IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

RESOLUTE FOREST PRODUCTS, INC., *et al.*	)	
Plaintiffs,	)	
v.	)	Case No. 1:16-cv-00071-JRH-BKE
GREENPEACE INTERNATIONAL, *et al.*	)	
Defendants.	)	

BRIEF OF *AMICI* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 11 MEDIA COMPANIES IN SUPPORT OF GREENPEACE'S MOTION TO DISMISS AND MOTION TO STRIKE

The Reporters Committee for Freedom of the Press and 11 additional *amici* listed below, through undersigned counsel, respectfully move for leave to appear as *amici curiae* in support of Defendants' motion to dismiss and motion to strike. Defendants have consented to the filing of this brief; Plaintiffs have stated that they do not consent.

In addition to the Reporters Committee, the *amicus* parties are: American Society of News Editors, Association of Alternative Newsmedia, Association of American Publishers, Inc., First Amendment Coalition, First Look Media Works, Inc., Investigative Reporting Workshop at American University, National Press Photographers Association, Online News Association, The Seattle Times Company, Tully Center for Free Speech, and Yelp, Inc. Each is described more fully in Appendix A.

As representatives of the news media and distributors of information to the public, *amici* are deeply concerned about application of federal RICO claims to speech, especially when such claims are intended to circumvent First Amendment protections. In addition, *amici* have an interest in ensuring that anti-SLAPP protections apply in federal courts throughout the country. Finally, *amici* write to highlight the importance of preserving robust protection for opinions. Protecting opinions guarantees that speakers can express themselves without fear of liability, a core guarantee of both the United States and Georgia Constitutions.

SUMMARY OF THE ARGUMENT

Resolute Forest Products, Inc., et al ("Resolute") sued Greenpeace International, Greenpeace, Inc., Greenpeace Fund, Inc., Daniel Brindis, Amy Moas, Matthew Daggett, and Rolf Skar (collectively, "Greenpeace") as well as ForestEthics, Todd Paglia, and John and Jane Does 1-20 for RICO violations, libel, tortious interference, conspiracy, and trademark dilution after Greenpeace publicly advocated against and published statements about Resolute's environmental practices. In response, Greenpeace filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) and a motion to strike under Ga. Code Ann. § 9-11-11.1, Georgia's anti-SLAPP statute.

This case is about the exercise of fundamental speech rights. Protecting Greenpeace's freedom of expression — by rejecting the application of a federal racketeering statute to speech on matters of public concern, by applying the protections of an anti-SLAPP statute, and by protecting statements of opinion — will ensure that speakers, including members of the news media, can exercise their constitutional rights without fear of unjustified reprisals.

Use of the RICO statute to target speech is clearly an attempt at an end-run around the protections of the First Amendment, and the U.S. Supreme Court has made clear that attempts to recover based on statements regarding matters of public concern or about public figures must be

subject to all the protections of the First Amendment. No claim that attempts to circumvent these standards should stand.

State statutes enacted to defeat "strategic lawsuits against public participation," or SLAPP suits, should apply in federal court. Anti-SLAPP statutes, enacted in 29 states and the District of Columbia, provide mechanisms for speakers to swiftly resolve lawsuits brought to intimidate them into silence. The public interest in recognizing anti-SLAPP remedies in federal actions is significant: frivolous or otherwise insufficient suits arising out of speech create a significant burden for speakers, including news organizations, and anti-SLAPP statutes help relieve this burden and, in most cases, help speakers avoid or minimize the costs of litigation and discovery. The application of state anti-SLAPP statutes in federal court has been upheld by three federal circuit courts, all of which have found that the laws do not conflict with the Federal Rules of Civil Procedure and create substantive rights.

Amici also emphasize the importance of preserving the broad protections afforded to subjective expression. If the barrier between protected opinion and actionable fact is blurred, the freedom to speak out on controversial matters of public interest as guaranteed by the First Amendment to the United States Constitution and Article I, Section I of the Georgia Constitution will be curtailed. Speakers would be deterred from injecting themselves into public debate for fear of tort liability, forcing people to examine matters of public concern without the benefit of diverse viewpoints. Courts should encourage — not suppress — a vast array of opinions.

