No. 126795

IN THE SUPREME COURT OF ILLINOIS

CONSTELLATION NEWENERGY, INC.; CNE GAS SUPPLY, LLC; CONSTELLATION ENERGY GAS CHOICE, LLC; and CONSTELLATION GAS DIVISION, LLC, Respondents-Appellants, v. RICHARD DENT and RLD RESOURCES, LLC, Petitioners-Appellees.	On Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-19-1652 There on Appeal from the Circuit Court of Cook County, No. 19 L 2910 Honorable Patricia O'Brien-Sheahan, Judge, presiding.

BRIEF OF *AMICI CURIAE* WOMEN EMPLOYED, THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, NATIONAL WOMEN'S LAW CENTER, AND TWENTY-EIGHT ADDITIONAL ORGANIZATIONS IN SUPPORT OF RESPONDENTS-APPELLANTS

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TABLE OF CONTENTS
AND POINTS AND AUTHORITIES

Preliminary Statement[1]

A critical reason why sexual harassment and other forms of discrimination continue to go unchecked at many workplaces is the valid and credible fear of retaliation that employees have when they consider coming forward with complaints. As the Equal Employment Opportunity Commission ("EEOC") and other experts have concluded, retaliation remains rampant and is still the primary basis for EEOC charges of discrimination. As the facts of this case demonstrate, that fear is based on very real concerns of a range of negative outcomes, including through retaliatory lawsuits against those who bring forward workplace sexual harassment complaints. The Appellate Court's decision, if not reversed, would strongly discourage the very actions that we need, particularly in this moment in our nation. We need employees to feel safe coming forward with sexual harassment and other forms of harassment and discrimination. The decision would also discourage employers from taking prompt and remedial action from addressing such complaints—even in circumstances where, like here, employers hire third parties to investigate the complaints. (There is a retaliation effort here against the investigator too). We need structures that encourage employees to come forward, and a greater number of entities to undertake such investigations, not fewer. This is the only way we can achieve what should undeniably be an unanimous goal of workplaces free of sexual harassment and other forms of discrimination.

Despite the prevalence of sexual harassment, fear of retaliation makes it rare that

[1] Pursuant to Supreme Court Rule 341(h), the Appellants' brief provides the information needed for Rule 341(h)(2) through (h)(9). Additional sections like this preliminary statement are included in this brief for context and to set forth the issues in a fashion the *amici* deem will aid the Court in its consideration of the issues.

employees come forward. A May 2020 report in the Harvard Business Review explained that retaliation against victims[2] who report sexual harassment in the workplace is the primary reason why internal corporate investigative and grievance procedures do not work and can even backfire:

> The answer, according to a variety of studies, is *retaliation* against victims who complain. One survey of federal workers found that two-thirds of women who had reported their harassers were subsequently assaulted, taunted, demoted, or fired by their harassers or friends of their harassers. This kind of retaliation has long term effects. Women who file harassment complaints end up, on average, in worse jobs and poorer physical and mental health than do women who keep quiet. And retaliation may be the only thing many victims get after filing a grievance, because *most procedures protect the accused better than they protect victims*.

Frank Dobbin & Alexandra Kalev, *Why Sexual Harassment Programs Backfire And What to Do About It,* Harvard Business Review (May-June 2020), at 6, *available at* https://scholar.harvard.edu/files/dobbin/files/hbr_2020_dobbin_kalev.pdf.[3] Numerous studies and authorities agree that retaliation is a significant concern, as this brief highlights.

Unless this Court reverses, the Appellate Court's decision would establish a prospective legal framework that goes many steps backwards. By breaking from

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[2] The term "victim" is used at times in this brief to refer to those who have been the target of coercive sexual conduct, which includes a spectrum of sexual harassment, including sexual assault and rape. The focus of this brief is on sexual harassment, but the collateral consequences of the Appellate Court's decision would reach the entire spectrum of sexually abusive conduct. In recent years, many groups have started to use the term "survivor" instead of, or interchangeably with "victim." Given the citation of sources that predate the use of "survivor," the terms "victim" or "employee" are used for consistency and are not intended to be a negative characterization or value judgment of individuals who have been subjected to any form of unwanted sexual conduct.

