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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES VERITY and SARAHNA VERITY, husband and wife,

Plaintiffs/Respondents,

vs.

USA TODAY, a division of Gannett Satellite Information Network, LLC, a Delaware limited liability company; KTVB, a division of King Broadcasting Company a Washington corporation; KGW, a division of Sander Operating Co. III, LLC, a Delaware limited liability company; TAMI TREMBLAY, an individual; STEPHEN REILLY, an individual; and JOHN / JANE DOES,

Defendants/Appellants.

Supreme Court Docket No. 45530-2017
Ada County No. CVOC-2016-6185

BRIEF OF AMICI CURIAE

The Associated Press, The Hearst Corporation, and The Idaho Press Club
Proposed additional amici: Adams Publishing Group, Advance Publications, The American Society of News Editors, BuzzFeed, The Center for Investigative Reporting, CNN, Dow Jones & Company, The E.W. Scripps Company, First Look Media, Forbes, Gray Television, The Idaho Statesman, Landmark Media Enterprises, The Media Institute, Meredith Corporation, The National Association of Broadcasters, The News Media Alliance, The New York Times Company, POLITICO, The Reporters' Committee for Freedom of the Press, The Radio and Television Digital News Association, The Society for Professional Journalists, tronc, and The Washington Post

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada,
Honorable Melissa Moody, District Judge, Presiding

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INTRODUCTION

Amici Curiae are a coalition of media organizations – as well as non-profit and trade groups supporting journalists – in Idaho and throughout the country that are deeply concerned by the lower court's decision in this case. The lower court created an unprecedented cause of action in this state for "defamation-by-implication," one which subjects journalists and media organizations to liability even when everything they report is concededly true and addresses a subject of legitimate public concern. The decision is contrary to a long line of precedent in other states and in the federal courts, which has either declined to recognize such a cause of action at all or, at the very least, has severely limited its scope. If the decision below is permitted to stand, journalists and media organizations reporting in Idaho will be severely hampered in their efforts to serve our nation's "profound national commitment" to a fully informed debate about public issues. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

BACKGROUND

In 2016, USA TODAY, along with two television stations serving viewers in Oregon and Idaho respectively, reported on the results of a collaborative national investigation into statewide school systems that granted licenses to teachers whose credentials had been revoked in another state. R. 1526-28. The plaintiff, James Verity, is one such teacher. Specifically, the USA TODAY article at issue – which was posted on the website of television station KGW in Portland – reported that, in 2005, Verity taught middle school and coached high school girls' softball and basketball in Oregon. The article then explained that:

> That year school administrators learned that Verity had been exchanging text messages and phone calls with a female student. Discipline records [ ] show the

> state revoked Verity's license after officials found he engaged in physical contact with the student, including "kissing on the lips, neck and earlobe, grinding his pelvis in her pelvic area and touching her breasts and groin area."
>
> When he tried to re-apply for a teaching license in 2009, a psychiatrist evaluating Verity recommended that he "not be left alone with any female student over the age of 12 in order to protect Mr. Verity and the student," according to discipline records [ ].
>
> The Oregon Teacher Standards and Practices Commission denied Verity's application to reinstate his teaching license.
>
> After the denial, records show Verity moved to Idaho where he was granted a teaching license. He worked in the Caldwell School District from 2010 to 2014. Superintendent Jodie Mills told USA Today the district was never made aware his license was revoked in Oregon. She said the revocation would "absolutely" have been a concern had it come to the district's attention.
>
> Since 2014, Verity has taught sixth grade science at Sage Valley Middle School in the Valivue School District, which is outside Boise. Valivue superintendent Pat Charlton said Verity "disclosed to his building principal that there had been an incident involving an 18-year-old female, eight years earlier, but no charges had been filed."

R. 525-33. The portion of the article concerning Verity closed by noting that he had declined to comment for the story, except to say that "the incident with the student happened in 2005 and that his 'life has changed significantly since then.'" It is undisputed that *every* fact set out in the USA TODAY article about Verity is entirely accurate.

On same day that KGW posted the USA TODAY story on its website, it also broadcast a shortened version of the story. It included only a brief reference to Verity:

> [I]n 2005, school administrators learned Verity had exchanged thousands of text messages, many of them late at night, with a female student. State teacher discipline records show they developed a sexual relationship.

> Oregon revoked Verity's teaching license. When he tried to re-apply several years later, a psychiatrist recommended he "not be left alone with any female student over the age of 12 in order to protect Mr. Verity and the student."
>
> But the very next year, Verity was back in the classroom – this time 300 miles away across state lines near Boise, Idaho. And today, he's still teaching. Our investigation found Verity's case is not an isolated example.

Supp. R. at Kristensen Decl., Ex. 68. In addition, KGW advised its viewers that Verity had declined an on-camera interview, saying only that his "life has changed" in the years since. At the end of the broadcast, the reporter noted, "[w]e also have much more on this story on KGW.com." *Id*. Again, it is undisputed that *every* reference to Verity in the KGW broadcast is entirely accurate.

The following week, KTVB, a television station based in Boise, broadcast the following:

> In 2005, school administrators learned Verity had exchanged thousands of text messages, many of them late at night, with an 18-year-old female student. Discipline records for Oregon teachers show they developed a sexual relationship.
>
> Oregon revoked Verity's teaching license. When he tried to reapply several years later, a psychiatrist recommended he "not be left alone with any female student over the age of 12 in order to protect Mr. Verity and the student." He was denied a new teaching license. But the very next year, Verity was back in the classroom. This time 300 miles away in Canyon County.
>
> ***
>
> Mr. Verity . . . worked for the Caldwell School District from 2010 to 2011 and from 2013 to 2014. The Superintendent there, Jodie Mills, tells us they had no idea about his past record. Verity started working in the Vallivue School District in 2014. He still teaches sixth grade science at Sage Valley.
>
> ***
>
> We reached out to Jim Verity. He declined an on-camera interview. . . .

