IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

ROBERT E. MURRAY, et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	**Case No. CA-15-102792**
	)	
JAMES A. CIOCIA, et al.,	)	
	)	
Defendants-Appellees.	)	
	)	

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC. IN SUPPORT OF DEFENDANTS-APPELLEES

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae the American Civil Liberties Union of Ohio Foundation ("ACLU") is the Ohio affiliate of the national American Civil Liberties Union, one of the oldest and largest organizations in the nation dedicated to the preservation of the Bill of Rights and the defense of the freedoms set forth therein. With some 500,000 members in all 50 states, and with almost 30,000 members and supporters in Ohio, the ACLU appears routinely in state and federal courts, both as *amicus* and as direct counsel, without bias or political partisanship, to protect the freedom of speech, especially on matters of public concern. This case involves the chilling of the rights of members of the public to speak on matters of public concern. The resolution of this case, thus, is a matter of substantial interest to the ACLU and its members and supporters.

STATEMENT OF THE ISSUES PRESENTED

The issues presented for review relate to the propriety of the trial court's grant of summary judgment in favor of Defendants-Appellees on Plaintiff-Appellants' claims for defamation and false-light invasion of privacy. This brief addresses the First Amendment interests implicated by this case: the chilling of the rights of members of the public to speak on matters of public concern.

BACKGROUND

James and Lisa Ciocia, political activists. Michael Stark, a contributor to The Huffington Post. Ken Ward, a reporter for *The Charleston Gazette*. Margaret Newkirk, a former reporter for the *Akron Beacon Journal*. What do these five have in common? Robert E. Murray, founder and president of Murray Energy, the largest privately owned coal company in the United States. At different times, he has sued each of them for making defamatory statements about him or the company.

And they are not the only ones. In the last 15 years, Murray and/or his company, whose operations dot the Ohio Valley, have also sued a team of journalists at the *Chagrin Valley Times*; and threatened to sue Steve Fiscor, editor of *Coal Age* and *Engineering & Mining Journal*, as well as R. Larry Grayson, a professor emeritus of energy and mineral engineering at Penn State University. So far, none of the cases has produced a judgment on the merits for Murray. Instead, the cases have settled, or the defendants have prevailed on pre-trial motions.

Murray has the right to defend his reputation, and the company has the right to do the same—by using the law to redress real, legally cognizable harms. But the company is a major player in local economies, Murray himself is active in politics, and their record of suing and threatening to sue journalists

and activists for constitutionally protected expressive activities—whatever Murray's motivations—stands to chill public discourse on business and industry practices that are of public concern.

That is problematic because expressive activities on matters of public concern are essential to effective governance, to the resolution of broad social problems, and to responsible resource management. Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 Ohio St. L.J. 845 (2010). First Amendment values and the principles of pluralism demand that citizens have the opportunity to speak and protest peaceably, free from threats of litigation by those with greater financial or institutional power.

In some of the suits filed or threatened by Murray—in this matter, for example, and in the *Chagrin Valley Times* and Stark matters, whose merits are dubious—Murray has looked the part of an oppressor, using the law and his superior resources to frighten and silence people who criticize him or his company. And, whether or not Murray is actually intending to play that part, the effects are evident, of his targeting expressive activities that are entitled to First Amendment protection.

Indeed, a panel of this very court in December 2014, affirming the summary judgment disposing of Murray's claims in the *Chagrin Valley Times* suit, concluded that "[t]his case illustrates the need for Ohio to join the majority

of states in this country that have enacted statutes that provide for quick relief from suits aimed at chilling protected speech." *Murray v. Chagrin Valley Publishing Co.*, 2014-Ohio-5442, 25 N.E.3d 1111 (8th Dist.). The panel continued:

> These suits, referred to as strategic lawsuits against public participation ("SLAPP"), can be devastating to individual defendants or small news organizations and act to chill criticism and debate. The fact that the *Chagrin Valley Times* website has been scrubbed of all mention of Murray or this protest is an example of the chilling effects this has. … Given Ohio's particularly strong desire to protect individual speech, as embodied in its Constitution, Ohio should adopt an anti-SLAPP statute to discourage punitive litigation designed to chill constitutionally protected speech.

Id.

