

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE AMERICAN CHEMICAL SOCIETY,

Appellant,

v.

LEADSCOPE, INC., ET AL.,

Appellees.

Case No. 2010-1335

On Appeal from the Franklin County
Court of Appeals, Tenth Appellate
District

Appellate Case No. 08AP-1026

**BRIEF *AMICUS CURIAE* OF THE OHIO CHAMBER OF COMMERCE, OHIO
MANUFACTURERS' ASSOCIATION, AND OHIO COUNCIL OF RETAIL
MERCHANTS IN SUPPORT OF APPELLANT**

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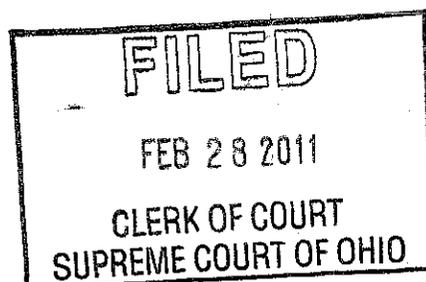


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INTRODUCTION AND STATEMENT OF AMICUS INTEREST

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization. The Ohio Chamber works to promote and protect the interests of its 4,000 business members, including more than 100 non-profit organizations that play a vibrant role in Ohio's business sector, by building a more favorable business climate in the state. The Ohio Manufacturers' Association ("OMA") is a statewide association of approximately 1,500 manufacturing companies in Ohio. Manufacturers employ roughly 600,000 men and women in the State of Ohio, and the OMA's members have a vital interest in ensuring that Ohio remains a desirable place to do business. The Ohio Council of Retail Merchants is a 2,800-member business trade association that represents various industries along the business supply-chain. The Council works to advance the interests of the retail and wholesale distribution industries and helps these enterprises achieve lasting excellence in all areas of their business.

All of the *amici* believe that a critical component of a strong Ohio economy is the ability of businesses to vindicate their rights under a system of predictable, fair, and efficient legal rules. This appeal presents the Court with an opportunity to affirm the fundamental protections that the First Amendment to the Federal Constitution provides and, in doing so, to reject a rule that would impose unpredictable, inequitable, and substantial new costs on routine business litigation. As explained below, the First Amendment protects the right to file a private lawsuit, as well as the right to discuss the suit with others. And the First Amendment therefore limits in important ways the scope of liability that state tort law can impose for engaging in these activities. Civil liability may *only* be imposed where the governing rules are clear and predictable; take a wide berth around protected conduct; and allow independent judicial review of factual findings. First Amendment jurisprudence imposes these requirements as without them, individuals and businesses engaged in *meritorious* litigation and *valuable* speech might abandon those activities

based on the fear that they will be confused with those engaged in *unmeritorious* litigation and *valueless* speech and be sanctioned accordingly.

The Court of Appeals ignored *each* of these requirements in its decision, holding instead that a business may be held liable for extensive civil damages based solely on a jury's finding that it filed a lawsuit, and publicly repeated the allegations of the lawsuit, based on a subjective and amorphous desire to "harm" a competitor. This subjective inquiry fails to offer a clear and predictable rule to those contemplating litigation; it fails to afford any breathing room to lawsuits that fall within the (wide) grey area of uncertain merit; and it impermissibly abdicates the required First Amendment analysis solely to the jury.

As explained below, such a result is inconsistent on multiple levels with the protections of the First Amendment to the Federal Constitution, punishing those who attempt to redress legitimate grievances through the courts or to accurately describe those attempts to others. Clear precedent from the U.S. Supreme Court squarely forbids it. Moreover, if allowed to stand, this result would do particular damage to the Ohio business community by dramatically increasing the costs and risks associated with routine litigation and chilling businesses from asserting their legal rights in the courts.

STATEMENT OF THE FACTS¹

This case in many ways tells the story of a typical business dispute. Appellant, the American Chemical Society (ACS), and Appellee, Leadscope, Inc., both invested substantial resources in pursuit of a business product. 2010-Ohio-2725, ¶4-5. A legal dispute arose over intellectual property rights in the product, which the parties initially attempted to settle out of court. *Id.* ¶5-6. When negotiations broke down, ACS filed suit, alleging misappropriation of

¹ A complete statement of the facts is contained in Appellant's brief, and the *amici* hereby adopt that statement, highlighting here only the essential facts.

trade secrets and related claims; by this time, hard feelings abounded. *Id.* ¶7-8, 61. The trial court found that each side's position was defensible and thus refused to resolve the case on summary judgment. *Id.* ¶9. Following an eight-week trial, the (non-unanimous) jury resolved factual disputes, applied the court's legal instructions, and found in Leadscope's favor. *Id.* ¶10.

At this point, however, the case took an unusual turn: After concluding that ACS's claims lacked merit, the jury was asked to determine whether ACS's decision to bring suit was motivated by a desire to harm Leadscope. *Id.* ¶31. Over ACS's objection, the jury was *not* told to consider whether ACS had an objectively reasonable basis for bringing its suit. *Id.* Rather, the jury was instructed that if it found that ACS's suit "was not founded upon good faith," the jury should find ACS liable for "malicious litigation." Further, Leadscope alleged that ACS was liable for defamation, based upon two statements that simply repeated the allegations of the suit (one in an internal memo instructing employees *not* to comment on the case and the other to a reporter). *Id.* ¶47-48. These claims accounted for the bulk of a \$26.5 million award to *Leadscope*. *Id.* ¶10. That is, ACS's objectively reasonable attempt to vindicate its legal rights, and its descriptions thereof, served as the basis for a multi-million dollar judgment against it.

The Ohio Court of Appeals affirmed. With respect to the malicious litigation judgment, ACS asserted that the First Amendment precluded the imposition of liability under such circumstances. *Id.* ¶29. The court expressly acknowledged that, under the First Amendment, there is immunity from liability for filing a lawsuit unless the claim is "objectively baseless." *Id.* However, the court upheld the award anyway, on the theory that Ohio law does not incorporate an "objectively baseless" element, *id.*, and because the court believed that a "bad faith standard is better suited to the nature of the malicious litigation claim than is an objectively baseless standard." *Id.* ¶31. In other words, the court concluded that a plaintiff can be found liable for

“malicious litigation” even if it had an objectively reasonable basis for bringing suit, so long as the defendant can convince a jury that the plaintiff had a “bad intent” in filing its complaint. And the court deferred to the jury, “as trier of fact,” to determine from the record evidence whether “ACS’s civil action constituted malicious litigation undertaken in bad faith.” *Id.* ¶38.

With respect to the defamation judgment, ACS similarly argued that Leadscope’s claim did not satisfy the elements that the First Amendment requires before liability can be imposed for speech. *Id.* ¶57-59. But the court concluded that ACS’s statements—which fairly summarized its litigation position—were “fals[e],” *id.* ¶58, and that subjective fault could permissibly have been inferred by the jury from evidence purportedly showing ACS’s “intent to suppress a competitor by any means necessary,” *id.* ¶61. Again, the court paid no heed to the fact that ACS’s legal claims, those described by the “defamatory” statements, had survived summary judgment and were *never* determined by judge *or* jury to have been objectively baseless.

