Case Nos. 19-5514/19-5557

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Déjà Vu of Nashville, Inc., *et al.*,

Plaintiffs – Appellants/Cross-Appellees,

v.

Metropolitan Government of Nashville and Davidson County, acting by and through its Traffic and Parking Commission, Freddie O'Connell, and Lee Molette,

Defendants – Appellees,

and

Linda Schipani,

Defendant – Appellee/Cross-Appellant.

On Appeal from the United States District Court for the
Middle District of Tennessee
Case No: 3:18-cv-00511

PRINCIPAL BRIEF OF APPELLEE AND CROSS-APPELLANT LINDA SCHIPANI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, Linda Schipani hereby makes the following disclosures:

(1) Is said party a subsidiary or affiliate of a publicly owned corporation? **No.**

(2) Does a publicly owned corporation or its affiliate, not a party to the appeal, have a financial interest in the outcome? **No.**

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III. STATEMENT REGARDING ORAL ARGUMENT

Mrs. Schipani submits that oral argument is unnecessary and will not aid in resolving the instant appeal. The record is short and uncomplicated, the Parties' positions are adequately set forth in their briefing, and this appeal turns on straightforward questions of law.

IV. STATEMENT OF JURISDICTION

The Plaintiffs' Notice of Appeal indicates that it was taken regarding "the Judgment [Docket No. 66] entered in this action on April 12, 2019," Plaintiffs' Notice of Appeal, R. 67, Page ID # 848, which applies to Defendant Molette alone. Accordingly, this Court's subject matter jurisdiction over the Plaintiffs' separate claims against Defendants Schipani, O'Connell, and the Metropolitan Government of Nashville and Davidson County is disputed.

A. JURISDICTIONAL HISTORY

The Plaintiffs initiated this action directly in federal court and asserted that the district court had subject matter jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(4), and 28 U.S.C. § 1343(a)(3).[1] Defendant Schipani contested federal jurisdiction, arguing that abstention was warranted under the *Colorado River* and *Burford* abstention doctrines and further arguing that Plaintiff Déjà Vu of Nashville lacked standing to maintain its claim against her because it had not suffered an injury.[2]

In a Memorandum Opinion, the district court determined that it had jurisdiction over the merits of this action and that abstention was not

[1] Complaint, R. 1, Page ID # 3, ¶ 8.

[2] Schipani Memo. in Support of Motion to Dismiss, R. 18, Page ID ## 244–251, 253–255.

warranted.[3] In its accompanying Order, the district court also entered an interlocutory order adjudicating all of the Plaintiffs' claims against three Defendants: (1) Defendant Schipani, (2) Defendant O'Connell, and (3) Defendant Metropolitan Government of Nashville and Davidson County.[4] Thereafter, the district court entered a separate Order adjudicating the Plaintiffs' claims against Defendant Molette—the last remaining defendant.[5]

The district court entered a judgment adjudicating the Plaintiffs' last remaining claims on April 12, 2019,[6] and the Plaintiffs filed a timely Notice of Appeal on May 10, 2019.[7] Thereafter, Defendant Schipani timely cross-appealed on May 23, 2019.[8] Accordingly, at least as to some issues, this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

B. SUBJECT MATTER JURISDICTION REGARDING SPECIFIED ORDER

"In deciding whether a notice of appeal confers appellate jurisdiction over a specific issue, [courts] are cognizant that 'the notice afforded by a document, not the litigant's motivation in filing it, determines the

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[3] Memorandum Opinion, R. 51, Page ID ## 611–617.

[4] Order, Feb. 4, 2019, R. 52, Page ID # 626.

[5] Order, Apr. 4, 2019, R. 64, Page ID ## 843–844.

[6] Entry of Judgment, R. 66, Page ID # 847.

[7] Plaintiffs' Notice of Appeal, R. 67, Page ID # 848.

[8] Defendant Schipani's Notice of Appeal, R. 69, Page ID # 854.

document's sufficiency as a notice of appeal.'" *Kotler v. Am. Tobacco Co.*, 981 F.2d 7, 11 (1st Cir. 1992) (quoting *Smith v. Barry*, 502 U.S. 244, 244 (1992)). Here, the Plaintiffs' Notice of Appeal is set forth at R. 67, Page ID ## 848–850. The Plaintiffs' notice does not indicate that the Plaintiffs were appealing from the district court's entire judgment or the final judgment of the entire case. *See id.* Instead, it specifies that the Plaintiffs were appealing only a specific order concerning Defendant Molette. *See id.* at Page ID # 848. In full, Plaintiffs' Notice of Appeal states:

> Notice is hereby given that Plaintiffs Deja Vu of Nashville, Inc. and The Parking Guys, Inc. hereby appeal to the Unites States Court of Appeals for the Sixth Circuit **from the Judgment [Docket No. 66] entered in this action on April 12, 2019**. Plaintiffs note that the body of the Judgment states that it is entered on April 15, 2019, but that the document was entered on the CM/ECF system on April 12, 2019.

Id. (emphasis added).

The April 12, 2019, judgment referenced in the Plaintiffs' Notice of Appeal—"Docket No. 66," *id.*—states, in full, that: "Judgment is hereby entered for purposes of Rule 58(a) and/or Rule 79(a) of the Federal Rules of Civil Procedure on 4/15/2019 **re [64]**."[9] In turn, the referenced Docket Entry No. 64 is the district court's Order dismissing the Plaintiffs' claims

[9] *See* R. 66, Page ID # 847 (emphasis added).

against Defendant Lee Molette alone.[10] By contrast, the district court's February 4, 2019, Order dismissing the Plaintiffs' claims as to Defendant Schipani, Defendant O'Connell, and Defendant Metropolitan Government of Nashville and Davidson County is set forth separately at Docket Entry No. 52.[11]

Under these circumstances, this Court at least arguably lacks subject matter jurisdiction to consider the Plaintiffs' claims as to Defendant Schipani, Defendant O'Connell, and Defendant Metropolitan Government of Nashville and Davidson County, which were disposed of in an entirely separate Order that the Plaintiffs' Notice of Appeal neither mentions nor references. *See Kotler*, 981 F.2d at 11 ("Omitting the preemption order while, at the same time, designating a completely separate and independent order loudly proclaims plaintiff's intention not to appeal from the former order." (citing *Mariani–Giron v. Acevedo-Ruiz*, 945 F.2d 1, 3 (5th Cir. 1991); *Pope v. MCI Telecommunications Corp.*, 937 F.2d 258, 266–67 (5th Cir. 1991), *cert. denied*, 504 U.S. 916 (1992); *Chaka v. Lane*, 894 F.2d 923, 925 (7th Cir. 1990); *Spound v. Mohasco Indus., Inc.*, 534 F.2d 404, 410 (1st Cir. 1976), *cert. denied*, 429 U.S. 886 (1976), *abrogated on other grounds by Pioneer*

[10] *See* R. 64, Page ID ## 843–844.

[11] *See* R. 52, Page ID ## 626–627.

Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993))). Several courts are in accord with this conclusion. *See, e.g.*, *McLaurin v. Fischer*, 768 F.2d 98, 102 (6th Cir. 1985) ("an appeal from a final judgment draws into question all prior non-final rulings and orders. If an appellant, however, chooses to designate specific determinations in his notice of appeal—rather than simply appealing from the entire judgment—only the specified issues may be raised on appeal.") (internal citations omitted); *Constructora Andrade Gutierrez, S.A. v. Am. Int'l Ins. Co. of Puerto Rico*, 467 F.3d 38, 44 (1st Cir. 2006) (collecting cases); *Parkhill v. Minnesota Mut. Life Ins. Co.*, 286 F.3d 1051, 1058 (8th Cir. 2002) ("Our court also has held on numerous occasions that a notice which manifests an appeal from a specific district court order or decision precludes an appellant from challenging an order or decision that he or she failed to identify in the notice." (citing *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 788 (8th Cir. 2001) (holding that notice indicating appeal was from judgment on date of jury verdict was insufficient to preserve appeal from earlier order granting summary judgment); *C & S Acquisitions Corp. v. Northwest Aircraft, Inc.*, 153 F.3d 622, 625–26 (8th Cir. 1998) (holding that notice indicating the appeal was from summary judgment order was insufficient to confer appellate jurisdiction to reach appellant's challenge to earlier order

compelling arbitration); *Bosley v. Kearney R–1 Sch. Dist.*, 140 F.3d 776, 780–81 (8th Cir. 1998) (concluding that notice stating appeal from entry of judgment as a matter of law was insufficient to confer appellate jurisdiction over earlier summary judgment order))); *Jones v. Prince George's Cty.*, 355 F. App'x 724, 728 (4th Cir. 2009) ("Here, the notice of appeal explicitly referenced the district court's April 2, 2008, order but failed to designate the April 28, 2005, order. Appellant argues her intent to appeal that order was obvious because she named the County as an appellee. 'While the intent to appeal may be obvious from the procedural history of a case or from the appeal information form completed by an appellant,' no such intent is obvious here. *Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1059 (8th Cir. 2002). Appellant's appeal information form does not mention the April 28, 2005, order, and the issues resolved in that order were not revisited or addressed in the April 2, 2008, order. . . . We thus lack jurisdiction to review the district court's April 28, 2005, order, and turn our attention to the April 2, 2008, order, which is all that is before us for review.").

Certainly, "'Rule 3(c)'s judgment-designation requirement is to be construed 'in light of all the circumstances.'" *FirsTier Mortg. Co. v. Inv'rs Mortg. Ins. Co.*, 498 U.S. 269, 276, n.6 (1991) (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988)). As a result, although it cannot cure

a defective notice of appeal, the Plaintiffs' ultimate "Civil Appeal Statement of Parties and Issues" filed in this Court is nonetheless a relevant consideration. *Id.* Critically, that statement demonstrates conclusively that the Plaintiffs had not yet settled on the issues that they would be appealing even a full month after their Notice of Appeal was filed, given that the issues that the Plaintiffs indicated they would be raising in their Civil Appeal Statement of Parties and Issues differ materially from those that they ultimately presented in their briefing.[12] Further, the Plaintiffs' ultimate briefing in this Court—which addresses only Plaintiffs' § 1985 claims and seemingly abandons the § 1983 claim that it alleged exclusively against Defendant Metropolitan Government of Nashville and Davidson County—nevertheless concludes with the limited demand that: "For the Foregoing [sic] reasons, Plaitniffs [sic] respectfully request that this honorable court REVERSE the district courts [sic] decision to dismiss Plaintiffs' caustion [sic] of action **under 42 U.S.C. § 1983** and REMAND to the district court for further proceedings not inconsistent with this Court's opinion," and thus, it is not a model of clarity.[13]

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[12] *Compare* Civil Appeal Statement of Parties and Issues, App. R. 22, *with* Appellants' Brief, App. R. 29, p. 3.

