IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES FELLHAUER
and SHARON FELLHAUER,
Husband and Wife,
Plaintiffs/Respondents,

vs.

TREVOR POPE, an individual;
DOE Individuals I through X; and
ROE Corporations, Entities, and
Organizations I through X, inclusive,
Defendants/Appellants.

Case No. 68673

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT,
CLARK COUNTY, NEVADA
Hon. Jim Crockett; Case No. A-15-714378-C

BRIEF OF *AMICUS CURIAE* THE MARION B. BRECHNER FIRST AMENDMENT PROJECT
(In Support of Defendants/Appellants' Opening Brief)

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NRAP 26.1 DISCLOSURE

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The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. The Marion B. Brechner Center is a nonprofit organization with no parent corporation and no stock.

2. No law firm or lawyer has appeared for the *amicus* below; the only law firms and lawyers appearing for *amicus* in this case are:

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Dated: March 2, 2016

/s/ Clyde DeWitt
Clyde DeWitt

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INTEREST OF *AMICUS CURIAE*

The Marion B. Brechner First Amendment Project is a nonprofit, nonpartisan organization located at the University of Florida in Gainesville, Florida. The Project, directed by Prof. Clay Calvert, is dedicated to contemporary issues of freedom of expression, including defamation law. As an organization focused on research into First Amendment rights and advocacy in support of such rights—though one with no direct stake in the outcome of this case—*amicus* may be able to inform this Court about how many courts throughout the country view the "public concern" test.

No fees were paid in connection with the preparation of this brief.

SUMMARY OF ARGUMENT

Neighborhood safety and residential privacy are often more important to people's lives than even the most contentious partisan debate. People must be free to discuss such matters that affect their daily lives and families, without fear of unfounded lawsuits.

To be sure, the Fellhauers should still have a remedy for libel if they can show that Pope's statements were libelous. Nevada's anti-SLAPP

statute simply provides an expedited way to determine whether libel plaintiffs indeed have a case. And the protection provided by the anti-SLAPP statute is vital to people discussing matters of importance to their local community, just as it is vital to people discussing matters of importance to the whole country.

Indeed, the U.S. Supreme Court has defined "public concern" (a phrase analogous to the Nevada anti-SLAPP statute's phrase "public interest," N.R.S. 41.637) as broadly covering any "matter of political, social, or other concern to the community." *Snyder v. Phelps*, 562 U.S. 443, 444 (2011). This definition is broad enough to cover allegations of invasions of privacy and other unneighborly behavior in a residential neighborhood—such as Pope's comments, made on a forum dedicated to discussions of community safety, alleging that his neighbors threatened him and violated his privacy. Pope App. 31, ¶¶ 13-15.

Likewise, just as courts have repeatedly held that allegations of poor service by businesses are matters of public concern, behavior that undermines community quality of life also is a matter of public interest. And just as courts have held that statements about events affecting a

single church parish or the readership of a narrow trade publication can be on a matter of public interest, matters important to a particular community's residents and potential residents qualify as well.

ARGUMENT

I. Community Safety, Privacy, and Quality of Life Are Matters of Public Interest

People are understandably interested in safety, privacy, and quality of life in their communities. Pope posted on AlertID, a forum dedicated to discussions of community safety, about neighbors who had allegedly threatened his guests and invaded his privacy. Pope App. 30-31, ¶¶ 3-12. Those are topics of lively public interest to a community.

Indeed, courts have recognized that accusations of harmful behavior can be matters of public concern, even when the act is not criminal. For instance, in *Gallagher v. Connell*, the California Court of Appeal held that allegations that a parish priest took financial advantage of an elderly parishioner were of public concern. 123 Cal. App. 4th 1260, 20 Cal. Rptr. 3d 673 (2d Dist. 2004). Statements on such matters "may cause elderly individuals to be more cautious about whom they allow to

control their financial affairs" as well as making it more likely for "relatives and friends to more closely monitor the personal well-being of their relatives and friends." *Id.* at 1275. Such statements would, of course, also bear on the trustworthiness of the priest. And, the court concluded, in close anti-SLAPP cases it is "better to err on the side of free speech." *Id.* The allegations in *Gallagher* cautioned a parish to be wary of its priest; Pope's statements about alleged harassment and violations of privacy were warnings to the community to be wary of particular neighbors.

