SUPREME COURT CASE NO. CVA07-021

IN THE SUPREME COURT OF GUAM

HAGÅTÑA, GUAM

JOHN BALDWIN AND GUAM GREYHOUND, INC.,

Appellants,

v.

DOROTHY BRIZILL,

Appellee.

ON APPEAL FROM THE
SUPERIOR COURT OF GUAM
(No. CV 0960-06)

BRIEF FOR THE APPELLEE

JEFFREY A. COOK
CUNLIFFE & COOK
Suite 200
210 Archbishop F.C. Flores Street
Hagåtña, GU 96910
Telephone: (671) 472-1824
Telecopier: (671) 472-2422

ARTHUR B. SPITZER
American Civil Liberties Union
of the National Capital Area
1400 20th Street, N.W., Suite 119
Washington, DC 20036
Telephone: (202) 457-0800
Telecopier: (202) 452-1868

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Guam's Citizen Participation in Government Act ("CPGA" or "anti-SLAPP statute") provides that

> Acts in furtherance of the Constitutional rights to petition, including seeking relief, influencing action, informing, communicating and otherwise participating in the processes of government, shall be immune from liability, except where not aimed at procuring any government or electoral action, result or outcome.

7 GCA § 17104. This appeal presents the following issues:

1. Whether the Superior Court correctly held that appellee Dorothy Brizill's statements were "[a]cts in furtherance of the Constitutional rights to petition," and therefore immunized by the anti-SLAPP statute, where the complaint admitted that Ms. Brizill's statements were "geared to bring people to the conclusion that they should vote against the slots initiative because Guam Greyhound's owner is untrustworthy."

2. Whether the Superior Court correctly rejected appellants' argument that the anti-SLAPP statute provides no broader protection for speech than the First Amendment provides.

3. Whether the Superior Court correctly rejected plaintiffs' argument that the anti-SLAPP statute is unconstitutional because it restricts the circumstances under which a plaintiff can sue for defamation and related torts.

4. If the anti-SLAPP statute provides no greater protection for speech than the First Amendment, whether appellants established, by clear and convincing evidence, that Ms. Brizill had acted with "actual malice" in making statements about them.

STATEMENT OF THE CASE

A. The Complaint.

In their complaint, John Baldwin and Guam Greyhound, Inc.,[1] asserted claims for defamation and false light invasion of privacy against Dorothy Brizill; Guam Greyhound also asserted a claim of tortious interference with prospective business advantage. Complaint ¶¶ 22-39, ER 2:010-012.[2] Those claims arose from statements Ms. Brizill allegedly made opposing Mr. Baldwin's ballot initiative legalizing slot machines on Guam.

The complaint also named "Does 1 through 20" as defendants, but it alleged no facts and asserted no claims against them, stating that "Plaintiffs are unaware of the . . . basis for liability of Defendants Does." Complaint ¶ 4, ER 2:004.[3]

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[1] This brief will refer to plaintiffs/appellants as "Mr. Baldwin" except when necessary to distinguish between him and Guam Greyhound.

[2] The Excerpts of Record are cited to tab and page numbers; ER 2:012 refers to the material at tab 2, page 12. The Supplemental Excerpts of Record are cited as "SER xx."

[3] The same plaintiffs also filed a virtually identical lawsuit against Jacqueline A. Marati, *Lina'la Sin Casino*, and twenty "Doe" defendants. The complaint in that case is at ER 11:472. The defendants' motion to dismiss that case remains pending in Superior Court.

B. The Motion to Dismiss.

Ms. Brizill moved to dismiss the complaint pursuant to the anti-SLAPP statute and the First Amendment, noting that the lawsuit was "a transparent attempt to retaliate against [her] for publicly opposing the slot machines initiative that Baldwin supports, and to intimidate her from making further public statements …." ER 3:014. Plaintiffs responded that the statute did not apply to statements that were not protected by the First Amendment, and that if it did, it was unconstitutional. ER 9:362-380. After extensive briefing, argument was held in March 2007.

C. The Superior Court Decision.

In July 2007, the Superior Court (Elizabeth Barnett-Anderson, J.) ruled that the CPGA immunized Ms. Brizill's statements from liability. ER Tab 18.

The court "appreciate[d]" the "the rich history and plethora of case law relative to the tort of defamation" presented by Mr. Baldwin, but found "such arguments more distractive than pertinent to the issue at bar." ER 18:621. Noting that the statute "presumes immunity in circumstances of political process," and imposes on a plaintiff "the burden of showing … by 'clear and convincing evidence that the acts of the moving party are not immunized from liability,'" ER 18:619 (quoting 7 GCA § 17106(e)), the court found that

> Based on Plaintiff's own admissions in his Complaint, there can be no other conclusion than that reached by Plaintiff himself:

> Ms Brizill's statement[s] were made in an effort of "letting the voters decide whether to approve a limited expansion of gambling on Guam." Nothing was presented to this Court to contravene this conclusion. It is not uncommon in public debate and initiative that the moral character and personal or professional background of proponents, and opponents, becomes the focus of discussion. Sometimes it becomes the distraction in the electoral process. The Guam Act is intended to allow for such discussion, distraction, and debate no matter how painful or potentially harmful.

ER 18:622 (quoting Complaint ¶ 21, ER 2:009).

Applying the "plain, simple, and clear" test of the statute, ER 18:621, the court therefore concluded that Mr. Baldwin had "failed to show by *clear and convincing* evidence that the alleged statements of Defendant, Dorothy Brizill, were not aimed at procuring any government or electoral action, result or outcome," *id*. at 623 (quoting 7 GCA § 17104) (emphasis in the statute).

The court also upheld the statute's constitutionality, adopting Ms. Brizill's arguments on that issue, ER 18:623, and observing that "absolute privilege" also exists in other "political arenas where robust debate is needed, such as during the course of legislative proceedings." *Id*. at 622.

Finally, the court dismissed the Doe defendants with prejudice, noting that "the Complaint contains no allegations of fact pertaining to any 'Doe' defendants, and … therefore fails to state any claim against the[m]." Order of

September 4, 2007. Final judgment was entered the same day. This appeal followed.[4]

Appellants seek reversal only on their defamation claims; the claims for invasion of privacy and tortious interference have been abandoned, as appellants' brief contains no factual or legal argument regarding those claims. *See People v. Quinata,* 1999 Guam 6, ¶¶ 22-27; *Grotto v. Leonardi*, 1999 Guam 30, ¶ 13.

STATEMENT OF THE FACTS

A. The Statutory Framework.

1. Background.

In a seminal study, professors at the University of Denver identified a widespread pattern of abusive lawsuits "filed by one side of a public, political dispute, to punish or prevent opposing points of view." SER 2. They dubbed these "Strategic Lawsuits Against Public Participation," or "SLAPPs." *See* George W. Pring and Penelope Canan, SLAPPS: GETTING SUED FOR SPEAKING

[4] The CPGA provides that "the court shall award a moving party who is dismissed … costs of litigation, including reasonable attorney and expert witness fees … and such additional sanctions … as it determines will be sufficient to deter repetition of such conduct …." 7 GCA § 17106(g). The parties agreed, and the Superior Court ordered, that proceedings regarding costs, fees and sanctions be held in abeyance pending this appeal. Order of September 4, 2007. Because such proceedings are collateral to the merits, that does not affect the finality of the judgment. *See White v. N.H. Dep't. of Employment Security*, 455 U.S. 445, 451-52 (1982).

OUT (Temple University Press 1996) ("*SLAPPs*").[5] They pinpointed several criteria that identify a SLAPP:

— That the actions complained of "involve communicating with government officials, bodies, or the electorate, or encouraging others to do so." *Id*. at 150.

— That the defendants are "involved in speaking out for or against some issue under consideration by some level of government or the voters." *Id.*

— That the claims fall into "very predictable tort . . . categories," including "defamation[,] . . . interference with . . . prospective economic advantage[, and] . . . invasion of privacy." *Id*. at 150-51.

— That the complaint names "John or Jane Doe defendants." *Id*. at 151. "We have found whole communities chilled by the inclusion of Does, fearing 'they will add my name to the suit.'" *Id*.

The authors "conservatively estimate[d] that … tens of thousands of Americans have been SLAPPed, and still more have been muted or silenced by the threat." *SLAPPs* at xi. Finding that "the legal system is not effective in controlling SLAPPs," *id*., they proposed a model anti-SLAPP statute to address the problem. *Id*. at 201.

[5] A copy of this book is in the record. A law review article by the same authors, briefly summarizing their findings, is at SER 1.

Twenty-six states have now enacted anti-SLAPP statutes.[6] Varying widely in form and effectiveness, *see* ER 5:069-129 (examples), many are the result of compromises with powerful opposing interests. *See SLAPPs* at 190-201.

2. The Citizen Participation in Government Act.

In 1998, *I Liheslaturan Guahan* enacted the Citizen Participation in Government Act, which closely tracks the model statute and is perhaps the best anti-SLAPP statute in the nation. The legislature's findings reflect its understanding of the problem and the need for a remedy:

> (6) SLAPPs are an abuse of the judicial process; they are used to censor, chill, intimidate, or punish citizens, businesses and organizations for involving themselves in public affairs, and controlling SLAPPs will make a major contribution to lawsuit reform;
> . . .
> (9) while some citizen communications to government inevitably will be incorrect, unsound, self-interested or not in good faith, it is essential in our democracy that the constitutional rights of citizens to participate fully in the process of government be uniformly, consistently, and comprehensively protected and encouraged.

7 GCA § 17102(a).

a. Special Procedures.

The CPGA effectuates its purpose by immunizing from liability "[a]cts in furtherance of the Constitutional rights to petition," 7 GCA § 17104, and by

[6] Links to these statutes can be found at http://www.casp.net/menstate.html.

requiring a plaintiff to show, at the threshold, that a defendant is not entitled to that immunity. *Id*. § 17106(e). Thus, on a motion to dispose of a claim under the CPGA, the facts alleged in the complaint are *not* taken as true; rather, the plaintiff bears "the burden of going forward with the evidence and of persuasion on the motion," *id*. § 17106(c), and the plaintiff must carry his burden by "*clear and convincing evidence*," *id*. § 17106(e) (emphasis in the statute). Because the statute's purpose is to provide immunity *from the burdens of litigation* as well as from liability, the plaintiff must make this showing based on the facts already known to him, without discovery. *Id*. § 17106(b).

b. The Statutory Standard.