ARGUMENT

Proposition of Law No. 1: It violates the First Amendment to the United States Constitution to impose liability on a party for filing a lawsuit, or for accurately describing that lawsuit, unless the lawsuit is determined to be objectively baseless and that determination is upheld on independent appellate review.²

Although, on its face, this case is about multiple claims and counterclaims asserted under Ohio law, its facts implicate a set of important and interrelated issues under the First Amendment to the United States Constitution. Because these issues arise in the background, they are easy to

² In this brief, the *amici* focus solely on the First Amendment issues that this appeal raises. Because the First Amendment clearly precludes liability on the facts here, the Court need not reach the remaining state law issues. Should the Court elect to do so, however, the *amici* adopt and support the arguments that ACS presses on those issues. In particular, the *amici* agree that Ohio common law does not allow liability for “malicious litigation” (or speech related to litigation) *unless* the litigation is objectively baseless. Moreover, the *amici* also agree that a party cannot obtain recovery for defamation absent a showing that any alleged harm was proximately caused by the allegedly defamatory statements. The court below thus erred not only in its treatment of the First Amendment, but also in its approach to these state law issues.

overlook, and indeed the court below appears to have done just that. But these basic principles of First Amendment law must be respected, not only to ensure the free exercise of constitutional rights, but also to protect the stable business environment that these principles help promote.

Part I of the Argument explains why the First Amendment is implicated here at all. Courts have long held that the First Amendment's Petition Clause extends not only to suits or petitions against the government, but also to lawsuits, such as the one here, between private parties. The right to openly discuss such litigation is *doubly* protected, both as a description of the petitioning activity and as a pure act of speech, and courts have long observed the importance of that right as well. In this case, the sole basis for the judgment against ACS was its filing a lawsuit and honestly describing the suit's allegations, and so that judgment brings the First Amendment into play.

Because this case involves conduct potentially subject to First Amendment protection, Part II elucidates the nature of the protections that the First Amendment provides. To start, states (including state juries) cannot impose liability upon a person based on his exercise of First Amendment rights. But, beyond that, in order to avoid chilling the exercise of First Amendment rights, states cannot impose liability except under rules that *clearly and objectively* limit liability to conduct that is *well beyond* the boundaries of core First Amendment activity as confirmed by *independent* appellate factual review.

Part III describes how these basic First Amendment principles coalesce with respect to state-law efforts to impose liability for litigation conduct. In particular, because the right to petition the courts for redress and the right to describe such petitioning to the public are generally protected by the First Amendment, courts may impose liability for these activities only if they fall *beyond* the scope of constitutional protection, as defined by *objective* standards and subject

to *independent* appellate review. These requirements, in substance, shelter a defendant from liability for pursuing litigation, or for summarizing the litigation, unless an appellate court *independently* determines that the suit was *objectively baseless* from the outset. The U.S. Supreme Court has adopted just that standard, and numerous state supreme courts—including this Court—have dutifully applied it. These decisions are controlling in this case.

Finally, Part IV explains how the court below erred by failing to apply these principles. At the outset, the court failed to appreciate the role that the First Amendment necessarily plays in guiding the analysis—the court rejected applying First Amendment standards as a limit on Ohio law simply because “Ohio courts considering . . . malicious litigation claims have not applied the [federal] standard.” *Id.* ¶29. Then wrongly freed from any consideration of First Amendment concerns, the court applied a rule that offers no objective basis for individuals or businesses to assess the permissibility of bringing litigation, and that disregards the need for a buffer between liability and core First Amendment activity. Finally, the court failed to provide independent review of the jury’s findings. The result: a decision at odds with fundamental First Amendment principles, which will substantially chill the protected activities of Ohio businesses.

I. THE FIRST AMENDMENT BROADLY EMBRACES THE RIGHT TO FILE AND DISCUSS PRIVATE LAWSUITS.

The First Amendment bears upon this case because the pursuit of private lawsuits, and the discussion of such lawsuits, are activities rooted in that constitutional provision. Clear precedent from the U.S. Supreme Court establishes as much. And it is those activities that formed the basis for the judgment against ACS that was upheld by the Court of Appeals.

A. The Right To Petition for the Redress of Grievances Includes the Right To Petition the Courts for the Redress of Private Grievances.

The First Amendment guarantees the right “to petition the government for a redress of grievances,” U.S. Const. amend. I, an entitlement the U.S. Supreme Court has described as

“among the most precious of the liberties safeguarded by the Bill of Rights,” *Mine Workers v. Ill. Bar Ass’n* (1967), 389 U.S. 217, 222.³ See also *Greer-Burger v. Temesi* (2007), 116 Ohio St.3d 324, 2007-Ohio-6442, at ¶10 (“The right to petition one’s government for the redress of grievances is enshrined within the First Amendment to the United States Constitution.”). Indeed, “the right is implied by ‘the very idea of a government, republican in form.’” *BE&K Constr. Co. v. NLRB* (2002), 536 U.S. 516, 524-25 (quoting *United States v. Cruikshank* (1876), 92 U.S. 542, 552). Because courts are a branch of “the government,” this encompasses the right to bring a legal action in order to redress a grievance. In fact, many grievances are more properly addressed to the court than the legislature or executive. See *Protect Our Mountain Env’t v. District Court (“POME”)* (Colo. 1984), 677 P.2d 1361, 1365 (en banc) (“Access to the courts is often the only method by which a person or a group of citizens may seek vindication of federal and state rights and ensure accountability in the affairs of government.”).

Perhaps the seminal modern “right to petition” case, although one that involves public advocacy as opposed to private lawsuits, is *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* (1961), 365 U.S. 127. There, certain truckers sought to impose liability upon certain railroads because the latter had “conduct[ed] a publicity campaign . . . designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business.” *Id.* at 129. The truckers alleged that this campaign violated the antitrust laws because its objective was to drive the truckers out of business. *Id.* The U.S. Supreme Court refused to construe the federal statute in that manner, however, citing the First Amendment right to petition: “The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of

³ “The First Amendment to the United States Constitution is applicable to the states by virtue of the Fourteenth Amendment.” *State ex rel. Beacon Journal Pub’g Co. v. Bond* (2002), 98 Ohio St.3d 146, 150 n.2 (citing *Gitlow v. New York* (1925), 268 U.S. 652, 666 and *Lovell v. Griffin* (1938), 303 U.S. 444, 450).

course, lightly impute to Congress an intent to invade these freedoms.” *Id.* at 138. In other words, the railroads had a constitutional right to advocate for whatever laws would advantage them, even if their motive was to injure the competition. *See also United Mine Workers v. Pennington* (1965), 381 U.S. 657.

About a decade later, the U.S. Supreme Court extended the protections of *Noerr* and *Pennington* (the *Noerr-Pennington* doctrine, as it has become colloquially known) from public advocacy to private litigation. As the Court explained, the “same philosophy” of these earlier cases “governs the approach of citizens or groups of them to . . . courts, the third branch of Government.” *Cal. Motor Transp. Co. v. Trucking Unlimited* (1972), 404 U.S. 508, 510. Specifically, the “right of access to the courts is indeed but one aspect of the right of petition,” *id.*, even in the context of one private party suing another.

Over the four decades since, the Court has repeatedly reaffirmed that the First Amendment’s right to petition includes the right to file private lawsuits. For example, in *Bill Johnson’s Restaurants, Inc. v. NLRB* (1983), 461 U.S. 731, the Court described filing a private lawsuit as part of the “First Amendment right to petition the Government for redress of grievances.” *Id.* at 741. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993), 508 U.S. 49, the Court again squarely held that private litigation is a constitutionally protected form of petitioning. *Id.* at 57. Most recently, in *BE&K Construction*, the Court emphasized the important Petition Clause values served by private litigation, such as “rais[ing] matters of public concern,” “promot[ing] the evolution of the law,” and “add[ing] legitimacy to the court system as a designated alternative to force.” 536 U.S. at 532.

