

No. 20-1886

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

DON BLANKENSHIP,

Plaintiff-Appellee,

v.

BRADLEY BLAKEMAN,

Defendant-Appellant,

and

KEVIN McLAUGHLIN; DOES 1 THROUGH 50,

Defendants.

On Appeal from the United States District Court
for the Eastern District of Virginia
Case No. 1:20-cv-429-LMB-IDD (Hon. Leonie M. Brinkema)

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 24 MEDIA ORGANIZATIONS
IN SUPPORT OF APPELLANT**

Jennifer A. Nelson, Esq.

Counsel of Record

Gabriel Rottman, Esq.*

UNIVERSITY OF VIRGINIA

SCHOOL OF LAW

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** Of counsel*

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1886 Caption: Blankenship v. Blakeman

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Reporters Committee for Freedom of the Press, The Associated Press,
(name of party/amicus)

The Center for Investigative Reporting (d/b/a Reveal),SEE ATTACHED PAGE

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

Lenfest Institute for Journalism, LLC.
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Jennifer A. Nelson

Date: 10/13/2020

Counsel for: Amici Curiae

The Foundation for National Progress d/b/a Mother Jones
The McClatchy Company, LLC
The Media Institute
MPA - The Association of Magazine Media
National Press Photographers Association
The News Leaders Association
News Media Alliance
Radio Television Digital News Association
Society of Environmental Journalists
Society of Professional Journalists
TIME USA, LLC
Virginia Press Association

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No. 20-1886 Caption: Blankenship v. Blakeman

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Atlantic Monthly Group LLC
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
The Atlantic Monthly Group LLC is owned by Emercon Collective and Atlantic Media, Inc.
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
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No. 20-1886 Caption: Blankenship v. Blakeman

Pursuant to FRAP 26.1 and Local Rule 26.1,

Daily Beast Company LLC
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

The Daily Beast Company LLC is a wholly-owned indirect subsidiary of IAC/InterActiveCorp, a publicly traded company.
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
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If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Jennifer A. Nelson

Date: 10/13/2020

Counsel for: Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-1886 Caption: Blankenship v. Blakeman

Pursuant to FRAP 26.1 and Local Rule 26.1,

The E.W. Scripps Company
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
Lenfest Institute for Journalism, LLC.
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
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If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Fox Television Stations, LLC
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

Fox Television Stations, LLC is an indirect subsidiary of Fox Corporation, a publicly held company.
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Gannett Co., Inc.

(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
BlackRock, Inc. and the Vanguard Group, Inc. each own ten percent or more of the stock of Gannett Co., Inc.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
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If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

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No. 20-1886Caption: Blankenship v. Blakeman

Pursuant to FRAP 26.1 and Local Rule 26.1,

The New York Times Company

(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
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If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

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Counsel for: Amici Curiae

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Pursuant to FRAP 26.1 and Local Rule 26.1,

POLITICO LLC

(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
Capitol News Company
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
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Pursuant to FRAP 26.1 and Local Rule 26.1,

The Tully Center for Free Speech
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
The Tully Center for Free Speech is a subsidiary of Syracuse University.
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
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Counsel for: Amici Curiae

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (“Reporters Committee”), The Associated Press, The Atlantic Monthly Group LLC, The Center for Investigative Reporting (d/b/a Reveal), The Daily Beast Company LLC, The E.W. Scripps Company, Fox Television Stations, LLC, Gannett Co., Inc., The McClatchy Company, LLC, The Media Institute, Mother Jones, MPA - The Association of Magazine Media, National Press Photographers Association, The New York Times Company, The News Leaders Association, News Media Alliance, The Philadelphia Inquirer, POLITICO LLC, Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, TIME USA, LLC, Tully Center for Free Speech, Virginia Press Association, and Vox Media, LLC (collectively, “amici”). Descriptions of each of the amici are included below as Addendum A.

Amici are members of the news media and organizations that advocate on behalf of the First Amendment rights of the press and the public. Because journalists and news organizations are frequent targets of strategic lawsuits against public participation (“SLAPPs”), amici have a strong interest in ensuring that statutory anti-SLAPP provisions provide robust protection from baseless litigation that chills and suppresses speech. Strong anti-SLAPP laws allow journalists to

report on matters of public concern without fear of being subjected to the expense and disruption of meritless litigation.