Likewise, in *Forrester v. WVTM TV, Inc.*, the Alabama Court of Civil Appeals ruled that footage of a man slapping his child at a baseball game was of public concern because "the community has an interest in the welfare of its children, especially at community-sponsored events." 709 So. 2d 23, 26 (Ala. Civ. App. 1997). The footage was part of a story about the pressure put on young children to win in sports. The court held that the debate about possible harms resulting from this pressure was "without a doubt a matter of public concern." *Id.*

Similarly, Pope's online forum posts alleged that the Fellhauers committed an unethical and possibly tortious act—taking a picture of a baby swimming naked in his backyard—just as they had earlier taken a picture of a naked man in his backyard. Pope App. 52, ¶12. Pope was likely concerned that the Fellhauers were continuously surveilling his guests, and likely believed that they would continue to invade his privacy and perhaps others' privacy as well.

Even if these allegations of tortious conduct had an audience limited to others who lived in the same community, concerns specific to particular communities are regularly protected for anti-SLAPP purposes. Speech is on a matter of public concern when it touches "on issues in which the public (even a small slice of the public) might be interested." *Pan Am Sys., Inc. v. Atl. Ne. Rails & Ports, Inc.*, 804 F.3d 59, 66 (1st Cir. 2015). Such issues "are those that can be fairly considered as relating to any matter of political, social, or other concern to the community." *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 132 (1st Cir. 1997) (internal quotation omitted). And "the relevant community need not be very large and the relevant concern need not be of paramount im-

portance or national scope. Rather, 'it is sufficient that the speech concern matters in which even a relatively small segment of the general public might be interested.'" *Id.* (quoting *Roe v. City of San Francisco*, 109 F.3d 578, 585 (9th Cir. 1997)).

Thus, in *Cross v. Cooper*, the revelation that a person with a past child molestation conviction was living near a house that the plaintiff was trying to sell was an issue of public interest for the purpose of the anti-SLAPP action. 197 Cal. App. 4th 357, 377, 127 Cal. Rptr. 3d 903, 917 (6th Dist. 2011). The "location of registered sex offenders" in one's neighborhood, the court concluded, was a matter of public interest. *Id.*

Discussion of these sorts of topics, ranging from privacy intrusions to the presence of people with serious criminal records, is thus of substantial public interest. It could inform current neighborhood residents about the need to take care to protecting their, their families', and their guests' safety and privacy. And it could inform prospective future neighbors about possible risks of moving into a neighborhood.

II. Information about Events in a Neighborhood Is as Important to Residents as Are Reviews of Local Businesses

Alleged misconduct by neighborhood residents and alleged misconduct by neighborhood businesses are both matters of public concern, and for similar reasons. Statements on each topic tell members of a community where they can be safe and where they should venture with caution. Both kinds of statements may be subject to well-founded libel claims, but both also merit protection under anti-SLAPP statutes against unfounded claims.

Many courts have held that commentary on local businesses is speech on a matter of public concern. In *Wilbanks v. Wolk*, for instance, a brokerage firm sued a consumer watchdog for defamation and unfair business practices. 121 Cal. App. 4th 883, 890, 17 Cal. Rptr. 3d 497, 499 (1st Dist. 2004). The watchdog had, on her own website, accused the firm of being under state investigation, providing incompetent advice, and being generally unethical. *Id.* The court in *Wilbanks* ruled that this commentary was of public concern because it was "consumer protection information." *Id.* at 899, 17 Cal. Rptr. 3d at 507. By alleging that the

Fellhauers had threatened him and invaded the privacy of his guests, Pope was similarly offering what he argued was neighborhood protection information. Pope App. 31, ¶¶ 13-15.