[3] All emphasis in this brief is added, unless noted.

precedent and *not* requiring allegations amounting to "bad faith" or "actual malice" necessary to overcome the qualified privilege against defamation, this decision threatens both to discourage workplace harassment complaints and to undermine investigations by exposing victims to even more retaliatory claims of defamation. *Amici* respectfully submit this brief to provide the Court with additional context to understand the harms at stake if the Appellate Court's decision is not reversed.

Interests of *Amici*

Women Employed ("WE") is a nonprofit advocacy organization based in Chicago. Founded in 1973, WE's mission is to improve the economic status of women and to remove barriers to economic equity. WE pursues equity for women in the workforce by effecting policy change, expanding access to educational opportunities, and advocating for fair and inclusive workplaces so that all women, families, and communities thrive. WE works with individuals, organizations, employers, educators, and policymakers to address the challenges women face in their jobs every day, and strongly believes that sexual harassment is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace. WE has participated as amicus curiae in numerous matters to provide information to courts in connection with the interests it represents.

The American Civil Liberties Union of Illinois ("ACLU of Illinois") is a statewide, nonprofit, nonpartisan organization with more than 60,000 members dedicated to the protection and defense of the civil rights and civil liberties of all Illinoisans. The ACLU of Illinois is committed to ensuring that all people are treated with fairness and dignity. In particular, the ACLU of Illinois challenges policies and

practices that undermine safety and opportunity for women, including those that facilitate or perpetuate sexual violence and harassment.

The National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization, founded in 1972, that fights for gender justice in the courts, in public policy, and in society. NWLC advocates to ensure that women can live free of sexual harassment, including assault, in the workplace, schools, healthcare settings, and beyond. NWLC has participated as counsel or amicus curiae in a range of cases before courts to ensure that all individuals may enjoy the protections against sex discrimination as promised by the law. NWLC Fund houses and administers the TIME'S UP Legal Defense Fund, which improves access to justice for those facing workplace sexual harassment, including through grants to support legal representation.

These organizations who led the amicus brief were joined by twenty-eight additional public interest and civil rights organizations committed to gender justice as listed above.[4]

Statement of Relevant Facts

As the Appellants' brief sets forth, the named harasser[5] was a vendor who had at-will contracts to provide services to Constellation NewEnergy Inc. and affiliates (together "Constellation," the Appellants in this Court). One or more Constellation employees reported via an internal Constellation mechanism that the claimant had acted inappropriately at a Constellation sponsored social event. Constellation engaged an

[4] All of the *amici* are identified in the foregoing Motion for Leave to File.

[5] The original petitioners below for the Rule 224 petition (Richard Dent and RLD Resources, LLC, the Appellees in this Court) will be referred to here as the "named harasser" or "claimant."

outside investigator, determined the reports were credible, and terminated the at-will contracts with the claimant. Constellation maintained the identity of the reporting person(s) in confidence. Having had its at-will contracts terminated by Constellation, the claimant below now wants to know the identity of the person(s) who reported the harassment and who conducted the investigation so he can sue them for defamation. Evidently aware he must plead actual malice to overcome the established qualified privilege that would immunize a reporting party from defamation suits, the claimant pronounces in his petition under Supreme Court Rule 224 that the reports were "not privileged." (A25 ¶ 16.c.)

The Circuit Court agreed with Constellation as a procedural matter that Rule 224 could not be used in these circumstances, but did not reach the other questions. (A49-50.) The Appellate Court reversed and determined that Rule 224 *could* be invoked here and determined that the Rule 224 petition (judged akin to a complaint) satisfied 735 ILCS 5 § 2-615. The Appellate Court mused that a qualified privilege can be established or overcome at trial, but made no mention that the sole and conclusory allegations against privilege amounted to a few words that the statements were "false" and "not privileged." (A01-20; A25 ¶¶ 16.b, 16.c.)