> Now his superintendent, Pat Charlton of Vallivue School District told us Verity's background checks came back clean, and he had positive recommendations. Charlton also says Verity told his principal at Sage Valley about his disciplinary action in Oregon. He says because criminal charges were never filed, since the student was 18, they chose to keep him in the classroom. . . . Verity did tell us his life had changed significantly since having a relationship with that student 11 years ago.

Supp. R. at Kristensen Decl., Ex. 69. Like the USA TODAY article and the KGW broadcast, it is undisputed that *every one* of these facts reported about Verity in the KTVB broadcast is entirely accurate.

In this civil action, Verity asserts causes of action for defamation, false light invasion of privacy, and negligent and intentional infliction of emotional distress based on the USA TODAY article and the two broadcasts. Because he cannot – and does not – contest the accuracy of the facts actually contained in these stories, he bases his claims instead on the contention that they nevertheless give rise to false implications about him, specifically:

(1) That he "was a danger to female students," R. 1533;

(2) That he "deceived Idaho officials by hiding his past conduct," *id.*; and

(3) That he "committed a crime by having sex with a student," R. 1534.[1]

THE LOWER COURT'S DECISION

At the close of discovery, defendants moved for summary judgment. In denying that motion in the decision now before this Court, the lower court concluded that the accuracy of every fact about Verity contained in each of the three challenged stories was not dispositive

[1] According to Verity, the latter implication arises only from the KGW broadcast because it, unlike the others, did not report that the Oregon student with whom he concededly had a sexual relationship was 18. R. 1534.

because Idaho recognizes a cause of action for what it described as "defamation by implication." R. 1529 n.4. To survive summary judgment in such a case, the court held, a plaintiff must show only that (1) the "statements – though literally true – could create false inferences" and that (2) those inferences were reasonable, intended, and (if the plaintiff is a public official or public figure) made "with actual malice," that is, that they were "knowingly or recklessly . . . false." R. 1523, 1529, 1532.[2]

Applying this legal standard to the three allegedly false implications that Verity placed at issue, the court concluded (1) that they could all be "infer[red]" from the challenged stories and (2) that "[t]here is evidence from which a jury could find" that defendants "implied, and intended to imply" each of them. R. 1533. The only "evidence" the court cited in support of this second conclusion was the language of the publications themselves and the fact that one or another of them had omitted other facts that, the court asserted, would have negated the alleged implications. R. 1533-35.[3]

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[2] The court below also determined that Verity, a teacher and coach at a public high school, was not a public official, *see* R. 1530-32, and, as a result, was obliged to prove – with respect to this last element of his claim – only that "Defendants were negligent regarding the falsity of the implications they conveyed," R. 1532. For the reasons set forth in Defendants' brief, *amici* respectfully submit that the lower court erred in this regard as well and that Verity is most certainly a public official for purposes of the law of defamation. In this submission, *amici* focus on that aspect of the lower court's decision that is of most concern to media organizations and journalists across the country – *i.e.*, the unprecedented burden it purports to place on journalism about matters of public concern.

[3] Specifically, the lower court determined (1) that the first alleged implication – that Verity was a danger to female students – would have been negated if defendants had reported that, although one psychologist concededly determined he should not be alone with girls over age 12, another had opined that was not a risk to students, (2) that the second alleged implication – that Verity had deceived Idaho officials – would have been negated if, beyond reporting that his record had

ARGUMENT

Amici, a coalition of Idaho and national media, submit this brief because, if the decision below is affirmed by this Court, the dissemination of truthful information about matters of public concern will be inhibited in a manner that cannot be squared with either the law of defamation or the First Amendment. As *amici* explain in the pages that follow, the lower court's decision demonstrates why Idaho (following the lead of other states) should not recognize a cause of action for "defamation by implication" based on the dissemination of concededly accurate facts about a matter of public concern. Moreover, even if such a cause of action is deemed necessary, to survive constitutional scrutiny, it must be cabined in a manner that requires the plaintiff to demonstrate, as essential elements of the claim, (1) that the challenged publication, on its face, reasonably can be said both (a) to communicate the alleged defamatory implication and (b) to have endorsed its accuracy, and (2) that there is evidence that could lead a reasonable jury to find that the defendant was both aware of, and subjectively intended to communicate, the alleged implication. In this case, in contrast, the court below:

- Confused its threshold obligation to assess whether the challenged stories could reasonably be said to communicate the alleged defamatory meanings with the very different question of what a reader or viewer might "infer" from the accurate facts reported;

---

been disclosed by him to officials at one of the Idaho school districts at which he worked, but not the other, the stories had also mentioned that it had been provided to Idaho licensing authorities, and (3) that the third alleged implication – that he had committed a crime – would have been negated if the KGW broadcast had expressly stated that the student with whom he had concededly had a sexual relationship was 18. *See* R. 1533-35.

- Failed to assess whether the challenged stories, on their face, can reasonably be said to have *endorsed* the alleged implications; and

- Improperly conflated two distinct inquiries by holding that the requisite evidence of the defendants' subjective awareness of and intention to communicate the alleged implication can be divined from the face of the publication, standing alone, including by identifying facts that it did *not* contain.

Thus, even if this Court determines that Idaho should recognize a cause of action for implied defamation based on the publication of accurate facts about a matter of public concern, it should nevertheless hold that Verity has failed to state such a claim in this case because:

- None of the challenged stories can reasonably be held to communicate the defamatory *meanings* that Verity was a danger to female students, that he deceived Idaho officials, or that he committed a crime;

- Even if one or another of them did, none of them can reasonably be held, on their face, to *endorse* any of those implications; and

- There is no evidence that any of the defendants was aware of and subjectively intended to communicate those implications in any event.