[13] *See* Appellants' Brief, App. R. 29, p. 39 (emphasis added).

Admittedly, mandatory dismissal of the Plaintiffs' appeal as to Defendant Schipani, Defendant O'Connell, and Defendant Metropolitan Government of Nashville and Davidson County due to a defect in this Court's subject matter jurisdiction produces a harsh result. *See Smith*, 502 U.S. at 248 ("Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review. Although courts should construe Rule 3 liberally when determining whether it has been complied with, noncompliance is fatal to an appeal.") (citation omitted). As a result, a rule change to the Federal Rules of Appellate Procedure that would eliminate the severe consequences produced by filing precisely the kind of defective notice of appeal that the Plaintiffs filed here is presently being considered. *See generally* MICHAEL CHAGARES, ADVISORY COMM. ON APP. R., REP. TO THE STANDING COMM. 95, 110–14 (2018), https://www.uscourts.gov/sites/default/files/ap12-2018_0.pdf. Unless and until adopted, however, this Court appears to have subject matter jurisdiction to consider only the Plaintiffs' claims regarding the "the Judgment [Docket No. 66] entered in this action on April 12, 2019,"[14] which concerns the Court's Order "on 4/15/2019 re [64]" applying to Defendant Molette alone.[15]

[14] R. 67, Page ID # 848.

[15] R. 64, Page ID ## 843–844.

V. INTRODUCTION

Plaintiffs Déjà Vu of Nashville and The Parking Guys contend that Defendant Linda Schipani—a business owner and neighbor of Déjà Vu of Nashville—violated "the provisions of the Anti-Ku Klux Klan Act of 1871, 42 U.S.C. § 1985(3),"[16] by testifying in opposition to The Parking Guys' valet permit application before a local regulatory commission. Specifically, the Plaintiffs allege that while testifying before the Traffic and Parking Commission of the Metropolitan Government of Nashville and Davidson County, and while providing evidence to that Commission, Linda Schipani engaged in a 42 U.S.C. § 1985(3) conspiracy to deny The Parking Guys its "civil right" to a valet parking permit to service Déjà Vu of Nashville, a local strip club.[17]

As the district court correctly held, "'to sustain a claim under section 1985(3), a claimant must prove both membership in a protected class and discrimination on account of it.'" *See* Memorandum Opinion, R. 51, Page ID # 618 (quoting *Estate of Smithers ex rel. Norris v. City of Flint*, 602 F.3d 758, 765 (6th Cir. 2010). The allegations in the Plaintiffs' Complaint,

[16] *See Browder v. Tipton*, 630 F.2d 1149, 1149 (6th Cir. 1980).

[17] *See* Complaint, R. 1, Page ID # 12, ¶ 50 ("Schipani's testimony included knowingly false statements that were known to be false when made or that were made with reckless disregard to the truth . . . . "); Page ID # 20, ¶¶ 79–81 (setting forth 42 U.S.C. § 1985 claim).

however, utterly failed to satisfy these essential prerequisites, and the Plaintiffs' § 1985(3) claim against Mrs. Schipani—the only claim asserted against her[18]—was properly dismissed for failure to state a claim upon which relief could be granted as a result.

On appeal, the Plaintiffs adopt a new argument that was never presented to the district court: that "[e]stablishments engaging in presentation of female dance performance" should be recognized as a protected class that is "worthy of protection under § 1985(3)."[19] Strip clubs, however, are not and have never been a protected class, and there is no justifiable basis for recognizing them as such. Notably, Plaintiff The Parking Guys is also a valet parking company—not a strip club—and thus, it is not even a member of the "class of organizations engaged in the presentation of female dance performance" for which the Plaintiffs belatedly seek special protection.[20] Regardless, though, because the Plaintiffs' argument that strip clubs are a discrete and insular minority that is entitled to protected class status was never presented to the district court, it is forfeited.

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[18] The governmental Defendants have additionally been sued under 42 U.S.C. § 1983, *see* Complaint, R. 1, Page ID # 20, ¶ 82, but the Plaintiffs' § 1983 claim was not alleged against Mrs. Schipani or Defendant Molette, *see id.*

[19] Appellants' Brief, App. R. 29, pp. 26, 28–34.

[20] Appellants' Brief, App. R. 29, p. 23.

Beyond failing to allege facts supporting the most basic elements of a § 1985(3) claim, the Plaintiffs' Complaint failed to state a cognizable claim for relief against Defendant Schipani for all of the following additional reasons as well:

First, to encourage witnesses like Mrs. Schipani to come forward with evidence, and to foreclose the possibility of retaliatory lawsuits like this one, Tennessee law affords witnesses absolute immunity for testimony and other statements made during the course of judicial and administrative proceedings. As such, Mrs. Schipani is absolutely immune from this lawsuit.

Second, the Plaintiffs' Complaint against Mrs. Schipani is subject to dismissal because it is patently implausible, given that Mrs. Schipani had no authority to deny The Parking Guys' valet permit application and could not have produced the injury over which the Plaintiffs have sued. Indeed, another court has already made this finding. *See* Memorandum and Order, R. 18-1, Page ID # 283 ("the decision to deny this permit was made by the Commission and not by those who spoke against the permit . . . .").

Third, notwithstanding the Plaintiffs' own characterization of their claims, the Plaintiffs sued Mrs. Schipani for her speech. Accordingly, the Plaintiffs' lawsuit must be treated as a common defamation claim, and it must satisfy the heightened constitutional requirements that govern

defamation claims as a consequence. Because it cannot do so, however, the Plaintiffs failed to state a cognizable claim against her.

Fourth, Déjà Vu of Nashville's claim against Mrs. Schipani must be dismissed for lack of standing, because Déjà Vu of Nashville did not suffer an injury.

Fifth, the Plaintiffs' lawsuit against Mrs. Schipani must be dismissed—and Mrs. Schipani is entitled to recover her reasonable attorney's fees and costs—because Mrs. Schipani is immune from this quintessential SLAPP-suit under Tennessee Code Annotated § 4-21-1003(a) as a matter of law.

VI. STATEMENT OF THE ISSUES

(1) Whether this Court has subject matter jurisdiction to adjudicate the Plaintiffs' appeal regarding their claims against Mrs. Schipani;

(2) Whether Plaintiff Déjà Vu of Nashville lacks standing to maintain this action because it was not injured;

(3) Whether the district court's Order dismissing the Plaintiffs' Complaint as to Mrs. Schipani should be affirmed; and

(4) Whether Mrs. Schipani should be awarded costs and attorney's fees under Tennessee Code Annotated § 4-21-1003 given that she timely raised her claim for anti-SLAPP immunity, prevailed on the merits against the Plaintiffs, and established her entitlement to immunity as a matter of law.

VII. STATEMENT OF THE CASE

The facts underlying this dispute are detailed in the Tennessee Court of Appeals' unanimous opinion upholding the Traffic and Parking Commission's similarly unanimous decision to deny Plaintiff The Parking Guys a permanent valet permit to service Plaintiff Déjà Vu of Nashville, a local strip club. *See Parking Guys, Inc. v. Metro. Gov't of Nashville & Davidson Cty. ex rel. Traffic & Parking Comm'n*, No. M201801409COAR3CV, 2019 WL 3406365 (Tenn. Ct. App. July 29, 2019). The facts at issue in this case are similarly detailed in the July 6, 2018, Memorandum and Order of the Chancery Court for Davidson County, Tennessee, *see* R. 18-1, Page ID ## 264–278, which reached the same conclusion. *id.* at Page ID # 283.

During the course of providing temporarily permitted valet service to Déjà Vu of Nashville, a local strip club, The Parking Guys trespassed on neighboring business owners' private property, interfered with the operations of area businesses by obstructing the entrances and exits of their parking lots and parking in alleys, and conducted an illegal valet operation both without a valid permit to operate and beyond permitted hours.[21] Thereafter, in the face of overwhelming and uniform opposition from

[21] *See generally* Memorandum and Order, R. 18-1, Page ID ## 268–278.

aggrieved local business owners who expressed concerns about The Parking Guys' trespassing, parking issues, and other misbehavior,[22] The Parking Guys sought a permanent valet permit from the Metropolitan Traffic and Parking Commission.[23] Upon review of the evidence submitted to the Commission, the members of the Traffic and Parking Commission unanimously voted to deny The Parking Guys a permanent valet permit.[24]

After being denied a permanent permit to operate its desired valet stand, The Parking Guys appealed the Commission's decision to the Chancery Court for Davidson County, Tennessee, which upheld the Commission's denial. *See* Memorandum and Order, R. 18-1, Page ID # 264–283. Undeterred, The Parking Guys then appealed further to the Tennessee Court of Appeals, which unanimously upheld the denial as well. *Parking Guys, Inc.*, 2019 WL 3406365, at *9 (upholding The Parking Guys' permit denial on the bases that "there was material evidence to support the Commission's decision, and that its decision was not arbitrary.").

While The Parking Guys' appeal was pending in state court, the Plaintiffs simultaneously initiated this parallel action in the U.S. District

[22] *Id. See also* Email, Aug. 11, 2017, R. 1-21.

[23] Memorandum and Order, R. 18-1, Page ID ## 264–265.

[24] Transcript, Aug. 14, 2017, R. at 1-25, Page ID # 161, line 11 ("The valet stand has been denied.").

