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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 APPELLANTS
USA TODAY, KTVB, KGW, TAMI TREMBLAY and STEPHEN REILLY

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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I. STATEMENT OF THE CASE

A. Nature of the Case.

This permissive appeal presents constitutional issues of first impression in Idaho; namely, whether truthful publications on matters of public concern may nonetheless be actionable and, if so, under what circumstances, and whether a public school teacher and coach should be deemed a public official for purposes of constitutional scrutiny on matters of public concern.

Respondent James Verity ("Mr. Verity") lost his teaching license in Oregon after the middle school teacher and high school coach admitted to an "inappropriate physical relationship involving sexual contact" with an 18-year-old high school student athlete. When reinstatement of his license proved unsuccessful in Oregon, Mr. Verity moved to Idaho where he obtained both a teaching certificate and job as a high school teacher and girls' basketball coach. Appellants KGW and KTVB broadcast stories that truthfully described Mr. Verity's Oregon license revocation and subsequent employment in Idaho. Such stories were local stories related to a Pulitzer Prize nominated report by Appellants USA Today and Stephen Reilly into the issue of disparate teacher discipline tracking systems at the state and local level and, more specifically, teachers guilty of serious misconduct finding their way back into the classroom. Mr. Verity voluntarily resigned his positions in Idaho after his history of misconduct in Oregon became widely known. Thereafter, Mr. and Mrs. Verity sued Appellants for defamation, invasion of privacy, and infliction of emotional distress.[1]

Mr. Verity admits the truth of every material statement that the Appellants published, but

[1] Mrs. Verity's claims were dismissed by the trial court and are not the subject of this appeal. R. 1536-1540.

asserts that false implications in each of the publications constitute defamation, invasion of privacy, and emotional distress. Appellants moved for summary judgment on all claims since the publications are true and/or substantially true, privileged, and because Mr. Verity was unable to demonstrate actual malice by each of the Appellants. The district court refused to dismiss Mr. Verity's claims, reframing his defamation claim as one for "defamation by implication" and finding that despite the truth of each statement, a jury could infer falsehoods and intent by each Appellant sufficient to sustain such claim and the related claims of false light invasion of privacy and intentional and negligent infliction of emotional distress. Given the significant constitutional issues involved, Appellants immediately moved for permissive appeal of the district court's decision by this Court.

B. Statement of Facts.

1. *Mr. Verity's Teaching/Coaching History in Oregon, Inappropriate Relationship with Student-Athlete, and License Revocation.*

The Teacher Standards and Practices Commission ("TSPC") licensed Mr. Verity to teach in Oregon (R. 245; 1377 at 26:11-13), and during the 2004-2005 school year, he taught and coached at the middle school in Prineville, Oregon and was the head varsity girls' basketball and softball coach at the high school. R. 247-250; 1377 at 27:9-29:23. Mr. Verity first met Rachael Conley in 2001 when she was a freshman on his junior varsity basketball team at Crook County High School. R. 1379 at 34:22-35:6. Mr. Verity continued to coach Rachael when she played on the school's varsity basketball team her junior and senior years. R. 1379 at 35:12-24. During her senior year (2004-2005), Rachael was also a Juvenile Tutor assigned to Mr. Verity's middle school science class for which she received academic credit. R. 254; 1379 at 36:9-38:16. During

this same time, Rachael lived at her friend's house during the week. R. 254; 262.

Beginning in the spring of 2005, Mr. Verity began having "an inappropriate physical relationship involving sexual contact (defined in OAR 584-20-005(a)(b)(c))" with Rachael. R. 254-257. *See also* R. 296 at ¶ 6. From February 28, 2005 to May 25, 2005, investigators found:

> [a]pproximately 2,625 text messages between Mr. Verity and Rachel Conley [sic] . . . many of these messages took place from 10:00 pm to 6:00 am in the morning – often lasting hours on end. Others took place during Mr. Verity's work hours while on duty at Crook County Middle School.

R. 252. These text messages – many sexual in nature – began in November 2004. R. 296 at ¶ 4; 1381 at 42:14-43:1. Investigators also found "[a]pproximately 507 hours of phone conversations between Mr. Verity and Rachael Conley which took place between November 22, 2004 and May 25, 2005." R. 252. Finally, investigators found that "Mr. Verity engaged in inappropriate physical conduct" with Rachael, which included "kissing on the lips, neck and earlobe, grinding his pelvis in her pelvic area and touching her breasts and groin area." R. 296 at ¶ 6. Mr. Verity admits to at least two separate incidents where he had inappropriate physical contact with Rachael. R. 1381-1382 at 43:2-16; 43:17-46:1.

On June 9, 2005, Crook County relieved Mr. Verity of his coaching duties. R. 280; 1390 at 79:20-80:14. On July 11, 2005, Mr. Verity agreed to resign "from his employment in lieu of termination" in exchange, *inter alia*, for the District agreeing to provide him with a reference for future employment "without mention of this agreement or the events giving rise thereto." R. 284 at ¶¶ 3, 6; 1391 at 82:25-83:13. Mr. Verity was concerned about giving prospective employers

information about his "ethical violation" because of its potential negative impact on his ability to get new employment. R. 1391 at 85:12-20. Mr. Verity resigned on July 11, 2005, and the school district provided him with a letter of reference for future employers that did not include any details of Mr. Verity's inappropriate relationship with Rachael. R. 287.

From August 2005 through April 2006, TSPC conducted an investigation into Mr. Verity's actions, the result of which was a Stipulation of Facts, Order of Revocation and Probation dated August 4, 2006. R. 295-298. Under this Stipulation and Order, the TSPC revoked Mr. Verity's Oregon teaching license for one (1) year from the date of the Order (*e.g.*, August 4, 2006) and held that if his license was reinstated, a four (4) year probation would be imposed upon Mr. Verity subject to special terms and conditions. R. 297.

2. *Mr. Verity Fails to Reinstate his Oregon Teaching License.*

Beginning on July 11, 2007, Mr. Verity reapplied for his Oregon teaching license. R. 303-310; 1396 at 104:16-105:2; 312-316; 1397 at 109:4-13. The TSPC required Mr. Verity to complete several conditions, including a complete psychological evaluation. *See* R. 295-298. To that end, Mr. Verity was seen and evaluated by James R. Hamer, MS, and Michelle Whitehead, Ph.D. R. 1398-1400 at 111:2-121:9.

Dr. Whitehead submitted a comprehensive evaluation of Mr. Verity to the TSPC. R. 329-333. Her report included seven conclusions and recommendations (R. 332-333), including "Mr. Verity should not coach female high school students" and "If Mr. Verity returns to teaching he should not be alone with any female student over the age of 12." R. 332-333. On June 11, 2008, the TSPC denied Mr. Verity's application for reinstatement because he "failed to

establish fitness to serve as an educator." R. 344-347. Mr. Verity appealed this decision. R. 349; 1403 at 130:14-25.

3. *Mr. Verity Applies for Idaho Teaching License.*

While his reinstatement proceedings were pending in Oregon, Mr. Verity submitted an application for an Idaho teaching license (R. 335-337; 1400-1401 at 121:23-122:14) wherein he reported that TSPC officials "decided to reinstate my license based on another letter of stipulation." R. 335. Later Mr. Verity submitted materials in support of his application to Idaho officials. R. 351-362. Mr. Verity's application materials do not disclose the facts underlying his resignation from Crook County or his license revocation. R. 335-337; 351-362; 1401 at 122:15-123:3; 1402 at 126:15-25; 1403-1404 at 133:20-134:11. Mr. Verity's teaching license has never been reinstated in Oregon. R. 1401 at 125:14-22.

Idaho officials denied Mr. Verity's application for a teaching certificate based on "your conduct in Oregon." R. 364. Mr. Verity appealed this denial and retained his brother-in-law, Mr. Shepherd, to assist him in the appeal. R. 366-367.

4. *Mr. Verity Pursues Appeals in Idaho and Oregon.*

On September 30, 2008, the Idaho Professional Standards Commission of the Department of Education of the State of Idaho ("Idaho PSC") denied Mr. Verity's application, but held "the record" open until April 1, 2009 to allow Mr. Verity to supplement his submissions. R. 75 at ¶ 34; 369-374. Thereafter, Mr. Verity provided additional materials. R. 1406 at 144:14-145:3.

Mr. Verity's application for reinstatement in Oregon was denied on February 23, 2009. R. 378. In so doing, the TSPC relied upon Dr. Whitehead's "reservations about Mr. Verity's

trustworthiness to teach female students" and her opinion that "Mr. Verity should not coach high school aged girls or be left alone with female students over 12" to conclude that "these restrictions disqualify Mr. Verity from being fit and trustworthy to hold a license." R. 377. "The Commission also finds that Mr. Verity has not fully acknowledged the extent of his misconduct." R. 377.

A month later, Mr. Verity's counsel submitted supplemental materials to Idaho's Chief Certification Officer, Christina Linder. R. 381-400. Based on these materials, the Idaho PSC entered an order directing Ms. Linder "to grant Mr. Verity's Application for an Idaho teaching credential." R. 405.