Summary of Argument

The Appellate Court's decision incorrectly changes the core pleading requirement in the context of defamation cases involving a qualified privilege and makes it easier for reported harassers to retaliate against employees who bring sexual harassment complaints. The law properly required individuals bringing defamation lawsuits to plead facts to establish bad faith (or actual malice) to overcome the

established qualified privilege that accompanies statements made in the context of workplace discrimination investigations. If the Appellate Court's decision is affirmed, it will eviscerate that pleading requirement and thus empower harassers to retaliate even more. In a time when civil rights law must be moving forward in parallel with necessary changes in the workplaces, the Appellate Court's decision moves things backwards. It provides even more space for named harassers to bring retaliatory defamation suits upon the flimsiest of conclusory pleadings and thus would chill workplace reporting and undermine employer processes designed to prevent, address, and remedy sexual harassment.

The applicable legal standards concerning defamation claims that were in place before the Appellate Court's decision were correct and must remain the standard to overcome the qualified privilege that is at issue here. The claimant's own Rule 224 petition on its face established the grounds for a qualified privilege. The complaint stated that Constellation investigated and followed workplace procedures concerning the alleged harassment. Prior to the Appellate Court's decision, a defamation complaint in Illinois that (like this one) made out a case for qualified privilege on its face would also have to plead facts (not conclusions) showing the bad faith or actual malice necessary to overcome the privilege. Otherwise the complaint would be dismissed under § 2-615. Longstanding pleading standards in Illinois have required that a "legally sufficient complaint … set forth factual allegations from which actual malice may reasonably be said to exist as opposed to the bare assertion of actual malice [or, in this case, a bare statement of 'not privileged']." *Arlington Heights Nat'l Bank v. Arlington Heights Fed. Sav. & Loan Ass'n*, 37 Ill. 2d 546, 551 (1967); *see also Segall v. Lindsay-*

Schaub Newspapers, 68 Ill. App. 2d 209, 214 (1966) ("it would seem that such a charge should not come into the courtroom naked, but should be clothed with factual allegations from which the actual malice might reasonably be said to exist."). Under that legal framework—which existed in Illinois before this troubling decision—an employee who reported sexual harassment pursuant to established workplace procedures would have been far less likely to face retaliation through an on-going defamation lawsuit *unless* there were facts pleaded that could overcome the privilege.

The Appellate Court's decision makes new pleading law in Illinois in the context of workplace harassment out of sync with the governing law detailed above. Under this decision, a defamation complaint by a reported harasser suing an employee who reports harassment no longer must plead facts overcoming the qualified privilege, even if the complaint alleges what amounts to a per se case for the qualified privilege to apply. A simple allegation stating the unsupported conclusion of "it was not privileged" would now be enough to create essentially a presumption of improper internal investigative processes. That unsupported approach to pleading in Illinois, in turn, rewinds progress made in preventing and remedying workplace harassment. If not reversed, the Appellate Court's decision would mean that employees facing harassment and other forms of discrimination in the Illinois workplace are much more likely to be subjected to defamation lawsuits on mere conclusory allegations. That increased fear of retaliation, in turn, would chill reporting of sexual and other harassment and render employer procedure to combat workplace discrimination meaningless.[6]

[6] In the context of state employees or those working for companies bidding for (or operating under) public contracts, the proposed lax pleading rules by the Appellate

Amici's brief provides the broader context of sexual harassment and how retaliation is a key concern of employees when they consider whether to report complaints that can lead to workplace investigations. In particular, given the rates of retaliation, it is critical to protect against unnecessarily disclosing the identity of reporting persons. Affirming the Appellate Court's decision would both chill employees facing sexual or other harassment from coming forward and discourage employers from addressing civil rights complaints.

Argument

I. The Appellate Court's decision encourages retaliatory defamation lawsuits against employees who bring forth complaints of sexual harassment.

Fuller context of the depth of the problem of sexual harassment helps illustrate the multiple problems with the Appellate Court's decision.

A. Sexual harassment is a serious and pervasive issue, including in the workplace, but is rarely reported because of fear of retaliation.