In this case, a corporation engaged in controversial activities of great public interest attempts to stifle the speech of an organization that has criticized and questioned its environmental record. Although framed as several different causes of action, the claims share a central purpose — silencing speech on matters of public concern.

ARGUMENT

I. This Court should reject any effort to plead around well-established First Amendment protections by alleging that statements on matters of public interest can lead to liability under RICO.

For each of its five claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Resolute asserts that Greenpeace "create[d] and disseminate[d] . . . reports and information concerning Resolute," making clear that what Resolute attempts to characterize as Greenpeace's alleged "widespread dissemination scheme" in violation of RICO was merely Greenpeace exercising its right to speak freely under the First Amendment. Complaint at 92, *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, No. 1:16-tc-05000 (S.D. Ga. filed May 31, 2016) [hereinafter Complaint]. *See also id.* at 97, 103, 106–07, 109, 113–14. Indeed, Resolute identifies under each RICO count the protected First Amendment activity or activities in which Greenpeace engaged: creating reports and "broadly disseminating" them, "communicating and coordinating with one another to" disseminate information via electronic mail, U.S. mail, and phone, and "us[ing] and caus[ing] to be used wire communications in interstate and foreign commerce and U.S. mails" that were circulated on its website and social media such as Twitter and Facebook. *Id.* at 93, 101, 103, 106–07, 109–10, 113–14. Greenpeace also argues that the other counts, such as tortious interference and conspiracy, are upon close examination just "garden variety defamation claims" – allegations that communications to other parties harmed or embarrassed the company. Mot. to Dismiss at 3.

If, as Greenpeace alleges, all of these actions simply come down to statements about public issues that Resolute does not like and that are more appropriately resolved through defamation actions if untrue, *amici* agree that such claims are not the proper subject of a RICO action. *Id.* at 4 ("*no* court has ever held that an advocacy campaign on issues of public importance,

standing alone, can be subject to liability for racketeering."). Attempting to disguise claims that seek to punish or halt allegedly improper or even false speech as a different cause of action in an effort to circumvent the protections courts have long recognized under the First Amendment should not be tolerated. In fact, such efforts have been specifically repudiated by the U.S. Supreme Court.

In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), the Court dismissed an intentional infliction of emotional distress claim because it concerned speech about a matter of public interest regarding a public figure. The Court found that any claim based on speech about public figures can stand only if it meets the "actual malice" requirement of *New York Times v. Sullivan*; thus, the Court held that plaintiffs could not circumvent that standard by framing their claims as something else. *See Hustler*, 485 U.S. at 52. Falwell attempted to argue that the "outrageous" nature of the conduct ascribed to him was sufficient to result in liability for intentional infliction of emotional distress, but the Court opined that "in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. . . . Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures." *Id.* at 53.

Permitting use of the RICO statute would be just as, if not more, onerous and damaging to public debate than allowing intentional infliction of emotional distress claims to proceed when traditional libel claims fail. Applying a racketeering statute to speech disregards the important "breathing space" for freedom of expression. *Id.* at 52. Greenpeace publicized environmental issues and evaluated Resolute's role in following sustainable foresting practices. Complaint at 3, 10–11, 21–22. Punishing Greenpeace's speech would create an "undoubted 'chilling' effect on

speech" and set a dangerous precedent for the news media reporting on matters of public concern. *See Hustler*, 485 U.S. at 52.

Resolute claims that Greenpeace's circulation of a series of reports and publications on its activities amounted to "a pattern of racketeering activity," Complaint at 92, but the company ignores the value of free debate and the significance of the First Amendment. In its five RICO counts, Resolute attempts to penalize and ultimately silence an advocacy campaign by treating it as an organized crime operation. Speakers of all types, whether advocates or journalists or something else, will often establish a "pattern" of speech; as public controversies rage on for years, there is every reason to believe that any interested speaker will communicate on the same topic many times. This pattern is, of course, particularly true for journalists as they gather and disseminate information on matters of public concern.