Court for the Middle District of Tennessee. Significantly, the Plaintiffs' Complaint is premised upon the same theory that has been rejected repeatedly in state court: that The Parking Guys' permit application was denied due to an elaborate conspiracy among the Defendants, rather than due to the Plaintiffs' trespassing, parking issues, and other misbehavior.

With respect to Mrs. Schipani, the Plaintiffs sued her under 42 U.S.C. § 1985(3) for statements that she made as a witness: (1) while testifying before the Traffic and Parking Commission during a hearing on The Parking Guys' permit application, (2) during the course of the Commission's proceedings on that application, or (3) in advance of those proceedings.[25] After being sued, Mrs. Schipani promptly moved to dismiss the Plaintiffs' 42 U.S.C. § 1985(3) claim—the only claim alleged against her[26]—on several bases.

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[25] Complaint, R. 1, Page ID # 9, ¶ 40 (referencing statements made "[p]rior to and at the meeting"); Page ID ## 9–10, ¶ 41 (referencing statements made "to support the denial of this valet parking"); Page ID ## 10–11, ¶ 44 (referencing photographs sent in support of permit denial); Page ID # 12, ¶ 50 (referencing "testimony in opposition to the Parking Guys being granted a Valet Permit" that Mrs. Schipani provided "[a]t the Commission's July 10, 2017 Hearing"); Page ID # 15, ¶ 61 (referencing information presented "to the Commission" in order to support "denial of the requested Valet Permit"); Page ID 15–16, ¶¶ 62–63 (referencing an email "requesting that the Commission deny the Parking Guys [the] requested Valet Permit" that purportedly contained false statements).

[26] Defendant Schipani's Motion to Dismiss, R. 17, Page ID # 236–237.

Separate from the merits, Mrs. Schipani argued that she was immune from the Plaintiffs' claim under the absolute privilege afforded to testifying witnesses,[27] that abstention was warranted under both the *Colorado River* and *Burford* abstention doctrines,[28] and that all claims filed by Déjà Vu of Nashville must be dismissed for lack of standing, because Déjà Vu of Nashville did not suffer an injury.[29]

Additionally, as to the merits of the Plaintiffs' § 1985(3) claim, Mrs. Schipani argued that the Plaintiffs' Complaint should be dismissed on the bases that:

(1) The Plaintiffs failed to state a cognizable claim under 42 U.S.C. § 1985(3) because they did not allege any class-based, invidiously discriminatory animus;[30]

(2) Mrs. Schipani had no authority to deny The Parking Guys' valet permit application, and, thus, could not plausibly have produced the injury

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[27] Schipani Memo. in Support of Motion to Dismiss, R. 18, Page ID ## 241–244; Defendant Schipani's Reply to Plaintiffs' Response to Motion to Dismiss, R. 27, Page ID ## 461–463.

[28] Schipani Memo. in Support of Motion to Dismiss, R. 18, Page ID ## 244–251

[29] *Id.* at Page ID ## 253–255. Mrs. Schipani further argued that the Plaintiffs had not properly served her with process. *See id.* at Page ID ## 261–262. This defect was later cured.

[30] *Id.* at Page ID ## 251–252.

over which the Plaintiffs sued her;[31]

(3) The Plaintiffs' speech-based lawsuit must be treated as a common defamation claim, and because it cannot satisfy the heightened constitutional requirements that govern defamation claims, the Plaintiffs' Complaint must be dismissed for failure to state a claim;[32] and

(4) Mrs. Schipani was immune from suit under the Tennessee Anti-SLAPP Act of 1997, Tennessee Code Annotated § 4-21-1003(a)—which affords defendants immunity from lawsuits based on qualifying statements made to government agencies—and thus, Mrs. Schipani was entitled to recover her reasonable attorney's fees and costs incurred.[33]

Upon review, the district court determined that abstention was not warranted.[34] The district court further determined that Déjà Vu of Nashville had standing to maintain this action.[35]

Turning to the merits of the Plaintiffs' § 1985(3) claim, the district court ruled that the Plaintiffs had failed to allege the requisite class-based, invidiously discriminatory animus. Specifically, the district court held:

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[31] *Id.* at Page ID ## 252–253

[32] *Id.* at Page ID ## 255–261.

[33] *Id.* at Page ID # 262.

[34] Memorandum Opinion, R. 51, Page ID ## 611–615.

[35] *Id.* at Page ID ## 615–617.

> [B]ecause Section 1985(3) provides a federal cause of action against persons who conspire to deprive an individual of "equal protection of the laws" or of "equal privileges and immunities under the laws," the Sixth Circuit has repeatedly held that a plaintiff must also "allege that the conspiracy was motivated by racial, or other class-based, invidiously discriminatory animus." *Moniz v. Cox*, 512 Fed. App'x 495, 499–500 (6th Cir. 2013) (collecting cases). Thus, "[t]o sustain a claim under section 1985(3), a claimant must prove both membership in a protected class and discrimination on account of it." *Smithers ex rel. Norris v. City of Flint*, 602 F.3d 758, 765 (6th Cir. 2010).
>
> . . .
>
> The complaint contains not a single allegation about a group of individuals that share their desire to engage in the same First Amendment activity opposed by Defendants, let alone that the amorphous group was subjected to racially discriminatory animus because of their desire. Indeed, Plaintiffs have not even alleged "entitle[ment] to the kind of special protection" afforded by § 1985(3) required for such a class. *Royal Oak Entm't, LLC v. City of Royal Oak*, 205 F. App'x. 389, 399 (6th Cir. 2006); *see McGee v. Schoolcraft Cmty. Coll.*, 167 F. App'x. 429, 435 (6th Cir. 2006) (citation omitted) ("The Sixth Circuit has ruled that § 1985(3) only applies to discrimination based on race or membership in a class which is one of those so-called 'discrete and insular' minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics."). Accordingly, Plaintiffs' § 1985(3) claim against Schipani will be dismissed.[36]

As a consequence, Mrs. Schipani prevailed on the merits in a lawsuit that was expressly based on evidence and testimony that she gave to a regulatory commission. Nonetheless, the district court held that "[b]ecause

[36] *Id.* at Page ID ## 618–619.

the Court dismisses Plaintiffs' § 1985 claim [for failure to state a claim] and does not reach the witness immunity issue, Schipani is not entitled to attorneys' fees under § 4-21-1003(c)."[37] Timely appeals by both parties followed.

VIII. SUMMARY OF ARGUMENT

The district court's Order dismissing the Plaintiffs' Complaint as to Mrs. Schipani should be affirmed for several reasons. As an initial matter, the district court correctly held that the Plaintiffs failed to state a cognizable claim for relief against Mrs. Schipani under 42 U.S.C. § 1985(3). Further, the class for which the Plaintiffs belatedly seek recognition is not a protected class within the meaning of § 1985(3); The Parking Guys is not even a member of the class for which the Plaintiffs now seek recognition; and the Plaintiffs' claims that "organizations engaged in the presentation of female dance performance" should receive protected class status is forfeited because the Plaintiffs failed to present the argument to the district court. Independently, the district court's Order dismissing the Plaintiffs' Complaint as to Mrs. Schipani may be affirmed based on numerous additional grounds.

The district court did err, however, regarding its standing analysis and

[37] *Id.* at Page ID # 619, n.3.

when it failed to adjudicate Mrs. Schipani's immunity claim or award her attorney's fees under Tennessee Code Annotated § 4-21-1003—Tennessee's anti-SLAPP statute regarding statements made to government agencies. Claims of immunity—both qualified and absolute—are threshold questions that a district court must address. Further, allowing qualifying claims of immunity raised under Tennessee Code Annotated § 4-21-1003(a) to go unadjudicated—as occurred here—frustrates the goals of Tennessee Code Annotated § 4-21-1001, *et seq*., and it is wholly incompatible with the purpose of the entire statute. Further still, one of the only decisions interpreting Tennessee Code Annotated § 4-21-1003 indicates that fee awards both may and should be sought only after litigation has concluded, *see Doe v. Andrews*, No. 3-15-1127, 2016 WL 632050, at *4 (M.D. Tenn. Feb. 17, 2016), and Mrs. Schipani was entitled to rely on this guidance and seek fees under § 4-21-1003 following the conclusion of this litigation as a consequence. Finally, because Mrs. Schipani's statements to the Traffic and Parking Commission—which The Parking Guys repeatedly characterized as "opinions" in parallel litigation—unmistakably fell within the protection of § 4-21-1003(a) as a matter of law, and because Mrs. Schipani established her entitlement to immunity as a matter of law, she should be awarded her reasonable attorney's fees and costs under § 4-21-1003(c) on that basis alone.

IX. ARGUMENT

A. THE DISTRICT COURT CORRECTLY HELD THAT THE PLAINTIFFS' COMPLAINT FAILED TO ALLEGE CLASS-BASED, INVIDIOUSLY DISCRIMINATORY ANIMUS, WHICH THIS COURT HAS HELD REPEATEDLY IS REQUIRED IN ORDER TO STATE A COGNIZABLE § 1985(3) CLAIM.