Likewise, in *Gardner v. Martino*, the Ninth Circuit treated customer complaints about a business's allegedly poor goods and services—there, quality and maintenance problems with personal watercraft sold by a dealer—as being "of public concern" for purposes of applying the First Amendment rules governing libel cases. 563 F.3d 981, 984-85, 989 (9th Cir. 2009) (treating the case as covered by the First Amendment rules applicable to statements "on a matter of public concern"); *see also Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1292 (9th Cir. 2014) (citing *Gardner* as an example of a holding that "even consumer complaints of non-criminal conduct by a business can constitute matters of public concern"). In *Terry v. Journal Broadcast Corp.*, 840 N.W.2d 255, 266-67, 351 Wis. 2d 479, 503-05 (Wis. Ct. App. 2013), the court concluded that allegations of poor service by a wedding videographer were on a matter of public interest. And in *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 147-50 (2d Cir. 2000), the court concluded that allegations

that an attorney was an "an 'ambulance chaser' with interest only in 'slam dunk cases,'" in a directory sent to organization members, were on a matter of public concern.

Consumer complaints, even if they are not about criminal or tortious misconduct, are of public interest because they help inform consumers' decisions. And discussion of alleged neighborhood misconduct is of public interest because it helps inform the decisions of neighborhood residents and potential residents.

Business practices can also be matters of public interest when the businesses' actions can affect a neighborhood. In *Manufactured Home Communities, Inc. v. County of San Diego*, speech accusing a mobile home park owner of rent gouging, predatory practices, and trying to "run out the older residents to bring in newer homes," was treated as being on a matter of public concern. 544 F.3d 959, 962, 965 (9th Cir. 2008). Similarly, in *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 479, 102 Cal. Rptr. 2d 205, 212-13 (4th Dist. 2000), a court found that statements critical of a private community's manager related to the public interest in how the community was managed.

Neighbors' actions can likewise affect community safety, privacy, and quality of life.

Moreover, statements that are part of "ongoing disputes" that are "of interest to a definable portion of the public," such as the members of a neighborhood community association, are on matters of public interest. *Ruiz v. Harbor View Community Ass'n*, 134 Cal. App. 4th 1456, 1468, 37 Cal. Rptr. 3d 133, 142 (4th Dist. 2005). Residents in Pope's community are concerned about safety. Neighbors had posted on AlertID about break-ins, suspicious book sales, and people allegedly casing homes, not only warning the community but also advocating that they must "show everyone that we are watching the neighborhoods!" Pope App. 82. Pope was responding to a discussion on AlertID about the neighborhood being a supposed "high crime area." Community residents must be free to discuss actions that they view as threatening to their community—subject, of course, to liability for actual defamation, but protected by anti-SLAPP law against unfounded libel claims.

CONCLUSION

Pope's comments were on matters of public interest—they dealt with questions of safety, privacy, and quality of life in his community, and fell within a broader ongoing discussion on community safety. If the statements libeled the Fellhauers, they may be able to recover damages for such libel. But Pope is entitled to the benefit of Nevada's anti-SLAPP law, and a prompt determination whether the libel claims against him are baseless.

Respectfully Submitted,

/s/ Clyde DeWitt
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/s/ Eugene Volokh
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(Subject to Admission pro hac vice)

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this *Amicus* Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this *Amicus* Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I further certify that this Amicus Brief complies with formatting requirements of NRAP 32(a)(4) and with the type-face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Amicus Brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point New Century Schoolbook.

Finally, I certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) as it contains 1,953 words.

Dated: March 2, 2016

/s/ Clyde DeWitt
Clyde DeWitt

CERTIFICATE OF SERVICE

Pursuant to NEV. R. APP. PROC. 25(b) and NEFR 9(f), I hereby certify that on this date I electronically filed the foregoing document with the Clerk of the Nevada Supreme Court by using the NEVADA ELECTRONIC FILING RULES ("Eflex"). Participants in this case who are registered with Eflex as users will be served by the Eflex system as follows:

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