The parties dispute what Mr. Baldwin must demonstrate to carry his burden. He argues that the Court must examine the merits and determine whether he has stated valid claim; if he has, then (he says) his lawsuit must be allowed to proceed, as if the anti-SLAPP statute did not exist. *See* Appellant's Brief at 2.

As the Superior Court recognized, however, a motion to dispose of a claim under the CPGA does *not* address the merits, but presents only the threshold question whether the plaintiff "has produced clear and convincing evidence that the acts of the moving party *are not immunized* from liability by § 17104." 7 GCA § 17106(e) (emphasis altered). Section 17104, in turn,

provides that:

> Acts in furtherance of the Constitutional rights to petition, including seeking relief, influencing action, informing, communicating and otherwise participating in the processes of government, shall be immune from liability, except where not aimed at procuring any government or electoral action, result or outcome.

Thus, the only relevant questions are whether Mr. Baldwin has shown, by clear and convincing evidence, that Ms. Brizill was not acting "in furtherance of the Constitutional rights to petition" or that her speech was "not aimed at procuring any … electoral action, result or outcome." If he has not made those showings then she is immune, regardless of whether Mr. Baldwin might have had valid claims in the absence of the CPGA.

This brief presents the facts that are relevant under both parties' constructions of the statute.[7] Under either construction, Mr. Baldwin failed to carry his burden.

B. John Baldwin and his Activities.

In 2004, efforts were made to place an initiative legalizing electronic slot machines on the District of Columbia ballot. Campaign finance reports filed with the D.C. government that year disclosed enormous expenditures by the sponsor to get on the ballot – more than $1.3 million – all of which came from

[7] Under 7 GCA § 17106(d) the motion is to be decided on the factual record, not on the pleadings.

two corporations located at the same address in the U.S. Virgin Islands: North Atlantic Investments, LLC, and Bridge Capital, LLC.[8]

Washington's major newspapers investigated the curious source of this massive funding. Front-page reports in The Washington Post and The Washington Times showed that John Baldwin was the real party in interest.

Mr. Baldwin is the President of Bridge Capital,[9] which he founded in Nevada in 1995.[10] Shawn Scott is also an owner of Bridge.[11] Scott and Baldwin "together have owned and operated numerous limited liability companies."[12] Authorities in two states have found the finances of these men so intertwined that they "couldn't distinguish Mr. Scott's finances from those of Mr. Baldwin."[13]

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[8] These reports are available on the D.C. Office of Campaign Finance website; their URLs are at ER 11:432; relevant excerpts are at SER 17. Reports filed in subsequent years list an additional contributor, Atlantic Northstar, LLC, which also shared Bridge's address.

As of 2004, D.C. law required 17,599 valid signatures to put a measure on the ballot. Matthew Cella and Jim McElhatton, *D.C. Slots Pitchman Led Troubled Maine Effort,* THE WASHINGTON TIMES, July 2, 2004, at A-1 ("*Slots Pitchman*"), SER 32. Thus, the slots proponents spent *$78 per required signature* – despite which they failed to submit sufficient valid signatures.

[9] Matthew Cella and Jim McElhatton, *A Mystery Player in a Bid for Slots*, THE WASHINGTON TIMES, July 8, 2004, at A-1 ("*Mystery Player*"), SER 30.

[10] Lori Montgomery, *Financing Behind D.C. Slots Murky*, THE WASHINGTON POST, August 1, 2004, at A-1 ("*Financing Murky*"), SER 27. Mr. Baldwin moved Bridge to the Virgin Islands in 2003, where it was granted a "90 percent exemption from federal income taxes for 15 years" under an "economic development program." *Id.*

[11] *Financing Murky*, SER 25.

[12] Matthew Cella and Jim McElhatton, *Bankrupt S.C. Firm Linked to Financier of D.C. Slots Bid*, THE WASHINGTON TIMES, July 14, 2004, at A-1 ("*Financier*"), SER 39.

[13] *Mystery Player,* SER 31.

It was Scott who "originally pitched the idea of bringing video lottery terminals to the District,"[14] but when legal counsel "discovered Scott's troubled past [he] demanded that Scott abandon the project."[15]

Scott's "troubled past" is inseparable from Mr. Baldwin. Scott "has been denied or failed to obtain gambling licenses in five states where regulators found evidence of financial mismanagement, irregular accounting practices and hidden partnerships."[16] Mr. Baldwin "was asked by the New York State Racing and Wagering Board last year [2003] to submit an application for a license … because it was difficult to distinguish his finances from those of his business associate Shawn A. Scott, the main applicant for the license."[17] Nevertheless, the license was denied "amid concerns about his [Scott's] character."[18] The Washington Times reported that the New York authorities also "*denied Mr. Baldwin a racing license*."[19]

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[14] *Id*., SER 30.

[15] *Financing Murky*, SER 25.

[16] *Financing Murky,* SER 25.

[17] *Mystery Player*, SER 30.

[18] *Id*., SER 31.

[19] Matthew Cella, *Gambling Rejection 5th for St. Croix Firm*, THE WASHINGTON TIMES, August 7, 2004, at A-9 ("*Gambling Rejection*") (emphasis added), SER 45. The Washington Times' online archive showed no correction to this article when it was filed in the Superior Court in 2006, *see* SER 44-45. Mr. Baldwin's representation that "[t]here were no public reports, even false ones, that Mr. Baldwin was denied a license anywhere," Appellant's Brief at 13, is therefore incorrect.

Scott was also denied a license in Maine after that state's investigation showed that he "owns or holds ownership in 111 companies, all of which gave a former Las Vegas address for Bridge Capital. The investigation report says those companies have demonstrated 'sloppy, if not irresponsible financial management and accounting practices.'"[20] As in New York, the Maine authorities found that they "couldn't distinguish Mr. Scott's finances from those of Mr. Baldwin,"[21] and that "Mr. Baldwin exercised too much control over his [Scott's] finances."[22]

The companies that "bankrolled the Bangor [Maine] slots initiative" – spending "more than $600,000 in the month leading up to the slots referendum" – both used the same address as Bridge Capital.[23] "'It's a shell game with all of these corporations,' Bangor Mayor Daniel Tremble said [in July 2004]. 'There was clearly always some concern about who these business partners were.'"[24]

Mr. Baldwin was also a partner with Mr. Scott in Carolina Equities LLC, which "held a controlling interest in gambling establishments in that state that *failed to pay various taxes and violated state gaming laws* before eventually

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[20] Matthew Cella and Jim McElhatton, *$617,000 Spent to Lobby for D.C. Slots*, THE WASHINGTON TIMES, July 13, 2004, at A-1, SER 37.

[21] *Mystery Player*, SER 31.

[22] *Gambling Rejection*, SER 45.

[23] *Slots Pitchman*, SER 33.

[24] *Slots Pitchman*, SER 32.

going bankrupt."[25] In 2000, South Carolina officials rejected applications from a subsidiary of Carolina Equities for seven video-poker licenses.[26]

When Scott was removed from the D.C. slots project, Mr. Baldwin dispatched Robert Newell to take his place. Newell owns North Atlantic Investments ("NAI"),[27] which was incorporated in Delaware just one day before the slots initiative was submitted to the D.C. Board of Elections.[28] NAI contributed $1,212,700 to the D.C. initiative.[29] But Newell is not wealthy; he's just "a worker bee."[30] "Mr. Baldwin is Mr. Newell's boss at Bridge Capital,"[31] where Newell is employed.[32] NAI used the same address as Bridge Capital,[33] and "North Atlantic's general manager, Steve Silver, acknowledged that the company is borrowing cash from Bridge."[34]

Like Scott, Newell "has a history of troubled business dealings, including bankruptcies, a government censure and ties to a gambling financier who has

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[25] *Financier*, SER 38 (emphasis added). Additional details about the company's failure to pay various taxes and its violations of state gaming laws are in the same article.

[26] *Financier,* SER 39.

[27] *Mystery Player*, SER 30.

[28] *Slots Pitchman*, SER 32.

[29] *See* footnote 8, above

[30] *Financing Murky*, SER 25.

[31] *Slots Pitchman,* SER 33.

[32] *Financing Murky*, SER 25; *see also Gambling Rejection*, SER 44.

[33] *Financing Murky; Mystery Player; Slots Pitchman*, SER 25, 30, 32.

[34] *Financing Murky*, SER 25.

been denied a license to run a Las Vegas casino."[35]

A clear picture emerges: John Baldwin has been intimately connected with gambling enterprises and partners that have broken laws and been denied licenses. His role may not have been public, but he pulled the strings. His finances "couldn't [be] distinguish[ed from] Mr. Scott's," over whom he "exercised too much control." The man he sent to run the D.C. slots initiative \ was his "worker bee," and the initiative was funded by Mr. Baldwin, either through his own Bridge Capital, or through NAI with money "borrowed" from Bridge. *Mr. Baldwin's name appears thirty-six times* in the cited newspaper stories about the D.C. slots initiative. *See* SER 25-45.

The complaint alleged that "Mr. Baldwin was not involved in the DC Slots project – and Brizill has no basis for believing he was." ER 2:007 (¶ 13). Mr. Baldwin represents to this Court that "Ms. Brizill knew that Mr. Baldwin was not involved in the DC VLT Campaign." Appellants' Brief at 13. In order to avoid being patently false, those statements must rely on an idiosyncratic definition of "involved" that does not include "bankrolling" or "being the boss of the person running the operation." *But see* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2007): "*involved:* … Connected by participation or association." Using any normal definition, Mr.

[35] *Mystery Player*, SER 29.

Baldwin was "involved" in the D.C. slots campaign: he bankrolled it and he sent first his partner, and then his employee, to run it.[36]

C. Jacqueline Marati and Dorothy Brizill's E-Mails and *Lina'la Sin Casino*'s Press Release.

Dorothy Brizill is the Executive Director of DCWatch, a "nonprofit good government organization" in Washington, D.C. ER 11:431. She has received awards for her work on behalf of clean government and has been named "Citizen of the Year" by a D.C. agency. *Id*.[37] In 2002, she successfully challenged more than 8,000 fraudulent signatures on the incumbent mayor's re-nomination petition, forcing him to run as a write-in candidate. ER 11:432.

