No. S20C1473

IN THE SUPREME COURT OF THE STATE OF GEORGIA

AMERICAN CIVIL LIBERTIES UNION, INC.,
Appellant,

v.

B. REID ZEH,
Appellee.

BRIEF OF AMICI CURIAE UNIVERSITY OF GEORGIA SCHOOL OF LAW FIRST AMENDMENT CLINIC, THE GEORGIA FIRST AMENDMENT FOUNDATION, THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW FIRST AMENDMENT CLINIC, AND THE SOUTHERN CENTER FOR HUMAN RIGHTS IN SUPPORT OF APPELLANT AMERICAN CIVIL LIBERTIES UNION, INC.

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INTRODUCTION

Pursuant to Rule 23 of the Georgia Supreme Court Rules, amici curiae the First Amendment Clinic at the University of Georgia School of Law ("UGA First Amendment Clinic"), the Georgia First Amendment Foundation ("GFAF"), the First Amendment Clinic at the University of Virginia School of Law ("UVA First Amendment Clinic"), and the Southern Center for Human Rights ("SCHR") respectfully submit this brief in support of Appellant American Civil Liberties Union, Inc. ("ACLU").

In *American Civil Liberties Union, Inc. v. Zeh*, 355 Ga. App. 731 (2020), the Court of Appeals affirmed the Superior Court of Glynn County's denial of Appellant ACLU's motion to strike Appellee B. Reid Zeh'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, the lower court erred in three ways. First, the lower court denied Appellant ACLU's motion to strike without first analyzing whether Appellee Zeh had met his burden of showing a probability of prevailing, through clear and convincing evidence, that the ACLU acted with actual malice (*i.e.*, that the ACLU in fact entertained serious doubts as to the truth of its statements about Zeh). Second, the lower court erred in finding that the ACLU lacked "good faith," and therefore had not engaged in a privileged communication under O.C.G.A. § 51-5-7 and the anti-SLAPP statute. This finding

was based solely on the ACLU's alleged failure to investigate which, standing alone, is legally insufficient to establish actual malice. Third, the lower court's misapplication of Georgia's anti-SLAPP statute and the conditional privileges codified at O.C.G.A. § 51-5-7 undermines important protections for exercising freedoms of speech and press on matters of public concern. If allowed to stand, the lower court's failure to apply the actual malice standard on an anti-SLAPP motion to strike, and apparent creation of a duty to investigate, will significantly chill news reporting and public discourse in Georgia and constrain the free flow of information about government activities.

Amici therefore urge this Court to reverse and grant the ACLU's anti-SLAPP motion to strike Zeh's defamation claim on the ground that he has not shown a probability that he can establish actual malice by clear and convincing evidence. Alternatively, amici ask this Court to remand this case for the lower court's proper application of the actual malice standard.

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 statutes.

The Southern Center for Human Rights ("SCHR") is a non-profit law firm dedicated to protecting and advancing the civil and human rights of people impacted by the criminal legal system. Through litigation and advocacy, SCHR has

worked for over 40 years to defend people accused of crimes, ensure humane conditions of confinement in jails and prisons, end practices that criminalize people simply for experiencing poverty and ensure open and transparent criminal proceedings. In pursuit of those aims, SCHR has brought class action lawsuits, issued investigative reports, and pressed for legislative reforms on behalf of indigent persons across the Deep South. This lawsuit, and the interpretation of the Georgia's anti-SLAPP law, chills our advocacy by requiring us to second-guess and distrust our clients' own stories prior to even initially making public comments of concern about otherwise credible allegations.

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.

Once the party moving to strike under the anti-SLAPP statute puts forth prima facie evidence that it acted in good faith, the non-movant 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 Company 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 (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); *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). *See also Davis v. Shavers*, 269 Ga. 75, 76-77 (1998) (applying *Sullivan* actual malice standard to find conditional privilege existed under O.C.G.A. § 51-5-7(9)).

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 (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). Thus, the complaining party must prove that the speaker "subjectively entertained serious doubt as to the truth of the statement." *Beilenson*, 44 Cal. App. 4th at 951 (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 n.30 (1984)).