I. Because Defamation-By-Implication Claims Based on the Reporting of Accurate Facts About Matters of Public Concern Necessarily Implicate First Amendment Freedoms, Several States Have Declined to Recognize Such a Cause of Action

In a typical defamation case, an allegedly false and defamatory fact is explicitly stated, *e.g.*, "Joe murdered Anne." In a defamation-by-implication case, however, the plaintiff attempts to assert a cause of action despite the fact that "the reported facts are materially true and the alleged defamation is not explicitly stated." *White v. Fraternal Order of Police* (*White II*), 909 F.2d 512, 518-19 (D.C. Cir. 1990). As a result, defamation-by-implication cases are necessarily "fraught with subtle complexities," precisely because of the inherent risk that, unless the cause of

action is narrowly cabined, liability will not only be imposed based on alleged implications that are "manufactured" from truthful reporting about public matters, but valuable speech will inevitably be inhibited because of the fear that its dissemination will lead to just such liability. *Id.*

For this reason, the courts have recognized that the very existence of such a cause of action places both would-be speakers and judges in a very difficult position. As one influential decision described the dilemma posed by such claims: "If a newspaper accurately reported that an individual was arrested and charged with a crime, a reader could reasonably infer, *i.e.*, guess, surmise, or derive as a probability, that the individual actually committed the crime," even if the reporter did not intend to communicate anything more than the accurate facts reported. *See White v Fraternal Order of Police* (*White I*), 707 F. Supp. 579, 589, n.12 (D.D.C. 1989), *aff'd*, 909 F.2d 512 (D.C. Cir. 1990). In such circumstances, if the reporter and newspaper can nevertheless be held liable, not for what they actually published, but for what some readers inferred from it, the ability of the press to gather and report about matters of public concern necessarily suffers. Put differently,

> [R]equiring a publisher to guarantee the truth of all the inferences a reader might reasonably draw from a publication would undermine the uninhibited, open discussion of matters of public concern. A publisher reporting on matters of general or public interest cannot be charged with the intolerable burden of guessing what inferences a jury might draw from an article and ruling out all possible false and defamatory innuendoes that could be drawn from the article.

Woods v. Evansville Press Co., 791 F.2d 480, 487-88 (7th Cir. 1986).

Because of the risks inherent in the imposition of defamation liability based on the dissemination of truthful statements about public matters, and the difficulty in fashioning meaningful limitations on the scope of such a cause of action, several jurisdictions have decided that, on balance, it is best not to recognize a tort of defamation-by-implication based on the publication of accurate facts at all, at least where the plaintiff is a public official or public figure. *See, e.g., Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990) ("an allegedly false implication arising out of true statements is generally not actionable in defamation by a public official"); *Schaefer v. Lynch*, 406 So. 2d 185, 188 (La. 1981) ("Even though a false implication may be drawn by the public, there is no redress for its servant."); *Mihalik v. Duprey*, 417 N.E.2d 1238, 1240-41 (Mass. Ct. App. 1981) (a public official plaintiff should not be able to pursue a defamation claim "where statements . . . were true," even if "they have an insinuating overtone"). And at least some courts have determined that there should be no such cause of action, even if the plaintiff is not a public figure, where the publication at issue addresses a subject of public concern. *See Fitzgerald v. Tucker*, 737 So. 2d 706, 717 (La. 1999) ("truthful facts which carry a defamatory implication can only be actionable if the statements regard a private individual *and* private affairs"); *Collins v. WAFB, LLC*, 2017 WL 1383948, at *8 (E.D. La. Apr. 18, 2017) (accurate reports "involv[ing] a private individual and a matter of public concern . . . cannot give rise to a claim for defamation, even if Plaintiff successfully showed that they carry a defamatory implication"). As one leading treatise has explained:

> The defendant's right to state the truth . . . might be undermined or destroyed if the defendant were held liable for the defamatory implications of complete and truthful statements of fact. Rightly concerned about this problem, courts have

> expressed doubts and cautions about imposing liability for the false and defamatory implications of accurate statements of fact. Some have gone so far as to say that, [at least] with public figure plaintiffs, no action lies for libel by implication.

3 Dan B. Dobbs, Paul T. Hayden, & Ellen M. Bublick, *The Law of Torts* § 566 (2d ed. 2011).[4]

This Court has not directly addressed whether Idaho should recognize the cause of action. The lower court's assertion that it did so in *Wiemer v. Rankin*, 790 P.2d 347 (Idaho 1990), *see* R. 1529, n.4, is simply not correct. In *Wiemer*, this Court was not presented, as it is here, with a defamation-by-implication claim, at least as that cause of action has traditionally been defined – *i.e.*, those cases in which the challenged implication allegedly arises from truthful speech about matters of public concern. Rather, the plaintiff in *Wiemer* asserted that certain facts published by the defendant were false and that *their* publication gave rise to a false implication. *Id.* at 352-53. This Court agreed that the plaintiff had carried his burden of proving the falsity of those *explicit* statements and, on that basis, permitted the claim to proceed. *Id.*; *see also Rinsley v. Brandt*, 700 F.2d 1304, 1310 (10th Cir. 1983) (requiring plaintiff to identify "false statements" before being allowed to proceed with defamation-by-implication claim). The question of whether to recognize a cause of action for defamation-by-implication where, as here, it is conceded that all the stated facts are true, is therefore one of first impression in this Court. For all of the reasons

[4] *See also* Peter B Kutner, *What Is Truth? True Suspects and False Defamation*, 19 Fordham Intell. Prop. Media & Ent. L.J. 1, 59 (2008) ("[s]everal courts . . . have held that there can be no liability" where the action is "premised on false implications found in a publication whose individual statements of fact were accurate"); *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 464 & n.9 (S.D.N.Y. 2012) ("some jurisdictions refuse to recognize a claim for a defamatory implication where the statements giving rise to the implication are all true"). *See generally*, Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825 (1984).

articulated by those courts that have declined to recognize such a tort, *amici* respectfully submit that this Court would be well served to reach the same conclusion.[5]