Against this backdrop, the purpose of this brief is to consider the role of free expression in a democratic society, as well as the phenomenon of SLAPP suits and anti-SLAPP measures. *Amicus* hopes this brief will be helpful to the court as it considers the constitutionally protected expressive activities at issue in this matter.[1]

ARGUMENT

A. FREE EXPRESSION IS ESSENTIAL TO A DEMOCRATIC SOCIETY

[1] Part of the introduction was adapted, with the author's permission, from Jonathan Peters, *A coal magnate's latest lawsuit was tossed—but Ohio can do more to defend free expression*, Columbia Journalism Review, May 28, 2014, available at http://www.cjr.org/united_states_project/murray_energy_defamation_lawsuits_huffington_post.php.

The seminal view that free expression advances the social good came from English poet John Milton's *Areopagitica*, published in 1644. He argued that people would be better citizens if they were knowledgeable and exposed to different viewpoints, writing, "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth to put to the worse, in a free and open encounter?" *Id*.

Roughly fifty years later, in "A Letter Concerning Toleration," the Enlightenment philosopher John Locke echoed Milton's belief that in a conflict with falsehood, truth would prevail.[2] Locke's conception of free expression arose from his skepticism that any governmental actor could be a trustworthy guide for seeking truth.

Similarly, English philosopher John Stuart Mill, 150 years after Locke, wrote that society would function effectively only if it protected expressive freedom. Mill, *On Liberty* (1859). He believed that the freedoms of thought, discussion and investigation were "goods in their own right," concluding that

[2] Locke wrote, "The truth certainly would do well enough if she were once left to shift for herself. She seldom has received and, I fear, never will receive much assistance from the power of great men, to whom she is but rarely known and more rarely welcome. She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. Errors, indeed, prevail by the assistance of foreign and borrowed succours. But if Truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her. Thus much for speculative opinions."

"silencing the expression of an opinion … [robs] the human race" by denying people the opportunity "of exchanging error for truth" and thus the "clearer perception and livelier impression of truth, produced by its collision with error." *Id*.

Those fundamental ideas first appeared in American case law in 1919, in Justice Oliver Wendell Holmes' influential dissent in *Abrams v. United States*.[3] And not 10 years later, in 1927, Justice Louis Brandeis included them in one of history's most powerful and significant judicial statements on the role of free expression in a democratic society:

> [F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty … that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.

Whitney v. California, 274 U.S. 357 375-376, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring).

[3] "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment." 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting).

The very essence of our federal Constitution is public participation. Democracy's foundation is the consent of the governed, implemented through popular participation in public affairs. The governed give their consent through the electoral process and exercise of the franchise, and they participate in debates on matters of public concern both between and among people, and between and among institutions. *See generally* Robert A. Dahl, *Polyarchy: Participation and Opposition* (1971). These ideas, traditions and theories animate modern free-expression cases, including those in which libel and false light are alleged.

Consider the language at the heart of the landmark 1964 libel case *New York Times v. Sullivan*, to this day one of the most compelling expositions of the First Amendment ever handed down by the Supreme Court. 376 U.S. 254, 84 S.Ct. 710, 95 A.L.R.2d 1412 (1964). The justices held unanimously that the First Amendment protects the publication of all statements, even false ones, about the conduct of public officials unless the statements were made with actual knowledge of their falsity or in reckless disregard of their truth or falsity. (The doctrine was later expanded to include public figures.)

Sullivan marked the first time that the Supreme Court invoked the First Amendment to review libel actions, which, Justice William Brennan wrote, could no longer claim "talismanic immunity from constitutional limitations."

Id. at 269. And, in a turn of phrase that captured the heart of free expression, Brennan declared, "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Id*.

Nearly 50 years later, Chief Justice John Roberts echoed those same sentiments in *Snyder v. Phelps*, analyzing the First Amendment's application to a claim for intentional infliction of emotional distress made against a group of protestors. 562 U.S. 443, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). Roberts wrote for the 8-1 majority:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and … inflict great pain. [Here, where the defendant addressed matters of public import on public property, in a peaceful manner, complying with the guidance of local officials], we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Id. SLAPPs, often in the form of defamation or false light claims, arise out of those debates, out of speech activities that relate to public issues, such as political relations or labor practices.