5. *Veritys Move to Idaho and Obtain Idaho Teaching License Over Objection of Idaho's Chief Certification Officer.*

The Verity family moved to Idaho in June 2009. R. 1400 at 121:18-22. By mid-July 2009, Ms. Linder had not issued an Idaho teaching credential to Mr. Verity, prompting Mr. Shepherd to write a letter to the Idaho Attorney General's Office:

> it is my understanding that, despite the Panel's order, the chief certification officer ("CCO") intends to issue a license to Mr. Verity with conditions. . . . that Mr. Verity disclose with all teaching applications that he had his Oregon teaching license revoked. The obvious intent of such a condition is to effectively render Mr. Verity's license useless despite the Panel's order to issue a license. *This condition serves no purpose except to make it extremely difficult for Mr. Verity to get a job*.

R. 409-410 (emphasis added).) Accordingly, he demanded that the CCO "immediately comply with the Panel's order" or he threatened to file a lawsuit to compel such action. R. 410. Ms. Linder and counsel reviewed Mr. Shepherd's demand, and Ms. Linder capitulated, writing: "Counsel & I have reviewed – *will issue certificate against my will.*" R. 407 (emphasis added).

Idaho issued Mr. Verity a teaching certificate in July 2009. R. 75 at ¶ 36.

6. ***Mr. Verity's Teaching Positions in Idaho.***

After obtaining his Idaho teaching certificate, Mr. Verity applied for several teaching positions in Ada and Canyon County, Idaho. R. 75 at ¶ 37. Although Mr. Verity disclosed the circumstances surrounding his license revocation in Oregon to Idaho *state licensing officials*, he did not provide the same information in his application materials to *local schools*. *See, e.g.,* R. 413; 1412 at 166:21-167:11 (Verity application to Caldwell School District states that he was a teacher in Oregon who "resigned from teaching position, contractor opportunity").

In August/September 2010, Mr. Verity began as a physical science teacher at Caldwell High School and coached boys' basketball. R. 75 at ¶ 38; 1412 at 166:2-20; 1412-1413 at 169:10-171:7. On February 22, 2013, Caldwell placed Mr. Verity on administrative leave after reports that he had "made inappropriate contact with female students in [his] classroom. These allegations include tickling, slapping girls on the butt, and comments made about punching/hitting when students need to go to the restroom." R. 417. An investigation was conducted during which "[a] number of students verified that [Mr. Verity] hit students on the behind, back of the legs, arms and/or head with a ruler during class time." R. 419-420.

After concluding its investigation, on February 27, 2013, Caldwell High School issued a formal letter of reprimand to Mr. Verity, stating:

> Your actions regarding hitting of students during the 2012-2013 school year, have been unprofessional and detrimental to the well being of the students you have hit, as well as the other students in the classroom. . . . As a result, this letter of reprimand is warranted. In the future, you are expected to not, under any circumstance, touch or have any physical contact with any student at any time that

> may reasonably be interpreted as threatening or endangering the student's welfare.

R. 419.

On June 12, 2014, Mr. Verity submitted an application to the Vallivue School District for a sixth grade science teaching position at Sage Valley Middle School. R. 435-438; 1419 at 197:7-13. In the application, Mr. Verity described his departure from the Crook County School District as "resigned position. Obtained contracting license and opening contracting business." R. 436. In response to a question of whether he had "any disciplinary action taken against you for misconduct?" Mr. Verity replied "No." R. 437. On July 15, 2014, Caldwell accepted Mr. Verity's resignation (R. 442), and he began work at Sage Valley Middle School in the Vallivue School District. R. 1422 at 206:5-207:5.

In November 2014, Mr. Verity applied to coach basketball at Eagle High School and started coaching the freshman-sophomore team. R. 444-451; 1422 at 207:7-208:22. Nothing in Mr. Verity's application to coach basketball at Eagle High School disclosed the reasons for his resignation from Crook County Middle School and the revocation of his Oregon teaching license, nor did Mr. Verity disclose these facts to anyone at Eagle High School. R. 444-451; 1422 at 208:23-209:18.

7. *Mr. Reilly and USA Today Begin Yearlong, National Investigation Into Tracking Teacher Discipline at State and Local Level.*

USA Today is a newspaper of nationwide circulation (R. 629; 659), and Mr. Reilly is an Investigative Reporter and Data Specialist with USA Today. R. 204 at 12:6-9; 205 at 13:11-18. In late 2014, Mr. Reilly and his editor "noticed news coverage of teacher misconduct and wanted

to do a national analysis of teacher misconduct to identify any issues in the systems that are meant to protect students from teacher misconduct." R. 206 at 17:18-19:12. To that end, in January 2015, Mr. Reilly "began sending a series of records requests to education agencies in each state to obtain databases and other records pertaining to teachers who have been disciplined and teachers who are licensed." R. 206 at 19:22-20:1. This was a "very long and sometimes complicated process" (R. 206 at 20:10-16) and involved Mr. Reilly "analyz[ing] teacher misconduct data from every state from which [he] had received it and compar[ing] it to names of teachers who may be currently teaching in other states." R. 209 at 29:11-14.

Once much of Mr. Reilly's database work had been collected and analyzed, USA Today "distributed [its] data to journalists in every state in which [it had] a partner organization." R. 207 at 23:5-10; s*ee also* R. 207 at 23:19-21 ("USA Today worked with reporters at [Gannett] newspapers and TEGNA news stations as part of this project."). KGW, a Portland based television station, and KTVB, a Boise based television station, are part of the TEGNA group of news stations and were invited to use the materials gathered by USA Today to do their own reporting on a local level. R. 118 at ¶ 2; 207 at 22:8-23:25; 208 at 28:7-9; 211 at 49:6-25; 619-620. "Mr. Verity's name was one of the names of teachers included in the data." R. 209 at 29:21-22.

After reviewing the publically available information about Mr. Verity, Mr. Reilly "conducted an investigation of [Mr. Verity's] teaching in Idaho, including contacting school administrators in that state in systems in which he was working or had worked." R. 210 at 34:3-8. Mr. Reilly recorded each of his phone calls as well as his interview with Mr. Verity.

R. 210 at 36:2-20; *see also* Supp. R. at DKK Dec. Exs. 77-84. In one such call, Caldwell School District Superintendent Jodi Mills informed Mr. Reilly, after reviewing district records, that her district was unaware of Mr. Reilly's license revocation and underlying behavior in Oregon at the time it hired him and, had the district known those facts, it would "absolutely" have been a concern. R. 215 at 67:7-18; 216 at 71:22-72:2; Supp. R. at DKK Dec. Ex. 80.

On February 8, 2016, Mr. Reilly emailed Mr. Verity to let him know about his forthcoming article and to ask to speak with him about the article because "it is important to me [Reilly] that I hear your side of the story and incorporate your perspective into my article – especially if you feel the descriptions in the [Oregon Teacher Discipline proceedings] are inaccurate, incomplete or unfair in any way." R. 455; 1423 at 210:13-211:14. Mr. Verity did not respond to Mr. Reilly's email. R. 1423-1424 at 213:6-215:17. Mr. Reilly continued to reach out to Mr. Verity for comment, finally reaching him on his classroom telephone on February 10, 2016, which Mr. Reilly recorded. R. 457-458; 1424 at 215:21-216:8; Supp. R. at DKK Dec. Exs. 79-84. Mr. Reilly memorialized this brief phone interview in writing, which he later emailed to KGW and KTVB. *Id.* Mr. Verity reviewed this memorialization during his deposition and confirmed its accuracy. R. 457-458; 562-563; 1424-1426 at 216:19-222:17; Supp. R. at DKK Dec. Ex. 84.

8. *KGW and KTVB Begin Reporting on Story.*

John Tierney is an Executive Producer at KGW in Portland and worked with Mr. Reilly on the teacher misconduct story. R. 118-119 at ¶¶ 1, 5, 7; 207-208 at 23:22-25:2; 670. Mr. Tierney received, and relied upon, the data and information shared by USA Today and

Mr. Reilly concerning Mr. Verity. R. 188 at ¶ 4; 674-676. In addition, KGW did its own investigative reporting into Mr. Verity. R. 188 at ¶ 6; 676; 688-689. Mr. Tierney and KGW shared information by and with KTVB and its reporter Tami Tremblay, including Ms. Tremblay's contacts with school officials in Idaho in reporting its own story. R. 119 at ¶ 7; 677.

Ms. Tremblay is an investigative reporter/anchor/producer at KTVB in Boise who worked on the teacher misconduct story beginning in about January 2016. R. 208 at 25:23-28:3; 223 at 11:8-12; 225-226 at 24:23-25:8; 226 at 28:15-23. Ms. Tremblay received materials, including teaching discipline and licensing databases, from USA Today and Mr. Reilly regarding a "companywide investigation" that had a working title of "The Dishonor Roll," R. 224-225 at 18:18-21:17, and that the KGW story was going to focus on Mr. Verity. R. 119 at ¶ 8; 225 at 21:21-23:9; 474. The reporters shared copies of Mr. Verity's discipline records from Oregon and records related to his license to teach in Idaho. R. 119 at ¶ 8; 227 at 29:4-31:17; 476-77.

