

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE AMERICAN CHEMICAL SOCIETY,

Appellant,

v.

LEADSCOPE, INC. et al.,

Appellees.

Case No.: 10-1335

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

Court of Appeals
Case No. 08AP-1026

BRIEF *AMICUS CURIAE* OF THE OHIO STATE BAR ASSOCIATION
IN SUPPORT OF APPELLANT THE AMERICAN CHEMICAL SOCIETY

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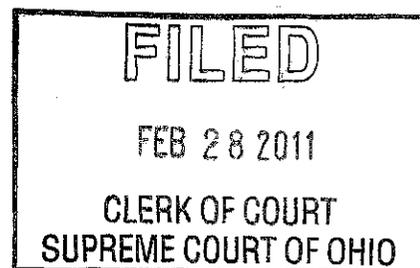


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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

As an unincorporated association of more than 25,000 members, including lawyers, judges, law students, and paralegals, the Ohio State Bar Association (“OSBA”) represents the legal profession in Ohio. The OSBA has members engaged in sole practice, government practice, practice in Ohio’s largest law firms, and practice within the numerous companies that do business in Ohio and nationwide. As stated in the OSBA’s Constitution, the OSBA’s purpose is partly “to promote improvement of the law, our legal system, and the administration of justice.” OSBA members are on both sides of the countless cases pending in state and federal court in Ohio, and it has no interest in the particular dispute between the American Chemical Society (“ACS”) and Leadscope before the Court.

This case presents fundamental questions about how to balance the constitutional freedoms to speak and to petition the government for a redress of grievances against a private corporation and its founders’ alleged reputational harms. Protected by the federal and Ohio constitutions, the freedom of speech is foundational of all other rights our citizens enjoy. As the late Justice Wright explained, “free speech is the brightest star in our constitutional constellation.” *Vail v. Plain Dealer Publ’g Co.* (1995), 72 Ohio St.3d 279, 284, 1995-Ohio-187, 649 N.E.2d 182 (Wright, J., concurring). No less valuable is the right to petition, which is “cut from the same cloth as the other guarantees of [the First] Amendment,” *McDonald v. Smith* (1985), 472 U.S. 479, 482, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (internal quotation marks omitted), and is “one of the most precious of the liberties safeguarded by the Bill of Rights,” *BE&K Construction Co. v. NLRB* (2002), 536 U.S. 516, 524, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (internal quotation marks omitted). On the other hand, there is a “legitimate state interest [in] compensat[ing] . . . individuals for the harm inflicted on them by defamatory falsehood.” *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 341, 94 S. Ct. 2997, 41 L. Ed. 2d 789.

In OSBA's view, the decision below strikes this balance so far against the rights to speak and to petition that it constitutes a substantial threat to the legal system and to the attorneys who are so crucial in its administration. A private individual has an interest in curbing comments that harm his or her reputation. But there is no substantial governmental interest in suppressing or penalizing comments that merely repeat or summarize public information about a legitimate, public dispute pending in the courts. Indeed, this Court and the U.S. Supreme Court have long recognized the public's rights to speak about and to access proceedings in pending criminal and civil cases, *State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas* (2010), 125 Ohio St.3d 149, 154, 2010-Ohio-1533, 926 N.E.2d 634; *Press Enterprise Co. v. Superior Court* (1986), 478 U.S. 1, 10-12 ("*Press Enterprise II*"), showing that litigants must expect that their disputes can be subject to public scrutiny. Indeed, the only recognized interests in curbing speech about an already-public aspect of a judicial proceeding is protecting the proceeding itself from a "clear and present danger" or "substantial likelihood of material prejudice," depending on whether the speaker is a member of the general public or an attorney in the case. *See Gentile v. State Bar of Nevada* (1990), 501 U.S. 1030, 1070-71, 111 S. Ct. 2720, 115 L. Ed. 2d 888. Neither of those interests is at stake here, as the statements at issue were brief and posed no danger of prejudicing the case.

The decision below is a chilling turnabout from these established principles. If the decision below is affirmed, a clear body of existing law respecting attorney speech and the right to petition will be supplanted by an inefficient, unpredictable, and unconstitutional regime of astronomical damages awards for necessary and innocuous statements about pending matters. A substantial amount of valuable, protected speech will be lost, parties and counsel will be subjected to huge potential tit-for-tat liability, countless suits will be prolonged by years, and

citizens will avoid bringing meritorious disputes to the courts for fear of reprisal. In short, affirming the judgment below would deal a major blow to the legal profession in Ohio. This Court must reverse.

STATEMENT OF FACTS

This case concerns two statements made by ACS shortly after it brought suit against Leadscope and its founders for misappropriation of trade secrets and other related claims. Following a trial before the Franklin County Court of Common Pleas, a jury found that those two statements were defamatory. It awarded \$13.75 million in compensatory damages and \$1.25 million in punitive damages.¹ The Court of Appeals for the Tenth District affirmed that award. *Am. Chem. Soc. v. Leadscope* (2010), 2010-Ohio-2725, ¶ 64.

The two statements at issue described the substance of ACS's legal claims against Leadscope. The first statement was an internal memorandum sent by ACS's in-house counsel to all ACS staff on the same day the complaint in that case was filed. *See* Defendants' Trial Ex. 42. That memorandum, in its entirety, stated:

Re: Communication re: Legal Matter

The nonprofit American Chemical Society has filed a legal complaint against Leadscope, Inc., and its founders, who sought and received a patent for technology indistinguishable from a project on which they worked while employees of the Society's Chemical Abstracts Service in the mid-1990s.

The Society is a leader in publishing scientific journals and databases that are indispensable to chemists around the globe, and is acting to protect its intellectual property and proprietary information.

Staff members are not authorized to comment on this matter. It is important to refrain from communicating and/or commenting about this subject to any individual while the legal process is being pursued. Please refer all inquiries to Eric Shively (Ext. 3847) or Janice Mears (Ext. 3667).

¹ ACS also has appealed other aspects of the decision below. The Ohio State Bar Association's *amicus curiae* brief, however, is limited to the propriety of the defamation award.