Here, the Court of Appeals erred in denying Appellant's motion to strike because it failed to correctly apply the actual malice standard. Additionally, upholding the Court of Appeals' decision would chill free speech by imposing harmful burdens on the press, particularly those reporting on the legal system, and on attorneys desiring to make public statements on legal matters of public concern.

I. Appellee Zeh failed to carry his burden of showing a probability of clear and convincing evidence of actual malice.

Analyzing a motion to dismiss a defamation claim under Georgia's anti-SLAPP statute is a two-step process: (1) the moving party must show that the challenged claim arose out of protected free-speech or petitioning activity, and (2) the non-movant must demonstrate probability of prevailing on the underlying defamation claim. *See Wilkes & McHugh*, 306 Ga. at 261-62. Only the second step is at issue here: whether Zeh, as the respondent to the ACLU's anti-SLAPP

motion, has established that there is a probability that he will succeed on his claim. To prevail on a defamation claim, Zeh must show: (1) a false and defamatory statement concerning Zeh; (2) an unprivileged communication to a third party; (3) actual malice by the ACLU[1]; and (4) special harm or the actionability of the statement irrespective of harm. *See Neff*, 346 Ga. App. at 525 & n.3 (citing *Smith v. DiFrancesco*, 341 Ga. App. 786, 787-88, 790 (2017)).

The Court of Appeals failed to appropriately apply the actual malice standard with respect to both elements (2) and (3) of Zeh's defamation claim. Statements that fall under one of the enumerated categories in O.C.G.A. § 51-5-7 are conditionally privileged.[2] *See DiFrancesco*, 341 Ga. App. at 790 n.3

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[1] The standard is actual malice, not negligence, when the plaintiff is a public official or public figure. *See Sullivan*, 376 U.S. at 279-80 (setting the constitutional rule for public officials attempting to recover on defamation claims). Although the ACLU argues, and amici agree, that Zeh is a public official in this case, this is not the reason actual malice applies. Rather, under O.C.G.A. § 51-5-7 (Georgia's conditional privilege statute), Zeh has to prove actual malice to satisfy the second element of his defamation claim -- *i.e.*, that the ACLU engaged in an unprivileged communication.

[2] O.C.G.A. § 51-5-7 provides:

> The following communications are deemed privileged: (1) Statements made in good faith in the performance of a public duty; (2) Statements made in good faith in the performance of a legal or moral private duty; (3) Statements made with a good faith intent on the part of the speaker to protect his or her interest in a matter in which it is concerned; (4) Statements made in good faith as part of an act in furtherance of the person's or entity's right of petition or free speech under the Constitution of the United States or the Constitution of the State of

(distinguishing between absolute and conditional privilege). Conditional privilege requires a showing that the statements were made in good faith, *i.e.*, without actual malice. *See id*. ("A defendant who has made a statement that is defamatory may nevertheless avoid liability if the statement was privileged, *absent a showing of actual malice*.") (emphasis added.). Thus, in the context of determining whether a conditional privilege exists, the actual malice standard applies regardless of public figure or public official status. *See Torrance v. Morris Publ'g Group, LLC*, 281 Ga. App. 563, 571 (2006) (observing that "[the plaintiff] correctly notes that the conditional privilege afforded by O.C.G.A. § 51-5-7[ ] is abrogated by actual malice" without any mention of the public figure or public official analysis) (citing *Davis v. Macon Tel. Publ'g Co.*, 93 Ga. App. 633, 637 (1956); *Edmonds v. Atlanta Newspapers, Inc.*, 92 Ga. App. 15, 20 (1955)); *see also Hammer v. Slater*, 20 F.3d 1137, 1142 (11th Cir. 1994) (collecting Georgia state cases that do not differentiate between private and public figures when applying the actual malice standard to

