SUPREME COURT NO. 20-0563
WOODBURY COUNTY CASE NO. EQCV185464

IN THE SUPREME COURT OF IOWA

Richard Bauer,
Individually and as Trustee for the Kendall R. Bauer Trust,

Plaintiff-Appellant,

v.

Bradley R. Brinkman,

Defendant-Appellee.

APPEAL FROM THE WOODBURY COUNTY DISTRICT COURT
HONORABLE JEFFREY A. NEARY, DISTRICT COURT JUDGE

UPON FURTHER REVIEW FROM THE IOWA COURT OF APPEALS DECISION FILED NOVEMBER 30, 2020

FINAL BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF IOWA

IN SUPPORT OF DEFENDANT- APPELLEE

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STATEMENT REQUIRED BY IOWA R. APP. P. 6.906(4)(d)

Neither party nor their counsel participated in the drafting of this brief, in whole or in part. Neither party nor their counsel contributed any money to the undersigned for the preparation or submission of this brief. The drafting of this brief was performed *pro bono publico* by amicus curiae.

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Iowa ("ACLU of Iowa") is a statewide nonprofit and nonpartisan organization with thousands of Iowa members that is dedicated to the principles of liberty and equality embodied in the United States and Iowa Constitutions. Founded in 1935, the ACLU of Iowa is the fifth oldest state ACLU affiliate. The ACLU of Iowa works in the courts, legislature, and through public education and advocacy to safeguard the rights of everyone in our state.

As part of its mission, the ACLU works to preserve the First Amendment freedom of expression—including the protection of the right to engage in unpopular, rude, or offensive speech. The ACLU of Iowa has a longstanding interest in the protection of the First

Amendment and Iowa Constitutional freedom of speech. Additionally, the ACLU of Iowa takes an interest in this case because of its potential to impact the resolution of a growing trend of "strategic lawsuits against public participation" (SLAPPs). SLAPPs have severe consequences for civil society, infringing civil liberties, including the freedom of speech. The resolution of this case is therefore a matter of substantial interest to the ACLU of Iowa.

ARGUMENT

This Court should affirm the decision by the Iowa Court of Appeals because the First Amendment protects Brinkman's speech calling Bauer a "Piece of Sh*t" and "nothing more than a Slum Lord!" on his friend's Facebook page. (Ct. of Appeals Opinion at 3). The Court of Appeals was correct as a matter of law that Brinkman's speech was protected as an expression of opinion—even though the speech was impolite and no doubt insulting and offensive to Bauer.

However, *amicus* submits this brief in particular to highlight the impact of this case "on the ground". To allow the litigation

against Brinkman to proceed to the jury based on these figurative epithets would chill free speech and debate on matters of public concern on social media in Iowa. The Court's opinion, in this case, is especially important given both the growing number of SLAPP cases in our state and the lack of an anti-SLAPP statute in Iowa.

I. Brinkman's Speech Is Protected Under The First Amendment As Opinion.

The district court and Court of Appeals rightly rejected Bauer's argument that Brinkman's statement was defamatory based on Brinkman's deposition testimony that "[i]n Bauer's defense, he is not a slumlord" and that Bauer "ran a respectable apartment complex." Application for Further Review at 13.

Under the First Amendment, false speech is generally protected, *see U.S. v. Alvarez*, 567 U.S. 709, 722 (2012)—and while defamation is an exception to First Amendment protection, not all false speech is defamatory. While false statements of fact *may* be defamatory, false statements of opinion are not. The First Amendment protects "rhetorical hyperbole", "vigorous epithet", and "a lusty and imaginative expression of contempt" as a matter of law. *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398

U.S. 6, 13 (1970) (characterizing a developer's aggressive negotiating style as employing "blackmail" was not libelous); *Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974) (calling someone a "traitor" in loose, figurative way could not be construed as representation of fact); *Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293, 295 (1943) (hurling insults like "unfair" or "fascist" was protected). The Court does not entertain the question of whether a statement was knowingly false until it has first determined that the statement was one of fact and not such a loose, figurative statement of opinion—"even [one expressed] in the most pejorative terms". *Letter Carriers*, 418 U.S. at 284.

Here, because the epithets "Piece of Sh*t" and "Slum Lord" were self-evidently written in the tradition of loose and imaginative expressions of contempt, protected under the First Amendment no matter how pejorative, it would be inappropriate to reach the issue of knowing falsity. For this reason, the decisions of the Court of Appeals and district court should be affirmed.

II. Reversing The Court Of Appeals Would Chill Free Speech In Iowa.

This case will have important implications for free speech and debate on matters of public concern—in particular on social media. Allowing Brinkman's Facebook post calling Bauer a "Piece of Sh*t" and "nothing more than a Slum Lord!" to be the basis of a defamation trial would have a chilling effect on free speech and debate in Iowa.

