freedom of the Press certifies that it is an unincorporated nonprofit association with no parent corporation and no stock.

ALM Media, LLC is privately owned, and no publicly held corporation owns 10% or more of its stock.

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

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The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

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MPA – The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

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

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit organization with no parent corporation and no stock.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

Dated: May 31, 2016

Respectfully submitted,

/s/ Hannah Bloch-Wehba
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RULE 29(C)(5) CERTIFICATION

Pursuant to Fed. R. App. P. 29(c)(5), *amici* states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person — other than the *amici*, their members, or their counsel — contributed money that was intended to fund preparing or submitting the brief.

SOURCE OF AUTHORITY TO FILE BRIEF

Pursuant to Fed. R. App. 29(b) and 11th Cir. R. 29-1, *amici* submitted a motion for leave to file brief. Appellees have consented to the filing of this brief, but Appellants have refused consent.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici, all of whom are engaged in newsgathering or represent the interests of journalists and publishers, have an interest in the application of state anti-SLAPP statutes in federal courts, and the scope of liability under the Lanham Act.

The issues presented in this case — whether a state anti-SLAPP statute may be applied in federal court and whether noncommercial speech can be subject to liability under the Lanham Act — have potentially broad ramifications for *amici*.

Amici depend on anti-SLAPP protections to avoid the costs and burden of litigating meritless claims challenging their constitutional rights. *Amici* have experience using the safeguards of anti-SLAPP statutes and believe they can provide a unique understanding of the need their broad application. The application of these laws in federal court would ensure defendants sued for exercising their rights of speech are not forced to litigate claims not viable as a matter of law.

Amici also write to discuss the impact of Lanham Act claims against media defendants. The Lanham Act was enacted and has been interpreted by courts to regulate only commercial speech. Upholding this principle would permit speakers to continue freely exercising their speech rights and contributing to a robust marketplace of ideas.

The Reporters Committee for Freedom of the Press ("Reporters Committee") is joined in this brief by ALM Media, LLC, American Society of

News Editors, Association of Alternative Newsmedia, The Boston Globe, LLC, California Newspaper Publishers Association, The Center for Investigative Reporting, Cox Media Group, Inc., The E.W. Scripps Company, First Amendment Coalition, First Look Media Works, Inc., Gawker Media LLC, Investigative Reporting Workshop at American University, The McClatchy Company, MPA – The Association of Magazine Media, National Press Photographers Association, NBCUniversal Media, LLC, The News Guild - CWA, Newspaper Association of America, North Jersey Media Group Inc., Online News Association, Sinclair Broadcast Group, Inc., Society of Professional Journalists, The Thomas Jefferson Center for the Protection of Free Expression, and Tully Center for Free Speech. Descriptions of all parties to this brief are given more fully in Appendix A. Parties' counsel are listed in Appendix B.

STATEMENT OF THE ISSUES

Amici adopt the statement of the issues submitted by Appellee-Defendant Steven Novella. However, our brief specifically addresses:

(1) Whether it was plain error for the district court to strike the California Appellant's state law claims under the California anti-SLAPP statute, where Appellant conceded the statute applied;

(2) Whether summary judgment was properly awarded where the articles were non-commercial and neither false nor deceptive.

INTRODUCTION

Amici, filing in support of Defendant-Appellee Steven Novella, M.D., urge this Court to affirm the district court's order granting Novella's special motion to strike under the California anti-SLAPP statute and order granting Novella's motion for summary judgment.

Plaintiff-Appellant Edward Tobinick, M.D., sued Novella for unfair competition, trade libel, and libel per se after Novella wrote and publicly disseminated two online articles about what Novella believed were Tobinick's unproven medical practices — specifically, using the drug Embrel to treat Alzheimer's disease and strokes. *See* DE-26-2. In response to this suit, Novella filed a special motion to strike under California's anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16. Anti-SLAPP statutes, enacted in 29 states, the District of Columbia, and the territory of Guam (including Georgia and Florida in the Eleventh Circuit), provide mechanisms for defendants who have invoked their constitutionally guaranteed speech rights to swiftly resolve "Strategic Lawsuits Against Public Participation" ("SLAPPs") brought to punish and intimidate speakers into silence. The district court appropriately granted Novella's motion to strike after finding that California's anti-SLAPP statute applied in federal court and that Tobinick could not meet his burden under that statute of establishing "a

probability that [he] will prevail on the claim[s]." Cal. Code Civ. Proc. § 425.16(b)(1).