The Northern District of Georgia has found that although plaintiffs may "couch their claims in terms of" other statutes and torts, the protections established for libel claims control when the "gravamen of the plaintiffs' cause of action is defamation." *Brock v. Viacom Int'l, Inc.*, No. Civ.A 1:04-CV-1029C, 2005 WL 3273767, at *2 (N.D. Ga. Feb. 28, 2005). In *Brock*, the plaintiffs filed nine claims, including fraud in the inducement, breach of contract, and promissory estoppel, against an entertainment company. The district court refused to evaluate each count separately; instead, it treated the complaint as bringing one claim pertaining to the company's speech. *See id.* As in *Brock*, Resolute must not be permitted to pursue RICO claims against Greenpeace that pertain solely to the latter's speech. The gravamen of Resolute's complaint is defamation arising out of Greenpeace's speech. *See generally* Complaint at 92–115. Given that Resolute seeks damages for reputational harm, its cause of action can only continue if it "meets the constitutional requirements of a defamation claim." *Brock*, 2005 WL

3273767, at *2 (quoting *Steele v. Isikoff*, 130 F. Supp. 2d 23, 29 (D.D.C. 2000); citing *Hustler*, 485 U.S. at 46).

RICO claims based on speech activities are a threat to news media's dissemination of information on matters of public concern. The Southern District of Georgia found that civil plaintiffs bringing RICO claims cannot prevail where the RICO claim was predicated on an act that the statute was not aimed at deterring. Brief of Greenpeace Fund, Inc. in Support of Mot. to Dismiss at 3 (citing *Doxie v. Ford Motor Credit Co.*, 603 F. Supp. 624, 628 (S.D. Ga. 1984)). But Resolute has done just that by asking this Court to apply a racketeering law to protected speech.

In this case, there is no right to circumvent the protections afforded speech on public affairs. The Supreme Court has been steadfast in its protection of the First Amendment and its decision not to punish free expression. *Hustler*, 485 U.S. at 51. Resolute's effort to contravene the First Amendment threatens to upend what is "essential to the common quest for truth and the vitality of society as a whole" — the robust protection of the freedom of speech. *Id.*

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

A. 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 helps to protect the exercise of 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. 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.*, 190 F.3d 963, 970–71 (9th Cir. 1999). The Ninth Circuit has noted the gravity of the interests at stake in applying anti-SLAPP statutes: "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)).

Refusing 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 undoubtedly remain 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 (Sup. Ct. 1992), *aff'd*, 616 N.Y.S.2d 98 (App. Div. 2d Dep't 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 state 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 news media is already facing reduced resources to contest lawsuits. *See In Defense of the First Amendment*, Knight Found. (Apr. 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 add additional monetary burdens to media defendants and vitiate the desire of state legislatures to curb abuses of the judicial process. *See* Ga. Code Ann. § 9-11-11.1(a) ("The General Assembly of Georgia further finds and declares that the valid exercise of the constitutional rights of petition and freedom of speech should not be chilled through abuse of the judicial process.").

A contrary ruling could have damaging, unintended consequences. In order to avoid the application of an anti-SLAPP law, plaintiffs could shift their litigation to federal court. *See Newsham*, 190 F.3d at 973 ("Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum."). 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. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (an "'untrammeled press [is] a vital source of public information,' . . . and an informed public is the essence of working democracy.") (citation omitted). Recognizing the substantive protections afforded to defendants by state anti-SLAPP laws to promptly dismiss speech-

suppressing lawsuits in federal court would ensure that plaintiffs do not choose a federal court instead of a state one merely to avoid these statutes.