Free speech is a cornerstone of our democracy, and freedom of expression regarding public questions is secured by the First Amendment. *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 431 (1963); *Roth v. United States*, 354 U.S. 476, 484 (1957); *Connick v. Myers*, 461 U.S. 138, 146 (1983). The United States Supreme Court has long recognized that "the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964); *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 83–84 (2004) (An expression of "public concern is

something that is a subject of legitimate news interest . . . [or] of general interest and value and concern to the public at the time of publication."). This Court also recognizes the need for "breathing room" around defamation actions to protect the robust and free exchange of political speech. *Bertrand v. Mullin*, 846 N.W.2d 844, 898 (Iowa 2014).

The United States Supreme Court has extended First Amendment protections to the internet in light of the increased use of social media platforms to voice opinions. The Court has clearly established that online speech does not receive a lesser degree of First Amendment protection than other speech. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."). Since then, the Court has further underscored the important role of social media as a public forum for speech, categorizing it as the "modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

While the Court of Appeals rightly cabined its holding to make clear that the fact that a statement is made on social media does

not automatically insulate its speaker from liability for defamation as a categorical matter, it wisely recognized that speech on social media is subject to no *less* protection. (Ct. of Appeals at 9). In this case, the Court of Appeals decision was guided by the context of the speech—being one of "a chain of comments [on Facebook] started between private individuals expressing disgruntlement over Bauer's dispute with the city." (Ct. of Appeals at 8). The social media context, while not immunizing as a categorial rule, provided important context to the Court's determination that the statement was one of "an exchange of opinions about the topic at hand." (*Id.*).

The risk of chilling such free exchange of opinions on social media is heightened in this case, given that one of the epithets Brinkman hurled was that Bauer was "nothing more than a Slum Lord." Advocacy for better housing and criticism of landlords is a matter of public concern. This is especially true given the very real threat of retaliation against tenants for complaining about, or organizing against, landlords.[1] In particular, this Court should

[1] In *New Line Realty Corp.*, a New York trial court sent a clear message to New York landlords that tenant organizing cannot be stopped by frivolous defamation claims. *New Line Realty V Corp. v.*

remain cognizant about the growing risk of frivolous SLAPP litigation to quell such criticism.[2]

United Committees of University Heights, No. 1021/2004, 7/12/2006 N.Y.L.J. 27, col. 3 (Bronx Cnty. Sup. Ct. 2006), *available at* https://www.clearinghouse.net/chDocs/public/FH-NY-0011-0001.pdf. This was the first case in which an anti-SLAPP counter suit was used successfully in a case between a landlord and tenants. While the tenant advocates were ultimately successful, as the legal maneuverings continued, tenants suffered from ongoing negligence to property conditions—and it was years before attorney's fees or compensatory damages were assessed. Betsy Morals, *Anti-SLAPP Ruling Cheers Tenant Advocates,* City Limits (Aug, 18, 2008) https://citylimits.org/2008/08/18/anti-slapp-ruling-cheers-tenant-advocates/; Elizabeth Dwoskin, *Tenant Activists Slap Landlord, Win Big Bucks,* The Village Voice (Apr. 12, 2010) https://www.villagevoice.com/2010/04/12/tenant-activists-slap-landlord-win-big-bucks/.

[2] As a federal judge in Illinois observed, "The court perceives … with a great deal of alarm … a growing trend of what have come to be known as SLAPP suits." *Westfield Partners, Ltd. v. Hogan*, 740 F.Supp. 523, 524-25 (N.D. Ill. 1990). While the United States Supreme Court has not considered the phenomenon of SLAPP litigation expressly, it has more generally recognized that the expense involved in defending meritless defamation suits is likely to have a chilling effect on First Amendment rights: "Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to steer wider of the unlawful zone and thus create the danger that the legitimate utterance will be penalized." *Time, Inc. v. Hill,* 385 U.S. 374, 389 (1967) (cleaned up).