Amici write to detail the burdens borne by media defendants when forced to defend against specious SLAPPs and to explain the silencing effect these lawsuits impose on all speakers. Amici agree with Defendant-Appellant Bradley Blakeman (“Blakeman”) that the Court should hold that Virginia’s anti-SLAPP law provides immunity from suit, and amici explain how the history and purpose of the law support this holding.

SOURCE OF AUTHORITY TO FILE

Counsel for Appellant and Appellee have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Amici state that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than amici, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Strategic lawsuits against public participation, or “SLAPPs,” are meritless legal claims that chill the exercise of First Amendment rights. SLAPP plaintiffs file suit to punish and deter speech “by increasing the cost of litigation to the point that the citizen party’s case will be weakened or abandoned[.]” *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970 (9th Cir. 1999). First Amendment jurisprudence has long recognized that the threat of a lawsuit—even an ultimately unsuccessful one—leads to self-censorship that ultimately diminishes the marketplace of ideas. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). Indeed, while SLAPPs lack merit, the threat of expensive, protracted litigation, alone, can discourage active participation in public discussion and debate, a bedrock of American democracy.

Thirty states and the District of Columbia have adopted what are known as “anti-SLAPP” laws, which aim to protect SLAPP defendants from these meritless lawsuits by permitting their swift dismissal at the earliest stages of a lawsuit—before a defendant is dragged through onerous, expensive discovery and trial. *See* Reporters Comm. for Freedom of the Press, *Understanding Anti-SLAPP Laws*, <https://www.rcfp.org/resources/anti-slapp-laws>. In addition to providing a mechanism for early dismissal, many of these laws permit or require an award of attorney’s fees to the successful defendant, simultaneously shielding the defendant

from the financial costs incurred and discouraging future plaintiffs from filing SLAPPs.

Amici agree with Blakeman that Virginia's anti-SLAPP statute, Va. Code § 8.01–223.2 (“Section 8.01–223.2”) grants SLAPP defendants immunity from suit altogether, and not merely immunity from liability, as Plaintiff-Appellee Don Blankenship argued below. Section 8.01–223.2 is similar to the prototypical anti-SLAPP law. However, rather than provide a procedural mechanism for dismissal, Section 8.01–223.2 grants SLAPP defendants immunity. Va. Code § 8.01–223.2(A). The statute's provision of immunity from suit ensures that the denial of a defendant's plea in bar (in state court) or motion to dismiss (in federal court) brought under the statute is immediately appealable, an important mechanism for limiting the burden and cost imposed by SLAPPs. In accordance with the text, legislative history, and underlying legislative purpose of Section 8.01–223.2—to protect the exercise of First Amendment rights—the statute is properly interpreted as providing immunity from suit.

For these reasons, amici urge this Court to hold that Section 8.01–223.2 provides for immunity from suit and, therefore that the district court's denial of

Blakeman's motion to dismiss pursuant to Section 8.01–223.2 is appealable under the collateral order doctrine.¹

ARGUMENT

I. Powerful plaintiffs use SLAPPs to punish and chill protected First Amendment speech, and anti-SLAPP laws provide a meaningful remedy to these meritless suits.

SLAPPs are baseless tort claims arising from a defendant's First Amendment-protected speech on a matter of public concern. *See* George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988). By using litigation as a punitive tool, a SLAPP plaintiff not only seeks to punish those who have spoken, but also chills future speech.

Like plaintiffs in other frivolous lawsuits, SLAPP plaintiffs may know from the outset that their claims are dubious at best (or entirely without merit), but proceed with suit nonetheless with the intent of garnering leverage over the defendant, influence in the community, or political power. *See* Robert G. Bone, *Modeling Frivolous Suits*, 145 U. Pa. L. Rev. 519, 534 (1997) (“[P]laintiffs file meritless suits just to impose litigation or reputation costs on opponents, hoping to secure some political or business advantage.”). From a practical standpoint,

¹ Amici write only to address the appealability of the district court's order under the collateral order doctrine. Amici do not address the district court's error in denying Blakeman's motion to dismiss under Section 8.01–223.2, which is fully addressed in Blakeman's opening brief. *See* Appellant's Br. 35–54.

