IN THE SUPREME COURT
STATE OF GEORGIA

SHIRLEY BERRYHILL,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. S06C0038
	)	
GEORGIA COMMUNITY SUPPORT AND SOLUTIONS, INC.,	)	
	)	
	)	
Appellee.	)	

AMICUS BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, GEORGIA FIRST AMENDMENT FOUNDATION AND ATLANTA PRESS CLUB

The American Civil Liberties Union of Georgia, Georgia First Amendment Foundation and Atlanta Press Club, Inc. are public interest organizations dedicated to protecting the civil liberties of Georgians. As such, we urge the Georgia Supreme Court to reverse the Court of Appeals' decision in *Berryhill v. Georgia Community Support and Solutions, Inc.,* 275 Ga.App. 189 (2005) because it stifles free speech by dangerously narrowing the scope of Georgia's anti-SLAPP statute.

STATEMENT OF FACTS

Amicae adopt the Defendant-Appellant's Statement of Facts in the case.

SUMMARY OF ARGUMENT

The Court of Appeals misinterpreted Georgia's anti-SLAPP statute in *Berryhill,* and failed to protect the exact type of expression the statute was designed to encourage. This ruling runs counter to the plain language of the statute, its legislative intent, and judicial precedent. The Court of Appeals decision severely limits the scope of the anti-SLAPP statute; holding that it applies only to statements made in the course of or actually leading to an official proceeding. See *Id. 92.*[1] (ruling that the anti-SLAPP statute applied only when "statements [are] made before or to a legislative, executive, or judicial proceeding or any other official proceeding....."). However, as enacted by the Georgia General Assembly in 1996, the statute by its express terms plainly protects not only citizens who speak at a government meeting but all

[1] Even though the defendant in *Berryhill* e-mailed the Georgia Department of Human Services, describing the deplorable treatment of her handicapped son, and even though she specifically stated that "she had hoped that 'the Atlanta-Journal Constitution, the Department of Human Resources, and other private individuals might be able to investigate the nature of my concerns ... and to remedy such concerns, if possible," the Court of Appeals nevertheless held that their was no "evidence" that Berryhill sought to initiate a government proceeding or investigation. *Id.*

who speak out in connection with an issue of public interest or concern. Not surprisingly, the Court of Appeals itself has previously so recognized. For these reasons, the Court of Appeals' decision should be reversed.

IDENTITY AND INTEREST OF AMICAE

ACLU of Georgia: The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 500,000 members dedicated to defending the principles embodied in the Bill of Rights. The American Civil Liberties Union of Georgia is a state affiliate of the ACLU with over 7,000 members. Before the passage of O.C.G.A. § 9-11-11.1, the ACLU of Georgia defended a number of citizens faced with baseless lawsuits -- called Strategic Lawsuits Against Public Participation (SLAPPs) – aimed at chilling citizen criticism of government and corporate ventures. The ACLU then worked with a coalition of public interest groups to help draft Georgia's anti-SLAPP law. Since the passage of the anti-SLAPP statute, the ACLU has represented victims of SLAPPs and filed amicus briefs in a number of cases.[2]

191-92.

[2] *See, e.g., Browns Mill Dev. Co. v. Denton*, 247 Ga.App. 232, *aff'd*, 275 Ga. 2 (2002); *Atlanta Humane Society v. Mills*, 264 Ga. App. 597 (2003), *aff'd in part reversed in part*, 278 Ga. 451 (2004), *on remand*, 2005 Ga. App. LEXIS 558 (2005); *Atlanta Humane Society v. Harkins*, 264 Ga. App. 356 (2003), *aff'd in part reversed in part*, 278 Ga. 451 (2004), *on*

The ACLU files this amicus to assist the Court and shed light on the history and proper application of O.C.G.A. § 9-11-11.1.

Georgia First Amendment Foundation: The Georgia First Amendment Foundation is a Georgia non-profit corporation organized in 1994 to inform and educate the public on government access and First Amendment issues and to provide legal support in cases in which the public's access to public institutions is threatened.

Atlanta Press Club: The Atlanta Press Club, Inc. ("APC"), is a Georgia non-profit corporation that represents approximately 800 members of the media and related organizations throughout Georgia and the southeast. APC members report daily on matters of government conduct and public affairs through many media outlets located within the state. As one of the largest press clubs in the nation outside of Washington, D.C., APC regularly holds meetings at which public figures are invited to speak to the media and public about important issues of the day. Additionally, for many years APC has

---

remand 2005 Ga. App. LEXIS 546 (2005).

organized and sponsored election-year debates among candidates for many state and federal public offices in the Atlanta area and statewide that are broadcast over Georgia Public Broadcasting. APC and its members have a vital interest in ensuring the free flow of information regarding all layers of government in Georgia.