Id. The assertion that Leadscope's patent was "for technology indistinguishable from" work Leadscope's founders had done for ACS was repeated in substance in ACS's complaint. *See* Complaint, ¶¶ 36-38. There is no evidence that ACS circulated the memorandum to the public.

The second statement appeared in a May 10, 2002 article in *Business First*, a Columbus-based newspaper. *See* Defendants' Trial Ex. 161. The passage of the article alleged to form a basis for liability consisted of a single sentence quoting ACS's outside counsel: "Our motivation in filing suit is to acquire back the protected information that they took from us," said Gerald Ferguson, a partner with Vorys Sater Seymour and Pease LLP in Columbus, which represents the American Chemical Society." *Id.*

The remainder of the article provided a detailed description of both the allegations in ACS's complaint and Leadscope's response to them. Regarding the complaint, the article stated: "The American Chemical Society is suing LeadScope Inc. and its founders, alleging they used proprietary information to form and operate their business"; "The suit . . . also contends LeadScope's three founders, all of whom worked at the Chemical Society's main division, Chemical Abstracts Service in Columbus, are violating former employment agreements with the company"; and "Accusations in the complaint include breach of employment agreement, misappropriation of trade secrets, common law unfair competition, breach of fiduciary duty and the duty of loyalty, conversion and implied license under the shop right doctrine." *Id.* Regarding Leadscope's view, the article quoted both David Young, Leadscope's counsel, and Michael Conley, Leadscope's CFO, who claimed: "The timing of this lawsuit speaks volumes as to its invalidity," "one of the company's investors walked away from the financing deal because of the complaint," "LeadScope thinks the complaint was delivered to the company before it was

filed to shatter the financing deal,” and “[ACS] knew legally that once we received that complaint we had to notify the venture capitalists.” *Id.*

As discussed in detail below, in the OSBA’s view, statements like these are routine incidents of corporate litigation that cannot form the basis for defamation liability.

ARGUMENT

Raising free-speech and freedom-to-petition concerns of the highest order, the courts below imposed the largest defamation award in Ohio history – \$13.75 million in compensatory damages, and \$1.25 million in punitive damages – solely on the basis of two utterly innocuous statements made by ACS counsel that did not go beyond the existing public record in a legitimate civil dispute. Far from being worthy of censure, such statements are fully protected by the First Amendment and analogous provisions of the Ohio Constitution and cannot be the basis for defamation liability. Principles of fair notice and the likelihood of arbitrary enforcement likewise require reversing the unprecedented eight-figure damages judgment entered below. This Court should hold that statements like those here, which merely repeated the already public allegations made in a genuine lawsuit, are absolutely privileged from defamation liability.

PROPOSITION OF LAW 1: To Safeguard the Fundamental Rights to Petition the Courts and Speak About Pending Judicial Proceedings, Statements that Merely Repeat Information Publicly Filed in a Legitimate Lawsuit Must Be Absolutely Privileged from Defamation Liability.

The judgment below threatens to do serious harm to the fundamental rights to petition the courts and to comment on public aspects of pending civil litigation. Although the law recognizes a private individual’s interest in protecting his or her good name, it also guarantees robust protections to those who bring legitimate disputes before the nation’s courts. Once a legitimate dispute is pending in the courts, numerous aspects of the dispute necessarily become public,

including the complaint, and the dispute becomes subject to the public's rights to speak about and to gain access to judicial proceedings. The two innocuous statements did not go beyond the public record in this case and they created *no* danger to the proceedings below. They are fully protected by the First Amendment rights to petition and to speak about pending cases, and they cannot serve as the basis for defamation liability.

Proposition of Law 1(A): The Public Has Fundamental Rights to Bring Legitimate Disputes to the Courts and to Speak about Those Disputes Once They Are Publicly Filed.

“The importance of the right to petition has long been recognized.” *A.D. Bedell Wholesale Co. v. Philip Morris Inc.* (C.A.3, 2001), 263 F.3d 239, 252. “As early as 1215, the Magna Carta granted barons the right to petition the King of England for redress.” *Id.* (citing Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 17 (1993) (detailing history of the right to petition from 1215 through colonial times, the constitutional convention, and today)). Thus, the right to petition is “one of ‘the most precious of the liberties safeguarded by the Bill of Rights.’” *BE&K Constr. Co.*, 536 U.S. at 524. “The very idea of government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.” *United States v. Cruikshank* (1875), 92 U.S. 542, 552.

The right to petition robustly protects Americans' ability to bring legitimate disputes before the courts. In particular, the right immunizes lawsuits unless they are “shams,” which are suits that are “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *BE&K Constr. Co.*, 536 U.S. at 526. This immunity is purposely expansive, as it is designed to protect petition activity from even the threat of liability. *See A.D. Bedell*, 263 F.3d at 250 (noting that the doctrine is “[r]ooted in the First Amendment and fears

about the threat of liability chilling political speech”). The U.S. Supreme Court thus has explained that a rule regulating the right to petition – as with other First Amendment rights – must afford “breathing space” to the right’s exercise. *BE&K Constr Co.*, 536 U.S. at 531 (reversing imposition of liability for filing of retaliatory suit, when suit was not objectively baseless). And as this Court has explained, “the ability to seek redress in the courts is a fundamental right . . . and restrictions on such a right require ‘close scrutiny’ by the judiciary.” *Greer-Burger v. Temesi* (2007), 116 Ohio St.3d 324, 326, 2007-Ohio-6442, 879 N.E.2d 174 (quoting *Krause v. State* (1972), 31 Ohio St.2d 132, 150 (Brown, J., dissenting)).