Ms. Tremblay first attempted to contact Mr. Verity by email on February 5, 2016. R. 171 at 211:18-212:6; 453. Ms. Tremblay also attempted to contact Mr. Verity through social media to request an interview. None of these efforts was successful. R. 230-231 at 44:19-45:4; 1423 at 213:1-4. Ms. Tremblay also reached out to a number of Idaho officials, R. 227 at 31:18-25; 230 at 41:18-42:7, including Idaho Department of Education spokesperson, Jeff Church, who spoke to Ms. Tremblay on camera about the process of teacher licensing in Idaho. R. 227-228 at 32:14-33:3; 576-579.

On February 5, 2016, Ms. Tremblay emailed Vallivue School District Superintendent Pat Charlton, indicating that she was working on a story with "our sister station in Portland" and hoped that Dr. Charlton would help her gather information or provide a statement based on the following information:

> A 6th grade teacher currently at Sage Valley Middle School received disciplinary action in Oregon for having inappropriate behavior with a student. The Oregon Board of Education never reported the information to the national database, NASDTEC, so Idaho had no idea when issuing him a license to teach here. He is certainly not the only teacher, but I wanted to get the district's take on this information . . .

R. 573. Superintendent Charlton confirmed the accuracy of Ms. Tremblay's information. R. 573. *See also* R. 230 at 43:18-44:16. Ms. Tremblay shared this information with Mr. Tierney on the same day. R. 522-523. Mr. Reilly was able to get more substantive information from Dr. Charlton on February 8, 2016, R. 230 at 43:13-44:13; 583, which he in turn shared with Mr. Tierney and Ms. Tremblay. R. 581-585.

Superintendent Mills confirmed to Ms. Tremblay, over the course of two telephone calls, that *Mr. Verity was not on the teacher misconduct database* and that the district had no knowledge of his license revocation in Oregon. R. 228 at 33:24-35:9; 229 at 37:10-38:23. Accordingly, Ms. Tremblay relied upon information she received from KGW and USA Today, in addition to her own newsgathering efforts, to produce the KTVB story. R. 226 at 27:2-28:14. On February 9, 2016, Mr. Reilly sent Mr. Tierney a draft of his article along with updated information about Mr. Verity: "I'm checking over everything, and noticed, Verity's name actually was submitted to NASDTEC in 2006." R. 119 at ¶ 11; 553. Ms. Tremblay was not

copied on this email. R. 553.

Although early drafts of Mr. Reilly's national story included references to Mr. Verity, he was not included in the final USA Today story. R. 212 at 53:20-56:5. Mr. Reilly and his editor planned to use "Mr. Verity in a followup or sidebar story." R. 212 at 55:15-17.

9. *February 15, 2016 Stories by USA Today/Reilly and KGW.*

On February 15, 2016, USA Today published its investigative story entitled "Teachers Flee Troubled Pasts: A Fragmented State System for Checking Educators' Backgrounds Leaves Gaps That Put Students at Risk" by Mr. Reilly. R. 570-571. USA Today also posted a version of this story on its website. R. 217-218 at 76:23-77:2; 593-603. Neither the print version nor the web version of the USA Today story mentioned Mr. or Mrs. Verity. R. 218 at 77:3-6; 1427 at 226:18-227:7.

Also on February 15, 2016, KGW broadcast a story entitled "The Dishonor Roll," which addressed the issue of tracking teacher discipline between state and local entities and described Mr. Verity's license revocation in Oregon and subsequent employment in Idaho. Supp. R. at DKK Dec. Ex. 68; R. 677-678. KGW also posted a version of the USA Today story entitled "Broken Tracking Systems Let Teachers Flee Troubled Pasts: An investigation found fundamental defects in the teacher screening systems used to ensure the safety of children in the nation's more than 13,000 school districts" (R. 120 at ¶ 13; 213-217 at 57:20-76:1; 494-502; 525-533; 677-678) which included "some of the Oregon/Idaho details" involving Mr. Verity. R. 560. *Compare* R. 593-603 (USA Today) with R. 525-533 (KGW). *See also* R. 120 at ¶ 15.

10. *USA Today Continues Reporting on Mr. Verity.*

Mr. Reilly continued reporting on Mr. Verity after his original February 15, 2016 story ran, including interviewing Mr. Verity's Principal at Sage Valley Middle School, Sean Smith, by telephone on February 23, 2016. R. 219 at 94:8-10. Principal Smith told Mr. Reilly that he did not become aware of documents regarding the revocation of Mr. Verity's Oregon teaching license during the hiring process. R. 637; 1157 at 94:8-10. Mr. Reilly also reached out to Dr. Charlton again. Supp. R. at DKK Dec. Ex. 87.

11. *Mr. Verity Voluntarily Resigns Teaching and Coaching Positions in Idaho.*

On February 22, 2016, Mr. Verity signed a Separation Agreement with the Vallivue School District. R. 460-461; 1427 at 227:17-228:21. Under the terms of this Agreement, Mr. Verity agreed to submit his letter of resignation immediately, and the District agreed to pay Mr. Verity "gross pay of $18,868.61" on February 25, 2016 and his benefits through April 30, 2016. R. 460. Moreover, the Agreement provided an acknowledgement by the parties that they had "entered into this Agreement voluntarily, that they have not been coerced or threatened into signing this Agreement." R. 460. Shortly thereafter, Mr. Verity submitted a letter of resignation dated February 22, 2016. R. 463; 1428 at 230:10-24. Late on February 22, 2016, Dr. Charlton emailed Ms. Tremblay to inform her Mr. Verity's resignation. R. 587.

12. *USA Today and KGW Report on Mr. Verity's Resignation.*

On February 24, 2016, USA Today published a story entitled "Third Teacher Forced Out by Probe" by Mr. Reilly, which reported that Mr. Verity "resigned after journalists questioned him and district and state officials about his career in both states [Oregon and Idaho]." R. 468;

565. This story appeared in both USA Today's print edition (R. 565-566) and online beginning the afternoon of February 23, 2016. R. 590-591. Mr. Verity verified the accuracy of each of the factual statements made in USA Today's online (R. 1428-1430 at 232:12-241:18) and print stories. R. 1430-1431 at 241:20-244:6. Mr. Verity never made a demand for retraction upon USA Today or Mr. Reilly. R. 1431 at 244:10-12. Mr. Reilly testified during his deposition that he did not intend to cause the Veritys any type of harm in writing his story, he specifically sought Mr. Verity's review and comment on his story before publishing and "believe[s] the reporting is completely fair and accurate." R. 215 at 66:3-4; 1170:3-19. *See also* R. 1155 at 88:5-8 ("My guidance throughout this process is accuracy and fairness and public importance"). A conclusion affirmed by Defendants' experts. R. 1317-1339 (Roger Plothow) and 1340-1364 (Mark Lodato).

On the same day, KGW reposted the USA Today online story on its webpage. R. 471-472. Mr. Verity verified the accuracy of the information reported in the KGW story, but he took issue with the fact that "more information" could have been included in some instances. R. 1437-1439 at 268:16-274:16. Mr. Verity never made a demand for retraction upon KGW. R. 1439 at 274:18-20.

13. *KTVB Airs Story After Mr. Verity's Resignation.*

On the evening of February 22, 2016 – after Mr. Verity had resigned – KTVB broadcast a story by Ms. Tremblay entitled "7 Investigates: Gap in Tracking Teachers." Supp. R. at DKK Dec. Ex. 69. *See generally* R. 232-241 at 91:17-126:2. On March 4, 2016, KTVB posted a written version of this story on its website. R. 538-540. Mr. Verity verified the accuracy of the KTVB online story. R. 1433-1435 at 253:22-259:6. Mr. Verity never made a demand for

retraction upon KTVB. R. 1435 at 259:6; 242 at 161:14-17.

Later, Ms. Tremblay found a minor error in her story—the statement that Mr. Verity was not included in the NASDTEC database when in fact he was—and immediately updated her online story. R. 542-547.[2] Ms. Tremblay testified that she did not intend to imply falsehoods about Mr. Verity and, specifically, did not intend to "send the message to [her] readers that Verity slipped through the cracks because Idaho didn't know about his history." R. 238 at 114:18-23. Defendants' experts confirmed that Ms. Tremblay's reporting complied with journalistic guidelines. R. 1317-1339 (Roger Plothow) and 1340-1364 (Mark Lodato).

14. *Mr. Reilly's Story is 2017 Pulitzer Finalist for Investigative Reporting.*

In 2017, Mr. Reilly and USA Today were finalists for the 2017 Pulitzer Prize in Investigative Reporting for their February 15, 2016 story "Broken Discipline Tracking Systems Let Teachers Flee Troubled Pasts." R. 605.