In light of this precedent, there can be no doubt that the choice to engage in private litigation falls squarely within the First Amendment’s purview. And, indeed, this Court has long

recognized as much. See *Greer-Burger*, 2007-Ohio-6442, at ¶ 11 (recognizing that First Amendment protects “ability to access the courts for redress of injuries”); see also *City of Long Beach v. Bozek* (Cal. 1982), 645 P.2d 137, 140 (“[I]t [is] clear that the right of petition protects attempts to obtain redress through the institution of judicial proceedings [and] encompasses the act of filing a [private] lawsuit solely to obtain monetary compensation for individualized wrongs.”). Accordingly, the First Amendment’s strictures must be considered in connection with imposing liability on a party for electing to pursue private litigation.

B. The Right To Repeat the Allegations of a Private Lawsuit Is Doubly Protected by the Petition Clause and the Speech Clause.

Because private litigation is an act of petitioning, *speaking* about pending litigation is doubly protected, both as a description of the act of petitioning and as speech generally. First, “communications between private parties are sufficiently within the protection of the Petition Clause to trigger the *Noerr-Pennington* doctrine, so long as they are sufficiently related to petitioning activity.” *Sosa v. DIRECTV, Inc.* (C.A.9, 2006), 437 F.3d 923, 935. Second, the Supreme Court has affirmed that, because description of court proceedings constitutes “discussion of governmental affairs,” it lies at the core of the Free Speech Clause. *Globe Newspaper Co. v. Superior Court, County of Norfolk* (1982), 457 U.S. 596, 604-05; see also *Richmond Newspapers, Inc. v. Virginia* (1980), 448 U.S. 555, 576, 580 n.17 (recognizing First Amendment right to “hear, see, and communicate observations concerning” criminal trials and suggesting that same applies in context of civil trials); *Landmark Commc’ns, Inc. v. Virginia* (1978), 435 U.S. 829, 840-42 (protecting reporting about judicial-misconduct proceedings).

State courts have long observed the same principle: “In this country it is a first principle that the people have the right to know what is done in their courts. . . . [T]he greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency, are

regarded as essential to the public welfare.” *In re Shortridge* (Cal. 1893), 34 P. 227, 228-29. Indeed, the recognition that the public has particular right to open reporting and discussion of legal proceedings is deeply rooted in Ohio law. *Dayton Newspapers, Inc. v. Phillips* (1976), 46 Ohio St.2d 457, 477 (Stern, J., concurring) (“[F]ree access to the traditionally public proceedings of our courts and tribunals is too fundamental a value to be sacrificed if an alternative exists.”).

Businesses as well as individuals benefit from the right to discuss ongoing litigation. Indeed, commenting on legal claims—as ACS did by telling its employees, and a newspaper, about the substance of its pending suit—can be particularly important in the commercial context. The goodwill and reputation of a company may depend on its ability not only ultimately to win the case, but also to demonstrate its merits to consumers, shareholders, and the public.

II. THE FIRST AMENDMENT PRECLUDES THE IMPOSITION OF LIABILITY THAT PENALIZES OR DISCOURAGES PROTECTED ACTIVITIES.

Because both filing and discussing private litigation implicate First Amendment concerns, before imposing liability for such conduct, a court must consider the limitations that the First Amendment imposes. To start, the First Amendment precludes efforts to penalize, through criminal sanctions or civil monetary liability, decisions by individuals or businesses to engage in the “protected” activities—speech, association, petition, religion—that the Framers considered essential to a free society. Moreover, even when aiming to impose liability only for *unprotected* conduct, such as, for example, defamatory speech, the government must avoid chilling the free exercise of protected rights by adopting clear and objective rules that steer well clear of protected activities.

A. The First Amendment Protects Individuals and Businesses from Being Punished or Held Liable As a Result of Exercising Their Rights.

The most obvious violations of the First Amendment occur when the Government itself seeks to impose criminal punishment on the basis of the defendant’s protected conduct, a

concern admittedly not at issue here. E.g., *United States v. Stevens* (2010), 130 S.Ct. 1577 (invalidating federal statute that criminalized depiction of animal cruelty). But it is well settled that the Constitution equally prohibits the imposition of monetary liability, even in “a civil lawsuit between private parties,” if the premise of the lawsuit is an attack on the defendant’s protected conduct. *N.Y. Times Co. v. Sullivan* (1964), 376 U.S. 254, 265. This follows from the logical principle that “[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law.” *Id.* at 277.

Thus, there are constitutional implications whenever a party (even a private party) invokes a cause of action based upon another party having engaged in protected First Amendment activity. At the federal level, the Supreme Court has construed statutes narrowly to avoid such implications, interpreting the statutes as inapplicable to the protected activity. E.g., *Noerr*, 365 U.S. at 137-38 (construing Sherman Act as inapplicable to attempts to persuade government to take action, as contrary construction would “raise important constitutional questions” about right to petition); *Bill Johnson’s Restaurants*, 461 U.S. at 741-43 (refusing to interpret NLRA to allow prosecution of protected conduct as “unfair labor practice”); *BE&K Constr.*, 536 U.S. at 536-37 (similar narrowing interpretation of NLRA).

Further, since the First Amendment applies to the States and trumps state law under the Supremacy Clause, the same principle holds in the context of state-law causes of action. Indeed, the U.S. Supreme Court has repeatedly applied the First Amendment to narrow the applicability of state tort law and to overturn jury awards that seek to impose liability based on a party engaging in constitutionally protected conduct. *See, e.g., Masson v. New Yorker Magazine, Inc.* (1991), 501 U.S. 496, 510 (“The First Amendment limits California’s libel law in various respects.”); *Hustler Magazine, Inc. v. Falwell* (1988), 485 U.S. 46 (overturning jury award for

intentional infliction of emotional distress as inconsistent with First Amendment); *NAACP v. Claiborne Hardware Co.* (1982), 458 U.S. 886, 931 (overturning award for interference with business relations because to permit liability “would impermissibly burden the rights of political association that are protected by the First Amendment”); *Time, Inc. v. Hill* (1967), 385 U.S. 374, 390-91 (overturning jury award for infringement of “right to privacy” and requiring finding of “knowing or reckless falsity” for cause of action to be constitutionally applied to speech). State courts, including this one, have in countless cases done the same. E.g., *Scott v. News-Herald* (1986), 25 Ohio St.3d 243. Thus, the permissible parameters of state tort law, at least where that law is being used in an effort to penalize protected activity, are, in large part, a function of the First Amendment.

In sum, a defendant cannot be penalized—through criminal sanction or civil liability, under a federal statute or a state cause of action—for engaging in conduct that the First Amendment protects. This principle is neither novel nor controversial. See Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition* (2010), 96 Iowa L. Rev. 249.

B. The First Amendment Also Requires That the Limits of Liability Be Defined To Avoid a Chilling Effect.

Preventing the imposition of civil liability for engaging in protected conduct is necessary to satisfy the First Amendment—but it is not sufficient. Courts have long recognized that even rules imposing liability on activities that are *not* protected under the First Amendment may still, in practice, discourage the exercise of First Amendment rights. That is, even if the government purports to punish only those defendants who engage in activities that fall outside the First Amendment’s scope, such as defamatory speech, uncertainty about the precise boundaries of the Constitution’s protections and the unpredictability of after-the-fact judgments by juries would

inevitably lead some people to conclude that even protected activities are not worth the risk. Because First Amendment freedoms are fundamental to a free society, however, the Constitution does not tolerate that indirect impingement: “Any threat of liability . . . may result in a ‘chilling’ effect with devastating consequences to a democratic society.” *Scott*, 25 Ohio St.3d at 246. Accordingly, the U.S. Supreme Court has set forth a series of principles designed to mitigate the potential chilling effect of laws that threaten liability for conduct near the outskirts of First Amendment protection. Three of these principles bear particular emphasis here.

