COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-12082

CARDNO CHEMRISK, LLC,
Plaintiff-Appellee,

v.

CHERRI FOYTLIN and KAREN SAVAGE,
Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

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Dated: June 6, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. STATEMENT OF THE ISSUE

Whether the Superior Court improperly refused to dismiss a SLAPP suit (strategic lawsuit against public participation) against two bloggers who were environmental activists under no professional obligation to objectively report facts, and who were, through the medium of online speech, petitioning the government to impose harsher sanctions against an oil company accused of being complicit in a massive environmental disaster.

II. INTEREST OF AMICUS

Amicus is the American Civil Liberties Union of Massachusetts ("ACLUM"). ACLUM is a non-profit organization that regularly engages in petitioning activities through the use of paid staff who organize, educate, and encourage the public to petition the government. ACLUM defends the freedoms established in the Bill of Rights and the Massachusetts Declaration of Rights. To protect the right to petition under the First Amendment, ACLUM has long been involved in representing individuals who have been sued in so-called "Strategic Lawsuits Against Public Participation" ("SLAPP suits") because of their exercise of that right. One of those cases, *Northern*

Provinces, Inc. v. Feldman, No. 91-2260 (Mass. Sup. 1992), was acknowledged by this Court as having been the "impetus for introduction of the anti-SLAPP legislation," *Duracraft Corp. v. Holmes Products, Corp.*, 427 Mass. 156, 161 (1998). ACLUM was among the organizations that sought the enactment of the Anti-SLAPP Act, codified at G.L. c. 231, § 59H. ACLUM also participated as amicus in *Baker v. Parsons*, 434 Mass. 543 (2001), *Fabre v. Walton*, 436 Mass. 517 (2002), *Benoit v. Frederickson*, 454 Mass. 148 (2009), *Fustolo v. Hollander*, 455 Mass. 861, 867 (2010), and *Town of Hanover v. New England Regional Council of Carpenters*, 467 Mass. 587 (2014), concerning the meaning of Section 59H.

ACLUM has a continuing interest in ensuring that the Anti-SLAPP statute is interpreted to effectively protect the exercise of the right to petition as it was intended. As an advocacy organization, it has a particular interest in ensuring that the protections of the Act are available to its employees, who carry out much of the organization's work to influence the judicial, legislative, and executive branches of government, either directly or through public education and engagement.

III. STATEMENT OF THE CASE

ACLUM adopts the Statement of the Case set forth in the brief of the Defendants-Appellants.

IV. STATEMENT OF FACTS

ACLUM adopts the Statement of the Facts set forth in the brief of the Defendants-Appellants.

V. SUMMARY OF THE ARGUMENT

The Defendants-Appellants here, Cheri Foytlin and Karen Savage, are precisely the sort of "petitioners" that the Massachusetts Anti-SLAPP statute, G.L. c. 231, § 59H, was intended to protect. They are citizens who were deeply concerned with BP's conduct with regard to the Deepwater Horizon oil spill, and believed that BP was citing flawed evidence to defend itself in a pending action brought by the United States Department of Justice. Defendants-Appellants also believed that Cardno Chemrisk, LLC ("Chemrisk"), had supplied BP (and other companies previously accused of environmental contamination) with misleading data. (R31-34).

As a result, the Defendants wrote a Blog in an attempt to exhort the courts to hold BP responsible, and to point out Chemrisk's role in the disaster. Chemrisk has sued the Defendants solely for that

protected petitioning activity (along with subsequent republications of the Blog), bringing this case squarely within the protection of Section 59H. Nonetheless, the Superior Court denied the Defendants-Appellants' special motion to dismiss, holding that under *Fustolo v. Hollander*, 455 Mass. 861 (2010), they were not exercising "their own" right to petition, and therefore Section 59H was inapplicable. This ruling was error.

First, the defendant in *Fustolo* was a professional reporter who explicitly testified that she was presenting nothing more than an objective recitation of certain facts. The Defendants here, by contrast, are environmental activists, not reporters, and as is facially apparent from the Blog, they were zealously advocating on behalf of a specific viewpoint. *Fustolo* is therefore distinguishable on its facts.