C. Course of Proceedings.

On March 28, 2016, the Veritys initiated this matter by filing a Complaint that pled three counts against Defendants: (1) defamation; (2) invasion of privacy – false light; and (3) negligent and intentional infliction of emotional distress. R. 15-29. Subsequently, the Veritys filed a First Amended Complaint ("FAC") to correct certain Defendants' designations. R. 70-84. The FAC restated the three causes of action for defamation, invasion of privacy and emotional distress against USA Today, KTVB and KGW, and Stephen Reilly and Tami Tremblay in their individual capacities. *Id.*

[2] This minor error did not figure in to the lower court's decision on summary judgment. *See* R. 1532-1535.

After significant discovery, on June 26, 2017, Defendants filed a Motion for Summary Judgment as to all claims. R. 114-788. The Veritys opposed the Motion (R. 789-1171), and Defendants filed an objection and motion to strike some of the material filed in opposition by the Veritys (R. 1256-1270) and a reply brief. R. 1271-1286. *See also* R. 1365-1475; 1481-1487 (Defendants' supplemental declarations).

On July 14, 2017, the Veritys filed a Motion for Leave to Amend to Add a Claim for Punitive Damages. R. 1171-1255. Defendants opposed the Motion, including submitting expert testimony as to the journalistic quality of reporting done by each of the Defendants. R. 1301-1364. On October 6, 2017, the district court denied the Veritys' Motion for Leave to Amend. R. 1517-1520.

On October 18, 2017, the district court entered an Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment. R. 1521-1541. After noting that "both parties agree that this case involves media defendants making statements on a matter of public concern" (R. 1523), the district court held "[t]his means Mr. Verity must prove ***either*** that Defendants' statements were false ***or*** that Defendants' statements – though literally true – could create false inferences. In addition, Mr. Verity must prove that Defendants were negligent in publishing a false statement." R. 1523 (emphasis in original). The district court then re-characterized Mr. Verity's defamation claim as "more accurately characterized as a claim of defamation by implication." R. 1529. In so doing, the district court specifically rejected Defendants' contention that the cause of action for defamation by implication does not exist in Idaho. R. 1529 at n.4. The district court also rejected Defendants' argument that summary judgment was

appropriate because "the statements are literally true and that, in any event, the allegedly defamatory statements are protected assertions of opinion," holding, instead, that "the literal truth of a statement will not defeat a defamation by implication claim" (R. 1532) and "an opinion may be actionable if the audience cannot determine for itself whether an author's or broadcaster's specified sources of information support the opinion." R. 1532.

The district court held that Mr. Verity was not a public official or public figure and, therefore, need not prove actual malice to prevail on his defamation by implication claim. R. 1532. "He must prove only that Defendants were negligent regarding the falsity of the implications they conveyed." R. 1532. Applying this standard, the district court held "a jury could find that each defendant implied, and intended to imply one or all of the following: that Mr. Verity was a danger to female students, that Mr. Verity deceived Idaho officials by hiding his past conduct, and that Mr. Verity engaged in criminal conduct by having sex with a minor." R. 1533. The district court was not concerned about the lack of evidence in the record to support any intent by Defendants to imply anything beyond the true facts reported, explaining: "[e]vidence of a defendant's intent to create a defamatory implication does not have to come in the form of extrinsic conduct. The particular manner or language of the communication can supply the necessary evidence. Here, the omission of facts may supply such evidence, depending upon how the factfinder ultimately views the statements and omissions." R. 1533 at n.6. Accordingly, the district court denied Defendants' Motion for Summary Judgment on Mr. Verity's defamation claim. "Defendants' statements may be literally true; however, that fact alone does not entitle Defendants to summary judgment." R. 1535. The district court also noted

that "issues of material fact prevent the Court from applying Idaho Code §§ 6-713 and § 6-710 ('fair report privilege') as a matter of law" to Mr. Verity's defamation by implication claim. R. 1535 at n. 8.

With respect to Mr. Verity's false light claim, the district court reformulated the cause of action to include "implied falsities" to explain that Mr. Verity had the burden to demonstrate that "the defendant was negligent in determining the truth of the information or *whether a false impression would be created by its publication.*" R. 1535 (emphasis added). Then, the district court held that genuine issues of material fact existed on all elements of Mr. Verity's false light claim. R. 1536.

On the intentional infliction and negligent infliction of emotional distress claims, the district court summarily concluded that Mr. Verity has presented "some evidence" on all of their elements to create a genuine issue of material fact. R. 1537-1538. Finally, the district court refused to dismiss Defendants Stephen Reilly and Tami Tremblay in their individual capacities. R. 5139.

On October 31, 2017, Defendants filed a Motion for Permission to Appeal Pursuant to I.A.R. 12 with the District Court. R. 11. On November 17, 2017, the district court entered an Order Approving, in Part, Motion for Permissive Appeal. R. 13. On November 21, 2017, Defendants filed a Motion for Permission to Appeal Pursuant to I.A.R. 12 with this Court. On December 20, 2017, this Court entered an Order Granting Motion for Permission to Appeal. R. 13-14. On December 22, 2017, Defendants timely filed their Notice of Appeal with the district court. R. 1614.

II. ISSUES PRESENTED ON APPEAL

Appellants' statement of the issues on appeal is as follows:

(1) Whether, as a public school teacher and coach, Mr. Verity is a public official, requiring him to prove actual malice by each of the Defendants in this case.

(2) Whether Idaho recognizes the tort of defamation by implication.

(3) If Idaho does recognize the tort of defamation by implication, what the elements of the claim are.

(4) If Idaho does recognize the tort of defamation by implication, what the standard of proof for that claim is.

(5) Whether Appellants are entitled to an award of their reasonable attorneys' fees on appeal under Idaho Code § 12-121.

III. STANDARD OF REVIEW

Because a permissive appeal under I.A.R. 12 from a denial of a motion for summary judgment leads to an unusual procedural posture, this Court must "rule narrowly and address only the precise question that was framed by the motion and answered by the trial court." *Aardema v. U.S. Dairy Sys., Inc.,* 147 Idaho 785, 789, 215 P.3d 505, 509 (2009) (quoting *Winn v. Frasher,* 116 Idaho 500, 501, 777 P.2d 722, 723 (1989)); *Pioneer Irr. Dist. v. City of Caldwell*, 153 Idaho 593, 596-97, 288 P.3d 810, 813-14 (2011). However, this Court has provided additional guidance to lower courts on issues outside of the scope of the permissive appeal when those issues are relevant to those directly on appeal. *Westby v. Schaefer*, 157 Idaho 616, 621, 338 P.3d 1220, 1225 (2014). Indeed, the purpose of a permissive appeal is to "advance the orderly

resolution of the litigation." *Winn*, 116 Idaho at 501, 777 P.2d at 723.

When reviewing the district court's ruling on a summary judgment motion, this Court applies the same standard used by the district court. *Van v. Portneuf Med. Ctr.,* 147 Idaho 552, 556, 212 P.3d 982, 986 (2009). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Regan v. Owen*, 413 P.3d 759, 762 (Idaho 2018). "If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review." *Indian Springs LLC v. Indian Springs Land Inv.,* 147 Idaho 737, 746, 215 P.3d 457, 466 (2009) (quoting *Cristo Viene Pentecostal Church v. Paz,* 144 Idaho 304, 307, 160 P.3d 743, 746 (2007)).

IV. ARGUMENT

A. As a Public School Teacher and Coach With Access to Children in Vulnerable Situations, Mr. Verity Should be Considered a Public Official, Requiring Him to Prove That Each Appellant Acted With Actual Malice.

This Court should hold that Mr. Verity is a public official *in this case* for the purposes of First Amendment analysis. Idaho's public has a profound interest in a robust and open debate regarding the performance and behavior of its schoolteachers and coaches—government employees who are paid with public funds and placed in positions of trust and responsibility with children at school and away from school after hours.

Public officials, since 1964, have been required to prove the defendant's actual malice—knowledge of falsity or reckless disregard for the truth—before they may recover damages. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 Sup. Ct. 710, 725-26 (1964). The United

States Supreme Court has declined to create a bright line rule regarding which government employees are public officials under the First Amendment. *Id.* at 283, n. 23, 84 Sup. Ct. at 727. The Court has provided guidance, however, holding that public officials are of at least two kinds. First, public official status definitely applies to government employees who have “substantial responsibility for or control over the conduct of governmental affairs.” *Rosenblatt v. Baer*, 383 U.S. 75, 85, 86 Sup. Ct. 669, 676 (1966). These include, for example, elected officials and others that directly create policy. *See id.* Second, public official status applies to those positions that have “such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . .” *Id.* at 86, 86 Sup. Ct. at 676.