[5] Indeed, for many of the same reasons, this Court should also consider whether it is appropriate to continue to recognize a cause of action for "false light" invasion of privacy of the kind Verity has asserted in this case. While the Court has previously noted that "the precise elements of this cause of action are unclear," *Hoskins v. Howard*, 971 P.2d 1135, 1140 (1998) (citation omitted), a growing number of states have rejected it entirely because – as this case demonstrates – it is essentially duplicative of a claim for defamation, albeit without at least some of the safeguards for free expression that surround that more established tort. *See, e.g.*, *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1100, 1114 (Fla. 2008) ("because the benefit of recognizing the tort . . . is outweighed by the danger of unreasonably impeding constitutionally protected speech, we decline to recognize a cause of action for false light invasion of privacy"); *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 894 (Colo. 2002) (*en banc*) (declining to recognize tort because it is "highly duplicative of defamation both in interests protected and conduct averted" and "the subjective component of the false light tort raises the spectre of a chilling effect on First Amendment freedoms"); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235–36 (Minn. 1998) (refusing to recognize tort because "[w]e are concerned that claims under false light are similar to claims of defamation, and to the extent that false light is more expansive than defamation, tension between this tort and the First Amendment is increased"). *See generally*, D. L. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. Rev. 364, 369-71 (1989) (demonstrating that the false light tort is both "conceptually empty" and unconstitutionally vague). If the Court is nevertheless inclined to continue to recognize the false light tort at all, it should take this opportunity to correct the lower court's erroneous recitation of its required elements – specifically, its failure to follow the Supreme Court's express holding in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), that a plaintiff asserting a false light claim arising from speech about a matter of public concern must prove actual malice, regardless of whether the plaintiff is a public or private figure. *See* RESTATEMENT (SECOND) OF TORTS § 652E (2018); *Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 134 (1st Cir. 2000); *Zeran v. Diamond Broad., Inc.*, 203 F.3d 714, 718 (10th Cir. 2000); *Dobkin v. Johns Hopkins Univ.*, 172 F.3d 43 (4th Cir. 1999); *Puckett v. Am. Broad. Cos.*, 917 F.2d 1305 (6th Cir. 1990); *Schifano v. Greene Cty. Greyhound Park, Inc.*, 624 So. 2d 178, 180 (Ala. 1993); *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 784 (Ariz. 1989).

II. If this Court Does Decide to Recognize a Cause of Action for Defamation-by-Implication, the Scope of the Tort Should be Narrowly and Precisely Defined to Safeguard Truthful Speech About Public Matters

Those jurisdictions that have recognized the defamation-by-implication tort have emphasized that that such claims must be examined rigorously and that its required elements must be defined narrowly and precisely. *See, e.g.*, *White II*, 909 F.2d at 518-19 ("In entertaining claims of defamation by implication, courts must be vigilant not to allow an implied defamatory meaning to be manufactured from words not reasonably capable of sustaining such meaning"); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092-93 (4th Cir. 1993) (requiring an "especially rigorous showing" in libel-by-implication claims). Specifically, in order to prevail on a defamation-by-implication claim based on the dissemination of truthful speech about public matters, courts have required plaintiffs to clear two distinct hurdles, one that requires judicial examination of the face of the challenged publication, and another that contemplates judicial assessment of the record evidence with respect to the defendant's state of mind. In this case, the lower court misconstrued and misapplied both of these requirements.

A. The Threshold Determination

To state a viable claim for defamation-by-implication based on the publication of accurate facts about a matter of public concern, a plaintiff must show, as a threshold matter, both that the implied defamatory meaning he attributes to the challenged publication is objectionably reasonable *and* that, on the face of the publication, that meaning is affirmatively endorsed by the

defendant. *See, e.g.*, *White II*, 909 F.2d at 520.[6] In the leading case describing this requirement, which has since been followed by courts in virtually every jurisdiction that has considered the issue, the District of Columbia Circuit explained that every plaintiff must show at the outset that the challenged publication "be reasonably capable of a defamatory interpretation." *Id.* at 519. Of necessity, this inquiry contemplates a judicial determination of what *meaning* the challenged publication can reasonably be said to communicate, *not* simply what inferences a reader or viewer might draw from it. As the district court in *White* explained through the hypothetical set out at page 8, *supra*, the relevant question centers on the meaning reasonably conveyed, and what a reasonable reader might infer from the facts reported is not dispositive of that very different inquiry. Thus, while a reader might reasonably infer from a news report that the plaintiff had been arrested and charged with a crime that he was in fact the perpetrator of that crime, that inference does *not* constitute a defamatory *meaning* that the mere report of his arrest could reasonably be said to bear. *See White I*, 707 F. Supp. at 589.

Moreover, as the court emphasized in *White*, where the alleged defamatory meaning is implied from the defendant's rendition of accurate facts about public matters, the conclusion that such a meaning may be reasonably conveyed is not enough. In such circumstances, the court must also determine whether "the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant *intends or*

[6] This inquiry is the same regardless of whether the plaintiff is a public or a private figure. *See, e.g.*, *Rubin v. U.S. News & World Report*, 271 F.3d 1305, 1309, n.11 (11th Cir. 2000); *Partington v. Bugliosi*, 56 F.3d 1147, 1152 & n.9 (9th Cir. 1995); *Abadian v. Lee*, 117 F. Supp. 2d 481 (D. Md. 2000); *Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 37 (N.Y. App. Div. 2014).

endorses the defamatory inference." *White II*, 909 F.2d at 520; *accord Chapin*, 993 F.2d at 1092-93 (to satisfy this threshold inquiry, the language of the publication must "affirmatively suggest that the author intends or endorses the inference"). In other words, as the D.C. Circuit further explained in *White II*:

> the court must first examine what defamatory inferences might reasonably be drawn from a materially true communication, and then evaluate whether the author or broadcaster has done something beyond the mere reporting of true facts to suggest that the author or broadcaster intends or endorses the inference.