Sexual harassment is a prevalent insidious problem that has spanned every industry, including academia, hospitality, domestic services, technology, and Hollywood. *See* Stefanie K. Johnson & Juan M. Madera, *Sexual Harassment is Pervasive in the Restaurant Industry. Here's What Needs to Change*, Harvard Business Review (Jan. 18, 2018), at 1, *available at* https://hbr.org/2018/01/sexual-harassment-is-pervasive-in-the-restaurant-industry-heres-what-needs-to-change. "Sexual harassment is really not about sex. It's about power and aggression and manipulation." Brendan

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Court in its decision would also be irreconcilable with the provisions against retaliation under the provisions of the Illinois Human Rights Act, 775 ILCS § 5/6-101(A), which make it a civil rights violation to retaliate against a person employed by companies engaged in public bidding or public contracting for reporting harassment.

L. Smith, *What it Really Takes to Stop Sexual Harassment*, American Psychological Association 49(2) (Feb. 2018), at 2, *available at* https://www.apa.org/monitor/2018/02/sexual-harassment. By failing to address sexual harassment through adequate measures, institutions have contributed to the creation of hostile work environments and an unhealthy workplace culture.

In 2020 alone, the EEOC received more than 67,000 charges alleging harassment or discrimination, nearly one-third of which involved sex-based harassment or discrimination. EEOC, *EEOC Releases Fiscal Year 2020 Enforcement and Litigation Data* (Feb. 26, 2021), *available at https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data*. Yet "the EEOC estimates that less than 14 percent of individuals experiencing harassment ever file a formal complaint." Smith, *What it Really Takes to Stop Sexual Harassment*, at 1. These numbers are corroborated by a poll of American women voters, 60% of whom said they had experienced sexual harassment, and 70% of that number reporting the harassment had occurred at work. *Id.*[7]

The EEOC has issued guidance declaring sexual harassment a violation of Title VII. U.S. Equal Emp't Opportunity Comm'n, *Policy Guidance on Current Issues of Sexual Harassment* ("EEOC Policy Guidance"), 8 FEP Manual 405:6699 (Mar. 19,

[7] According to experts who have researched the issue of sexual harassment in the workplace, to begin to eradicate this insidious and pervasive problem, "[g]reater public awareness of sexual harassment and more proactive involvement by companies and other institutions," is needed. *See* Smith, *What it Really Takes to Stop Sexual Harassment*, at 6. Constellation recognized these issues and instituted a clear policy that sexual harassment would not be tolerated and a deliberative, fair process to investigate any such allegations. That policy should be supported by the courts, not undermined.

1990), at ¶ 4, *available at* https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment. It defined the circumstances under which an employer could be held liable for permitting sexual harassment in the workplace and provided suggestions for how to prevent sexual harassment. 29 C.F.R. § 1604.11. Workplace sexual harassment includes harassment at work-sponsored events outside the office, as well as harassment of employees by vendors or independent contractors that may occur there. The EEOC directed employers to "have a procedure for resolving sexual harassment complaints," in a way that "encourage[s] victims of harassment to come forward." EEOC Policy Guidance, at § E ¶ 1. Such a policy "should not require a victim to complain first to the offending supervisor" and "[i]t *should ensure confidentiality as much as possible* and provide effective remedies, including protection of victims and witnesses against retaliation." *Id.*

Even though the law has protected employees for decades against sexual harassment, we remain poised on the precipice—rather than on the other side—of real change. *See generally*, U.S. Equal Emp't Opportunity Comm'n, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/select-task-force-study-harassment-workplace. This underreporting of sexual harassment and other harassment is unsurprising given the very real risks of retaliation. Year after year, retaliation is consistently and by far the most common type of workplace discrimination reported to the EEOC. A "staggering 55.8 percent of all charges filed" included claims of retaliation. *EEOC Releases Fiscal Year 2020 Enforcement and Litigation Data*, at 2. Workers who report sexual harassment face not only demotions and shadow smear

campaigns at work but also surveillance by private investigators, attacks in the press, and threats of physical violence outside of work. Hillary Jo Baker, *No Good Deed Goes Unpunished: Protecting Gender Discrimination Named Plaintiffs from Employer Attacks*, 20 Hastings Women's L.J. 83, 104-109 (2009).

