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IN THE
COURT OF APPEALS OF INDIANA

Case No. 22A-PL-541

Timothy Stabosz,	)	Appeal from the
Appellant-Defendant,	)	LaPorte Circuit Court
	)	
v.	)	Case No. 46C01-2106-PL-001110
	)	
Shaw Friedman,	)	Hon. Stephen R. Bowers, Special Judge
Appellee-Plaintiff.	)	

BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 14 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANT-DEFENDANT

Michael A. Wilkins
Attorney No. 14368-02
BORYLES KIGHT & RICAFORT
8250 Haverstick Road, Suite 100
Indianapolis, IN 46240
(317) 428-4527

Counsel for amici curiae

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STATEMENT OF THE INTEREST OF AMICUS CURIAE

Amici are the Reporters Committee for Freedom of the Press (the "Reporters Committee") and 14 media organizations. Lead amicus the Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. A supplemental statement of the identity and interest of all amici is included the Motion to File this amici curiae brief.

Amici are dedicated to defending the First Amendment rights of journalists and news organizations. Members of the news media are the frequent targets of strategic lawsuits against public participation ("SLAPPs") designed to punish and deter constitutionally protected newsgathering and reporting activities. Amici therefore have a strong interest in ensuring that Indiana courts properly interpret and apply the state's anti-SLAPP law.

Amici write to emphasize the benefits of robust anti-SLAPP protections, which safeguard the right to engage in speech on matters of public interest without fear of being subjected to the expense, harassment, and disruption of meritless litigation. Amici draw on their collective experience with SLAPPs to provide the Court with a broader perspective on the impact of state anti-SLAPP laws. Amici further write to clarify that, to survive Appellant-Defendant Stabosz's motion to dismiss under Indiana's anti-SLAPP law, Appellee-Plaintiff Friedman bears the burden of offering evidence sufficient to demonstrate the existence of a triable issue of fact regarding whether Stabosz acted with actual malice given the lower court found that "Stabosz's

verification . . . [was] sufficient to shift the burden of proof to Friedman." *See* Order, Cause No. 46C01-2106-PL-001110 at 9 (Dec. 7, 2021) (hereinafter, the "Order").

SUMMARY OF ARGUMENT

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

To combat this troubling trend, Indiana, along with thirty-one other states and the District of Columbia have adopted anti-SLAPP laws, which provide mechanisms to lower the costs and other burdens associated with defending against baseless lawsuits arising out of speech on matters of public concern. *See* Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws*, Reporters Comm. for Freedom of the Press, https://perma.cc/4DW5-H2JK. These laws protect a wide range of valuable speech on issues of public interest and enable defendants to recover attorney's fees and costs if they prevail in dismissing a SLAPP.

Indiana's anti-SLAPP statute, codified at I.C. §§ 34-7-7-1 to -10, provides a means for the swift dismissal of SLAPPs early in the litigation and acts as a safeguard for the exercise of a defendant's First Amendment rights to speak freely and to petition. *See Gresk for Est. of VanWinkle v. Demetris*, 96 N.E.3d 564, 566 (Ind. 2018) ("When citizens are faced with meritless retaliatory lawsuits designed to chill their constitutional rights of petition or free speech . . . Indiana's anti-SLAPP statute provides a defense."). To that end, Indiana's statute protects acts in furtherance of the right of petition or free speech under the U.S. or Indiana Constitution "in

connection with a public issue" and "taken in good faith and with a reasonable basis in law and fact." I.C. § 34-7-7-5(1)-(2). A defendant facing a SLAPP may bring a motion to dismiss the suit which "[t]he court must act on … within thirty (30) days." I.C. § 34-7-7-9.

The present case concerns a defamation suit brought by Shaw Friedman, County Attorney for LaPorte County, against Timothy Stabosz, the LaPorte County Auditor. Stabosz filed a motion to dismiss pursuant to Indiana's anti-SLAPP law. Indiana requires the actual malice standard of proof in defamation cases involving matters of public or general concern brought by both public figures and private individuals. *See J.-Gazette Co. v. Bandido's, Inc*., 712 N.E.2d 446, 449 (Ind. 1999), *cert. denied*, 528 U.S. 1005 (1999). Thus, it is undisputed that "[a]t trial, Friedman will have to establish by clear and convincing evidence that Stabosz made the statements with 'actual malice or reckless disregard of the truth.'" *See* Memorandum in Opposition to SLAPP Motion to Dismiss Filed By Defendant Timothy Stabosz at 19 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964)). In his accompanying memorandum, Stabosz argued that Friedman had failed to make any showing of actual malice, and that such a showing is required to defeat his motion to dismiss under the anti-SLAPP statute. *See* Reply Supporting Stabosz's Motion to Dismiss at 10–13. The lower court denied Stabosz's motion to dismiss, concluding that Friedman need not make any showing of actual malice to defeat the motion, reasoning "actual malice is not properly before the Court [at the anti-SLAPP motion to dismiss phase], and the issue is not ripe for decision." Order at 14.