1. ***The boundaries between protected and unprotected activity must be clearly and objectively demarcated.***

First, there is a clear and objective boundary requirement. If the boundaries between protected conduct and unprotected conduct are unclear or subjective, there is a danger that fear of potential sanctions will frighten individuals and businesses away from engaging in even *protected* conduct. “Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ than if the boundaries of the forbidden areas were clearly marked.” *Grayned v. City of Rockford* (1972), 408 U.S. 104, 109 (quoting *Speiser v. Randall* (1958), 357 U.S. 513, 526). As such, the First Amendment demands, to the extent that statutes or common-law causes of action “abut upon sensitive areas of basic First Amendment freedoms,” *Baggett v. Bullitt* (1964), 377 U.S. 360, 372, that clear and objective lines distinguish the proscribed from the protected. *See also Harte-Hanks Commc’ns, Inc. v. Connaughton* (1989), 491 U.S. 657, 686 (“Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords.”).

For example, the U.S. Supreme Court has been especially skeptical of *vague* statutes that tread near the First Amendment’s boundaries. *See, e.g., Cramp v. Bd. of Pub. Instruction* (1961), 368 U.S. 278, 287 (“The vice of unconstitutional vagueness is further aggravated where, as here,

the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.”); *Ashton v. Kentucky* (1966), 384 U.S. 195, 200 (noting that “[v]ague laws in any area suffer a constitutional infirmity” and, “[w]hen First Amendment rights are involved, we look even more closely”). The Court has likewise refused to accept inherently *subjective* lines between protected and unprotected conduct. E.g., *Grayned*, 408 U.S. at 113 (describing the Court’s earlier rejection of “completely subjective standard of ‘annoyance’”).

The U.S. Supreme Court’s cases about the relationship between the First Amendment and defamation liability illustrate this principle in practice. When the allegedly defamatory statement is *factual* in nature, a clear and objective line can be drawn *ex ante* between protected speech (which cannot be the predicate for a defamation suit) and unprotected speech (which can be). That objective line is defined by the truth or falsity of the statement. *Bill Johnson’s Restaurants*, 461 U.S. at 743 (“[F]alse statements are not immunized by the First Amendment . . .”). Unless the plaintiff is able to prove that the statement was *factually false*, liability cannot be imposed. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 347. By contrast, where the allegedly defamatory statement does not involve any assertion of fact, it is impossible to draw any clear, objective line that would allow a person to know *ex ante* what is permissible and impermissible. Thus, the Court in *Hustler Magazine* rejected a standard that would have allowed liability to be imposed for especially “outrageous” non-factual speech:

If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description ‘outrageous’ does not supply one. ‘Outrageousness’ in the area of political and social discourse has an *inherent subjectiveness about it* which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.

485 U.S. at 55 (emphasis added). The Court concluded that an *ex post*, subjective jury determination offers insufficient protection where the First Amendment is implicated.

Neither vague nor subjective standards are compatible with the First Amendment because such uncertain and unpredictable standards pressure individuals and businesses that operate within their confines to hold themselves back, chilling exercise of our basic freedoms.

2. *There must be a buffer zone surrounding protected activity.*

Second and relatedly, the law must not threaten punishment or liability for conduct that is too close to the boundaries of the First Amendment, even if the conduct is technically outside its bounds. “First Amendment freedoms need breathing space to survive,” *NAACP v. Button* (1963), 371 U.S. 415, 433, and—like vague or subjective statutes—laws that impose penalties for conduct just outside First Amendment limits will discourage the exercise of *protected* conduct. “[W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized.” *Speiser*, 357 U.S. at 526. As a result, individuals and businesses will “steer far wider of the unlawful zone” *Id.* The First Amendment requires not just immunity for protected activity, but also a buffer zone around it.

Again, the U.S. Supreme Court’s defamation cases provide an illustration of this principle at work. Although, as mentioned above, *false* statements of fact do not qualify for constitutional protection, *New York Times v. Sullivan* went further than to simply require that state defamation law recognize a “truth” defense. 376 U.S. at 278-79. The Court reasoned that “[a]llowance of the defense of truth . . . does not mean that only false speech will be deterred.” *Id.* at 279. Rather, individuals would still “be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.” *Id.* Such an outcome would be

inconsistent with the purposes of the First Amendment, and the Court accordingly constructed a buffer zone around protected, truthful speech: Before liability could be imposed, the *plaintiff* would have to prove both that the defendant's conduct satisfied the objective test defining unprotected speech (i.e., falsity) *plus* some level of culpability by the defendant. *Id.* at 280-83; *see also Gertz*, 418 U.S. at 347 (rejecting strict liability even for objectively false statements).

Thus, in setting the scope of liability, courts must be careful to ensure that the First Amendment has the requisite "elbow room within which to function," *Rosenbloom v. Metromedia, Inc.* (1971), 403 U.S. 29, 52 (plurality opinion), always keeping an eye toward the potential deterrent effect that a rule may have on the exercise of First Amendment freedoms.

3. *Appellate courts must independently review the facts to ensure that protected activity is not penalized.*

Third and finally, the U.S. Supreme Court has expressed concern about giving juries the power to determine on which side of the First Amendment line a defendant's conduct falls. "Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently . . . to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Bose Corp. v. Consumer Union of United States, Inc.* (1984), 466 U.S. 485, 505. Juries are notoriously unpredictable, and if they are permitted to determine whether particular conduct falls within the realm of First Amendment protection, the exercise of constitutional rights will be chilled by fear that a hostile jury will subsequently strip even *protected* conduct of the requisite immunity.

Thus, the Supreme Court has held that, where a case presents the question whether a defendant has crossed "the line between speech unconditionally guaranteed and speech which may legitimately be regulated," *Speiser*, 357 U.S. at 525, appellate courts must "examine for [themselves] the statements in issue and the circumstances under which they were made to see

whether or not they . . . are of a character which the principles of the First Amendment . . . protect,” *Pennekamp v. Florida* (1946), 328 U.S. 331, 335. The appellate court must conduct “an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.” *Bose Corp.*, 466 U.S. at 505; *accord Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 90.

The rule of independent review, even of matters ordinarily entrusted to the jury, “reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.” *Bose Corp.*, 466 U.S. at 510-11.

III. A PARTY WHO FILES AND DISCUSSES A LAWSUIT IS IMMUNE FROM LIABILITY UNLESS THE LITIGATION IS OBJECTIVELY BASELESS.

Because private litigation (as well as speech regarding that private litigation) implicates First Amendment concerns, tort law that imposes liability for engaging in such conduct—such as “malicious litigation” or defamation based on litigation-related speech—must comply with the foundational principles set forth above. In the context of such claims, those First Amendment principles preclude the imposition of liability for litigation unless the suit is an “objectively baseless” sham. Indeed, the U.S. Supreme Court has adopted that very test in precedent that binds this Court, and courts across the country have dutifully applied it. Adopting any other standard here would be incompatible with both the case law and the guiding rationale behind it.

A. To Prevent Chilling of the Right to Petition, First Amendment Principles Require That Litigation Be Immunized Unless It Is “Objectively Baseless.”

Admittedly, the fact that litigation is generally protected by the First Amendment does not mean that liability can *never* be imposed for its “malicious” instigation, any more than the fact that the First Amendment generally protects speech means that one is free to say anything one wants, anywhere, at any time. *See Greer-Burger*, 116 Ohio St.3d at 326 (“Despite the

paramount importance placed on the ability to access the courts for redress of injuries, the right is not absolute.”). Not all lawsuits represent genuine attempts to redress genuine grievances, and those that do not are not entitled to immunity. The question is how to define the *scope* of protected litigation, how to distinguish between the sacrosanct and the sanctionable.