ARGUMENT AND CITATION OF AUTHORITY

The Court of Appeals, in *Berryhill,* misinterprets Georgia's anti-SLAPP statute – frustrating the statute's legislative intent and conflicting with prior judicial precedent.

I. The Court of Appeals Decision Contradicts the Terms and Legislative Intent of Georgia's Anti-SLAPP Statute

The pivotal error in *Berryhill* stems from both a failure to embrace the broad and clearly stated purpose of the anti-SLAPP statute and a misinterpretation of its language. This misinterpretation unjustifiably narrows the scope of the statute and frustrates the legislation's purpose.

Purpose: When the anti-SLAPP statute was enacted in 1996, the General Assembly used broad language in the stated purpose: "to encourage

participation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances." *See* O.C.G.A. §9-11-11.1(a).

Text: Subsection (c) of the statute defines its scope of protection:

> an act in furtherance of the right of free speech ***includes*** any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law. O.C.G.A. §9-11-11.1(c) (emphasis added).

Berryhill misinterpreted the statute's use of "includes" in *Berryhill* by as an introduction to an exhaustive and complete list of the types of speech protected. This crabbed interpretation restricts the scope of the statute, making it applicable only to statements made in official proceedings or statements which actually led to an official proceeding.

Rules of Statutory Construction: *Berryhill*'s construction runs counter to well-settled rules of statutory construction. "Includes" is regarded as an enlarging, not limiting, term. *See Ballentine's Law Dictionary* (3d ed. 1969); *A Dictionary of Modern Legal Usage*, (1990) ("including should not be used to

introduce an exhaustive list, for it implies that the list is only partial.").[3]

[3] For support of its definition, *A Dictionary of Modern Legal Usage* cites a federal case, *Puerto Rico Maritime Shipping Authority v. I.C.C.*, 645 F.2d 1102, 1112 n.26 (D.C.Cir. 1981), where the court found that "it is a hornbook law that the use of the word 'including' indicates that the specified list...is illustrative, not exclusive." If the Court had applied the accurate definition of "includes," it would have correctly concluded that Defendant's statements made about an issue of public interest and concern with the "hope" of an "official investigation" are protected speech for purposes of the anti-SLAPP statute.

Prior Decisions: A non-limiting definition of "includes" is consistent with prior interpretations of the anti-SLAPP statute. In *Chatham Orthopaedic Surgery Center, LLC et al. v. Georgia Alliance of Community Hospitals, Inc.*, 262 Ga. App. 353, 355-56 (2003), the Georgia Court of Appeals ruled that subsection (c) of the anti-SLAPP statute did ***not*** limit the types of speech covered by the statute, but instead the act "***broadly*** applies to any claim asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right of free speech ... in connection with an issue of public interest or concern." Additionally, in *Hawks v. Hinely*, 252 Ga. App. 510, 549-50 (2001), the Court of Appeals held that a narrow interpretation of the statute would produce "undesirable and illogical results and consequences" while defeating the legislative intent and central purpose of the statute. Multiple state courts across the nation agree with the enlarging, rather than limiting, definition of "includes."[4]

[4] Numerous state courts have used the same statutory construction rule to conclude that the word "includes" is a word of illustration or enlargement – ***not*** limitation. *Flanagan v. Flanagan*, 41 P.3d 575 (Cal. 2002) ("Includes" is ordinarily a term of enlargement rather than limitation; thus, the statutory definition of a thing as "including"certain things does not necessarily place thereon a meaning limited to the inclusions.);

Dong v. Smithsonian Institution, 125 F.3d 877 (C.A.D.C. 1997) (The word “includes”normally does not introduce exhaustive list but merely sets out examples of some general principle, for purposes of statutory construction.); *Group Health Ass'n, Inc. v. Blumenthal*, 453 A.2d 1198 (Md. 1983)(Ordinarily the word ‘including’ means comprising by illustration and not by way of limitation.); *Lucke v. Lucke*, 300 N.W.2d 231 (N.D. 1980) (Ordinary sense of the word “includes” is that it is not a word of limitation but of enlargement.); *Lyman v. Town of Bow Mar*, 533 P.2d 1129 (Colo. 1975) *Greyhound Lines, Inc. v. City of Chicago*, 321 N.E.2d 293 (Ill.App.1.Dist. 1974)(Word “include” by itself in statute does not connote exclusivity; ordinarily, term “include” is interpreted as a term of enlargement.); *North Carolina Turnpike Authority v. Pine Island, Inc.*, 143 S.E.2d 319 (N.C. 1965)(Term "includes" in statute is ordinarily a word of enlargement and not of limitation.).

