COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-13405

COLUMBIA PLAZA ASSOCIATES,
Plaintiff-Appellant,

v.

NORTHEASTERN UNIVERSITY,
Defendant-Appellee

On Appeal from a Judgment of the Suffolk Superior Court

SJC-13460

ROCHESTER BITUMINOUS PRODUCTS, INC., ALBERT TODESCA, and PAUL TODESCA, INDIVIDUALLY and as TRUSTEES OF THE TODESCA REALTY TRUST,
Defendants-Appellants,

v.

BRISTOL ASPHALT CO., INC. and EDGEWOOD DEVELOPMENT CO., LLC,
Plaintiffs-Appellees

On Appeal from a Decision of the Plymouth Superior Court

Brief of *Amicus Curiae* New England First Amendment Coalition In Support of No Party

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Date: September 11, 2023

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The New England First Amendment Coalition respectfully submits this brief pursuant to the Court's solicitations of *amicus curiae* briefs issued on March 22, 2023 (in SJC-13405) and June 30, 2023 (in SJC-13460).

CORPORATE DISCLOSURE STATEMENT

The New England First Amendment Coalition has no parent corporation and no stock.

STATEMENT OF INTEREST OF AMICUS CURIAE

The New England First Amendment Coalition (NEFAC) is a non-profit corporation organized and existing under the laws of the Commonwealth of Massachusetts. NEFAC aspires to advance and protect the five freedoms of the First Amendment, including the right to petition, as well as principles of government transparency and the public's right to know. In collaboration with other like-minded advocacy organizations, NEFAC works to advance understanding of the First Amendment across the nation.

DECLARATION PURSUANT TO MASS. R. APP. P. 17(C)(5)

No party or a party's counsel authored this brief in whole or in part. No party or a party's counsel, or any other person or entity, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of the brief. Neither the amicus curiae nor its counsel represents or has represented one of the parties to the present appeals in another

proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeals.

STATEMENT OF ISSUES ADDRESSED BY *AMICUS CURIAE*

1. Whether the Court should retain the "second path" for a non-movant to meet its burden on a special motion to dismiss under the anti-SLAPP statute, G.L. c. 231, § 59H, as set forth in *Blanchard v. Steward Carney Hospital, Inc*., 477 Mass. 141, 155 (2017) (*Blanchard I*), and *Blanchard v. Steward Carney Hosp., Inc*., 483 Mass. 200 (2019) (*Blanchard II*).

2. Whether the Court should revisit the standard of proof under which a non-movant may show that the petitioning on which a claim is based is devoid of factual or legal merit.

3. Whether the Court should apply a standard of *de novo* review of a trial court's determination that petitioning is devoid of reasonable basis in fact or arguable basis in law.

STATEMENT OF THE CASE

NEFAC has no independent knowledge of the facts in either case before the Court. For purposes of this brief, NEFAC accepts the statements of the case and of the facts that appear undisputed as set forth by the parties in their respective briefs to this Court.

BACKGROUND

In 1994, the Legislature enacted the Anti-SLAPP Law, G.L. c. 231, § 59H, which is intended to provide "very broad protection" against lawsuits that are based on a party's exercise of the right to petition the government. *Duracraft Corp. v. Holmes Prod. Corp*., 427 Mass. 156, 162 (1998). The statute provides that if a claim is based on "a party's exercise of its right to petition," as broadly defined in the statute, that party may bring a "special motion to dismiss." G.L. c. 231, § 59H. The trial court "shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party." *Id.*

This Court first interpreted the anti-SLAPP statute in *Duracraft Corp*., 427 Mass. 156, where it held that a party who is sued based on its petitioning is required to show that the claims against it are "based on . . . petitioning activities alone" as defined in the statute, and that they "have no substantial basis other than or in addition to the petitioning activities." *Duracraft Corp.,* 427 Mass. at 166-168. Under *Duracraft*, if the moving party met that threshold, the non-moving party could attempt to show, by a preponderance of the evidence, that "(1) the petitioning activity [was] devoid of any reasonable factual support or any arguable

basis in law, and (2) the activity caused the plaintiffs actual harm." *Off. One, Inc. v. Lopez*, 437 Mass. 113, 123 (2002) (internal quotations omitted).

For 19 years after *Duracraft,* courts applied the Anti-SLAPP statute in a predictable fashion, consistent with the statutory text and the intent of the Legislature. Then came *Blanchard I,* 477 Mass. 141 (2017).

In *Blanchard I,* the Court determined that the longstanding *Duracraft* test did not sufficiently reflect what the Court deemed to be the Legislature's intent in enacting the anti-SLAPP statute. "The anti-SLAPP statute is meant to subject only meritless SLAPP suits to expedited dismissal," the Court stated, "yet it nonetheless may be used to dismiss meritorious claims not intended primarily to chill petitioning." *Blanchard I,* 477 Mass. at 143.