Tobinick also brought claims against Novella for unfair competition and false advertising under the Lanham Act, 15 U.S.C. § 1125(a). The district court properly granted Novella's motion for summary judgment and dismissed those claims after determining Novella's articles are not commercial speech and thus cannot be punished under the Lanham Act.

SUMMARY OF ARGUMENT

This case is about the exercise of fundamental speech rights. Finding California's anti-SLAPP statute applicable in federal court and noncommercial speech shielded from liability under the Lanham Act will ensure that speakers, including members of the news media, can exercise their constitutional rights without fear of unjustified litigation.

Applying anti-SLAPP statutes in diversity actions in federal court will allow subjects of meritless lawsuits aimed at stifling speech to quickly resolve the claims, and will discourage forum-shopping among libel plaintiffs who would otherwise seek to avoid state anti-SLAPP laws by bringing federal actions. The application of these statutes in federal court has been upheld by three circuit courts, which have found they do not conflict with the Federal Rules of Civil Procedure and provide substantive rights. The interests in allowing anti-SLAPP remedies in

federal diversity actions is significant: Plaintiffs bring SLAPPs against speakers to silence their speech and force them to spend valuable time and resources defending meritless lawsuits, while anti-SLAPP statutes provide members of the news media and other speakers a mechanism to expedite the resolution of lawsuits and, in most cases, avoid or minimize the burdens of discovery.

Amici also emphasize the importance of protecting noncommercial speech from Lanham Act claims. Tobinick appealed the district court's dismissal of his Lanham Act and unfair competition claims on the grounds that Novella's speech was commercial in nature and thus subject to Lanham Act liability merely because the website Novella used to publish his articles contained profit-generating elements, and the speech discussed a member of the same profession. Tobinick's erroneous premise, which was properly rejected by the district court, is unsupported by law and irreconcilable with First Amendment values. As courts have repeatedly made clear, the Lanham Act is not intended to regulate noncommercial speech.

ARGUMENT

I. Application of state anti-SLAPP statutes by federal district courts advances First Amendment freedoms and comports with *Erie* and its progeny.

Tobinick's unfair competition, trade libel, and libel per se claims arising from Novella's articles about an issue of public health is precisely the type of

punitive lawsuit contemplated by the California Legislature when it enacted California's anti-SLAPP statute. The legislature intended for the anti-SLAPP statute to "encourage continued participation in matters of public significance" by providing speakers a mechanism through which they could have meritless suits more promptly dismissed. Cal. Code Civ. Proc. § 425.16(a).

In this case, Novella brought a motion to strike under the California anti-SLAPP statute. The district court followed the guidance of the Ninth Circuit and two other circuit courts of appeals and applied the state anti-SLAPP law to this diversity action. Finding that the lawsuit arose from Novella's discussion of a public issue — namely, the public health concerns raised by a doctor's unverified practices — and that Tobinick was unable to establish a probability of prevailing on his claims, the district court properly dismissed Tobinick's unfair competition, trade libel, and libel per se claims.

The district court did not, as Tobinick asserts, violate his constitutional rights, any Federal Rule of Civil Procedure, or the *Erie* doctrine. Rather, the district court confirmed Novella's First Amendment right to speak freely about a matter of public concern, consistent with the interests at the heart of the California anti-SLAPP statute and all anti-SLAPP statutes. The protections afforded the news media and other speakers by the California anti-SLAPP statute are valuable in enhancing the marketplace of ideas. Defendants in meritless suits should not be

precluded from availing themselves of the protections of anti-SLAPP statutes merely because a plaintiff elects to file in federal rather than state court.

