No. S20C1473

IN THE SUPREME COURT OF THE STATE OF GEORGIA

AMERICAN CIVIL LIBERTIES UNION, INC.,
Petitioner,

v.

B. REID ZEH,
Respondent.

BRIEF OF AMICI CURIAE UNIVERSITY OF GEORGIA SCHOOL OF LAW FIRST AMENDMENT CLINIC, THE GEORGIA FIRST AMENDMENT FOUNDATION, AND THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW FIRST AMENDMENT CLINIC IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Clare R. Norins
Georgia Bar No. 575364
First Amendment Clinic
University of Georgia School of Law
P.O. Box 388
Athens, Georgia 30603
Telephone: (706) 542-1419
Email: cnorins@uga.edu

Counsel for Amici

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INTRODUCTION

Pursuant to Rule 23 of the Georgia Supreme Court Rules, the First Amendment Clinic at the University of Georgia School of Law ("UGA First Amendment Clinic"), the Georgia First Amendment Foundation ("GFAF"), and the First Amendment Clinic at the University of Virginia School of Law ("UVA First Amendment Clinic") respectfully file this amici curiae brief in support of the American Civil Liberties Union ("ACLU")'s Petition for Writ of Certiorari.

In *American Civil Liberties Union v. Reid*, A20A0251 (Ga. App. June 23, 2020), the Court of Appeals affirmed the Superior Court of Glynn County's denial of Petitioner's motion to strike Respondent's defamation claim under Georgia's Anti-Strategic Lawsuits Against Public Participation ("anti-SLAPP") statute, O.C.G.A. § 9-11-11.1. In doing so, it misapplied the anti-SLAPP statute in two ways that, if allowed to stand, would cause significant self-censorship by the press and public and constrain the free flow of information about government activities. Amici urge the Supreme Court to accept this case for review to clarify two related points. First, that a reviewing court must look at all the evidence before it on a motion to strike to determine if the non-moving party can establish a probability of prevailing by *clear and convincing* evidence on a claim of actual malice. Second, that failure to investigate, standing alone, does not establish a probability of prevailing on actual malice, for purposes of defeating a motion to strike.

STATEMENT OF THE IDENTITY & INTERESTS OF AMICI CURIAE

The First Amendment Clinic at the University of Georgia School of Law, located in Athens, Georgia, defends and advances freedoms of speech and the press through direct client representation and advocacy on behalf of journalists, students, government employees, and public citizens. The Clinic's legal and educational activities promote free expression, newsgathering, and the creation of a more informed citizenry.

The Georgia First Amendment Foundation is a not-for-profit, non-partisan organization which advocates for greater government transparency and free speech, and which, for more than 25 years, has been providing educational services to citizens, journalists and public officials about Georgia's laws regarding newsgathering and publication. As part of its overarching mission, the Georgia First Amendment Foundation works to ensure public access to information about government operations throughout the state. This includes promoting freedom of the press to bring this information to Georgia's citizens.

The First Amendment Clinic at the University of Virginia School of Law, located in Charlottesville, Virginia, promotes free expression, free press, and the free flow of information and ideas in a democratic society, both through its case work and by training new First Amendment and media law attorneys. The Clinic concentrates its efforts in the Commonwealth and regionally, particularly with

respect to nonprofit news organizations and freelance journalists, and provides education and research support on anti-SLAPP statute.

ARGUMENT

Georgia's anti-SLAPP statute serves the same purpose as the constitutional protection of the "actual malice" standard -- to "encourage participation by the citizens of Georgia in matters of public significance and public interest through the exercise of their constitutional rights of petition and freedom of speech," which "should not be chilled through abuse of the judicial process." O.C.G.A. § 9-11-11.1(a). To that end, the law is to be "construed broadly" and, among other things, permits litigants, counsel, and the public and press, to comment on matters pending before courts in the state without fear that public statements relaying the substance of allegations in legal proceedings will draw a defamation suit. *Id.* § 9-11-11.1(a), (c)(1). The law does so both by providing an early opportunity for defendants to move to strike SLAPP suits and by overlaying a series of privileges, including a judicial privilege, on top of the anti-SLAPP statute. *See* O.C.G.A. § 51-5-7.