Paired with the right to file a legitimate civil suit is the public’s right to access judicial proceedings. In particular, the First Amendment grants a right of public access to judicial proceedings that have historically been open to the public and in which public access plays a significantly positive role. *See Press Enterprise II*, 478 U.S. at 10-12. That right undoubtedly extends to run-of-the-mill civil proceedings like that at issue here. *See Cincinnati Gas & Elec. Co. v. Gen. Elec. Co.* (C.A.6, 1988), 854 F.2d 900, 906; *Lugosch v. Pyramid Co. of Onondaga* (C.A.2, 2006), 435 F.3d 110, 119; *cf. Richmond Newspapers, Inc. v. Virginia* (1980), 448 U.S. 555, 590, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (“[T]here is little record, if any, of secret proceedings, criminal or civil, having occurred at any time in known English history.”). The Ohio Constitution affords identical protection, providing that “[a]ll courts *shall be open*,” Ohio Const. art. I, § 16 (emphasis added), a provision that provides protection coextensive with the First Amendment. *See State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas* (2010), 125 Ohio St.3d 149, 154, 2010-Ohio-1533, 926 N.E.2d 634; *State ex rel. Plain Dealer Publ’g Co. v. Geauga County Court of Common Pleas* (2000), 90 Ohio St.3d 79, 82, 2000-Ohio-35, 734 N.E.2d 1214.

The rights to petition and of access nourish a vigorous public debate about the judicial process that is the lifeblood of our democracy. American courts, including this Court, long have shown “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 270; *City of Seven Hills v. Aryan Nations* (1996), 76 Ohio St.3d 304, 306, 1996-Ohio-394, 667 N.E.2d 942; *Leonard v. Robinson* (C.A.6, 2007), 477 F.3d 347, 357. That fundamental protection is grounded in the federal Constitution, as well as in that of this State: “[e]very citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.” Ohio Const. art. I, § 11. “It is a prized American privilege to speak one’s mind, although not always with perfect good taste, on *all* public institutions,” including the judiciary. *Sullivan*, 376 U.S. at 269 (emphasis added).

The First Amendment thus fully protects the public’s right to relay the content of, and to comment on, publicly accessible judicial materials. Most directly on point is *Cox Broadcasting Corp. v. Cohn* (1975), 420 U.S. 469, 491, 95 S. Ct. 1029, 43 L. Ed. 2d 328. In that case, the Court held that the First Amendment barred a state from “impos[ing] sanctions on the accurate publication of the name of a rape victim obtained from public records – more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.” As the Court explained, “[s]tates may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.” *Accord Smith v. Daily Mail Publishing Co.* (1979), 443 U.S. 97, 103-04, 99

S. Ct. 2667, 61 L. Ed. 2d 399.² The Court cogently expressed the principle in *Nebraska Press Association v. Stuart* (1976), 427 U.S. 539, 559, 96 S. Ct. 2791, 49 L. Ed. 2d 683: “Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment.” See also *Shifflet v. Thomson Newspapers (Ohio), Inc.* (1982), 69 Ohio St.2d 179, 184, 23 O.O.3d 205, 431 N.E.2d 1014 (recognizing federal and state-law privilege for such communications)

The three freedoms described above – to bring a non-sham lawsuit, to access judicial proceedings, and to convey the substance of judicial proceedings – cultivate a vigorous and informed debate about the judicial process and the conduct of government. No less is required in a government of the people, by the people, and for the people. As the Sixth Circuit has explained, “[t]he courts are public institutions funded with public revenues for the purpose of resolving public disputes, and the right of publicity concerning their operations goes to the heart of their function under our system of civil liberty.” *United States v. Ford* (C.A.6, 1987), 830 F.2d 596, 599. Thus, “[t]rial judges, the government, the lawyers and the public must tolerate robust and at times acrimonious or even silly public debate about litigation.” *Id.*

Such robust debate strengthens the public’s faith in the judicial system. Indeed, public commentary about judicial matters “has always been regarded as the handmaiden of effective judicial administration Its function in this regard is documented by an impressive record of service over several centuries.” *Nebraska Press Ass’n*, 427 U.S. at 559-60. “The value of

² The Court has repeatedly reaffirmed and expanded these principles beyond the judicial context. See *Fla. Star v. B.J.F.* (1989), 491 U.S. 524, 532, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (extending *Cox* to protecting publication of rape victim’s name found in police report, and noting that an important fact in *Cox* was that “[t]he name of the rape victim in that case was obtained from courthouse records that were open to public inspection”); *Bartnicki v. Vopper* (2001), 532 U.S. 514, 518, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (First Amendment protects publication even of wiretaps concerning public issue, even though wiretaps had been unlawfully intercepted).

openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed.” *Press-Enterprise Co. v. Superior Court* (1984), 464 U.S. 501, 508 (“*Press Enterprise I*”). This Court has expressed a similar esteem, stating that “there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves,” that “[t]he public has a . . . legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern,” and that “the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.” Ohio R. Prof. Cond. 3.6, Comment [1].

Recognizing that such speech is critically important to the public interest and to the right to petition, courts have required any restriction on speech about pending judicial proceedings to meet an extremely high burden before being upheld. The public’s right to convey the substance of public judicial proceedings can be limited only if the speech creates a “clear and present danger to the impartiality and good order of the courts,” *Pennekamp v. Florida* (1946), 328 U.S. 331, 336, 66 S. Ct. 1029, 90 L. Ed. 1295, or a “clear and present danger of the obstruction of justice,” *Sullivan*, 376 U.S. at 273. Ohio courts have imposed a similar standard, requiring courts to attempt to implement other ameliorative measures (such as a change of venue) before countenancing *any* restriction on speech. See *State ex rel. Dayton Newspapers, Inc. v. Phillips* (1976), 46 Ohio St. 2d 457, 468-69, 75 O.O.2d 511, 351 N.E.2d 127 (granting writ of prohibition); *State ex rel. Dispatch Printing Co. v. Golden* (10th Dist. 1982), 2 Ohio App. 3d 370, 373, 12 OBR 427, 442 N.E.2d 121; cf. *Presley v. Georgia* (2010), 130 S. Ct. 721, 725, 75 L. Ed. 2d 675 (“Trial courts are obligated to take *every* reasonable measure to accommodate public attendance at criminal trials.”) (emphasis added).