1. Class-based, invidiously discriminatory animus is an essential element of a § 1985(3) claim.

Over, and over, and over again—including many times very recently—this Court has held without the slightest ambiguity that in order to state a cognizable claim for relief under 42 U.S.C. § 1985(3), a plaintiff must allege class-based, invidiously discriminatory animus. *See, e.g.*, *Webb v. United States*, 789 F.3d 647, 672 (6th Cir. 2015) ("The Supreme Court requires that § 1985 claims contain allegations of 'class-based, invidiously discriminatory animus.'" (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971))); *Curtis v. Breathitt Cty. Fiscal Court*, 756 Fed. App'x 519, 524 (6th Cir. 2018) ("A section 1985(3) complaint must 'allege both a conspiracy and some class-based discriminatory animus behind the conspirators' action.'" (quoting *Newell v. Brown*, 981 F.2d 880, 886 (6th Cir. 1992))); *Kuerbitz v. Meisner*, No. 17-2284, 2018 WL 5310762, at *3 (6th Cir. July 11, 2018) ("'The plaintiff must also show the conspiracy was motivated by racial, or other class based animus.'" (quoting *Collyer v. Darling*, 98 F.3d 211, 233 (6th Cir. 1996))); *Moniz*, 512 F. App'x at 499 ("The plaintiff must allege that 'the conspiracy

was motivated by racial, or other class-based, invidiously discriminatory animus.'" (quoting *Bass v. Robinson*, 167 F.3d 1041, 1050 (6th Cir. 1999))); *Taylor v. Streicher*, 465 F. App'x 414, 419 (6th Cir. 2012) ("The plaintiff must also allege that the conspiracy was motivated by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus.'" (quoting *Bartell v. Lohiser*, 215 F.3d 550, 559–60 (6th Cir. 2000))); *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 367 (6th Cir. 2012) ("The complaint thus must 'allege both a conspiracy and some class-based discriminatory animus behind the conspirators' action.'" (quoting *Newell*, 981 F.2d at 886)). *See also Blankenship v. City of Crossville*, No. 2:17-CV-00018, 2017 WL 4641799, at *4 (M.D. Tenn. Oct. 17, 2017) ("[T]he Sixth Circuit has repeatedly held that a plaintiff must also 'allege that the conspiracy was motivated by racial, or other class-based, invidiously discriminatory animus.' *Moniz*, 512 Fed. App'x at 499–500 (collecting cases). Thus, '[t]o sustain a claim under section 1985(3), a claimant must prove both membership in a protected class and discrimination on account of it.'" (quoting *Estate of Smithers*, 602 F.3d at 765)).

This Court has additionally made clear—also recently and repeatedly—that for § 1985(3) purposes, a "class" is narrowly defined and "must be based upon race or other 'inherent personal characteristics.'" *See Webb*, 789 F.3d

at 672 (quoting *Browder v. Tipton*, 630 F.2d 1149, 1150 (6th Cir. 1980)). *See also Warner v. Greenebaum, Doll & McDonald*, 104 F. App'x 493, 498 (6th Cir. 2004) ("Close on the heels of *Bray*, we held that in order to be protected by § 1985(3), a class 'must possess the characteristics of a discrete and insular minority, such as race, national origin, or gender,' *Haverstick Enters., Inc. v. Fin. Fed. Credit, Inc.,* 32 F.3d 989, 994 (6th Cir. 1994), language that was recently reiterated in *Vakilian v. Shaw*, 335 F.3d 509, 519 (6th Cir. 2003) (citing *Haverstick*, 32 F.3d at 994)."). Consequently, "the class of individuals protected by the 'equal protection of the laws' language of [Section 1985(3)] are those so-called 'discrete and insular' minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics." *Browder*, 630 F.2d at 1150. *See also id.* at 1152 ("The distinction between classes protected by s 1985(3) and those that are unprotected must be rooted somewhere in traditional equal protection analysis.").

Given this requirement, a non-suspect class of people who jointly exercise First Amendment or other fundamental rights is not a protected class for § 1985(3) purposes. *See, e.g.*, *Browder*, 630 F.2d at 1150 ("[C]lasses do not include picket line crossers who are falsely arrested."). Indeed, <u>even a protected class</u> of individuals who jointly exercise fundamental rights

cannot assert a § 1985(3) claim under circumstances when the allegedly tortious conduct is not based on the plaintiffs' membership in the protected class. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993) (holding that "'[w]omen seeking abortion' is not a qualifying class," even though "women in general" may well be). Instead, a plaintiff must plead both "membership in a protected class and discrimination on account of it." *Estate of Smithers*, 602 F.3d at 765 (citing *Bartell*, 215 F.3d at 559).

2. The Plaintiffs did not allege class-based, invidiously discriminatory animus as defined by § 1985(3).

As the district court correctly observed, the Plaintiffs' Complaint "contains not a single allegation" of class-based, invidiously discriminatory animus.[38] Review of the Plaintiffs' Complaint confirms this finding, as the Plaintiffs' Complaint is devoid of any allegation of "membership in a protected class and discrimination on account of it." *Estate of Smithers*, 602 F.3d at 765 (citing *Bartell*, 215 F.3d at 559). The Plaintiffs' § 1985(3) claim was properly dismissed accordingly.

Insisting otherwise, the Plaintiffs reference various portions of their Complaint that they claim did assert the requisite class-based animus:

First, the Plaintiffs contend that: "Page one of the Complaint

[38] *Id.* at Page ID # 619.

introduces Plaintiffs' class broadly as those who have "rights . . . secured to them by the Constitution . . . ."[39] However, a § 1985(3) claim premised upon such a "class" is unquestionably foreclosed. *Bray*, 506 U.S. at 269 ("Whatever may be the precise meaning of a 'class' for purposes of *Griffin*'s speculative extension of § 1985(3) beyond race, **the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors**. Otherwise, innumerable tort plaintiffs would be able to assert causes of action under § 1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with.") (emphasis added).

> Next, the Plaintiffs claim that:
>
> > [O]n page two, Plaintiffs refine the definition of their class as organizations 'engaged in the presentation of female performance dance entertainment to the consenting public. [Id. at Page ID # 2]. Such are protected speech and expression under the First and Fourteenth Amendments of the United States Constitution." [Id.] This narrows the class down to establishments engaged in or supporting the presentation of female performance dance entertainment. Making it even clearer, on page six the Complaint identifies Deja Vu as a "gentlemen's club," which seeks to "protect its First Amendment rights to operate . . . ." [Id. at Page ID # 6].[40]

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[39] Appellants' Brief, App. R. 29, p. 21 (quoting Complaint, R. 1, Page ID # 1).

[40] *Id.*

Again, however, precedent unambiguously establishes that a mere "group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors" is not a cognizable class for § 1985(3) purposes, *see Bray*, 506 U.S. at 269, and in any event, strip clubs are not among the "'discrete and insular' minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics." *Browder*, 630 F.2d at 1150. Further still, The Parking Guys—which is a valet parking company, not a strip club—is not even among the non-cognizable class for which the Plaintiffs now seek special protection.

Last, to support their claim that they sufficiently alleged a fundamental rights-based conspiracy under § 1985(3), the Plaintiffs insist that "under the heading '42 U.S.C. § 1985 Conspiracy to Deprive Civil Rights,' Plaintiffs pled Defendants conspired to improperly deny 'the Valet Permit requested by Parking Guys to service ***Deja Vu***,' explicitly referencing the 'gentlemen's club' pled earlier."[41] Dismissal is required based on this insufficient allegation, too, however, because a valet parking permit is not a fundamental right. *Cf. Warner*, 104 F. App'x at 498–99 ("[W]e do not believe that in their efforts to block the zoning change, the plaintiffs can be said to have been 'asserting *fundamental rights*' sufficient to satisfy § 1985(3).").

[41] *Id.* (quoting Complaint, R. 1, Page ID ## 6, 20).

B. THE PLAINTIFFS FORFEITED THEIR ARGUMENT THAT STRIP CLUBS ARE A DISCRETE AND INSULAR MINORITY THAT IS ENTITLED TO PROTECTED CLASS STATUS BY FAILING TO PRESENT THAT ARGUMENT TO THE DISTRICT COURT.

The Plaintiffs separately contend that because "[e]stablishments engaging in presentation of female dance performance have historically been the target of discrimination across the country," they should receive recognition as a discrete and insular minority that is "worthy of protection under § 1985(3)" and entitled to protected class status.[42] There are, of course, several immediate problems with this claim.

First, "establishments engaged in or supporting the presentation of female performance dance entertainment"[43] are not "characterized by 'some inherited or immutable characteristic'" that would even conceivably merit protected class status. *Volunteer Med. Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 224 (6th Cir. 1991) (quoting *McLean v. Int'l Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987)). Such an omission is fatal. *See, e.g.*, *McGee*, 167 F. App'x at 436 ("The group of individuals seeking a degree as a certified occupational therapy assistant may be a relatively discrete minority, but certainly it is neither based on inherent personal characteristics nor traditionally the subject of special protection under the Equal Protection

[42] *Id.* at pp. 26, 28–34.

[43] *Id.* at p. 21.

Clause."). There is also no serious doubt that no court—much less the Supreme Court—has ever conferred suspect or quasi-suspect class status upon "establishments engaged in or supporting the presentation of female performance dance entertainment,"[44] and this failure, too, compels dismissal. *See Bartell*, 215 F.3d at 560 (dismissing § 1985(3) claim because "the Supreme Court has not conferred suspect or quasi-suspect status on statutory classifications covering the disabled") (citations omitted).

Second, Plaintiff The Parking Guys—which was the sole entity denied the valet permit at issue—is a valet parking company, not a strip club. As a result, it is not even a member of the class of "establishments engaged in or supporting the presentation of female performance dance entertainment"[45] for which the Plaintiffs demand special recognition.

Third, and even more simply, the Plaintiffs' claim that "establishments engaged in or supporting the presentation of female performance dance entertainment"[46] should be afforded protected class status under § 1985(3) is forfeited because the Plaintiff failed to raise the claim at any point during the proceedings below. This Court has held repeatedly that it will not

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[44] *Id.*

[45] *Id.*

[46] *Id.*

consider new arguments that were not raised in the district court. *See, e.g.*, *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 758 (6th Cir. 1999) ("Because the issue was not raised in the district court below, Appellants have waived their right to argue the point on appeal"); *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990) ("This court will not decide issues or claims not litigated before the district court."); *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 614–15 (6th Cir. 2014) ("[T]his Court explained in *Scottsdale Ins. Co. v. Flowers* 'that an argument not raised before the district court is waived on appeal to this Court.'" (quoting *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008))). The forfeiture rule also extends to new arguments regarding whether a statute applies to a plaintiff's claims. *See, e.g.*, *Campbell v. Mack*, No. 18-2156, 2019 WL 2359419, at *9 (6th Cir. June 4, 2019) ("We find that Mack forfeited his statutory argument by failing to raise it before the district court . . . . Mack has not articulated any reason why this Court should exercise its discretion to excuse his failure to raise this argument below. . . . Accordingly, Mack forfeited his statutory argument, and we will not address it for the first time here."). The Plaintiffs' argument that strip clubs should be afforded protected class status under § 1985(3) is forfeited accordingly. *See id.*

C. THE DISTRICT COURT DID NOT HOLD THAT A § 1985(3) CLAIM MUST BE PREMISED UPON RACIAL ANIMUS.

The Plaintiffs additionally insist that a single sentence in the district court's Memorandum Opinion—which the Plaintiffs conveniently strip of its broader context—"implies the district court believes only classes subject to racial discrimination are protected by § 1985(3), or at a minimum that the lack of racial animus in the case at bar caused the district court to subject Plaintiffs' claims to a more exacting level of scrutiny."[47] Specifically, the Plaintiffs purport to find reversible error in the following finding:

> The complaint contains not a single allegation of a group of individuals that share their desire to engage in the same First Amendment activity opposed by Defendants, let alone that the amorphous group was subjected to racially discriminatory animus because of their desire.