To survive a motion to strike under Georgia's anti-SLAPP statute, a defamation plaintiff must show a probability of establishing actual malice by clear and convincing evidence, the same constitutional standard articulated by the United States Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964) (requiring actual knowledge of falsity or reckless disregard for truth). *See Neff v.*

McGee, 346 Ga. App. 522, 527, 530 (Ga. Ct. App. 2018) (applying actual malice standard in reversing trial court's denial of motion to strike under anti-SLAPP statute because defamation plaintiff could not demonstrate a probability that she would prevail; "[s]tatements are deemed to have [been made] with malice, if the evidence shows in a clear and convincing manner that a defendant in fact entertained serious doubts as to the truth of his statements") (quotation marks and citation omitted); *see also Davis v. Shavers*, 269 Ga. 75, 76-77 (1998) (applying *Sullivan* actual malice standard to find conditional privilege applied under O.C.G.A. § 51-5-7(9)).

Here, the Court of Appeals' erred in denying Petitioner's motion to strike for two critical reasons. First, after Petitioner put forth prima facie evidence that it acted in good faith, the Court did not require Respondent to show a probability of prevailing by *clear and convincing* evidence on actual malice. *Smith v. Henry*, 276 Ga. App. 831, 832-33 (2005) (pursuant to O.C.G.A. § 51-5-7 and Georgia anti-SLAPP statute, once evidence of good faith is proffered, burden shifts to complaining party to show "specific evidence" of actual malice). Actual malice is a demanding burden, one "such as to command the unhesitating assent of every reasonable mind." *Beilenson v. Superior Court*, 44 Cal. App. 4th 944, 950 (Cal. Ct. App. 1996); *see also Wilkes & McHugh, P.A. v. LTC Consulting, L.P.*, 306 Ga. 252, 252, 258 (2019) (Georgia courts may look to California anti-SLAPP

jurisprudence, as laws are similar). Actual malice cannot be implied; it must be proven by direct evidence that the speaker "subjectively entertained serious doubt as to the truth of the statement." *Id.* (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 n.30 (1984)). Second, as this Court has observed, a failure to investigate is not enough to establish actual malice. *Cottrell v. Smith*, 299 Ga. 517, 525-26 (2016) (actual malice not measured by "whether a reasonably prudent man would have conducted further investigation. The evidence must show in a clear and convincing manner that a defendant in fact entertained serious doubts as to the truth of his statements"). *See also St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *Beilenson*, 44 Cal. App. 4th at 952. Here, other than Petitioner allegedly failing to consult court records, the Superior Court and the Court of Appeals failed to consider any evidence on whether Petitioner subjectively harbored doubts as to the truth of the allegedly defamatory statements.

The proper application of Georgia's anti-SLAPP statute and the privileges for statements concerning matters before official bodies codified at O.C.G.A. § 51-5-7 are crucially important for the press and public. They allow parties to these proceedings to speak to the press, and the press to report on those statements, without fear of burdensome and expensive litigation. Further, allegations made in litigation, statements made in connection with legislative activity, and other speech regarding public affairs are intensely newsworthy. Adopting the Court of Appeals'

apparent duty-to-investigate rule would chill discourse on government affairs and make Georgia a haven for SLAPP suits by litigants with little or no connection to the state. *See* Justin Jouvenal, *Va. Legislature Passes Bills Aimed at Lawsuits by Devin Nunes, Johnny Depp*, Wash. Post (Feb. 11, 2020), https://perma.cc/8P5Q-YLG2 (last visited 07/23/20) ("Virginia legislature passed bills [] that would make it harder to pursue frivolous lawsuits designed to chill free speech, a response to a string of splashy defamation cases filed in state courts by Rep. Devin Nunes (R-Calif.), actor Johnny Depp and others."); Matthew Barakat, *Press Group: Hollywood Libel Lawsuit Could Set Bad Precedent*, Associated Press (Nov. 8, 2019), https://apnews.com/521c4445a1fe4aabb00a28200e7d03ac (last visited 07/23/20).

Accordingly, amici curiae urge the Court to grant the Petition for Writ of Certiorari to correct the Court of Appeals' application of an erroneous legal standard that, if allowed to stand, dangerously weakens the First Amendment protections codified in the Georgia anti-SLAPP statute.