SLAPPs are effective primarily because the defendant must expend time and money disposing of the litigation, whether by defending against the claims in court or pursuing a settlement with the plaintiff. *See Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740–41 (1983) (“A lawsuit no doubt may be used . . . as a powerful instrument of coercion or retaliation . . . regardless of how unmeritorious the [plaintiff’s] suit is, the [defendant] will most likely have to retain counsel and incur substantial legal expenses to defend against it.”).

Beyond the significant time and financial burdens SLAPPs impose, these suits also have a deleterious effect on the dissemination of information to the public. Since the Supreme Court’s landmark decision in *Sullivan*, First Amendment jurisprudence has recognized that the threat of a lawsuit—even an ultimately unsuccessful one—leads to self-censorship and diminishes the marketplace of ideas. 376 U.S. at 279. Journalists and members of the public who might otherwise exercise their right to report on or participate in public affairs may no longer do so for fear of being sued by a powerful plaintiff. *See* Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 Ohio St. L.J. 845, 846–47 (2010) (“The threat of such litigation—which is generally without merit—has a chilling effect on public participation and speech . . .”). This deprives the public of access to newsworthy information, a collective harm to society.

SLAPPs often target political speech—the very speech said to “l[ie] at the core of the First Amendment.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982) (internal citations omitted); *see also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (“[T]he [First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office.”). Thus, some commentators have described SLAPPs as attempts to “use civil tort action to stifle political expression.” *Pring & Canan, supra*, at 506–07. Many SLAPPs—including this very lawsuit—are filed in direct response to political commentary; other SLAPPs are filed against news outlets or journalists who report on politics. *See, e.g., Arpaio v. Zucker*, 414 F. Supp. 3d 84, 87–88 (D.D.C. 2019) (dismissing defamation claims brought by political candidate against three news outlets based on outlets’ reporting on candidate’s criminal history). The chilling effect of SLAPPs threatens the media’s ability to engage in the “vigorous reportage” of political matters necessary for the “optimal functioning of [our] democratic institutions.” *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 687 (1989).

SLAPPs are often brought by the wealthy or influential against the less well-resourced or powerful. In one quintessential example of a SLAPP, in 2012 the coal magnate Bob Murray and his company, Murray Energy, filed suit against the *Charleston Gazette* and its environment reporter Ken Ward, Jr. in West Virginia—

a jurisdiction that does not have an anti-SLAPP law. Erica Peterson, *Murray Energy Sues WV Newspaper, Reporter for Libel*, 89.3 WFPL (Aug. 30, 2012), <https://perma.cc/476V-L59A> (“*Murray Energy Sues*”). The *Gazette* had published a blog post critical of Murray’s connections to then-presidential candidate Mitt Romney and recent criminal plea agreements Murray Energy subsidiaries had reached with the government. See Ken Ward, Jr., *Mitt Romney, Murray Energy, and Coal Criminals*, Coal Tattoo (July 18, 2012), <https://perma.cc/W7QL-3YD3>. Murray claimed the blog post defamed him and sought more than \$150,000 in damages from the *Gazette*. *Murray Energy Sues, supra*. Faced with a costly lawsuit, the newspaper was forced to retain counsel and ultimately settled the case, the terms of which included the publication of an employee op-ed praising Murray. See Erica Peterson, *Coal Company, West Virginia Newspaper Reach Settlement In Libel Suit*, 89.3 WFPL (Oct. 29, 2012), <https://perma.cc/GGP3-YJ8E>. In another example, a small Ohio newspaper facing a SLAPP suit brought by Murray “scrub[bed] all mention of Murray” from its website. *Murray v. Chagrin Valley Publ. Co.*, 25 N.E.3d 1111, 1124 (Ohio Ct. App. 2014).

To combat the sinister silencing effects of SLAPPs and to protect the public’s First Amendment speech rights, thirty states and the District of Columbia, including the Commonwealth of Virginia, have adopted anti-SLAPP laws. See Reporters Comm. for Freedom of the Press, *supra*. Anti-SLAPP laws typically

provide mechanisms to lower the costs and other burdens of defending against meritless lawsuits targeting protected speech in connection with a public issue. Many of these state laws permit defendants to seek early dismissal of SLAPPs and permit or require trial courts to order the plaintiff to pay a prevailing defendant's attorney's fees. *Id.* And many of these state laws provide SLAPP defendants with a right to an interlocutory appeal should their anti-SLAPP motion be denied by the trial court. *Id.* In these ways, an anti-SLAPP statute “minimizes the chilling effect of these lawsuits,” which is inextricably tied to the cost and duration of the suit, and serves as an effective “means to weed out meritless suits.” *ABLV Bank v. Ctr. for Advanced Def. Studies Inc.*, Civ. Action No. 1:14-cv-1118, 2015 WL 12517012, at *2 (E.D. Va. Apr. 21, 2015).