In 2004, Ms. Brizill became aware of improprieties in the signature-gathering for Mr. Baldwin's D.C. gambling initiative. She challenged the petitions, which were rejected when the Board of Elections "justifiably found that wrongdoing permeated [the] signature-gathering operation." *Citizens*

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[36] Perhaps some details in these news articles were erroneous. But that is not the issue here. Even on Mr. Baldwin's narrow view of the CPGA, he recognizes that it is his burden to show, by clear and convincing evidence, that Ms. Brizill spoke with "constitutional malice." Appellants' Brief at 4. He cannot do so when she relied on these published reports. See p. 53, below.

Mr. Baldwin apparently thinks Ms. Brizill's statements were false because he did not *personally* direct the unlawful signature-gathering activities in D.C. and was not *personally* fined. But the complaint does not allege that Ms. Brizill made such statements; it alleges only that she said he "was involved …" or "was part of a group …" ER 2:007 (¶ 13). The fact that Mr. Baldwin was not *physically* in D.C. does not mean he was "not involved" in the D.C. project. Nor does the fact that he was not *personally* fined mean that the Guam electorate cannot hold him responsible for the conduct of the activities he bankrolled. The standard of responsibility in an election campaign is not the same as in a court of law.

[37] Her photograph is on the DCWatch website at www.dcwatch.com/dorothy.

Committee for the District of Columbia Video Lottery Terminal Initiative v. District of Columbia Board of Elections and Ethics, 860 A.2d 813, 818 (D.C. 2004) (*"Citizens Committee"*).

Two years later, Mr. Baldwin backed an initiative to legalize slot machines on Guam. On or about July 28, 2006, Jacqueline Marati sent Ms. Brizill an e-mail on behalf of *Lina'la Sin Casino*, informing her of the initiative and requesting "[a]ny assistance or advice you can provide to our organization." ER 8:352.

Ms. Brizill responded by e-mail, providing factual information about the D.C. initiative and Internet addresses for websites where relevant public documents were available. ER 8:351. She suggested that Ms. Marati do "a Google search on the[] names" of Mr. Baldwin's associates and "search the archives of *The Washington Post* and *The Washington Times*, both of which had major articles on their backgrounds in 2004." *Id.*

Having done its homework, *Lina'la Sin Casino* issued a press release on July 31, 2006, reporting on the connections between Mr. Baldwin and his associates and various worrisome activities and events in other jurisdictions. ER 4:063.

D. Mr. Baldwin's Threatening Letter to the Guam Press.

Rather than responding to this press release with a frank discussion about his activities and his associates, Mr. Baldwin responded with a threat. His lawyer e-mailed a letter to the "Guam Press" inaccurately asserting that "[n]early every statement in the press release put out by Jacqueline Marati … is false." ER 11:468. For example, the letter astonishingly asserts that "Mr. Baldwin was not 'behind' the DC Slots Initiative." ER 11:470. The letter implicitly threatened to sue anyone who reported the press release, stating that it contained "the very sort of defamation for which liability is easily found and punitive damages are imposed." ER 11:468.

In fact, *Lina'la Sin Casino*'s press release was based on reliable public sources in all essential respects, and could not have resulted in liability, much less punitive damages. *See* p. 53, below.

E. Ms. Brizill's Factual Response to the Lawyer's Letter.

Having received a copy of the lawyer's letter, Ms. Brizill responded by e-mail to Guam news media correcting some of its misstatements, providing references to public records where the facts could be found, and supplying contact information for the reporters at The Washington Post and The Washington Times who had written about Mr. Baldwin and his associates in

2004. ER 8:346. In contrast to the lawyer's threatening letter, Ms. Brizill's e-mail was a model of accuracy. For example, she explained:

> Ms. Deitsch-Perez [Mr. Baldwin's lawyer] is technically correct that the DC Board of Elections and Ethics did not assess [a] fine for "signature buying", instead, it found that:
>
> > The … petition circulation process revealed significant and pervasive irregularities and improprieties of a magnitude never previously experienced in this jurisdiction. The illegal activities compromised, and made a mockery of, the integrity of the electoral process.

Id. (quoting the D.C. Board of Elections decision (ER 8:272)). And she accurately stated:

> While Ms. Deitsch-Perez correctly claims that Scott, Newell, and Baldwin were not individually named or fined by the District of Columbia Board of Elections and Ethics, the committee that was their hired agent was.

ER 8:347. Ms. Brizill's e-mail further explained:

> These three individuals [Scott, Newell and Baldwin] have been partners, in various combinations, in more than 160 companies. … Ms. Deitsch-Perez denies that Mr. Baldwin was involved in the Washington, DC, effort in any way, but Mr. Baldwin is the primary source of financing for Mr. Scott and Mr. Newell, so this denial is disingenuous and misleading. … The truth is that the three members of this group are all interconnected in all of their deals, and they commonly disguise and deny their connections by using these shell corporations.

ER 8:348-349. Although this message was e-mailed to eight members of the Guam media, *see* ER 8:346, Mr. Baldwin has not alleged that any of it – or of

Ms. Brizill's earlier e-mail to Jacqueline Marati – was false. Rather, his claims against Ms. Brizill are based on statements in a press release she did not write, and on statements in a radio interview his witnesses cannot quote. His silence regarding her *actual* statements implicitly concedes their truth.

F. Ms. Brizill's Interview on KUAM.

After receiving the lawyer's letter and Ms. Brizill's e-mail, radio station KUAM interviewed both by telephone. "The interviewer played lengthy excerpts from … [Ms.] Deitsch-Perez, and then asked Ms. Brizill to respond." ER 12:491 (Imhoff Declaration). Ms. Brizill "had before her" a copy of her own e-mail, *id*., and she "used that e-mail as 'talking points' during [her] interview, and [her] remarks adhered closely to the content of the e-mail." ER 11:436 (Brizill Declaration). Mr. Imhoff, who "was present in the same room during the entire time," agrees that "she closely followed the statements that she had made in that e-mail." ER 12:491. As already noted, her e-mail was factual; Mr. Baldwin has never suggested otherwise.

G. Mr. Baldwin Files his SLAPP suits.

When his lawyer's letter did not succeed in intimidating the opposition, Mr. Baldwin filed this SLAPP-suit against Dorothy Brizill and twenty Does,

and a parallel lawsuit against Jacqueline Marati, *Lina'la Sin Casino,* and twenty Does.[38]

The complaint, ER Tab 2, contains two central allegations. First, it alleges that statements in *Lina'la Sin Casino*'s press release were defamatory (¶ 11) and that "Brizill provided Marati with some of the defamatory material" (¶ 12), thereby "ma[king] false statements about Plaintiffs" (¶ 23). Second, it alleges that Ms. Brizill "repeated [on KUAM] many of the same false and defamatory statements contained in the Defamatory Release" (¶ 12), identifying four specific statements (¶ 13).

Mr. Baldwin has not supported any of his allegations by clear and convincing evidence, or, indeed, by any reliable evidence.

1. Mr. Baldwin has not produced *any* evidence that Ms. Brizill was the source of the allegedly defamatory statements in the press release.

The only communication from Dorothy Brizill to Guam preceding *Lina'la Sin Casino*'s press release was her July 28 e-mail. This is the only evidence Mr. Baldwin cites to support his allegation. *See* Appellants' Brief at

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[38] The complaint stated that plaintiffs were not only unaware of the identities of the "Does" – the usual, and legitimate, reason for naming Doe defendants, *see, e.g., Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) – but also that they were "*unaware of the . . . basis for liability*" of the Does." ER 2:004 (¶ 4) (emphasis added). In other words, the plaintiffs had no reason to believe that any "Doe" had actually injured them in any way. The "Doe" defendants were wholly imaginary, included only to chill the speech of other opponents of Mr. Baldwin's initiative. *See SLAPPs* at 150: "We have found whole communities chilled by the inclusion of Does, fearing 'they will add my name to the suit.'"

10 n.33 (citing Ms. Deitsch-Perez' Declaration, ER 8:138 ¶ 6, which in turn cites only the July 28 e-mail). It is therefore undisputed that Ms. Brizill provided no other information to Ms. Marati. *Her e-mail never mentions Mr. Baldwin*. ER 8:351-52. Thus, Mr. Baldwin's first major allegation against Ms. Brizill has no factual support whatsoever.

2. Mr. Baldwin has not supported his allegation that Ms. Brizill said he was "involved in a signature buying scheme." In any event, he *was* involved in such a scheme.

Mr. Baldwin has not presented clear and convincing evidence that Ms. Brizill said he "was 'involved in a signature buying scheme'" (Complaint ¶ 13). In any event, the evidence shows that he *was* involved in a signature-buying scheme.

Neither of Mr. Baldwin's declarants can recall Ms. Brizill's actual words. *See* ER 6:131 (Scott); ER 8:138 (Deitsch-Perez). In the face of Ms. Brizill's denial that she made such a statement, ER 11:437, and the clarity with which her e-mail to the press – undisputedly used as "talking points" during her interview – stated that the D.C. Board of Elections "did not assess that fine for 'signature buying,'" ER 8:346, Mr. Baldwin's proof cannot meet the *clear and convincing* standard.[39]

[39] That standard requires evidence of high probative quality, and the First Amendment also requires the Court to weigh Ms. Brizill's evidence on this point, along with Mr. Baldwin's. See pp. 49-52, below.

In any event, Mr. Baldwin *was* involved in a program of buying signatures in Washington, D.C. His agents and their subcontractors hired professional petition-circulators to collect signatures; circulators were paid *as much as $6.50 per signature*. ER 8:166 (Board of Elections decision). *Mr. Baldwin's money paid for those signatures*. The payments went to circulators, not voters, but Mr. Baldwin has not alleged that Ms. Brizill said he was *paying voters* – only that he was *buying signatures*. And so he was, quite literally. There is no defamation in truth.

3. Mr. Baldwin has not supported his allegation that Ms. Brizill said he was "part of a group fined $622,820 in DC signature buying scheme for slot legalization."