The retaliatory defamation suit at issue in this case highlights the wisdom in how Illinois protects an employer's investigation of sexual harassment allegations with a qualified privilege. The claimant aims to change the rule of law to manipulate the justice system into a continued form of harassment and retaliation against the brave victim(s) who reported. *See* Madison Pauly, *She Said, He Sued: How libel law is being turned against MeToo accusers*, Mother Jones (Mar. 2020), *available at* https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault; Mark S. Mulholland & Elizabeth S. Sy, *Victim Defamation Claims in the Era of #MeToo*, N.Y.L.J. (Aug. 2, 2018), at 1, *available at* http://rmfpc.com/wp-content/uploads/2018/08/NYLJ-Victim-Defamation-Claims-in-the-era-of-Metoo.pdf. Over 70% of EEOC sexual harassment charges filed from 2016-2018 included a retaliation charge. *See id.* If a defamation suit can so easily strip a victim's confidentiality, that percentage will only rise.

B. Data show that employees tell the truth regarding sexual harassment and false claims are exceedingly rare.

Due to the historical "credibility discounting" of allegations of rape and sexual assault, sexual harassment allegations have been subjected to an implied assumption of falsity. *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. Pa. L. Rev. 1, 1-7 (2017). In recent years the law and the judicial system have taken affirmative, concerted action to undo the compounded harm

of that outmoded and unfounded assumption. *See generally*, Catherine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) (detailing the transformation of sexual harassment from a common social practice to a cognizable cause of action); *see also* A. Thomas Morris, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 Duke L.J. 154 (1988) (describing a manifestation of the presumption of falsity in the judicial context by exploring the evolution of the "Lord Hale instruction" discussed below). Such progress should not be undermined by the decision at issue here that gets the standard backwards by allowing conclusory pleading to overcome the privilege.

The law and the broader society are thus moving beyond archaic standards where women who report sexual harassment are presumptively disbelieved. Since 1847 when Sir Matthew Hale, Chief Justice of the court of the King's bench of England couched sexual assault claims as presumptively *incredible* (and for periods long before Lord Hale's lifetime), women facing sexual assault and harassment have been burdened by the baseless myth encapsulated in his famously tragic words that placed systemic doubt on victims' reports of misconduct.[8] *See* W.A. Stokes & E. Ingersoll, *The History of the Pleas of the Crown* (1st Am. ed. 1847), at 634.

We know better now. Numerous studies scrutinizing thousands of sexual assault reports have debunked this distrust of victims and found that only 2-8% of those reports were false. Kimberly A. Lonsway, PhD, et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault* (2009), at 2,

[8] Lord Hale's view, which is rooted in distrust and fear that victims make false accusations, served as the genesis for the "Lord Hale instruction," which cautioned juries to scrutinize carefully the testimony of a victim of sexual assault or harassment.

available at https://www.nsvrc.org/sites/default/files/publications/2018-10/Lisak-False-Reports-Moving-beyond.pdf. The largest study based in the United States (of 2,059 sexual assault reports made to police in eight communities throughout the nation over an 18-24 month period), found that police classified only 6.8% of those reports as false. Kimberly A. Lonsway, PhD & Joanne Archambault, *Understanding the Criminal Justice Response to Sexual Assault: Analysis of Data from the Making a Difference Project* (2008); *see also* David Lisak, et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*. Violence Against Women 16 (12) (2010), at 1326.

Even these figures are likely inflated. Biases and stereotypes against sexual assault victims are "still quite prevalent among law enforcement personnel," making them less likely to believe victims who were intoxicated or who were assaulted by acquaintances and romantic partners. Lisak, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, at 1321-22. Researchers who audit police investigations can also be subject to bias. For instance, in their review of one data set of sexual assaults reported to police, the researchers classified certain reports as "false" merely because "there *appeared* to be evidence that rape did not occur"—without confirming that a rape did not, in fact, occur. *Id.* at 1324.