Proposition of Law 1(B): Attorneys In a Pending Proceeding Have Similar Rights, As Long As Their Comments Do Not Create a Substantial Likelihood of Material Prejudice to the Proceeding.

An attorney representing a party in a pending case does not “surrender [his] First Amendment rights at the court-house door.” *Seattle Times Co. v. Rhinehart* (1984), 467 U.S. 20, 32 n.18, 104 S. Ct. 2199, 81 L. Ed. 2d 17. Yet an attorney has a special role as an officer of the Court, and courts have held that a lower constitutional standard applies to an attorney’s speech about a case in which the attorney serves as counsel. The applicable standard still provides substantial constitutional protection for speech, subject only to restrictions necessary to protect the proceeding’s fairness.³

The U.S. Supreme Court set forth the controlling standard in *Gentile*, 501 U.S. 1030. There, an attorney made statements in the press before a criminal trial accusing the police of drug abuse, describing prosecution witnesses as money launderers and drug dealers, and claiming the police themselves committed the offense. *Id.* at 1064. The Nevada Bar disciplined the attorney, finding that he “knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client’s case.” *Id.* at 1065.

The U.S. Supreme Court recognized the weighty interests on both sides of the issue. “The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding.” *Id.* at 1070 (opinion of Rehnquist, C.J.). “At the same time, however, the criminal justice system exists in a larger context of a government ultimately of the people, who wish to be

³ Information acquired by counsel through the discovery process is subject to a higher degree of regulation as necessary to facilitate efficient resolution of disputes. *See Seattle Times*, 467 U.S. at 34-35. That rule is irrelevant to the statements for which liability was imposed in this case, which were made at the outset of the case and were based only on allegations in the publicly available complaint and on information counsel acquired lawfully from Appellant.

informed about happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system.” *Id.*

Although reversing the disciplinary order on vagueness grounds, the Court held that the “substantial likelihood of material prejudice” standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State’s interest in fair trials” because “it imposes only narrow and necessary limitations on lawyers’ speech.” *Id.* at 1075. The Court explained that “the limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found.” *Id.* The Court further emphasized that the “restraint on speech is narrowly tailored” to limiting those dangers because “it applies *only* to speech that is substantially likely to have a materially prejudicial effect.” *Id.* at 1076.

This Court and other courts nationwide have uniformly coalesced around the standard approved in *Gentile*. When the Court decided *Gentile*, the ABA Model Rules of Professional Conduct had employed that standard and thirty-one states already had adopted it. *Id.* at 1068 & n.1. Since *Gentile*, the eleven states – including Ohio – that had followed less speech-protective standards decided to enhance attorney-speech protections by conforming their rules to the *Gentile* rule. *See* Ohio R. Prof. Cond. 3.6(a); Alaska R. Prof. Cond. 3.6(a); Colo. R. Prof. Cond. 3.6(a); Ga. R. Prof. Cond. 3.6(a); Haw. R. Prof. Cond. 3.6(a); Iowa Ct. R. 32:3.6(a); Mass. R. Prof. Cond. 3.6(a); Neb. Ct. R. Prof. Cond. § 3-503.6(a); Tenn. R. Prof. Cond. 3.6(a); Vt. R. Prof. Cond. 3.6(a); North Car. R. Prof. Cond. 3.6(a). *Every state* now has adopted this rule.

The *Gentile* rule draws the line between protected and unprotected attorney speech about public aspects of pending cases. This Court’s comments on the Ohio Rule are unambiguous on

this score. The Rule is meant to “strike a balance between protecting the right to a fair trial and safeguarding the right of free expression.” Ohio R. Prof. Cond. 3.6(a) Comment [1] (emphasis added); *Office of Disciplinary Counsel v. Gardner* (2003), 99 Ohio St.3d 416, 428-29, 2003-Ohio-4048, 793 N.E.2d 425 (citing *Gentile* and explaining that standard imposes a “narrow restriction” on attorney speech). Numerous cases have adopted employed the standard to determine whether speech is protected. See, e.g., *Iowa Supreme Court Bd. of Prof. Ethics & Conduct v. Visser* (Iowa 2001), 629 N.W.2d 376; *State v. Carruthers* (Tenn. 2000), 35 S.W.3d 516, 563; *Atlanta Journal-Constitution v. Georgia* (Ga. Ct. App. 2004), 596 S.E.2d 694; *Breiner v. Takao* (Haw. 1992), 835 P.2d 637, 645. Indeed, the prior Ohio rule – which the Supreme Court cited as less-protective of speech than the Nevada standard it upheld, *Gentile*, 501 U.S. at 1068 & n.2 – was struck down by a federal district court after *Gentile* as reaching a “substantial amount of constitutionally protected conduct” and as having “a chilling effect in that it prohibits attorney speech in civil litigation that is otherwise protected by the First Amendment.” See *Wachsman v. Disciplinary Counsel* (S.D. Ohio Sept. 30, 1991), No. C-2-90-335, 1991 WL 735079, at *11.

This Court and numerous other jurisdictions have adopted “safe harbors” to offer guidance to attorneys that particular types of speech are protected. Those include “the claim, offense, or defense involved and, except when prohibited by law, the identity of the person involved”; “information contained in a public record”; “that an investigation of a matter is in progress”; and “the scheduling or result of any step in litigation.” Ohio R. Prof. Cond. 3.6(b).⁴ As the Rule’s comments explain, such statements “would not ordinarily be considered to present

⁴ The claims, defenses, and identities of the involved parties, as well as “information contained in a public record,” parallel the information the publication of which was held protected by the Supreme Court in *Cox*, 420 U.S. 469, and other cases.

a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of division (a).” *Id.* Comment [4]. Moreover, because of the concern that a lawyer may feel the need to advocate for his client in the press in response to negative publicity, the Court also has stated: “a lawyer may make a statement that a *reasonable* lawyer would believe is required to protect a client from the *substantial* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client.” *Id.* R. 3.6(c). With respect to this “safe harbor,” the Court has said that “[w]hen prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding.” *Id.* Comment [7].