The complaint alleges that Ms. Brizill "repeated" from the "Defamatory Release" that "John Baldwin was 'part of a group fined $622,820 in DC signature buying scheme for slot legalization.'" Complaint ¶¶ 12-13. *But there is no such statement in the press release. See* ER 4:063-065. Nor do Mr. Baldwin's declarants support this allegation. They state "Brizill said in words or substance that John Baldwin *controlled* and/or was part of a group fined $622,820 in DC for violating election law." ER 6:131 (Scott); ER 8:138 (Deitsch-Perez) (emphasis added). *That* statement is true: the sponsoring committee for the D.C. initiative *was* fined $622,820 for violating D.C. election law, *see* ER 8:311, and Mr. Baldwin controlled that committee by bankrolling it

and by sending his employee, Newell, to direct its activities. There is no defamation in truth.

4. Mr. Baldwin has not supported his allegation that Ms. Brizill said he "was denied or failed to obtain gambling licenses in five states due to financial irregularities."

Mr. Baldwin has not presented clear and convincing evidence that Ms. Brizill repeated from the "Defamatory Release" that he "was denied or failed to obtain gambling licenses in five states due to financial irregularities." Complaint ¶ 13. Again, the complaint misquotes the press release, which actually said:

> The Washington Post … reports the following: *Baldwin/Scott have been* denied or failed to obtain gambling licenses in five states where regulators found evidence of financial mismanagement, irregular accounting practices and hidden partnerships.

ER 4:065 (emphasis added). That is virtually an exact quotation from a front-page story in the Washington Post, which reported:

> Scott, whose properties have received financial support from Baldwin, has been denied or failed to obtain gambling licenses in five states where regulators found evidence of financial mismanagement, irregular accounting practices and hidden partnerships.

Financing Murky, SER 25. As other news reports made clear, when it came to gambling enterprises, Baldwin and Scott "couldn't [be] distinguished," and

Baldwin "exercised … control" over Scott.[40] *Lina'la Sin Casino* had abundant grounds for referring to "Baldwin/Scott" together in connection with gambling applications. Thus, even if Ms. Brizill had made this alleged statement – which she denies, *see* ER 11:442 – it would not have been defamatory, because it was fundamentally true.

5. Mr. Baldwin has not supported his allegation that Ms. Brizill said he "was a partner in a company that in the late 1990s owned gambling halls in South Carolina that failed to pay taxes and broke state gaming rules." In any event, he *was* a partner in such a company.

The complaint alleges that on KUAM Ms. Brizill "repeated" from the "Defamatory Release" that **"**John Baldwin was a 'partner in a company that in the late 1990s owned gambling halls in South Carolina that failed to pay taxes and broke state gaming rules.'" Complaint ¶¶ 12-13. However, neither of Mr. Baldwin's declarants even mentions this allegation, *see* ER 6:131 (Scott); 8:138 (Deitsch-Perez), and Ms. Brizill denies it, ER 11:443 (¶ 14), so it is *undisputedly* false. Nevertheless, had Ms. Brizill made this statement, it would have been well founded; this is precisely what the Washington Times reported in the *Financier* story, SER 38. There is no defamation in truth.

[40] *Mystery Player*, SER 30, 31; *Gambling Rejection*, SER 45.

In sum, it is clear that the complaint must be dismissed because Mr. Baldwin has failed to provide even substantial evidence, much less clear and convincing evidence, to support *any* of his allegations.[41]

SUMMARY OF ARGUMENT

1. Ms. Brizill's speech is protected by the CPGA because it was "in furtherance of the Constitutional rights to petition" and was "aimed at procuring any … electoral action, result or outcome." 7 GCA § 17104.

(a) "In furtherance of" is a broader concept than "guaranteed by," as courts in other jurisdictions with anti-SLAPP statutes have agreed. Ms. Brizill

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[41] Beyond what has been discussed, appellants have presented no evidence supporting their invasion of privacy or tortious interference claims, which therefore would fail even had they not been abandoned by omission from appellants' brief (see p. 5, above).

Moreover, those claims, and Guam Greyhound's defamation claim, all must be dismissed for independent reasons:

1. Guam Greyhound's invasion of privacy claim must be dismissed because a corporation cannot bring such a claim: "an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded." RESTATEMENT (SECOND) OF TORTS § 652I. *Accord, e.g., West v. Media General Convergence, Inc.,* 53 S.W.3d 640, 648 (Tenn. 2001); *Intercity Maintenance Co. v. Local 254 SEIU*, 62 F.Supp.2d 483, 506 (D.R.I. 1999), *aff'd in part and vacated in part on other grounds*, 241 F.3d 82 (1st Cir. 2001); *Seidl v. Greentree Mortgage Co.,* 30 F.Supp.2d 1292, 1302 (D. Colo. 1998).

2. Guam Greyhound's defamation claim must be dismissed because Ms. Brizill is not alleged to have said anything *about* Guam Greyhound. *See, e.g., Church of Scientology of California v. Flynn*, 578 F.Supp. 266, 268 (D. Mass. 1984) ("a corporation … cannot prevail in a libel action unless the allegedly defamatory statement was published 'of and concerning' the corporation. … One who is not himself libelled cannot recover even though he has been injured by the libel published concerning another.") (internal quotation marks omitted); *Golden Palace, Inc. v. National Broadcasting Co., Inc*., 386 F.Supp. 107, 109 (D.D.C. 1974) ("a corporation … has no personal reputation and may be libeled only by imputation about its financial soundness or business ethics.").

3. Guam Greyhound's tortious interference claim must be dismissed because Mr. Baldwin's initiative was defeated at the polls in 2006, and again defeated, by a landslide, in a January 2008 election in which Ms. Brizill played no part. It would therefore be impossible for Guam Greyhound to prove that Ms. Brizill's statements proximately caused its damages.

Thus, the only remaining claim is Mr. Baldwin's claim for defamation.

furthered, or *advanced*, her own right of petition, by bringing important facts to the attention of governmental decision-makers (here, the voters). She also *furthered*, or *assisted,* the voters' exercise of *their* rights of petition by providing them with relevant information about Mr. Baldwin's initiative.

(b) The statutory exclusion for "[a]cts … not aimed at procuring any government or electoral action, result or outcome" is intended to exclude only the "sham" activity of "using the governmental process … as a weapon." *See SLAPPs* at 27 (internal quotation marks omitted). Ms. Brizill's speech invoked no governmental process, and was no sham.

Moreover, "read naturally, the word 'any' has an expansive meaning," *Ali v. Federal Bureau of Prisons*, __ U.S. __, 2008 WL 169359 at *3 (Jan 22, 2008). "[P]rocuring *any* … electoral … result or outcome" includes procuring an *informed* result or outcome, as Ms. Brizill did by providing the citizens of Guam with relevant information.

2. The CPGA is not unconstitutional. Mr. Baldwin's argument rests on the proposition that his lawsuit is "objectively reasonable" or "well-grounded," but that is an entirely circular argument. Whether a lawsuit is well grounded depends upon the law of the forum jurisdiction – including, here, the CPGA.

Mr. Baldwin's argument could succeed only if he had a constitutional right to an unrestricted cause of action for defamation. He has no such right, because the First Amendment creates a floor for the protection of speech, not a ceiling, and because the common law yields to legislation. The very statute establishing the tort of defamation on Guam reserves the legislature's right to limit it:

> Every person has, *subject to the qualifications and restrictions provided by law*, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

19 GCA § 2101 (emphasis added). The CGPA is simply one such "qualification[] or restriction[] provided by law."

3. Mr. Baldwin has not shown, by clear and convincing evidence, that Ms. Brizill acted with "actual malice." In fact, he has not even shown by clear and convincing evidence that she *made* the alleged statements. The undisputed evidence shows that Ms. Brizill provided no defamatory material for *Lina'la Sin Casino*'s press release. And the allegation that Ms. Brizill repeated defamatory statements from that press release on KUAM is supported only by two declarations that do not even purport to quote her actual words. This is not evidence of such "extraordinary persuasiveness" that it can qualify as "clear and convincing." *Shorehaven Corp. v. Taitano*, 2001 Guam 16, ¶19.

Under the constitutional standards of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny, Mr. Baldwin's SLAPP-suit could not withstand a motion for summary judgment even in the absence of the CPGA.

This Court should make clear to Mr. Baldwin and others who would "abuse … the judicial process … to chill, intimidate, or punish citizens, businesses and organizations for involving themselves in public affairs," 7 GCA § 17102(a)(6), that the courts of Guam will not tolerate such abuse.

ARGUMENT[42]

In July 2006, Mr. Baldwin was faced with legitimate, informed criticism of his past activities and associations by grassroots opponents of his initiative.[43] Rather than responding on the merits – a debate he could not win – he abused the legal process by filing two SLAPP-suits to squelch their speech and intimidate others.

This case exemplifies the problem that Guam's anti-SLAPP statute was enacted to address. The Superior Court recognized that the CPGA applies to this lawsuit and requires dismissal. This Court should likewise construe the

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[42] Mr. Baldwin's statement of the standard of review is generally correct, except that on a motion for summary judgment in a public figure defamation case, the court need *not* credit plaintiff's version of the facts or draw inferences in his favor, but must independently weigh the evidence. See pp. 49-50, below.

[43] Mr. Baldwin suggests that Ms. Brizill's speech contravenes LEVITICUS 19:16, the biblical injunction against "talebearing." Appellants' Brief at 34 n.120. There is a more pertinent scripture: "they that will be rich fall into temptation and a snare, and into many foolish and hurtful lusts …. For the love of money is the root of all evil." 1 TIMOTHY 6:9-10.

statute "liberally to effectuate its purposes and intent fully," 7 GCA § 17109, and to deter future abuse, by affirming that judgment.

I. Ms. Brizill is Immune Under the CPGA Because She was Acting in Furtherance of the Constitutional Right of Petition by Communicating with the Voters to Procure an Informed and Educated Electoral Outcome.

Mr. Baldwin insists that the issue before this Court is the same as it would be if the CPGA did not exist: are there disputes of fact about the merits of his claims? *See* Appellants' Brief at 11.