909 F.2d at 520. Since *White*, courts across the country have consistently held that this threshold requirement governs defamation-by-implication claims arising from speech about matters of public concern.[7]

In *White* itself, the plaintiff was a police officer who had failed a drug test, and then, contrary to protocol, was given a second test. *Id.* at 515. Both the first and second urine samples

[7] *See, e.g.*, *Chapin*, 993 F.2d at 1093 (adopting *White* test and dismissing libel-by-implication claim); *Kavanagh v. Zwilling*, 578 F. App'x 24, 24–25 (2d Cir. 2014) ("To survive a motion to dismiss a claim for defamation by implication . . . the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference." (citation omitted)); *Deripaska v. Associated Press*, 282 F. Supp. 3d 133, 148 (D.D.C. 2017) (applying *White* test and dismissing claim); *Wyoming Corp. Servs. v. CNBC, LLC*, 32 F. Supp. 3d 1177, 1189 (D. Wyo. 2014) ("The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author *intends* or *endorses* the inference." (citation omitted)); *Biro*, 883 F. Supp. 2d at 470 (granting motion to dismiss defamation-by-implication claim because "nothing in the language [of the publication] suggests that Defendants intended or endorsed" the proffered implications); *accord Heyward v. Credit Union Times*, 913 F. Supp. 2d 1165, 1189 (D.N.M. 2012); *Duncan v. Gilead Scis., Inc.*, 2011 WL 1807017, at *3 (S.D.W. Va. May 9, 2011); *Abadian*, 117 F. Supp. 2d at 488; *Webb v. Virginian-Pilot Media Cos.*, 752 S.E.2d 808, 810 (Va. 2014); *Leddy v. Narragansett Television, L.P.*, 843 A.2d 481, 489 (R.I. 2004); *Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.*, 495 N.W.2d 392, 396 (Mich. Ct. App. 1992); *Stepanov*, 120 A.D.3d at 37-38.

were hand-delivered (again, contrary to protocol) to an out-of-state lab, among other "irregularities." That lab found both samples to be drug-free, and the plaintiff was thereafter promoted. Two years later, the Fraternal Order of Police ("FOP") learned of these irregularities and sent letters to the mayor and the U.S. attorney outlining them while pointedly suggesting that there had been "a systematic effort to subvert the integrity of the drug testing procedures." *Id.* The police chief then opened an inquiry (called the "Cox Investigation"), which ultimately concluded that, although protocols were not properly followed, "there had been no tampering with the specimens." *Id.* at 515-16. Several news organizations, including *The Washington Post*, published stories about the FOP's allegations and the Cox Investigation. Plaintiff sued both the FOP and the Post, among other defendants, for defamation and false light invasion of privacy.

The plaintiff conceded that all of the factual information in the Post's stories and the FOP letter were accurate. *Id.* at 525. Nevertheless, he asserted that they falsely implied that he had, in fact, used illegal drugs, because they omitted certain facts that would have made his "innocence" clear (including that the first sample was confirmed by another lab to be untainted and that the test he initially took had a very low accuracy rate). On the Post's motion for summary judgment, the court rejected the plaintiff's contention that the omissions on which he relied created a defamatory implication. Alleged omissions, the court explained, are not relevant to whether a defamatory implication *exists* on the face of the challenged publication, but rather only to the separate question of whether that alleged defamatory meaning, if it is reasonably gleaned from the publication, is *false*. *Id.* at 520-21, 525. Turning to the required threshold

determination with respect to meaning, the court concluded that the Post articles were "incapable of bearing a defamatory meaning based on the text of the articles themselves" as a matter of law. *Id.* at 526. While a reader might infer (from the true facts reported) that the plaintiff used drugs, there was "no evidence in the text of the articles to suggest that it would be reasonable for a reader to conclude that the Post intended the defamatory inference," such as "suggestive juxtapositions, turns of phrase, or incendiary headlines." *Id.* In contrast, the court held that the FOP was *not* entitled to summary judgment because its letter went "beyond merely reporting materially true facts." *Id.* at 521. By asserting that "the high level of cannabinoids registered by" the first test "'should easily have been confirmed," and "raising the specter of criminal violations . . ., the FOP provided a clear signal . . . that the defamatory inference was intended or endorsed." *Id.*

In this case, the court below both misstated and misapplied this objective, threshold inquiry (is the proffered defamatory meaning reasonable and, if so, can the publication, on its face, reasonably be construed to endorse it?) in three important respects. *See* R. 1532-33. First, it plainly confused the question of what *inferences* a reader or viewer might draw from the accurate facts set out in the challenged stories with the first step of the actual threshold inquiry contemplated by *White* and its progeny – *i.e.*, whether the implied defamatory meanings proffered by the plaintiff were reasonable ones. *See* R. 1523 (plaintiff must prove only that "Defendants' statements—though literally true—could create false *inferences*") (emphasis added). Simply put, unless the text of the challenged story, "considered as a whole, in context, could be reasonably understood to express" one or more of the implied defamatory meanings

alleged by the plaintiff, those stories cannot be "actionable" in defamation as a matter of law. *White I*, 707 F. Supp. at 589 n.12; *see also Webb*, 752 S.E.2d at 812 (just because readers may draw a defamatory inference does not mean that the inference is actionable). In this case, *amici* respectfully submit no reasonable reader or viewer of the challenged stories would understand them to communicate the defamatory meanings that Verity attributes to them. Rather, their only reasonable *meaning* is confined to the accurate facts they report – *i.e.*, that Verity had a sexual relationship with a student, that he lost his teaching license in Oregon as a result, and that he subsequently secured employment in Idaho where one of his employers was concededly unaware of what had transpired in Oregon.

Second, the court below did not even purport to evaluate whether the challenged stories did anything "beyond the mere reporting of true facts to suggest" to a reasonable reader or viewer that the defendants "intend[ed] or endors[ed]" the proffered implications. *White II*, 909 F.2d at 520. If it had, it could reach no reasonable conclusion other than that, like the Post articles at issue in *White*, they do not in any sense endorse any of the defamatory implications that Verity attributes to them. In each of the challenged stories, the concededly accurate facts are set out in a straightforward manner and, unlike the FOP letter at issue in *White*, they contain no "suggestive juxtapositions, turns of phrase, or incendiary headlines" that could reasonably be construed as indicia of endorsement. *Id.* at 526. For this reason as well, Verity cannot state a claim for defamation-by-implication as a matter of law.

