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*Affiliations appear only for purposes of identification.*

January 20, 2022

The Honorable Chief Justice and Associate Justices of the  
Supreme Court of California  
350 McAllister Street  
San Francisco, California 94102-4797

Re: Letter of Amici Curiae in Support of the Petition for Review in *Ukraine Relief v. Ruslan Gurzhiy*, Supreme Court Case No. S272253 (Ct. of Appeal Case No. C088778)

To the Honorable Chief Justice and Associate Justices:

Pursuant to rule 8.500, subdivision (g) of the California Rules of Court, amici curiae, the Reporters Committee for Freedom of the Press and 12 media organizations (collectively, “Amici”) respectfully submit this letter in support of the petition for review filed in *Ukraine Relief v. Ruslan Gurzhiy*, case number S272253, on December 15, 2021.

## I. INTEREST OF AMICI CURIAE

Amici are news media organizations and organizations who advocate on behalf of journalists and the press. Lead amicus the Reporters Committee for Freedom of the Press is an unincorporated nonprofit association 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.<sup>1</sup>

News organizations play an essential role in informing public discussion about matters of public concern. Because defamation actions can chill news reporting and commentary about such issues, rigorous application of statutory and constitutional limitations on defamation actions are essential to ensure that they do not undermine our “profound national commitment” to the principle that public discourse “should be uninhibited, robust, and wide-open.” (*N.Y. Times Co. v. Sullivan* (1964) 376 U.S. 254, 270 (hereinafter *Sullivan*)). The decision of the Third Appellate District of the California Court of Appeal (the “Court of Appeal”) in this case undermines one such vital protection for daily and weekly news publishers who report on matters of concern to California communities, specifically the interpretation and application of California Civil Code § 48a (the “California Retraction Statute” or the “Statute”). As members and representatives of the news media, Amici have a strong interest in ensuring that the Statute is interpreted and applied in

<sup>1</sup> Full descriptions of the other amici are included below as Appendix A.

a manner that provides an effective safeguard for the constitutional protections for a free press under the First Amendment and the California Constitution. Accordingly, for the reasons discussed herein, Amici urge this Court to grant review.<sup>2</sup>

## II. WHY REVIEW SHOULD BE GRANTED

This case concerns an important question of law; specifically, the evidentiary burden required to show that a publication is a news publication for purposes of the California Retraction Statute. (*See* Cal. Rule of Court 8.500(b)(1) [“The Supreme Court may order review of a Court of Appeal decision” when necessary “to settle an important question of law”].) Here, Plaintiffs-Respondents (collectively, “Respondents”) alleged that Petitioner-Defendant-Appellant Ruslan Gurzhiy (“Gurzhiy”) defamed them in three articles he wrote and published in his online news outlet, *The Slavic Sacramento*. (Op. 2.) Gurzhiy filed a special motion to strike pursuant to California’s anti-SLAPP law, Code Civ. Proc. § 425.16. (*Id.*) The trial court granted the motion in part and denied the motion in part. (*Id.*) In denying the motion in part, the trial court misinterpreted, and thus failed to apply, the California Retraction Statute which provides that “[i]n any action for damages for the publication of a libel in a daily or weekly news publication” a “plaintiff shall only recover special damages unless a correction is demanded and is not published.” (Civ. Code § 48a, subd. (a), (d)(5).) The Statute defines a weekly news publication as “a publication, either in print or electronic form, that contains news on matters of public concern and that publishes at least once a week.” (*Id.*)

Respondents did not request a correction. (*Id.* at 3.) Thus, Gurzhiy argued that the California Retraction Statute barred Respondents’ claims except with respect to special damages. (*Id.*) However, despite Gurzhiy’s uncontradicted sworn declaration that *The Slavic Sacramento* publishes two to five articles per week (*Id.* at 19), the Court of Appeal affirmed the lower court’s holding that Gurzhiy failed to meet his burden to show that *The Slavic Sacramento* publishes news at least once a week. (*Id.* at 23–24.) In reaching its decision, the court concluded that, because Gurzhiy’s declaration did not include a weekly publication schedule or list of issues for *The Slavic Sacramento* (*Id.* at 22) or include a showing that it was published at least 36 times during the relevant 36-week period between publication of the allegedly defamatory articles (*Id.* at 21), Gurzhiy did not produce sufficient evidence to “determine the truth of his statement.” (*Id.* at 22).