To address this perceived problem, *Blanchard I* announced a new, alternative scenario under which a Court may deny a special motion to dismiss: where the non-movant "establish[es], such that the motion judge may conclude with fair assurance, that its primary motivating goal in bringing [each] claim, viewed in its entirety, was not to interfere with and burden defendants' petition rights, but to seek damages for the personal harm to it from the defendants' alleged legally transgressive acts." *Blanchard I*, 477 Mass. at 160 (cleaned up). A "necessary but not sufficient factor" in this new test is a showing that "the nonmoving party's claim at issue is colorable or worthy of being presented to and

considered by the court, i.e., whether it offers some reasonable possibility of a decision in the party's favor." *Id.* at 160-161 (internal quotations and citations omitted). If the claim is colorable, the Court must then assess the "totality of the circumstances pertinent to the nonmoving party's asserted primary purpose in bringing its claim." *Id.* This includes consideration of "[t]he course and manner of proceedings, the pleadings filed, and affidavits stating the facts upon which the liability or defense is based," which "may all be considered in evaluating whether the claim is a 'SLAPP' suit." *Id.* at 160 (internal quotations and citations omitted).

Two years later, in *Blanchard II,* the Court identified six non-exclusive factors that trial judges may consider when determining whether they are "fairly assured" that the non-moving party's "primary motivating goal" is something other than interfering with petitioning rights:

1. "whether the case presents as a 'classic' or 'typical' SLAPP suit, i.e., whether it is a lawsuit directed at individual citizens of modest means for speaking publicly against development projects,

2. "whether the lawsuit was commenced close in time to the petitioning activity;

3. "whether the anti-SLAPP motion was filed promptly;

4. "the centrality of the challenged claim in the context of the litigation as a whole, and the relative strength of the nonmoving party's claim;

5. "evidence that the petitioning activity was chilled; and

6. "whether the damages requested by the nonmoving party, such as attorney's fees associated with an abuse of process claim, themselves burden the moving party's exercise of the right to petition."

Blanchard II, 483 Mass. at 206-207. "[N]o single factor is dispositive," the Court stated, and "not every factor will apply in every case." *Id.*

Lower courts have struggled to apply the augmented *Blanchard* standard. Shortly after *Blanchard I,* on remand in a companion case, a Superior Court judge noted:

> [t]he parties have filed extensive affidavits and counter-affidavits, supplemented by voluminous exhibits, to support their arguments about the plaintiff's primary motivation for its abuse of process claim. The sheer weight of the papers filed in this regard undermines the notion that the anti-Slapp statute is being used in this instance as a quick remedy to frivolous litigation.

477 Harrison Ave, LLC, v. JACE Boston, LLC, 1584-cv-0829 (Memorandum and Order dated December 21, 2017).

The question of how to assess competing, often fact-laden submissions on a motion to dismiss has bedeviled the lower courts. In *Nyberg v. Wheltle,* for example, a Superior Court judge held that a pair of real estate developers had failed to show that their abuse of process lawsuit against neighboring landowners -- which was based solely on the neighbors' partially-successful adverse possession lawsuit against the developers -- was subject to the *Blanchard* standard. 101 Mass. App. Ct. 639 (2022), review denied, 491 Mass. 1105 (2023) (internal citations

omitted). The Appeals Court noted that the case highlighted "some of the difficulties associated with the application of the augmented framework."

> On one hand, the present action presents as a typical SLAPP case in that a supposedly wealthy developer sued abutters of supposedly modest means for petitioning in court to challenge a development project. On the other hand, the Nybergs averred that far from being wealthy and powerful developers, they were a real estate broker and part-time bookkeeper attempting to develop a single-family residential property, while the Wheltles were not the 'individual citizens of modest means' contemplated by the anti-SLAPP law. The parties contested each other's motivations and representations. There is an inherent difficulty and, in some cases, prematurity in requiring a judge to make credibility determinations and discern a party's primary motivation predicated on affidavits, pleadings, and proffers, and not on a more complete evidentiary record scrutinized through cross-examination.

Nyberg, 101 Mass. App. Ct. at 654–55 (internal citations omitted). The court continued:

> [T]here are obvious difficulties in applying the latter stages of the augmented framework and requiring judges to be fairly assured that the challenged claim is not a SLAPP suit absent full discovery and testimony tested through cross-examination. Yet, the special motion to dismiss remedy exists, in large part, to avoid costly litigation and trial.

Id. (internal citations omitted).

The complexity of post-*Blanchard* anti-SLAPP case law has also attracted the attention of this Court. In *Commonwealth v. Exxon Mobil Corp*., 489 Mass. 724, 728 n. 5 (2022), the Court observed that "[t]he ever-increasing complexity of the anti-SLAPP case law has . . . made resolution of these cases difficult and time consuming," citing several cases in which appeals from anti-SLAPP rulings were decided years after the filing of the complaint. *Id.,* citing *Matter of Hamm*, 487

Mass. 394, 395-396 (2021) (affirming denial of anti-SLAPP motion two years after underlying objection to guardianship accounting was filed); *Blanchard II*, 483 Mass. at 201 (affirming second denial of anti-SLAPP motion against complaint filed in 2013); *Haverhill Stem LLC v. Jennings*, 99 Mass. App. Ct. 626, 627, 629 (2021) (affirming denial of anti-SLAPP motion two years after complaint filed). The Court suggested that "this case law may require further reconsideration and simplification to ensure that the statutory purposes of the anti-SLAPP statute are accomplished and the orderly resolution of these cases is not disrupted." *Exxon Mobil Corp*., 489 Mass. at 728 n. 5.

SUMMARY OF THE ARGUMENT

The Court has solicited *amicus* briefs on "[w]hether to revisit the existing framework for assessing special motions to dismiss filed under the anti-SLAPP statute, G.L. c. 231, § 59H." The New England First Amendment Coalition (NEFAC) submits that the time has come to reconsider and simplify the Court's increasingly complex anti-SLAPP case law. *Exxon Mobil Corp*., 489 Mass. at 728 n. 5. The Court should do so by returning to the language of the statute itself.