It is also important to highlight that people of color, individuals with disabilities, and LGBTQ employees are uniquely susceptible to sexual harassment and even more likely to be disbelieved if they report such conduct. *See* Nancy Chi Cantalupo, *And Even More of Us are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 Harvard J. L. & Gender 16, 24-29 (May 1, 2018); NAACP Legal Def. and

Educ. Fund, Inc. & Nat'l Women's Law Ctr., *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* (2014), at 20, 25, *available at* https://www.nwlc.org/sites/default/files/pdfs/unlocking_opportunity_for_african_american_girls_final.pdf; Elizabeth Kennedy, *Victim Race and Rape: A Review of Recent Research*, Feminist Sexual Ethics Project (2003), *available at* https://www.brandeis.edu/projects/fse/slavery/united-states/slav-us-articles/art-kennedy.pdf. Consequently, many employees live and work at the intersection of being a more likely target of harassment and discrimination, and a heightened presumption of falsity if they report.

These data—these *facts*—demonstrate that in the context of defamation claims regarding sexual harassment and assault, a finding that a complaint includes well-pleaded allegations of falsity will be exceedingly rare. Thus in the vast majority of cases, named harassers cannot be allowed to strip those individuals who report sexual harassment of their necessary qualified privilege by simply using conclusory "magic language" such as the statements were "false and not privileged" without any related evidence (A25 ¶ 16).

C. The Appellate Court ignored standards governing defamation law.

The Appellate Court ignored the well-established standards that govern defamation law. Pre-suit discovery is not "necessary" if the defamation allegations in the Rule 224 petition could not survive dismissal under 735 ILCS 5 § 2-615. *Hadley v. Doe*, 393 Ill. Dec. 348, 352 (Il. 2015). This Court in *Hadley* explained how this standard is necessary to safeguard protected speech. *Id*. An employer's investigation of a sexual harassment claim is subject to a qualified privilege as a matter of law where, as here, the communication involved (1) an interest of the person who published the alleged

defamatory matter, and (2) an interest of the person who received the publication. *Vickers v. Abbott Labs.*, 308 Ill. App. 3d 393, 401 (1st Dist. 1999). That is the case because there is a recognized public interest in "ridding workplaces of sexual harassment." *Id*. at 402 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). There is "an obligation of employers to 'take all steps necessary to prevent sexual harassment from occurring' and to establish a complaint procedure designed to encourage victims of harassment to come forward." *Id.* The burden therefore is on a would-be defamation claimant to prove an abuse of that privilege. "Actual malice"—and outright "bad faith"—therefore is necessary to overcome the qualified privilege made on the face of a complaint. *Kuwik v. Starmark Star Mktg. & Admin*, 156 Ill. 2d 16, 24, 30 (1993) ("bad faith" required to overcome qualified privilege).

These are pleading requirements. "[W]here a qualified privilege exists, actual malice must be pled and proved to overcome the privilege" because "[a]llegations of failure to make a proper investigation are not sufficient to state a claim of malice." *Beasley v. St. Mary's Hosp. of Centralia*, 200 Ill. App. 3d 1024, 1037 (5th Dist. 1990) (granting motion to dismiss complaint).

The Appellate Court permitted the named harasser here to forego satisfying his burden to plead specific facts sufficient to establish actual malice and thereby demonstrate an abuse of the qualified privilege afforded to Constellation's investigation. To obtain pre-suit discovery of confidential information related to a privileged investigation, the named harasser seeking to bring defamation claims must plead definite facts regarding the defendant's knowledge of the falsity of the alleged defamatory statement or a reckless disregard for the statement's truth. *Kuwik*, 156 Ill.