Memorandum Opinion, R. 51, Page ID # 619.

The Plaintiffs' argument in this regard lacks merit as well. To the contrary, the district court's opinion repeatedly reflects its conclusion that discrimination based on race or membership in another protected class may give rise to a § 1985(3) claim. *See, e.g.*, Memorandum Opinion, R. 51, Page ID ## 623–624 (holding that "the Sixth Circuit has repeatedly held that a plaintiff must also 'allege that the conspiracy was motivated by racial, **or**

[47] *Id.* at p. 27.

other class-based, invidiously discriminatory animus.'" (emphasis added) (quoting *Moniz*, 512 Fed. App'x at 499–500)); *id.* (finding that "Plaintiffs do not claim racial animus **or membership in a protected class** as a basis for their § 1985 claim.") (emphasis added); *id.* (observing that "In *Scott*, the Supreme Court quoted *Griffin v. Breckenridge*, 403 U.S. 88, 91 (1971), for the principle that a claim under § 1985(3) could only be 'motivated by some racial or perhaps otherwise class-based invidiously discriminatory animus behind the conspiracy.'"); *id.* at Page ID # 619 (citing *McGee*, 167 F. App'x. at 435, for the proposition that: "The Sixth Circuit has ruled that § 1985(3) only applies to discrimination based on race **or membership in a class which is one of those so-called 'discrete and insular' minorities** that receive special protection under the Equal Protection Clause because of inherent personal characteristics.") (emphasis added). Consequently, the Plaintiffs' contention that the district court "require[d]" an allegation of racial animus "in order to prevail on a § 1985(3) claim" has no merit.[48]

D. THE PLAINTIFFS' CLAIM AGAINST MRS. SCHIPANI WAS SUBJECT TO DISMISSAL ON MULTIPLE INDEPENDENT GROUNDS.

In addition to failing to allege the most basic elements of a § 1985(3)

[48] *Id.*

claim, the Plaintiffs' claim against Mrs. Schipani was subject to dismissal on multiple independent grounds that she raised below. Each ground also provides a separate basis for affirmance regardless of whether or not the district court considered her claims in the first instance. *See United States v. Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 581, n.6 (6th Cir. 2002) ("[T]his court may affirm a district court's judgment on any ground supported by the record." (citing *City Mgmt. Corp. v. U.S. Chem. Co., Inc.*, 43 F.3d 244, 251 (6th Cir. 1994))). *See also Dixon v. Clem*, 492 F.3d 665, 673 (6th Cir. 2007) ("[W]e 'may affirm on any grounds supported by the record even if different from the reasons of the district court.'" (quoting *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 629 (6th Cir. 2002))).

1. Mrs. Schipani is absolutely immune from this lawsuit based on the absolute privilege that applies to witness statements made during quasi-judicial and administrative proceedings.

Tennessee law affords witnesses absolute immunity for all statements made during judicial proceedings. *Wilson v. Ricciardi*, 778 S.W.2d 450, 453 (Tenn. Ct. App. 1989) ("It is a well-settled proposition of law in [Tennessee] that the testimony of a witness given in a judicial proceeding is absolutely privileged.") (citations omitted); *Jones v. State*, 426 S.W.3d 50, 57 (Tenn. 2013) ("Statements made in judicial proceedings are absolutely privileged.") (citation omitted). The absolute witness privilege "also applies to statements

made by witnesses ***in the course of*** judicial proceedings." *Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152, 159 (Tenn. Ct. App. 1997) (emphasis added) (citation omitted). *See also Lambdin Funeral Serv., Inc. v. Griffith*, 559 S.W.2d 791, 792 (Tenn. 1978) (holding that the absolute privilege extends beyond testimony to "statements made in the course of a judicial proceeding that are relevant and pertinent to the issues involved . . . .") (citations omitted). Further, given Tennessee's strong public policy interests in having witnesses come forward and testify freely without fear of retaliatory lawsuits like this one, Tennessee courts "extend the doctrine to communications ***preliminary to*** proposed or pending litigation" as well. *See Myers*, 959 S.W.2d at 161 (emphasis added). *See also Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 137 (6th Cir. 1996) ("Tennessee law recognizes that statements relevant and pertinent to issues pending in, and made in the course of, judicial and administrative proceedings cannot form the basis of a defamation suit; those statements are absolutely privileged." (citing *Lambdin*, 559 S.W.2d at 792)).

The Plaintiffs themselves alleged that the statements over which they sued Mrs. Schipani all concerned The Parking Guys' valet permit application and were made: (1) while testifying at a Traffic and Parking Commission hearing on The Parking Guys' permit application, (2) during the course of

the Commission's proceedings on that application, or (3) preliminary to those proceedings.[49] Thus, to determine whether Mrs. Schipani was entitled to immunity, the only remaining question is whether the official proceedings of Metro Nashville's Traffic and Parking Commission come within the ambit of the absolute witness privilege.

That question is easily answered in the affirmative. Under Tennessee law, both quasi-judicial proceedings and administrative proceedings clothe witnesses with absolute immunity from suit. *See Boody v. Garrison*, 636 S.W.2d 715, 716 (Tenn. Ct. App. 1981) ("In this jurisdiction the absolute privilege [applies to] judicial and quasi-judicial proceedings . . . ."); *Lambdin*, 559 S.W.2d at 792 (holding that the absolute privilege applicable to witnesses "also holds true in administrative proceedings before boards or commissions . . . ."). Tennessee law also makes clear that when a commission holds a hearing, applies law to fact to reach a decision, creates a record of the

[49] *See* Complaint, R. 1, Page ID # 9, ¶ 40 (referencing statements made "[p]rior to and at the meeting"); Page ID ## 9–10, ¶ 41 (referencing statements made "to support the denial of this valet parking"); Page ID ## 10–11, ¶ 44 (referencing photographs sent in support of permit denial); Page ID # 12, ¶ 50 (referencing "testimony in opposition to the Parking Guys being granted a Valet Permit" that Mrs. Schipani provided "[a]t the Commission's July 10, 2017 Hearing"); Page ID # 15, ¶ 61 (referencing information presented "to the Commission" in order to support "denial of the requested Valet Permit"); Page ID ## 15–16, ¶¶ 62–63 (referencing an email "requesting that the Commission deny the Parking Guys [the] requested Valet Permit" that purportedly contained false statements).

proceeding, and issues a determination without the need for approval from another governmental body, it performs a quasi-judicial function. *See McFarland v. Pemberton*, 530 S.W.3d 76, 104 (Tenn. 2017) ("The Commission applied existing law to the facts at hand to reach a decision, created a record of the proceeding, and issued a determination that authorized the Commission to certify the ballots without requiring approval of the board's decision from another government body. For these reasons, we find the hearing was quasi-judicial.").

Here, the record reflects that the Traffic and Parking Commission did all of these things.[50] Accordingly, the Commission's proceedings were quasi-judicial in nature. *See id.* *See also* Memorandum and Order, R. 18-1, Page ID # 279 (indicating that the Traffic and Parking Commission was a "local board[] acting in a judicial capacity"). Moreover, even if the Commission's actions were considered purely administrative, the absolute privilege that applies to witness statements would still "hold[] true in administrative proceedings before boards or commissions" as well. *Lambdin*, 559 S.W.2d at 792.

Because the Traffic and Parking Commission's proceedings were both quasi-judicial and administrative, the absolute witness privilege protected

[50] Transcript, July 17, 2017, R. 1-19; Transcript, Aug. 14, 2017, R. 1-25.

any statement made by Mrs. Schipani during the course of them. *See Boody*, 636 S.W.2d at 716; *Lambdin*, 559 S.W.2d at 792 ("The underlying basis for the grant of the privilege is the public's interest in and need for a judicial process free from the fear of a suit . . . based on statements made in the course of a judicial or quasi-judicial proceeding."). *See also Lambdin*, 559 S.W.2d at 792 (noting that the absolute privilege "'extends also to the proceedings of many administrative officers such as boards and commissions, so far as they have powers of discretion in applying the law to the facts which are regarded as judicial, or "quasi-judicial" in character.'" (quoting PROSSER, LAW OF TORTS 799 (3d Ed. 1964))). As such, Mrs. Schipani's statements were protected by absolute immunity, and the Plaintiffs' claims against her must be dismissed with prejudice.

2. The Plaintiffs' claims against Mrs. Schipani were patently implausible because she could not have produced the injury alleged.

"To survive a motion to dismiss, a complaint must 'state[ ] a plausible claim for relief,' *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), which requires that the complaint 'show[ ] that the pleader is entitled to relief,' Fed. R. Civ. P. 8(a)(2)." *Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd.*, 833 F.3d 680, 688 (6th Cir. 2016). Given this threshold requirement, the Plaintiffs' Complaint against Mrs. Schipani is independently subject to

dismissal because it is patently implausible.

Here, the Plaintiffs' entire lawsuit against Mrs. Schipani is premised upon the Plaintiffs' claim that they were injured by The Traffic and Parking Commission's decision to deny The Parking Guys a valet permit. Critically, however, the decision to approve or deny The Parking Guys' valet permit application was subject to the exclusive authority of the members of the Traffic and Parking Commission, of which Mrs. Schipani indisputably is not a member. By contrast, Mrs. Schipani—who is merely an interested citizen—had no authority to deny The Parking Guys' valet permit application at all.