Robust anti-SLAPP statutes are essential for news organizations and journalists, who regularly engage in speech on matters of public interest and concern. Strong anti-SLAPP laws allow news organizations to do so without fear of being subjected to the expense and disruption of meritless, retaliatory litigation, and media defendants frequently look to anti-SLAPP statutes to obtain the swift dismissal of baseless lawsuits. The protections that anti-SLAPP laws provide to the news media, in turn, benefit the public, which otherwise might be deprived of reporting on important issues. *See Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered

interchange of ideas for the bringing about of political and social changes desired by the people.”).

II. The history and purpose of Section 8.01–223.2 demonstrate that it provides immunity from suit.

The history of Section 8.01–223.2 demonstrates that the Virginia General Assembly intended to provide SLAPP defendants with a means to avoid the burden and expense of protracted litigation targeting First Amendment-protected speech. The ability to immediately appeal the denial of a defendant’s plea in bar brought in state court, or motion to dismiss brought in federal court, under Section 8.01–223.2, is important to the statute’s efficacy in limiting the burden and cost imposed by SLAPPs. And only if Section 8.01–223.2 provides immunity from suit is such immediate appeal permitted. *See* Appellant’s Br. 20-21; *see also Mitchell v. Forsyth*, 472 U.S. 511, 525–26 (1985) (holding “issues of absolute immunity to be appealable under the collateral order doctrine”); Va. Code Ann. § 8.01–670.1(B) (2020 Supp.). Interpreting Section 8.01–223.2 as providing immunity from suit, and thereby allowing for such immediate appeal, is not only consistent with the statute’s text but also ensures that it serves the purpose the General Assembly intended.

Since the General Assembly enacted Section 8.01–223.2 in 2007, it has amended the statute several times to strengthen and broaden its protections. The General Assembly strengthened Section 8.01–223.2 in 2016, by amending the law

to permit trial courts to award “reasonable attorney fees and costs” to successful defendants.² 2016 Va. Acts ch. 239. In addition, the General Assembly has expanded the type of speech to which Section 8.01–223.2 applies. As originally enacted, Section 8.01–223.2 provided narrow protection only for statements made “at a public hearing before the governing body of any locality or other political subdivision, or the boards, commissions, agencies and authorities thereof, and other governing bodies of any local governmental entity concerning matters properly before such body.” 2007 Va. Acts ch. 798. In 2017, the General Assembly amended Section 8.01–223.2 to protect speech both “regarding matters of public concern that would be protected under the First Amendment to the United States Constitution made by that person that are communicated to a third party” and speech made to a governing body concerning matters properly before such body. *See* 2017 Va. Acts chs. 586, 597; *see also* Va. Code Ann. § 8.01–223.2. Further, the 2017 amendment to Section 8.01–223.2 specifically added “defamation to the causes of action from which a citizen shall be immune when making statements[.]” Virginia Bill Summary, 2017 S.B. 1413.

The 2017 amendment to Section 8.01–223.2 was not made in a vacuum. Senator Glen Sturtevant (R-Richmond) introduced the legislation after learning

² The General Assembly amended Section 8.01–223.2 again earlier this year, modifying subsection B to allow the recovery of attorney’s fees when “a witness subpoena or subpoena duces tecum [is] quashed.” 2020 Va. Acts ch. 824.

about four Richmond parents who struggled to defend themselves against a \$3.5 million defamation suit filed against them by a school principal. *See* Graham Moomaw, *Ex-principal's lawsuit against Richmond parents rejected a third time*, Richmond Times-Dispatch (June 12, 2015), <https://perma.cc/QL8M-V7MV>. The principal sued the parents after they wrote a letter to the acting superintendent expressing their concerns about the administration of their local middle school. *Id.* Though the suit was ultimately unsuccessful, *see id.*, the principal appealed her case to the Virginia Supreme Court twice, dragging the case out for 486 days and subjecting the parents to significant stress and legal fees. *See* Melissa Hipolit, *Bill to protect residents from defamation lawsuits passes in the Senate*, WTVR News (Feb. 10, 2017), <https://perma.cc/73LP-X7R4>.