The United States Supreme Court has so far declined to hear the issue of whether public school teachers and coaches are public officials. However, in a dissent from denial of certiorari on that issue, Justice Brennan, joined by Justice Thurgood Marshall, reasoned that teachers are public officials because they work in highly important roles: “[T]he status of a public school teacher as a ‘public official’ for purposes of applying the *New York Times* rule follows *a fortiori* from the reasoning of the Court in *Rosenblatt* . . . . [P]ublic school teachers may be regarded as performing a task that goes to the heart of representative government.” *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 958, 106 Sup. Ct. 322, 326 (1985) (Brennan, J.) (citations and internal quotations omitted).

With the guidance of *Rosenblatt*, and later Brennan's dissent in *Milkovich*, state courts have held that teachers are public officials. *See, e.g., Basarich v. Rodeghero*, 321 N.E.2d 739, 742 (Ill. App. Ct. 1974) (public school teachers and coaches are public officials because they are public employees who "maintain highly responsible positions in the community," because public schools "are consistent subjects of intense public interest and substantial publicity," and because the conduct and policies of teachers and coaches "are of as much concern to the community as are other 'public officials' and 'public figures.'"); *Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 56 (Minn. Ct. App. 1995) (teachers are public officials because "Minnesota strongly emphasizes education," "teachers act with the authority of the government," "[t]eachers who abuse their positions may affect many lives," and society holds teachers in a "position of special trust"); *Kelley v. Bonney*, 606 A.2d 693, 710 (Conn. 1992) ("Unquestionably, members of society are profoundly interested in the qualifications and performance of the teachers who are responsible for educating and caring for the children in their classrooms."); *Sewell v. Brookbank*, 581 P.2d 267, 270 (Ariz. Ct. App. 1978) ("As far as the law of defamation is concerned, teachers are 'public officials.'"); *Kapiloff v. Dunn*, 343 A.2d 251, 258 (Md. Ct. Spec. App. 1975), *cert. denied* 426 U.S. 907, 96 Sup. Ct. 2228 (1976).

Holding public school teachers to the higher constitutional standard of public officials is even more critical where those teachers are also coaches—public employees who have significant access to, and control over, student-athletes in vulnerable positions and often times away from school and after-hours. For example, in *Johnston v. Corinthian TV Corp.*, 583 P.2d 1101, 1103 (Okla. 1978), the Oklahoma Supreme Court, applying the reasoning of *Rosenblatt*,

held that a middle school teacher and coach was a public official. The case arose when a TV station accurately reported that Johnson, a middle school teacher and coach, required a student to strip and submit to a whipping by him and team members before rejoining the wrestling team. The court relied on *Rosenblatt* to hold that Johnston was a public official, noting, "we can think of no higher community involvement touching more families and carrying more public interest than the public school system." *Id.*

The facts of the instant case highlight the important rationale for treating public school teachers and coaches as public officials – particularly since the alleged defamatory *implications* (based on true facts) are matters of public concern. Mr. Verity, as a teacher and coach, had unchecked access to Rachael and other female students-athletes – he saw Rachael during the day in his classroom as his teacher's aide, had access to her on nights and weekends and away from home as her coach and, knowing of her vulnerability as a young woman who was not living with her parents, had unlimited phone and text access to Rachael at all hours. This sort of access to, and influence over, students requires the utmost responsibility, care and trust by teachers and coaches. Mr. Verity admits he abused this access and influence by engaging in an inappropriate relationship involving sexual contact with his student-athlete, Rachael. Once Mr. Verity was teaching and coaching in Idaho, he again breached the public trust and his students' welfare by, for example, tickling, slapping girls on the butt, and making inappropriate comments to them. R. 417-419. Here, the Appellants played an important role in alerting the public to Mr. Verity's misconduct—particularly since Mr. Verity had concealed his behavior from local school officials in Idaho. R. 413; 1412 at 166:21-167:11; 436-37; 444-51; 1422 at 208:23-209:18.

The facts of this case overwhelmingly support a holding that Mr. Verity is a public official for the purposes of the First Amendment. The Court need not make a bright line rule that teachers and coaches are *always* public officials. However, at least under the egregious factual circumstances of this case, the Court should hold that Mr. Verity is a public official. As such, Mr. Verity is required to demonstrate, with clear and convincing evidence, that each Appellant acted with actual malice in making each of the allegedly defamatory statements at issue. *See Elliott v. Murdock*, 161 Idaho 281, 385 P.3d 459, 465 (2016) citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710, 11 L.Ed.2d 686 (1964) (a public figure plaintiff may only recover "if he can prove actual malice, knowledge of falsity or reckless disregard for the truth, by clear and convincing evidence"). Because there is no evidence to support such a contention (*see* R. 1301-1364), this Court should hold that all of Mr. Verity's claims are barred.

B. Idaho has Long Held That True Statements are Absolutely Privileged, and Not Actionable in Any Form.

The First Amendment reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 Sup. Ct. 710, 721 (1964). To protect this healthy debate, "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison v. State of La.,* 379 U.S. 64, 74, 85 Sup. Ct. 209, 216 (1964).

The Idaho Supreme Court has long recognized this fundamental constitutional principle that true or substantially true statements cannot support a claim for defamation: "*It is axiomatic* that truth is a complete defense to a civil action for libel." *Baker v. Burlington*, 99 Idaho 688,

690, 587 P.2d 829, 831 (1978) (emphasis added) (citing *Hemingway v. Fritz*, 96 Idaho 364, 529 P.2d 264 (1974)). "If a statement is proven to be true, it is non-defamatory." *Steele v. Spokesman Review*, 138 Idaho 249, 251–52, 61 P.3d 606, 608–09 (2002). Literal truth, however, is not required: "[S]o long as the substance, the gist, the sting of the allegedly libelous charge be justified," minor inaccuracies do not amount to falsity. *Baker,* 99 Idaho at 690, 587 P.2d at 831. This rule of absolute privilege for true statements is particularly important in the context of matters of public concern: "[W]here allegedly defamatory speech is of public concern, the First Amendment requires that the plaintiff, whether public official, public figure, or private individual, prove the statements at issue to be false." *Steele*, 138 Idaho at 252, 61 P.3d at 609 (quoting *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 776, 106 Sup. Ct. 1558 (1986) (Brennan, J., concurring).

This "axiom"—that true statements are absolutely privileged—is equally applicable to the torts of false light and emotional distress. *Steele*, *supra*, 138 Idaho at 253, 61 P.3d at 610 (citing *Hoskins v. Howard*, 132 Idaho 311, 316, 971 P.2d 1135, 1140 (1998)) (in order to state a claim for false light against a media defendant, a plaintiff must demonstrate that there is "some 'public disclosure of falsity or fiction concerning the plaintiff.' Where the publication is free from material falsehood, recovery under this cause of action may not be had.")[3]; *Snyder v. Phelps*, 562 U.S. 443, 443–44, 131 Sup. Ct. 1207, 1211 (2011) (citing *Hustler Magazine Inc. v.*

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[3] *See also Peterson v. Idaho First Nat'l Bank,* 83 Idaho 578, 367 P.2d 284 (1961) (false light requires "publicity which places the plaintiff in a false light in the public eye"). Put another way, when a false light claim "rests upon the same acts as the libel and slander claims, it is subject to the same immunities and defenses as the libel and slander." *Holbrook v. Chase,* 12 Media L. Rep. 1732 (Idaho 4th Dist. 1985).

Falwell, 485 U.S. 46, 50-51, 108 Sup. Ct. 876, 879 (1988) ("The Free Speech Clause of the First Amendment can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.").

It is undisputed that everything Appellants published about Mr. Verity is true and/or substantially true and on matters of public concern. Such statements lie at the heart of protected speech under the First Amendment of the U.S. Constitution and Article I, § 9 of the Idaho Constitution. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 758-759, 105 Sup. Ct. 2939, 86 L.Ed.2d 593 (1985) (opinion of Powell, J.) (quoting *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 776, 98 Sup. Ct. 1407, 55 L.Ed.2d 707 (1978)) ("[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection'"); *In re Contempt of Wright*, 108 Idaho 418, 423, 700 P.2d 40, 45 (1985) ("Art. I, § 9 of the Idaho Constitution provides for protection of freedoms substantially similar to those of the First Amendment to the U.S. Constitution"). Thus, this Court should simply follow its longstanding and uninterrupted line of cases holding that truthful statements of fact are not actionable however labeled. Such a holding would prohibit Mr. Verity's case in its entirety, would affirm the principle of *stare decisis*, would provide certainty to all media and members of the public and would ensure that debate on matters of public concern remains "uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270, 84 Sup. Ct. at 721.

C. This Court Should Not Recognize a Claim for Defamation by Implication, and Thereby Deviate From its Longstanding Precedent Holding That True Statements Are Not Actionable.

Idaho has never abandoned the principle that true statements on matters of public concern

are absolutely privileged. Nonetheless, the district court, relying on *Wiemer v. Rankin*, 117 Idaho 566, 790 P.2d 347 (1990), held that Mr. Verity's claim based on the publication of true facts of public concern could go forward under the tort of defamation by implication. R. 1529. *Wiemer* did not abandon Idaho's long line of cases holding that truth is an absolute defense to defamation, nor did it adopt an entirely new (and constitutionally suspect) tort of defamation by implication.