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> Georgia in connection with an issue of public interest or concern, as defined in subsection (c) of Code Section 9-11-11.1; (5) Fair and honest reports of the proceedings of legislative or judicial bodies; (6) Fair and honest reports of court proceedings; (7) Comments of counsel, fairly made, on the circumstances of a case in which he or she is involved and on the conduct of the parties in connection therewith; (8) Truthful reports of information received from any arresting officer or police authorities; and (9) Comments upon the acts of public men or public women in their public capacity and with reference thereto.

determine if conditional privilege shields allegedly defamatory statements).[3] Therefore, Zeh must prove that the ACLU acted with actual malice. Otherwise, the ACLU's statements are privileged under OCGA § 51-5-7, Zeh cannot prevail on his claim, and the ACLU's anti-SLAPP motion should be granted.

"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. Absence of "good faith" therefore turns on whether the alleged defamer was aware the statements were likely untrue. Indeed, "[c]onstitutional malice does not involve the motives of the speaker or publisher, though they may be wrong, but rather it is his awareness of actual or probable falsity, or his reckless disregard for their falsity." *Williams v. Trust Co. of Ga.*, 140 Ga. App. 49, 51 (1976).

The Court of Appeals, however, did not examine whether Zeh has shown a probability of demonstrating by clear and convincing evidence that the ACLU was aware of the actual or probably falsity of its statements. Instead, the court merely recounts that when the ACLU made its statements about Zeh having charged Cox and his mother for Zeh's public defense services which should have been free,

[3] *Hammer* examined actual malice in the context of O.C.G.A. § 51-5-9, which provides that statements falling within the ambit of O.C.G.A. § 51-5-7 are presumed privileged, unless this presumption is rebutted by demonstrating that the privilege was used "merely as a cloak for venting private malice." *See* O.C.G.A. § 51-5-9.

Cox's criminal case had already been transferred to a different prosecutorial unit for which Zeh was not the public defender, and therefore the ACLU's statements were false. *ACLU*, 355 Ga. App. at 734-36. The court concludes from this timeline that "Zeh established a prima facie case that the ACLU did not make its statements in good faith" and therefore were not privileged. *Id.* at 735. However, the Court of Appeals failed to consider whether there is evidence that the ACLU knew, when it made its statements, that they were false or that the ACLU entertained serious doubt as to their truth. *Id*. This failure is contrary to well-established Georgia law. *See Williams*, 140 Ga. App. at 51 ("[Malice] is his awareness of actual or probable falsity.").

Moreover, the court, applying an incorrect standard, finds the ACLU "negligen[t]" for not having located the publicly filed court document that contradicted its statements. *ACLU*, 355 Ga. App. at 736. Negligence, of course, does not satisfy the actual malice standard under which the ACLU's "good faith" must be analyzed. *See Torrance v. Morris Publ'g Group, LLC*, 289 Ga. App. 136, 140 (2007) ("[E]rrors of fact caused by negligence . . . do not show actual malice."). Because the only fault Zeh can possibly attribute to the ACLU is based in negligence, Zeh fails to provide "clear and convincing evidence" of malice. The ACLU's motion to strike under the anti-SLAPP statute should therefore have been granted.

II. Actual malice cannot be shown by a failure to investigate.

The Court of Appeals held that the ACLU's "failure to investigate" constituted negligence. *ACLU*, 355 Ga. App. at 736 (applying a negligence standard because of the erroneous holding that the ACLU's statements were not privileged). A failure to investigate is not, however, tantamount to actual malice—which was the determination the court was required to make. *See Edward Lewis Tobinick, MD v. Novella*, 848 F.3d 935, 946 (11th Cir. 2017) (holding that the plaintiff's "evidence at most demonstrates mere negligence and does not . . . prove actual malice").

Actual malice can be shown by demonstrating "reckless disregard" for whether the challenged statement is true. *See Cottrell v. Smith*, 299 Ga. 517, 528 (2016). This Court has clearly articulated that failure to investigate, standing alone, is not "reckless disregard." *See id*. 525-26 ("[I]t is not sufficient to measure reckless disregard by . . . whether a reasonably prudent man would have conducted further investigation.") (quoting *Atlanta Humane Soc. v. Mills*, 274 Ga. App. 159, 165 (2005)); *Jones v. Albany Herald Publ'g Co.*, 290 Ga. App. 126, 133 (2008) ("Mere failure to investigate 'does not evince actionable reckless disregard.'") (citation omitted). The United States Supreme Court has also long held that a failure to investigate does not create actual malice. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("[R]eckless conduct is not measured by whether a

reasonably prudent man would have published, or would have investigated before publishing.").