Only one rule defines that scope, and draws that distinction, in a way that respects the core First Amendment principles described in Part II, *supra*: a person is immune from liability for filing a lawsuit so long as his lawsuit has an *objectively reasonable basis*, but immunity does not extend to filing suits that are *objectively baseless*. Other possible tests—such as drawing the line based on whether the litigation is *actually meritorious*, or whether it was pursued for a *subjectively worthy motive* (which is the test that the court below adopted)—fail to adequately account for the important First Amendment interests at stake.

1. ***An “objectively baseless” test sets sufficiently clear boundaries between protected and unprotected litigation activity.***

As explained above in Part II.B.1, the First Amendment abhors uncertain or subjective standards. Instead, it requires clarity and objectivity in order to permit individuals and businesses to know, before engaging in conduct, whether that conduct falls within legal boundaries.

Lawsuits are not “a kind of provable statement,” *BE&K Constr.*, 536 U.S. at 532, and thus the true/false boundary, *see Bill Johnson’s Restaurants*, 461 U.S. at 743, does not directly apply. However, denying protection to suits that are “objectively baseless” offers an analogous line that meets the constitutional requirements of objectivity and predictability. By definition, such a test is “objective,” turning on whether a reasonable litigant could expect success. And because such a test requires a party to assess only whether the lawsuit is entirely baseless, it is relatively predictable. A reasonable person can judge, in advance, whether a suit has an

objective basis (so the person will not face liability for filing it), or is objectively baseless (in which case he could).

By contrast, a test that limited the protections of the First Amendment to only *successful* lawsuits would offer little comfort to a party contemplating litigation. Litigation is inherently uncertain. Questions of fact often turn “on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts,” *Bill Johnson’s Restaurants*, 461 U.S. at 745, and the “possibility of mistaken factfinding” is “inherent in all litigation,” *Speiser*, 357 U.S. at 526. Indeed, the “difficulties of adducing legal proofs” create unpredictability even when one is sure of the factual premise for his suit, *N.Y. Times*, 376 U.S. at 279, and the “fact that [a suit] loses does not mean it is false,” only that “the plaintiff did not meet its burden of proving its truth,” *BE&K Constr.*, 536 U.S. at 533. Furthermore, questions of law are often legitimately arguable; even if the court must ultimately choose one side’s position, in many cases there “may be no ‘right’ answer,” *Tum v. Barber Foods, Inc.* (C.A.1, 2004), 360 F.3d 274, 283 (Boudin, C.J., concurring). Thus, a rule protecting only successful litigation would deeply chill protected First Amendment activity, as a party contemplating meritorious lawsuits would necessarily fear civil liability should a judge or jury ultimately reject his claim.

Likewise, a test that turned solely on the subjective intent of the plaintiff would not provide the needed clarity or objectivity. Such a test would of course not be objective. And it would also be highly unpredictable, if not downright incoherent. “[I]ll will is not uncommon in litigation.” *BE&K Constr.*, 536 U.S. at 534. Indeed, it is perhaps “inevitable” that a party advocating against a competitor would “be pleased by” the prospect of harming it. *Noerr*, 365 U.S. at 143. Thus, if a purely subjective test were to provide *any* protection for legitimate lawsuits, something beyond a bare showing that a plaintiff hoped to damage the opponent would

be a necessary element. Yet it is entirely unclear what this additional showing might be. *Cf. Hustler Magazine*, 485 U.S. at 55 (holding that “outrageousness” failed to supply “principled standard” required by First Amendment). An exception to First Amendment immunity for suits brought in subjective bad faith would not come close to supplying the “real intelligible guidance” required by the Constitution. *Allied Tube & Conduit Corp. v. Indian Head, Inc.* (1988), 486 U.S. 492, 507 n.10.

2. An “objectively baseless” test gives the First Amendment its needed breathing room.

As explained above in Part II.B.2, the First Amendment not only protects certain conduct, but also requires a buffer zone around it—“elbow room,” so to speak. *Rosenbloom*, 403 U.S. at 52. If liability attached immediately upon straying from the boundaries of protected conduct, malicious litigation counterclaims would become a routine feature of commercial litigation, and businesses would curtail their legitimate activities in response to the added costs of litigation and the unpredictable risk of being judged to have acted with “bad intent.” This “pall of fear and timidity . . . is an atmosphere in which the First Amendment freedoms cannot survive.” *N.Y. Times*, 376 U.S. at 278.

The “objectively baseless” test provides the necessary breathing room by ensuring that those who reasonably believe in the merits of a legal claim can rest assured that they will not be punished for asserting it. No matter how a jury resolves questions of credibility, what inferences the finder of fact draws, or what legal rule the judge determines to adopt, no liability will attach for filing the suit, so long as the suit had an objectively reasonable basis at the outset. Conversely, when a litigant brings an objectively baseless lawsuit, he has fair warning that his conduct may be sanctioned. Thus, the “objectively baseless” test permits *ex ante* predictability

and prevents liability from being imposed upon cases within the wide grey area of uncertain merit, giving the First Amendment the “breathing space” that it needs. *Button*, 371 U.S. at 433.

In contrast, a test that would protect only *successful* litigation would cut far too close to the bone and chill large amounts of legitimate First Amendment activity. As described above, a litigant rarely (if ever) will know *ex ante* whether a potential suit will be meritorious in court—whether he will be able to successfully convince a jury of the facts that he knows to be true, or to successfully persuade the judge that the law is as he sees it. Thus, even if an unsuccessful lawsuit could be analogized to a “false” statement of fact, “[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.” *Gertz*, 418 U.S. at 341; *see also BE&K Constr.*, 536 U.S. at 531.

Moreover, if liability could be imposed simply for pursuing a lawsuit that turns out to be unsuccessful, almost any defendant in any business case could likely file a “malicious litigation” counterclaim. As a result, many *meritorious* cases would surely be abandoned due to the added costs of litigation and the uncertainty of whether losing will be accompanied by enormous liability based on a jury finding of ill will. “This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.” *Christiansburg Garment Co. v. EEOC* (1978), 434 U.S. 412, 422. Similarly, a test allowing liability upon a finding of animus would deprive the First Amendment of its “elbow room.” *Rosenbloom*, 403 U.S. at 52. Litigation “will not be uninhibited if the [plaintiff] must run the risk that it will be proved in court that he [sued] out of hatred.” *Garrison v. Louisiana* (1964), 379 U.S. 64, 73-74.

3. *An “objectively baseless” test allows for independent appellate review.*

As explained above in Part II.B.3, First Amendment principles further require that the appellate court conduct “an independent review of the record” in order to “be sure that the

speech in question actually falls within the unprotected category.” *Bose Corp.*, 466 U.S. at 505. Unbridled jury discretion causes chill and is incompatible with the First Amendment.

Only an objective test distinguishing protected from unprotected litigation would allow for the meaningful independent review that the Constitution and the Supreme Court require. Courts are particularly adept at assessing whether a legal claim has a “reasonable” basis. For example, Ohio courts already assess the objective legitimacy of claims in determining parties’ settlement obligations. *See Patton v. Cleveland* (1994), 95 Ohio App.3d 21, 27 (“If a party holds an objectively reasonable belief that he has no liability, he need not make a settlement offer [under R.C. 1343.03(C)].”). And they routinely make such judgments in determining whether to sanction parties for frivolous claims. *See, e.g., State ex rel. Kreps v. Christiansen* (2000), 88 Ohio St.3d 313, 318 (per curiam) (imposing sanctions under S.Ct.Prac.R. XIV(5) because appellant’s claims were “not reasonably well grounded in fact or warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law”).