First, the Court should abandon the "second path" by which non-movants may avoid dismissal of a claim based solely on meritorious petitioning, as set forth in *Blanchard I* and *II.* This standard conflicts with the text of the statute, which provides only one "path" for a non-movant to meet its burden. It also introduces

needless complexity into nearly every anti-SLAPP motion, and strips immunity from persons whom the Legislature intended to protect.

Second, the Court should leave intact its rule requiring a non-movant to prove by a preponderance of the evidence that the petitioning activity on which its claim is based was devoid of merit, and should not replace the rule with a less demanding standard. *Baker v. Parsons,* 434 Mass. 543, 553-554 (2001). The preponderance standard provides the kind of robust protection intended by the legislature, while permitting non-moving parties to recover where petitioning is truly a "sham."

Third, the Court should clarify that the standard on appeal from a determination that petitioning was devoid of reasonable factual or legal support is *de novo*, not abuse of discretion. The *de novo* standard of review is necessary to vindicate the First Amendment-based privilege afforded by the Anti-SLAPP Law.

ARGUMENT

I. THE COURT SHOULD ABANDON THE BLANCHARD TEST.

The Court should abandon *Blanchard's* "second path" for three reasons: (1) it conflicts with the text of the Anti-SLAPP statute, G.L. c. 231, § 59H; (2) it introduces unneeded, costly, and time-consuming complexity to anti-SLAPP motions, resulting in waste of the resources of the courts and of the parties who petition the government, and (3) it strips protection from persons who exercise the

right to engage in meritorious petitioning, to the detriment of the purposes of the statute.

A. The *Blanchard* "Second Path" Test Conflicts with the Text of the Anti-SLAPP Statute.

The first problem with the *Blanchard* "second path" is that it conflicts with "the language of the statute," which is supposed to be "the primary source of insight into the intent of the Legislature." *Velazquez v. Commonwealth*, 491 Mass. 279, 281 (2023) (quotation and citation omitted). "A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." *Sullivan v. Brookline*, 435 Mass. 353, 360 (2001). The *Blanchard* standard deviates from the plain meaning of the Anti-SLAPP Law without identifying any "illogical result" that would occur absent the detour.

The Anti-SLAPP Law identifies only one "path" by which a non-moving party may sustain its burden: a showing that the petitioning was devoid of merit and caused actual injury. The language of the statute is mandatory: a court "shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party." G.L. c. 231, § 59H

(emphasis supplied). The statute contains no room for any "alternative" showing, whatever its merits might be.

"[A] statutory expression of one thing is an implied exclusion of other things omitted from the statute." *Harborview Residents' Comm., Inc. v. Quincy Hous. Auth*., 368 Mass. 425, 432 (1975). This principle, *expressio unis est exclusio alterius*, is "an aid to interpretation," and it should be applied unless "to do so would frustrate the general beneficial purposes of the legislation . . . or if its application would lead to an illogical result." *Phillips v. Equity Residential Mgmt., L.L.C*., 478 Mass. 251, 259 n.19 (2017), quoting *Bank of Am., N.A. v. Rosa*, 466 Mass. 613, 619–620 (2013).

Neither exception applies here. It is not an "illogical result" to protect people who legitimately petition the government from the burden of having to spend thousands of dollars in attorneys' fees to defend against claims based solely on such meritorious petitioning. That was the state of the law under *Duracraft,* and it was not "illogical," nor did it "frustrate the general beneficial purposes of the legislation." *Phillips*, 478 Mass. at 259 n.19.

Just as importantly, the concept of assessing the plaintiff's "primary motivating goal" in bringing its petitioning-based suit does not appear anywhere in the text of the statute. Rather, the *Blanchard I* court appears to have taken the concept from the statute's preamble, as set forth in 1994 House Doc. 1520.

Blanchard I, 477 Mass. at 143–44, (quoting *Duracraft,* 427 Mass. at 161, in turn quoting 1994 House Doc. No. 1520). The preamble reads, in relevant part:

> *Whereas,* The legislature finds and declares that . . . there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, and that such litigation is disfavored and should be resolved quickly with minimum cost to citizens who have participated in matters of public concern.

1994 House Doc. No. 1520 (emphasis supplied).

A statute's preamble is no part of the act itself. "[S]tatements regarding the scope or purpose of an act that appear in its preamble may aid the construction of doubtful clauses, but they cannot control the plain provisions of the statute." *Brennan v. The Governor*, 405 Mass. 390, 395–96 (1989), citing *Milk Control Bd. v. Gosselin's Dairy, Inc*., 301 Mass. 174, 179–180 (1938); see *United States v. Oregon & C.R. Co*., 164 U.S. 526, 541 (1896)("[t]he title is no part of an act, and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous."). Thus, the preamble cannot serve as the foundation of an alternative burden of proof for a non-moving party. Such an approach "places far too much emphasis upon the literal meaning of the words in the preamble as compared with the scope and tenor of the act as a whole."[1] *Milk Control Bd. v. Gosselin's Dairy*, 301 Mass. 174 (1938).