In finding that Gurzhiy’s uncontroverted sworn declaration was insufficient to establish that *The Slavic Sacramento* publishes on a weekly basis, the Court of Appeal imposed an evidentiary burden not found in the Statute that runs contrary to the intent of the California Legislature (“Legislature”). Indeed, the Legislature amended the Statute in 2015 with the express intent that it apply to a broader group of news publications,

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<sup>2</sup> Amici write to address only the Court of Appeal’s holding that the California Retraction Statute does not apply to *The Slavic Sacramento*. Amici do not address the other issues presented and fully addressed in Gurzhiy’s Petition for Review.

including smaller, online publications like *The Slavic Sacramento*. (Assem. Bill No. 998 (2015-2016 Reg. Sess.)) The Court of Appeal’s decision on this issue, which has not before been addressed by this Court, has far-reaching implications, particularly for local and community news publications and foreign language news outlets. If allowed to stand, the Court of Appeal’s decision could deny these smaller news organizations the protection the Legislature specifically intended to afford them under the Statute.

**A. The Court of Appeal erred in finding that *The Slavic Sacramento* did not show it is a “weekly news publication” within the meaning of the Statute.**

The California Retraction Statute was enacted in 1931 “to encourage a more active press” by shielding it “from liability arising from erroneous published statements.” (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 30). Thus, the Legislature designed the Statute to protect publications that engage in the “immediate” or “rapid” dissemination of news (*Field Research Corp. v. Superior Court* (1969) 71 Cal.2d 110, 114-115 (hereinafter “*Field Research*”)), and that “may in good faith publicize items that are untrue but whose falsity they have neither the time nor the opportunity to ascertain.” (*Kalpoe v. Superior Court* (2013) 222 Cal.App.4th 206, 212].). The Statute reflects the Legislature’s view that “the public interest in the dissemination of news outweighs the possible injury to a plaintiff from the publication of a libel,” and thus “properly encourage[s] and protect[s] news dissemination by relieving newspapers and radio stations from all but special damages resulting from defamation, upon the publication of a retraction.” (*Id.*). In 2014, the Court of Appeal, Second Appellate District, Division Four held that the Statute applied only to print newspapers and radio broadcasts and therefore did not apply to the daily online entertainment newspaper *The Wrap*. (*Thieriot v. The Wrapnews Inc.*, No. B245022, 2014 WL 1491494, at \*11 (Cal. Ct. App. Apr. 15, 2014).) In response to that decision, the Legislature amended the Statute in 2015 to extend its protection to daily and weekly online news publications, who, like print publications, may also be engaged in the immediate dissemination of news. (Assem. Floor Analysis of Assem. Bill No. 998 (2015-2016 Reg. Sess.) Aug. 31, 2015, p. 2.) As amended, the Statute defines a “daily or weekly news publication” as “a publication, either in print or electronic form, that contains news on matters of public concern and that publishes at least once a week.” (Civ. Code § 48a, subd. (d)(5).)

Here, Gurzhiy submitted a sworn declaration in which he stated that he is the creator and Editor-in-Chief of *The Slavic Sacramento*, “an online news publication that publishes matters of public concern to the Slavic community.” (Pet. 26.) The declaration goes on to state that “*The Slavic Sacramento* has been publishing news on a weekly basis (between two and five articles each week) since 2014.” (*Id.*) Respondents did not challenge or dispute Gurzhiy’s declaration in the trial court. (*Id.* at 22.) Yet despite the fact that Gurzhiy’s declaration established each element of the definition of a weekly news publication under Civ. Code § 48a, subd. (d)(5), the Court of Appeal rejected that uncontroverted sworn testimony as “conclusory” and insufficient to show that *The Slavic Sacramento* “was a weekly publication under section 48a.” (*Id.* at 22–23.)

As Gurzhiy argues in his Petition, “in deciding if evidence is impermissibly conclusory, the question in each case is whether the declaration provides the necessary foundation and does not purport to relay a mere opinion.” (*See* Pet. 23–25 (collecting cases).) Gurzhiy, the Editor-in-Chief of *The Slavic Sacramento*, stated in his sworn testimony that the publication “has been publishing news on a weekly basis (between two and five articles each week) since 2014.” (*Id.* at 26.) This is not a mere opinion, but a foundational statement of fact from the Editor-in-Chief of the news publication at issue. Gurzhiy thus satisfied his burden under Civ. Code § 48a, subd. (d)(5) to show that *The Slavic Sacramento* is “a publication . . . in . . . electronic form, that contains news on matters of public concern and that publishes at least once a week.” In finding otherwise, the Court of Appeal’s decision runs contrary to the Legislature’s intent that the Statute, as amended, be construed broadly to apply to online publications that “perform the same news-disseminating function as a daily newspaper.” (Assem. Bill No. 998 (2015-2016 Reg. Sess.)) Rather, in imposing an increased evidentiary burden, the decision serves to “actively discourage the very free and rapid dissemination of news [that the Statute] seeks to encourage.” (*Field Research, supra*, 71 Cal.2d at p. 115.)