Second, the Superior Court improperly expanded *Fustolo*'s scope. *Fustolo* was based primarily upon two cases - *Kobrin v. Gastfriend*, 443 Mass. 327 (2005) and *Fisher v. Lint*, 69 Mass. App. Ct. 360 (2007) - in which Section 59H was found inapplicable to the defendants who were working on behalf of the

government. Other than *Fustolo*, virtually no appellate decision has applied *Kobrin* and *Fisher* to nongovernmental agents, and the only reason this Court did so in *Fustolo* was because the petitioner was under an explicit obligation to remain neutral. The Superior Court, and Chemrisk on appeal, seek to transform *Fustolo* into a general license to probe the motivations of every petitioner who seeks to rely on Section 59H. This Court should reject their attempt to do so.

Finally, the Superior Court, by denying the Defendants-Appellant's motion, created a dangerous precedent that could threaten not just the Defendants, but bloggers everywhere. Blogs, and the internet more generally, represent a revolutionary advance in the exercise of free speech, one that results in speech, expression, and petitioning that is more democratic, more diverse, more interactive, and in many cases more effective than traditional forms of media. But because bloggers lack the resources of larger media entities, SLAPP suits have the potential to be especially burdensome, thereby making the "chilling" effect of such suits all the more worrisome. The Court should therefore affirm that the protections of Section 59H

extend squarely to citizen activist bloggers like the Defendants.

VI. ARGUMENT

A. *Fustolo* Is Distinguishable From The Present Case Because The Defendants-Appellants Were Not Reporters Who Were Objectively Reporting Facts.

This Court should reverse the Superior Court's decision because the Superior Court misapplied *Fustolo*.

The Massachusetts Anti-SLAPP statute's protections extend to "any case in which a party asserts that the civil claims . . . against said party are based on said party's exercise of its right of petition." G.L. c. 231, § 59H. The purpose of the statute is to address the "'disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.'" *Duracraft Corp.*, 427 Mass. at 161 (quoting 1994 House Doc. No. 520).

Petitioning activity is defined under the statute to include "any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding" or "any statement reasonably

likely to enlist public participation in an effort to effect such consideration." *Id.* Here, there can be no dispute that the Defendants-Appellants were engaged in petitioning activity; their Blog is likely to encourage public support for and demands that the courts and other governmental entities hold BP "responsible for the damage done" to residents of Louisiana's coastline. (R33). Indeed, even the Superior Court, in its order denying Defendant Foytlin's motion to dismiss for lack of personal jurisdiction, expressly found that the Blog was intended "to influence ongoing governmental proceedings." (R562).

Nonetheless, the Superior Court, in its order denying the Defendants' motion to dismiss pursuant to Section 59H, determined, in all of two sentences, "that the resolution of [their] motion to dismiss [was] controlled by the decision of the Supreme Judicial Court in *Fustolo . . .*" because the Defendants' conduct, like the author's conduct in *Fustolo*, was not exercising "their own right to petition." (R.558). In doing so, the Court overlooked several key distinctions between the Defendants' Blog and the article in *Fustolo*.

Fustolo involved a community activist who subsequently had been hired to be a paid reporter for a neighborhood newspaper. The publisher instructed her to write and she did write "objective, factual news accounts of neighborhood meetings . . . ." Some of her articles were about development and zoning issues. 455 Mass. at 862. A developer, Fustolo, sued the reporter for allegedly defamatory remarks in several articles she wrote. This Court affirmed the denial of her motion to dismiss under Section 59H because it concluded that she was not exercising "her own" right to petition. *Id.* at 864-71. Key to that holding, however, was the fact that (1) the reporter was acting "in her capacity as a reporter" and (2) the reporter explicitly testified that she was "'always careful to present an objective description of the subject matter, including the positions of both sides where applicable,'" and that while she had personal views on the issues she covered, "'they were not reflected in the articles [she] wrote.'" *Id.* at 864, 867.

Neither of these elements are present here. First, the Defendants-Appellants here did not write in a journalistic capacity; rather, as set forth in their

brief, they were both environmental advocates who had an extensive history of petitioning for tougher sanctions directed against BP. (Defendants-Appellants Brief at 4-8). Moreover, Defendant Foytlin was a resident of Louisiana, the location of much of the damage from the Deepwater Horizon spill. (R47).

