IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 092323

GARR N. JOHNSON, ET. AL.,

Appellants,

v.

GREGORY WOODARD, ET. AL.,

Appellees.

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 2

ASSIGNMENTS OF ERROR 2

QUESTIONS PRESENTED 2

INTRODUCTION TO ARGUMENT 3

ARGUMENT 3

I. ORGANIZING A PETITION FOR THE REMOVAL OF ELECTED OFFICIALS IS CORE POLITICAL SPEECH THAT RECEIVES THE HIGHEST DEGREE OF PROTECTION PROVIDED UNDER THE FIRST AMENDMENT 3

II. VIRGINIA CODE SECTION 8.01-271.1 SHOULD NOT BE CONSTRUED TO APPLY TO PETITIONS FOR REMOVAL. 7

III. IF THE ATTORNEY'S FEES STATUTE DOES APPLY, THE FIRST AMENDMENT REQUIRES IT TO BE STRICTLY CONSTRUED. 10

IV. THE CIRCUIT COURT'S IMPOSITION OF ATTORNEY'S FEES IN THIS CASE VIOLATED THE FIRST AMENDMENT. 15

CONCLUSION 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Case **Page**

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)......................... 9

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)................................ 9

Bigelow v. Virginia, 421 U.S. 809 (1975)... 3

Blake Construction Co., Inc. v. Upper Occoquan Sewage Authority, 266 Va. 564, 587 S.E.2d 711 (2003)... 8

Broadrick v. Oklahoma, 413 U.S. 601 (1973)... 9

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) ... 11, 12, 14

Federal Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007)... 9

Freedman v. Maryland, 380 U.S. 51 (1965) 9

Elliott v. Commonwealth, 267 Va. 464, 593 S.E.2d 263 (2004) 3, 6

Garrison v. Louisiana, 379 U.S. 64 (1964) 5

Hughes v. Rowe, 449 U.S. 5 (1980).. 12

Jackson v. Hartig, 274 Va. 219, 645 S.E.2d 303 (2007) 6

Kopalchick v. Catholic Diocese of Richmond, 274 Va. 332, 645 S.E.2d 439 (2007) 7

Mahan v. National Conservative Political Action Committee, 227 Va. 330, 315 S.E.2d 829 (1985) 6

Meyers v. Grant, 486 U.S. 414 (1988).. 4, 5, 7

NAACP v. Button, 371 U.S. 415 (1963)....................6-7

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)............5, 7, 13, 15

Roth v. United States, 354 U.S. 476 (1957)....................5

Thornhill v. Alabama, 310 U.S. 88 (1940)....................5

Virginia v. Black, 538 U.S. 343 (2003)....................6

Other

U.S. Constitution
Amendment I....................passim

Constitution of Virginia
Article I, § 12....................3

VA Code § 24.2-233....................3, 4, 9, 14

VA Code § 24.2-238....................8, 10, 14

VA Code § 8.01-271.1....................3, 4, 7, 8, 14

Title VII of the Civil Rights Act of 1964
42 U.S.C.A. § 2000e-5(k)....................11

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Virginia, Inc. is a non-profit Virginia corporation affiliated with the American Civil Liberties Union (ACLU), the oldest and largest citizen membership organization devoted to preservation and furtherance of Constitutional rights in the United States. The ACLU of Virginia has approximately 11,000 members and has appeared frequently before the state and federal courts of Virginia both as *amicus* and direct counsel in constitutional cases. One of the ACLU's core commitments is the protection of the First Amendment freedom of speech.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. The Center has as its sole mission the protection of freedom of speech and press from threats of all forms. Since its founding in 1990, the Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this Court and state and federal courts around the country in cases involving important free expression issues.

STATEMENT OF THE CASE

Amici Curiae concur with the Statement of the Case set forth in the appellants' opening brief.

STATEMENT OF FACTS

Amici Curiae concur with the Statement of Facts set forth in the appellants' opening brief.

ASSIGNMENTS OF ERROR

Although the appellants' opening brief raises a number of Assignments of Error, this brief will only directly address Assignment of Error # 4.

The imposition of sanctions against the citizens violates the Petition Clause of The First Amendment to the United States Constitution.