Proposition of Law 1(c): An Absolute Privilege Applies to Routine Statements Repeating Allegations Made in Pending, Non-Sham Cases.

Applying these standards, the innocuous statements – which were based solely on information in the public record – are absolutely privileged and cannot serve as the basis for *any* defamation verdict, let alone a shocking \$15.0 million judgment.⁵ When a non-sham dispute like ACS’s suit against Leadscope is brought before the courts, it necessarily follows that the public has a right to access and to speak about the dispute. *See supra* Section 1(a). That right extends to attorneys and parties in the case. *See supra* Section 1(b). Here, counsel’s comments were based entirely on publicly available materials and posed *no danger* of prejudice to the case.⁶ *Gentile*, 501 U.S. at 1075; *Cox*, 420 U.S. at 491; *Smith*, 443 U.S. at 103-04; *Stuart*, 427 U.S. at

⁵ Liability in this case was imposed on ACS itself, not on its attorneys. Thus, whether the “clear and present danger” standard (applicable to the general public) or the “substantial likelihood of material prejudice” standard (applicable to attorney representing parties in a case) should apply is an unsettled question.

⁶ In reviewing this issue, this Court “has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’” *Gentile*, 501 U.S. at 1038 (quoting *Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 499).

559; *Shifflet*, 69 Ohio St. 2d at 184. They consequently were absolutely privileged, and the defamation award cannot stand.⁷

1. *Statement by In-House Counsel to Company Personnel*

For a series of reasons, it is plain that the internal memorandum sent by in-house counsel to ACS's staff on the day the underlying lawsuit was filed is integrally connected to ACS's publicly filed complaint, created *no danger* to the underlying proceeding, and therefore is absolutely privileged.

First, this internal memorandum posed *no* risk of prejudice to the adjudicatory proceedings in this case. The statement falls firmly within two protective safe harbors laid out by this Court: it consists of a distillation of "the claim, offense, or defense involved and . . . the identity of the person involved," Ohio R. Prof. Cont. 3.6(b)(1), and contains only "information contained in a public record," *id.* 3.6(b)(2), namely the complaint, which alleged, *inter alia*, misappropriation of trade secrets, unfair competition, conversion, and breach of implied license. In other words, the statement is not actionable because it does nothing more than provide "an accurate summary of the allegations . . . made in [a] lawsuit," *Early v. Toledo Blade* (6th Dist. 1998), 130 Ohio App.3d 302, 329, 720 N.E.2d 107, in a context in which its recipients would have believed that the dispute "ultimately would be [resolved] by a court of law," *Sethi v. WFMJ Television, Inc.* (7th Dist. 1999), 134 Ohio App.3d 796, 808, 732 N.E.2d 451. Moreover, an internal legal memo to one party's employees cannot pose such a risk because none of the memo's recipients could have served on the jury without Appellee's consent. *See* Ohio Rev. Code § 2313.42(E); *Hall v. Banc One Mgmt. Corp.* (2007), 114 Ohio St.3d 484, 490, 2007-Ohio-

⁷ The First Amendment limits liability and damages in defamation actions. *See Sullivan*, 376 U.S. at 277 ("[t]he fear of damage awards under . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."); *BMW of N. Am., Inc. v. Gore* (1996), 517 U.S. 559, 573, 116 S. Ct. 1589, 134 L. Ed. 2d 809 ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

4640, 873 N.E.2d 290. On its face the internal memo *mitigates* any potential prejudice by *forbidding* employees from discussing the case.

Second, the statement is of a type that an organizational litigant *must make* at the outset of a case and therefore falls firmly within this Court's well established absolute privilege for "remarks made during and relevant to judicial proceedings." *Willitzer v. McCloud* (1983), 6 Ohio St.3d 447, 449, 6 OBR 489, 453 N.E.2d 693; *Surace v. Wuliger* (1986), 25 Ohio St.3d 229, 233, 25 OBR 288, 495 N.E.2d 939. All that is required for a statement to qualify for that protection is that it be "(1) made in the regular course of preparing for and conducting a proceeding that is contemplated in good faith and under serious consideration, (2) pertinent to the relief sought, and (3) published only to those directly interested in the proceeding." *Morrison v. Gugle* (10th Dist. 2001), 142 Ohio App.3d 244, 260, 755 N.E.2d 404. The statement above unquestionably qualifies. It was made to facilitate the conduct of major litigation by the company by limiting unauthorized employee comment; it was pertinent to the relief sought, in the sense that it put employees on notice of the suit and prevented them from undermining the company's litigation position; and it was published only to staff.⁸ Attorneys must be able to investigate the facts of the particular case, *Upjohn*, 449 U.S. at 394, which necessarily entails discussing the substance of the suit with employees. Such statements are routine, and the OSBA knows of no other case in the nation in which liability was imposed for such a statement. Indeed,

⁸ The suggestion, embraced by the Court of Appeals, that ACS should have sent the message only to a narrower subset of its employees is unworkable. ACS could not know which staff members would receive media inquiries about the case, and could not have perfect knowledge of which staff members might have information or documents relevant to the case. If ACS had used an underinclusive distribution list, it would have put itself at risk as well. It would demand far too much of counsel for corporate litigants to require them to identify, with mathematical precision, the specific employees who need to know particular information before sending a message to them. Moreover, for the reasons discussed here, the message would be absolutely privileged even if it had been distributed outside the company.

this type of communication is almost certainly privileged legal advice. See *Upjohn Co. v. United States* (1981), 449 U.S. 383, 394, 101 S. Ct. 677, 66 L. Ed. 2d 584; *State ex rel. Leslie v. Ohio Hous. Fin. Agency* (2005), 105 Ohio St.3d 261, 265, 2005-Ohio-1508, 824 N.E.2d 990. “The rights of clients should not be imperiled by subjecting their attorneys to the fear of suits for libel of slander.” *Theiss v. Scherer* (C.A.6, 1968), 396 F.2d 646, 650.