A. The California anti-SLAPP statute does not conflict with the federal rules and is substantive under *Erie*.

Tobinick asserts the district court dismissed his claims under the California anti-SLAPP statue in violation of various Federal Rules of Civil Procedure and the *Erie* Doctrine. The crux of these contentions is that the district court improperly dismissed his claims by applying the California anti-SLAPP statute. However, after a choice of law analysis determined California law governs Tobinick's claims, the district court looked to decisions from three federal circuit courts in deciding to apply the California anti-SLAPP statute, particularly the Ninth Circuit, which has interpreted the applicability of the California statute. *See* Order Granting Defendant's Special Motion to Strike at 5, fn. 4 (June 4, 2014). The Ninth Circuit has held that California's anti-SLAPP statute applies in federal court. *United States* ex rel. *Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999); *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180 (9th Cir. 2013). The Fifth and First Circuits have concurred with the Ninth Circuit in applying state anti-SLAPP statutes in federal court. *Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010); *Henry v. Lake Charles Am. Press LLC*, 566 F.3d 164, 168-69 (5th Cir. 2009).

In deciding whether a state law applies in a federal court sitting in diversity, courts first ask if there is a conflict between a state law and federal rule, determining whether there is a "direct collision" between the state law and federal rule that "leave[s] no room for the operation of [the state] law." *Walker v. Armco Steel, Corp.*, 446 U.S. 740, 749-50 (1980); *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). If there is no direct collision, courts then examine whether the state law confers substantive or procedural rights under *Erie*. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). In order to make this substantive or procedural classification, courts look to the substantive state interests furthered by the state law and the twin purposes of *Erie* — "discouragement of forum-shopping and avoidance of inequitable administration of the law." *Newsham*, 190 F.3d at 973 (citing *Hanna*, 380 U.S. at 468).

The First, Fifth, and Ninth Circuits have concluded state anti-SLAPP laws do not "directly collide" with Federal Rules of Civil Procedure 12 and 56. *See Godin*, 629 F.3d at 86-91; *Henry*, 566 F.3d at 168-69; *Newsham*, 190 F.3d at 973; *Makaeff*, 736 F.3d at 1182. In *Makaeff*, the Ninth Circuit used the U.S. Supreme Court's analysis in *Shady Grove* to determine if the laws collided, asking whether the state statute at issue "attempts to answer the same question" as the Federal

Rule. *Makaeff*, 736 F.3d at 1182 (citing *Shady Grove*, 559 U.S. at 393). The Ninth Circuit confirmed that there is no direct collision in light of *Shady Grove* because California's anti-SLAPP statute "supplements rather than conflicts" with the Federal Rules by creating a "separate and additional theory upon which certain kinds of suits may be disposed of before trial." *Makaeff*, 736 F.3d at 1182. The First and Fifth Circuits have agreed there is no direct collision between state anti-SLAPP statutes and the federal rules. *Godin*, 629 F.3d at 88 ("In contrast to the state statute in *Shady Grove*, section 566 does not seek to displace the Federal Rules or have Rules 12(b)(6) and 56 cease to function."); *Henry*, 566 F.3d at 168-69 ("Louisiana law, including the nominally-procedural [anti-SLAPP statute] . . . governs this diversity case."). In addition to finding that state law does not conflict with federal law because the anti-SLAPP statute supplements the Federal Rules, the Ninth Circuit found California's interest in the speech rights of its citizens "cautions against finding a direct collision." *Makaeff*, 736 F.3d at 1182 (writing that a majority of Justices in *Shady Grove* recognized state interests are significant in determining whether there is a conflict).

After determining there is no "direct collision" between the state law and Federal Rules, the inquiry turns to whether the state law in question is procedural or substantive under *Erie* and its progeny. Courts ask if it "significantly affect[s] the result of a litigation for a federal court to disregard a law of a State that would

be controlling in an action upon the same claim by the same parties in a State court. . . ." *Hanna*, 380 U.S. at 466 (quoting *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945)). Under this test, California's anti-SLAPP statute provides substantive protection. California's anti-SLAPP statute constitutes "an additional, unique weapon to the pretrial arsenal [of Rules 12 and 56], a weapon whose sting is enhanced by an entitlement to fees and costs." *Newsham*, 190 F.3d at 973. Unlike the Federal Rules of Civil Procedure, the California anti-SLAPP statute is specifically designed to protect a defendant's substantive, constitutional rights of freedom of speech and petition for redress of grievances. Cal. Code Civ. Proc. § 425.16(a). In the words of the Ninth Circuit:

> That the California legislature enacted both an analog to Rule 12 and, additionally, an anti-SLAPP statute is strong evidence that the provisions are intended to serve different purposes. Moreover, the anti-SLAPP statute asks an *entirely different question*: whether the claims rest on the SLAPP defendant's protected First Amendment activity and whether the plaintiff can meet the substantive requirements California has created to protect such activity from strategic, retaliatory lawsuits.

Makaeff, 736 F.3d at 1182 (emphasis added).

Courts also analyze the twin purposes of *Erie* — forum shopping and the inequitable administration of the law — to settle the substantive-procedural dispute. *Newsham*, 190 F.3d at 973. These considerations weigh in favor of applying anti-SLAPP statutes in federal court. If California's anti-SLAPP statute

only applied in state and not federal court, a SLAPP litigant seeking to suppress the speech of a defendant would have a significant incentive to bring his suit to federal court where the provisions of the anti-SLAPP statute could not reach him. There, a SLAPP defendant would suffer from a considerable disadvantage, unable to dismiss a meritless claim as quickly as in state court and unable to escape the fees and costs associated with defending a SLAPP suit. Additionally, not recognizing anti-SLAPP statutes in federal court would "flush away state legislatures' considered decisions on matters of state law" and "put[s] the federal courts at risk of being swept away in a rising tide of frivolous state actions." *Makaeff*, 736 F.3d at 1187. Applying the federal rules instead of the state law would increase forum-shopping and create inequitable administration of the law. Such a result encouraging litigants to shop for a federal forum and disadvantage defendants entitled to anti-SLAPP protections in federal proceedings "run[s] squarely against the 'twin aims' of the *Erie* doctrine." *Newsham,* 190 F.3d at 973.

As the lower court acknowledged, *see* Order Granting Motion to Strike at 5, fn. 4, the D.C. Circuit found that the D.C. anti-SLAPP statute is inapplicable in federal court. *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015). The D.C. Circuit concluded the D.C. anti-SLAPP statute conflicted with Federal Rules of Civil Procedure 12 and 56 because the Rules "answer the same question" as the state law. *Abbas*, 793 F.3d at 1333-34 (citing *Shady Grove*, 559

U.S. at 398-99). However, the Federal Rules and the California anti-SLAPP statutes ask different questions. While Rules 12 and 56 *uniformly* provide defendants theories for disposing of suits before trial, California's anti-SLAPP statute creates a "separate and additional theory" for disposing of suits for a *particular* type of defendant — one acting "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." Cal. Code Civ. 425.16(b)(1). The question asked when assessing a special motion to strike under the California anti-SLAPP statute involves an inquiry into the defendant's actions not present under a Rule 12 or 56 analysis. Thus, the Federal Rules and the California anti-SLAPP statute do not conflict.

Because the California anti-SLAPP statute does not directly conflict with the Federal Rules of Civil Procedure and is substantive under *Erie*, this Court should join the First, Fifth, and Ninth Circuits in finding the anti-SLAPP statute applies in federal court.

B. The ability to utilize anti-SLAPP statutes in federal court protects speakers from frivolous lawsuits and reduces chilling effects.

The application of state anti-SLAPP statutes by federal courts sitting in diversity is consistent with fundamental constitutional liberties. For defendants who have validly exercised their speech rights, the statutes provide an invaluable

shield, allowing them to dismiss meritless claims promptly while avoiding unnecessary legal expense. The statutes are also a sword, discouraging unscrupulous litigants who might bring claims with the threat of fees and costs. These features are critically important because many SLAPP litigants are not motivated primarily by a desire to win the litigation. Instead, they wish to increase the legal costs to such an extent that a defendant will be forced to abandon the case and refrain from exercising his or her constitutional rights in the future. *See U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 970–71 (9th Cir. 1999). The Ninth Circuit has noted the gravity of the interests at stake: "It would be difficult to find a value of a 'high[er] order' than the constitutionally-protected rights to free speech and petition that are at the heart of California's anti-SLAPP statute." *DC Comics v. P. Pictures Corp*., 706 F.3d 1009, 1015–16 (9th Cir. 2013) (quoting *Perry v. Schwarzenegger*, 591 F.3d 1147, 1155–56 (9th Cir. 2010)).