Second, the Blog, unlike the articles in *Fustolo*, was not an "objective description of the subject matter." The Superior Court's decision overlooks the wide diversity of different publications on the internet, and, in particular, the unique nature of blogs, which frequently advance a specific viewpoint. "Those who operate blogs more often resemble pundits or opinion-writers than beat reporters." Russo, "Are Bloggers Representatives of the News Media Under the Freedom of Information Act?," 40 COLUM. J.L. & SOC. PROBS. 225, 232 (2006). Indeed, "[t]he dominant mode of blog discourse has been commentary upon the news," id., and various courts have recognized blogs as being "a subspecies of online speech" which focus upon the opinions of the authors as opposed to "provable assertions of fact." *Obsidian Fin. Grp., LLC v. Cox*, 812 F. Supp. 2d 1220, 1223-24 (D. Or. 2011), aff'd, 740 F.3d 1284 (9th Cir. 2014); *see also* Annot., "First

Amendment Protection Afforded to Blogs and Bloggers," 35 A.L.R.6TH 407 (2008) ("[B]logs deal with the opinions of a wide variety of persons . . ."). This emphasis on opinion as opposed to objective facts is reflected in the tone in which blogs are written, which is "often characterized by casualness and unedited dialog akin to chatting with those familiar to you." Flanagan, "Blogging: A Journal Need Not A Journalist Make," 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395, 397 (2006); Technorati, "State of the Blogosphere 2011" (Nov. 4, 2011), http://technorati.com/state-of-the-blogosphere-2011/ (noting that "79% of all [survey] respondents describe their blogging style as 'sincere,' and 67% describe their style as 'conversational.'").

Such is the case with the Defendants-Appellants' Blog. For example:

- The title caustically refers to Chemrisk's "Not-So Independent" science. (R31).
- The Defendants-Appellants adopt a clearly incredulous tone (ex. "BP does not exactly have a reputation for coming clean on the facts surrounding the disaster") and use

quotes around words such as "science." (R.31-32).

- The Blog concludes with the assertion that "while the BP trial continues in New Orleans, Gulf Coast residents are left wondering if BP will ever be held responsible for the damage done to their fisheries, ecosystems and livelihoods, wait to see if their bodies will ever recover from an assault of BP's oil and dispersants, and wonder if anyone will ever . . . 'make it right.'" (R.33-34).

In other words, unlike the reporter in *Fustolo* who carefully ensured that her personal views were "not reflected in the articles [she] wrote," the Defendants-Appellants made no secret of their leanings and, as the Superior Court recognized in its other ruling on the matter, were seeking to influence ongoing proceedings.

Nor does the fact that the Blog appears on the Huffington Post alongside factual articles affect the analysis. Newspapers frequently include a mix of factual content and opinion. In this respect, the Blog is simply the digital equivalent of an op-ed or a

letter to the editor, both of which have long been recognized as falling within the scope of Section 59H. *See Thomson v. Town of Andover Bd. of Appeals*, No. 931716, 1995 WL 1212920, at *1 (Mass. Super. July 25, 1995)(letter to the editor accusing industrial site owner of environmental contamination fell within Section 59H); *Joyce v. Slager*, No. 081240B, 2009 WL 4282113, at *1 (Mass. Super. Apr. 6, 2009)(editorial pieces in local newspaper protected under Section 59H); *cf. Wynne v. Creisle*, 63 Mass. App. Ct. 246, 253-54 (2005)(finding that statements made to a newspaper constituted petitioning activity).

B. This Court Should Make Clear That *Fustolo* Is Limited To News Reporters Who Are Acting Pursuant To An Explicit Professional Or Contractual Obligation To Objectively Report Facts

In addition to reversing the Superior Court's misapplication of *Fustolo*, this Court should also use this case as an opportunity to emphasize the limited scope of both *Fustolo* and the line of cases upon which it relies.

The *Fustolo* decision relied principally on two cases: *Kobrin v. Gastfriend*, 443 Mass. 327 (2005) and *Fisher v. Lint*, 69 Mass. App. Ct. 360 (2007). *See Fustolo*, 455 Mass. 866-67. Both *Kobrin* and *Fisher*

involved individuals who were sued for defamation as a result of work they did in their capacities as government agents. In *Kobrin*, the moving party was a physician hired by the Board of Registration in Medicine to investigate and testify as an expert in a disciplinary action before the Board, 443 Mass. at 328-29; in *Fisher*, he was a state police sergeant who submitted a report as part an internal investigation relating to another officer's misconduct, 69 Mass. App. Ct. at 360.