**B. The Court of Appeal’s holding undermines the ability of local and foreign language news outlets to avail themselves of the Statute’s protections.**

The Court of Appeal’s finding that Gurzhiy’s declaration was insufficient to establish that *The Slavic Sacramento* is a weekly news publication imposes a significant burden on news publications seeking to invoke the California Retraction Statute, specifically, smaller, online, local, and foreign language news outlets. In extending the protections of the Statute to daily and weekly news publications, including online news outlets, the Legislature sought to ensure that the free exchange of information would remain unfettered in accordance with the principles of the First Amendment and the California Constitution. (U.S. Const., 1<sup>st</sup> Amend.; Cal. Const., art. I, § 2.) The First Amendment secures our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .” (*Sullivan, supra*, 376 U.S. at p. 70.) As the Supreme Court has observed: “[A]n untrammelled press [is] a vital source of public information, . . . and an informed public is the essence of working democracy.” (*Minn. Star & Trib. Co. v. Minn. Comm’r of Revenue* (1983) 460 U.S. 575, 585 [quoting *Grosjean v. Am. Press Co.* (1936) 297 U.S. 233, 250].) And California courts have long recognized that “[o]ur form of democratic government is dependent upon the unfettered exchange of information. (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 956.)

Local news organizations play an essential role in informing the American public. (*See* Josh Stearns, *How We Know Journalism is Good for Democracy*, Medium (June 26, 2018) < <https://perma.cc/YS2K-3DKS> > [as of Dec. 16, 2021] [compiling studies examining the importance of local news].) Similarly, foreign language news organizations are a critical source of information for Americans whose primary or sole

language is not English.<sup>3</sup> As of 2013, 28 percent of New York City residents subscribed to one of the city’s 95 foreign language papers, for a total circulation of about 2.94 million. (See Center for Community and Ethnic Media, *Getting the Word Out (or Not): How and Where New York City Advertises* (Mar. 2013) <<https://perma.cc/5QKM-28WV>> [as of Dec. 16, 2021].) Since the early 2000s, the U.S. news industry has experienced financial strain as advertising revenue has declined.<sup>4</sup> News organizations of all sizes have suffered, but nondailies have fared the worst. Of the 2,100 newspapers that shuttered between 2004 and 2019, weeklies and nondailies comprised more than 2,000. (Penelope Muse Abernathy, *News Deserts and Ghost Newspapers: Will Local News Survive?* (2020) <<https://perma.cc/4PSK-3QUY>> [as of Dec. 16, 2021], p. 11.) The demise of these news outlets has contributed to the existence of 1,800 “news deserts” across the country. (*Id.*)<sup>5</sup> Foreign language news organizations have struggled along with their English counterparts. For example, New York’s oldest Spanish language newspaper *El Diario La Prensa* lost approximately \$2 million in 2015. (Jas Chana, *Smaller, Ethnic Publications Get a Much-Needed Boost*, *Observer* (Jan. 29, 2016) <<https://perma.cc/EKR7-VY3V>> [as of Dec. 16, 2021].)

In order to survive, nondailies and foreign language news organizations must limit their costs. Some smaller news organizations who are sued may well be forced to defend themselves without the benefit of legal counsel.<sup>6</sup> The Court of Appeal’s holding that an Editor-in-Chief’s uncontroverted declaration that a news organization publishes “between two and five articles a week” is insufficient to show that it is a “daily or weekly news publication” imposes a significant burden on smaller local and foreign language news outlets, requiring them to produce documentary evidence of their publication history and frequency. Indeed, many small online-only news outlets, despite publishing multiple articles a week, may not have a regular “publication” schedule. If the Court of Appeal’s holding is allowed to stand, smaller, online-only news organizations, like *The Slavic Sacramento*, may be unable to avail themselves of the protections of the California Retraction Statute—protections that the Legislature intended to extend to them when it amended the Statute in 2015.

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<sup>3</sup> As of 2016, more than 15 percent of the adult U.S. population spoke a language other than English at home. (Christopher Ingraham, *Millions of U.S. citizens don’t speak English to one another – that’s not a problem*, *Wash. Post* (May 21, 2018) <<https://perma.cc/7697-NGCV>> [as of Dec. 16, 2021].)

<sup>4</sup> This decline in advertising revenue largely has been attributed to competition from social media platforms and other technology companies. (See Brad Adgate, *Newspapers Have Been Struggling and Then Came the Pandemic*, *Forbes* (Aug. 20, 2021) <<https://perma.cc/3CKC-PSUD>> [as of Dec. 16, 2021].)

<sup>5</sup> “News deserts” are 1) communities that have no local newspaper, or 2) communities that have a local newspaper but whose “residents are facing significantly diminished access to the sort of important local news and information that feeds grassroots democracy.” (*Ibid.* at p. 115.)