1. The Georgia anti-SLAPP statute does not conflict with the Federal Rules and is substantive under *Erie*.

The First, Fifth, and Ninth Circuits have concluded that state anti-SLAPP statutes apply in federal court. *Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010); *Henry*, 566 F.3d at 168–69; *Newsham*, 190 F.3d at 973; *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1189–90 (9th Cir. 2013). The applicability of state anti-SLAPP statutes in federal court is currently an open question in the Eleventh Circuit, but a case now before the court may resolve the dispute. *See Tobinick v. Novella*, No. 15-14889 (11th Cir.) (filed Sept. 1, 2016). The lower court in that case — the U.S. District Court for the Southern District of Florida — found that state anti-SLAPP statutes can be utilized in federal court, applying the California anti-SLAPP statute to the claims at issue. *Tobinick v. Novella*, 108 F. Supp. 3d 1299 (S.D. Fla. 2015). Because the Georgia anti-SLAPP statute is analogous to the anti-SLAPP statutes in *Godin*, *Henry*, and *Newsham*, it should also be found to apply in federal court.

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 N. 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 all 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 conflict, asking whether the state statute at issue "attempts to answer the same question" as the Federal Rule. 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. *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 also found that 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* considered the significance of the state interests in determining whether there is a conflict).

Following the logic of these courts, Georgia's anti-SLAPP statute does not conflict with the Federal Rules because it, like the statutes at issue in the above cases, "supplements rather

than conflicts" with the Federal Rules. *Id*. The Georgia anti-SLAPP statute creates a "separate and additional theory upon which certain kinds of suits may be disposed of before trial." *Id.*

Because there is no "direct collision" between Georgia's anti-SLAPP statute and the 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 *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945)). Under this test, Georgia's anti-SLAPP statute provides substantive protection for defendants. The 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, the Georgia anti-SLAPP statute is specifically designed to protect a defendant's substantive, constitutional rights of freedom of petition and speech. Ga. Code Ann. § 9-11-11.1(b)(1).

Georgia courts specifically recognized the substantive protections of the state's anti-SLAPP law, finding that although there are "procedural aspects" of the statute, there are also substantive provisions for determining privileged speech that apply in federal court. *Adventure Outdoors, Inc. v. Bloomberg*, 519 F. Supp. 2d 1258, 1278–79 (N.D. Ga. 2007) (citing *Atlanta Humane Soc'y v. Harkins*, 278 Ga. 451 (2004)). As the Court of Appeals of Georgia held, "[b]ased on the plain language of the statute, existing case law, and the statute's express purpose, . . . the verification requirement of the anti-SLAPP statute is procedural in nature in that verifications must contain certain assertions and must be filed within a certain time, but is also substantive in nature in that to determine whether the requirements of the statute have been met, the court must take a substantive look at the verification offered to ensure that the underlying

lawsuit has not been initiated for an improper purpose. An interpretation that the verification requirement is entirely procedural in nature would be contrary to the stated purpose of the statute, which is to 'encourage participation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech. . . .'"[1] *Harkins v. Atlanta Humane Soc'y*, 264 Ga. App. 356, 360 (2003) (citation omitted).

As the verification requirement has since been overhauled in the newly enacted anti-SLAPP law – effective July 1, 2016 – there is no impediment to its application in federal court. *See* Ga. Code Ann. § 9-11-11.1. Georgia courts permit dismissal of claims under the state's anti-SLAPP statute "based on the substantive protection that the anti-SLAPP statute provides for persons who exercise their right to free speech." *E.g.*, *Harkins*, 264 Ga. App. at 358, 360. *See also Buckley v. DIRECTV, Inc.*, 276 F. Supp. 2d 1271, 1274 (N.D. Ga. 2003) (applying Georgia's anti-SLAPP statute in federal court to dismiss plaintiff's claims because pre-litigation demand letter was on matter of public concern and an exercise of First Amendment right of petition). The inclusion of a verification requirement in Georgia's anti-SLAPP statute is the single distinction the Northern District of Georgia outlined between its state anti-SLAPP law and California's, but as that distinction no longer exists, the argument no longer stands that these two statutes should be treated differently in federal court. Such a proposal negates the substantive provisions of Georgia's special motion to dismiss that the Northern District of Georgia held apply in federal court. *Compare 15249 Alberta Ltd. v. Lee*, No. 1:10-CV-02735-RWS, 2011 WL 2899385, at *3 (N.D. Ga. July 15, 2011), *with Adventure Outdoors, Inc.*, 519 F. Supp. 2d at 1278–79.