[1] Notably, the Supreme Court of California rejected the argument that a near-identical preamble in its anti-SLAPP statute engrafted an "intent-to-chill" element

The Court in *Blanchard I* identified another statutory "hook" for the new test: the words "based on," in the phrase, "based on said party's exercise of its right of petition. . . ." G.L. c. 231, § 59H; *Blanchard I,* 477 Mass. at 143-144 ("we take this opportunity to . . . broaden[] the construction of the statutory term 'based on' by holding that a nonmoving party's claim . . . is not subject to dismissal as one solely based on a special movant's petitioning activity if the nonmoving party can establish that its claim was not 'brought primarily to chill' the special movant's legitimate exercise of its right to petition.") However, the words "based on" govern only the threshold question: is the lawsuit is "based on" petitioning? G.L. c. 231, § 59H. The *Blanchard* "second path" applies *after* the Court has determined that the claims are "based on" petitioning alone. *Blanchard II,* 483 Mass. at 203–04. Moreover, the plain meaning of "based on" has nothing to do with assessment of the non-movant's "primary motivating goal" in bringing its claim. *Blanchard I*, 477 Mass. at 160. Indeed, as the Court recognized in *Duracraft Corp.,* "[t]he focus of the statutory test . . . is *not* on the plaintiff's claim, but rather on the petitioning activity that the special movant asserts bars the plaintiff's claim." 427 Mass. at 165

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onto the law. "'The fact the Legislature expressed a concern in the statute's preamble with lawsuits brought "primarily" to chill First Amendment rights does not mean that a court may add this concept as a separate requirement in the operative sections of the statute.'" *Equilon Enterprises v. Consumer Cause, Inc*., 29 Cal. 4th 53, 60–61, 52 P.3d 685, 690 (2002), quoting *Damon v. Ocean Hills Journalism Club,* 85 Cal.App.4th 468, 480 (2000).

(emphasis in original). Accordingly, the words "based on" provide no grounding for the "second path."

In short, the *Blanchard* "second path" should be abandoned because it directly conflicts with the words of the anti-SLAPP statute. The Legislature provided one "path" by which a non-movant may avoid dismissal of a claim that is based solely on petitioning: proving that the petitioning was devoid of factual or legal merit and caused actual injury. G.L. c. 231, § 59H. This Court "cannot insert words into a statute, where, as here, the language of the statute, taken as a whole, is clear and unambiguous," even "if an injustice or hardship were to result."[2] *Bronstein v. Prudential Ins. Co. of Am*., 390 Mass. 701, 708 (1984). *Blanchard* is inconsistent with this rule, and the Court should take this opportunity to correct course.

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[2] In *Equilon Enterprises*, 29 Cal. 4th at 59, the Supreme Court of California rejected a request to interpret that state's anti-SLAPP law to include a subjective motivation test, where its text did not include one. The court held:

> Since [the Anti-SLAPP Law] neither states nor implies an intent-to-chill proof requirement, for us judicially to impose one, as Equilon urges, would violate the foremost rule of statutory construction. When interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law. This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.

Id. (internal quotations omitted).

B. The *Blanchard* "Second Path" Leads to Undue Complexity, Expense, and Delay in Resolving Anti-SLAPP Motions.

The Court should abandon *Blanchard's* "second path" for another reason: it introduces needless complexity, cost, and delay into anti-SLAPP procedure, undermining the central purpose of the law: to resolve SLAPP suits "quickly with minimum cost to citizens who have participated in matters of public concern." 1994 House Doc. 1520, quoted in *Duracraft*, 427 Mass. at 161; see *Exxon Mobil Corp*., 489 Mass. at 728 n. 5 (2022).

"Typically, rulings on special motions to dismiss under the anti-SLAPP statute run many pages and require difficult legal analysis." *Krimkowitz v. Aliev*, 102 Mass. App. Ct. 46, 47 (2022). The same is true of their briefing. *477 Harrison Ave, LLC, v. JACE Boston, LLC*, 1584-cv-0829 (Memorandum and Order dated December 21, 2017) (noting "sheer weight" of the "extensive affidavits and counter-affidavits, supplemented by voluminous exhibits," filed for and against an anti-SLAPP motion post-*Blanchard*).

The *Blanchard* "second path" innovation is largely to blame for this problem. Pre-*Blanchard,* a moving party could present a winning anti-SLAPP motion by: (1) showing that the claims against it were based solely on petitioning (a task consisting primarily of reviewing the complaint) and (2) explaining why the movant's petitioning was not "devoid" of factual or legal merit. G.L. c. 231, § 59H. The non-movant would then oppose the motion by attempting to show: (1)

that its claims had a non-petitioning basis, and/or (2) that the petitioning was devoid of merit and caused actual injury. *See generally Duracraft*, 427 Mass. 156.

Post-*Blanchard*, the moving party must do much more. It must attempt to show, through pleadings and affidavits, as many of the following additional factors as it can: (1) that the petitioning-based claims are not "colorable" (which often boils down to showing that they fail to state a claim); (2) that "the case presents as a 'classic' or 'typical' SLAPP suit," i.e., *Goliath v. David,* (3) that "the lawsuit was commenced close in time to the petitioning activity;" (4) that the movant filed the motion "promptly;" (5) that the challenged claim is "central" to the litigation as a whole; (6) that the movant's "petitioning activity was chilled," (7) that the damages requested would burden the right to petition, and (8) that other factors (as applicable) tend to show that the plaintiff's "primary motivating goal" in bringing its claim was "to interfere with and burden defendants' petition rights," not "to seek damages for the personal harm to it from the defendants' alleged legally transgressive acts." *Blanchard I*, 477 Mass. at 160. The opposing party must then respond with its own arguments and evidence on each of these points.