2d at 24, 30. "Statements subject to [a] qualified privilege carry a presumption of good faith." *Muthuswamy v. Burke*, 269 Ill. App. 3d 728, 732 (1st Dist. 1993), *reh'g denied.*

In the context of a sexual harassment investigation, that standard can rarely be met. A named harasser bringing a defamation claim who seeks pre-suit discovery of privileged information should be required to plead facts tantamount to a false report or corrupt and otherwise deeply ineffective procedures. Truth is an absolute defense to a claim of defamation. *Harrison v. Addington*, 353 Ill. Dec. 233, 239 (3d Dist. 2011). The law should not be moving in the reverse direction.

II. The Appellate Court's decision would chill the reporting of sexual harassment and undermine processes designed to prevent and remedy it.

The Appellate Court's decision threatens to make employees even less likely to come forward in the face of the threat of a retaliatory defamation suit. Employers like Constellation have implemented processes designed to encourage employees to report sexual harassment. Using civil actions resting on conclusory allegations of "falsity" to wrest out the names of employees who reported harassment directly undermines internal investigative and grievance procedures because it further deters employees from reporting sexual or other harassment due to fear of retaliation. The mere threat of defamation litigation poses a daunting obstacle to employees facing harassment or assault in reporting the misconduct to an employer.

In the wake of the #MeToo movement in 2017, as more and more victims of sexual assault began coming forward, the Illinois Senate "recognized that Illinois has not historically provided victims of harassment with adequate recourse" and created a task force charged with studying sexual harassment in Illinois in both the public and private sector. Senate Task Force on Sexual Discrimination and Harassment Awareness

and Prevention, *Findings and Proposals for Addressing Sexual Harassment in Illinois* (2018), at 3, *available at* https://ilga.gov/reports/ReportsSubmitted/290RSGAEmail638RSGAAttachSenate%20Sexual%20Discrimination%20and%20Harassment%20Task%20Force%202018%20Final%20Report.pdf. The Task Force's report concluded that "[a]nother legal mechanism harassers or abusers are increasingly deploying to silence victims is a claim for defamation," and that "retaliatory defamation claims are an issue that warrants further review by the General Assembly." *Id.* at 19-20.

Workplace harassment already goes largely unreported and stripping the victims of the protection of confidentiality would only result in more troubling statistics. As a 2016 EEOC study on workplace harassment confirmed, "based on the empirical data, the extent of non-reporting is striking." Feldblum, *Select Taskforce on the Study of Harassment in the Workplace*, at 11. That study found that "roughly three out of four individuals who experienced harassment" never even reported it "because they fear[ed] disbelief of their claim, inaction on their claim, blame, or social or professional retaliation." *Id*. at 4. These fears are well-founded:

> One 2003 study found that 75% of employees who spoke out against workplace mistreatment faced some form of retaliation. Other studies have found that sexual harassment reporting is often followed by organizational indifference or trivialization of the harassment complaint as well as hostility and reprisals against the victim. Such responses understandably harm the victim in terms of adverse job repercussions and psychological distress. Indeed, as one researcher concluded, such results suggest that, in many work environments, the most "reasonable" course of action for the victim to take is to avoid reporting the harassment.

Id. at 11.

Employees who consider filing a complaint of harassment know that retaliation occurs despite the existence of anti-retaliation policies. A significant portion of

harassment charges include allegations of retaliation For instance, a "2018 report by the Center for Employment Equity found that 68% of sexual harassment charges during 2012-2016 included a retaliation charge and 64% of those who filed sexual harassment charges reported losing their job as a result of their complaint." Jenny R. Yang & Jane Liu, *Strengthening Accountability for Discrimination*, Economic Policy Institute, (Jan. 15, 2021), at 14, *available at* https://www.epi.org/unequalpower/publications/strengthening-accountability-for-discrimination-confronting-fundamental-power-imbalances-in-the-employment-relationship/. The aforementioned Harvard Business Review study explained that because of retaliation, victims "who file harassment complaints end up, on average, in worse jobs and poorer physical and mental health than do women who keep quiet." *See* Dobbin, *Why Sexual Harassment Programs Backfire And What to Do About It*, at 6. Another study reporting on sexual assault in the military, likewise confirmed that lack of confidentiality has a chilling effect on reporting:

> In this study of both currently serving and veteran [women], 52% endorsed being too embarrassed to make an unrestricted [not confidential] report and 42% thought reporting would negatively affect their career. The common reasons [women in the military] endorsed for not reporting included *confidentiality concerns*, career effects/reprisal, and the belief that nothing would be done…. Until [sexual assault] can be prevented, addressing reporting outcomes (e.g., *ensuring confidentiality*, preventing reprisal, and investigating offenders) is needed for [military] members to believe that reporting is in their best interest and that of the larger military community.