Taking a closer look at *Cottrell* is instructive as to why Zeh has failed to provide evidence of reckless disregard. In *Cottrell*, the alleged defamer Smith authored a blog post asserting that Cottrell had defrauded and stolen from the company where he was the CEO.[4] *Cottrell*, 299 Ga. at 526-27. Smith's statements were based only on information and personal anecdotes she had received from Resnick, a former coworker of Cottrell's at the company. *Id*. at 527. The Court held that Cottrell did not establish that Smith had acted with actual malice or reckless disregard in publishing the information she had learned from Resnick, even though she had never met Resnick in person and their first interaction was an email she sent seeking information about Cottrell. *Id*. at 528. In fact, the Court found that "[t]here is *no evidence*, much less 'clear and convincing' evidence, that [Smith] disbelieved what Resnick told her or that she otherwise had a high degree of awareness of the probable falsity of what she posted." *Id*. (emphasis added).

Similar to Smith's reliance on information provided by Resnick in *Cottrell*, the ACLU in this case had no reason to disbelieve their clients' statements that Zeh had charged them for his criminal defense services while he was still acting in his

[4] Cottrell also alleged defamation for other statements by Smith that are not relevant to the issues in this case. *See id*. at 529-31 (analyzing whether other blog posts, list-serve emails, and Facebook message defamed Cottrell).

role as public defender. Moreover, the ACLU was not merely relying on the oral statements of a stranger contacted through the Internet as in *Cottrell*; instead, the ACLU relied on their clients' declarations, *sworn under penalty of perjury*, with whom they had an ongoing relationship. Just as this Court concluded that the evidence in *Cottrell* "forcefully supports" the conclusion that Smith acted without actual malice, *see id.*, the same is true in this case for the similarly-situated ACLU.

III. The Court of Appeals' treatment of the actual malice standard will significantly chill newsgathering and reporting.

If allowed to stand, the Court of Appeals' ruling will chill the speech of members of the press by expanding potential liability for journalists reporting on public officials and other public figures. The United States Supreme Court has recognized the importance of this sort of reporting, as it fulfills an "essential role in our democracy." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The press was protected so that it could bare the secrets of government and inform the people."). The Court of Appeals' treatment of the actual malice standard directly undercuts this constitutional protection, and is inconsistent with this Court's precedent. *See Cottrell*, 299 Ga. at 525-26 (actual malice not measured by "whether a reasonably prudent man would have conducted further investigation"). If journalists can be held liable under an actual malice standard for failure to investigate, fear of litigation and liability will chill reporting on matters of public interest. *See Sullivan*, 376 U.S. at 279.

In order to foster reporting on issues of public importance, the actual malice standard contemplates that some factual inaccuracies must be tolerated, as "erroneous statement[s] [are] inevitable in free debate." *Id*. This is because freedom of expression needs "breathing space" to survive. *Id*. Without these protections, speakers on issues of public concern "may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court." *Id.* at 279. This decision to "steer far wider of the unlawful zone," would "dampen[] the vigor and limit[] the variety of public debate." *Id.*