I. Respondent must show a probability of prevailing by "clear and convincing" evidence on actual malice.

In denying Petitioner ACLU's motion to strike, the Court of Appeals construed Respondent B. Reid Zeh's representations in the light most favorable to Respondent, and held that Respondent had "established a prima facie case" that the statements at issue were not privileged. Slip Op. at 8. A conditional privilege

can be overcome, however, only if "the privilege is used merely as a cloak for venting private malice." O.C.G.A. § 51-5-9. Moreover, the anti-SLAPP statute requires that a motion to strike be granted "unless the court determines that the nonmoving party has established that there is *a probability* that the nonmoving party will prevail on the claim." O.C.G.A. § 9-11-11.1(b)(1) (emphasis added).

In other words, in order to overcome the privilege, Respondent had to show a probability of prevailing on "actual malice," a foundational safeguard in First Amendment law reflecting our "profound national commitment" to the principle that public discourse "should be uninhibited, robust, and wide-open." *N.Y. Times*, 376 U.S. at 270. The actual malice standard protects statements made in connection with public affairs, including statements related to litigation, in recognition that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive." *Id.* at 271-72. Absent that breathing space, the press and public will self-censor and not engage in protected speech. They will "steer far wider of the unlawful zone." *Id.* (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

Georgia's anti-SLAPP statute thus requires a reviewing court to determine whether the evidence presented by both plaintiff and defendant in a defamation claim based on privileged statements is sufficient to show that the plaintiff has "a

probability" of showing actual malice as a matter of law. *See* O.C.G.A. § 9-11-11.1(b)(1) & (2) (directing reviewing court to "consider the pleadings and supporting and opposing affidavits" in determining whether the non-moving party has established "a probability" of prevailing). Here, neither the Court of Appeals nor the Superior Court engaged in this required analysis. The Court of Appeals merely found a "prima facie case" of lack of good faith, without progressing to the necessary next step of determining whether Respondent could demonstrate a probability of prevailing on actual malice. This failing alone is reason for this Court to grant Petitioner's Petition for Certiorari and, in any event, Respondent cannot make the requisite showing of malice. "Statements are deemed to have not been made in good faith, but rather with malice, if the evidence shows in a clear and convincing manner that a defendant in fact entertained serious doubts as to the truth of his statements." *Neff*, 346 Ga. App. at 527 (quotation marks and citation omitted). Georgia courts may consider California case law when interpreting Georgia's anti-SLAPP statute, as California law "substantially mirrors" Georgia's, and California has developed a "considerable body of" of anti-SLAPP jurisprudence. *Wilkes & McHugh, P.A.*, 306 Ga. at 252, 258. California has set a high bar for what constitutes the requisite showing of malice by clear and convincing evidence, characterizing it as a "heavy burden, far in excess of the preponderance sufficient for most civil litigation." *Christian Research Inst. v.*

Alnor, 148 Cal. App. 4th 71, 84 (Cal. App. 2007) (quoting *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186-87 (9th Cir. 2001)). The burden requires a finding of "high probability" and must "leave no substantial doubt." *Id.* (quoting *Copp v. Paxton*, 45 Cal. App. 4th 829, 846 (Cal. App. 1996)).

Crucially,

> a reviewing court *is not bound to consider the evidence of actual malice in the light most favorable to respondents or to draw all permissible inferences in favor of respondents*. To do so would compromise the independence of [the court's] inquiry. The constitutional responsibility of independent review encompasses far more than [an] exercise in ritualistic inference granting.

Id. (italics in original, quotation marks and citations omitted).

California courts apply this level of scrutiny at the motion to strike stage. *See id.* ("Independent review is applied with equal force in considering whether a plaintiff has established a probability of demonstrating malice by clear and convincing evidence in opposing an anti-SLAPP motion."). As discussed below, such evidence must show that the moving party harbored subjective doubts about the truth of the statements at issue, which Respondent cannot demonstrate here. *See Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1167 (Cal. App. 2004) ("Gross or even extreme negligence will not suffice to establish actual malice; the defendant must have made the statement with knowledge that the statement was

false or with *actual* doubt concerning the truth of the publication.") (italics added, quotation marks and citation omitted).

II. A duty-to-investigate with respect to actual malice would chill newsgathering, reporting, and public debate.

This Court has recognized that failure to investigate, standing alone, will not suffice to establish actual malice. *Cottrell*, 299 Ga. at 525-26 (actual malice not measured by "whether a reasonably prudent man would have conducted further investigation"). *See St. Amant*, 390 U.S. at 731 ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing."). And the courts have established that rule in full knowledge that some false statements on public affairs may be beyond redress. *Id.* at 731-32 ("Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of a reasonable man or the prudent publisher."). But the importance of open and free discussion on matters of public affairs -- and particularly the role that the press plays in seeding that discussion with information about government activities -- requires that the balance tilt toward preserving "breathing space" that may countenance some falsity to protect truth. *Id.* at 732 ("[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.").