Third, such internal memoranda are necessary for counsel to comply with far-reaching discovery obligations to preserve *all potentially relevant evidence* in their possession, custody, or control. See, e.g., *Loukinas v. Roto-Rooter Servs. Co.* (1st Dist. 2006), 167 Ohio App.3d 559, 569, 2006-Ohio-3172, 855 N.E.2d 1272; *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2004), 229 F.R.D. 422, 432. Complying with these obligations necessarily entails broad-based communications from counsel to all types of employees. And such communications *must* explain the substance of the lawsuit: otherwise, no employee would know what evidence is “potentially relevant.” Indeed, *not* engaging in such communication could subject counsel and client alike to sanctions, including monetary penalties and a dispositive judgment. See *Northpoint Props., Inc. v. Charter One Bank* (8th Dist. 2011), 2011-Ohio-68, at ¶ 61; *Thomas v. Miller* (C.A.6, 2007), 489 F.3d 293, 299 (explaining potential discovery sanctions); *Columbia Pictures, Inc. v. Bunnell* (C.D. Cal. Dec. 13, 2007), No. 06-cv-01093, 2007 U.S. Dist. LEXIS 96360 (awarding terminating sanctions).

In the OSBA’s view, it is absolutely critical for in-house attorneys to be permitted to make these kinds of beneficial statements in commercial litigation to ensure that management retains control of the litigation process, that employees do not comment about the litigation (which could jeopardize the company’s litigation position, subject the company to additional liability, or endanger the judicial process), and that required document preservation measures are

taken. All members of the OSBA have a substantial interest in ensuring that they and their clients are not forced to “navigate between the Scylla of” discovery obligations and “the Charybdis” of a shockingly massive monetary award. *Cf. State ex rel. Finkbeiner v. Lucas County Bd. of Elections* (2009), 122 Ohio St.3d 462, 464, 2009-Ohio-3657, 912 N.E.2d 573.

2. *Statement to Business First*

The statement to *Business First* appeared in an article dated May 10, 2002 – only days after the complaint was filed and *years* before any jury was impaneled. The quoted statement from ACS’s outside counsel – “Our motivation in filing suit is to acquire back the protected information that they took from us,” Defendants’ Trial Ex. 161 – went no further than a summary of the complaint. As with the internal staff memorandum, this comment to *Business First* should be treated as absolutely privileged against potential defamation liability.

First, the statement is protected by the First Amendment and the Ohio constitution. It merely relays a layperson’s summary of information that already was in the public record. Indeed, the article explains ACS’s counsel’s statement by describing the complaint allegations in detail. *Id.* Any reader would have understood that Leadscope’s founders had worked for ACS, that they were accused of using ACS’s proprietary information to start Leadscope, and that ACS had taken legal action as a result. Counsel’s statement added nothing to that understanding, or to the numerous other public allegations in the complaint.

It is undisputed that the statements in the complaint are absolutely privileged and thus not actionable, and it is clear that the same absolute privilege should attach to the statement quoted in the *Business First* article. In the OSBA’s view, the longstanding First Amendment standards set down in *Cox* and *Gentile*, and incorporated into Rule of Professional Conduct 3.6, are a principled and clear way to draw the line between statements about a legitimate civil dispute that are and are not absolutely privileged. Under those standards, ACS’s counsel’s statement to

Business First is absolutely privileged. The U.S. Supreme Court has held that the First Amendment protects such statements – even when they reveal the identity of a rape victim. *Cox*, 420 U.S. at 491. Likewise, the statement is protected under *Gentile*, 501 U.S. 1030, and related professional standards. In particular, the statement merely conveys a sense of “the claim, offense, or defense involved and . . . the identity of the person involved,” Ohio R. Prof. Cont. 3.6(b)(1), and plainly contains only “information contained in a public record,” *id.* 3.6(b)(2).

Second, because ACS’s statement appeared alongside vigorous denials by Leadscope officials and counsel, the *Business First* article unambiguously conveyed the message that the dispute was unresolved. The public is not so pliable as to be swayed by one side’s brief remark in the press. It knows “there are (at least) two sides” in any lawsuit, *Riley v. Camp* (C.A.11, 1997), 130 F.3d 958, 984 (Birch, J., concurring in the denial of rehearing), and it “understands that . . . lawyers, although also officers of the court, are advocates for the interests of their clients,” *Broadman v. Comm’n on Judicial Performance* (Cal. 1998), 959 P.2d 715, 731 (“[T]he public does not expect a high degree of neutrality or objectivity when lawyers comment on pending cases.”). Indeed, the article clearly presented Leadscope’s alternative view, quoting comments from its counsel and CFO that were both more detailed and more scathing than ACS’s lone comment: “The timing of this lawsuit speaks volumes as to its invalidity,” “one of the company’s investors walked away from the financing deal because of the complaint,” “LeadScope thinks the complaint was delivered to the company before it was filed to shatter the financing deal,” and “[ACS] knew legally that once we received that complaint we had to notify the venture capitalists,” Defendants’ Trial Ex. 161.⁹

⁹ In this regard, the U.S. Supreme Court has explained that “[t]he first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.” *Gertz*, 418 U.S. at 344. Although the

It thus was plain that the article presented both sides of a public dispute that “ultimately would be [resolved] by a court of law,” and thus that neither side’s comments were actionable, *Sethi*, 134 Ohio App.3d at 808; (“The articles were not one-sided and referred to facts or opinions that were both favorable and unfavorable to defendant.”). ACS’s counsel himself explained in the article that the case would be resolved by “a jury trial,” leaving the reader with no doubt that the court ultimately would decide between both sides’ perspectives. Defendants’ Trial Ex. 161.