[1] In 2014, the Eleventh Circuit also found that the verification requirement in Georgia's former anti-SLAPP statute was procedural and could not be applied in federal court. *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1359–62 (11th Cir. 2014).

Courts also look to the twin purposes of *Erie* — to minimize forum shopping and the inequitable administration of the law — in conducting the substantive-procedural analysis. *Newsham*, 190 F.3d at 973. These considerations weigh in favor of applying Georgia's anti-SLAPP statute in federal court. If Georgia'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 the federal courts at risk of being swept away in a rising tide of frivolous state actions." *Makaeff*, 736 F.3d at 1187. Thus, refusing to apply the state law would reward forum shopping and lead to the inequitable administration of the law. Such a result, which would encourage 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.

Although three federal circuit courts have found state anti-SLAPP statutes applicable in federal court, the D.C. Circuit determined the D.C. anti-SLAPP statute did not apply in federal court in *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015). The D.C. Circuit concluded that the D.C. anti-SLAPP statute conflicted with Federal Rules 12 and 56 because the Rules "answer the same question" as the state law. *Id.* at 1333–34 (citing *Shady Grove*, 559 U.S. at 398–99). But the court ignored the primary distinction between the Federal Rules and anti-SLAPP statutes that it had earlier highlighted: "Many States have enacted anti-

SLAPP statutes to give more breathing space for free speech about contentious public issues. Those statutes 'try to decrease the 'chill effect' of certain kinds of libel litigation and other speech-restrictive litigation.'" *Abbas*, 783 F.3d at 1332 (citations omitted). Specifically, the D.C. Circuit noted that the D.C. Council enacted the statute "in response to . . . an upsurge in 'lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Under the Act as relevant here, a defendant may file a special motion to dismiss to dismiss 'any claim arising from an act in furtherance of the right of advocacy on issues of public interest.'" *Id.* In focusing on the "procedural mechanism" of the anti-SLAPP statute as opposed to its objective, the D.C. Circuit overlooks a crucial fact – the declaration of a new substantive right that Georgia's anti-SLAPP law also incorporates. *Id.* at 1332, 1335.

While Rules 12 and 56 *uniformly* provide defendants theories for disposing of suits before trial, Georgia'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 or entity's right of petition or free speech 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." Ga. Code Ann. § 9-11-11.1(b)(1). The question asked when assessing a special motion to strike under the Georgia 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 Georgia anti-SLAPP statute do not conflict.

Because the Georgia anti-SLAPP statute does not directly conflict with the Federal Rules of Civil Procedure and is substantive under *Erie*, *amici* urge this Court to hold that Georgia's anti-SLAPP statute applies in federal court.

2. A civil lawsuit arising out of speech on environmental issues is precisely the type of suit that the Georgia anti-SLAPP statute is meant to apply to.

Resolute's RICO, libel, tortious interference, conspiracy, and trademark dilution claims arising from Greenpeace's advocacy about an issue of public importance are precisely the type of claims contemplated by the Georgia legislature when it amended Georgia's anti-SLAPP statute. The legislature intended for the anti-SLAPP statute to "encourage participation by the citizens of Georgia in matters of public significance and public interest through the exercise of their constitutional rights of petition and freedom of speech." Ga. Code Ann. § 9-11-11.1(a). The law declared that speech rights "should not be chilled through abuse of the judicial process." *Id*. Dismissing Resolute's claims pursuant to an anti-SLAPP motion to strike both encourages Greenpeace's participation in a matter of public interest — namely, the environmental impact of Resolute's operations in the boreal forest — and discourages the chilling of speech.