In both cases, the court found that those individuals were not exercising their own right to petition and therefore the Anti-SLAPP statute was inapplicable. But these holdings are hardly surprising considering that, in each instance, the witness had either been hired (as with the expert in *Kobrin*) or ordered (as with the police sergeant in *Fisher*) to represent the views of the government. The Appeals Court has been especially cautious not to expand either decision beyond its unique facts, noting that *Kobrin* and *Fisher* merely "rest on the commonsense principle that a statute designed to protect the constitutional right to petition has no applicability to situations in which the government petitions

itself." *Keegan v. Pellerin*, 76 Mass. App. Ct. 186, 192 (2010 (*Kobrin* and *Fisher* inapplicable where an employee was petitioning on behalf of employer); *see also Blanchard v. Steward Carney Hosp., Inc.*, 89 Mass. App. Ct. 97, 104 n. 8 (2016) (same); *Dickey v. Warren*, 75 Mass. App. Ct. 585, 590-91 (2009 (refusing to apply *Kobrin* where petitioning party testified in a condemnation proceeding against landlord).

Apart from *Fustolo*, virtually no Massachusetts appellate court has ever applied *Kobrin* and *Fisher* outside the government-agent context,[1] and for good

[1] The only published appellate decision, of which ACLUM is aware, in which *Kobrin* was applied to non-government agents (other than *Fustolo*) is *Maxwell v. AIG Domestic Claims*, Inc., 72 Mass. App. Ct. 685 (2008), in which the court briefly cited *Kobrin* in determining that an employee of a worker's compensation insurer, AIG, could not raise a Section 59H motion because the right to petition belonged to AIG. The court's language in this regard, however, was essentially dicta; the court had previously determined that the claims brought against AIG and the employee were not "based solely on" petitioning activity and that the petitioning which did occur was "'devoid of any reasonable factual support.'" *Id.* at 694-96 (quoting Section 59H). As a result, the Section 59H motion failed regardless of whether anyone was exercising "their own" right to petition. Furthermore, unlike in *Maxwell*, the Defendants-Appellants here were, of course, not acting as employees of anyone.

reason. Whereas it is simply "common sense" that a government witness is representing the views of the government and not herself, no such presumption applies to private individuals such as the Defendants-Appellants. Absent a governmental role, or the unique professional obligations associated with news reporting, there is simply no basis for concluding that a person who seeks to influence governmental proceedings is not exercising her own right to petition.[2]

Chemrisk would have this Court expand *Fustolo* well beyond the *Kobrin/Fisher* line of cases from which it originates. According to Chemrisk, the Defendants-Appellants were not exercising their own right to petition because they were only "writing on behalf of others -- i.e., 'clean up workers'" in Louisiana.

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[2] This is not to say that every reporter will fall outside of the protection of Section 59H. For example, in-depth reporting aimed at exposing societal problems and encouraging government action should be protected (e.g., the Boston Globe Spotlight Team reporting on the clergy abuse scandal). The defendant in *Fustolo* was not engaged in that kind of journalistic effort and the decision should be limited to the kind of basic objective news reporting that she performed.

(Appellee Brief at 8). In other words, under Chemrisk's reading of *Fustolo*, a petitioner is never exercising "her own" right to petition if she is not the immediate beneficiary of those efforts.

Kobrin, *Fisher* and *Fustolo*, however, impose no such limitation. In each of those cases, the problem was not that the petitioners were writing to address a wrong done to some third party, the problem was that the defendants' speech was governed by specific professional duties that dictated the content of that speech. Where, as here, a blogger is expressing her own views, not objective news reports or the views of the government, that line of cases simply does not apply.