Amici urge this Court to reverse the lower court's Order and hold that, to survive a motion to dismiss under Indiana's anti-SLAPP statute, a plaintiff must put forth sufficient contrary evidence to create a triable issue of material fact as to actual malice. Such a requirement corresponds to the approach taken by several Indiana courts of appeals, mirrors the

approach routinely undertaken by federal courts in deciding motions for summary judgment in defamation cases governed by *Sullivan*, and comports with the interpretation of the majority of courts around the country construing other states' anti-SLAPP statutes. Strong anti-SLAPP protections are essential to protecting the news media's ability to inform the public. The lower court's Order, if left undisturbed, would weaken Indiana's anti-SLAPP law and the vital protections it affords to public discourse.

For the reasons stated herein, amici urge this Court to reverse and remand the decision of the trial court for consideration of whether Friedman made a sufficient showing of actual malice to survive Stabosz's motion to dismiss under Indiana's anti-SLAPP law.

ARGUMENT

I. Anti-SLAPP statutes, including I.C. §§ 34-7-7-1 *et seq.*, protect and encourage the exercise of First Amendment freedoms.

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

Anti-SLAPP statutes guard against a serious threat to constitutionally protected speech and expressive activity: the potentially exorbitant costs of meritless lawsuits. *See e.g.*, *Gresk*, 96 N.E.3d at 568 ("The defining goal of these lawsuits [is] not to win, but to silence opposition with delay, expense and distraction.") (internal quotations omitted). From a practical standpoint, a SLAPP is an effective means to deter and punish speech primarily because it forces a defendant to expend time and money disposing of the litigation, whether by defending against the claims in court or pursuing a settlement with the plaintiff. *See* Canan & Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988).

The Supreme Court of the United States warned of litigation's potential chilling effect in its 1964 decision *New York Times v. Sullivan*, cautioning that "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." 376 U.S. at 279. Such self-censorship "dampens the vigor and limits the variety of public debate." *Id.*

SLAPP plaintiffs exploit the judicial process in the manner described in *Sullivan* to chill speech on matters of public concern. They impose legal costs on the defendant with the aim of forcing the defendant to abandon speech or petitioning activity and refrain from exercising constitutional rights in the future. *See U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970–71 (9th Cir. 1999). As one court has explained: "The ripple effect of [SLAPP] suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent . . . a greater threat to First Amendment expression can scarcely be imagined." *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992), *aff'd*, 616 N.Y.S.2d 98 (N.Y. App. Div. 2d Dep't 1994).

To combat the chilling effect of SLAPPs, anti-SLAPP statutes—including Indiana's—provide a mechanism for the early resolution of meritless claims, often also providing a temporary stay of discovery while a dismissal motion is pending to shield defendants from unnecessary litigation expenses. *See, e.g.*, I.C. § 34-7-7-6 (providing that "[a]ll discovery proceedings in the action are stayed upon the filing of a motion to dismiss made under this chapter, except for discovery relevant to the motion."). Indiana's anti-SLAPP statute, like many others, further discourages plaintiffs from filing SLAPPs by requiring courts to order plaintiffs to

pay a prevailing defendant's attorney's fees and costs. *See, e.g.*, I.C. § 34-7-7-7 ("A prevailing defendant on a motion to dismiss made under this chapter is entitled to recover reasonable attorney's fees and costs."). These mechanisms work in concert to relieve defendants facing SLAPPs from the financial and other burdens of defending the suit, thus helping to protect the free exchange of ideas and to encourage individuals' full participation in public discourse and debate.

B. I.C. §§ 34-7-7-1, *et seq.* provides a mechanism for the prompt dismissal of lawsuits that threaten the rights of free speech and petition.