A subjective test, by contrast, would render “independent” appellate review an empty formality. If immunity turned solely on the plaintiff’s *motives*, any jury determination of “bad” motive would be effectively insulated from review: There will always be *some* evidence that a litigant intended to “harm” his opponent through the suit—as one “may presume that every litigant intends harm to his adversary,” *Prof'l Real Estate Investors*, 508 U.S. at 69 (Stevens, J., concurring in the judgment)—and so appellate courts will be hard-pressed to reject a jury’s unverifiable inference about a party’s motives. Such a rule would hardly “preserve the precious liberties established and ordained by the Constitution.” *Bose Corp.*, 466 U.S. at 511.

B. The U.S. Supreme Court Has Adopted the “Objectively Baseless” Standard, and Many State Courts Have Applied It.

Given that the “objectively baseless” test is the only one that comports with core First Amendment values, it is unsurprising that the U.S. Supreme Court has adopted that very standard. The Court has limited liability for petitioning activity to only those petitions that are “shams.” And, in the context of litigation, “sham” litigation has been defined as litigation that is “objectively baseless.” Subjective purpose is never enough, standing alone, to vitiate the immunity that the First Amendment confers. Nor does a plaintiff lose his immunity simply because a lawsuit ultimately fails on the merits.

The origins of the “sham” petition exception are found in *Noerr*. While announcing that the antitrust statutes could not be read to impose liability on a company for advocating laws that would harm its competitors (i.e., for petitioning activity), the Court added a caveat: “There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor” 365 U.S. at 144. Importantly, however, the Court rejected the suggestion that the railroads’ campaign—admittedly designed “to hurt the truckers in every way possible,” *id.* at 142—fit into that category. It was “inevitable,” the Court said, that “those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury” to competitors. *Id.* at 143. But malign intentions, on their own, were inadequate to justify classifying the campaign as a “sham.” *Id.* at 144.

When *Noerr* immunity was extended to litigation, the “sham” exception followed. Thus, although parties have a right to file suit, they do not have a right to “abuse” the judicial process by filing “a pattern of baseless, repetitive claims.” *Cal. Motor Transp.*, 404 U.S. at 513. “Just as false statements are not immunized by the First Amendment right to freedom of speech, *baseless*

litigation is not immunized by the First Amendment right to petition.” *Bill Johnson’s Restaurants*, 461 U.S. at 743 (emphasis added). Logically, “since sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition.” *Id.* (quoting Thomas A. Balmer, *Sham Litigation and the Antitrust Laws* (1980), 29 *Buff. L. Rev.* 39, 60).

The Court clarified the scope of the “sham” exception in the litigation context in *Professional Real Estate Investors*. The question there was whether litigation is sham just “because a subjective expectation of success does not motivate” it. 508 U.S. at 57. In other words, can a person be punished for pursuing litigation with ill-will or a malign motive, even if the litigation has an objective basis? The Court said no: Litigation is protected by the First Amendment so long as it bears “objective reasonableness.” *Id.* The “sham” exception “contains an indispensable objective component.” *Id.* at 58. As such, “evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham,” and an “objectively reasonable effort to litigate cannot be sham regardless of subjective intent.” *Id.* at 57, 59.

Most recently, in *BE&K Construction*, the Court again reiterated the importance of the “objectively baseless” standard. The case, like those described above, raised “the same underlying issue of when litigation may be found to violate [the] law.” 536 U.S. at 526. The Court first took aim at the suggestion that litigation could be penalized if it failed on the merits, stressing that “the genuineness of a grievance does not turn on whether it succeeds.” *Id.* at 532. To the contrary, “even unsuccessful but reasonably based suits advance some First Amendment interests.” *Id.* Next, the Court rejected the argument that the presence of “antiunion animus” allowed for the imposition of liability: “Disputes between adverse parties may generate such ill will that recourse to the courts becomes the only legal and practical means to resolve the

situation. But that does not mean such disputes are not genuine.” *Id.* at 534. Therefore, the Court refused to permit the NLRB to penalize an employer for bringing a reasonable but unsuccessful suit against a union, notwithstanding the employer’s animus. *Id.* at 536.

In sum, the Supreme Court—motivated by fundamental principles of First Amendment jurisprudence—has determined that litigants who file objectively legitimate, *i.e.*, non-frivolous, lawsuits are immunized by the Constitution and therefore cannot be penalized as a result.

Many state courts, conforming to this binding precedent, have likewise refused to impose liability for the act of filing a lawsuit so long as the lawsuit has an objectively reasonable basis. For example, in *Titan America, LLC v. Riverton Investment Corp.* (Va. 2002), 569 S.E.2d 57, the court shielded litigation from tort liability because the underlying suit was not “objectively baseless.” *Id.* at 62-63. Likewise, in *Karousos v. Pardee* (R.I. 2010), 992 A.2d 263, the court explained that litigation “constitutes a sham,” and therefore can be punished as an abuse of process, “only if it is both objectively and subjectively baseless.” *Id.* at 269. In *Wolfinger v. Cheche* (Ariz.Ct.App. 2003), 80 P.3d 783, the court agreed that it would be “unconstitutional” to impose liability for wrongful institution of civil process if the underlying claim had not been objectively baseless. *Id.* at 788; *see also, e.g., Tichinin v. City of Morgan Hill* (Cal.Ct.App. 2009), 99 Cal. Rptr.3d 661, 679 (agreeing that “litigation must be objectively baseless,” in order to qualify as an unprotected “sham”); *Sahli v. Bull HN Info. Sys., Inc.* (Mass. 2002), 774 N.E.2d 1085, 1092-93 (refusing to treat lawsuit as unlawfully retaliatory because it had “legitimate basis in law” and “legitimate basis in fact”); *POME*, 677 P.2d at 1369 (allowing liability only where “the defendant’s administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion”).

Indeed, this Court has *itself* observed this rule. In *Greer-Burger*, this Court noted that the First Amendment “does not protect ‘sham’ litigation,” which this Court defined (quoting the U.S. Supreme Court) as “a ‘lawsuit that is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.’” 2007-Ohio-6442, at ¶11 (quoting *Prof'l Real Estate Investors*, 508 U.S.at 60). But, “[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized.” *Id.* (quoting *Prof'l Real Estate Investors*, 508 U.S. at 60). Thus, a litigant “must be afforded an opportunity to show that there is an objective basis for his lawsuit” before being penalized for pursuing it. *Id.* at 327. Any other rule “would undermine the right to petition.” *Id.* And, in support of this proposition, the court cited the First Amendment cases discussed above, including *Noerr*, *Professional Real Estate Investors*, and *BE&K Construction*. *See id.* at 326-27. In light of this precedent, there can be no reasonable dispute that claims based on litigation activity must satisfy the “objectively baseless” test.