This is obviously a daunting task for both sides, and it can result in an avalanche of paperwork. In the *Nyberg* case, for example, the record appendix on appeal from the allowance of a special motion to dismiss ran 410 pages, including hundreds of pages of pleadings and exhibits from the underlying adverse

possession litigation in the Land Court, and eight substantive affidavits addressing the *Blanchard II* factors. See *Nyberg v. Wheltle,* No. 2021-P-0791, Record Appendix. Such volume is more like an appeal from a motion for summary judgment than from a motion to dismiss.

Does all this extra expense and effort serve a purpose? One answer lies in the relative infrequency with which courts find the "second path" factors to be satisfied under the "fair assurance" standard. *Blanchard's* "second path" doesn't make much of a difference in how most cases turn out.

This office has reviewed what it believes to be all 100+ post-*Blanchard* anti-SLAPP cases in Massachusetts state and federal courts to date. It has found only a handful of decisions (other than *Blanchard* itself) holding that the non-moving party had satisfied the "second path" standard. They are: *Daye v. Cobb Corner, LLC*, 101 Mass. App. Ct. 1105 (2022)(unpub.) (reversing dismissal of claim for declaratory judgment that levy on plaintiff's homestead property was unlawful and violated G.L. c. 93A, because claims were brought primarily to remove cloud on title, not to chill petitioning); *Allen v. Fuller*, No. 23-CV-10549-AK, 2023 WL 4706177, at *2 (D. Mass. July 24, 2023) (denying motion to dismiss colorable counterclaim for false imprisonment); *Doelger v. JPMorgan Chase Bank, N.A.*, No. 21-CV-11042-AK, 2022 WL 1805479, at *2 (D. Mass. June 2, 2022) (holding that claims for breach of contract based on filing of a lawsuit were colorable and

not a SLAPP, in part because the claims were not directed at "individual citizens of modest means for speaking publicly against development projects"); *Radfar v. City of Revere*, 20-cv-10178-IT, 2021 WL 4121493 (D. Mass. Sept. 9, 2021) (denying special motion to dismiss claims based on allegedly false abuse prevention application, in part because they were brought after petitioning concluded); *Piccirilli v. Town of Halifax, Massachusetts*, No. 21-CV-11039-ADB, 2021 WL 3036879 (D. Mass. July 19, 2021) (denying motion to dismiss due process claim against town based on plaintiff's employment under *Blanchard* second path); *America's Test Kitchen, Inc. v. Kimball*, 34 Mass.L.Rptr. 167 (2018)(denying special motion to dismiss counterclaims of abuse of process under *Blanchard* second path).

Some of these six cases could likely have been decided the same way on other grounds. For example, in *Daye,* the petitioning amounted to levying on a homestead, apparently without arguable basis in law. 101 Mass. App. Ct. 1105. Thus, the "first path" may have been open to the non-movant. The *Doelger* court seems to have misapprehended the threshold test by determining that breach of contract claims were based "solely" on petitioning. *Compare Duracraft*, 427 Mass. at 168 (holding that a contract that prohibits otherwise-protected petitioning provides non-petitioning basis for a claim).

Regardless, even if one were to deem the *Blanchard* "second path" to be a reasonable interpretation of the Anti-SLAPP Law, it is unnecessary, because experience has now shown that few cases call out for this alternative means of avoiding dismissal. On the other hand, the standard complicates and increases the cost of all anti-SLAPP motions, including those brought by movants who are indisputably entitled to the protection of the statute. Thus, the standard has inflicted needless expense and bother in scores of anti-SLAPP cases to date, to no good effect.

In *Equilon Enterprises*, 29 Cal. 4th at 65 the Supreme Court of California rejected the "intent-to-chill" requirement this Court later imposed in *Blanchard I*. It did so partly because it determined that directing courts to "inquire into the plaintiff's subjective intent would commit scarce judicial resources to an inquiry inimical to the legislative purpose that unjustified SLAPPs be terminated at an early stage." *Id.* Such a requirement "'adds a needless burden to SLAPP targets seeking relief, and destroys the relatively value-free nature of existing anti-SLAPP structures under which actions become suspect because of the circumstances of their arising and the relief sought, without need to litigate motive.'" *Id.*, quoting Jerome I. Braun, "Increasing SLAPP Protection: Unburdening the Right of Petition in California," 32 U.C. DAVIS L. REV. 965, 1078 n. 9 (1999) (noting a subjective motive test is "pregnant with complications").

The experience of Massachusetts has borne out the California court's concerns. The addition of *Blanchard's* subjective motivation requirement has added needless burden and expense to these cases, in contravention of the legislature's intent.

C. *Blanchard* Strips Protection From Persons the Legislature Intended to Shield.

Most importantly, the *Blanchard* "second path" is now being used to strip Anti-SLAPP protection from persons who legitimately petition the government, contrary to the intent of the Legislature. Before *Blanchard,* courts regularly held that the Anti-SLAPP Law protects alleged victims of rape, assault, or domestic violence from claims based on their meritorious complaints to authorities. Now, protection for such parties is far less certain.