As such, Mrs. Schipani could not plausibly have produced the injury over which the Plaintiffs have sued her. Indeed, another court has already made this exact finding. *See* Memorandum and Order, R. 18-1, Page ID # 283 (holding that "the decision to deny this permit was made by the Commission and not by those who spoke against the permit . . . ."). Moreover, after reviewing the very same record evidence that is appended to the Plaintiffs' Complaint, both the Davidson County Chancery Court and the Tennessee Court of Appeals concluded that the Plaintiffs' entire conspiracy theory is evidentiarily barren. *See id.* ("The Petitioner asserts before this Court that the Councilman and others who spoke against the permit are actually opposing the permit due to the adult nature of the Déjà Vu business,

but the administrative record contains no evidence that this is the case . . . ."); *see also Parking Guys, Inc.*, 2019 WL 3406365, at *9 ("While Parking Guys asserts that these opponents are biased and are acting on pretext, it fails to cite to any evidence of the pretext in the record. Certainly, there is no hint that the Commission, which ultimately made the decision, was operating under any pretext."). The Plaintiffs' Complaint against Mrs. Schipani should be dismissed as implausible accordingly. *See Iqbal*, 556 U.S. at 679.

3. The Plaintiffs' speech-based claims against Mrs. Schipani fail to satisfy the requirements that govern defamation claims.

The Plaintiffs have sued Mrs. Schipani for her oral and written speech based on factual allegations that are quintessentially representative of defamation claims.[51] Critically, given the constitutional requisites of defamation claims, "[a] party may not skirt the requirements of defamation law by pleading another, related cause of action." *Boladian v. UMG Recordings, Inc.*, 123 F. App'x 165, 169 (6th Cir. 2005) (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988)). *See also Seaton v. TripAdvisor LLC*, 728 F.3d 592, 601, n. 9 (6th Cir. 2013) ("Seaton's claims

[51] *See* Complaint, R. 1, Page ID # 12, ¶ 50 (alleging that "Schipani's testimony included knowingly false statements that were known to be false when made or that were made with reckless disregard to the truth . . . .").

for false-light invasion of privacy, trade libel/injurious falsehood, and tortious interference with prospective business relationships appear to be an attempt to bypass the First Amendment."). Thus, as relevant here, a plaintiff "may not use related causes of action to avoid the constitutional requisites of a defamation claim." *Moldea v. New York Times Co.*, 22 F.3d 310, 319–20 (D.C. Cir. 1994). *See also Montgomery v. Risen*, 875 F.3d 709, 713 (D.C. Cir. 2017).

As such, and notwithstanding the Plaintiffs' own characterizations of their Complaint, the Plaintiffs' speech-based claims against Mrs. Schipani must be treated as a common defamation claim and must satisfy the heightened constitutional requirements that govern all defamation claims. *See id.* For several reasons, however, they do not. The Plaintiffs' Complaint should be dismissed accordingly.

a. The Plaintiffs' claims against Mrs. Schipani for her spoken words are time-barred.

The Plaintiffs' § 1985(3) claims are "governed by the state personal injury statute of limitations." *Fox v. DeSoto*, 489 F.3d 227, 233 (6th Cir. 2007) (citations omitted). Thus, with respect to the purportedly "false"

testimony that Mrs. Schipani gave on July 10, 2017,[52] the Plaintiffs' claims are time-barred by Tennessee's six-month statute of limitations governing torts premised upon spoken words. *See Cawood v. Booth*, No. E2007-02537-COA-R3-CV, 2008 WL 4998408, at *4 (Tenn. Ct. App. Nov. 25, 2008) ("[I]f the actionable tort involves words, the statute of limitations is six (6) months . . . ."); Tenn. Code Ann. § 28-3-103; *Ali v. Moore*, 984 S.W.2d 224, 227, n.6 (Tenn. Ct. App. 1998) ("The statute of limitations for slander is only six months and the discovery rule does not apply.").

As relevant here, the statute of limitations that applies to every verbal statement that Mrs. Schipani made on July 10, 2017, expired on January 10, 2018. *See id.* However, the Plaintiffs' lawsuit was not filed until June 1, 2018. *See* Complaint, R. 1, Page ID #1 ("Filed 06/01/18"). Accordingly, regardless of merit, all of the statements that Mrs. Schipani made at the Commission's July 10, 2017, hearing—in other words, nearly all of the statements over which she has been sued[53]—are time-barred. *Cawood*, 2008 WL 4998408, at *4, n.6.

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[52] *See id.* (alleging that "Schipani's testimony included knowingly false statements that were known to be false when made or that were made with reckless disregard to the truth . . . .").

[53] *See id.*

b. Mrs. Schipani's statements were constitutionally protected opinions that could not have held the Plaintiffs up to public hatred, contempt or ridicule.

"[T]he Supreme Court of the United States has constitutionalized the law of [defamation]." *Press, Inc. v. Verran*, 569 S.W.2d 435, 440 (Tenn. 1978). *See also Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 507 (6th Cir. 2015); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). As a result, defamation claims are subject to heightened constitutional requirements, and they present several threshold questions of law that do not require deference to Plaintiffs' characterizations of their own Complaint. *Moman v. M.M. Corp.*, No. 02A01-9608-CV00182, 1997 WL 167210, at *3 (Tenn. Ct. App. Apr. 10, 1997) ("If the [allegedly defamatory] words are not reasonably capable of the meaning the plaintiff ascribes to them, the court must disregard the latter interpretation."). Given this context, "ensuring that defamation actions proceed only upon statements which may actually defame a plaintiff is an essential gatekeeping function of the court." *Pendleton v. Newsome*, 772 S.E.2d 759, 763 (Va. 2015) (internal quotation omitted).

With this "essential gatekeeping function" in mind, *see id.*, several categorical bars prevent claimed defamations from being actionable, at least two of which independently control this case. *First*, mere opinions—as

compared with statements of actual fact—enjoy constitutional protection. *Seaton*, 728 F.3d at 597 ("Although the Supreme Court has refused to give blanket First Amendment protection for opinions, its precedents make clear that the First Amendment does protect 'statements that cannot reasonably be interpreted as stating actual facts about an individual.'" (quoting *Milkovich v. Loraine Journal Co.*, 497 U.S. 1, 20 (1990))). Second, statements that are merely "annoying, offensive or embarrassing" are not actionable. *Davis v. Covenant Presbyterian Church of Nashville*, No. M2014-02400-COA-R9-CV, 2015 WL 5766685, at *3 (Tenn. Ct. App. Sept. 30, 2015), *appeal denied* (Feb. 18, 2016) (quotation omitted). Based on these principles, none of the statements underlying the Plaintiffs' Complaint states a plausible claim for defamation as a matter of law.

i. The Parking Guys is bound by its contention that Mrs. Schipani offered mere "opinions"—which are not actionable—rather than assertions of fact.

Throughout its state court litigation, The Parking Guys repeatedly contended that Mrs. Schipani offered mere "opinions" when testifying before and otherwise communicating with the Traffic and Parking Commission—rather than asserting actionable statements of fact.[54] Notably, the

[54] *See, e.g.*, Petitioner's Reply in Support of Petition for Writ of Certiorari, R. 18-3, Page ID # 320 (arguing that "[t]he opinions supplied by the Valet

Commission agreed.[55] Consequently, throughout years of state court litigation, The Parking Guys repeatedly characterized and cited Mrs. Schipani's statements to the Commission as mere "opinions" as a basis for discounting their weight.[56]

Significantly, despite adopting an entirely different position in federal court, **The Parking Guys also argued repeatedly in state court that Mrs. Schipani's statements were mere "opinions" during the pendency of this lawsuit**.[57] As a result, The Parking Guys' consistent contention—in parallel state court litigation—that Mrs. Schipani offered

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Permit opponents at the August 14, 2017 Commission meeting were no different in character from those presented at the July 20, 2017 meeting . . . ."); *id*. (arguing that "[c]itizen opinions, even where sincere, are not material evidence."); Transcript, June 20, 2018, R. 18-4, Page ID # 330, lines 5–8.

[55] *See* Transcript, Aug. 14, 2017, R. 1-25, Page ID #152, lines 13–15.

[56] *See, e.g.*, Petitioner's Reply in Support of Petition for Writ of Certiorari, R. 18-3, Page ID # 320 (emphasizing that "Chairperson Green characterized the opponents [sic] statement [sic] as 'opinions': 'Are you all interested in hearing additional opinions from folks that we heard at the last meeting?' [referring to Transcript, Aug. 14, 2017, R. 1-25, Page ID # 152.] 'We heard a lot of opinions a month ago.'").

[57] *See* Transcript, June 20, 2018, R. 18-4, Page ID # 330, lines 5–8 ("And the petitioner would characterize the testimony of the local business owners as 'opinion on the ultimate issue of whether the valet operation was causing traffic concerns.'"); lines 18–22 ("It seems to be more than just opinion, is it not? It seems that these were personal observations of these folks as to the impact on their own businesses. MR. HOFFER: No, I would -- I would disagree with that, Your Honor.").

mere "opinion" testimony constitutes a judicial admission by which The Parking Guys is conclusively bound. *See, e.g.*, *Loftis v. Rayburn*, No. M2017-01502-COA-R3-CV, 2018 WL 1895842, at *11 (Tenn. Ct. App. Apr. 20, 2018) ("'a statement of counsel in pleadings or stipulation or orally in court is generally regarded as a conclusive, judicial admission . . . .'") (collecting cases). Thus, because mere opinions are not actionable as defamation, *see, e.g.*, *Seaton*, 728 F.3d at 597, dismissal is compelled as a matter of law.

ii. No statement made by Mrs. Schipani can be construed as a serious threat to the Plaintiffs' reputation.