Indeed, the Anti-SLAPP statute has long been recognized as applying to activities such as "writing to government officials," "circulating petitions for signature," "lobbying for legislation," and "engaging in peaceful boycotts and demonstrations," *Duracraft Corp.*, 427 Mass. at 161 (internal quotation marks omitted), all of which frequently involve individuals advocating on behalf of unjustly treated or underrepresented groups. This is so because inherent in one's right to petition is the right to not only

correct harm perpetrated against oneself, but also the right to seek redress when one's government or private entities are acting in an immoral, unethical, or illegal manner. Whether it be northern Abolitionists seeking the end slavery, white citizens marching to end racial inequality, American college students protesting Apartheid, anti-war protestors in the Boston Common, or lawyers and judges demanding more funding for legal aid, the right to speak out against injustice is at the core of the right to petition. And yet Chemrisk would have this Court leave those who do so defenseless in the face of corporate lawsuits simply because they are not acting purely in their own self-interest.

This Court should unequivocally reject Chemrisk's reading of *Fustolo*. Instead, the Court should take this opportunity to prevent any further confusion from arising out of *Fustolo* and expressly limit that decision to reporters who disavow expressing opinions to achieve government action.

C. The Superior Court's Decision Threatens A Wide Range Of Socially Beneficial Internet-Based Free Speech By Leaving Bloggers Of Limited Means Defenseless In the Face of Well-Financed Corporations.

Lastly, this Court should remain particularly mindful of the fact that blogs, and indeed, internet-based speech more generally, represent a dynamic new frontier of grass-roots free speech, one that is both filled with promise and yet, at the same time, vulnerable to suits like the one Chemrisk is prosecuting. Denying the Defendants-Appellants the protections of Section 59H, therefore, could have dire ramifications that extend well beyond the facts of this case.

"The Internet represents a revolutionary advance in communication technology," one that has been referred to as the "'greatest innovation in speech since the invention of the printing press[.]'" *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001)(quoting Shih Ray Ku, "Open Internet Access and Freedom of Speech: A First Amendment Catch-22," 75 TUL. L. REV. 87, 88 (2000)). Whereas once ideas were exchanged "in streets and parks," today "to an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in

mass and electronic media." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 802-03 (1996) (Kennedy, J., concurring in part and dissenting in part). But it is not simply the venue that has changed; because of its ease of accessibility and the breadth of its reach, the internet offers average citizens an unprecedented opportunity to share their ideas and express their views with what previously would have been an unimaginably large audience. As the Supreme Court remarked almost twenty years ago:

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders and newsgroups, the same individual can become a pamphleteer.

Reno v. ACLU, 521 U.S. 844, 853 (1997); *see also Sony Music Entm't, Inc. v. Does 1-40*, 326 F.Supp.2d 556, 562 (S.D.N.Y. 2004)("Courts have recognized the Internet as a valuable forum for robust exchange and debate.").

Because of its transformative potential and its ever changing nature, "[t]he law is rightly hesitant about allowing government—including the courts—to inhibit and restrict the use of such modern

instruments of communication." *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 393 (E.D.N.Y. 2007). Indeed, in *Citizens United v. Fed. Election Comm'n*, the Supreme Court aptly warned that "[r]apid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. . . ." 558 U.S. 310, 364 (2010).

The Massachusetts Anti-SLAPP statute views attempts to curb online speech through defamation actions with equal suspicion; in fact, the Appeals Court has already previously held that articles posted online qualify as petitioning activity under Section 59H. *See MacDonald v. Paton*, 57 Mass. App. Ct. 290, 294-96 (2003) (posting on website qualified as petitioning activity); *cf. Duracraft Corp.*, 427 Mass. at 162 ("The legislative history in Massachusetts demonstrates that in response to the problem of SLAPP suits the Legislature intended to enact very broad protection for petitioning activities.").

Furthermore, no other medium better epitomizes the promise of online free speech than the blog. *See* Gely & Bierman, "Social Isolation and American

Workers: Employee Blogging and Legal Reform," 20 HARV. J.L. & TECH. 287, 292 (2007) ("A blog, you see, is a little First Amendment Machine." (citation omitted)). Although they vary in terms of tone, format and content, blogs typically have at least four unique characteristics that reflect many of the values which lie at the core of the First Amendment.