In *Wiemer*, the plaintiff, the husband of a woman who shot herself, challenged the truth of the statement that a reporter (Rankin) published challenging the wife's suicide, claiming the evidence was "overwhelming" that the wife did not shoot herself. *Wiemer*, 117 Idaho at 571, 790 P.2d at 352. Much was made of what "inferences" <u>could</u> be reached from the article, but ultimately the case turned on the truth of statements <u>actually</u> made in the article. This Court, recognizing that the publication was a matter of public concern, held that it was the plaintiff's burden to prove falsity regarding the reporter's statement that "the evidence was overwhelming" that the wife had not shot herself. *Id.* at 573, 790 P.2d at 354. And, "[l]iberally construing these facts and drawing all reasonable inferences in Wiemer's favor . . . we conclude that there was a genuine issue of material fact as to the falsity of Rankin's statement that the evidence was overwhelming." *Id.*

Thus, far from adopting a new tort in Idaho, *Wiemer* affirmed the basic principles of defamation law—that a false statement of fact must underlie a valid claim for defamation. In the 27 years of case law since *Wiemer*, the only Idaho court to specifically address a defamation by implication claim "assumed" that such tort existed in Idaho before dismissing it. *Worrell-Payne*

v. Gannett Co. Inc., 134 F. Supp. 2d 1167, 1176 (D. Idaho 2000), *aff'd*, 49 F. App'x 105 (9th Cir. 2002) ("*Assuming the tort of defamation by implication exists in Idaho*, the First Amendment poses at least two obstacles to this claim") (emphasis added).

A defamation by implication claim is one that is alleged when the plaintiff complains not about "what is literally stated, but from what is implied." *White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990). Such claims are constitutionally perilous, as the plaintiff can manufacture a defamatory message from "words not reasonably capable of sustaining such meaning." *Id.* at 519. The district court in *White* posed a hypothetical that exemplifies the problem: "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 intended to only communicate the facts of the arrest and charging. *White v. Fraternal Order of Police*, 707 F. Supp. 579, 589, n. 12 (D.D.C. 1989), *aff'd*, 909 F.2d 512 (D.C. Cir. 1990). Defamation by implication claims are particularly problematic "where the reported facts are materially true and the alleged defamation is not stated explicitly." *White,* 909 F.2d at 519. Such claims are obviously contrary to the principle—explained above—that true statements are not actionable.

Holding publishers responsible for any defamatory inferences that a reader or viewer could draw from materially true facts is therefore profoundly at odds with the First Amendment. "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). Such a "burden" is not only intolerable, but impossible since there is no way to guarantee or control what any reader may infer, speculate, or conclude on the basis of facts of which he is made aware. Plainly, "[a] publisher cannot be responsible for every strained interpretation that a plaintiff might attribute to its words." *Strada v. Connecticut Newspapers*, *Inc.*, 477 A.2d 1005, 1011 (Conn. 1984) (citing *Lewis v. Time Inc.*, 710 F.2d 549, 553–56 (9th Cir. 1983); *Cibenko v. Worth Publishers, Inc.,* 510 F. Supp. 761, 765 (D.N.J. 1981)). Thus, such claims inhibit the robust discussion of public affairs—the First Amendment's promise of open discussion on matters of public concern and regarding public officials is inhibited when a defamation claim "depends fundamentally on an interpretation of various aspects of the broadcast, not on anything directly said in it." *Pierce v. Capital Cities Commc'n, Inc.*, 576 F.2d 495, 500 (3d Cir. 1978), *cert. denied*, 439 U.S. 861, 99 Sup. Ct. 181 (1978).

Given the constitutional concerns, some courts—including nearby Washington—have created a bright line rule that a plaintiff cannot state a claim for defamation by implication based on the publication of true facts. *E.g.*, *Sisley v. Seattle Pub. Sch.*, 321 P.3d 276, 279 (Wash. App. 2014) ("A defamation claim may not be based on the negative implication of true statements."); *Price v. Viking Penguin, Inc.,* 881 F.2d 1426, 1432 (8th Cir. 1989) ("We do not recognize defamation by implication."); *Strada v. Connecticut Newspapers, Inc.*, 477 A.2d 1005, 1012 (Conn. 1984) ("The media would be unduly burdened if, in addition to reporting facts about public officers and public affairs correctly, it had to be vigilant for any possibly defamatory implication arising from the report of those true facts."); *Mihalik v. Duprey*, 417 N.E.2d 1238,

1240-41 (Mass. App. Ct. 1981) ("It would be incongruous [under the *Times*' malice standard] to permit a public official to recover where statements . . . were true as far as they went. . . . We think that their falsity . . . has not been established merely because in the aggregate they have an insinuating overtone."); *Diesen v. Hessberg*, 455 N.W.2d 446, 452 (Minn. 1990) ("[W]e hold 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, 186 (La. 1981) ("Even though a false implication may be drawn by the public, there is no redress for its servant."). Further, some courts recognize a defamation by implication claim, but *only* when the stated facts are false. *Rinsley v. Brandt*, 700 F.2d 1304, 1310 (10th Cir. 1983). This Court has not addressed this issue, but should follow this line of cases to reject such constitutionally-suspect claims.

Compounding the constitutional infirmity of the district court's ruling is the fact that it recognized a cause of action for defamation by implication *by omission*—a claim never raised by Mr. Verity nor recognized by this Court. R. 1533. Merely omitting facts favorable to Mr. Verity or facts that Mr. Verity (or the district court) thinks should have been included does not make a publication false and subject to defamation liability. This is particularly the case where the alleged omitted facts would not have "negated" the amorphous bad impression that Mr. Verity alleges. *See, e.g.,* R. 1324-1326. For example, the Fifth Circuit rejected a defamation plaintiff's claim that a news report was misleading because the broadcaster did not include all the potentially relevant information about the plaintiff. *Green v. CBS Inc.,* 286 F.3d 281 (5th Cir. 2002), *cert. denied* 537 U.S. 887 (2002). The *Green* court held that since "CBS accurately reported the facts, albeit not all of the facts, whether or not the story painted [the plaintiff] in an

attractive light is irrelevant." *Id.* at 285. The court held that even though including more facts would have led to a more balanced report, the broadcast did not create a false impression and thus was not defamatory. *Id.; see also Peter Scalamandre & Sons, Inc. v. Kaufman,* 113 F.3d 556, 563 (5th Cir. 1997) (omission of footage that would have portrayed subject in a more favorable light insufficient to establish actionable falsity because it "is common knowledge television programs . . . shoot more footage than necessary and edit the tape they collect down to a brief piece."); *Janklow v. Newsweek, Inc.,* 759 F.2d 644, 648 (8th Cir. 1985) (rejecting claim to hold magazine liable "for omission of those additional facts that [the plaintiff] believes should have been published, but whose omission did not make what was unpublished untrue"), *aff'd on reh'g,* 788 F.2d 1300 (1986); *UTV of San Antonio, Inc. v. Ardmore, Inc.,* 82 S.W.3d 609, 613 (Tex. App. 2002) (no defamatory false impression where television report omitted facts favorable to plaintiff).

Moreover, the basic principle of editorial autonomy recognized in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 94 Sup. Ct. 2831 (1974), is at odds with the theory of libel by implication by omission. *See NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr.*, 879 P.2d 6, 15 (Colo. 1994); *Newton v. NBC, Inc.*, 930 F.2d 662, 686 (9th Cir. 1991). As the United States Supreme Court has aptly stated: "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have

evolved to this time." *Miami Herald*, 418 U.S. at 258, 94 Sup. Ct. at 2840.

And, recognizing a defamation by implication tort under these circumstances, where the publications are largely based on public records, would effectively overrule the statutory fair reporting privilege. Idaho Code §§ 6-713, § 6-710(3). "In the State of Idaho, 'fair and true' reports of 'public official proceedings' are privileged. I.C. § 6-713(4).'" *Worrell-Payne*, *supra*, 134 F. Supp. 2d at 1178 (citing *Wiemer*, *supra*, 117 Idaho at 573, 790 P.2d at 357). If the Court sustained a defamation by implication claim here, plaintiffs could state a cause of action based on implications arising from a fair and true report of public proceedings.

Due to these numerous constitutional concerns and the uncertainty that a contrary ruling would create for all publishers of truthful information on matters of public concern, Appellants urge this Court to follow the lead of neighboring states like Washington and decline to recognize a cause of action for defamation by implication.

D. If the Tort of Defamation by Implication Exists in Idaho, its Elements and Standard of Proof Must be Consistent With Heightened Constitutional Standards. Mr. Verity Cannot Meet This Heightened Standard.