Academic Interpretations: In an article published by the Georgia Bar Association entitled *Georgia's New Anti-SLAPP Statute: Protecting the Right of Free*

Speech Against Meritless Claims, the following arguments were made:

- The [anti-SLAPP] statute applies not only to the activities listed in sub-section (c), but also to any act which could reasonably be construed as an act in furtherance of the right of free speech *or* the right to petition government for a redress of grievances under the Constitution of the Untied States or the Constitution of the State of Georgia in connection with an issue of public interest or concern...***the statute covers a vast array of situations and has wide-ranging implications for litigants in any case where freedom of speech can be claimed as a defense.***

- Unlike other states' anti-SLAPP statutes, Georgia's is not limited to actions brought against particular classes of parties, such as public applicants or permittees, nor is it limited to actions involving communications to a particular class, such as government officers or employees or government agencies. ***Whereas some states define acts covered by their anti-SLAPP statutes in limiting language, Georgia's statute is broad and expansive, cataloging only actions that are included in the definitional scope.***

Daniel A. Kent & Douglas M. Isenberg, *Georgia's New Anti-SLAPP Statute: Protecting the Right of Free Speech Against Meritless Claims*, 1997 Ga. Bar. J. 26, 29.

Additionally, an article published by the Georgia Law Review entitled

Don't

Raise that Hand: Why, Under Georgia's Anti-SLAPP Statute, Whistleblowers Should

Find Protection Find Reprisals for Reporting Employer Misconduct, 38 Ga. L. Rev. 769, also presents arguments for the statue's broadness. The writer argues that "Georgia's anti-SLAPP statute was drafted to apply to a ***broad*** class of lawsuits" and that "the statute provides no other limitations on the scope of its application." *See id* at 794-95.

For all the above reasons, the enlarging or illustrative definition of "includes" is consistent with rules of statutory construction, legislative purpose and prior decisions and interpretations of Georgia's anti-SLAPP statute.

II. **The Court of Appeals Decision Contradicts the Judicial Precedent of Georgia's Anti-SLAPP Statute**.

In six anti-SLAPP cases that preceded *Berryhill*, the Georgia Court of Appeals itself held that the scope of the statute was ***not*** limited to statements made before a governmental proceeding. In these cases, the court recognized the broad applicability of Georgia's anti-SLAPP statute and found that it protects speech made in any context (to the media, government officials, or the public at large) so long as it is in connection with an issue of public interest or concern:

- *Hawks v. Hinely*, 252 Ga. App. 510 (2001) (statements made in recall application prior to any official proceeding covered by anti-SLAPP statute).

- *Browns Mill Dev. Co. v. Denton*, 247 Ga.App. 232, *aff'd*, 275 Ga. 2 (2002) (dissemination of memoranda to media and government officials to "dramatize and indirectly influence" government activities covered by anti-SLAPP statute though statements not directed to an official proceeding).
- *Atlanta Humane Society v. Mills*, 264 Ga. App. 597 (2003), *aff'd in part reversed in part*, 278 Ga. 451 (2004), *on remand*, 2005 Ga. App. LEXIS 558 (2005) (statement disseminated on the Internet covered by anti-SLAPP statute though not directed to an official proceeding).[5]

[5] Appellee argues that e-mails do not have the requisite (and undefined) level of formality that Appellee claims is necessary under the anti-SLAPP statute. Appellee Brief at 5, 12-15. However, as *Mills* and other cases have recognized, the anti-SLAPP statute contains no

· *Atlanta Humane Society v. Harkins*, 264 Ga. App. 356 (2003), *aff'd in part reversed in part*, 278 Ga. 451 (2004), *on remand* 2005 Ga. App. LEXIS 546 (2005) (statements to WSB-TV and government officials "believing that her efforts could 'influence or persuade government officials and the public at large to help change the problems'"

---

requirement that a communication that is in furtherance of free speech and about a matter of public interest or concern must also be "formal"in some undefined way. *See Atlanta Humane Society v. Mills*, 278 Ga. 451, 455 (2004); *See also Denton v. Browns Mill Dev. Co.*, 275 Ga. 2, 5-11 (2002).

covered by anti-SLAPP statute).[6]

- *Metzler v. Rowell*, 248 Ga. App. 596 (2001) ("letter written by an attorney for parties to a petition to intervene, directed to the owner of the land in litigation and developer actually performing work on that land is clearly made in connection with an issue of zoning and development under consideration by a judicial body" and is thus covered by the anti-SLAPP statute).
- *Buckley v. Direct TV, Inc.* ,276 F.Supp.2d 1271 (N.D. Ga.2003) (letters

[6] Appellee attempts to distinguish *Harkins* because it claims the Atlanta Humane Society was "an arm of the government with governmental authority." Appellee Brief at 4. This is both a factually erroneous statement (the Atlanta Humane Society is a private non-profit), but also legally insignificant as the anti-SLAPP statute covers SLAPP filers that are both governmental and non-governmental. Indeed, many if not most SLAPP lawsuits are filed by private entities. *See* Atlanta Humane Society, Welcome Page, www.atlantahumane.org ("The Atlanta Humane Society is a private nonprofit organization..."); *See also* Daniel A. Kent & Douglas M. Isenberg, *Georgia's New Anti-SLAPP Statute: Protecting the Right of Free Speech Against Meritless Claims*, 1997 Ga. Bar. J. 26, 28.

sent to thousands of individuals regarding alleged signal piracy protected under Georgia anti-SLAPP statute).