First, they are accessible to a wide number of people and allow for the "democratization" of the press. *See* "It's the links, stupid," THE ECONOMIST (Apr. 20, 2006) ("Links"), http://www.economist.com/node/6794172 (internal quotation omitted). Whereas once publishing was a monopoly held only by those who could bankroll printing presses and large distribution networks, the modern blogger needs little more than a computer and an internet connection - an accessibility illustrated by the fact that the number of blogs is well into the tens of millions. Bump, "Finally, We Know How Many Bloggers Live In Their Parents' Basements," THE WASHINGTON POST (Mar. 25, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/25/finally-we-know-how-many-bloggers-live-in-their-parents-basement/ (estimating that there are upward of 31 million blogs). The result is a vibrant

forum in which otherwise marginalized citizens are given an opportunity to voice opinions that would otherwise go unheard. *See, e.g.*, Posner, "Bad News," THE NEW YORK TIMES SUNDAY BOOK REVIEW (July 31, 2005), http://www.nytimes.com/2005/07/31/books/review/bad news.html?_r=0("[Blogs] enable unorthodox views to get a hearing. They get 12 million people to write rather than just stare passively at a screen. In an age of specialization and professionalism, they give amateurs a platform.").

Second, blogs allow for a "raw, unpolished authenticity and individuality" frequently absent in more conventional forms of media. *See* Links, *supra*. Bloggers are not required to appease editors or advertisers, nor are they required to adhere to style guidelines or content restrictions. Gely & Bierman, *supra*, at 295 ("Because bloggers can finance themselves, they completely control their blogs' content, tone, and direction"); Bump, *supra* (citing one definition of a blogger as being "'one voice, unedited, not determined by group-think'"). Like the Defendants-Appellants here, bloggers call the world as they see it and denounce injustice in the most

explicit of terms. Bloggers, therefore, represent free speech in its purest form.

Third, blogs frequently allow readers to interact with authors and exchange ideas to an unprecedented degree. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999)(explaining that the First Amendment exists to foster "political conversations and the exchange of ideas."). For one, blogs frequently include comment boards, which permit readers to instantly respond with their own thoughts and ideas. Gely & Bierman, *supra*, at 295 (explaining the role comment boards have had on the overall influence of blogs). Likewise, bloggers frequently use hyperlinks to allow readers to access their sources in real time. In doing so, these "links generate transparency and foster critical evaluation of bloggers' research, interpretation, and analyses, revealing bias or inaccuracy, and potentially enhancing their credibility." *Id.* at 294.

Fourth, despite (or perhaps because of) the lack of editors, blogs are often much more capable of self-correction. Bloggers are held in check by their reading public, all of whom are easily capable of posting their own blogs in the event that they find

content that is untrue or misleading. Posner, *supra* ("[T]he blogosphere as a whole has a better error-correction machinery than the conventional media do. The rapidity with which vast masses of information are pooled and sifted leaves the conventional media in the dust"); Bloom, "Comment: Subpoenaed Sources and the Internet: A Test for When Bloggers Should Reveal Who Misappropriated A Trade Secret," 24 YALE L. & POL'Y REV. 471, 475 (2006) ("[T]here is a powerful check keeping bloggers accountable--the public. Readers point out mistakes very quickly, and, with digital feedback and the ability to update web pages instantly, corrections can be made to blogs much more quickly than they can be made in print publications."). If "'sunlight is the most powerful of all disinfectants,'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 305 (1964)(quoting Freund, THE SUPREME COURT OF THE UNITED States 61 (1949)), than blogs ensure that it shines perpetually. Furthermore, a correction in a newspaper may not reach as many readers as the original erroneous article. When a mistake appears in a blog, by contrast, a correction is as simple as clicking a button, and the change can appear directly in the text itself. Bloom, *supra*, at 475 ("[C]orrections in blogs

can be inserted directly into the text, while newspapers and magazines issue corrections in small print the next day or (sometimes much) later.").