Consistent with the above principles, Indiana enacted its anti-SLAPP statute in 1998 to "address and reduce abusive SLAPP litigation." *Gresk*, 96 N.E.3d at 568. Several high-profile SLAPP lawsuits in the state motivated the legislature to enact the 1998 statute. One such case involved the Hoosier Environmental Council (the "HEC") and its secretary Charlotte Robertson. In 1997, the town of Chesterton, Indiana and the Lake Erie Land Co. countersued the HEC and Robertson seeking damages after they filed lawsuits to overturn two decisions by the Chesterton Board of Zoning. *See* Steve Walsh, *Judge upholds decision in favor of Chesterton*, TIMES OF NW. IND. (Aug. 21, 1997), https://perma.cc/5ZLM-WCGQ. Robertson was countersued solely for exercising her right to petition the government to challenge certain zoning decisions—a clear example of a SLAPP suit. *See id.* In 1998, she testified about her experience before the House Rules Committee considering the anti-SLAPP bill (Senate Bill 260). *See* Susan Dillman, *House weighs bill to assist victims of SLAPP actions*, SOUTH BEND TRIB. (Feb. 17, 1998). Robertson detailed the legal fees and mental toll that defending the suit had taken—she had spent $50,000 and estimated she could spend twice that much before the case was concluded. *See id.* She added ". . . the oppression is unbearable. You realize how really fragile our freedoms are." *Id.*

State Representative Mark Kruzan, a sponsor of the anti-SLAPP bill, explained "[t]he goal of the bill is to ward off assaults on freedom of speech . . . to stop intimidation of citizens' rights to free speech by way of civil lawsuits." *Id.*

Indiana's anti-SLAPP statute, codified at I.C. §§ 34-7-7-1 to -10, allows SLAPP defendants to move to dismiss such abusive lawsuits at their earliest stages—a "key procedural tool[] to safeguard First Amendment rights." *Gresk*, 96 N.E.3d at 568. Section 5 of the statute sets forth the "conditions under which rights of petition or free speech may be used as [a] defense"; it provides:

> It is a defense in a civil action against a person that the act or omission complained of is:
>
> (1) an act or omission of that person in furtherance of the person's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana in connection with a public issue; and
>
> (2) an act or omission taken in good faith and with a reasonable basis in law and fact.

I.C. § 34-7-7-5. Thus, when ruling on an anti-SLAPP motion to dismiss, the trial court must determine:

> (1) whether an action was in furtherance of the person's right of petition or free speech; and, (2) if so, whether the action was in connection with a public issue. If both requirements are satisfied, the court then analyzes (3) whether the action was taken in good faith and with a reasonable basis in law and fact.

Gresk, 96 N.E.3d at 569 (internal quotations omitted).

A motion to dismiss under Indiana's anti-SLAPP statute is treated as a motion for summary judgment. I.C. § 34-7-7-9(a)(1). Pursuant to Rule 56(C) of the Indiana Rules of Trial Procedure, summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Ind. Trial R. 56(C). The "movant's burden is to make a 'prima facie' showing of entitlement to judgment." *Shepard v.*

Schurz Commc'ns, Inc., 847 N.E.2d 219, 224 (Ind. Ct. App. 2006).[1] And, in ruling on the motion, "the Court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party." *Id.* Accordingly, in assessing a motion to dismiss under Indiana's anti-SLAPP statute, courts must examine "whether the [defendant] made a prima facie showing that it spoke lawfully and whether [the plaintiff] timely responded and identified a genuine issue of material fact precluding summary judgment upon his defamation claim." *Id.*

"[T]o establish a claim of defamation a plaintiff must prove the existence of 'a communication with defamatory imputation, malice, publication, and damages.'" *Trail v. Boys and Girls Clubs of Northwest Ind.*, 845 N.E.2d 130, 135 (Ind. 2006) (quoting *Davidson v. Perron,* 716 N.E.2d 29, 37 (Ind. Ct. App. 1999), *trans. denied*). The Indiana Supreme Court has held that "the actual malice standard of proof required in defamation cases involving matters of public or general concern applies not only to public figures, but to private individuals as well." *Bandido's*, 712 N.E.2d at 449.[2] The actual malice standard "protects the rights and values embodied in the First Amendment to the fullest extent" while a lower standard "likely would require the news media to censor stories of public or general concern or avoid publication

[1] It is well established in Indiana that the inconsistency between the anti-SLAPP statute providing that summary judgment is appropriate only when the movant has "proven by a preponderance of the evidence" that the act underlying the claim is a lawful act, I.C. § 34-7-7-9, and Indiana Trial Rule 56(C) requiring only a burden upon the movant to make a "prima facie" showing of entitlement to judgment, is resolved in favor of Rule 56. *See e.g., Hamilton v. Prewett*, 860 N.E.2d 1234, 1242 (Ind. Ct. App. 2007).