The Georgia anti-SLAPP statute defines a SLAPP as an "act of such person or entity which could reasonably be construed as an act in furtherance of the person's or entity's right of petition or free speech 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." *Id.* § (b)(1). Greenpeace is an advocacy organization that openly seeks to promote public debate on a number of environmental issues including the future of Canadian boreal forests, the threat to biodiversity, questionable logging practices, violations of the Canadian Boreal Forest Agreement, and concern for the future of communities relying on a healthy boreal forest. Greenpeace is motivated by its desire to reform laws and practices in a manner that it believes will protect the environment. Greenpeace's publications at issue in this case are clearly, as defined in the Georgia anti-SLAPP statute, acts in furtherance of a person's right of free speech in connection with an issue of public

concern. *See Connick v. Myers*, 461 U.S. 138, 146 (1983) (defining speech of a public concern as speech that can "be fairly considered as relating to any matter of political, social, or other concern to the community"); *Robinson v. Balog*, 160 F.3d 183, 188 (4th Cir. 1998) (finding that statements about potential environmental hazards were speech on a matter of public concern).

III. Statements based on disclosed, truthful facts are protected opinions.

Protection of opinionated writing is important to the news media. Everything from commentary on op-ed pages to the viewpoint of a documentary film may be more opinionated than factual news reporting, and deserving of protection without the need to justify the "factual" accuracy of opinionated conclusions when the factual *basis* of those opinions is disclosed.

A. Broadly protecting statements of opinion encourages robust speech, spurs societal change, and infuses valuable information into the public sphere.

Protecting opinion is essential to ensuring a flourishing marketplace of ideas. If courts find publishers liable for opinions, 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). Publishers of all types rely on these broad protections to provide illuminating information to the public. Without expansive safeguards for opinions, "authors of every sort would be forced to provide only dry, colorless descriptions of facts, bereft of analysis or insight." *Partington*, 56 F.3d at 1154. The ability to freely quote sources, observe and describe events, and disseminate information while drawing sometimes subjective conclusions from the facts presented is a critical journalistic tool. Reporting on the facts — the who, what, when, and where — is often only the starting point. Adding creative and illustrative features to the information being disseminated and placing facts in context helps make journalism compelling to readers, and captures aspects of the story that would be absent without opinions.

Preserving robust protections for opinion, whether from an advocacy organization or a journalist, is important to give speakers the security they need to contribute to public discourse without fear of liability. It was an opinion column by Eileen McNamara that caused then-*Boston Globe* editor Marty Baron to designate resources to thoroughly investigate allegations of sexual abuse by priests in the Catholic Church. *See* Eileen McNamara, *A Familiar Pattern*, THE BOSTON GLOBE (July 22, 2001). The investigation revealed a history of covering up sexual abuses by Church officials, resulting in *The Boston Globe* receiving a Pulitzer Prize in 2003 and inspiring the movie *Spotlight*, winner of the Oscar for Best Picture in 2016. Strong legal protections for opinion can encourage publications to shine a light on matters of public concern.

B. Courts across the country and in Georgia have held that opinions based on disclosed, truthful facts are not actionable.

The U.S. Supreme Court recognized the importance of protecting opinions in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). While rejecting the idea of a distinct "opinion defense," the Court described two categories of opinion shielded by the First Amendment: statements that are not "provable as false" and statements that "cannot reasonably be interpreted as stating actual facts." *Id.* at 19–20. Some statements in and of themselves are so subjective and unverifiable that they must be deemed opinion (sometimes referred to as "pure opinion"). RESTATEMENT (SECOND) OF TORTS, § 566 cmt. b (1977). Other statements can be perceived as factual or opinion statements, and in such cases, if the facts supporting the statement are true and known from the context in which they are made or truthfully expressed, they are protected. *Id.* Thus, a "simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." *Id.* § 566 cmt. c.

Extrapolating from the parameters set out in *Milkovich*, courts across the country, including those in Georgia, have recognized an important principle of defamation law — conclusions based upon disclosed, true facts are not actionable. *See, e.g.*, *Hoffmann-Pugh v. Ramsey*, 193 F. Supp. 2d 1295, 1302 (N.D. Ga. 2002), *aff'd*, 312 F.3d 1222 (11th Cir. 2002) (". . . statements clearly recognizable as pure opinion because their factual premises are revealed" are excluded from defamation liability (citing *Jaillett v. Ga. Television Co.*, 238 Ga. App. 885, 890 (1999)); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995) ("A statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning."); *Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997) (Where "a statement of opinion either discloses the facts on which it is based or does not imply the existence of undisclosed facts, the opinion is not actionable."). This tenet is rooted in the theory that "statements clearly recognizable as pure opinion because their factual premises are revealed" are protected because they cannot be understood as stating "actual facts." *Phantom Touring v. Affiliated Publ'ns*, 953 F.2d 724, 731 n.13 (1st Cir. 1992).