A refusal to apply anti-SLAPP statutes 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. *See Henry v. Lake Charles Am.*

Press, LLC, 566 F.3d 164, 177 (5th Cir. 2009) ("[The anti-SLAPP statute] aims to serve the substantial public interest of protecting those exercising their First Amendment rights from the chilling effect of defending meritless and abusive tort suits."). Some speakers would be silent to avoid the risk of expensive and time-consuming litigation: "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 chilling effects would be most profound for speakers with reduced financial support who may not have the backing of legal counsel to defend against lawsuits. If anti-SLAPP statutes were to be found inapplicable in federal court, the advantages of bringing an anti-SLAPP motion and forcing a court to assess the merits of a plaintiff's suit before litigation costs surge would be eliminated. The press is already facing reduced resources to contest lawsuits. *See In Defense of the First Amendment*, Knight Foundation (April 21, 2016), http://www.knightfoundation.org/media/uploads/publication_pdfs/KF-editors-survey-final_1.pdf. Such a narrowed application of anti-SLAPP statutes would impose additional monetary burdens upon media defendants, vitiating state legislators' desire to

eliminate "needless increase[s] in the cost of litigation." Ga. Code Ann § 9-11-11.1(b).

Two Eleventh Circuit states, Florida and Georgia, have enacted anti-SLAPP statutes to safeguard speakers. Georgia's anti-SLAPP statute, Ga. Code Ann § 9-11-11.1, protects acts "in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern." The Georgia law applies to statements made in relation to official proceedings, including legislative, executive, or judicial proceedings. Ga. Code Ann § 9-11-11.1(c). The Florida Legislature valued speech rights to such an extent it amended its anti-SLAPP statute in 2015 to provide for even broader coverage than the previous version. Florida's anti-SLAPP statute, Fla. Stat. § 768.295, allows for "an expeditious resolution of a claim" brought against a person for exercising the "constitutional right of free speech in connection with a public issue." "Free speech in connection with public issues" is defined 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, audiovisual work, book, magazine article, musical work, news report, or other similar work." Fla. Stat. § 768.295(2)(a). In order for these and other state anti-SLAPP laws to effectively

and comprehensively secure constitutional rights they must be applied by federal courts sitting in diversity.

A contrary ruling could have damaging, unintended consequences. In order to avoid the application of an anti-SLAPP law, a plaintiff could shift their litigation to federal court. *See Newsham*, 190 F.3d 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."). A disparity in constitutional safeguards between state and federal courts would not only encourage such forum shopping, it 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 the substantive protections afforded speakers by state anti-SLAPP laws to promptly dismiss speech-suppressing lawsuits in federal court would ensure libel plaintiffs do not choose a federal court instead of a state one merely to avoid these statutes.

II. The First Amendment protects noncommercial speech from Lanham Act claims.

Allowing Tobinick's unfair competition and false advertising claim under the Lanham Act to proceed would violate the First Amendment rights of many speakers. A false advertising claim under the Lanham Act only prescribes liability to "commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B). This is because commercial speech "is entitled to a lesser degree of protection than other forms of constitutionally guaranteed expression." *Gordon & Breach Science Publishers v. AIP* , 859 F. Supp. 1521, 1536 (S.D.N.Y. 1994). On the other hand, noncommercial speech receives full constitutional protection and cannot constitutionally be subjected to a Lanham Act suit. *See Taubman Co. v Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003) ("Lanham Act is constitutional because it only regulates commercial speech."); *Radiance Fdn., Inc. v. NAACP*, 2015 U.S. App. LEXIS 8203, *12 (4th Cir. 2015) ("Courts have uniformly understood that imposing liability under the Lanham Act for [speech on political and social issues] is rife with the First Amendment problems."); *Groden v. Random House, Inc.*, 61 F.3d 1045, 1052 (2d Cir. 1995) ("[W]e have been careful not to permit overextension of the Lanham Act to intrude on First Amendment values.").