But the statute does exist. The legislature recognized that lawsuits like this one, filed against individuals and organizations because of their activity "seeking relief, influencing action, informing, communicating and otherwise participating in the processes of government," 7 GCA § 17104, are "an abuse of the judicial process." *Id*. § 17102(a)(6). The statute's purpose is to protect defendants like Ms. Brizill (and Ms. Marati and *Lina'la Sin Casino*) from the "expense, harassment and interruption," *id*. § 17102(a)(4), that would be imposed upon them by the SLAPP-suits that plaintiffs like Mr. Baldwin wish to pursue, for it is *the litigation itself* that is "used to censor, chill, intimidate, or punish citizens, businesses and organizations for involving themselves in public affairs." *Id*. § 17102(a)(6).

Contrary to Mr. Baldwin's position, determining whether a speaker's statements are immunized does not require a court to examine the merits of a plaintiff's claims. If it did, the immunity would be of little value, for it would apply only after a plaintiff's claims had been rejected on the merits, after discovery or even after trial. The CPGA is intended, instead, to achieve the "speedy adjudication of SLAPPs, as a major contribution to lawsuit reform." *Id*. § 17102(b)(4).

Thus, the issue is not whether there are disputed facts relevant to the merits of Mr. Baldwin's claims, but whether he has shown, by clear and convincing evidence, that Ms. Brizill is not entitled to immunity because she was not acting "in furtherance of the Constitutional rights to petition, including … informing and communicating," or that her actions were "not aimed at procuring any government or electoral action, result or outcome." *Id*. § 17104.

He has not made that threshold showing. The facts show that Ms. Brizill engaged in precisely the sort of activity the statute was intended to protect.

A. Mr. Baldwin has not shown that Ms. Brizill did not speak "in furtherance of the Constitutional rights to petition."

Mr. Baldwin's principal argument is that the CPGA "does not and can not protect statements made with 'constitutional malice' as defined by *New York Times v. Sullivan*." Appellants' Brief at 18. We explain below (Part II)

that the CPGA *can* protect statements allegedly made with 'constitutional malice' because *Times v. Sullivan* (like most constitutional decisions) creates a floor, not a ceiling. Legislatures may, and often do, provide greater protection for speech than the Constitution requires. We explain here that the CPGA *does* protect Dorothy Brizill's contribution to the public debate about Mr. Baldwin's initiative, despite his claim that her statements were false.

Mr. Baldwin focuses on the phrase "Constitutional right," defined as a "right guaranteed by the Constitution." Appellants' Brief at 21. But no statute is needed to guarantee constitutional rights – the Constitution guarantees them. The CPGA immunizes "[a]cts *in furtherance of* the Constitutional rights to petition." 7 GCA § 17104 (emphasis added). Mr. Baldwin ignores those key words, but they have meaning. "In furtherance of" is broader than "guaranteed by," as courts interpreting similar statutory provisions have concluded.

California's anti-SLAPP law applies to "any act of a person *in furtherance of* the person's right of petition or free speech under the United States or California Constitution." Cal. Code Civ. Pro. § 425.16(b)(1) (emphasis added). Such acts include any "statement … made in a place open to the public or a public forum in connection with an issue of public interest," *id*. at § 415.16(e)(3); statements to the press are statements in a public forum. *Annette F. v. Sharon S.,* 119 Cal.App.4th 1146, 1161 (2004).

The California courts have held that "[t]he Legislature did not intend that in order to invoke the [anti-SLAPP statute] the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law," *Navellier v. Sletten*, 52 P.3d 703, 713 (Cal. 2002) (internal quotation marks omitted), recognizing that such a requirement would render the statute "superfluous because by definition the plaintiff could not prevail on its claim." *Flatley v. Mauro,* 139 P.3d 2, 11 (Cal. 2006) (internal quotation marks omitted).

Likewise in Oregon, "[t]he writing and publishing of a magazine article is conduct *in furtherance of* the exercise of free speech rights under the anti-SLAPP statute." *DuBoff v. Playboy Enterprises Int'l*, __ F.Supp.2d. __, 2007 WL 1876513 at *6 (D. Ore. 2007) (emphasis added). And a Louisiana court held that publishing allegedly defamatory statements in a newspaper "[c]learly … involves an act *in furtherance of* the defendants' right to free speech under the United States and Louisiana Constitutions." *Starr v. Boudreaux*, __ So.2d __, 2007 WL 4463086 at *2 (La. App. 2007) (emphasis added).[44]

This is also correct as a matter of ordinary English usage. A statute prohibiting employment discrimination by private companies *furthers* the Fifth

[44] Had the Guam legislature wished to protect only speech already protected by the Constitution, it could have copied the Massachusetts anti-SLAPP statute, which covers, *inter alia*, "any other statement falling *within constitutional protection* of the right to petition government." Mass. Gen. Laws ch. 231 § 59H, ER 5:094 (emphasis added). Guam did not choose that course. *See Castro v. Peck*, 1998 Guam 2, ¶ 16 (refusing to "read[] into the statute a provision which the Legislature could have provided, but did not.")

and Fourteenth Amendment principle of equal protection, although the Constitution itself does not prohibit private discrimination. A police officer's volunteer work with a Boys and Girls Club *furthers* her crime-prevention mission, although that work is not required by her job. A lawyer's communication with the media *furthers* the representation of his client, although it is not part of the practice of law.

Ms. Brizill's speech also satisfies the "in furtherance" requirement of the CPGA for a second, independent reason. Unlike some anti-SLAPP statutes, such as California's, which apply to "any act of a person in furtherance of *the person's* right of petition," Cal. Code Civ. Pro. § 425.16(b)(1) (emphasis added), the CPGA protects "Acts in furtherance of *the* Constitutional rights to petition," 7 GCA § 17104 (emphasis added). Thus, even were the Court to conclude that Ms. Brizill was not exercising her *own* right of petition, it is plain that she assisted, or furthered, the voters of Guam in exercising *their* constitutional rights of "participating in the processes of government," *id*., by providing them with relevant, timely information about the slots initiative.

Mr. Baldwin argues that the legislature's finding that abusive lawsuits have been filed against defendants "based on their valid exercise of their right to petition," 7 GCA § 17102(a)(3), proves that only constitutionally protected

speech is covered by the statute, citing *Flatley v. Mauro*, *supra*. Appellants' Brief at 24. But *Flatley* says just the opposite:

> That the Legislature expressed a concern in the statute's preamble with lawsuits that chill the valid exercise of First Amendment rights does not mean that a court may read a separate proof-of-validity requirement into the operative sections of the statute.

Flatley, 139 P.3d at 15 (internal quotation marks omitted). *Flatley* created a narrow exception to California's anti-SLAPP statute for speech "conclusively demonstrated to be illegal as a matter of law," *i.e., criminal conduct*. *Id*. Mr. Baldwin does not allege that Ms. Brizill's speech was criminal. Thus, the legislative finding that many lawsuits have been filed "based on th[e] valid exercise of the[] right to petition" does not mean her speech is unprotected.[45]

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[45] Mr. Baldwin also makes much of the Superior Court's quotation of a passage from *Webb v. Fury*, 282 S.E.2d 28 (W.Va. 1981), because that case was later overruled in light of *McDonald v. Smith*, 472 U.S. 479 (1985). *See* Appellants' Brief at 7, 27-29. This is grasping at straws.

Webb held that both the First Amendment and the West Virginia Constitution provided absolute protection for petitioning activity. After the Supreme Court held in *McDonald* that the Petition Clause of the First Amendment does not provide absolute protection, the West Virginia Supreme Court reconsidered and brought its state constitution into line with the federal Constitution. *Harris v. Adkins*, 432 S.E.2d 549 (W.Va. 1993).

None of this is relevant here. To be sure, under *McDonald* the First Amendment does not provide *absolute* protection for petitioning activity. But the legislature of Guam has provided special protection by statute. The Superior Court's agreement with *Webb*, that "[t]o prohibit robust debate on these [public policy] questions would deprive society of the benefit of collective thinking and … destroy the free exchange of ideas which is the adhesion of our democracy," ER 18:622 (quoting 282 S.E.2d at 461) (ellipsis by the court), simply indicates that the Superior Court agreed with *I Liheslaturan Guahan* on the need for an anti-SLAPP statute.

Next, Mr. Baldwin argues that protecting Ms. Brizill's speech would contravene the legislature's intent to create a "more equitable balance between the rights of persons to file lawsuits and to trial by jury, and the rights of other persons to petition, speak out, associate and otherwise participate in their governments." Appellants' Brief at 25 (quoting 7 GCA § 17102(b)(3)). But that provision does not specify *what* balance the legislature considered equitable. The answer is provided by § 17102(b)(1), stating the statute's purpose "to protect and encourage citizen participation in government *to the maximum extent permitted by law."* (Emphasis added.) Protecting Dorothy Brizill's speech here falls well within that maximum; dismissing Mr. Baldwin's abusive SLAPP-suit creates no inequity.

Mr. Baldwin also urges application of a "common law principle that grants of immunity are to be interpreted narrowly." Appellants' Brief at 25 (internal quotation marks omitted). But statutes displace the common law, *see Sky Enterprise v. Kobayashi*, 2003 Guam 5 ¶ 11 (2003), and the legislature specified that *this* grant of immunity "shall be construed liberally to effectuate its purposes and intent fully." 7 GCA § 17108. That is the applicable rule of construction.

As the Superior Court noted, ER 18:622, analogous immunities for individuals participating in the legislative process are similarly broad. *See, e.g.,*

RESTATEMENT (SECOND) OF TORTS § 590A ("A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying … if the matter has some relation to the proceeding"). One court explained:

> the strong public policy of encouraging full and open citizen participation in legislative proceedings outweighs [the plaintiff's] interest in his reputation. … Moreover, absolute privilege in this context ensures that decision makers will be more fully informed to enact suitable legislation. This privilege eliminates the chilling effect of defamation suits by ensuring that citizens will be allowed to speak freely and without fear that their participation in this democratic process will result in a lawsuit. Finally, absolute privilege encourages the free expression of ideas as part of the political process.

Krueger v. Lewis, 834 N.E.2d 457, 464 (Ill. App. 2005) (citations omitted).