This Court should not adopt the tort of defamation by implication for all the reasons stated above. However, if it is inclined to do so, the Court must only allow such a claim after a plaintiff makes an "especially rigorous showing," due to the constitutional problems these claims present. *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1092-93 (4th Cir. 1993). "[C]laims of defamation by implication, which by nature present ambiguous evidence with respect to falsity, *face a severe constitutional hurdle*." *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112, 129 (Mich. 1991) (emphasis added). In order to protect free expression, those courts accepting such a

claim require that a plaintiff clear two distinct and demanding hurdles: first, the plaintiff must show that "the disputed [publications] are reasonably capable of sustaining the false implications [the plaintiff] attributes to them." *Worrell-Payne*, 134 F. Supp. 2d at 1176 (citing *Dodds v. American Broadcasting Co.*, 145 F.3d 1053, 1063 (9th Cir. 1998)). This threshold determination is comprised of two parts, as explained below. And, significantly, the plaintiff "must *present clear and convincing evidence* from which a jury could find that the [media] *actually intended* to convey the false impressions." *Id.* at 1176-77 (emphasis added). The district court's holding that Mr. Verity need only demonstrate that "Defendants were negligent regarding the falsity of the implications they conveyed" is, therefore, wrong as a matter of law. R. 1532. Finally, defamation by implication claims must rest on false implications of fact, not opinions or ideas. *E.g.*, *Dodds*, 145 F.3d at 1066.

In the instant case, had the lower court properly applied these standards, Mr. Verity's entire case should have been dismissed. Instead, the lower court found that the publications implied three actionable defamatory implications: (1) implication that Mr. Verity was a danger to female students; (2) implication that Mr. Verity deceived Idaho officials by hiding his past conduct; and (3) implication that Mr. Verity committed a crime by having sex with a minor. R. 1532-1535.[4]

1. Mr. Verity Must Show, as a Threshold Matter, That the Publications are Reasonably Capable of Sustaining the Alleged Defamatory Implications.

The initial threshold determination is comprised of two parts—the plaintiff must show

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[4] Appellants maintain that even if the publications can sustain these alleged defamatory implications, they are true or substantially true or are nonactionable opinions.

that the publication is "reasonably capable of a defamatory interpretation," and that the defamatory interpretation is endorsed by the defendant within the publication's four corners. *See, e.g.*, *White*, 909 F.2d at 520. In other words, "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." *Id.*; *accord Chapin v. Knight-Ridder*, 993 F.2d 1087, 1093 (4th Cir. 1993); *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."); *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.")

The first part of the threshold determination—whether the language can be reasonably read to impart the false innuendo—depends not necessarily on what a reasonable reader could infer, but rather on the meaning reasonably conveyed. *See White*, 707 F. Supp. at 589; *Webb. v. Virginian-Pilot*, 752 S.E.2d 808, 812 (Va. 2014). And, whether an alleged defamatory implication can reasonably be drawn from a materially true communication is a question of law for the court. *Webb*, 752 S.E.2d at 812. ("Resolving it is an essential threshold, gatekeeping function of the court before a case is submitted to the jury.")

Here, none of the Appellants' publications are reasonably capable of sustaining the defamatory implications that the lower court found.

a. The publications are not reasonably capable of sustaining the implication that Mr. Verity committed a crime by having sex with a minor, and nothing on the face of the publications endorses this view.

In the Order Approving, in Part, Motion for Permissive Appeal, the district court "clarified" that the only Appellant potentially liable for defamation by implication for implying that Mr. Verity committed a crime by having sex with a minor is KGW. R. 1580. In so doing, the district court noted that the KGW broadcast was "literally true, however, that fact alone does not entitle [Appellants] to summary judgment. True facts can create false implications." R. 1535. The only "evidence" identified in the Order to support the contention that KGW intended to imply that Mr. Verity committed a crime by having sex with a minor is that "KGW aired statements that Mr. Verity had a 'sexual relationship with a student,' and that he was disciplined for it . . . . In the context of the KGW broadcast a jury could conclude the student was a minor and that the sexual relationship involved sexual intercourse." R. 1534. Mr. Verity does not dispute that it is true that he had "an inappropriate physical relationship involving sexual contact" with a high school student. R. 254-57.

Nothing in the KGW broadcast indicates that it intended to communicate any message other than the true facts reported. And, even if the KGW broadcast can reasonably sustain the false implication that Mr. Verity committed a crime by having sex with a minor, there is no evidence from the face of the broadcast itself that KGW affirmatively endorsed this view. KGW did not go "beyond the mere reporting of true facts to suggest that the author or broadcaster

intends or endorses the inference," as required by *White*. The district court did not point to any evidence from the broadcast suggesting an endorsement of the defamatory implication nor did Mr. Verity in his opposition to Appellants' Motion for Summary Judgment. Without evidence in the broadcast that KGW intended or endorsed this interpretation, Mr. Verity simply cannot clear the threshold determination on this implication.

b. Mr. Verity likewise cannot meet the threshold determination regarding the allegedly defamatory implication that he deceived Idaho officials by hiding his past conduct.

The publications cannot reasonably sustain the implication that Mr. Verity deceived Idaho officials by hiding his past conduct. The only support that the district court found for Appellants' intent to convey the "implication that Mr. Verity deceived Idaho Officials by hiding his past conduct" is its conclusion that "Idaho officials *arguably knew* about Mr. Verity's past in Oregon. However, none of [Appellants'] publications acknowledged this fact." R. 1533. This is not only untrue, it is pure speculation not based on any evidence before the district court.

The USA Today publications describe the process that Mr. Verity went through to obtain his Idaho teaching credential, negating any implication that Verity deceived Idaho state officials by hiding his past conduct. R. 465-66; 468-69. KTVB, in its online story and broadcast, interviewed the spokesperson for the Idaho Department of Education, who indicated all applicants are screened: "Regardless if the person is in state or out of state the process is relatively the same," and applicants "would need to go through a background check and submit a fingerprint card which would be run through state and federal databases." R. 538-40; 542-47; Supp. R. at DKK Dec. Ex. 69. The KGW broadcast focused on certification standards in Oregon

and had a similar interview with a state licensing official. Supp. R. at DKK Dec. Ex. 69. The context of these statements in the KTVB and KGW broadcasts indicated that Mr. Verity went through the state screening process to obtain a license in Idaho.

The district court's support for KGW's intended implication is that "[t]he KGW broadcast shifted directly from a psychiatrist's recommendation that Mr. Verity not be left alone with female students to Mr. Verity obtaining employment as a teacher in Idaho. Individuals considering these statements could reasonably infer that Mr. Verity hid his past from at least some Idaho officials." R. 1534. This single juxtaposition of *true facts* (on matters of public concern) by a single Appellant in a single publication cannot be the basis for sustaining a claim against *all Appellants* for the alleged implication. Mr. Verity did not meet his burden on summary judgment to show that the publications are reasonably capable of sustaining this allegedly false implication. Therefore, Mr. Verity cannot clear the threshold determination on this implication.

c. Mr. Verity likewise cannot meet the threshold determination regarding the allegedly defamatory implication that he is a danger to female students.

The sum total of the evidence that the district court identified in support of the alleged implication that Mr. Verity is a "danger" to female students is: (1) the observation that the Appellants published the true fact that Oregon revoked Mr. Verity's teaching license while also publishing the true fact that a psychologist concluded that Mr. Verity should not be left alone with female students over the age of twelve (12); and (2) the fact that each Appellant was aware of another psychologist's conclusion that Mr. Verity was not a danger to any student yet did not

publish that fact. R. 1533. The district court stated that "[a] jury could conclude that these statements implied that Mr. Verity was dangerous to female students," and "[t]he [Appellants'] omission of [the favorable psychological finding by Dr. Miller] could lead a jury to conclude that [Appellants] were at least negligent in implying that Verity was a danger to female students." *Id.*[5] This is not the standard. Mr. Verity must show clear and convincing evidence that the Appellants *endorsed* a defamatory implication. One factual juxtaposition of true statements and one omission of a minor positive fact cannot be clear and convincing evidence of intent to defame.

Furthermore, Mr. Reilly's USA Today online and print article dated February 24, 2016 *does mention* Dr. Miller's finding in addition to other facts favorable to Mr. Verity. R. 465-66; 468-69. The article states that "In its order granting Verity's license, the Idaho Department of Education's Professional Standards Commission *cited a psychologist's opinion that he had been rehabilitated through therapy* and 'was contrite, embarrassed and humble about his misconduct.' The Idaho order notes Verity 'continued to coach youth sports since leaving his Oregon teaching position with no known recurrences of problems.'" *Id.* (emphasis added). The district court's Order ignores the plain language of this article, further evidence that the district court merely considered the publications in the aggregate. At the very least, summary judgment on this

[5] The district court held that Appellants defamed Mr. Verity by omission. R. 1533. However, "omission of relatively minor details in an otherwise basically accurate account is not actionable. This is largely a matter of editorial judgment in which the courts, and juries, have no proper function." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 383, 366 N.E.2d 1299, 1308 (1977). *See also McPheters v. Maile*, 138 Idaho 391, 395, 64 P.3d 317, 321 (2003) (an omission to state or publish a fact does not constitute the requisite "publication" requirement for a slander of title claim).

implication should be granted to USA Today and Reilly because they *did* publish Dr. Miller's positive finding and published the fact that there were no known additional incidences at the time of Mr. Verity's licensure. Without evidence in each of the publications that the Appellants endorsed this implication, Mr. Verity cannot clear the threshold determination on this implication.