Although this principle was not explicitly addressed in *Milkovich*, the U.S. Supreme Court provided an example of the reasoning behind protecting statements based on disclosed, true facts. The Court explained that the statement, "In my opinion Mayor Jones is a liar," could be actionable, but the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teaching of Marx and Lenin," would not be actionable. *Milkovich*, 497 U.S. at 20. The second statement, in which the speaker presents reasons for the belief, receives constitutional protection because it does not imply a provable false fact. *Id*. As the U.S. Court of Appeals for the First Circuit described this principle, when opinions are based on disclosed facts, "all sides of the issue, as well as the rationale for [the defendant's] view, [are] exposed,

[and] the assertion . . . reasonably could be understood as [the defendant's] personal conclusion about the information presented, not as a statement of fact." *Phantom Touring*, 953 F.2d at 730.

Consistent with *Milkovich*, federal circuit courts protect opinion based on disclosed, true facts. *See, e.g.*, *Riley v. Harr*, 292 F.3d 282, 297 (1st Cir. 2002) (concluding a statement that a witness was "lying" was protected opinion because the speaker disclosed the facts supporting the opinion); *Potomac Value & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1290 (4th Cir. 1987) (finding statements about a business were protected opinion because "the reader is by no means required to share" the conclusions made by the author when they were based on seven specific points outlined in the article); *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 972 (3d Cir. 1985) (determining that listeners can choose to accept or reject the speaker's conclusion by independently assessing the facts); *Lauderback v. Am. Broad. Cos.,* 741 F.2d 193, 195 (8th Cir. 1984) (finding that statements that agent was "rotten," "unethical," "sometimes illegal," a "crook," and a "liar" were protected opinions based on disclosed, true facts); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995) (indicating that by divulging facts underlying a conclusion, "readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts"); *Moldea v. New York Times Co.*, 15 F.3d 1137, 1144-45 (D.C. Cir. 1994) (holding that statements were not actionable as opinion because the "reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts").

Georgia courts also protect statements based on disclosed, true facts. *See, e.g.*, *Hoffmann-Pugh*, 193 F. Supp. 2d at 1302; *Jaillett*, 238 Ga. App. at 890 ("If an opinion is based

upon facts already disclosed in the communication, the expression of the opinion implies nothing other than the speaker's subjective interpretation of the facts."); *Austin v. PMG Acquisitions, LLC*, 278 Ga. App. 539, 541–42 (2006) (finding that a newspaper article claiming an oral surgeon "was apparently trying to protect his daughter" by falsifying a blood alcohol lab report was protected as the journalist's opinion based upon facts presented in the article). In *Hoffmann-Pugh*, the parents of JonBenet Ramsey published a book recounting the investigation into the mysterious killing of their six-year-old daughter. 193 F. Supp. 2d at 1297. The parent authors identified seven possible leads they believed should be investigated, including Linda Hoffmann-Pugh, the family housekeeper at the time of JonBenet Ramsey's death. *Id.* After publication, Hoffmann-Pugh sued John and Patsy Ramsey for defamation, alleging that the book created the false impression that Hoffmann-Pugh murdered JonBenet Ramsey. *Id.* The court granted Defendants' motion to dismiss, finding that the statements were protected opinion because the facts upon which the statements were based were completely revealed to the reader, and those facts were not defamatory. *Id* at 1302.

C. Greenpeace's statements about Resolute's practices are the type of nonactionable opinion that should not give rise to a libel suit.