When considering ballot measures, "the people are deemed to be members of the largest legislative body in the state." *Brock v. Thompson*, 948 P.2d 279, 286 (Okla. 1997) (internal quotation marks omitted). It follows that speakers providing information to voters about initiatives are precisely analogous to speakers testifying before legislative committees: they are equally seeking to influence the government's decision on matters of public policy. *See* 7 GCA § 17103(a) (defining "Government" to include "the electorate"). The same immunity is therefore entirely appropriate, as the Guam legislature recognized.

The legislature defined "[a]cts in furtherance of the Constitutional rights to petition" to include "*informing, communicating* and otherwise *participating in the processes of government*." 7 GCA § 17104 (emphasis added). By agreeing to be interviewed on KUAM, Ms. Brizill *informed* and *communicated* to the Guam electorate important information about a ballot measure, thereby *participating in that process of government.* Her speech fits comfortably within the statutory grant of immunity.

Finally, Mr. Baldwin cites the doctrine of "constitutional avoidance," arguing that the Court should construe the statute narrowly to avoid rendering it unconstitutional. Appellants' Brief at 26. But that doctrine applies only where "an otherwise acceptable construction of a statute would raise *serious constitutional problems*." *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (emphasis added). As we show below (Part II), the CPGA does not raise even colorable constitutional issues. The doctrine of "constitutional avoidance" thus has no application here.[46]

[46] That the CPGA is closer to the model anti-SLAPP statute and stronger than some other states' laws is not a flaw. As Justice Brandeis famously explained, "[i]t is one of the happy incidents of the federal system that a single courageous state [or territory] may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J, dissenting).

B. Mr. Baldwin has not shown that Ms. Brizill's speech was "not aimed at procuring any … electoral … result or outcome."

The CPGA excludes from immunity acts that are "not aimed at procuring any government or electoral action, result or outcome." 7 GCA § 17104. A plaintiff has the burden of "produc[ing] *clear and convincing* evidence that the acts of the [defendant] are not immunized" because of this exclusion. 7 GCA § 17106(e) (emphasis in the statute).

The meaning and purpose of this exclusion are not entirely clear from the face of the statute, but the drafters explained that their intent was to mirror the narrow, "sham" exception to the *Noerr-Pennington* doctrine, as articulated in *City of Columbia v. Omni Outdoor Advertising, Inc*., 499 U.S. 365, 380 (1991). *See SLAPPs* at 27.[47] Thus, a SLAPP should

> be allowed to continue … only if the [defendant's] petitioning uses the governmental process solely as an end in itself (that is, it invokes the costs, delays, and inconveniences of the government procedure only, without regard to outcome).

Id. In other words, if the speaker "use[d] the governmental process … as a 'weapon.'" *Id*. (quoting *Omni*).[48]

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[47] Because this provision of the CPGA tracks the model statute, the drafters' explanation of the model's meaning provides a reliable guide to the CPGA's meaning. *See, e.g., People v. Palisoc*, 2002 Guam 9, ¶ 38 (relying on commentary to Model Penal Code to discern meaning of Guam statute).

[48] "A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." *Omni,* 499 U.S. at 380.

Mr. Baldwin has not attempted to show that Ms. Brizill used any governmental process as a "weapon," with no interest in the result. Indeed, she did not invoke any "governmental process" at all – her action was pure speech. It bore no resemblance to the "sham exception" of *Omni*.

In any event, Mr. Baldwin has *admitted* that Ms. Brizill's speech was "aimed at procuring any … electoral action, result or outcome." As he acknowledged in his complaint, her statements were "geared to bring people to the conclusion that they should vote against the slots initiative because Guam Greyhound's owner is untrustworthy." ER 2:007 (¶ 14). The Superior Court properly relied on that admission in dismissing this lawsuit: "Based on Plaintiff's own admissions in his Complaint, there can be no other conclusion than that reached by Plaintiff himself …." ER 18:622.

Belatedly realizing that he committed truth, Mr. Baldwin now seeks to renounce his own pleading. This he may not do:

> It is a well-settled rule that a party is bound by what it states in its pleadings. Thus, a plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts.

Ex parte Blankenship, 893 So.2d 303, 306 (Ala. 2004) (internal quotations and citations omitted) (collecting authorities). Mr. Baldwin's untimely effort to renounce his pleading on appeal should be rejected.

Even if this Court were to consider Mr. Baldwin's new argument, it would fail. He points to a single sentence in Ms. Brizill's declaration stating that her "sole purpose was to share the information that I gained in the 2004 and 2006 initiative efforts in the District of Columbia, for any value that it may have had for the voters in Guam." Appellants' Brief at 33 (citing ER 11:445). But the fact that Ms. Brizill did not presume to *tell* Guamanians how to vote hardly constitutes clear and convincing evidence that her statements were "not aimed at procuring any government or electoral action, result or outcome." To the contrary, providing relevant information to voters in an election campaign is self-evidently an action aimed at procuring an *informed and educated* electoral result or outcome. An *informed and educated* result or outcome certainly qualifies as "*any* … result or outcome." *See, e.g., Ali v. Federal Bureau of Prisons*, __ U.S. __, 2008 WL 169359 at *3 (Jan 22, 2008) ("read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind") (internal quotation marks omitted).

Mr. Baldwin's new theory – that only a speaker who explicitly champions one side of a debate is protected by the right to petition or the CPGA – makes no sense. Under his theory, a newspaper editorial presenting the pros and cons of the slots initiative and concluding, "each voter should consider the issues carefully and make up his or her own mind," would not be protected if

Mr. Baldwin sued and alleged that the facts had been presented with "constitutional malice." Under his theory, an actual petition to the governor, signed by hundreds of Guamanians, would not be an exercise in "petitioning" if it presented factual information relevant to a controversial bill but did not conclude with a request to sign or veto the bill.

Mr. Baldwin cites *Kobrin v. Gastfriend*, 821 N.E.2d 60 (Mass. 2005), Appellants' Brief at 31-32, but *Kobrin* has no relevance here. The Massachusetts anti-SLAPP statute protects only a "party's exercise of *its* right of petition under the constitution," *id*. at 64 (emphasis added); this "restrict[s] the statute's coverage to those defendants who petition the government *on their own behalf*." *Id*. (emphasis added). Mr. Gastfriend had not spoken on his own behalf, but as an agent of the state. *Id*. at 62. It would be senseless, the court recognized, to conclude that the government was *petitioning itself*. *Cf. Garcetti v. Ceballos*, 126 S.Ct. 1951, 1960 (2006) ("when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes").

Dorothy Brizill was not a government agent or employee, and the CPGA protects all "[a]cts in furtherance of *the* Constitutional rights to petition," 7 GCA § 17104 (emphasis added) – not just in furtherance of the *speaker's* right. It is common for one person to assist another in exercising the right to petition –

whether a scrivener writing a letter for an illiterate person or a lawyer filing suit for a client.

Here, Dorothy Brizill – in addition to exercising her own rights – was assisting Jacqueline Marati and *Lina'la Sin Casino* in exercising *their* rights to "participat[e] in the processes of government" on Guam, *see* ER 8:352 (e-mail from Ms. Marati seeking Ms. Brizill's "assistance or advice" regarding the slots initiative), and was assisting the people of Guam in exercising *their* rights to "participat[e] in the processes of government" by receiving timely, relevant information. *See, e.g., Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 200 (Alaska 2007) ("the Constitution protects the right to receive information and ideas, because this is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press and political freedom.") (Emphasis in original; internal quotation marks and citation omitted); *Voters Education Committee v. Washington State Public Disclosure Comm'n*, 166 P.3d 1174, 1181 (Wash. 2007) ("The constitutional safeguards which shield and protect the communicator, perhaps more importantly also assure the public the right to *receive* information in an open society.") (Emphasis in original; internal quotation marks omitted.)

Mr. Baldwin has not carried his burden of showing that Ms. Brizill's speech was subject to the narrow statutory exclusion.

II. The CPGA Does Not Unconstitutionally Prohibit Mr. Baldwin From Pursuing An "Objectively Reasonable Lawsuit," Because his Lawsuit is Not "Objectively Reasonable" under Guam Law.

Mr. Baldwin argues that the CPGA is unconstitutional if it prevents him from litigating "an objectively reasonable lawsuit." Appellants' Brief at 34. The Superior Court rejected that argument, ER 18:623, adopting by reference Ms. Brizill's explanation (ER 10:401-06) of its infirmity.

Mr. Baldwin's argument implicitly rests on the proposition that the First Amendment creates a ceiling, rather than a floor, for the protection of speech, so that any speech not protected by the First Amendment must be actionable. That is incorrect:

> [T]he substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution.

Mills v. Rogers, 457 U.S. 291, 300 (1982). Congress and state legislatures regularly protect speech that the First Amendment does not protect. *See, e.g.*, 47 U.S.C. § 230 (granting Internet publishers absolute immunity from liability for material provided by third parties);[49] Cal. Educ. Code § 94367

[49] This federal statute provides an apt analogy to the CPGA. The Internet can enable any person to publish a defamatory message to the whole world, greatly harming the subject. Yet, in order "to preserve the vibrant and competitive free market that presently exists for the Internet …, unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2), Congress enacted this "broad immunity against defamation liability for those who use the Internet to publish information that originated from another source." *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006).

(generally prohibiting private colleges from punishing student speech).

Accordingly, Mr. Baldwin's assertion that he has a *constitutional right* to sue for defamation, false light invasion of privacy, and tortious interference with prospective business opportunities is wrong. To the contrary, "[i]t is well settled that the Legislature possesses a broad authority both to establish and to abolish tort causes of action. … It may create new rights or provide that rights which have previously existed shall no longer arise." *Cory v. Shierloh*, 629 P.2d 8, 12-13 (Cal. 1981) (internal quotation marks omitted).

Thus, for example, in 1985 the legislature enacted 7 GCA § 9107, immunizing from tort liability actions taken by, *inter alia*, members of the Guam Bar Association Ethics Committee in the course of their duties. The official comment explains that "[i]mmunity protects the independent judgment of the Bar of Guam and avoids diverting the attention of its personnel as well as its resources towards resisting collateral attack and harassment." This is an absolute privilege. The comment explains that an absolute privilege was enacted "because qualified privilege does not protect against harassment made possible by simply alleging malice in a law suit." While a plaintiff might file an "objectively reasonable" claim that a member of the Ethics Committee had maliciously defamed him, that claim would be dismissed pursuant to 7 GCA § 9107. The statute would not thereby be rendered unconstitutional. *See also* 10

GCA § 12326 (absolutely immunizing "any witness appearing before the Board [of Nurse Examiners] … [in] a professional review proceeding").