In the pre-*Blanchard* case of *Fabre v. Walton*, for example, Amalia Walton sought and obtained an abuse protection order against her ex-boyfriend, Sean Fabre. *Fabre v. Walton*, 436 Mass. 517, 519 (2002). The district court extended the order for six months after a hearing, and Fabre did not appeal. After these proceedings concluded, Fabre sued Walton for abuse of process. This Court held that Fabre's claim must be dismissed under the anti-SLAPP law because he could not show that Walton's petitioning was devoid of merit: the abuse prevention order was final and was not appealed, conclusively showing it was not "devoid" of support. *Id.*

Similarly, in *Benoit v. Frederickson,* sixteen-year-old Amanda Frederickson reported to the police that an acquaintance, Neil Benoit, had raped her. 454 Mass. 148, 149 (2009). The police arrested Benoit and charged him. *Id.* at 150. Ultimately, Frederickson decided that she did not wish to testify, and the rape case was dismissed. *Id.* Benoit then sued Frederickson for malicious prosecution, false imprisonment, and defamation. *Id.* This Court held that the motion must be allowed because Benoit had failed to demonstrate that Frederickson's rape accusation was devoid of reasonable factual support. *Id.* at 153-154.

Now, however, courts are increasingly denying anti-SLAPP motions to dismiss claims like Fabre's and Benoit's based on the *Blanchard* "second path." In *Allen v. Fuller*, No. 23-CV-10549-AK, 2023 WL 4706177, at *2 (D. Mass. July 24, 2023), Elizabeth Allen reported to the police that Michael Fuller had assaulted her, and Fuller spent a weekend in jail. Fuller brought claims against Allen for false imprisonment and intentional infliction of emotional distress. In opposing Allen's anti-SLAPP motion, Fuller did not attempt to show that Allen's assault complaint was devoid of factual or legal merit, instead arguing only the "second path." *Allen v. Fuller,* No. 23-CV-10549-AK (D. Mass.), Doc. No. 21. The Court denied the motion primarily because Fuller filed his claims two years after the assault complaint was resolved. "Fuller's lawsuit does not come 'close in time' to the protected petitioning activity — here, the police report — and Allen's

petitioning activity has not been chilled; the police report and any resultant criminal charges have long been resolved." *Allen v. Fuller*, No. 23-CV-10549-AK, 2023 WL 4706177, at *2 (D. Mass. July 24, 2023), quoting *Blanchard II,* 483 Mass. at 206.

Similarly, in *Radfar v. City of Revere*, No. 1:20-CV-10178-IT, 2021 WL 4121493, at *2 (D. Mass. Sept. 9, 2021), defendant Covino filed an abuse prevention complaint in Lynn District Court against plaintiff Radfar, who then sued him for abuse of process and malicious prosecution. The court denied the anti-SLAPP motion solely because it found the claims "colorable" and because "[p]laintiff waited until the conclusion of the actions undertaken by the government as a result of Covino's petitioning activity." As such, her complaint supposedly "did not interfere with Covino's petitioning activity."[3] *Id.*

The pernicious theme running through these cases is that a victim who files a meritorious police report or abuse complaint with the government can now be

[3] By contrast, anti-SLAPP motions have recently been allowed in spite of arguments under the *Blanchard* "second path" where a claim targeting statements in a police report was filed close in time to the petitioning. *Amato v. Perlera*, No. 1984CV2709, 2020 WL 4812744, at *5 (Mass.Super. Feb. 24, 2020), aff'd 99 Mass. App. Ct. 1125 (2021) (unpub.) (allowing anti-SLAPP motion based on complaint of indecent assault & battery filed during period of plaintiff's pretrial probation for that offense); *Kretsedemas v. Zasoba*, 2184-cv-01660 (Suffolk Super. Ct.) (allowing anti-SLAPP motion to dismiss claim based on call to police over domestic altercation, where complaint filed close in time to divorce filing referencing the call).

deprived of protection simply because her abuser waits to file his claim until after her petitioning has concluded. This is a direct result of *Blanchard's* erroneous re-framing of the Anti-SLAPP law as protecting only against claims brought with an "intent" to "chill" petitioning. Indeed, *Fabre* and *Benoit* themselves could have come out differently today: the alleged abusers in both those cases did not file their claims until after the victim's petitioning had concluded.[4]

The notion that the availability of anti-SLAPP protection could depend on plaintiff's choice of when to file his retaliatory claim would have surprised the Legislature, which said nothing about timing in the words of the statute. G.L. c. 231, § 59H. An anti-SLAPP motion should rise or fall based on the factual and legal merit of the petitioner's speech, not the whims of her antagonist. That is what the Legislature intended when it enacted the statute, and that is the principle to which the Court's caselaw should return.

[4] The Appeals Court in *Nyberg* held that claims targeting past petitioning are not *categorically* non-retaliatory under *Blanchard*. *Nyberg,* 101 Mass. App. Ct. at 652, citing *Wenger v. Aceto*, 451 Mass. 1, 7 n.6 (2008). The anti-SLAPP statute, the court noted, was intended to protect against claims that "punish" protected petitioning, whenever it occurred. *Id.* Nonetheless, *Blanchard II* instructs that whether the claim is filed "close in time" to the petitioning is one factor in the analysis, and some courts appear to be giving it great weight, perhaps due to the absence of other applicable *Blanchard II* factors in some cases. 483 Mass. at 206-207.