As he noted in press interviews during consideration of the 2017 amendment, the prolonged litigation “struck [Senator Sturtevant] as a huge problem” because the parents were forced “to go into their own pockets and spend a significant amount of money to hire lawyers to defend them against this lawsuit simply because they were speaking out on issues they really cared about.” *Id.* (noting that the bill proposed by Senator Sturtevant and ultimately enacted into law “give[s] citizens immunity from a defamation lawsuit when discussing matters of public concern”). As such, when introducing the amendment, Senator Sturtevant expressly noted that it was intended to expand Section 8.01–223.2 “to protect the

public from similar types of strategic lawsuits that are meant to stifle discussion of matters of public concern but that are not necessarily made at a school board meeting or a city council meeting.” Feb. 7, 2017 Regular Session, Sen. of Va. (statement of Sen. Glen Sturtevant), *available at* <https://www.richmondsunlight.com/minutes/senate/2017/02/07/>.

This history shows that the General Assembly has repeatedly amended Section 8.01–223.2 with the intent to effectively shield defendants from the expense and burden of meritless, harassing litigation based on the exercise of their First Amendment rights. Interpreting Section 8.01–223.2 to provide immunity from suit, and not merely a defense to liability, is both consistent with the language of the statute and promotes its purpose.

Amici agree with Blakeman that the text of Section 8.01–223.2 specifically contemplates immunity from suit and the dismissal of SLAPPs before trial. Appellant’s Br. 23–25 (citing, *inter alia*, the title of the 2017 amendment as providing “immunity of persons” for “defamation” and the shifting of attorney’s fees for “[a]ny person who has a suit against him dismissed” pursuant to the law). This interpretation is entirely in line with the policy purposes underlying the 2017 amendment—to permit individuals like the four Richmond parents, sued for \$3.5 million after publicly advocating for changes to their city’s middle school, to avoid the burdens of lengthy, expensive litigation.

If immunity was instead construed as a defense to liability, a SLAPP defendant would be left without the opportunity to immediately appeal a denial of a plea in bar filed in state court, or a motion to dismiss filed in federal court, pursuant to Section 8.01–223.2. *See* Va. Code Ann. § 8.01–670.1(B) (2020 Supp.) (providing for interlocutory appeal of orders denying a plea in bar based on “sovereign, absolute, or qualified immunity”); *United States ex rel. Citynet, LLC v. Gianato*, 962 F.3d 154, 158 (4th Cir. 2020) (explaining that in the context of qualified immunity, “a conclusive order denying a motion to dismiss . . . constitutes an immediately appealable collateral order if it turns on a pure issue of law”). Instead, the defendant would be forced to bear the burdens of discovery and trial. Statutory immunity defangs the prototypical SLAPP suit by allowing for an immediate appeal of the denial of a plea in bar or motion to dismiss, significantly shortening the time a defamation defendant is embroiled in litigation and the expense of that litigation. As at least one Supreme Court Justice has recognized, “requiring a free speech claimant to undergo a trial” is no trivial matter—even “[a] journalist who prevails at trial in a defamation case will still have been required to shoulder all the burdens of difficult litigation” *Nat’l Review, Inc. v. Mann*, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of cert.). Section 8.01–223.2 lightens these burdens by immunizing journalists and members of the public from SLAPPs, ensuring a quicker release from the travails of litigation.

Finally, interpreting Section 8.01–223.2 as providing only immunity from liability, rather than immunity from suit, would render portions of Section 8.01–223.2(A) a nullity, given that the statute provides immunity from defamation claims based on statements “protected by the First Amendment.” In other words, if not read as an immunity from suit provision, Section 8.01–223.2(A) offers no protection to defamation defendants in the Commonwealth beyond what the First Amendment already provides, an outcome that violates basic principles of statutory interpretation. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (stating that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant”).

Though the First Amendment grants some of the strongest protections for speech rights in the world, it does not provide the built-in mechanisms necessary to protect a speaker from the threat of frivolous litigation. If individuals must weigh the right to speak publicly against the risk of expensive and protracted litigation, they may choose not to speak. Section § 8.01–223.2 mitigates this risk by providing real-world protections to speakers, including journalists and news organizations. But it can be effective only if the Court properly interprets Section 8.01–223.2 as providing immunity from suit, rather than immunity from liability.