The legislature has the same authority to immunize individuals who serve the public interest by participating in public debate about government policy as it has to immunize individuals who serve the public interest by participating in legal or medical peer review activities. Like Bar Ethics Committee members, individuals who "participat[e] in the processes of government," 7 GCA § 17104, deserve protection from the "collateral attack and harassment" that is the very purpose of a SLAPP-suit – or so the legislature determined "[i]n its wisdom in formulating public policy in this area of the law." *Fagan v. Dell'Isola*, 2006 Guam 11, ¶ 40.[50]

Mr. Baldwin relies on *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), yet that case actually highlights the flaw in his argument. *Bill Johnson's* held that the NLRB may not enjoin the prosecution of a "well-

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[50] In the absence of legislation, state courts can also shape the common law. For example, courts in at least ten states have refused to recognize the tort of "false light invasion of privacy," one of Mr. Baldwin's claims here. *See Cain v. Hearst Corp*., 878 S.W.2d 577, 579 (Tx. 1994) (collecting cases). *Cain* cogently explains why permitting such claims would "unacceptably increas[e] the tension that already exists between free speech constitutional guarantees and tort law." *Id*. at 580.

Mr. Baldwin's Texas counsel apparently believes that if she filed an "objectively reasonable" claim for false light invasion of privacy in a Texas court, she would have a constitutional right to pursue it. Her own state Supreme Court disagrees.

The courts of Guam have not recognized the tort of false light invasion of privacy in any reported decision, and this Court could decline to do so here. But the Court need not reach that issue because the CPGA immunizes Ms. Brizill's statements from liability under *any* tort claim – and also because that claim has been abandoned on appeal.

grounded state lawsuit," *id*. at 742, but recognized that whether a state lawsuit is "well-grounded" is a matter of *state law*. *See id*. at 748-49 (the NLRB *may* enjoin the prosecution of a state lawsuit that "lacks a reasonable basis" under state law). The applicable "state" law here is the law of Guam, and the law of Guam includes the CPGA. Mr. Baldwin seeks to label his Guam-law claims as "objectively reasonable" while ignoring the law of Guam. That will not wash.

This issue was properly analyzed in *Johnson v. Federal Express Corp*., 147 F. Supp. 2d 1268 (M.D. Ala. 2001). Johnson alleged that FedEx defamed her by falsely stating that "she was fired for threatening … supervisors." *Id*. at 1277. Mr. Baldwin might call that claim "objectively reasonable," but the court dismissed it, observing that "[t]hough the First Amendment does not protect malicious falsehoods … *the legislature is free to abolish the common law tort of defamation*." *Id*. (emphasis added). While Alabama had not gone that far, it had enacted a statutory privilege for certain communications by employers, *id*., leaving Johnson without a "well-grounded" cause of action under Alabama law.[51]

Thus, the fact that malicious falsehoods are not constitutionally protected does not creatte a constitutionally guaranteed tort remedy for such acts. Mr.

[51] Mr. Baldwin disputes *Johnson*'s construction of the Alabama statute, *see* Appellants' Brief at 26 n.85, but that's irrelevant. The point is that if the legislature enacts a statute immunizing certain statements, then a plaintiff cannot have a well-grounded claim in that jurisdiction based on the immunized statements.

Baldwin reluctantly concedes as much, *see* Appellants' Brief at 43: "Yes, Guam might be able to eliminate the tort of defamation, … but it hasn't." Indeed it hasn't. But like Alabama (and probably every state) Guam has limited the scope of that tort in various ways. The very statute recognizing the tort reserves the legislature's right to limit it:

> Every person has, *subject to the qualifications and restrictions provided by law*, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

19 GCA § 2101 (emphasis added). The CPGA is simply a "qualification[] and restriction[] provided by law" on tort claims that could be abolished altogether.

If courts adopted Mr. Baldwin's constitutional analysis, *all* state statutes abolishing or limiting common law torts, or creating new immunities or privileges, would be unconstitutional, because, prior to that enactment, claims for such torts were "objectively reasonable" and "well grounded." For example, at least 33 state legislatures have abolished the common law tort of "alienation of affection," which makes a third party liable for willful and malicious interference with a married couple's happy relations. *See Veeder v. Kennedy*, 589 N.W.2d 610, 614 n.3 (S. Dak. 1999) (collecting statutes). Under Mr. Baldwin's theory, those statutes violated the constitutional rights of married people to sue their spouses' seducers. We are not aware of any court that has accepted such a theory.

Mr. Baldwin complains that the CPGA's impact on him is unfair. Even assuming that were so, "[a]lthough a harsh result may occur, the problem exists not within the judicial system, but instead with the Legislature where the sole remedy lies in … amendment or repeal." *People v. Palomo*, 1998 Guam 12, ¶ 17. If Mr. Baldwin wishes to be free to pursue his SLAPP-suits with impunity, he can lobby the legislature to repeal the CPGA.

III. Mr. Baldwin has Not Shown, by Clear and Convincing Evidence, that Ms. Brizill's Statements were Made with "Actual Malice."

Mr. Baldwin acknowledges that "[p]ursuant to the CPGA's burden-shifting provision, [he] must point to clear and convincing evidence in the record that Ms. Brizill's actions are not immunized." Appellants' Brief at 33. On his theory, this requires showing only that on "summary judgment, an issue of fact … exists." *Id*. at 11. But that is not the law in a defamation case brought by a public figure.

A. The First Amendment Requires a Public Figure Suing for Defamation to Prove "Actual Malice" by Clear and Convincing Evidence.

New York Times v. Sullivan, 376 U.S. 254 (1964), held that a public official suing for defamation must prove "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. The same burden

applies to "limited purpose public figures" – those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345 (1974).

To show actual malice (also called "constitutional malice"), a plaintiff must demonstrate that the defendant either *knew* his statement was false or "*in fact* entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added); *accord Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 n.30 (1984).

The plaintiff must make this showing by clear and convincing evidence, *id.*, including at the summary judgment stage. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986) ("the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case.")*; accord Guam Top Builders, Inc. v. Tanota Partners*, 2006 Guam 3, ¶ 10 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment") (quoting *Anderson*, 477 U.S. at 248).[52]

Moreover, contrary to Mr. Baldwin's assumptions, the Court "must independently review all the evidence presented on the issue of actual malice.

[52] This is an independent constitutional requirement, in addition to the CPGA's statutory requirement of clear and convincing evidence.

It may not restrict itself … to evidence favorable to the [plaintiff]." And it "is not bound to consider the evidence of actual malice in the light most favorable to [plaintiff] or to draw all permissible inferences in [his] favor," as in ordinary summary judgment practice. *McCoy v. Hearst Corp*., 727 P.2d 711, 718 (Cal. 1986). "Independent review is applied with equal force in considering whether a plaintiff has established a probability of demonstrating malice by clear and convincing evidence in opposing an anti-SLAPP motion." *Christian Research Institute v. Alnor*, 55 Cal.Rptr.3d 600, 613 (Cal. App. 2007).

Finally, it is not enough for a plaintiff to demonstrate some technical error in the defendant's statements, because the law does not permit liability for statements that are *fundamentally* true. *See* RESTATEMENT (SECOND) OF TORTS, § 581A comment *f* (1977); *Liberty Lobby, Inc. v. Dow Jones & Co.,* 838 F.2d 1287, 1296 (D.C. Cir. 1988) (no liability where "[t]he sting of the charge … is substantially true").

These are high barriers, and intentionally so. They protect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on … public [figures]," *Times v. Sullivan*, 376 U.S. at 270, and that "erroneous statement is inevitable in free debate, and ... must be protected if the freedoms of expression are to

have the 'breathing space' that they 'need ... to survive,'" *id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).[53] They also reflect the reality that public figures like Mr. Baldwin "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344.

B. Mr. Baldwin Has Not Carried His Heavy Burden.

Mr. Baldwin does not deny that he made himself a public figure regarding his initiative, "thrust[ing] [him]sel[f] to the forefront of [this] public controvers[y]." *Gertz,* 418 U.S. at 345. He must therefore show, by clear and convincing evidence, that Ms. Brizill acted with "actual malice."

To meet that standard, his proof "must be of extraordinary persuasiveness." *Shorehaven Corp. v. Taitano*, 2001 Guam 16, ¶19. "Clear and convincing evidence means testimony that is so clear, direct, weighty, and convincing as to

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[53] As the Supreme Court recognized *Sullivan*, while the First Amendment does not protect factually false speech, it requires the establishment of a prophylactic legal standard that sometimes will have the *effect* of protecting false speech, because a narrower standard would deprive valuable speech of the "breathing space" it "need[s] to survive." Analogously, the goal of criminal law is to convict the guilty and acquit the innocent, but the Constitution requires the government to prove guilt "beyond a reasonable doubt," *In re Winship*, 397 U.S. 358 (1970), even though that standard sometimes will have the *effect* of acquitting the guilty, because convicting an innocent person is worse than acquitting a guilty one.

The same insight underlies the CPGA. As the legislature recognized, even "citizen communications [that are] incorrect, unsound, self-interested or not in good faith" require protection, so that "the constitutional rights of citizens to participate fully in the process of government" can be "comprehensively protected and encouraged." 7 GCA § 17102(a)(9).

enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Id.* (internal quotation marks omitted). Ambiguous and equivocal evidence, like Mr. Baldwin's, will not suffice:

> When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual *quantum* and *quality* of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of *insufficient caliber* or *quantity* to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Anderson v. Liberty Lobby, 477 U.S. at 254 (emphasis added). "It is the plaintiff's burden to introduce specific evidence of what was said, by whom, and to whom." *White v. General Motors Corp*., 908 F.2d 669, 674 (10th Cir. 1990).