To provide substantial breathing room for free speech and unfettered commentary upon issues of public importance, statements that are merely "annoying, offensive or embarrassing" are not actionable, either. *Clark v. Burns*, 105 F.3d 659, 659 (6th Cir. 1997) (unpublished table decision) (cleaned up). Instead, for a communication to be defamatory, it must constitute "a serious threat to [the plaintiff's] reputation." *Id.*

Here, the statements over which the Plaintiffs have sued Mrs. Schipani do not come close to satisfying these standards. The Plaintiffs specifically complain that Mrs. Schipani made the following statements:

(1) "The valet operation was parking vehicles on her property."[58]

[58] Complaint, R. 1, Page ID # 12, ¶ 50(a).

(2) "The valet operation [was] causing 'traffic up and down the street.'"[59]

(3) "The valet operation [was] 'constantly' parking in a manner that impedes vehicular ingress and egress to her business's parking lot."[60]

(4) "The neighborhood surrounding the valet permit operation 'continues to witness public safety hazards' associated with the Parking Guys' valet operation servicing Deja Vu;"[61]

(5) "The Parking Guys' valet operation servicing Deja Vu was somehow associated with 'two pedestrians hit by cars in the past two months.'"[62]

(6) "'The corner of Church Street and 15th is gridlock[ed] most nights.'"[63]

(7) "[T]he [] gridlock at 15[th] Avenue North and Church Street was somehow associated with Parking Guys' valet operation servicing Deja Vu."[64]

(8) "[The] Parking Guys' valet operation servicing Deja Vu was a cause of traffic backing up from 15th Avenue north to Church Street 'thus blocking the traffic light and no one can move . . . .'"[65] And:

(9) "[P]hotographs attached to the email demonstrate traffic of safety concerns caused by the Parking Guys' valet operation servicing Deja Vu."[66]

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[59] *Id.* at ¶ 50(b).

[60] *Id.* at ¶ 50(c).

[61] *Id.* at Page ID # 16, ¶ 63(a).

[62] *Id.* at ¶ 63(b).

[63] *Id.* at ¶ 63(c).

[64] R *Id.* at ¶ 63(d).

[65] *Id.* at ¶ 63(e).

[66] *Id.* at ¶ 63(f).

Self-evidently, none of these statements presents a serious threat to the Plaintiffs' reputations. *See id.* Rather, they are, at most, "annoying, offensive or embarrassing." *See id.* Consequently, no statement uttered by Mrs. Schipani is capable of conveying a defamatory meaning as a matter of law, and the Plaintiffs' Complaint must be dismissed for failure to state a claim on that basis.

4. Plaintiff Déjà Vu of Nashville lacks standing to maintain this action because it was not injured.

Plaintiff Déjà Vu of Nashville's claims should also be dismissed for lack of standing under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Specifically, because The Parking Guys—not Déjà Vu of Nashville—was the only entity whose valet permit application was denied, Déjà Vu of Nashville never suffered an injury. The district court's conclusion to the contrary was also based on a clear and material misreading of the record.

As a plaintiff, Déjà Vu of Nashville had the burden of establishing its standing to maintain this action. *See Lyshe v. Levy*, 854 F.3d 855, 857 (6th Cir. 2017) ("The plaintiff bears the burden of establishing standing."). To do so, Déjà Vu was required to:

> establish that: (1) [It] has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent rather than conjectural or hypothetical; (2) that there is a causal

> connection between the injury and the defendant's alleged wrongdoing; and (3) that the injury can likely be redressed."

Id. (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). The absence of standing represents a defect of this Court's Article III subject matter jurisdiction that compels dismissal under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See Lyshe*, 854 F.3d at 857.

In arguing that Déjà Vu of Nashville did not suffer an injury, Mrs. Schipani noted that: "In the administrative proceedings at issue, The Parking Guys was the only entity whose permit application was considered and then ultimately denied by the Traffic and Parking Commission. Déjà Vu, for its part, was not a party to that proceeding . . . ."[67] Even more critically, Mrs. Schipani observed that "as recently as June 20, 2018, Metro Nashville made clear that although *The Parking Guys'* specific valet permit application to service Déjà Vu had been denied, there is nothing whatsoever that prohibits *any other valet parking company* from applying to service Déjà Vu instead."[68]

Flatly rejecting Mrs. Schipani's claim, the district court held that:

> Schipani's conclusory assertion that Deja Vu can merely contract with another valet service is belied by the factual record. Schipani's (and Molette's) multiple and fervent complaints to the

[67] Schipani Memo. in Support of Motion to Dismiss, R. 18, Page ID # 254.

[68] *Id.* (citing Transcript, June 20, 2018, R. 18-4, Page ID # 347, line 19–Page ID # 348, line 13).

> Commission about TPG's valet service were premised on the congestion the service created and the logistical impossibility of any valet service, not just TPG, servicing Deja Vu. (See Doc. Nos. 1 at 16, 1–16 at 2.) Schipani gives no indication that these same complaints could not, or would not, be raised against other potential valet service vendors. Indeed, the suggestion that the individual defendants would not object to another valet service strains credulity.

Memorandum Opinion, R. 51, Page ID # 616–617, n.2.

Mrs. Schipani's assertion on the matter, however, was not "conclusory" in any regard. Indeed, as Mrs. Schipani observed—and as evidenced by the following colloquy between the Traffic and Parking Commission and the Davidson County Chancellor during The Parking Guys' state court litigation—it was the position of Metro's Traffic and Parking Commission itself, which is the one and only entity that has any authority to grant or deny the relevant permit:

> THE COURT: -- but if something's changed, if there's additional expert testimony or perhaps traffic patterns have changed, or like you say, it's a different location for a valet permit, then I'm assuming they could go back.
>
> [Traffic and Parking Commission Lawyer]: **Or if a different valet company**--
>
> THE COURT: Uh-huh.
>
> [Traffic and Parking Commission Lawyer]: -- **applied, that would be a completely -- that would be a new hearing**, because they--
>
> THE COURT: Should it make any difference regarding which--

> [Traffic and Parking Commission Lawyer]: It--
>
> THE COURT: -- valet company?
>
> [Traffic and Parking Commission Lawyer]: I think it would depend. **In this case one of -- some of the allegations of the neighbors were that this particular valet company was operating in a way that is not appropriate. So if another valet company did not**--
>
> THE COURT: Are they licensed by Metro to operate a valet?
>
> [Traffic and Parking Commission Lawyer]: Yes.

See Transcript, June 20, 2018, R. 18-4, Page ID # 347, line 19–Page ID # 348, line 13 (emphases added).

By contrast, although Mrs. Schipani would certainly be entitled to raise "complaints" or "object" to another valet company servicing the location at issue,[69] the Traffic and Parking Commission is not bound in any way by her "complaints" or "object[ions]," and notwithstanding the district court's contrary conclusion, Mrs. Schipani has no authority whatsoever to control the Commission. *Cf.* Memorandum and Order, R. 18-1, Page ID # 283 ("the decision to deny this permit was made by the Commission and not by those who spoke against the permit . . . ."). Nor does objecting or complaining produce a constitutionally cognizable injury. *See Lyshe*, 854 F.3d at 857

[69] Memorandum Opinion, R. 51, Page ID # 617, n.2.

(citing *Lujan*, 504 U.S. at 560–61). The claims brought by Déjà Vu of Nashville should be dismissed for lack of standing as a result, and the district court's contrary holding that Déjà Vu of Nashville has standing to maintain this action should be reversed.

E. Mrs. Schipani is immune from this lawsuit under Tennessee Code Annotated § 4-21-1003(a), and she was entitled to recover her attorney's fees.

In seeking dismissal, Mrs. Schipani also claimed immunity under Tennessee Code Annotated § 4-21-1003(a). The district court should have adjudicated that claim of immunity, and because she qualified for immunity as a matter of law, Mrs. Schipani should have been awarded her reasonable attorney's fees and costs under Tennessee Code Annotated § 4-21-1003(c).

Section 4-21-1003(a)—the central component of the Tennessee Anti-SLAPP Act of 1997—is a limited immunity provision that affords citizens civil immunity for non-defamatory statements made to governmental agencies regarding matters of concern to the agency. *Id.* The purpose of § 4-21-1003(a) is well established: "[T]o provide protection for individuals who make good faith reports of wrongdoing to appropriate governmental bodies," Tenn. Code Ann. § 4-21-1002(a), and to protect litigants from expensive SLAPP-suits that seek to "punish concerned citizens for exercising the constitutional right to speak and petition the government for redress of

grievances," Tenn. Code Ann. § 4-21-1002(b). The State of Tennessee appropriately regards such lawsuits as being "evil[]." *See Residents Against Indus. Landfill Expansion, Inc. v. Diversified Sys., Inc.*, No. 03A01-9703-CV-00102, 1998 WL 18201, at *8, n.6 (Tenn. Ct. App. Jan. 21, 1998); *see also id.* at *3 ("Their lawsuit fits all of the characteristics of a lawsuit filed to intimidate a citizen into silence regarding an issue of public concern."); *id.* at *8, n.6 ("The legislature has recently recognized the evils of this type of lawsuit.").

In full, Tennessee Code Annotated § 4-21-1003(a) provides that:

> (a) Any person who in furtherance of such person's right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency.

Under Tennessee Code Annotated § 4-21-1003(c), "[a] person prevailing upon the defense of immunity provided for in this section shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense." The only exception to the immunity that is set forth at Tennessee Code Annotated § 4-21-1003(a) is found in § 4-21-1003(b), which provides that immunity does not attach for false statements that satisfy the constitutional requisites for defamation.

Here, given that the Plaintiffs' claims against Mrs. Schipani were premised strictly upon statements that she made to a local government agency that were of concern to that agency, this case was the exceedingly rare instance in which Tennessee Code Annotated § 4-21-1003(a) applied. Consequently, during the proceedings before the district court, Mrs. Schipani raised her claim of immunity and attorney's fees upfront in her motion to dismiss.[70] Given several outcome-determinative concessions in the Plaintiffs' Response, Mrs. Schipani also observed that she was entitled to immunity under § 4-21-1003(a) as a matter of law, noting:

> Mrs. Schipani's entitlement to immunity under Tenn. Code Ann. § 4-21-1003(a) is fully established by the Plaintiffs' response. The Plaintiffs concede that "[w]hether any specific oral or written statement by Schipani is actionable under defamation law is a question of law for the court." (Doc. 26, p. 25.) Plaintiffs further acknowledge that they have asserted that Mrs. Schipani's statements were "lay opinion on an ultimate issue of fact. . . ." (Doc. 26, p. 24.)
>
> Critically, "opinions cannot be false." *Ollman v. Evans*, 750 F.2d 970, 976 (D.C. Cir. 1984) (citing *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283 (1974)). As such, as a matter of law, Mrs. Schipani's opinions could not have been provided with knowing, reckless, or negligent disregard for their falsity. Tenn. Code Ann. § 4-21-1003(b). Consequently, she qualifies for immunity under Tenn. Code Ann. § 4-21-1003(a), and she is entitled to recover her costs and attorney's fees under Tenn. Code Ann. § 4-21-1003(c).