Although courts have clearly stated the First Amendment shields noncommercial speech from Lanham Act claims, Tobinick sued Novella for false

advertising and unfair competition, attempting to punish Novella for his constitutionally protected speech. Tobinick argues Novella's articles are commercial speech both because Novella received tangential financial gains from the website and because the articles concerned a member of the same profession. *See* Appellant's Brief at 1-4. These propositions cannot withstand First Amendment review and would threaten the strength of speech and press rights. The First Amendment protects Novella's noncommercial speech about healthcare treatment, a matter of public concern, regardless of the profit motives and occupation of the speaker. Thus, the district court correctly granted summary judgment for Novella, dismissing Tobinick's false advertising and unfair competition claims.

A. Shielding noncommercial speech from Lanham Act liability ensures a robust marketplace of ideas.

As the trial court concluded, Novella's articles are noncommercial speech under U.S. Supreme Court jurisprudence and are immune from a Lanham Act false advertising claim. Novella's speech does not fall within the "core notion of commercial speech" because it does more than propose a commercial transaction by raising awareness about a healthcare issue. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976)); *see also Central*

Hudson Gas and Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience"). If speech is not within the *core notion* of commercial speech, courts consider three factors to determine whether it is nonetheless commercial speech: (1) whether the speech is an advertisement; (2) whether the speech refers to a specific product; and (3) whether the speaker has an economic motivation for the speech. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983). Novella's speech is also noncommercial under this evaluation. Novella's articles were not advertisements, did not independently promote his medical practice, and was not motivated by an economic interest. As a clinical neurologist at the Yale University School of Medicine, Novella furthered the conversation initiated by a *Los Angeles Times* article about Tobinick's controversial use of the drug Embrel to treat Alzheimer's. *See* DE-26-2. Novella published the articles to discuss what he deemed a questionable medical practice and assist the public in making an informed healthcare decision. *See* DE-55-1.

Dismissing Tobinick's attempt to leverage the Lanham Act to punish speech about a matter of public importance protects the liberties at the core of the First Amendment. The U.S. Supreme Court has declared that protecting speech on matters of public concern, defined as speech relating to "any matter of political,

social, or other concern to the community," is critically important under the First Amendment. *Connick v. Myers*, 461 U.S. 138, 146 (1983); *see also Synder v. Phelps*, 562 U.S. 443, 451-52 (2011) ("Speech on matters of public concern . . . is at the heart of the First Amendment's protection."). In this case, Novella exercised his speech rights on a matter of health and safety concern to the community — the consequences and legitimacy of a doctor's unproven medical practices. *Spelson v. CBS, Inc*., 581 F. Supp. 1195, 1206 (N.D. Ill. 1984) ("There may be no more serious or critical issue extant today than the health of human beings. Given the frailty of human existence, any controversy on the subject must be afforded wide open discussion and criticism so that individuals may make well educated health care choices."). As speech of public concern, Novella's articles are precisely "the kind of speech the First Amendment was primarily designed to keep within the area of free discussion." *New York Times Co. v. Sullivan*, 376 U.S. 254, 296-97 (1964).

The First Amendment encourages more — not less — speech on a wide array of subjects to ensure a spirited environment where the truth can ultimately be determined. Justice Holmes emphasized this when writing about how the First Amendment helps foster a robust marketplace of ideas: "[T]he ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .

That at any rate is the theory of our Constitution." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In order to reach the best conclusions, speech like Novella's must be allowed in the marketplace. The ability of Novella's opinion on Tobinick's practices to gain support and be accepted as true will be determined over time. Until then, courts should not inject themselves into the marketplace and punish protected speech.