2. Mr. Verity Must Show That the Appellants Actually Intended to Defame Him.

If Mr. Verity can clear the threshold determination outlined above by looking at the face of each of the publications, he must then show that the Appellants subjectively, *i.e.*, *actually*, intended to defame him. This means that Mr. Verity must show that each Appellant knew of the defamatory implication and intended to communicate it. *Dodds,* 145 F.3d at 1063; *Nichols v. Moore*, 477 F.3d 396, 402 (6th Cir. 2007); *Saenz v. Playboy Enter., Inc.*, 841 F.2d 1309, 1318 (9th Cir. 1988). The standard of actual intent is mandated by the First Amendment, which requires that the defendant publish a "calculated falsehood." *Garrison*, 379 U.S. at 74. And, Ninth Circuit precedent requires "clear and convincing evidence from which a jury could find that the [media] actually intended to convey the false impressions." *Worrell-Payne*, 134 F. Supp. 2d at 1176-77 (citing *Dodds*).

This standard—of requiring actual intent—is strenuous, but "strikes the proper balance between protecting victims of defamation and protecting against the possible chilling effect that results from overly broad applications of our defamation laws." *Dodds*, 145 F.3d at 1064 (citing *Newton v. Nat'l Broad. Co., Inc.*, 930 F.2d 662, 681 (9th Cir. 1990)). Nevertheless, if some false

and defamatory implications go unaddressed due to such a holding, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 341, 94 Sup. Ct. 2997, 3007 (1974). Indeed, public debate must be protected to ensure freedom of expression has the "breathing space" that it needs to survive. *New York Times*, 376 U.S. at 271–72, 84 Sup. Ct. at 721 (1964) (quoting *NAACP v. Button,* 371 U.S. 415, 433, 83 Sup. Ct., 328, 338 (1963)).

Here, the district court cited to no evidence of actual, subjective intent on the part of the Appellants to defame Mr. Verity. R. 1602-05. Rather, the district court looked to the face of the documents to determine subjective intent. *Id.* This is erroneous, and conflates the threshold requirement of determining whether the publication itself shows an intent to defame (objective intent), as described above, with actual intent to defame. Mr. Verity cited no evidence—let alone clear and convincing evidence—that could lead a jury to conclude that Appellants intended to communicate a false implication. R. 789-1171. He cited to no affidavit, deposition or admission on this point. *Id.* In fact, the only record evidence supports that the journalists involved did not intend to harm Mr. Verity. R. 215 at 66:3-4; 1170 at 146:3-19; 238 at 114:18-23; *see also* R. 1155 at 88:5-8. Mr. Verity simply did not sustain his burden on actual intent on summary judgment, and without any evidence of actual intent to impliedly defame him, his defamation by implication claim fails.

3. Defamation by Implication Claims Cannot be Based on Implied Opinions, Ideas, Feelings or Other Vague Impressions.

Publications under consideration must state or imply provable facts that are demonstrably

false. *Schmalenberg v. Tacoma News, Inc.*, 943 P.2d 350, 357 (Wash. App. 1997); *Milkovich,* 497 U.S. 1, 110 Sup. Ct. 2695. A defamation by implication action must therefore falsely imply facts, not ideas or opinions. *E.g.*, *Dodds*, 145 F.3d at 1066 (ABC segment that plaintiff allegedly implied that he "is one of the three worst judges in the country" not actionable because it was "in the nature of an opinion rather than the type of factual assertion that can be proved to be demonstrably false."); *Worrell-Payne*, 134 F. Supp. 2d at 1177-78 (Implied opinion that the plaintiff "ought" to have done something, implied opinion comparing plaintiff to two other housing officials who resigned under pressure, and implied opinion that plaintiff was unfit to serve as housing official were not actionable.) Further, implied facts must be more than just an "implied disparaging message"—it is not enough to show an overall negative message independent of the facts. *Auvil v. CBS "60 Minutes,"* 67 F.3d 816, 822 (9th Cir. 1995); *see also Price v. Stossel*, 620 F.3d 992, 1004 (9th Cir. 2010) ("Price also contends that even if the broadcast did not imply accusations of criminal behavior, it nonetheless implied accusations that Price was dishonest. The district court found that the remaining implications alleged by Price were too vague to constitute actionable defamation. We agree."); *Mihalik*, 417 N.E.2d at 1241 (The alleged defamatory implications were "too vague and uncertain, and too fragile in impact, to be the basis of a libel action by a public official, particularly when each [statement] viewed alone is consistent with the truth.") Plainly, the rule that a plaintiff cannot recover for implied opinions or ideas is simply an extension of the rule—long recognized in Idaho—that pure opinion is not actionable. *E.g.*, *Elliott v. Murdock*, 161 Idaho 281, 385 P.3d 459, 465 (2016) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40, 94 Sup. Ct. 2997, 3007 (1974));

Worrell-Payne, 134 F. Supp. 2d at 1172 ("A statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning.") An implied opinion is "evaluated as any other opinion is evaluated." *Worrell-Payne,* 134 F. Supp. 2d at 1178.

Many of Mr. Verity's alleged implications are the sorts of opinions, ideas and negative impressions that simply are not actionable. In particular, Mr. Verity states that the publications falsely imply that he was dangerous, and the district court agreed that this was somehow actionable. (R. 1603.) Putting aside the observation that this implication is likely true, it is a nonactionable opinion or idea, derived from disclosed and admittedly true facts. Like the judge in *Dodds* who complained that ABC insinuated that he was one of the "three worst" in America, or the plaintiff in *Price* who complained that the broadcast implied he was "dishonest," Mr. Verity cannot recover on the basis that the Appellants implied he was "dangerous," or for any other negative impressions derived from disclosed, true facts. As Idaho has long recognized (and recently reaffirmed in *Elliott*, 161 Idaho at 287, 385 P.3d at 466), such opinions are not actionable. *See also Idaho State Bar v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1114 (1996) (citing *Wiemer v. Rankin*, 117 Idaho at 572, 790 P.2d at 353) (in determining whether a statement is one of fact or opinion, "the important consideration . . . is not whether the particular statement fits into one category or another, but whether the particular article provided sufficient information upon which the reader could make an independent judgment for himself."). This is especially true here, where the opinion is "implied" from admittedly disclosed, true facts regarding a matter of public concern. Thus, this Court should hold that Mr. Verity cannot state a

defamation by implication claim based on implied opinions and reverse the district court's holding on this point.

E. Appellants are Entitled to an Award of Their Reasonable Attorney's Fees and Costs on Appeal Pursuant to Idaho Code § 12-121 Because Respondent's Claims Were Brought Without Basis in Law or Fact.

Idaho Code § 12-121 provides that "the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." *See also* I.R.C.P. 54(e)(2). This Court has ruled that Idaho Code § 12-121 may also serve as a basis to award attorney fees on appeal. *Fuquay v. Low*, 162 Idaho 373, 397 P.3d 1132, 1138 (2017). An award of fees under Section 12-121 is warranted when the Court is left with the "'abiding belief" that the appeal was brought or defended frivolously, unreasonably or without foundation. *Am. Semiconductor, Inc. v. Sage Silicon Sols., LLC*, 162 Idaho 119, 395 P.3d 338, 346 (2017), reh'g denied (June 8, 2017); *see also Balderson v. Balderson,* 127 Idaho 48, 54, 896 P.2d 956, 962 (1995).

Here, Appellants have been forced to incur significant fees and costs in defending their admittedly true publications on matters of public concern. Because such speech has always been at the heart of First Amendment protections, Mr. Verity's claims are without basis in law or fact, and Appellants are entitled to an award of their fees under Idaho Code § 12-121.

V. CONCLUSION

Absolute protection for truthful statements on matters of public concern lies at the heart of free speech protections under the U.S. and Idaho Constitutions. This bright line provides certainty for publishers of all kinds. Mr. Verity seeks to abrogate this longstanding constitutional

principle by allowing his claims – based on admittedly true, disclosed facts of public concern – to go forward under a variety of civil tort theories. This Court should not allow him to make an end-run around these constitutional protections.

Accordingly, Appellants respectfully request that this Court hold that, under the facts of this case, Mr. Verity is a public official and that Mr. Verity's claims are barred in their entirety because he cannot demonstrate that each of the Appellants acted with actual malice in publishing each of their news stories. Appellants further request that this Court hold that Appellants' true and/or substantially true statements of fact on matters of public concern are absolutely privileged from civil liability, regardless of the label given to the claim and, accordingly, reverse the district court's conclusion that Idaho recognizes a claim for defamation by implication.

DATED this 25th day of April, 2018.

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