[2] "This is so because, in most instances, there is little disparity in the ability of private versus public individuals to obtain access to the channels of effective communication in order to counteract false statements and because a citizen assumes the risk of media comment when he becomes involved in a matter of general or public interest." *Schurz Commc'ns, Inc.*, 847 N.E.2d at 225 (cleaned up).

of controversial articles." *Id.* at 453. Actual malice exists when a defendant publishes a defamatory statement "'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Id.* at 456 (quoting *Sullivan*, 376 U.S. at 279–80).

In enacting anti-SLAPP legislation, Indiana affirmed its interest in protecting freedom of speech and of the press and the right to petition as guaranteed under the First Amendment and the Indiana Constitution.[3] The question presented on appeal—whether the issue of actual malice (an essential element of a defamation claim concerning speech on matters of public concern under Indiana law) must be addressed by a plaintiff facing a well-supported motion to dismiss under the anti-SLAPP statute—is crucially important in ensuring swift dismissal of lawsuits that threaten the exercise of First Amendment rights and that are "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Brandom v. Coupled Prod., LLC*, 975 N.E.2d 382, 385 (Ind. Ct. App. 2012).

II. A showing of fault by the plaintiff is an essential component of a court's anti-SLAPP analysis in Indiana and around the country.

A. A showing of actual malice is required for a plaintiff's defamation claim to survive a defendant's well-supported motion to dismiss under Indiana's anti-SLAPP law.

The Indiana Supreme Court has not addressed whether, at the anti-SLAPP stage of a defamation lawsuit, the burden shifts to the plaintiff to put forth sufficient contrary evidence to create a triable issue of fact as to actual malice once the defendant has made a prima facie showing that the act or omission complained of was taken in good faith and with a reasonable

[3] Article I, § 9, of the Indiana Constitution "is even more emphatic than the First Amendment," *Bandido's*, 712 N.E.2d at 471 (Boehm, J., concurring), in prohibiting any law "restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever." Ind. Const. art. I, § 9.

basis in law and fact. Several Indiana appellate courts, however, have required a showing of actual malice to survive an anti-SLAPP motion to dismiss.

The court's analysis in *Nexus Grp., Inc. v. Heritage Appraisal Serv.* is informative. There, a trial court granted the defendant's motion to dismiss under the anti-SLAPP statute, and the plaintiff appealed to challenge "whether the trial court properly found that [the defendant] made the statements in good faith and with a reasonable basis in law and fact." *Nexus Grp., Inc. v. Heritage Appraisal Serv.*, 942 N.E.2d 119, 122 (Ind. Ct. App. 2011). The court defined "good faith" in the context of a defamation lawsuit as: "a state of mind indicating honesty and lawfulness of purpose; belief in one's legal right; and a belief that one's conduct is not unconscionable"— effectively requiring a showing by the SLAPP defendant that negates actual malice. *Id.* (quoting *Owens v. Schoenberger*, 681 N.E.2d 760, 764 (Ind. Ct. App. 1997), *reh'g denied*). In analyzing the first allegedly defamatory statement at issue, the court first noted the research that the defendant relied on and the data it collected to support its statement, and then stated: "Putting aside whether this statement was actually true or false, we note that [the plaintiff] has offered no evidence establishing that [the defendant] knew it was false or entertained serious doubts as to its truth." *Id.* at 123. Though the court framed this analysis in terms of whether the plaintiff had offered evidence to show the defendant did not act in "good faith," practically speaking, the court affirmed the lower court's grant of the anti-SLAPP motion to dismiss because the plaintiff had offered no evidence of actual malice. *See Sullivan*, 376 U.S. at 279–80 (defining actual malice as "knowledge that it was false or with reckless disregard of whether it was false or not.").