III. Strategic Lawsuits Against Public Participation Chill Free Speech.

Strategic lawsuits against public participation ("SLAPPs") are generally civil complaints filed by wealthy, powerful interests against individuals or community organizations that have spoken out against them, and often rise from debates on public issues. *See* George W. Pring and Penelope Canan, *SLAPPS: Getting Sued for Speaking Out*, Temple University Press (1996); *see also* George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 945-46 (Summer 1992). A defining feature of SLAPPs is that "winning is not a SLAPP plaintiff's primary motivation." *Blumenthal v. Drudge*, Civ. No. 97-1968, 2001 WL 587860, at *3 (D.D.C. Feb. 13, 2001); *see also* Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 Ohio St. L.J. 845, 846-847 (2010) [hereinafter, Barylak, *Anti-SLAPP Protection*]. Instead, the intent is to silence and harass critics by forcing them to spend time and money to defend these meritless suits. *Id.*

SLAPPs can take on different forms, and present themselves under a variety of legal theories, such as defamation, invasion of privacy, business torts, abuse of process, and conspiracy. Jennifer E. Sills, *SLAPPs (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate Their Appeal?*, 25 Conn. L. Rev. 547, 549 (1993). The classic example of a SLAPP is a land developer suing area residents who are protesting a new development. Victor J. Cosentino, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 Cal. W. L. Rev. 399, 402 (1991) [hereinafter Cosentino, *SLAPP*]. Other frequent SLAPP filers are property owners, police officers, alleged polluters, public utilities, and state or local governments, and they represent the full political spectrum. George W. Pring and Penelope Canan, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches,* 22 Law & Soc'y Rev. 385, 389 (1988).

SLAPP suits create a chilling effect on public participation and make speech on matters of public interest increasingly burdensome. Even if a judge ultimately dismisses the claims, the

SLAPP forces the defendant to take on the high costs associated with defending vexatious litigation. Barylak, *Anti-SLAPP Protection,* at 846-847. The chilling effect that follows can "ripple through a community." Cosentino, *SLAPP*, at 408.

As a response to the increasing trend of SLAPP litigation[3], in recent years many states have adopted anti-SLAPP laws of some

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[3] The use of SLAPPs to silence public participation is already a reality in Iowa. A few cases have been high profile. For example, in 2018, the Carroll Times Herald, a small-town newspaper, won a libel lawsuit filed by a former Carroll police officer following its accurate reporting about the officer's sexual relationships with teenagers and a prior termination as a police officer for inappropriate online messages sent to a teenage girl. *Smith v. Strong,* 2018 WL 2418929, Case No. CVCV039797 (Iowa Dist. Ct. for Carroll Cnty. May 21, 2018). The court recognized the suit for what it was and dismissed the case on summary judgment: "[T]his case involves First Amendment rights and freedoms, and the courts are instruction 'to determine whether allowing a case to go to a jury would, in the totality of the circumstances, endanger [F]irst [A]mendment freedoms." *Id.* (citing *Jones v. Palmer Commc'ns, Inc.*, 440 N.W.2d 884, 889 (Iowa 1989), overruled on other grounds by *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 224 (Iowa 1998) (cleaned up)).

Despite the legal victory, the lawsuit cost the newspaper approximately $140,000 in legal expenses and lost revenue. Thomas Friestad, *Iowa newspaper in financial peril turns to social media to raise $140,000*, The Gazette (Oct. 11, 2019) https://www.thegazette.com/subject/news/carroll-times-iowa-libel-lawsuit-fundraiser-20191011. The paper was forced to create a GoFundMe page to recoup losses from the reporting. *Id.*

form or another to address the abuse of judicial system and encroachment on First Amendment rights. Austin Vining and Sarah Matthews, *Introduction to Anti-SLAPP laws*, Reporters Committee for Freedom of Press, https://www.rcfp.org/introduction-anti-slapp-guide/ (last visited February 9, 2021). These statutes generally provide a legal mechanism for early dismissal of a SLAPP, such as a special motion to dismiss, as well as recovery of attorney's fees and court costs. *Id.*

As of January 2021, thirty states have laws that create a framework for courts to analyze anti-SLAPP claims and to dismiss those cases targeting constitutionally protected activity.[4] *Id.;* Colin Quinlan, *Erie and the First Amendment: State Anti-SLAPP*

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[4] Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, and Virginia. Austin Vining and Sarah Matthews, *Introduction to Anti-SLAPP Laws*, Reporters Committee for Freedom of Press, https://www.rcfp.org/introduction-anti-slapp-guide/ (last visited February 9, 2021).