Third, companies often are required by federal law to disseminate far more extensive commentary about their pending litigation than is at issue here. In particular, federal statutes and regulations compel many companies to inform the public of pending litigation impacting their bottom lines. If companies fail to disclose such facts, including the nature of the allegations at issue, investors could be deluded into thinking an investment is less risky than it actually is, or into voting their shares without full information. *See City of Philadelphia v. Fleming Cos.* (C.A.10, 2001), 264 F.3d 1245, 1266; *Wielgos v. Commonwealth Edison Co.* (C.A.7, 1989), 892 F.2d 509. Thus, SEC regulations require public reporting of “any material pending legal proceedings . . . [including] a description of the factual basis alleged to underlie the proceeding and the relief sought.” 17 C.F.R. § 229.103. Failing to so report can be the basis for federal liability under Section 10(b) of the Securities and Exchange Act and SEC Rule 10b-5. *See Wilson v. Great Am. Indus., Inc.* (N.D.N.Y. 1987), 661 F. Supp. 1555, 1564, *rev’d on other grounds*, (C.A.2, 1988), 855 F.2d 987 (imposing liability). Any public company faced with a similar lawsuit will be required to make statements far more extensive than ACS’s in *Business*

OSBA believes none of ACS’s statements were defamatory, Leadscope’s vigorous defense of its position and its accusations against ACS in the *Business First* article plainly illustrate that Leadscope had no difficulty helping itself.

First. The Court should not place companies in the untenable position of choosing between federal securities liability and state defamation liability.

Fourth, and more broadly, because comments like that of ACS's counsel to *Business First* are commonplace and necessary in the business world, the Court should not craft a rule that subjects companies to crushing defamation liability based on such routine statements. Commercial disputes often involve issues that are critically important to the economic prosperity of the country – take, for example, the Chrysler and General Motors bankruptcies. They also necessarily touch on critical public policy issues in which the public has a fundamental interest. *See* Ohio R. Prof. Cond. 3.6, Comment [1] (“[T]here are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves”); *id.* (“the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.”).

Commercial disputes often generate public interest, which sparks press inquiries to which litigants must respond. Both litigants did so here. A cursory examination of recent regional press coverage reveals numerous instances of similar statements by commercial litigants, a sample that surely does no more than scratch the surface. *See, e.g., Dismissal Sought in Suit Delaying CCAD Inheritance*, Columbus Business First, Nov. 3, 2008 (“‘It appears to be nothing more than an attempt to try to intimidate my client,’ said Marion’s attorney, Brian Murphy”); *Ruling Leaves Credit Suisse on the Hook in National Century Lawsuits*, Columbus Business First, Dec. 24, 2007 (similar); *Lexmark Sues Laser Cartridge Importers*, Business First of Louisville, Aug. 23, 2010 (similar); *Former CFO Sues Sunrise Senior Living*, Business First of Louisville, Sept. 19, 2007 (similar). The OSBA urges the Court not to burden virtually every Ohio company with defamation liability for such standard commentary.

Finally, the statement included no information that would have caused any potential reader to prejudge the case. On this score, the Supreme Court's recent decision in *Skilling v. United States* (2010), 130 S. Ct. 2896, 2914-16, 177 L. Ed. 2d 619, is instructive. The case concerned the infamous Enron bankruptcy, which "wounded Houston deeply," reducing "the city's 'largest, most visible, and most prosperous company,' its 'foremost social and charitable force,' and 'a source of civic pride' . . . to a 'shattered shell.'" 130 S. Ct. at 2942 (Sotomayor, J., dissenting). "[M]edia coverage of the story saturated the community," *id.*, with the local newspaper mentioning the scandal more than 4,000 times and mentioning the defendant hundreds of times, *id.* at 2943.

Nevertheless, the Court rejected Mr. Skilling's argument that publicity prejudiced his trial because, "although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Id.* at 2916. Unlike a prior defendant's "dramatically staged admission of guilt, [which] was likely imprinted indelibly in the mind of anyone who watched it," *Skilling*, 130 S. Ct. at 2916, "[p]retrial publicity about Skilling was less memorable and prejudicial," and "[n]o evidence of the smoking-gun variety invited prejudgment," *id.*

The civil dispute between Leadscope and ACS is a minor schoolyard tussle compared to the all-consuming war of the Enron bankruptcy. Thousands of articles and news stories lambasted Mr. Skilling and his cohorts. Here, *one article* generically explains a recently filed civil suit concerning a piece of intellectual property that tracks chemical formulas – hardly the subject of a public firestorm. Ohio R. Prof. Cond. 3.6, Comment [6] ("Civil trials may be less sensitive."). Further, the article contains *no* "smoking gun" confession from Leadscope. Rather, it contains vigorous, full-throated denials and accusations from Leadscope officials. No reader

reflexively would have accepted ACS's position in such circumstances. *Cf. Skilling*, 130 S. Ct. at 2916; *United States v. Chagra* (C.A.5, 1982), 669 F.2d 241, 251-252 & n.11. Moreover, any prejudice would have dissipated in the nearly *six years* between the suit's inception (May 2002) and the beginning of trial (February 2008). *See Skilling*, 130 S. Ct. at 2916 (four years); *see also Visser*, 629 N.W.2d at 382 (two years). Thus, applying *Skilling*, it is clear that there was *no risk* of prejudice here.

PROPOSITION OF LAW 2: Rules Regulating Speech About Pending Judicial Proceedings Must Be Clearly Defined Before The Speech Occurs, Not Subject to *Post Hoc* Development by a Jury.

Before the Court of Appeals issued its decision in this case, the law applicable to the right to petition and to speech about public aspects of pending cases was crystal clear. The filing of a lawsuit was protected unless the suit was "objectively baseless." Speech about public aspects of a pending case likewise was protected. In no case of which the OSBA is aware had a jury awarded or an appellate court sustained a defamation award based on routine statements like those at issue here. Certainly no court had *ever* countenanced a draconian \$15.0 million damages award – the largest defamation verdict in Ohio history – on such a tenuous basis. The verdict's expectation-shattering nature raises two additional free-speech problems that the OSBA believes compel the Court to reverse the judgment: it conflicts with clear U.S. Supreme Court precedent requiring that rules regulating attorney speech about pending cases be clearly defined in advance of the speech, and it openly permits discriminatory enforcement and extreme penalty based on the content of the speech.