Similarly in *Shepard v. Schurz Commc'ns, Inc.*, the court affirmed the grant of a motion to dismiss under the anti-SLAPP statute because the defendant "made a prima facie showing that

it acted without malice" and the plaintiff "designated no evidence tending to show" malice in response. 847 N.E.2d at 224. And in *Brandom v. Coupled Products, LLC*, the court affirmed the trial court's denial of defendant's anti-SLAPP motion to dismiss in part because there was a triable issue of fact as to whether the defendant "made the statements with reckless disregard of whether they were false"— i.e., with actual malice. 975 N.E.2d at 390. The court in *Brandom* interpreted 'good faith' as being synonymous with a lack of actual malice, noting that a defendant fails to act in "good faith" (or, put another way, acts in bad faith) when "regardless of truth or falsity, [the speaker makes] a statement [they] 'knew . . . was false or entertained serious doubts as to its truth,' even if the speaker is 'motivated by self-interest.'" *Id.* at 389.

The *Brandom* court did not ground its decision expressly on either bad faith or the actual malice standard, because the outcome would have been the same either way. *See id.* at 388 n.4 ("We find there is a genuine issue of fact under either standard."). But, here, the distinction matters. If this Court holds that Stabosz made a prima facie showing that he acted lawfully and in good faith when making his statements, he has satisfied his burden under the anti-SLAPP statute. The question then becomes whether Friedman "identified a genuine issue of material fact precluding summary judgment upon his defamation claim." *Schurz Commc'ns, Inc.*, 847 N.E.2d at 224. If Friedman is unable to assert sufficient contrary evidence to create a triable issue of fact as to actual malice, Stabosz is "entitled to summary judgment . . . as an element of [plaintiff's defamation] claim was negated." *Id.* at 226.

This interpretation mirrors the federal standard applied to defamation claims governed by *Sullivan*'s actual malice standard on a motion for summary judgment—the proper analogy given that Indiana's anti-SLAPP statute treats a motion to dismiss "as a motion for summary

judgment." *See* I.C. § 34-7-7-9. In *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986), for example, Justice White, writing for the majority, observed:

> [W]here the *New York Times* 'clear and convincing evidence' requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be *whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not*.

Id. at 255–56 (emphasis added). Thus, though "[t]he movant has the burden of showing that there is no genuine issue of fact," the plaintiff, in response to a well-supported motion for summary judgment in a defamation case, bears "his own burden of producing in turn evidence that would support a jury verdict." *Id.*

Amici acknowledge that several Indiana appellate courts have declined to "require the clear and convincing evidence standard to be applied at . . . the summary judgment stage." *Chester v. Indianapolis Newspapers, Inc.*, 553 N.E.2d 137, 140 (Ind. Ct. App. 1990). But even those courts have recognized that "[t]he *existence* of factual issues . . . is quite a different question from that concerning the burden of establishing, as a matter of evidentiary proof, the facts alleged by plaintiff." *See id.* (quoting *McNabb v.* Mason, 148 Ind. App. 233, 241 (1970)) (emphasis in original). Thus, even if the court declines to "bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times* [*v. Sullivan*]," *Liberty Lobby*, 477 U.S. 242 at 244, where there is *no evidence* whatsoever of actual malice, the motion to dismiss should be granted because plaintiff cannot show the existence of a triable issue of fact. *See e.g.*, *Chester*, 553 N.E.2d at 141 (affirming trial court's grant of summary judgment "notwithstanding the statement that [plaintiff] failed to present clear and convincing evidence of

actual malice" because record showed no evidence of actual malice); *see also Kitco, Inc. v. Corp. for Gen. Trade*, 706 N.E.2d 581, 590 (Ind. Ct. App. 1999) (affirming trial court's grant of summary judgment given insufficient evidence presented to create a genuine issue of material fact as to whether defendant acted with actual malice).

Because an anti-SLAPP motion is treated as a motion for summary judgment under Indiana law, after a defendant makes a prima facie showing, a plaintiff in a defamation suit governed by the actual malice standard must present evidence sufficient to show the existence of a genuine issue of material fact as to the defendant's actual knowledge of falsity or high degree of subjective awareness of probable falsity of the challenged statements. This interpretation of the statute is consistent with decisions from the Indiana court of appeals and U.S. Supreme Court precedent governing motions for summary judgment in the defamation context.

B. Courts around the country require defamation plaintiffs to make a showing of actual malice in order to survive an anti-SLAPP motion.

Courts interpreting similar state anti-SLAPP statutes have consistently required a plaintiff to show some probability of success on the merits as to each element of a defamation claim—including actual malice when applicable—to survive a well-supported anti-SLAPP motion to dismiss. *See Prewett*, 860 N.E.2d at 1243 ("[B]ecause Indiana case law does not address the issue . . . we must look to case law from other jurisdictions for guidance.").