B. SLAPPS ARE A GRAVE THREAT TO FIRST AMENDMENT EXPRESSION

Generally, a SLAPP is a civil complaint filed against individuals or

organizations arising from their government petitioning or their expressive activities on issues of public concern. *See generally* Shannon Hartzler, *Protecting Informed Public Participation: Anti-Slapp Law and the Media Defendant*, 41 Val. U. L. Rev. 1235 (2007). Often, plaintiffs do not file SLAPPs to achieve a favorable resolution on the merits—they file them to intimidate and discourage the target and others from speaking out, through the threat of costly and time-consuming litigation. Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 Ohio St. L.J. 845, 846-847 (2010). That threat has a chilling effect on public participation and speech, and it can consume scarce judicial resources. *Id*.

However, conceptually, the plaintiff's subjective intent does not determine whether a lawsuit is a SLAPP. The plaintiff's intent is generally irrelevant. Rather, the critical issue is whether the activity that triggered the suit, and thus the activity at risk because of the suit, was constitutionally protected expressive activity. If that is the case, then the suit is a SLAPP. *What are SLAPPs?* Anti-SLAPP Resource Center at the First Amendment Project, available at http://www.thefirstamendment.org/antislappresource center.html.

SLAPPs come in many forms, under a variety of legal theories, such as defamation, invasion of privacy, business torts, abuse of process, and conspiracy. Jennifer E. Sills, *SLAPPs (Strategic Lawsuits Against Public*

Participation): How Can the Legal System Eliminate Their Appeal?, 25 Conn. L. Rev. 547, 549 (1993). Whatever their form, SLAPPs have become a national problem because of their effectiveness. *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992) ("[A] greater threat to First Amendment expression can scarcely be imagined."). Scholars estimate that ordinary citizens have been "sued into silence … by the thousands" simply for speaking out on public issues. George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* 1-3 (1996). And the constitutional implications are grave:

> [This type of litigation conveys] an ominous message for every American, because SLAPPs threaten the very future of 'citizen involvement' or 'public participation' in government, long viewed as essential in our representative democracy. ... The real value at stake is, quite simply, whether our nation will continue to encourage, to protect, and to be a government 'of the people, by the people, and for the people.'

Pring & Canan, *supra*, at 28-29.

As the prevalence of SLAPPs has increased, judges have begun to mention the phenomenon in their opinions. As noted above on pages 3 and 4, a panel of this very court, reviewing the dismissal of a previous SLAPP filed by this very Plaintiff-Appellant, recently concluded that Ohio has a "strong desire to protect individual speech, as embodied in its Constitution," and that Ohio "should adopt an anti-SLAPP statute to discourage punitive litigation

designed to chill constitutionally protected speech." *Murray v. Chagrin Valley Publishing Co.*, 2014-Ohio-5442, 25 N.E.3d 1111, ¶ 40 (8th Dist.).

A Supreme Court justice in Wisconsin, discussing the challenge of disposing of SLAPPs, recommended that "[t]he legislature ... consider the experience of other states that have enacted anti-SLAPP statutes and consider adopting [such] legislation … [because] … [t]he potential for the strategic abuse of legal process is real." *Lassa v. Rongstad*, 718 N.W.2d 673, 710 (Wis. 2006) (Prosser, J., dissenting). And, as a federal judge in Illinois observed, "The court perceives … with a great deal of alarm … a growing trend of what have come to be known as SLAPP suits." *Westfield Partners, Ltd. v. Hogan*, 740 F.Supp. 523, 524-25 (N.D. Ill. 1990).

In some cases, courts have noted that the absence of anti-SLAPP measures has made it difficult to address the SLAPP phenomenon. *See TES Franchising, LLC v. Feldman*, 943 A.2d 406, 413 n.10 (Conn. 2008). Other courts have looked to the jurisprudence of states with a statutory remedy. For example, a Connecticut court decided a motion for summary judgment arising from a putative SLAPP by using as guidance a series of Rhode Island decisions construing that state's anti-SLAPP law. *Zeller v. Consolini*, 1999 WL 99192, at *5 (Conn. Super. Ct. Feb. 17, 1999). Still others have declined to determine the availability of anti-SLAPP remedies in the absence of an anti-SLAPP

statute. *AVB Props., LLC v. Chesler*, 9th Dist. Lorain No. 04CVG008292006, WL 2390243 (Aug. 21, 2006) (declining to reverse a trial court's grant of a directed verdict on a SLAPP cause of action, noting that the "Court takes no stance on whether SLAPP actions are cognizable under Ohio law").