Blogs, therefore, represent a bold new frontier in the realm of free speech. But many of the features which make blogs so influential also render them vulnerable to SLAPP suits like the one Chemrisk is prosecuting. For example, because bloggers are typically not professional journalists and lack the resources of a larger media organization, bloggers are more likely to be unaware of their rights and unable to finance costly litigation defense in the event that they are sued. Trende, "Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem," 44 DUQ. L. REV. 607, 629 (2006) ("In an era where the vitality of the internet is increasingly dependent upon [] small entities, the chilling effect posed by vindictive [SLAPP] litigation is uniquely threatening" to bloggers); Lidsky, "Silencing John Doe: Defamation & Discourse in Cyberspace," 49 DUKE L.J. 855, 889 (2000)("[C]hilling-effect arguments have particular resonance in cases involving 'nonmedia' defendants like those typically sued in the new Internet libel cases"); "Legal Guide for Bloggers,"

ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/issues/bloggers/legal ("The difference between [a blogger] and [a] reporter at your local newspaper is that in many cases, [the blogger] may not have the benefit of training or resources to help . . . determine whether what [the blogger is] doing is legal."). Furthermore, because the internet transcends geography, bloggers can easily find themselves subject to suits in distant and burdensome venues - a problem vividly illustrated by facts of this case.

Not surprisingly, then, those posting comments online have been subject to an increasingly large number of SLAPP suits across the country. Richards, "A SLAPP in the Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs and Consumer Gripe Sites," 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 221, 221-30(2011)(noting increasing prevalence of SLAPP suits against on-line posters); Trende, *supra*, at 631-38 (same). This trend threatens to not only chill free speech, it also threatens the survival of a whole new medium of communication that, comparatively speaking, is still in its infancy. Richards, *supra*, at 229 ("As more and more public discussion migrates to the

Internet, the burden of SLAPPs on the free flow of information becomes increasingly evident. SLAPP suits threaten to chill a popular form of expression, namely, social networking sites and blogs.").

Here, however, the Superior Court, in two sentences, stripped bloggers of the most powerful defense they have at their disposal in Massachusetts-Section 59H. Indeed, if a blog written by two environmental activists condemning a corporation alleged to be complicit in one of the worst environmental disasters in the nation's history is not found to fall within the shield of the Massachusetts Anti-SLAPP statute, it is difficult to conceive of a blog that would. Were the Superior Court's decision to stand, then, it would mean that, henceforth, every blogger seeking to challenge a well-funded corporation would have to choose between keeping silent or risk being dragged into litigation halfway across the country - all because their post bears some ill-defined resemblance to the reporter in *Fustolo*. The result, of course, is hardly consistent with the "very broad protection" Section 59H was intended to confer. *Duracraft Corp.*, 427 Mass. at 162.

VII. CONCLUSION

For the foregoing reasons, ACLUM respectfully requests that this Court reverse the Superior Court's decision, order that this action be dismissed, and order that that the Defendants-Appellants receive their reasonable attorney's fees.

Respectfully Submitted,

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

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Dated: June 6, 2016

ADDENDUM

MASSACHUSETTS GENERAL LAWS
PART III. COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
TITLE II. ACTIONS AND PROCEEDINGS THEREIN
CHAPTER 231

Section 59H. Strategic litigation against public participation; special motion to dismiss

In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

The attorney general, on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed, may intervene to defend or otherwise support the moving party on such special motion.

All discovery proceedings shall be stayed upon the filing of the special motion under this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion.

Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

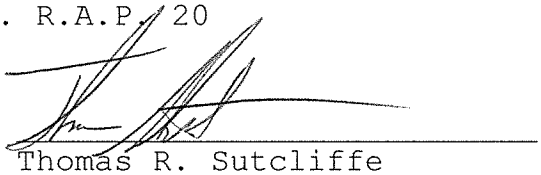
If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. Nothing in this section shall affect or preclude the right of the moving party to any remedy otherwise authorized by law.

As used in this section, the words "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

CERTIFICATE OF COMPLIANCE

I, certify that the foregoing brief complies with the rules of court pertaining to the filing of briefs, including:

Mass. R.A.P. 16(e)
Mass. R.A.P. 16(f);
Mass. R.A.P. 16(h);
Mass. R.A.P. 18; and
Mass. R.A.P. 20



Thomas R. Sutcliffe

CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that a true copy of the foregoing was served by email and first-class mail upon the following counsel of record on June 6, 2016:

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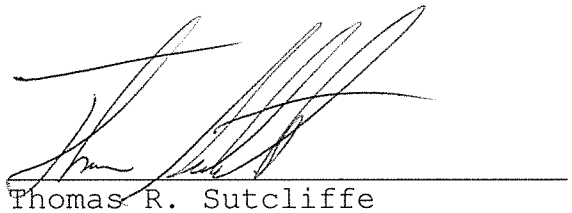

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