Based on amici's review of anti-SLAPP statutes nationwide, Nevada's anti-SLAPP statute appears to most closely mirror Indiana's. Nevada's anti-SLAPP statute provides that a defendant may file a special motion to dismiss upon showing "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. § 41.660(3)(a) (2019). As in

Indiana, the anti-SLAPP statute protects the communication only if it was made in "good faith" and is in "furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." *Id.*

Under Nevada law, the moving party must first show that "the comments at issue fall into one of the four categories of protected communications" and then show that the communication 'is truthful or is made without knowledge of its falsehood.'" *Stark v. Lackey*, 136 Nev. 38, 40 (2020) (quoting Nev. Rev. Stat. § 41.637). "[A]n affidavit stating that the defendant believed the communications to be truthful or made them without knowledge of their falsehood is sufficient to meet the defendant's burden *absent contradictory evidence in the record*." *Id.* at 43 (emphasis added). If the moving party "makes this initial showing, the burden shifts to the plaintiff to show 'with prima facie evidence a probability of prevailing on the claim.'" *Shapiro v. Welt*, 133 Nev. 35, 38 (2017). "The probability of prevailing is determined by comparing the evidence presented with the elements of the claim." *Smith v. Zilverberg*, 137 Nev. 65, 71 (2021). Thus, for a defamation claim arising out of speech on a matter of public concern, once the defendant has offered evidence that the challenged statements are good faith, protected communications, the plaintiff must then "provide evidence of actual malice." *Id.* If the plaintiff makes no showing of actual malice, the special motion to dismiss must be granted. *See id.* (affirming grant of special motion to dismiss where plaintiff "did not attest to any facts tending to show that [defendants] knowingly or recklessly made false statements.").

California's anti-SLAPP statute also provides broad protection from SLAPPs—a model that several other states, including Indiana, have followed. *See e.g.*, *Brandom*, 975 N.E.2d at 386 ("[Finding instructive the analysis in *Cross v. Cooper*, 127 Cal. Rptr. 3d 903 (Cal. Ct. App. 2011)"). Like Indiana, California courts have "repeatedly described the anti-SLAPP procedure

as operating like an early summary judgment motion." Thomas R. Burke, *Anti-Slapp Litigation* § 5.2 (2019). In order to survive a special motion to dismiss under California's anti-SLAPP statute, California courts require a plaintiff to show "by competent and admissible evidence" that the plaintiff has "a probability of prevailing" on the underlying claim; for a defamation cause of action brought by a public figure that includes a showing of "actual malice." *See e.g.*, *Balla v. Hall*, 59 Cal. App. 5th 652, 682 (2021), *review denied* (Apr. 14, 2021).

This type of burden shifting, requiring a SLAPP plaintiff to assert some evidence that their claim contains merit once the defendant establishes that the claim arises out of protected activity, is characteristic of anti-SLAPP statutes. *See* Laura Prather *et al.*, *Anti-SLAPP: Tort Defense*, BLOOMBERG LAW (April 2022), https://perma.cc/2FL6-NPZP. For example, several anti-SLAPP statutes—including the Uniform Public Expression Protection Act (UPEPA), a model anti-SLAPP statute adopted in Washington and Kentucky—contain language requiring a plaintiff to make a prima facie showing for each essential element of the claim in question, including actual malice where applicable.[4] This "prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment." UNIF. PUB. EXPRESSION PROT. ACT. § 7 cmt. 4 (UNIF. L. COMM'N 2020) (citing *Yu v. Signet Bank/Virginia*, 126 Cal. Rptr. 2d 516, 530 (Cal. Ct. App. 2002)). As explained in the comments to UPEPA, anti-SLAPP laws "do not insulate defendants from any liability for claims arising from protected rights of petition or speech.

[4] *See e.g.*, Kan. Stat. Ann. § 60-5320(d) (2019) (requiring plaintiff "to establish a likelihood of prevailing on the claim by presenting substantial competent evidence to support a prima facie case."); Okla. Stat. tit. 12 § 1434(C) (requiring plaintiff establish "by clear and specific evidence a prima facie case for each essential element of the claim in question."); Tenn. Code § 20-17-105(b) (requiring plaintiff show a prima facie case for the essential elements of the claim); Tex. Civ. Prac. & Rem. Code § 27.005(c) (requiring plaintiff establish by clear and specific evidence a prima facie case for each essential element of the claim).