Although Tobinick may disagree with Novella's views, the law should not be used to settle this dispute. Litigation is not the proper means in which to combat critical speech. The guarantee of free speech and a free press is rooted in the notion that society benefits from robust speech free of unwarranted governmental and legal restrictions. *See* A. Meiklejohn, *Free Speech: And Its Relationship To Self-Government*, 88-89 (1948) ("The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no counter-belief, no relevant information, may be kept from them."). In order to protect against making subjective views about the value of certain speech, the government remains "neutral in the marketplace of ideas." *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978). A disagreement with how to safely treat a health concern should be argued in the public sphere, not through courts. *See Sanderson v. Culligan Int'l,* 415 F.3d 620, 624 (7th Cir. 2005) ("[T]he Lanham

Act is [not] designed to throw into federal courts all disputes about the efficacy of competing products . . . . [S]cientific disputes must be resolved by scientific means."). This Court should affirm the dismissal of Tobinick's Lanham Act and unfair competition claims to allow for the marketplace of ideas to take its course and determine truth without unnecessary governmental interference.

B. Profit motives do not deprive speech of complete First Amendment protection.

Contrary to Tobinick's assertion, generating revenue from speech does not deprive the expression of full First Amendment protection. Tobinick argues Novella's online articles are commercial speech and thus subject to liability under the Lanham Act because Novella had "goals of making money and self-promotion." Appellant Br., at 3-4, 54-63, Jan. 13, 2016. Tobinick concludes Novella had this narrow purpose in publishing the articles on sciencebasedmedicine.org because the website contained advertisements for paid memberships, offers to purchase t-shirts and podcasts, and ways to donate to SGU Productions, a for-profit company controlled by Novella. *Id*. This is incorrect. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 761 (1976), the U.S. Supreme Court reiterated a position it characterized as "settled or beyond serious dispute" — "speech does not lose its First Amendment protection because money is spent to project it" or because "it is

carried in a form that is 'sold' for profit" and "even though it may involve a solicitation to purchase or otherwise pay or contribute money." (citing *Buckley v. Valeo*, 424 U.S. 1, 35-59 (1976); *Smith v. California*, 361 U.S. 147, 150 (1959); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)). Rather, the line between commercial and noncommercial speech is drawn by asking if the speech does "no more than propose a commercial transaction" and lacks any "exposition of ideas." *Virginia Board of Pharmacy*, 425 U.S. at 761 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Here, in publishing the articles at the subject of this litigation, Novella sought to expose what he believed to be a "dubious medical practice" and foster debate about unproven medical tactics affecting health decisions of the public.

If economic remunerations were determinative of whether speech is commercial, as Tobinick suggests, then any newspaper or website article with advertisements or accessible only through a paid subscription would fall within the ambit of the Lanham Act and be subject to liability. This would restrain a free press from serving as a "'vital source of public information' and the essence of working democracy." *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 (1936)). For example, *The Washington Post*'s website requires a

subscription to access its full content. Under Tobinick's reasoning, because *The Washington Post* profits from charging a subscription fee to access the articles, this revenue-generating "toll" would convert all of the articles on washingtonpost.com from fully protected speech into commercial speech. In a similar way, articles in the print edition of *The New York Times* would also qualify as commercial speech because they appear beside paid advertisements.

In sum, equating commercial speech with economic motivation would reclassify virtually every piece of journalism as commercial speech. This cannot and would not be tolerated under the First Amendment. The U.S. Supreme Court's refusal to give economic interest or motivation a talismanic power to transform protected speech into commercial speech is critical to maintaining flourishing First Amendment freedoms. *See Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*, 413 U.S. 376, 385 (1973) ("If a newspaper [or website]'s profit motive was determinative, all aspects of its operations . . . would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment."); *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 667 (1989) ("If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.").

C. Discussing a competitor and the competitor's products does not deprive speech of complete First Amendment protection.

Tobinick also argues Novella's speech is commercial because Novella is a "businessman and a commercial competitor" who spoke about Tobinick's services and products. Appellant Br., at 2, 63. Tobinick contends that because Novella competes with him as a doctor, his articles are commercial speech. *Id.* However, Tobinick's unprecedented perspective would choke speech critical to the First Amendment. Justice Brandeis, in a historic defense of free speech, declared:

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

In keeping with that principle, a publication evaluating a current medical treatment practiced by a particular doctor receives full First Amendment protection. Because the speaker at issue is a doctor himself, the critique is especially important for an uninformed party making a decision about whether to receive the treatment. The law encourages, rather than discourages, those with knowledge of a particular field to engage in a public discussion about best practices within it. Speaking about a business competitor does not reduce the afforded First Amendment protection. In fact, those best suited to making

educated criticisms about a topic are often those who work in a certain field because they possess the relevant knowledge and experience. A contrary holding would be harmful to the vitality of journalism.