This Court promulgates rules of attorney conduct so that Ohio attorneys can know in advance what the permissible bounds of conduct are. Following *Gentile* and operating within the background rule of *Cox*, this Court in Rule 3.6 laid out clear guidelines that balance the freedom of speech against the potential of prejudice to an ongoing proceeding. There is no doubt that

ACS counsel's statements are protected under those standards, *supra* Section 1(c). Even were the Court to conclude that defamation liability *could* arise on these facts, which it should not, the Court should not subject ACS (or any other counsel or party who made utterances in reliance on prior law) to such liability because they justifiably relied on existing law.

A fundamental principle of First Amendment and due process law is that a law regulating speech must give "fair notice to those to whom it is directed." *Grayned v. City of Rockford* (1972), 408 U.S. 104, 112, 92 S. Ct. 2294, 33 L. Ed. 2d 222; *State v. Schwing* (1975), 42 Ohio St.2d 295, 300, 71 O.O.2d 288, 328 N.E.2d 379. "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." *City of Chicago v. Morales* (1999), 527 U.S. 41, 58, 119 S. Ct. 1849, 144 L. Ed. 2d 67. Indeed, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore* (1996), 517 U.S. 559, 574, 116 S. Ct. 1589, 134 L. Ed. 2d 809; *Barnes v. Univ. Hosps. of Cleveland* (2008), 119 Ohio St.3d 173, 180-81, 2008-Ohio-3344, 893 N.E.2d 142 (same). "[T]he basic protection against 'judgments without notice' [is] afforded by the Due Process Clause" in civil cases. *BMW*, 517 U.S. at 574 (quoting *Shaffer v. Heitner* (1977), 433 U.S. 186, 217).

In *Gentile*, the U.S. Supreme Court struck down a state bar regulation of attorney speech because it failed this requirement. In that case, the Nevada bar had promulgated the "substantial likelihood of material prejudice" standard, but also had enacted a safe harbor allowing an attorney to "state without elaboration . . . the general nature of the . . . defense." 501 U.S. at 1048. The Court concluded that the safe harbor failed "to provide 'fair notice to those to whom [it] is directed.'" *Id.* at 1049. As the Court explained: "A lawyer seeking to avail himself of [the

safe harbor's] protection must guess at its contours. . . . The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." *Id.* at 1048-49. The Court further explained that the Rule could not stand because it created an "impermissible risk of discriminatory enforcement." *Id.* at 1051. "Both failure of adequate notice and arbitrary and capricious enforcement can individually or collectively cause an unconstitutional 'chill' to free speech." *Fieger v. Mich. Supreme Court* (E.D. Mich. Sept. 4, 2007), No. 06-11684, 2007 U.S. Dist. LEXIS 64973 (citing *Coates v. City of Cincinnati* (1971), 402 U.S. 611, 614), *rev'd on other grounds*, (C.A.6, 2009), 553 F.3d 955, 957 (ordering dismissal for lack of jurisdiction).

These dangers are present here in spades, and the same result should follow. As explained above, ACS's counsel's comments were firmly within the existing zone of constitutional protection. Any reasonable attorney evaluating the state of the law necessarily would have concluded that such statements were permissible because they created no danger of prejudicing the underlying proceeding, hewed closely to the public record, and made clear that the issues in the case ultimately would be resolved in Court. The OSBA knows of no award in Ohio or nationwide coming anywhere near this staggering eight-figure amount for comments merely summarizing allegations in a publicly filed complaint or other judicial document.

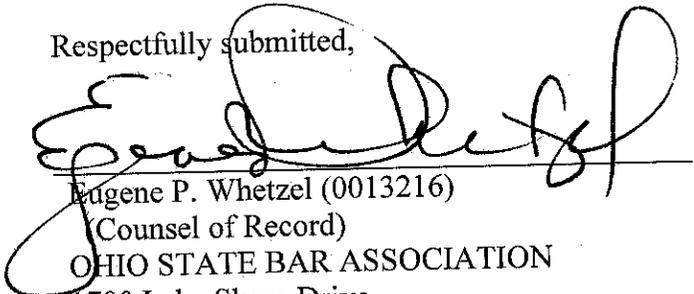
Assuming such statements can be the basis for liability, granting to juries unfettered discretion to impose multimillion dollar awards on counsel and parties for making such statements is a perilous move. It surely would result in an extreme chill of valuable speech; one would have to be willing to risk his entire financial future to make such a statement, an unconscionable penalty for making a benign statement about a pending judicial proceeding. As the Court explained in *Sullivan*, "[t]he fear of damage awards under . . . may be markedly more

inhibiting than the fear of prosecution under a criminal statute,” 376 U.S. at 277. Indeed, the Court repeatedly has warned against subjecting speech to such impulses, warning that doing so risks imposing an unconstitutional heckler’s veto on speech. See, e.g., *Forsyth County v. Nationalist Movement* (1992), 505 U.S. 123, 135-35, 112 S. Ct. 2395, 120 L. Ed. 2d 107 (“Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”); *Gertz*, 418 U.S. at 351 (punitive damages cannot be awarded in defamation actions without a showing of actual malice because “juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused” and “they remain free to use their discretion selectively to punish expressions of unpopular views”).

CONCLUSION

The OSBA respectfully urges the Court to reverse the judgment below and affirm longstanding, entrenched protections for public and attorney speech about pending cases.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Brief of Amicus Curiae was sent by ordinary U.S. mail to the following parties on February 28, 2011.

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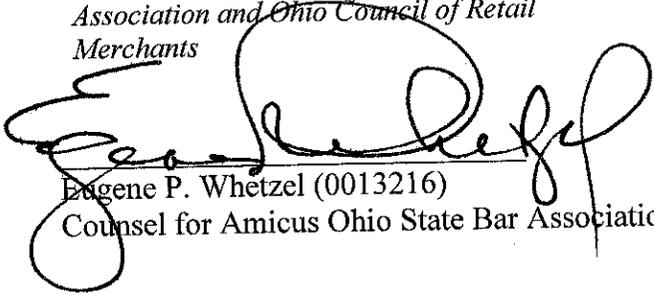
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