Indeed, the constitutional implications of imposing liability on speech regarding public officials and public figures are so significant that, in addition to establishing the actual malice standard, the Court in *Sullivan* also mandated independent judicial review of lower court records in these cases. *Id.* at 285 (This review is necessary "to assure . . . that the judgment does not constitute a forbidden intrusion on the field of free expression."). Accordingly, in *Bose Corp. v. Consumers Union of United States, Inc.*, the Court instructed appellate courts to independently review the record concerning actual malice in defamation cases. 466 U.S. 485, 511 (1984) ("Judges . . . must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual

malice.'"); *Morton v. Stewart*, 153 Ga.App. 636, 642 (1980) (holding that under *New York Times v. Sullivan*, actual malice in a defamation case was made "a constitutional issue to be decided initially by the trial judge vis-à-vis motions for summary judgment and directed verdict" and "[u]nless the court finds . . . that the plaintiff can prove actual malice . . . it should grant summary judgment for the defendant.") (internal quotations omitted). Actions under the anti-SLAPP statute should enjoy no less judicial scrutiny than defamation actions, as the very purpose of the statute is to encourage citizens to "exercise their constitutional rights of freedom of speech," and to prevent "chill[] through abuse of the judicial process." O.C.G.A. § 9-11-11(a); *see also United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008) (mandating independent review of cases under the Religious Freedom Restoration Act, because "[t]he statute asks courts to draw on constitutional doctrines developed under the Free Exercise Clause").

Other elements of a defamation claim are also suitable for independent review, "as a logical corollary to independent review of actual malice." *Locricchio v. Evening News Ass'n,* 438 Mich. 84, 113 (1991) (concluding that "an independent review of the burden of proof with regard to falsity in private-figure, public interest cases deters 'forbidden intrusion on the field of free expression'"). *Sullivan*'s actual malice standard and independent review requirements combine to ensure that constitutional rights are not abridged and the press enjoys the

"breathing space" needed to perform its constitutionally recognized function as a watchdog for the electorate. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.").

If Georgia's anti-SLAPP statute is not correctly applied, the threat of chill to newsgathering and reporting is a real and immediate concern. For example, the "Gawker effect," colloquially named after the online publication sued by wrestler Hulk Hogan, has pressured some media publications to vet stories to the point where they are "bulletproof." Margaret Sullivan, *That R. Kelly 'Cult' Story Almost Never Ran. Thank Hulk Hogan for That.,* WASH. POST, (July 30, 2017), https://perma.cc/3TBF-XTTL (last visited Apr. 26, 2021). Following the Gawker lawsuit, a story regarding sexual misconduct by musician R. Kelly was rejected by three media organizations before it was eventually picked up by Buzzfeed, and was only published after an extreme vetting process. *Id.* Not all pieces eventually find a publisher, and members of the media have noted that a climate of fear has developed in many newsrooms. *Id.*

The Court of Appeals' erroneous application of the anti-SLAPP statue could further exacerbate this potential chill by making 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/8P5QYLG2 (last visited July 23, 2020) ("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://perma.cc/GJX9-CJ4H (last visited Apr. 26, 2021). If allowed to stand, the Court of Appeals' holding in this case would significantly limit the scope of Georgia's anti-SLAPP statute, thus undermining its purpose and encouraging the filing of harassing defamation suits in Georgia by plaintiffs with little tie to the State.

The Court of Appeals' finding that Zeh "made a prima facie case that the ACLU should have determined from public court records whether there was any truth to Cox's contentions" is not enough to establish a probability of prevailing by clear and convincing evidence on actual malice. "[A]ny standard which would require strict accuracy in reporting legal events factually or in commenting upon them in the press would be an impossible one." *Pennekamp v. State of Fla.*, 328 U.S. 331, 371–72 (1946) (Rutledge, J., concurring). This is because the law "is full of perplexities." *Id.* The Georgia legislature has recognized the importance of allowing the press to report on legal matters, classifying "fair and honest reports"

of proceedings before judicial bodies and courts as conditionally privileged communications under the Georgia's Libel and Slander Law. O.C.G.A. § 51-5-7(5)-(6). This statutory recognition of the importance of public discourse about the legal system provides an essential protection for the free flow of newsworthy information to the public, of which the actual malice showing is a critical piece.