QUESTIONS PRESENTED

Although the appellants' opening brief presents a number of questions, this brief will only directly address the following:

May a trial court punish citizens who exercise their rights under the Petition Clause? (Assignment of Error 4)

INTRODUCTION TO ARGUMENT

The trial court's order that 40 citizens pay $80,000 for initiating an unsuccessful petition to remove four county supervisors from office represents an unconstitutional application of both VA Code § 24.2-233 et. seq. and VA Code § 8.01-271.1 Specifically, the order violates the Petition Clause of the First Amendment to the United States Constitution, made applicable to Virginia through the due process clause of the Fourteenth Amendment. *Bigelow v. Virginia*, 421 U.S. 809, 811 (1975). As such, the order also violates the Petition Clause of Article I, § 12 of the Constitution of Virginia. *See Elliott v. Commonwealth*, 267 Va. 464, 474, 593 S.E.2d 263, 269 (2004) ("We take this opportunity to declare that Article I, § 12 of the Constitution of Virginia is coextensive with the free speech provisions of the federal First Amendment.")

ARGUMENT

I. ORGANIZING A PETITION FOR THE REMOVAL OF ELECTED OFFICIALS IS CORE POLITICAL SPEECH THAT RECEIVES THE HIGHEST DEGREE OF PROTECTION PROVIDED UNDER THE FIRST AMENDMENT.

This Court need look no further than the text of the First Amendment to determine that the Constitution's framers fully intended to

protect citizens' right to "petition the government for a redress of grievances." Yet the court below seemingly disregarded the plain language of the petition clause by interpreting two state statutes as allowing the government to impose an $80,000 sanction upon 40 citizens (hereinafter "the citizens") for organizing just such a petition. These interpretations of VA Code § 24.2-233 et. seq. and VA Code 8.01-271.1 are contrary to the holdings of this Court and the United States Supreme Court.

There can be little doubt that the citizens' effort to remove four elected officials involved political speech on a matter of public concern and, as such, deserved the highest degree of First Amendment protection. Illustrative of this point is *Meyers v. Grant*, 486 U.S. 414 (1988), in which the U.S. Supreme Court considered the constitutionality of a state statute regulating the petition process for placing an issue on the state ballot:

> The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the

> matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech."

Id. at 421. A regulation restricting political speech "trenches upon an area in which the importance of First Amendment protections is at its zenith." *Id.* at 425. (citations omitted); *see also Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (holding that there is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open"); *Roth v. United States*, 354 U.S. 476, 484 (1957) (affording the highest First Amendment protection to political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (holding that "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to

discuss publicly and truthfully all matters of public concern without previous restraint or *fear of subsequent punishment*…" (emphasis added)).

This Court has accorded no less protection to political speech. "[T]here can be no doubt that discussion of public issues and debate on the qualifications of candidates for public office are integral to the operation of our system of government and are entitled to the broadest protection the First Amendment can afford." *Jackson v. Hartig*, 274 Va. 219, 231, 645 S.E.2d 303, 310 (2007) (quoting *Mahan v. National Conservative Political Action Committee*, 227 Va. 330, 336, 315 S.E.2d 829, 833 (1985)); *see also Elliott v. Commonwealth*, 267 Va. at 471, 593 S.E.2d at 267 ("the provision chills constitutionally protected political speech because of the possibility that a State will prosecute…somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect")(quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)(plurality opinion)).[1]

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[1] The fact that the court system is involved in the petition for removal process in no way diminishes the First Amendment value of petitioners' political speech. *See NAACP v. Button*, 371 U.S. 415, 429 (1963) (holding that litigation may be a "form of political expression.")

Government restrictions on political speech must overcome a burden that “is well-nigh insurmountable.” *Meyer*, 486 U.S. at 425. Even in legal disputes between private individuals or entities, it is well-established that a high standard must be met if the action is based on speech directed against a public official, as it was in this case. *See New York Times,* 376 U.S. at 277. Yet the trial court’s order appears not to recognize the highly protected nature of the citizens’ speech.