We have already shown that Mr. Baldwin presented, at best, ambiguous and equivocal evidence that Ms. Brizill even *made* the alleged statements, or that the statements she did make were false, much less that she knew they were false or actually entertained serious doubts about their truth.[54] The evidence shows that her statements were scrupulously factual and carefully referenced to their original, reliable sources – Board of Elections decisions, official campaign finance filings, and reports in major newspapers. It is undisputed that Ms.

[54] Ms. Brizill canvassed the evidence in greater detail for the Superior Court, *see* ER 10:407-429.

Brizill relied upon these sources, *see* ER 11:436 (Brizill Declaration ¶ 10). She was entitled to rely on them, as a matter of constitutional law. *See, e.g., Masson v. New Yorker Magazine, Inc*., 960 F.2d 896, 902 (9th Cir. 1992) (speaker "was entitled to rely on the investigation of the matter previously conducted by The New Yorker"); *Mehau v. Gannett Pacific Corp*., 658 P.2d 312, 323 (Haw. 1983) (speaker "was entitled to rely on UPI's reputation as a reliable source of news"). Given her reliance on reputable sources, "[n]o basis for a possible jury finding that there was a reckless disregard for the truth appears." *Id*.[55]

We have also shown that Mr. Baldwin's first major allegation – that Ms. Brizill provided defamatory material for *Lina'la Sin Casino*'s press release – has no factual support *whatsoever* (pp. 20-21, above), and that his second major allegation – that Ms. Brizill repeated defamatory statements from the press release on KUAM – is supported only by two declarations that do not even purport to quote her actual words, and that in several respects abandon the allegations of the complaint (pp. 21-24, above). This is not evidence of the "quality" or "caliber" necessary to meet the standard of "extraordinary persuasiveness" required both by the First Amendment and the anti-SLAPP

[55] Mr. Baldwin says that the Washington Post and Washington Times "corrected their false stories." Appellants' Brief at 13. But the stories he cites are from *a different year* than the articles relied on by Ms. Brizill, and the erroneous statement (that Shawn Scott had been fined by the D.C. Board of Elections) is not a statement Ms. Brizill ever made. Nor is Mr. Scott, the subject of that error, a plaintiff here. Mr. Baldwin is just blowing smoke, hoping to obscure the *relevant* facts.

statute. That is true even without considering Ms. Brizill's evidence, and it is undeniable once her evidence is also considered, as it must be here, *see McCoy, supra; Alnor, supra.* Ms. Brizill's actions are not those of a person acting with malice, "actual," "constitutional," or any other kind.

Regarding Mr. Baldwin's claim that he was "not involved in the DC Slots project," Complaint ¶ 13, the undisputed facts make clear that he was *actually*, even if not *technically*, involved. That is sufficient. *See Liberty Lobby v. Dow Jones, supra,* 838 F.2d at 1296 ("reporters should not be required to convert the results of investigative journalism into a Standard & Poor's report on the formalities of corporate structure"); *Tavoulareas v. Piro*, 817 F.2d 762, 787 (D.C. Cir. 1987) (en banc) ("even if the [defendants] failed to make clear the formal, corporate relationship between [plaintiff and others], ... the defendants cannot in reason and in law be held liable for accurately reporting the direct link that undisputably did exist").

Mr. Baldwin's factual showing thus falls exceedingly short of the constitutional standard. Because he has "'fail[ed] to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial,'" – that Ms. Brizill acted with actual malice – "Rule 56(c) requires entry of summary judgment." *Kim v. Hong*, 1997

Guam 11, ¶ 8 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Mr. Baldwin could not survive summary judgment in this case even if the anti-SLAPP statute did not exist.

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Mr. Baldwin asks, "Does the CPGA … immunize deliberate lying …?" Appellants' Brief at 2. There is no evidence of deliberate lying here.[56] Even if there were, statutory immunities often are absolute, "because qualified privilege does not protect against harassment made possible by simply alleging malice in a law suit." 7 GCA § 9107 *comment*.

The better question is, does a bully like Mr. Baldwin have the right to force individuals like Dorothy Brizill and Jacqueline Marati, and grassroots organizations like *Lina'la Sin Casino*, to bear the burden of discovery and trial in retaliation for their speech? Does a bully like Mr. Baldwin have the right to sue twenty John and Jane Does for *imaginary* conduct in order to intimidate hundreds of ordinary citizens from speaking out on a public issue?[57]

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[56] Except, perhaps, by Mr. Baldwin, who claims that he was "not involved in the DC Slots project," Complaint ¶ 13, although his name appears *thirty-six times* in newspaper articles about the DC slots project, *see* SER 25-45.

[57] Mr. Baldwin's SLAPP-suit apparently had its intended effect: in a poll conducted by University of Guam professor Ron McNinch on November 12, 2007, and reported on the Pacific Daily News website, a sample of Guam voters were asked "Do you fear that you might be sued by the Greyhound Park if you talk against Prop. A?" A remarkable 53% of responders thought they might be, and another 20% were uncertain. Only 27% answered "no." *See* http://forums.guampdn.com/viewtopic.php?t=12410. Public debate about the initiative – at least public opposition – surely was chilled.

I Liheslaturan Guahan says bullies like Mr. Baldwin, who "abuse … the judicial process … to censor, chill, intimidate, or punish citizens … for involving themselves in public affairs," 7 GCA § 17102(a)(6), have no such right. The CPGA was intended to create a "process for *speedy adjudication* of SLAPPs, as a major contribution to lawsuit reform." *Id*. § 17102(b)(4) (emphasis added). This case has already been pending for eighteen months, and many briefs and exhibits have been filed as Mr. Baldwin attempts to pursue precisely the burdensome litigation that the statute was intended to preclude. But for Ms. Brizill's ability to find *pro bono* counsel, the financial cost to her would have been enormous and perhaps bankrupting, as Mr. Baldwin undoubtedly hoped. Future SLAPP defendants may not be so fortunate.

This Court should tell Mr. Baldwin and those who would follow his example that Guam has set its face against SLAPP suits. The Citizen Participation in Government Act should be upheld and applied forthrightly "to effectuate its purposes and intent fully." 7 GCA § 17108.[58]

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[58] Mr. Baldwin presents a parade of horribles that, he asserts, may occur if he loses. Appellants' Brief at 42. While some of his hypotheticals could be prosecuted as crimes, which are not protected by the CPGA, the more general answer was given by the Supreme Court in another context:

> the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech. *See generally Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by

CONCLUSION

For the reasons stated above, the judgment of the Superior Court should be affirmed.

Respectfully submitted this sixth day of February, 2008,

CUNLIFFE & COOK
A Professional Corporation

By _____
JEFFREY A. COOK, ESQ.

ARTHUR B. SPITZER
Admitted pro hac vice
American Civil Liberties Union
of the National Capital Area

Attorneys for Dorothy Brizill

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the processes of education, the remedy to be applied is more speech, not enforced silence").

Meese v. Keene, 481 U.S. 465, 481 (1987). One of Mr. Baldwin's hypotheticals involves false speech on the morning of Election Day. That is a situation where "more speech" will not cure the potential harm – but neither will a subsequent lawsuit for damages, which cannot change the election result. The only effective remedy in such a situation is to postpone or set aside the election. The CPGA does not bar such a remedy, if it is otherwise available. *Cf. Duenas v. Guam Election Commission*, 2008 Guam 1 ¶ 54 (discussing availability of such relief); *Guam Election Commission v. Responsible Choices for All Adults Coalition,* 2007 Guam 20 (affirming writ of mandamus directing Election Commission to remove a measure from the ballot or not certify the results).

STATEMENT REGARDING ATTORNEYS' FEES

Pursuant to Rule 13(k), appellee notes that if she prevails in this appeal, she intends to seek attorneys' fees under the authority of 7 GCA § 17106(g). See p. 5 n.4, above, for an additional note on attorneys' fees.

Dated this 6th day of February, 2008.

CUNLIFFE & COOK
A Professional Corporation
Attorneys for Appellee
Dorothy Brizill

By _____
JEFFREY A. COOK, ESQ.
Cooperating attorney with the
American Civil Liberties Union
of the National Capital Area

STATEMENT REGARDING RELATED CASE

On the same day this case was filed, the same plaintiffs filed a virtually identical SLAPP-suit in the Superior Court against Jacqueline A. Marati, *Lina'la Sin Casino,* and twenty John and Jane Doe defendants. That case, No. CV 0959-06, remains pending in the Superior Court. The complaint in that case is in the record of this case at ER 11:472.

Dated this 6th day of February, 2008.

CUNLIFFE & COOK
A Professional Corporation
Attorneys for Appellee
Dorothy Brizill

By_____
JEFFREY A. COOK, ESQ.
Cooperating attorney with the
American Civil Liberties Union
of the National Capital Area

STATEMENT REGARDING ORAL ARGUMENT

Appellee agrees with appellants that the Court may be assisted by oral argument in this case, which presents questions of first impression under the Citizen Participation in Government Act.

Dated this 6th day of February, 2008.

CUNLIFFE & COOK
A Professional Corporation
Attorneys for Appellee
Dorothy Brizill

By _____
JEFFREY A. COOK, ESQ.
Cooperating attorney with the
American Civil Liberties Union
of the National Capital Area

CERTIFICATE OF COMPLIANCE WITH RULE 16

I hereby certify that this brief complies with the type-volume limits prescribed by Rule 16(a)(7)(B)(i), in that it is set in 14-point Times New Roman type and contains 13,995 words (excluding those portions exempted by Rule 16(a)(7)(B)(iii)), as calculated by the word-count function of Microsoft Word X for Macintosh.

Dated this 6th day of February, 2008

CUNLIFFE & COOK
A Professional Corporation
Attorneys for Appellee
Dorothy Brizill

By _____
JEFFREY A. COOK, ESQ.
Cooperating attorney with the
American Civil Liberties Union
of the National Capital Area

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for the Appellee and of the Supplemental Excerpts of Record were served upon counsel for the appellants:

Richard A. Pipes, Esq.
Orlean Pacific Plaza, Suite 201
865 South Marine Corps Drive
Tamuning, Guam 96913

and

Deborah Deitsch-Perez, Esq.
Lackey Hershman, LLP
3102 Oak Lawn Avenue, Suite 777
Dallas, Texas 75219

by e-mail (by agreement), this sixth day of February, 2008.

JEFFREY A. COOK