Michelle A. Mengeling, et al., *Reporting sexual assault in the military: who reports and why most servicewomen don't*, American Journal of Preventive Medicine 47(1) (2014), at 21, 24.

It bears mentioning that some employers and institutions have been forming ombuds (formerly ombudsmen) as an independent alternative to human resources with

whom victims can have informal, neutral, and truly confidential conversations. These programs have proved to be successful because there is an emphasis on confidentiality. Through an ombuds, "[t]he company can learn of issues and system problems that won't be raised through other channels, and problems are most often resolved effectively and *confidentially*." Charles Howard, *What Happens When an Employee Calls the Ombudsman?*, Harvard Business Review (May-June 2020), at 18. This welcome trend would be equally undermined by the rule of law that would be created if the Appellate Court's decision remains in place.

Under the new standards proposed in the Appellate Court's decision, every employee who reports sexual harassment becomes more likely to be a potential defendant in a defamation lawsuit that will survive a motion to dismiss. Defamation suits can be particularly effective in silencing victims or coercing them into withdrawing their claims, even when the allegations are compelling. Most victims cannot afford to hire an attorney and endure years of aggressive litigation. Lesley Wexler et al., *#metoo, Time's Up, and Theories of Justice*, 2019 U. Ill L. Rev. 45, 58 (2019) (noting that most of those requesting representation from the Time's Up Legal Defense Fund are low-income wage-earners). Nor can they afford the risk that jurors might believe false and harmful sex stereotypes and "rape myths" (common false beliefs about sexual assault, including rape, that are used to dismiss or minimize allegations and shift blame to victims). Diana Scully, *Understanding Sexual Violence: A Study of Convicted Rapists* (1990), at 52. The data and facts identified in the many studies cited in this brief highlight that sexual harassment is already underreported for fear of retaliation and that retaliation is a major obstacle in addressing and preventing sexual and other harassment.

If this decision is not overturned, victims will be forced to repeatedly relive their trauma through litigation, including court filings, depositions, and court testimony. *See, e.g.*, Rape, Abuse & Incest National Network ("RAINN"), *Victims of Sexual Violence: Statistics*, *available at* https://rainn.org/statistics/victims-sexual-violence (collecting studies showing that "94% of women who are raped experience symptoms of [PTSD] during the two weeks following the rape[;] 30% of women report symptoms of PTSD 9 months after the rape[;] 33% of women who are raped contemplate suicide[;] 13% of women who are raped attempt suicide[;] [a]pproximately 70% of rape or sexual assault victims experience moderate to severe distress"). They will be forced to disclose potentially embarrassing private information through invasive discovery. And perhaps most troubling, they must endure continued unwanted interaction with their named harasser throughout the litigation process—often being forced to testify at deposition within feet of the person who harmed them. Alyssa R. Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era*, 17 First Amend L. Rev. 441, 448 (2019).

Endorsing this decision by the Appellate Court would render toothless the qualified privilege and the protection of confidentiality with which it shields victims. This will predictably result in even fewer employees reporting sexual and other harassment and even more named harassers escaping accountability. This Court must reverse this decision in light of the existing legal standards and the policies that drove that standard, alongside the range of policy issues at stake here. *Amici* urge this Court to help address the many existing barriers for employees who face workplace sexual harassment and seek to come forward to address it, not affirm a decision that erects

additional pathways for punishment against those who courageously come forward.

Conclusion

The judgment of the Appellate Court should be reversed.

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Respectfully submitted,

On behalf of the *Amici Curiae*

By: /s/*John. J Hamill*
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 21 pages.

Dated: May 26, 2021

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