II. VIRGINIA CODE SECTION 8.01-271.1 SHOULD NOT BE CONSTRUED TO APPLY TO PETITIONS FOR REMOVAL.

Because petitions for removal constitute highly protected political speech, any sanctions against them under VA Code § 8.01-271.1 raise serious First Amendment concerns. "In construing a statute, it is the duty of the courts so to construe its language as to avoid a conflict with the constitution." *Kopalchick v. Catholic Diocese of Richmond*, 274 Va. 332, 340, 645 S.E.2d 439, 443 (2007). In the present case, such a construction is readily available, because the General Assembly expressly addressed the issue of attorney’s fees in the context of petitions for removal. Specifically, the target of an unsuccessful removal effort may recover “court costs or reasonable attorney fees, or

both," from "the state agency or political subdivision" for which the official serves. VA Code § 24.2-238. Under the doctrine *expressio unius est exclusio alterius*, the legislature's designation of the state or political subdivision as sources for attorney's fees conveys an intent to exclude other potential sources. *Blake Construction Co., Inc. v. Upper Occoquan Sewage Authority,* 266 Va. 564, 577, 587 S.E.2d 711, 718 (2003). In applying Code § 8.01-271.1 to the petitioners, the trial court ignored this principle of statutory construction as well as its duty to construe statutes to avoid constitutional problems.

In their Brief in Opposition, the appellees argued that the First Amendment does not give "anyone the right to initiate frivolous litigation." Brief in Opposition to Petition, p. 18. But this argument misconstrues the free speech principle at issue in this case by failing to recognize that, under the First Amendment, the priority is ensuring protection of speech, not the punishment of those who may engage in an unprotected expressive activity. "The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted…." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *see also Federal*

Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 457 (2007) ("The First Amendment requires us to err on the side of protecting political speech rather than suppressing it"); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (rejecting the argument that "protected speech may be banned as a means to ban unprotected speech.") Even in regulating speech that is not protected under the First Amendment, "a State is not free to adopt whatever procedures it pleases …without regard to the possible consequences for constitutionally protected speech." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965). The most rigorous procedural safeguards are required to insure that "freedoms of expression [are]… ringed about with adequate bulwarks." *Bantam Books*, 372 U.S. at 66 (citations omitted).

The foregoing principles are equally compelling in the context of this case. In enacting VA Code § 24.2-233 et. seq., the Virginia General Assembly was not regulating unprotected speech, but rather codifying a procedure for the exercise of one form of protected expression—the right to petition for the removal of elected officials. The legislative body provided protection from financial harm to any targets of a frivolous

petition through the designation of the state or political subdivision as the source for recovering any costs incurred in fighting the petition. VA Code § 24.2-238. Further, the designation serves to prevent chilling the initiation of valid removal petitions by those who fear a financial penalty should their petition ultimately prove unsuccessful. This safeguard was rendered meaningless by the lower court's failure to give effect to VA Code § 24.2-238's express limitation on who could be ordered to pay court costs and attorney fees.

III. IF THE ATTORNEY'S FEES STATUTE DOES APPLY, THE FIRST AMENDMENT REQUIRES IT TO BE STRICTLY CONSTRUED.

As discussed above, the citizens' conduct in gathering signatures and filing the removal petitions constitutes political speech at the core of the First Amendment. Courts must take special care not to chill such activity. Absent the most extreme circumstances, this kind of direct participation in the political process should not be punished. Several principles of guidance are available to craft a standard for when such sanctions may be appropriate: the law governing fees assessed against civil rights plaintiffs, the law pertaining to defamation against public figures, and the actions of the General Assembly in reaction to the

present case. Taken together, these principles command that in the context of a removal petition, sanctions may not be imposed unless the petitioners acted with knowledge or reckless disregard of the fact that the petition lacked any legal or factual basis.

In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the United States Supreme Court considered the analogous context of whether attorney's fees could be assessed against the plaintiffs in an unsuccessful employment discrimination suit. Under Title VII of the Civil Rights Act of 1964, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . ." 42 U.S.C.A. § 2000e-5(k). The Court held that although "a prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances," 434 U.S. at 417, a prevailing defendant should be awarded fees only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation."   In reaching this conclusion, the Court reasoned that Congress intended to encourage the bringing of valid discrimination claims, but to discourage entirely frivolous litigation.