Further, the scope of the investigation that the Court of Appeals' holding would require would be extremely burdensome, delaying publication on critical and emerging issues. While journalists often consult public records in the course of their reporting, the sheer number of these records and the time and expense under the Georgia Open Records Act it can take to access them, prohibit an exhaustive search in all circumstances, particularly when journalists are reporting fairly on allegations in sworn court documents. *See* Nyamekye Daniel, *Cost can be high to obtain public records in Georgia*, THE CENTER SQUARE (Oct. 8, 2020), https://perma.cc/HTV5-T9ZP (last visited Apr. 26, 2021) (reporting that the Atlanta-Journal Constitution's request for records related to the Covid-19 pandemic cost an estimated $33,000 and would take 1,230 hours to complete). There is also no guarantee that a journalist would correctly identify a record that is exactly on point—assuming that such a record actually exists. If a court could find a journalist to have acted with actual malice for failing to request and consult all possible records, important stories may simply never reach publication. *See St.*

Amant, 390 U.S. at 731–32 ("[T]he stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.").

IV. The Court of Appeals' decision will significantly chill the constitutionally protected speech of attorneys.

In addition to chilling newsgathering and reporting, the Court of Appeals' decision in this case would chill the speech of attorneys and undermine the client-lawyer relationship. Attorney speech receives First Amendment protection, particularly when an attorney is engaging in "classic political speech" regarding alleged misconduct. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991) (distinguishing this speech from "solicitation of clients or advertising").

Communicating with the public is an essential element of being an effective advocate. It is well accepted that "[a]n attorney's duties do not begin inside the courtroom door," as public opinion can have significant implications in resolving disputes and lawyers often act to protect their client's reputation. *Id.* at 1044. The specter of liability in this case will cause attorneys to hesitate before making constitutionally protected statements about matters they are litigating—diminishing their effectiveness as advocates, as well as the free flow of newsworthy information about the legal process to the public.

Imposing a duty for lawyers to exhaustively investigate each and every statement made by a client before speaking publicly about a case would ultimately create tension between the interests of the attorney and client. This could dissuade prompt and zealous advocacy, as attorneys may feel pressure to stay publicly silent or wait for independent verification of factual claims. While this hesitancy would protect the attorney from liability, the client's interests could be undercut.

Here, the ACLU had no reason to doubt the truth of its clients' sworn statements. Two separate individuals described their dealings with Zeh in similar terms. There was no reason for the ACLU to think both their client and his mother were making false claims, and Zeh has failed to introduce *any* evidence that the ACLU acted with any subjective doubt about the veracity of the facts contained in its clients' sworn declarations, the sine qua non of "recklessness" under the actual malice inquiry. *See St. Amant*, 390 U.S. at 733 (declining to find actual malice following a speaker's televised reading of an affidavit, "swor[n] . . . first in writing and later in the presence of newsmen"). This is exactly the situation where an attorney should be free to make a public statement and advocate for a client, but the Court of Appeals' decision would chill this valuable speech.

CONCLUSION

The Georgia legislature promulgated O.C.G.A. 9-11-11.1 in order to prevent lawsuits just like this one. The anti-SLAPP statute provides the press with a safe harbor to report on public officials and public figures without fear of liability, requiring a potential plaintiff to prove by clear and convincing evidence that there was actual malice in order to prevail on a defamation claim. The Court of Appeals undermined the purpose of the statute by permitting Zeh to prove his case only through a standard of negligence. Furthermore, the Court of Appeals holds contrary to Georgia and federal law by concluding that a failure to investigate creates liability for the ACLU. This conclusion is legally incorrect and could create chilling consequences for the speech of the press and of attorneys if allowed to stand. *Amici curiae* therefore respectfully request that this Court reverse and grant the ACLU's anti-SLAPP motion to strike Zeh's defamation claim, or else remand to the Court of Appeals for proper consideration of the actual malice standard.

Respectfully submitted this 29th day of April, 2021.

[Signature on next page.]

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* Counsel thanks Gabriel Rottman and Ian Kalish from the University of Virginia School of Law's First Amendment Clinic for their significant contributions to this brief, and Gerry Weber of the Southern Center for Human Rights.

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, the University of Virginia School of Law First Amendment Clinic, and the Southern Center for Human Rights in Support of Petitioner American Civil Liberties Union, Inc.** 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:

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