C. The Same Standards Necessarily Apply To Immunize the Discussion of “Objectively Reasonable” Litigation.

As explained in Part I.B, *supra*, the First Amendment also embraces the right to speak publicly about the allegations of a lawsuit. The significance of a litigant’s ability to describe judicial proceedings arguably justifies an absolute immunity for such statements. *See Morrison v. Gule* (2001), 142 Ohio App. 3d 244. At the very least, however, the same First Amendment principles that limit liability for malicious litigation likewise limit liability for defamation to situations in which the underlying litigation is objectively baseless. If, as shown above, there is a constitutional right to file a lawsuit, there can be no legitimate reason to prohibit the out-of-court repetition of its allegations. Indeed, the U.S. Supreme Court has held that, if allegations are “contained in official court records open to public inspection,” one cannot be “sanctioned for

publishing” them. *Cox Broad. Corp. v. Cohn* (1975), 420 U.S. 469, 495, 496. Accordingly, protection for speech accurately describing a lawsuit is at least as broad as protection for the lawsuit itself. If the filing of the lawsuit is unprotected as “objectively baseless,” *Prof'l Real Estate Investors*, 508 U.S. at 60, then liability could equally attach to statements that repeat the suit’s allegations. But, by the same token, if the plaintiff is immune from liability, then the First Amendment equally prohibits penalizing the plaintiff for remarks that summarize the suit’s basis.

While the U.S. Supreme Court has not confronted this precise fact pattern, its case law and the core principles behind it demand this result. Just as litigation cannot be proved “true” or “false” as an objective, *ex ante* matter, so too statements repeating the thrust of the litigation cannot be readily classified in such a fashion. The statement “I have a right to obtain X relief from Y” is not a pure assertion of fact, but a complex combination of legal prediction and factual belief. In order to impose a sufficiently clear, objective, protective, reviewable line between permissible and impermissible descriptions of legal actions, the only standard is—just as for the lawsuits themselves, and for the same reasons—an “objectively baseless” test. Part III.A, *supra*.

Any narrower protection for litigation-related speech would leave litigants at sea, permitted to file an “objectively reasonable” suit but afraid to explain to the public what it is about. The U.S. Supreme Court has made clear that, because of the need to avoid chilling speech, even purely factual statements about purely private matters cannot support liability unless they are both false *and* published negligently, i.e., without an *objectively reasonable basis*. See *Gertz*, 418 U.S. at 347-48; *BE&K Constr.*, 536 U.S. at 534 (noting that it is “problematic to regulate [even] *demonstrably false* expression based on the presence of ill will”). In the context of statements about litigation, the equivalent of this bare constitutional minimum is that liability cannot attach unless the lawsuit was filed without an *objectively reasonable basis*.

Doctrinally, courts often reach this same conclusion through application of the more general rules that apply to defamation claims (which are usually premised on speech that is *not* litigation-related). More specifically, courts apply a “qualified privilege” to speech concerning litigation, and then require a showing of “actual malice” to overcome the privilege. *See, e.g., Jacobs v. Frank* (1991), 60 Ohio St.3d 111, 114-15. “Actual malice” means that the defendant spoke while “know[ing] that the statements are false or acting with reckless disregard as to their truth or falsity.” *Id.* at 116. And, as explained, statements summarizing litigation positions are not “true” or “false” in the same way as ordinary factual assertions, thus necessitating instead the use of an “objectively baseless” test. *See generally* Brief of Appellant Am. Chem. Soc’y at 40-41. The analysis presented in this brief reaches the same result but via an analytically simpler path, proceeding directly from the First Amendment rather than framing the analysis in the terms of the common law of defamation.

IV. THE DECISION OF THE COURT BELOW DISREGARDS THESE PRINCIPLES AND UNDERMINES THE POLICIES THEY PROTECT.

From the start, the analysis of the court below essentially ignored the First Amendment and its implications for this case. As a result, the court adopted a rule that is at odds with the governing precedents and their animating principles. The harmful consequences of its decision, for the law, and for Ohio’s business community in particular, are substantial.

A. The Court Ignored the Role of the First Amendment.

At the outset, the Court of Appeals committed serious errors of law in refusing to conform its analysis to the First Amendment, which, as explained above, has significant implications for any case that threatens to impose liability upon protected conduct like litigation.

1. ***The court failed to appreciate that the First Amendment sets the permissible parameters of state tort law.***

Remarkably, the Court of Appeals began its analysis by *acknowledging* the U.S. Supreme Court's First Amendment case law. Quoting *Professional Real Estate Investors*, the court observed that "the First Amendment protects the right to petition or file lawsuits . . . unless the activity is 'objectively baseless.'" 2010-Ohio-2725, at ¶29. Yet, in the very same paragraph, the court dismissed that authority, purportedly because "Ohio courts considering comparable malicious litigation claims have not applied the 'objectively baseless' standard." *Id.*

This reasoning betrays a fundamental misunderstanding of the interaction between the First Amendment and state tort law. While state law governs the elements of its causes of action, those causes of action *cannot* be invoked in ways that violate the First Amendment. The lower court's contrary analysis could equally have been applied to the defamation cause of action in *New York Times*, or to the intentional infliction of emotional distress claim in *Hustler Magazine*, for example, but the Court in each case (and many others, including those cited in Part I.A, *supra*) held that state law could not be used to penalize the exercise of First Amendment freedoms. The same is true here. The Court of Appeals went off the rails, right at the start, by dismissing out-of-hand the U.S. Constitution's relevance to the questions before it.

2. ***The court failed to appreciate the need to avoid chilling the exercise of constitutional rights.***

The Court of Appeals ultimately decided that liability could be imposed if ACS had acted in "bad faith." It reasoned that, compared to the "objectively baseless standard" established by the U.S. Supreme Court, a subjective bad-faith test would do a better job of "reveal[ing] the malicious character" of litigation than the "bare requirement" that the litigation be objectively baseless. *Id.* ¶31. In other words, the court concluded that its proposed test would best serve the goal of capturing all of the bad-faith malicious conduct in which parties sometimes engage.

In light of the First Amendment interests at stake, however, the court's reasoning was exactly backward. First Amendment case law requires that legislatures enact laws, and that courts interpret them, with an eye toward the *protected* conduct that is at risk of being chilled, not the *unprotected* conduct that might otherwise go unpunished. That is, legal boundaries must be drawn to avoid discouraging protected conduct, even if certain unprotected conduct must as a result remain beyond the law's reach. This is the lesson of the U.S. Supreme Court's repeated admonitions about First Amendment's needed "breathing space" and "elbow room." *Button*, 371 U.S. 433; *Rosenbloom*, 403 U.S. at 52. By insisting on adopting a test that would reach all "malicious" behavior, without regard to the legitimate First Amendment activity that would also be deterred as a result of that test, the Court of Appeals ignored these warnings. *Cf. BE&K Constr.*, 536 U.S. at 534 (admitting that Court's defamation jurisprudence, reflecting First Amendment principles, "may indirectly shield much speech concealing ill motives").

Moreover, in analyzing whether ACS did engage in "bad faith" conduct by filings its lawsuit, the Court of Appeals did not remotely conduct the searching, independent review of the record that the U.S. Supreme Court requires. The court acknowledged that the jury had been presented with "conflicting evidence about the timeline and circumstances of ACS's approach to dealing with Leadscope's potentially competing product." 2010-Ohio-2725, at ¶32. Then, after briefly recounting some of this "conflicting evidence"—none of which stands out as beyond the norm of ordinary business litigation—the court essentially threw up its hands: "The jury, as trier of fact, was entitled to draw permissible inferences from the chronology, course, and scope of litigation ACS undertook and to conclude ACS's civil action constituted malicious litigation undertaken in bad faith" *Id.* ¶38. Then the court moved on to the next issue.

This is exactly the sort of abdication to jury findings that the U.S. Supreme Court has held incompatible with the First Amendment. Courts must “examine for [themselves] the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment . . . protect.” *Pennekamp*, 328 U.S. at 335. Simply deferring to a jury finding on a subjective and open-ended question like “bad faith” creates the “danger that decisions by triers of fact may inhibit the expression of protected ideas.” *Bose Corp.*, 466 U.S. at 505. In this respect, too, the court below failed to abide by the important First Amendment principles established by the U.S. Supreme Court.