Finally, the court below erred when it purported to rely on alleged "omissions" from the challenged stories to support its conclusion that they communicated the implied defamatory

meanings Verity attributes to them. As the court explained in *White*, omissions are simply not relevant to assessing what meaning a challenged story can reasonably be held to bear. *Id.* at 520-21, 525. At most, any such omissions become relevant only *after* the threshold hurdles contemplated by *White* and its progeny have been cleared, and then only for the purpose of assessing whether the defamatory meaning at issue is false in some material respect. *Id.* at 520-21. In this case, the Court does not need to reach that question because the threshold requirement has not been satisfied. *See, e.g.*, *Revil v. Coleman*, 54 N.E.3d 608 (Mass. App. Ct. 2016) (press release stating that teacher was placed on leave pending investigation of alleged sexual relationship with student did not communicate implied defamatory meaning that plaintiff was guilty, despite plaintiff's allegation that the press release failed "to include pertinent facts" which "rendered it false").[8]

[8] Even if the Court were to consider the alleged omissions at this stage, it should conclude, as did the Court in *White*, that they are immaterial because the undisputedly accurate facts reported in the stories demonstrate that the "gist" of the alleged implications is substantially true. Verity had an inappropriate sexual relationship with a high school student, a psychologist thereafter determined he should not be around girls over age 12, his Oregon teaching credentials were revoked as a result, and he told some Idaho officials, but not others, about what had taken place in Oregon. As a matter of law, the "gist" or "sting" of these stories would not have been materially altered if they had also noted that a different psychologist believed Verity could have contact with middle and high schoolers, that there were additional Idaho officials that were also aware of his experience in Oregon, or that (with respect to the KGW broadcast) the high school student with whom he had a sexual relationship was 18. *See, e.g.*, *Biro*, 883 F. Supp. 2d at 465 (noting that courts are skeptical of claims "based on the omission of facts that may have cast the plaintiff in a different, more positive light, but would not otherwise render the expressed statements untrue").

B. The Fact-Based Determination

Beyond the threshold determination described in *White* and its progeny, a plaintiff alleging a cause of action for defamation-by-implication arising from speech about a matter of public concern must also establish that the defendant was in fact aware of the proffered defamatory implication and intended to communicate it. *See, e.g.*, *Nichols v. Moore*, 477 F.3d 396, 402 (6th Cir. 2007) (granting summary judgment where the plaintiff failed to provide sufficient evidence "indicating that [the defendant] intended to falsely implicate" the plaintiff). Where the plaintiff is a public official or public figure, that showing must be supported by clear and convincing evidence. *See, e.g.*, *Kendall v. Daily News Publ'g Co.*, 716 F.3d 82, 90-91 (3d Cir. 2013); *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1318-19 (7th Cir. 1988) (plaintiff must show by clear and convincing evidence that defendants "intended to imply" the defamatory meaning urged by the plaintiff); *Worrell-Payne v. Gannett Co.*, 134 F. Supp. 2d 1167, 1176-77 (D. Idaho 2000) (plaintiff must "present clear and convincing evidence from which a jury could find that the [defendant] actually intended to convey the false impressions"), *aff'd*, 49 F. App'x 105, 106 (9th Cir. 2002).[9]

[9] A public figure plaintiff's burden of proving such a subjective "intention" necessarily arises in part from the overarching requirement that such a plaintiff show that the defendant published what amounted to a "calculated falsehood,"– *i.e.*, publication either with knowledge that the alleged implication was false or with at least a "high degree of awareness" of its "probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Sullivan*, 376 U.S. at 279-80. *See also Kendall*, 716 F.3d at 93. As courts across the country have uniformly recognized, that constitutional requirement would be meaningless if liability could "be imposed not only for what was not said but also for what was not intended to be said." *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 681 (9th Cir. 1990); *see also Saenz*, 841 F.2d at 1318 (if a public official "must establish by clear and convincing evidence that the defendants acted" with actual malice, "it

In *Kendall*, for example, the defendant newspaper reported that the plaintiff, a judge, had released a criminal defendant, Castillo, on his own recognizance and that, shortly thereafter, Castillo murdered a 12-year-old girl. 716 F.3d at 84. In describing the preliminary hearing, the article at issue stated: "Kendall found probable cause to charge Castillo [with assault] but released him pending trial – despite Castillo's history of violence, including charges of rape, assault and weapons violations." *Id.* The plaintiff alleged that this sentence "implied that he was aware of Castillo's violent history when, in fact, he was not" because those charges "were absent from the criminal record presented to [him]" at the hearing. *Id.* The Third Circuit nevertheless affirmed the lower courts' entry of judgment for the defendant newspaper, holding that, to sustain a cause of action based on an implied defamatory meaning, there must be "*evidence* showing, directly or circumstantially, that the defendants themselves understood the potential defamatory meaning of their statement." *Id.* at 93 (emphasis added). Indeed, because the plaintiff was a public official, the court recognized that such a finding must be supported by clear and convincing evidence, which necessarily required considerably more than an analysis of the four corners of the challenged publication itself. *Id.*

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follows that where the plaintiff is claiming defamation by innuendo, he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw"); *Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1063-64 (9th Cir. 1998) (plaintiff "must show that a jury could reasonably find by clear and convincing evidence that [the defendant] intended to convey the defamatory impression" (citation and internal marks omitted)); *Woods*, 791 F.2d at 487 (there can be no liability absent clear and convincing evidence that "the publisher of the statement either intended the statement to contain such a defamatory implication or even knew that readers could reasonably interpret the statement to contain the defamatory implication"); *Jacobson v. CBS Broad., Inc.*, 19 N.E.3d 1165, 1178 (Ill. App. Ct. 2014) (plaintiff "required to establish that the defendant was subjectively aware of the implied meaning").