Although Petitioner here was serving as counsel in a lawsuit, these protections are essential for both the press and the public at large. The press routinely relies on statements of counsel concerning allegations in lawsuits when reporting on those proceedings. Indeed, the "fair report" privileges codified in O.C.G.A. § 51-5-7(5)-(6) exist precisely to preserve the press's ability to report to the public about legal allegations and court proceedings without fear that doing so will lead to a defamation suit against the news media or their sources. Moreover, courts considering a motion to strike under an anti-SLAPP statute like Georgia's will consider whether a "fair report" privilege applies at that early stage. *See, e.g.*, *Healthsmart Pacific, Inc. v. Kabateck*, 7 Cal. App. 5th 416, 434 (Cal. App. 2016) (granting anti-SLAPP motion to strike on fair report privilege as "the rule is considered essential to allow the public to keep informed as to what is occurring in its judicial system.") (quotation marks and citations omitted).

Accordingly, an anti-SLAPP statute like Georgia's, which substantially mirrors California's, should require a reviewing court to consider a motion to strike under the following analytical framework: First, were the allegedly defamatory statements made in furtherance of protected speech or petition rights "in connection with an issue of public interest or concern," O.C.G.A § 9-11-11.1(b)(1) & (c), thus triggering the protections of the anti-SLAPP statute. Second, were the allegedly defamatory statements made about a public figure or pursuant to a

qualified privileged under O.C.G.A. § 51-5-7. If either apply, has the non-moving party established a probability that they will prevail in showing actual malice by clear and convincing evidence.

As noted, under California law, which this Court may look to in construing Georgia's anti-SLAPP statute, courts will conduct an independent review of the record. *Cf.* O.C.G.A. § 9-11-11.1(b)(2) ("[T]he court [considering a motion to strike] shall consider the pleadings and supporting or opposing affidavits stating the facts upon which the liability or defense is based . . . ."). And, when a party's evidence amounts to a failure to investigate, standing alone, the non-moving party cannot establish a probability of prevailing on the heavy burden of clear and convincing evidence. *See Cottrell*, 299 Ga. at 525-26.

CONCLUSION

The anti-SLAPP and qualified-privilege protections under Georgia law are essential to promoting the free flow of newsworthy information to the public and protecting both the press' and the public's ability to speak in criticism of government and its officials. The lower courts in this case have significantly undermined these protections by failing to conduct the required analysis or apply the actual malice standard before denying Petitioner's motion to strike. To right this speech-chilling error, amici curiae respectfully urge the Court to grant Petitioner's Petition for Certiorari.

Respectfully submitted this 23rd day of July, 2020.

/s/Clare R. Norins
Clare R. Norins
Georgia Bar No. 575364
First Amendment Clinic
University of Georgia School of Law
P.O. Box 388
Athens, Georgia 30603
Telephone: (706) 542-1419
Email: cnorins@uga.edu

Counsel for Amici

CERTIFICATE OF SERVICE

This is to certify that I have this day caused a true and correct copy of the foregoing **Brief of Amici Curiae University of Georgia School of Law First Amendment Clinic, the Georgia First Amendment Foundation, and the University of Virginia School of Law First Amendment Clinic in Support of Petition for Writ of Certiorari** to be served on counsel for Respondent and Petitioner by placing a copy of same in the United States Mail via first class delivery, postage prepaid, addressed to the following:

Counsel for Respondent:
Brent J. Savage
Savage, Turner, Durham, Pinckney & Savage
PO Box 10600
Savannah, GA 31412

Counsel for Petitioner:
Leslie K. Eason
Tiffany N. Taylor
Gordon Rees Scully Mansukhani, LLP
55 Ivan Allen Jr. Blvd., NW, Suite 750
Atlanta, GA 30308

John P. Batson
P.O. Box 3248
Augusta, GA 30914

Sean J. Young
American Civil Liberties Union Foundation of Georgia
P.O. Box 77208
Atlanta, GA 30357

Brian Hauss
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Counsel for Petitioner

This 23rd day of July 2020.

/s/ Clare R. Norins
Clare R. Norins
Georgia Bar No. 575364