- *Providence Constr. Co. v. Bauer*, 229 Ga. App. 679 (1997) (statements in the form of petitions, letters to county officials, and speaking out before a county planning commission were covered by the anti-SLAPP statute).

Shirley Berryhill, and other similarly-situated citizens of Georgia, should have the full protection of the anti-SLAPP statute. The statute was designed especially for them – to encourage their participation in government and protect them from the intimidating threat of expensive and time-consuming litigation. As in prior decisions, Berryhill voiced her complaints of wrong-doing to the media and government officials with the hope of prompting a government investigation of the alleged wrong-doer. Her speech was clearly about a matter of public interest or concern. The anti-SLAPP statute applies, and the Court of Appeals decision must be reversed.

III. **The Undesirable Consequences of a Limiting Construction of the Anti-SLAPP Statute**

If this Court upheld *Berryhill's* limiting construction of the anti-SLAPP statute, many Georgians' free speech would be chilled. Demonstrators, protestors, community activists, journalists, whistleblowers, and concerned citizens generally would rightly fear wallet-crippling lawsuits if their speech was not made to a government body or did not happen to lead to a government investigation. It benefits us all if they expose wrong-doing. As it stands, *Berryhill* penalizes these courageous and responsible citizens by forcing them to limit their speech to official

government proceedings. The broad construction of the anti-SLAPP statute intended by the General Assembly must be maintained.

Indeed, many unjustifiable situations might result. Consider the following example: Two citizens in adjoining counties become concerned about a sanitary landfill planned at the border of their two counties. They have demonstrations, write letters to the editor, and contact government officials. One county agrees to hold a meeting about the issue, the other does not. Under *Berryhill*'s reasoning, only one citizen would have anti-SLAPP protection (because his county took up the issue) while the other would be subject to suit (because her county declined to take up the matter).

This Court should read the anti-SLAPP statute consistent with its text, statutory construction, purpose and prior decisions. The anti-SLAPP statute allows citizens to seek its protection where a matter is "in connection with an issue of public interest or concern" and the speaker "act[s] is in furtherance of the right of free speech or

right to petition the government for a redress of grievances." Whether the speaker convinces a government body to take the matter up, or fails, should not be dispositive.

CONCLUSION

For all the above reasons, Amicae request that this Court reverse the Court of Appeals decision in *Berryhill v. Georgia Community Support and Solutions, Inc.*

DATED: This the 19th day of April, 2006.

Respectfully submitted,

_____

Gerald Weber
Georgia Bar No. 744878
Elizabeth Littrell

Georgia Bar No. 454949
Margaret F. Garrett
Georgia Bar No. 255865

ACLU of Georgia Foundation
75 Piedmont Avenue, Suite 514
Atlanta, Georgia 30303
(404) 523-6201
Attorneys for ACLU of Georgia Foundation

_____
Hollie Manheimer
Georgia Bar No. 468880

STUCKEY & MANHEIMER, LLC
150 E. Ponce de Leon Avenue
Suite 350
Decatur, Georgia 30030
(404) 377-0485
Attorney for Georgia First Amendment Foundation

Robert L. Rothman
Georgia Bar No. 615850

Arnall Golden Gregory LLP
171 17th Street, N.W. Suite 2100
Atlanta, Georgia 30363
(404) 873-8668
Attorney for Atlanta Press Club, Inc.

IN THE SUPREME COURT
STATE OF GEORGIA

SHIRLEY BERRYHILL,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. S06C0038
	)	
GEORGIA COMMUNITY SUPPORT AND SOLUTIONS, INC.,	)	
	)	
	)	
Appellee.	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the within and foregoing **AMICUS BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, GEORGIA FIRST AMENDMENT FOUNDATION, AND ATLANTA PRESS CLUB IN SUPPORT OF REVERSING THE COURT OF APPEALS DECISION IN *BERRYHILL V. GEORGIA COMMUNITY SUPPORT AND SOLUTIONS, INC.*** to the Supreme Court of Georgia upon opposing counsel by depositing the same in the U.S. Mail, in a properly addressed envelope, postage prepaid, upon:

Richard E. Witterman
Attorney at Law
2001 Macy Drive
Roswell, Georgia 30076

Torin D. Togut
140 Hanarry Drive
Lawrenceville, Georgia 30045

DATED: This the 19th day of April, 2006.

_____

Gerald Weber