Similarly, in *Nichols*, the plaintiff, the brother of one of the Oklahoma City bombers, challenged portions of the documentary film *Bowling for Columbine* on the ground that it falsely implied that he was involved in the bombing. He pointed specifically to several accurate statements contained in the film that he alleged communicated such a false implication—that both "Nichols brothers made practice bombs before Oklahoma City;" that both were "arrested in connection to the bombing;" that "[o]fficials charged [plaintiff] . . . with conspiring to make and possess small bombs;" and, that while Terry Nichols was convicted, "the feds didn't have the goods on [his brother] James, so the charges were dropped." 477 F.3d at 398.[10] The Sixth Circuit affirmed the trial court's entry of summary judgment for the defendant despite its recognition "that a viewer of the movie could erroneously conclude that James Nichols made practice bombs in preparation for Oklahoma City, and was arrested and charged in the Oklahoma City bombing." *Id.* at 402. It did so because it concluded that the "plaintiff's evidence cannot meet the high hurdle presented by a defamation by implication claim," which requires proof not simply that reasonable viewers could draw from the film the false implication he alleged, but also that the defendant "intended to falsely implicate James Nichols in the Oklahoma City bombing." *Id.*

[10] On the defendants' motion for summary judgment, the court confirmed that all of these statements were substantially true: The plaintiff *had* practiced making bombs "before Oklahoma City," although not in connection with the bombing for which his brother was convicted, and he was arrested and charged with an explosives offense, although not with respect to "any criminal act directly related to the bombing." 477 F.3d at 398-401.

In this case, in contrast, the only "evidence" on which the court below based its determination that the defendants intended to communicate the alleged implications was its analysis of the content of the stories themselves. *See* R. 1533, n.6 ("Evidence of a defendant's intent to create a defamatory implication does not have to come in the form of extrinsic conduct," but can be gleaned from "[t]he particular manner or language of the communication" itself). This is plain error – indeed, it conflates the threshold objective determination articulated in *White* and its progeny with the distinct, fact-based determination described in cases like *Kendall* and *Nichols*. For purposes of the threshold determination, the court properly looks only to the four corners of the publication or broadcast at issue to determine if (1) an implied defamatory meaning is reasonably conveyed, and, if it is, (2) whether the publication itself evinces an intention to endorse such an implication. *See, e.g.*, *Chapin*, 993 F.2d at 1092-93 (relevant question is whether language of the publication at issue "affirmatively suggest[s] that the author intends or endorses the inference"). If the cause of action clears that hurdle, the plaintiff must still satisfy the fact-based requirement by pointing to *evidence* from which a reasonable jury could find that the defendant in fact intended to convey the defamatory implication. *See, e.g.*, *Jacobson*, 19 N.E.3d at 1180 ("The mere fact that a statement is capable of one defamatory inference" does not mean that the publisher "either intended the statement to contain such a defamatory implication or even knew that the readers could reasonably interpret the statement to contain the defamatory implication") (citing *Saenz*, 841 F.2d at 1318; *Woods*, 791 F.2d at 487); *Newton*, 930 F.2d at 681 (fact that "broadcast may be capable of supporting the impression [plaintiff] claims" does not therefore mean that defendant "intended to convey the

defamatory implication"); *cf. Wiemer*, 790 P.2d at 357-59 (scrutinizing summary judgment record to determine whether there was sufficient evidence of actual malice). Moreover, if the plaintiff is a public official or public figure, he must make the requisite showing by "clear and convincing evidence." *See, e.g.*, *Kendall*, 716 F.3d at 90-91.

In his opposition to defendants' summary judgment motion, Verity provided no evidence that could support a jury finding that the defendants intended to convey the allegedly false implications at issue. He cited to no document produced in discovery, no deposition testimony from any of the journalists responsible for the challenged stories, and no admissions by any of them secured through third-party testimony that even remotely evinces the requisite intention. Rather, the only "evidence" on which he and the lower court purported to rely is that defendants "omitted," in one or another of the stories, facts the inclusion of which he asserts would have negated the false implications on which he bases his claims. Such omissions, however, are insufficient to sustain the plaintiff's burden as a matter of law, especially in the absence of independent evidence that the journalists responsible for the challenged stories intended by those omissions to create the false implications alleged. There is simply no such evidence in the record of this case. Moreover, as the courts have repeatedly recognized, judges are appropriately reluctant to substitute a defamation plaintiff's judgment on such matters for the editorial choices made by professional journalists. *See, e.g.*, *White II*, 909 F.2d at 525 (press "should not be required to report the results of investigative journalism with a precision establishing an exhaustive, literal picture of what transpired"); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1305 (8th Cir. 1986) ("Courts must be slow to intrude into the area of editorial judgment . . .with

respect to inclusions in or omissions from news stories. Accounts of past events are always selective, and under the First Amendment the decision of what to select must almost always be left to writers and editors. It is not the business of government."). Accordingly, for this reason as well, this Court should properly reverse the decision below and enter judgment for defendants.

CONCLUSION

For the foregoing reasons, and for the reasons stated by the defendants, this Court should reverse the decision of the court below and hold that there is no cause of action in Idaho for defamation-by-implication, or, if there is such a tort, that the plaintiff has failed to state such as claim as a matter of law.

DATED this 25th day of April, 2018.

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APPENDIX

THE MEDIA AMICI

Adams Publishing Group understands the need for local news in vibrant communities. APG's 63 community newspapers, their 18 advertising shoppers, 20 specialty publications and 81 associated websites provide an important communication tool for citizens and businesses in dozens of local communities across 15 states.

Advance Publications, Inc., directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in 10 states, and leading business journals in over 40 cities throughout the United States. Through its subsidiaries, Advance also owns numerous digital video channels and internet sites.

The American Society of News Editors ("ASNE") is an organization with some 500 members that include directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press is a not-for-profit mutual news cooperative. The members of AP are more than 1,500 newspapers and more than 5,000 television and radio stations throughout the United States. AP has journalists stationed in 321 locations worldwide, including in Idaho.