Laws in Federal Court After Shady Grove, 114 Colum. L. Rev. 367 (2014); The Public Participation Project, "Your State's Free Speech Protections," http://www.anti-slapp.org/?q=node/12 (summarizing and providing links to anti-SLAPP statutes in 30 states and Guam) (last visited February 9, 2021). The Iowa legislature is currently considering anti-SLAPP legislation.[5]

IV. In The Absence of Anti-SLAPP Protections, Dismissal or Summary Judgment is Appropriate.

Because Iowa does not yet have an anti-SLAPP law, Iowa victims of SLAPPs have no recourse but to fight their cases following the regular course in court: The defendant can file a motion to dismiss, and if that fails, the defendant can file a motion for summary judgment, and if *that* fails, the defendant must

[5] Anti-SLAPP legislation is currently proceeding in the Iowa House, Uniform Public Expression Protection Act, H.F. 456, 89th Gen. Assembly, 2021 Sess. (Iowa 2021) https://www.legis.iowa.gov/docs/publications/LGI/89/HF456.pdf. This bill provides that a civil defendant may file a special motion for expedited relief to dismiss a cause of action related to exercise of the right of freedom of speech on a matter of public concern within sixty days of service of the petition. *Id.* It would also entitle prevailing defendants to attorney's fees and costs. *Id.*

prepare for trial or negotiate a settlement, all the meanwhile incurring considerable costs and expenses.

Some courts in other states without anti-SLAPP laws have noted that the absence of anti-SLAPP measures has made it difficult to address the rise in SLAPPs. *See, e.g., TES Franchising, LLC v. Feldman*, 943 A.2d 406, 413 n.10 (Conn. 2008); *but cf. Zeller v. Consolini*, 1999 WL 99192, *5-8 (Superior Ct. Conn. 1999) (granting summary judgment by applying an analysis taken from Rhode Island decisions applying that state's anti-SLAPP law because Connecticut lacked such a statute); *see also Lassa v. Rongstad*, 718 N.W.2d 673, 710 (Wis. 2006) (Prosser, J., dissenting) (Supreme Court justice in Wisconsin, discussing the challenge of disposing of SLAPPs, recommended that "[t]he legislature ... consider the experience of other states that have enacted anti-SLAPP statutes and consider adopting [such] legislation … [because] … [t]he potential for the strategic abuse of legal process is real.").

In Iowa, because of the importance of the First Amendment rights invoked, summary judgment is afforded a unique role

in defamation cases, and "a more stringent test applies to avoid summary judgment." *Stevens v. Iowa Newspapers, Inc.,* 711 N.W.2d 732 (Iowa Ct. App. 2006), *aff'd,* 728 N.W.2d 823 (Iowa 2007); *see also Carr v. Banker's Trust Co.,* 546 N.W.2d 901, 905 (Iowa 1996) (in public figure or public concern defamation cases, at least, applying "clear and convincing" evidence standard to summary judgment motions); *see also Jones v. Palmer Commc'ns, Inc.*, 440 N.W.2d at 889, overruled on other grounds by *Schlegel v. Ottumwa Courier*, 585 N.W.2d at 224.

Iowa courts are not alone in this regard. Barring the possibility of an early dismissal through the application of anti-SLAPP laws, numerous federal and state courts have found that "because of this potential chilling effect, summary judgment is especially appropriate." *Anderson v. Cramlet*, 789 F.2d 840, 842 n.2 (10th Cir. 1986) (citing *Southard v. Forbes,* 588 F.2d 140, 146 (5th Cir.1979); *see also Schuster v. U.S. News and World Report, Inc.,* 602 F.2d 850, 855 (8th Cir.1979); *Anderson v. Stanco Sports Library, Inc.,* 542 F.2d 638, 641 (4th Cir.1976); *Treutler v. Meredith Corp.,* 455 F.2d 255, 257 n. 1 (8th Cir.1972); *Bon Air Hotel, Inc. v.*

Time, Inc., 426 F.2d 858, 864-65 (5th Cir.1970); *Washington Post Co. v. Keogh,* 365 F.2d 965, 968 (D.C.Cir.1966), *cert. denied,* 385 U.S. 1011 (1967); *Sassone v. Elder*, 626 So. 2d 345, 351 (La. 1993); *Read v. Phoenix Newspapers, Inc.*, 169 Ariz. 353, 357, 819 P.2d 939, 943 (Az. 1991); *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 540, 563 N.W.2d 472, 479 (Wis. 1997).

In a notice pleading state with no anti-SLAPP law yet in place, like Iowa, early dismissal of meritless SLAPP cases is unlikely. As a result, summary judgment is "especially appropriate" to at least dispose of such cases prior to the expense of trial and guard, as much as possible, against the further chilling effect of such actions.

That is the procedural posture of this appeal.

CONCLUSION

This Court should affirm the Court of Appeals and district court because Brinkman's statements were protected expressions of opinion consisting of figurative and loose epithets. This case is important not only in its own right, but because it will impact the

ability of Iowans to use social media to continue to voice their opinions without fear of expensive, meritless litigation.

Respectfully submitted,

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COST CERTIFICATE

I hereby certify that the cost of printing this application was $0.00 and that that amount has been paid in full by the ACLU of Iowa.

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