[They] only provide[] a procedure for weeding out, at an early stage, *meritless claims* arising from protected activity." UNIF. PUB. EXPRESSION PROT. ACT. § 7 cmt. 4 (citing *Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.*, 434 P.3d 1152, 1157 (Cal. 2019) (emphasis added)). By requiring a minimal showing from the plaintiff that their claim has merit, the court can successfully "weed out" frivolous claims. *See id.* Indiana would become a stark outlier if this Court were to adopt the lower court's holding that, in cases in which the actual malice standard applies, plaintiffs do not bear any burden whatsoever as to actual malice to survive a well-supported anti-SLAPP motion to dismiss.

C. Requiring a showing of actual malice is essential to achieving the anti-SLAPP statute's goal of protecting the exercise of First Amendment rights in connection with matters of public interest.

The significance of this case extends well beyond the individual actors involved. The lower court's interpretation of Indiana's anti-SLAPP statute, if accepted, would undermine the statute's effectiveness at protecting free speech and public participation.

As detailed above, the purpose of anti-SLAPP statutes, including Indiana's, is to provide a defendant facing a SLAPP with a procedural mechanism to obtain a prompt dismissal. But if the lower court's interpretation of the statute is permitted to stand, few anti-SLAPPs motions could succeed. By its plain text, Indiana's anti-SLAPP law requires that a motion to dismiss be granted "if the court finds that the person filing the motion has proven [] that the act upon which the claim is based is a lawful act in furtherance of the person's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana." I.C. § 34-7-7-9(d). By the lower court's lights, even when a defendant makes a prima facie showing that the statements at issue were made in good faith and had a reasonable basis in law, the plaintiff bears no burden of offering any evidence to the contrary that would demonstrate the

existence of a triable issue of fact regarding whether defendant acted with actual malice. Such an interpretation would leave the statute with no teeth at all. Libel plaintiffs across Indiana would be able to defeat a well-supported anti-SLAPP motion to dismiss merely by asserting, without sufficient support, that the defendant did not subjectively believe the truth of the statements—an outcome contrary to the policy underlying the anti-SLAPP statute and Indiana law. *See e.g.*, *Ratcliff v. Barnes*, 750 N.E.2d 433, 437 (Ind. Ct. App. 2001) ("In order to prove that a defendant published with reckless disregard, a plaintiff must designate sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."). A showing of actual malice is a crucial component of a defamation claim arising out of speech on a matter of public concern and, therefore, a necessary component of the analysis under Indiana's anti-SLAPP statute. *See* I.C. § 34-7-7-5 (applying only to speech "in connection with a public issue").

CONCLUSION

For the foregoing reasons, amici respectfully ask that this Court reverse the lower court's Order.

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Respectfully submitted,

/s/ Michael A. Wilkins

Michael A. Wilkins
Attorney No. 14368-02
BORYLES KIGHT & RICAFORT
8250 Haverstick Road, Suite 100
Indianapolis, IN 46240
(317) 428-4527

Counsel for amici curiae

WORD COUNT CERTIFICATE

I verify that this brief of amici curiae contains no more than 7,000 words, not including those portions excluded by Indiana Appellate Rule 44(C).

/s/ Michael A. Wilkins
Michael A. Wilkins
BORYLES KIGHT & RICAFORT
8250 Haverstick Road, Suite 100
Indianapolis, IN 46240
(317) 428-4527

Counsel for amici curiae

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2022, the foregoing brief of amici curiae Reporters Committee for Freedom of the Press and 14 media organizations was filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court and was served on the following via the Indiana E-filing System ("IEFS"):

Andrew Beare Jones
JONES LAW OFFICE LLC
224 West Colfax Ave 100
South Bend, IN 46601
574-239-7017

J. Thomas Vetne
JONES OBENCHAIN, LLP
130 South Main St., Suite 400
South Bend, IN 46634
574-233-1194

Counsel for Appellant-Defendant

Robert William Jonas
Robert Joseph Palmer
MAY OBERFELL LORBER
4100 Edison Lakes Pkwy, Ste. 100
Mishawaka, IN 46545
574-232-2031

Counsel for Appellee-Plaintiff

/s/ Michael A. Wilkins
Michael A. Wilkins
BORYLES KIGHT & RICAFORT
8250 Haverstick Road, Suite 100
Indianapolis, IN 46240
(317) 428-4527

Counsel for amici curiae