BuzzFeed, Inc. is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

The Center for Investigative Reporting ("CIR"), founded in 1977, is the nation's first nonprofit investigative news organization. CIR produces investigative journalism for its website Reveal (https://www.revealnews.org/), the Reveal national public radio show and podcast, and various documentary and video projects -- often in collaboration with other newsrooms across the country.

CNN owns and operates numerous news platforms and services that provide live coverage and analysis of breaking news, as well as a full range of international, political, business, entertainment, sports, health, science and weather coverage, and topical in-depth interviews.

Dow Jones & Company, Inc. is a global provider of news and business information, delivering content to consumers and organizations around the world across multiple formats, including print, digital, mobile and live events. Dow Jones has produced quality content for more than 130 years and today has one of the world's largest newsgathering operations. It produces leading publications and products including the flagship Wall Street Journal; Factiva; Barron's; MarketWatch; Financial News; Dow Jones Risk & Compliance; Dow Jones Newswires; and Dow Jones VentureSource.

The E.W. Scripps Company owns and operates 33 local television stations across the country, including KIVI-TV in Boise and KSAW-TV in Idaho Falls. Scripps also owns and operates radio stations in eight markets throughout the United State, including four FM stations in Boise. Scripps is the longtime steward of the Scripps National Spelling Bee.

First Look Media is a not-for-profit American news organization that owns and operates several journalistic outlets, including The Intercept.

Forbes is a global media company reaching more than 117 million people throughout the United States and worldwide through Forbes and Forbes Asia magazines, Forbes.com and 40 licensed local editions covering more than 70 countries.

Gray Television, Inc. is a television broadcast company headquartered in Atlanta, Georgia, that owns and operates over 100 television stations across 57 television markets that collectively broadcast over 200 program streams including over 100 channels affiliated with the CBS Network, the NBC Network, the ABC Network and the FOX Network. In Idaho, Gray owns KMVT and KSVT, which are, respectively, the CBS and FOX affiliates in Twin Falls market. Gray's portfolio covers approximately 10.4 percent of total United States television households.

The Hearst Corporation is one of the nation's largest media companies. It owns and publishes 15 daily newspapers, including the *Seattle Post-Intelligencer* and the *San Francisco Chronicle*; nearly 300 magazines, including *Good Housekeeping* and *O, The Oprah Magazine*; and 29 television stations around the country.

The Idaho Press Club is a statewide association of working journalists, from all media – newspaper reporters, broadcast journalists, radio reporters, photographers, bloggers, magazine writers and others. Its members also include journalism students and teachers and retired journalists. Its mission is to promote excellence in journalism, freedom of expression and freedom of information.

The Idaho Statesman (McClatchy), established in 1864, is Boise's and Idaho's source of news, providing high-quality news in a wide array of digital and print formats.

Landmark Media Enterprises, LLC (formerly Landmark Communications) is a privately held media company headquartered in Norfolk, Virginia with interests in print and internet publishing, internet marketing/web services, and data centers.

The Media Institute is a nonprofit foundation specializing in communications policy issues. The Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. The Media Institute is one of the country's leading organizations focusing on the First Amendment and speech-related issues.

Meredith Corporation has been committed to service journalism for 115 years. Today, Meredith uses multiple distribution platforms — including broadcast television, print, digital, mobile and video — to provide consumers with content they desire.

The National Association of Broadcasters is a nonprofit incorporated trade association that serves and represents radio and television stations and broadcast networks. Our members broadcast news, public affairs, entertainment and other programming to the people of Idaho and the nation, and NAB seeks to preserve and enhance its members' ability to create and disseminate freely programming and information of all types.

The News Media Alliance ("NMA") is a nonprofit organization based in Washington, D.C., representing the interests of online, mobile, and print news publishers in the United States and Canada. More than 2,000 news media organizations are members of the NMA. NMA members account for nearly 90 percent of the daily newspaper circulation in the United States, as well as a wide range of online, mobile, and non-daily print publications. The NMA focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

The New York Times Company is the publisher of The New York Times and The International New York Times, and operates the news websites nytimes.com, inyt.com, and related properties. In 2017, The Times had 1,450 journalists, reporting from 160 countries and across the United States, including in Idaho.

POLITICO is a global news and information company. Since its launch in 2007, POLITICO has grown to more than 350 reporters, editors and producers. POLITICO distributes 30,000 copies of its Washington newspaper on each publishing day, publishes POLITICO Magazine, with a circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month.

The Reporters' Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Radio and Television Digital News Association is the world's largest professional association devoted to advocating on behalf of broadcast and digital journalists. RTDNA's Voice of the First Amendment Task Force defends against threats to press freedom targeting all journalists. Founded as a grassroots organization in 1946, RTDNA works to protect the rights of journalists in the courts and legislatures throughout the country, promotes ethical standards in the industry, provides members with training and education and honors outstanding work in the profession through the Edward R. Murrow Awards.

The Society for Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

tronc, Inc. is one of the country's leading media companies. The company's daily newspapers include the Los Angeles Times, Chicago Tribune, New York Daily News, San Diego Union-Tribune, The Baltimore Sun, Sun Sentinel (South Florida), Orlando Sentinel, Hartford Courant, The Morning Call and Daily Press. Popular news and information websites, including www.chicagotribune.com and www.latimes.com, complement tronc's publishing properties and extend the company's nationwide audience.

WP Company LLC d/b/a The Washington Post is one of the leading news organizations in the United States. It publishes The Washington Post, a daily print newspaper based in the nation's capital, as well as the website www.washingtonpost.com, which is read in all 50 states and around the world. Washingtonpost.com reached an audience of more than 70 million unique visitors per month in 2017.

CERTIFICATE OF SERVICE

I, Alia Smith, hereby certify that on the 25th day of April, 2018, I caused a true and correct copy of the foregoing Brief of Amici Curaie to be served via U.S. Mail and electronic mail upon the following:

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