B. The Court Imposed Liability for Filing and Discussing a Lawsuit That Was Protected by the First Amendment.

Because it disregarded the proper role of the First Amendment in its analysis, the Court of Appeals reached a result that is directly contrary to governing precedent. The court determined that even if ACS’s lawsuit was objectively reasonable, the jury could permissibly have imposed liability on ACS. 2010-Ohio-2725, at ¶31. The court also upheld a defamation judgment against ACS, premised upon two statements in which ACS summarized the substance of its suit. *Id.* ¶61. With respect to both claims, the Court of Appeals relied on the same fact: that the jury could have inferred that ACS filed its lawsuit in order to harm Leadscope. *Id.* ¶31, 61. As explained above, however, the First Amendment immunizes all litigation (and speech repeating the allegations of litigation) that is not “objectively baseless.” Bad faith alone is not sufficient, because First Amendment rights “cannot properly be made to depend upon [one’s] intent” in exercising them. *Noerr*, 365 U.S. at 139.

The standard that the Court of Appeals applied cannot be reconciled with this requirement and instead illustrates the unpredictability, and the imposition on legitimate First Amendment activity, that would be created by a non-objective approach. In light of the decision

below, a litigant with even a strong claim would likely fear liability for malicious litigation if he, for some reason, lost his case; after all, such liability could turn solely on a determination (by the same jury that has just rejected his claim on the merits) that he harbored some sort of ill-will.

Nor would the Court of Appeals' decision provide any basis to trust in the ability of appellate review to save a litigant with strong claims (but bad luck) from civil liability. To the contrary, the court rubber-stamped the jury's finding of malice based on evidence that would likely be present in *any* case. The court cited "the course of events leading up to litigation"—presumably that ACS waited until Leadscope was approaching commercial viability and had rebuffed settlement and arbitration offers before bringing suit, 2010-Ohio-2725, at ¶5-7, 61—along with ACS's two published statements (an internal memo and single-sentence statement to a reporter), *id.* ¶47-48. These activities, the court concluded, "suggest ACS's inferable intent to suppress a competitor by any means necessary." *Id.*

It is difficult to see how a company's waiting to assert legal rights until it is threatened with commercial harm, or pursuing alternative dispute resolution, is either unusual or remotely probative of malice. Indeed, the court's finding of "inferable [bad] intent" could just as easily have been based on the opposite activities—filing a lawsuit immediately and without pursuing alternative methods of resolution. ACS's litigation-related statements are similarly un-extraordinary; it is hardly suggestive of malice that a company would instruct its employees *not* to comment on ongoing litigation and provide a single-sentence summary of the suit to a reporter. If these statements reflect ACS's attempts at no-holds-barred public-relations warfare, one must question the company's creativity.

The Court of Appeals' adoption of the wrong legal standard was, in this case, outcome-determinative. When a court determines that a reasonable jury could find in a plaintiff's favor—

which is what the court does in denying summary judgment to the defendant, *see Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686-87—the necessary implication is that the plaintiff’s claim is not “objectively baseless.” In *Professional Real Estate Investors*, the Court held that a suit was not “sham” litigation even though the lower courts *had* granted summary judgment against it. 508 U.S. at 63-64. *A fortiori*, a suit is not a sham if the court *denies* summary judgment and allows the suit to reach the jury. *See, e.g., Porous Media Corp. v. Pall Corp.* (C.A.8, 1999), 186 F.3d 1077, 1080 (holding that denial of summary judgment establishes “that there was probable cause” for the suit); *Greer-Burger*, 2007-Ohio-6442, at ¶16 (“In determining whether the employer’s action has an objective basis, the [judge] should review the employer’s lawsuit pursuant to the standard for rendering summary judgment. . . . If the employer satisfies this standard, the suit does not fall under the definition of sham litigation.”).

In this case, the defendants never even meaningfully *suggested* that the case was objectively baseless. Only one of the defendants even moved for summary judgment, and the trial court *rejected* that motion, implicitly finding that ACS’s suit was at least objectively reasonable. The trial court likewise *rejected* a request for directed verdict, again finding that there was a sufficient basis for the case to go to the jury. And the jury could not reach a unanimous result, offering yet further proof that ACS’s suit was not objectively baseless. Yet, despite all of that, the court upheld a multi-million dollar judgment against ACS, premised on solely on ACS having filed and accurately discussed that suit. The decision of the Court of Appeals thus contravened the holdings of the U.S. Supreme Court, both in the decisional framework that the Court of Appeals used and in the result that it reached.

C. **The Court's Decision Will Have A Serious, Detrimental Impact on Ohio's Business Community.**

If allowed to stand, the Court of Appeals' decision will burden the First Amendment rights of a wide range of individuals and organizations; but these burdens will be particularly onerous for the business community.

While most individuals are never parties to a lawsuit, many companies cannot avoid going to court as a regular incident of their businesses. Moreover, once engaged in litigation, companies are particularly likely to need to make public statements regarding the lawsuit. Under the federal rules governing electronic discovery, businesses have an obligation to aggressively notify their employees of pending litigation in order to prevent the routine and unintentional destruction of relevant evidence. *See Mosaid Techs., Inc. v. Samsung Elecs. Co.* (D.N.J. 2004), 348 F. Supp. 2d 332, 336. The failure to do so can result in lost evidence, court sanctions, and even criminal charges. *See id.* at 340 (imposing sanctions); *Arthur Andersen LLP v. United States* (2005), 544 U.S. 696, 702 (describing criminal indictment for destruction of documents). Indeed, businesses have been sanctioned precisely because they *failed* to provide all employees with adequate detail regarding the nature of a pending lawsuit. E.g., *In re Prudential Ins. Co. of Am. Sales Practices Litig.* (D.N.J. 1997), 169 F.R.D. 598, 612, 615 (imposing sanctions for company's failure to "initiate a comprehensive document preservation plan and to distribute it to all employees" and "advise its employees of the pending multi-district litigation"). Further, if a business is publicly traded, it must report any known litigation that could have a material effect on its stock prices. 17 C.F.R. § 229.103; *see also United States v. Peterson* (C.A.5, 1996), 101 F.3d 375, 379-81 (securities fraud conviction for failure to disclose ongoing litigation). And companies often have a commercial interest in assuring consumers and the public of their legal positions.

The Court of Appeals' ruling would substantially raise the costs of undertaking these important and legitimate business activities and make them a potential source of civil liability. Under the Court of Appeals' ruling, malicious litigation and defamation counterclaims would become a routine feature of business litigation; after all, why would a defendant pass up the opportunity to convert a successful defense into millions of dollars in damages when all that is required is a finding of "bad intent"? The added costs of defending against such counterclaims, by themselves, would present a substantial deterrent to meritorious business litigation.

In addition to these costs, the uncertain threat of liability imposed by the Court of Appeals' ruling would further chill legitimate litigation. Even if its legal claims appear to be strong, a business can rarely be certain of a victory in litigation; and with a loss would come the risk of a multi-million dollar damages award based solely on a jury's inference that the business's motives in bringing suit were less than pure. Moreover, the lawsuit would carry with it the further risk that, if legal requirements or business judgment led the company to disclose the suit's substance, it could be liable for additional damages for defamation. And, under the Court of Appeals' ruling, any jury finding (based on subjective inferences about the company's purposes) would be opaque to appellate review.

For good reason, settled First Amendment jurisprudence rejects this regime, and the court below erred in imposing it here.

CONCLUSION

For the foregoing reasons, the *amici* respectfully request that this Court reverse the judgment of the court below.

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CERTIFICATE OF SERVICE

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