The Court also emphasized that plaintiffs should not be subject to fees merely because they ultimately lost the case:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. . . . Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Id. at 422-23. Only when such a reasonable ground is entirely lacking should attorney's fees be assessed against the civil rights plaintiff.[2]

Christiansburg thus sets a high bar for assessing attorneys' fees against plaintiffs in civil rights cases. As described earlier, however, the petitions for removal in this case constitute direct participation in the political process, entitled to the greatest degree of protection. Any sanction against such speech should be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,

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[2] In *Hughes v. Rowe*, 449 U.S. 5 (1980) which applied the *Christiansburg* holding to civil rights attorneys fees under 42 U.S.C. § 1988, the Court stressed that "[t]hese limitations apply with special force in actions initiated by uncounseled" plaintiffs, against whom "attorney's fees should rarely be awarded." 449 U.S. at 14. "An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims." *Id.* The petitioners' *pro se* status in this case is yet another reason why attorney's fees are inappropriate in this case.

and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964).

The same principles that do not permit innocent or even negligent mistakes of fact as grounds for liability in the defamation context are equally applicable in the petition context. "[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they need . . . to survive." *Id.* at 271-72 (internal quotation marks and citation omitted). *Id.* at 272. Accordingly, the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

Finally, the General Assembly's response to this case demonstrates the lack of any public interest in imposing sanctions on individuals who petition for the removal of public officials. Following the imposition of fees in this case, which generated extensive publicity, the legislature amended VA Code § 24.2-238, which allows for attorney's

fees to be assessed against “the agency or political subdivision which the respondent serves.” The amendment added the following:

> No person who signs a petition for the removal of an official pursuant to § 24.2-233 or who circulates such a petition (i) shall be liable for any costs associated with removal proceedings conducted pursuant to the petition, including attorney fees incurred by any other party or court costs, or (ii) shall have sanctions imposed against him pursuant to § 8.01-271.1.

VA Code § 24.2-238(B).

The amendment evinces strong disapproval for the trial court’s sanctioning of the petitioners. It also reflects a public policy in favor of allowing citizen to pursue petitions for removal without fear of punishment.

In sum, *Christiansburg* counsels that sanctions should not be imposed against litigants who are pursuing an important legislative priority unless the action is legally or factually meritless. The amended legislation demonstrates that petitions for removal of public officials for neglect of duty, misuse of office, or incompetence is such a priority. Finally, *New York Times v. Sullivan* stands for the proposition that criticism of public officials may not be sanctioned for mere mistake or negligence. Taken together, these authorities suggest that petitioners

for removal should not be sanctioned unless the petition is entirely without merit, and the petitioners acted with knowledge or reckless disregard for that lack of merit.

IV. THE CIRCUIT COURT'S IMPOSITION OF ATTORNEY'S FEES IN THIS CASE VIOLATED THE FIRST AMENDMENT.

In assessing attorney's fees against the citizens in this case, the Circuit Court failed to give any weight to the important First Amendment interests at stake. Applying the rigorous constitutional standards discussed above, sanctions were unquestionably inappropriate.

First, the evidence does not establish that the petitions were without merit. All of the supervisors who were the subjects of the petition had been criminally indicted. Regardless of the ultimate outcome of the indictments, it was entirely reasonable for the petitioners to rely on the judgment of the Commonwealth's Attorney and a grand jury of their peers to conclude that the supervisors had engaged in wrongdoing.

The respondents argue that the petitioners were part of a vast conspiracy in which frivolous indictments were procured for the purpose of forming the basis of petitions for removal. Even assuming the

existence of such a conspiracy, however, there is no evidence in the record that the petitioners took part in it.

The respondents further claim that the petitioners should have known that the indictments lacked merit. Again, however, there is no basis in the record for this conclusion. The record does not indicate that any of the petitioners were attorneys or had special expertise in criminal law. They were entitled to presume that the indictments were valid and based in law and fact. Moreover, even accepting the highly debatable assertion that petitioners *should* have known that the indictments were unsound, there is no evidence that they *did* know. And, as stated above, mere negligence cannot be the basis of punishment for criticism of public officials on a matter of public concern.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the judgment of the Circuit Court be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of May, 2010, I filed fifteen hard copies of the foregoing Brief with the Clerk of the Supreme Court of Virginia, and filed an electronic version by e-mail at scvbriefs@courts.state.va.us, and served three copies via U.S. mail, postage prepaid, to the following:

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