Under Tobinick's argument, any person evaluating colleagues would be engaging in commercial speech. For example, the articles of acclaimed food writer Ruth Reichl would be considered commercial speech when writing about any restaurant because of her work as a chef. CNN's television program *Reliable Sources* would be deemed commercial speech because it involves reporters and others involved in the press industry discussing and evaluating media outlets. Tobinick's logic would transform the speech of every op-ed responding to a publication, every politician questioning her opponent's views, and every church criticizing another denomination into commercial speech. These forms of critical commentary must be fully protected by the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 296-97 (1964) ("[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."). Without allowing for expansive dialogue on controversial occurrences, the "robust debate among people with different viewpoints that is a vital part of our democracy would surely be hampered." *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995). Thus, Novella's freedom to speak his mind about another doctor must be shielded

to uphold the First Amendment's commitment to "uninhibited, robust, and wide-open" debate on public issues. *Sullivan*, 376 U.S. at 270.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to uphold the district court's rulings.

Dated: May 31, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,028 words.

Dated: May 31, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2016, an electronic copy of the foregoing Brief was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

Dated: May 31, 2016

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APPENDIX A: STATEMENTS OF INTEREST

ALM Media, LLC publishes over 30 national and regional magazines and newspapers, including The American Lawyer, The National Law Journal, New York Law Journal and Corporate Counsel, as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's The Recorder, for example, has been published in northern California since 1877; New York Law Journal was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media.

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

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

The Boston Globe, LLC publishes The Boston Globe, the largest daily newspaper in New England.

The California Newspaper Publishers Association ("CNPA") is a nonprofit trade association representing the interests of nearly 850 daily, weekly and student newspapers throughout California. For over 130 years, CNPA has worked to protect and enhance the freedom of speech guaranteed to all citizens and to the press by the First Amendment of the United States Constitution and Article 1, Section 2 of the California Constitution. CNPA has dedicated its efforts to protect the free flow of information concerning government institutions in order for newspapers to fulfill their constitutional role in our democratic society and to

advance the interest of all Californians in the transparency of government operations.

The Center for Investigative Reporting (CIR) believes journalism that moves citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly pursued and revealed injustices that otherwise would remain hidden from the public eye. Today, we're upholding this legacy and looking forward, working at the forefront of journalistic innovation to produce important stories that make a difference and engage you, our audience, across the aisle, coast to coast and worldwide.

Cox Media Group, Inc. is an integrated broadcasting, publishing, direct marketing and digital media company. Its operations include 15 broadcast television stations, a local cable channel, a leading direct marketing company, 85 radio stations, eight daily newspapers and more than a dozen non-daily print publications and more than 100 digital services.

The E.W. Scripps Company serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 34 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

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

First Look Media, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Gawker Media LLC is the publisher of some of the web's best-loved brands and communities, including the eponymous Gawker, the gadget sensation Gizmodo,

and the popular sports site Deadspin. Founded in 2002, Gawker's sites reach over 100 million readers around the world each month.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as the Miami Herald, The Kansas City Star, The Sacramento Bee, The Charlotte Observer, The (Raleigh) News and Observer, and the (Fort Worth) Star-Telegram. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

MPA – The Association of Magazine Media, ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, 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 approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

NBCUniversal Media, LLC is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal

Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline NBC" and "Meet the Press."

The News Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

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

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

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital

delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

Sinclair is the largest and one of the most diversified television broadcasting companies in the country. Including pending transactions, the Company owns, operates and/or provides services to 171 television stations in 81 markets, broadcasting 467 channels and affiliations with all the major networks. Sinclair is the leading local news provider in the country, as well as a producer of sports content. Sinclair's broadcast content is delivered via multiple-platforms, including over-the-air, multi-channel video program distributors, and digital platforms.

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.

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