II. THE COURT SHOULD RETAIN *BAKER'S* PREPONDERANCE STANDARD.

In *Baker v. Parsons*, the Court held that "the party opposing a special motion to dismiss is required to show by a preponderance of the evidence that the moving party lacked any reasonable factual support or any arguable basis in law for its petitioning activity." 434 Mass. 543, 553-554 (2001)(emphasis supplied). This standard, the Court held, "places the burden on the nonmoving party, as the Legislature intended, but without creating an insurmountable barrier to relief." *Id.* The Court's solicitations of amicus briefs ask whether it should "revisit" this standard, "including by considering alternative standards of proof, including, e.g., a *prima facie* standard," for this determination.

The Court should retain the *Baker* standard. The statute requires courts to grant a special motion to dismiss unless the non-movant "shows that . . . the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law." G.L. c. 231, § 59H (emphasis supplied). To "show" something means to "prove" it. *Coyle v. Com.*, 104 Pa. 117, 133–34 (1883) ("'To show' is to make apparent or clear by evidence, to prove . . . ."); *Hennessy v. Hall*, 14 Cal. App. 759, 762–63 (Cal. Ct. App. 1910) (same); *Chumbley v. Courtney*, 181 Iowa 482, 164 N.W. 945, 946 (1917) (same); BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "show" as "[t]o make (facts, etc.) apparent or clear by evidence; to prove."). The Legislature could have used words imposing

a lesser burden, such as "alleges," "claims," or "makes a *prima facie* showing," but it did not, and the Court lacks the power to rewrite the legislation.

The continued need for *Baker's* preponderance standard is further apparent when one compares the relative burdens of the parties with the language of the statute. The statute states that a moving party may file a special motion to dismiss when it "asserts that the civil claims . . . against said party are based on said party's exercise of its right of petition." G.L. c. 231, § 59H (emphasis supplied). This Court has construed the word "asserts" to require the moving party to "establish[] by a preponderance of the evidence that the putative SLAPP suit . . . was solely based on the moving party's own petitioning activities." *Blanchard II,* 483 Mass. at 203 (cleaned up, emphasis supplied). As for the non-moving party, the statute requires dismissal unless it "shows" that the petitioning was devoid of reasonable factual support or arguable basis in law. G.L. c. 231, § 59H. It would be highly anomalous for the Court to re-interpret "shows" to require a *lesser* burden of proof than the word "asserts" in the same paragraph of the same statute. G.L. c. 231, § 59H.

Furthermore, there has been no demonstration, in the case law or elsewhere, that *Baker's* preponderance of the evidence standard "creat[es] an insurmountable barrier to relief." *Baker,* 434 Mass. at 554. Indeed, in one of the cases before this Court, the plaintiff proved that the opposing party's litigation against it was devoid

of reasonable factual support or arguable basis in law, and the Appeals Court affirmed.[5] *Bristol Asphalt Co. v. Rochester Bituminous Prod., Inc*., 102 Mass. App. Ct. 522 (2023). The same is true in many other appellate decisions. *Van Liew v. Stansfield*, 474 Mass. 31, 40 (2016)(non-moving party made required showing by preponderance of the evidence that complaint for harassment prevention had "no valid basis"); *Gillette Co. v. Provost*, 91 Mass. App. Ct. 133, 139 (2017) (alleged "trade secret" concepts were in the public domain, and thus preponderance of evidence showed that plaintiff's claim was devoid of reasonable factual support or arguable basis in law); *Maxwell v. AIG Domestic Claims, Inc*., 72 Mass. App. Ct. 685 (2008) (workers' compensation insurer's act of urging criminal prosecution of claimant for insurance fraud devoid of any reasonable factual support). The showing may be a "high bar," *Blanchard II,* 483 Mass. at 204, but can be, and has been, cleared.[6]

In short, the preponderance of evidence standard works well, and any lesser standard would fail to carry out the legislature's intent to provide "very broad" protection for petitioning. *Duracraft Corp.,* 427 Mass. at 162.

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[5] Judge Englander dissented from one portion of this determination. *Id.*

[6] To the extent the plaintiff lacks certain specified evidence it needs to clear the bar, the lower courts have the power to order limited, identified discovery for "good cause shown" to assist in this task. G.L. c. 231, § 59H; see *Benoit*, 454 Mass. at 156 (Cordy, J., concurring)(discussing availability of discovery).

III. THE COURT SHOULD EXERCISE *DE NOVO* REVIEW OF WHETHER PETITIONING IS DEVOID OF REASONABLE FACTUAL SUPPORT OR ARGUABLE BASIS IN LAW.

In *McLarnon v. Jokisch*, the Court first stated that appellate review of "the judge's decision to grant the special motion to dismiss [is] to determine whether there was an abuse of discretion or error of law." 431 Mass. 343, 348 (2000). The Court did not explain its choice of this standard of review. Over the years, its decisions have sometimes neglected to mention the standard, or have appeared to look at elements of the standard with fresh eyes. *See, e.g., N. Am. Expositions Co. Ltd. P'ship v. Corcoran,* 452 Mass. 852, 866 (2009) ("North American has made no showing that Bayside's activities were 'devoid of any reasonable factual support or any arguable basis in law.'"); *Benoit*, 454 Mass. at 154 ("Benoit did not show by a preponderance of the evidence that the defendants lacked any reasonable factual support for their petitioning activity."); *Wenger v. Aceto*, 451 Mass. 1, 7 (2008)("the plaintiff has not shown that the defendant's petitioning activity lacked an arguable basis in law."). In fact, the Appeals Court has gone so far as to hold that review of the threshold determination – whether claims are based solely on petitioning – is *de novo*. *Reichenbach v. Haydock*, 92 Mass. App. Ct. 567, 572 (2017) ("[b]ecause the first stage of the Duracraft analysis is, like the analysis of an ordinary motion to dismiss under Mass.R.Civ.P. 12(b), 365 Mass.