CONCLUSION

For all of these reasons, amici respectfully request this Court to hold that Section 8.01–223.2 provides for immunity from suit and that the district court’s denial of Blakeman’s motion to dismiss pursuant to Section 8.01–223.2 is appealable under the collateral order doctrine.

Dated: October 13, 2020

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³ Counsel wish to thank law students Blake Page and Sumner Fortenberry, class of 2021, for their invaluable contributions to this brief. The brief does not express the institutional views of the University of Virginia School of Law.

ADDENDUM A
Descriptions of Amici

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The Atlantic Monthly Group LLC is the publisher of *The Atlantic* and TheAtlantic.com. Founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others, *The Atlantic* continues its 160-year tradition of publishing award-winning journalism that challenges

assumptions and pursues truth, covering national and international affairs, politics and public policy, business, culture, technology and related areas.

The Center for Investigative Reporting (d/b/a Reveal), founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

The Daily Beast delivers award-winning original reporting and sharp opinion from big personalities in the arenas of politics, pop-culture, world news and more.

The E.W. Scripps Company serves audiences and businesses through local television, with 60 television stations in 42 markets. Scripps also owns Newsy, the next-generation national news network; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

Directly and through affiliated companies, **Fox Television Stations, LLC**, owns and operates 28 local television stations throughout the United States. The 28 stations have a collective market reach of 37 percent of U.S. households. Each of

the 28 stations also operates Internet websites offering news and information for its local market.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states and Guam — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

The McClatchy Company, LLC is a publisher of iconic brands such as the *Miami Herald*, *The Kansas City Star*, *The Sacramento Bee*, *The Charlotte Observer*, *The (Raleigh) News & Observer*, and the *Fort Worth Star-Telegram*. McClatchy operates media companies in 30 U.S. markets in 16 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, California.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

Mother Jones is a nonprofit, reader-supported news organization known for ground-breaking investigative and in-depth journalism on issues of national and global significance.

MPA – The Association of Magazine Media, (“MPA”) is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA’s membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The News Media Alliance is a nonprofit organization representing the interests of digital, mobile and print news publishers in the United States and Canada. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

The Philadelphia Inquirer, owned by the Lenfest Institute for Journalism, is the largest newspaper in the United States operated as a public-benefit corporation. It publishes *The Inquirer* as well as the *Philadelphia Daily News* in print, and online at www.inquirer.com. *The Inquirer* has won 20 Pulitzer Prizes. Under the non-profit ownership of the Institute, which is dedicated solely to the

mission of preserving local journalism, the Inquirer is dedicated to public service journalism and news innovation.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to nearly 300 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day and attracts an influential global audience of more than 35 million monthly unique visitors across its various platforms.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta

Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

TIME is a global multimedia brand that reaches a combined audience of more than 100 million around the world. TIME's major franchises include the TIME 100 Most Influential People, Person of the Year, Firsts, Best Inventions, Genius Companies, World's Greatest Places and more. With 45 million digital visitors each month and 40 million social media followers, TIME is one of the most trusted and recognized sources of news and information in the world.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

The mission of the **Virginia Press Association** is to support our membership through responsive services and resources. We champion the common interests of Virginia newspapers and the ideals of a free press in a democratic society. Since 1881, the Virginia Press Association has been an unwavering advocate for newspapers in the Commonwealth.

Vox Media, LLC owns New York Magazine and several web sites, including Vox, The Verge, The Cut, Vulture, SB Nation, and Eater, with 170 million unique monthly visitors.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief of amici curiae complies with:

- 1) the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3,419 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and
- 2) the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

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Dated: October 13, 2020
 Washington, DC

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

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Retained Court-appointed(CJA) CJA associate Court-assigned(non-CJA) Federal Defender

Pro Bono Government

COUNSEL FOR: Reporters Committee for Freedom of the Press and TK Media Organizations

_____ as the
 (party name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s) movant(s)

/s/ Jennifer A. Nelson

(signature)

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CERTIFICATE OF SERVICE (required for parties served outside CM/ECF): I certify that this document was served on 10/13/20 by personal delivery; mail; third-party commercial carrier; or email (with written consent) on the following persons at the addresses or email addresses shown:

/s/ Jennifer A. Nelson

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10/13/20

Date