In this case, Greenpeace asserts that it based its subjective conclusions about Resolute on disclosed facts from reliable information that are substantially true. See Mot. to Dismiss at 22 ("The writers of the statements at issue went out of their way to set forth the basis for the opinions expressed through footnoting sources, adding hyperlinks to sources, and providing links to supportive news reports.") Providing truthful information to support its conclusions would clearly warrant finding that the statements Greenpeace made, no matter how vehemently, must be protected as opinions based on disclosed facts.

Indeed, at least one example illustrates the importance of allowing speakers to be critical of other parties as long as they state the facts on which their opinions are based. Greenpeace's "Resolute: Forest Destroyer" campaign and publications associated with it included statements that Resolute destroyed endangered forests and species and exploited the Canadian Boreal indigenous communities, including that of the First Nations. However, Greenpeace's conclusion that Resolute is a "Forest Destroyer" is its own opinion based on facts presented to readers. These facts consist of findings from the Grand Council of the Crees and from independent investigations and audits of Resolute's environmental practices, including the Accreditation Services International ("ASI") and Forest Stewardship Council ("FSC"). *See* Mot. to Dismiss at 24; Mot. to Strike at 15–24. Greenpeace referred to the findings of the Grand Council of the Crees, ASI, and FSC to readers throughout its publications about Resolute. After analyzing the disclosed facts, readers could agree or disagree with Greenpeace's subjective conclusion that Resolute was a "Forest Destroyer," and form their own view.

Further, courts have found that the status of a speaker or the context in which speech is made can signal to readers that the speaker's statements are subjective opinions meant to persuade. *See Pellegrini v. Ferrer*, 27 Media L. Rep. 1127, 1128 (N.Y. Sup. Ct. 1998) (listeners would likely perceive a radio show guest's statements critical of a police officer as opinion because the guest had previously been critical of the police department); *McGill v. Parker*, 179 A.D.2d 98, 110 (N.Y. 1st Dep't 1992) (readers of letters to government officials would interpret statements alleging the plaintiff mistreated his horses as opinion because they were designed primarily to persuade); *Immuno A.G. v. Moor-Jankowski*, 537 N.Y.S.2d 129, 137 (1st Dep't 1989) (average readers of a letter to an editor would understand the statements to be opinion rather than facts because they were written by a known animal rights activist). Here,

Greenpeace, a worldwide organization established in 1971, is known by the public as an activist organization that advocates for environmental causes. Accordingly, a reasonable reader would interpret its statements as being subjective expressions of opinion.

IV. CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to find that the Georgia anti-SLAPP statute applies in federal court and to reject any attempt to circumvent longstanding constitutional protections in defamation law by advancing RICO claims based on disagreement with statements on matters of public interest.

Respectfully submitted this 15th day of September 2016.

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I HEREBY CERTIFY that on the 15th day of September 2016, I filed the foregoing *amicus curiae* memorandum via the CM/ECF system, which electronically served the following:

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V. APPENDIX A: DESCRIPTION OF AMICI

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 Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

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

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 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.

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.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-Republic*, *Walla Walla Union-Bulletin*, *Sammamish Review* and *Newcastle-News*, all in Washington state.

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.

Yelp Inc. provides online services, including Yelp.com, which allow consumers to share ratings, reviews, photographs, and other information about businesses, government services, and other local establishments. Approximately 23 million unique mobile devices accessed Yelp via the Yelp app, approximately 73 million unique visitors visited Yelp via desktop computer, and approximately 69 million unique visitors visited Yelp via mobile website on a monthly average basis during the second quarter of 2016. Yelp's users have posted over 100 million reviews since Yelp's inception in 2004.

VI. APPENDIX B: DISCLOSURE STATEMENTS

American Society of News Editors is a private, non-stock corporation that has no parent.

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

The Association of American Publishers, Inc. is a nonprofit organization that has no parent and issues no stock.

First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

First Look Media Works, Inc. is a non-profit non-stock corporation organized under the laws of Delaware. No publicly-held corporation holds an interest of 10% or more in First Look Media Works, Inc.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

The Seattle Times Company: The McClatchy Company owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

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

Yelp Inc. has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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