754 (1974), directed to examining the allegations of the complaint, our review is fresh and independent, i.e., *de novo*.") (internal quotations omitted).

In his dissent in the *Bristol Asphalt* case, Judge Englander persuasively argues that review from a determination of whether petitioning was devoid of reasonable factual support or arguable basis in law should also be *de novo,* not for abuse of discretion. *Bristol Asphalt Co.,* 102 Mass. App. Ct. at 544 (Englander, J., dissenting). NEFAC agrees, and suggests that this Court should so hold.

To determine whether petitioning has an "arguable basis in law" the court must determine whether a "reasonable person could conclude that there was a basis in law for" the position taken. *Baker*, 434 Mass. at 555. This is fundamentally a legal determination, and legal questions are reviewed *de novo*. *Robinhood Fin. LLC v. Sec'y of Commonwealth*, No. SJC-13381, 2023 WL 5490571, at *6 (Mass. Aug. 25, 2023)(a "question of law" is "subject to *de novo* review"); *Commonwealth v. Brule*, 98 Mass. App. Ct. 89, 93 (2020) ("Whether two different crimes are duplicative is a legal question, and our review is *de novo*.").

Likewise, this Court in *Benoit* made clear that the trial court's job on the "reasonable basis in fact" element is not to determine "which of the parties' pleadings and affidavits are entitled to be credited or accorded greater weight," but to decide "whether the nonmoving party has met its burden (by showing that the underlying petitioning activity by the moving party was devoid of any reasonable

factual support or arguable basis in law. . . .)." *Benoit*, 454 Mass. at 154 n. 7. "Where the motion judge's determination of the second prong of the two-part test does not implicate credibility assessments, it is arguable that appellate review should be similarly *de novo*." *Blanchard v. Steward Carney Hosp., Inc*., 89 Mass. App. Ct. 97, 103 (2016), order aff'd in part, vacated in part, 477 Mass. 141, (2017).

The problem with the current standard of review is that it leaves motion judges with "discretion" to deny an anti-SLAPP special motion to dismiss even where the "the prior petitioning activity was reasonably based." *Bristol Asphalt Co.,* 102 Mass. App. Ct. at 545 (Englander, J., dissenting). In a realm that derives from First Amendment rights and principles, more searching review is needed.

In *New York Times Co. v. Sullivan*, the Supreme Court famously announced a new, heightened, First Amendment-based "actual malice" standard for defamation claims brought by public officials. 376 U.S. 254 (1964). It also held that cases implicating First Amendment freedoms require appellate courts to "'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Sullivan,* 376 U.S. at 285, quoting *Edwards v. South Carolina*, 372 U.S. 229, 235. This Court has likewise followed the "independent examination of the whole record" standard in cases implicating "First Amendment values." *Murphy v. Bos. Herald, Inc*., 449 Mass. 42, 49 (2007) ("Because First Amendment

values are at stake, Federal constitutional law also requires the reviewing court to conduct an independent examination of a jury verdict favorable to the plaintiff, to determine whether the evidence in the record is sufficient to support a determination of 'actual malice.'"); *Cole v. Westinghouse Broad. Co*., 386 Mass. 303, 308 (1982) ("[w]e must examine for ourselves the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect.")(quotations and citations omitted).

Here, the Anti-SLAPP Law's second prong derives from "First Amendment values": the protection of non-frivolous petitioning. *The Real Est. Bar Ass'n For Mass., Inc. v. Nat'l Real Est. Info. Servs*., 608 F.3d 110, 124 (1st Cir. 2010) ("The right to petition the courts for redress implicates the First Amendment right of free speech and right to petition the government," and these principles "include the right to file lawsuits that are not baseless."); *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc*., 508 U.S. 49, 60 (1993) (to avoid invalidity under First Amendment, Sherman Antitrust act construed to prohibit liability for petitioning unless the claim is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.") Like appeals from determinations that allegedly defamatory statements are actionable and not First Amendment-protected opinions, *Cole,* 386 Mass. at 308, or from jury verdicts

finding actual malice, *Murphy*, 449 Mass. at 49, a determination that otherwise First Amendment-protected petitioning is a "sham" implicates questions of freedom of speech, expression, and petitioning, and should be subject to more searching review than abuse of discretion. This Court has not previously relegated First Amendment freedoms to the discretion of trial courts, and it should not do so in the Anti-SLAPP context.

CONCLUSION

As explained above, the Court should re-orient its anti-SLAPP caselaw to more faithfully track the language of the statute itself, and the legislative purposes revealed in that text. Such a recalibration will expedite the resolution of these cases and protect those who wish to petition the government from crippling legal fees and the fear of liability, as the Legislature intended.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure

I, Jeffrey J. Pyle, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 17 (amicus briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

Counsel further certifies that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the Times New Roman, 14-point proportional font, and created on Microsoft Word 365. According to the word count function of Microsoft Word 365, it contains 7,412 non-excluded words. I have relied on the word count feature in the word processing software for this word count.

/s/ *Jeffrey J. Pyle*
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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13 and the Massachusetts Rules of Electronic Filing, Rule 7, I hereby certify that on September 11, 2023, I have made service of this Brief upon the attorney of record for each party via the Electronic Filing System, email or first-class mail on the following:

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