C. OVER HALF OF THE STATES HAVE ENACTED ANTI-SLAPP MEASURES. UNFORTUNATELY, OHIO IS NOT ONE OF THEM.

For their part, legislatures have been active in this area, as referenced above. Twenty-eight states have passed an anti-SLAPP statute that creates a framework for courts to analyze SLAPP claims and to dismiss those targeting constitutionally protected activity. Ohio is not one of them. Colin Quinlan, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 Colum. L. Rev. 367 (2014). Notably, the statutes share the common purpose of protecting First Amendment interests. *See Metabolife Int'l. v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001) (the law "was enacted to allow early dismissal of meritless … cases aimed at chilling expression through costly, time-consuming litigation."); *see also Yeshiva Chofetz Chaim Radin. v. Vill. of New Hempstead*, 98 F. Supp. 2d 347, 360 (S.D.N.Y. 2000) ("The clearly expressed intent of the legislature was to safeguard the free exercise of speech, petition and association rights … against those who would try to interfere with a citizen's constitutional rights.").

Otherwise, beyond that shared purpose, the statutes vary in nature and scope. For example, no single or shared definition of expressive activity exists. The range of activity protected under anti-SLAPP statutes runs the gamut, from narrow measures (defining protected activity as oral or written testimony provided to a government entity in the course of a government proceeding) to broad measures (defining protected activity as any exercise of First Amendment rights in connection with a matter of public concern). Hartzler, *supra*, at 1248-1270.

That being said, anti-SLAPP statutes typically allow the following: (1) The defendant may bring an early motion to strike the complaint. Once the defendant shows that the expression addressed a matter of public concern, the burden shifts to the plaintiff. (2) To meet the burden, the plaintiff must proffer evidence to support every element of its claim. For libel, generally that requires an early showing that the expression is an actionable statement of fact, concerned the plaintiff, and caused harm. (3) Discovery is stayed pending resolution of the motion, unless the plaintiff shows that targeted discovery is necessary. (4) If the plaintiff cannot meet its burden, the court must dismiss the case with prejudice. (5) Many statutes provide mandatory or discretionary fee awards to the prevailing defendant. Charles D. Tobin, *Help Restore Balance*

to Free Expression Litigation with Anti-SLAPP Statutes, 29 Comm. Law. 2, 2–3 (2012).

Again, as noted earlier, Ohio does not have such a statute. Right now in Ohio, options are limited for targets of a SLAPP. Basically, the defendant can file a motion to dismiss, and if that fails, the defendant can file a motion for summary judgment, and if *that* fails, the defendant must prepare for trial or negotiate a settlement. The Stark, *Chagrin Valley Times*, and *Beacon Journal* matters all followed that path to a point. Ohio's absence of anti-SLAPP protections is inconsistent with the certainty essential to the effective deterrence of SLAPPs and to the free exercise of First Amendment rights. Barylak, *supra*, 849. This is not an inconsistency our state can afford.

CONCLUSION

As scholars George Pring and Penelope Canan, who coined the term SLAPP, have said, whenever a SLAPP is filed it transforms "a public … controversy into a private, legalistic one," inhibiting the First Amendment's exercise. Pring & Canan, supra, at 149. Worse yet, the resulting chilling effect can "ripple through a community." Victor J. Cosentino, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 Cal. W. L. Rev. 399, 408 (1991). Put simply, a SLAPP filed against one speaker or activist can reduce the odds that other citizens will become speakers or activists. That

chilling effect can reduce expressive activity on public issues and, in turn, the effectiveness of our representational form of government. Indeed, the chilling effect is the most insidious and perhaps most damaging aspect of SLAPPs. *Id*.

Murray and his companies have the right to defend their reputations by using the law to redress real, legally cognizable harms. But his companies are major players in local economies, Murray himself is active in politics, and their record of suing people for protected expressive activities—whatever Murray's motivations—stands to chill public discourse on business and industry practices that are of public concern. That discourse must be left in the societal and political forums where it belongs, "against the background of a profound national commitment," as *Sullivan* said, "to the principle that debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. at 269.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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