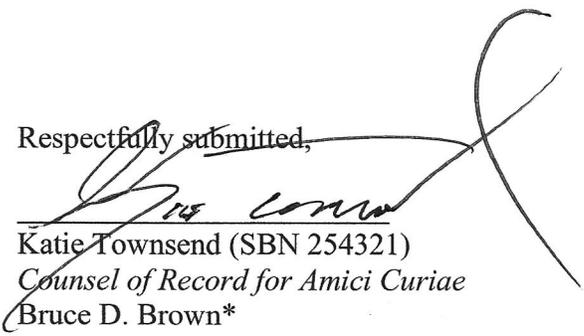
<sup>6</sup> According to a study conducted in 2015, “65% of the editors who responded reported that the news industry is weaker in its ability to pursue legal activity around First Amendment-related issues than it was 10 years ago.” (Knight Foundation, *In Defense of the First Amendment* (2016) <<https://perma.cc/CCF7-YEWQ>> [as of Dec. 16, 2021].) 89 percent of this group said that a lack of financial resources was to blame. (*Ibid.*)

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and Associate Justices of the  
Supreme Court of California  
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For the foregoing reasons, Amici urge this Court to grant the petition for review  
filed by Petitioners.

Dated: January 20, 2022

Respectfully submitted,



Katie Townsend (SBN 254321)

*Counsel of Record for Amici Curiae*

Bruce D. Brown\*

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**APPENDIX A**  
**SUPPLEMENTAL STATEMENTS OF IDENTITY OF AMICI CURIAE**

**The California News Publishers Association** (“CNPA”) is a nonprofit trade association representing the interests of over 400 daily, weekly and student newspapers and news websites throughout California.

**The Center for Investigative Reporting (d/b/a Reveal)**, founded in 1977, is the nation’s oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

**Embarcadero Media** is a Palo Alto-based 40-year-old independent and locally-owned media company that publishes the Palo Alto Weekly, Pleasanton Weekly, Mountain View Voice and Menlo Park Almanac, as well as associated websites. Its reporters regularly rely on the California Public Records Act to obtain documents from local agencies.

**First Amendment Coalition** is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition’s mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

**The Investigative Reporting Workshop**, based at the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at [investigativereportingworkshop.org](http://investigativereportingworkshop.org) about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

**The Media Institute** is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

**MPA – The Association of Magazine Media**, (“MPA”) is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA’s membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports,

lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

**The News Leaders Association** was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

**The Northern California Chapter of the Society of Professional Journalists** (“SPJ NorCal”) is dedicated to improving and protecting journalism. It is a Chapter of the national Society of Professional Journalists, the nation’s most broad-based journalism organization. Founded in 1909 as Sigma Delta Chi, the Society of Professional Journalists promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects the First Amendment guarantees of freedom of speech and press. SPJ NorCal has a Freedom of Information Committee of journalists and First Amendment lawyers, which assists in its free speech and government transparency advocacy. Also, in collaboration with its Freedom of Information Committee, it hosts the annual James Madison Freedom of Information Awards and offers training to journalists on free press and access issues.

**The Society of Environmental Journalists** is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

**Society of 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.

**The Tully Center for Free Speech** began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

**PROOF OF SERVICE**

I, Katie Townsend, do hereby affirm that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above-captioned action. My business address is 1156 15th Street NW, Suite 1020, Washington, D.C. 20005. I am a citizen of the United States and am employed in Washington, District of Columbia.

On January 20, 2022, I caused the foregoing document to be served: **Letter of Amici Curiae in Support of the Petition for Review**, as follows:

**[x] By Truefiling electronic delivery:**

All counsel of record in *Ukraine Relief v. Ruslan Gurzhiy* (S272253)

**[x] By mail:**

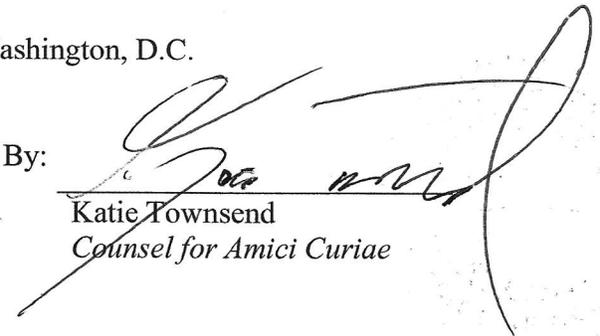
Superior Court of California  
County of Sacramento  
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(Case No. 34-2018-00234969)

Court of Appeal, Third Appellate District  
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Sacramento, CA 95814  
(Case No. C088778)

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on the 20th of January, 2022, in Washington, D.C.

By:

  
Katie Townsend  
Counsel for Amici Curiae