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[70] Defendant Schipani's Motion to Dismiss, R. 17, Page ID # 236; *see also* Schipani Memo. in Support of Motion to Dismiss, R. 18, Page ID # 262.

Defendant Schipani's Motion to Dismiss, R. 27, Page ID #465.

Separately, because Mrs. Schipani was sued for statements that she made as a testifying witness, her statements were absolutely privileged and could never be deemed defamatory for that reason, either. *See, e.g., Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 137 (6th Cir. 1996) ("Tennessee law recognizes that statements relevant and pertinent to issues pending in, and made in the course of, judicial and administrative proceedings cannot form the basis of a defamation suit; those statements are absolutely privileged." (citing *Lambdin*, 559 S.W.2d at 792)).

Given this context, Mrs. Schipani's claim of immunity under Tennessee Code Annotated § 4-21-1003(a) was properly raised and should have been adjudicated. In a footnote, however, the district court held that it would not adjudicate Mrs. Schipani's immunity claim, stating: "Because the Court dismisses Plaintiffs' § 1985 claim [for failure to state a claim] and does not reach the witness immunity issue, Schipani is not entitled to attorneys' fees under Tennessee Code Annotated § 4-21-1003(c)."[71] The district court's failure to adjudicate Mrs. Schipani's immunity claim or award her attorney's fees under § 4-21-1003(c) even after she prevailed in this lawsuit on the merits, however, was erroneous for several reasons.

[71] Memorandum Opinion, R. 51, Page ID # 619, n.3.

First, claims of immunity—both qualified and absolute—are generally regarded as "threshold question[s]" that a district court must address upfront. *See, e.g.*, *Summers v. Leis*, 368 F.3d 881, 886 (6th Cir. 2004) ("[B]ecause the defense of qualified immunity is a threshold question, if the defense is properly raised prior to discovery, the district court has a duty to address it."); *Rogers v. O'Donnell*, 737 F.3d 1026, 1033 (6th Cir. 2013) ("[T]he absolute immunity defense presents a threshold question that may be raised prior to discovery . . . ."). Consequently, where, as here, Mrs. Schipani presented a claim of immunity and was entitled to immunity under Tennessee Code Annotated § 4-21-1003(a) as a matter of law, her claim of immunity should have been addressed as a threshold issue.

Second, the stated purposes of Tennessee Code Annotated § 4-21-1001, *et seq*. are to provide concerned citizens like Mrs. Schipani protection against qualifying SLAPP-suits and to compensate defendants who are subjected to them for the "considerable legal costs" associated with such actions. *See* Tenn. Code Ann. § 4-21-1002. Thus, by refusing to adjudicate Mrs. Schipani's claim for immunity, the district court has provided bad actors a road map to circumventing § 4-21-1001's entire purpose. Specifically, a plaintiff who seeks to avoid a fee-shifting penalty under Tennessee Code Annotated § 4-21-1003(c) while nonetheless subjecting concerned citizens

like Mrs. Schipani to costly, meritless litigation regarding immunized statements made to government agencies need only do what the Plaintiffs have done here: File a facially baseless complaint that fails even to state a cognizable claim for relief and then litigate it exhaustively. By doing so, a plaintiff can ensure that a reviewing court will dismiss its claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure, rather than reaching a claim of immunity under Tennessee Code Annotated § 4-21-1003(a). Thereafter, a plaintiff will consistently succeed in avoiding a fee-shifting penalty while achieving the central goal of SLAPP litigation: to force a defendant to incur considerable legal expenses in retaliation for protected speech that the suing plaintiff disfavors.

Allowing such a result, however, would frustrate the goals of Tennessee Code Annotated § 4-21-1001, *et seq*., and it is wholly incompatible with the purpose of the entire statute. Moreover, it creates seriously perverse litigation incentives that could not have been intended. Specifically, in order for a qualifying defendant like Mrs. Schipani to ensure receipt of an award of attorney's fees under Tennessee Code Annotated § 4-21-1003(c), the district court's Order requires that Mrs. Schipani and other similarly situated litigants refrain from presenting any other meritorious claims for dismissal under Rule 12(b)(6) and seek dismissal

under Tennessee Code Annotated § 4-21-1003(a)'s immunity provision alone. Such an absurd result, however—which mangles Rule 12 in multiple regards, *see* Fed. R. Civ. P. 12(g)(1) ("A motion under this rule may be joined with any other motion allowed by this rule."); Fed. R. Civ. P. 12(b) ("No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.")—could not have been intended, and it should be avoided in favor of an alternative interpretation that is consistent with Tennessee Code Annotated § 4-21-1003's purpose as a consequence. *See, e.g.*, *Guzman v. U.S. Dep't of Homeland Sec.*, 679 F.3d 425, 432 (6th Cir. 2012) ("'Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.'" (quoting *Lockhart v. Napolitano*, 573 F.3d 251, 261 (6th Cir.2009)) (cleaned up).

Third, although few courts have interpreted Tennessee Code Annotated § 4-21-1001 given how rare it is for a plaintiff to file suit against a defendant over testimony provided in a qualifying governmental proceeding, one of the only opinions interpreting the statute indicated that fee awards should not be sought under Tennessee Code Annotated § 4-21-1003 until after a case has concluded, even if an applicable cause of action has been abandoned. *See Andrews*, 2016 WL 632050, at *4 (M.D. Tenn. Feb. 17,

2016) ("Plaintiff claims that Defendant Andrews abandoned his prior defamation theory in favor of a new one and, therefore, she seeks an award of attorneys' fees and costs pursuant to Tennessee's Anti-SLAPP statute, Tenn. Code Ann. § 4-21-1003. That law provides that any person who, in furtherance of such person's right of free speech or petition under the Tennessee or U.S. Constitution, in connection with a public or governmental issue, communicates information regarding another person to any agency of the federal, state or local government regarding a matter of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency. Plaintiff's request is premature. Once this case is completed, Plaintiff may, if appropriate, file a motion to request fees and costs in accordance with the Local Rules of Court.") (emphasis added). Mrs. Schipani was entitled to rely on this guidance and seek fees under Tennessee Code Annotated § 4-21-1003 following the conclusion of litigation as a result. *See Andrews*, WL 632050, at *4.

Fourth, because Mrs. Schipani established her entitlement to immunity under § 4-21-1003(a) as a matter of law, and because she prevailed in this action on the merits, Mrs. Schipani should be deemed prevailing under Tennessee Code Annotated § 4-21-1003(c). The Plaintiffs' own Complaint reflects unambiguously that they sued Mrs. Schipani over

statements that she made to a governmental agency regarding a matter of concern to the agency. As a consequence, Mrs. Schipani's statements were necessarily immune under Tennessee Code Annotated § 4-21-1003(a) unless the exceptions set forth in § 4-21-1003(b) applied. Further, following a full and final adjudication of this matter on the merits, her statements were deemed inactionable under the only theory of liability asserted.

In response to Mrs. Schipani's claim of immunity under Tennessee Code Annotated § 4-21-1003(a), however, the Plaintiffs never established that any exception set forth at § 4-21-1003(b)—which the Plaintiffs themselves stipulated was "a question of law for the court"[72]—applied so as to preclude immunity. Indeed, the Plaintiffs' response to Mrs. Schipani's motion to dismiss made clear that the relevant § 4-21-1003(b) exceptions did not and *could not* apply. Specifically, the Plaintiffs adopted the position that Mrs. Schipani's statements were "lay opinion on an ultimate issue of fact,"[73] which rendered them categorically non-defamatory as a matter of law. *See, e.g.*, *Ollman*, 750 F.2d at 976 ("opinions cannot be false." (citing *Old Dominion Branch No. 496*, 418 U.S. at 283)). As detailed above, *see supra* pp. 34–36, The Parking Guys also judicially admitted and repeatedly pressed

[72] Plaintiffs' Response to Schipani's Mot. to Dismiss, R. 26, Page ID # 436.

[73] *Id.* at Page ID # 435.

that claim in parallel state court litigation thereafter. *See id.* *See also Parking Guys, Inc.*, 2019 WL 3406365, at *8 ("Parking Guys argues that the Commission's decision was based entirely on the 'beliefs, opinions and fears' of neighborhood opponents") (emphasis added).

Given this context, the district court should have adjudicated Mrs. Schipani's immunity claim, and its failure to do so served only to deprive Mrs. Schipani of a fee award to which she was entitled as a matter of law. *See, e.g.*, *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 262 (Tenn. 2015) ("Tennessee courts have always been empowered to decide legal questions upon agreed facts.") (quotation omitted). Mrs. Schipani's claim of immunity under Tennessee Code Annotated § 4-21-1003(a) should have been adjudicated as a consequence.

X. CONCLUSION

For the foregoing reasons, the district court's Order dismissing the Plaintiffs' Complaint against Mrs. Schipani should be **AFFIRMED**; its Order determining that Plaintiff Déjà Vu of Nashville had standing to maintain this action should be **REVERSED**; and this Court should **REMAND** with instructions that Mrs. Schipani be awarded her reasonable costs and attorney's fees under Tennessee Code Annotated § 4-21-1003.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,286 words, excluding the parts of the brief exempted by Rule 32(f).

This brief also complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Georgia font.

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I hereby certify that on this 4th day of September, 2019, a copy of the foregoing was filed electronically through the appellate CM/ECF system and sent via CM/ECF to the following parties:

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