In the Supreme Court of Ohio

AARON ANDERSON, et al.,	)	No. 2018-0792
	)	
Plaintiffs-Appellees,	)	On Appeal from the Franklin County
	)	Court of Appeals, Tenth Appellate
v.	)	District
	)	
WBNS-TV, INC.,	)	Court of Appeals Case
	)	No. 17-AP-660
Defendant-Appellant.	)	

AMICUS CURIAE BRIEF OF THE OHIO ASSOCIATION OF BROADCASTERS, OHIO NEWS MEDIA ASSOCIATION, AMERICAN SOCIETY OF NEWS EDITORS, ASSOCIATED PRESS MEDIA EDITORS, RADIO TELEVISION DIGITAL NEWS ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND SOCIETY FOR PROFESSIONAL JOURNALISTS IN SUPPORT OF DEFENDANT-APPELLANT WBNS-TV, INC.

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I. STATEMENT OF INTEREST

A. The changes in Ohio defamation law wrought by the Tenth District are matters of grave concern to news media organizations in Ohio and across the nation.

The seven friends of the Court who submit this amicus brief include state and national organizations for broadcast, print and online news outlets; organizations of journalists who edit and report the news to the public; and organizations of those who strive to protect newsgathering rights under the First Amendment. These organizations exist because freedom of the press is "among our most cherished liberties," playing an "essential role in our democracy," in which "[t]he durability of our system of self-government hinges upon the preservation" of that freedom. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 382, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973)**{** TA \l "*Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973)" \s "Pittsburgh Press" \c 1 **}**. Without appropriate judicial supervision, defamation lawsuits against the news media would infringe on freedom of the press to the detriment of all. Thus this Court has acted to "reinforce[] the view that the First Amendment grants a unique protection to the press from the 'chilling effect' of defamation litigation[.]" *Lansdowne v. Beacon Journal Publ'g Co.*, 32 Ohio St.3d 176, 178, 512 N.E.2d 979 (1987)**{** TA \l "*Lansdowne v. Beacon Journal Publ'g Co.*, 32 Ohio St.3d 176, 512 N.E.2d 979 (1987)" \s "Lansdowne" \c 1 **}** (citing *Grau v. Kleinschmidt*, 31 Ohio St.3d 84, 509 N.E.2d 399 (1987)**{** TA \l "*Grau v. Kleinschmidt*, 31 Ohio St.3d 84, 509 N.E.2d 399 (1987)" \s "Grau" \c 1 **}**, and *Scott v. News-Herald*, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986)**{** TA \l "*Scott v. News-Herald*, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986)" \s "Scott" \c 1 **}**).

1. The Tenth District has altered the balance between press freedom and individual rights that this Court struck over thirty years ago in adopting the duty of "reasonable care."

This case calls upon the Court to reset the balance between freedom of the press and individual rights that the Court struck in *Lansdowne**{** TA \s "Lansdowne" **}***. In

private-figure defamation actions against the news media in Ohio, as the Court ruled, "the plaintiff must prove by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character" of a publication. *Lansdowne*, 32 Ohio St.3d at 180. In the present case, however, the Court of Appeals has decided to impose upon the news media an unspecified "stronger duty" than this Court recognized in *Lansdowne*. "Frankly," the Court of Appeals announced, "a [news] media outlet has a stronger duty to research the facts . . . than it did when the *Lansdowne* case was decided." *Anderson v. WBNS-TV, Inc.*, 10th Dist. Franklin No. 17AP-660, 2018-Ohio-761**{** TA \l "*Anderson v. WBNS-TV, Inc.*, 10th Dist. Franklin No. 17AP-660, 2018-Ohio-761" \s "Anderson" \c 1 **}**, ¶ 11. The "stronger duty" appears to arise from the perceptions of the Court of Appeals about rebuttal of an allegedly false claim in the age of the Internet. *Id.* As set forth below, this heightened standard is legally indefensible in the face of the First Amendment to the United States Constitution**{** TA \l "First Amendment to the United States Constitution" \s "First Amendment to the United States Constitution" \c 5 **}** and Article I, Section 11, of the Ohio Constitution**{** TA \l "Article I, Section 11, of the Ohio Constitution" \s "Article I, Section 11, of the Ohio Constitution" \c 5 **}**.

2. The "stronger duty" created by the Tenth District will impede the flow of information to the general public.

In practical terms, the "stronger duty" means that antagonists could now expose the news media in the Tenth District to the risk of a defamation judgment upon a mere showing of anything less than an ***extraordinary*** vetting process before publication of any prejudicial information later determined to be incorrect. That modification of the "reasonable care" standard will present a daunting extra barrier to publication, contrary to the even-handed allocation of risk that this Court adopted in *Lansdowne**{ TA \s "Lansdowne" }*** in observance of the First Amendment and the free press provision of the Ohio Constitution. *Lansdowne*, 32 Ohio St.3d at 180. Satisfaction of the duty of

"reasonable care" no longer will secure to the news media the "breathing space" necessary for them to do their jobs. *Id*. The Court of Appeals has instead created a "new normal."

3. In displacing the "reasonable care" standard set by this Court, the Tenth District has taken an unworkable approach.

The creation of a new duty of "extraordinary care" is a dangerous departure from well-settled Ohio law and a matter of grave concern to the journalistic community in Ohio and across the nation. At its core, the standard set by the Court of Appeals is nebulous. "Reasonableness" and "ordinary care" are concepts that are thoroughly integrated into the fabric of the law. "Extraordinary care" is not as familiar a concept. By definition, it connotes care that ordinarily is not existent. A consensus on what level of effort would be "extraordinary" enough to satisfy an undefined "stronger duty" will be inherently elusive.

Compounding this problem is the fact that a "stronger duty" of extraordinary care would require the news media to meet an unattainable standard. The extraordinary level of homework that the news media in the Tenth District now will have to undertake before publication in order to avoid liability will soon become subject to redefinition once it becomes the norm, and thus start over for the news media the perilous guesswork as to what will then be deemed extraordinary. As soon as the extraordinary becomes ordinary, the law would have to search for new bearings. The cycle will never end.

The variances introduced into Ohio defamation law by the Tenth District threaten to tip the scale against publication of even information as to which there has been a reasonable verification effort. They thus change the calculus of any publication decision, to the detriment of the free flow of information and contrary to the First Amendment and the Ohio Constitution.

4. The shift to a "stronger duty" standard is even more problematic in the age of the Internet.

These concerns, and the wisdom of the *Lansdowne*{ TA \s "Lansdowne" } "reasonable care" standard, are even more acute in the fast-paced age of the 24-hour online news cycle. Ohioans and other Americans increasingly rely on digital sources of information for news of current events.[1] Between 2016 and 2017, online news gained five percent in popularity among U.S. consumers, nearly overtaking television as the most popular news medium.[2] The prevalence of online news consumption is greatest among younger and working-age adults: 52% among those between ages 30 and 49 often consume news online.[3] In other words, Ohioans and other Americans, especially those of working age, rely on the Internet to get information about their communities, nation, and world.

As the public moves online, news organizations have increased their Internet presence.[4] Broadcasters (including WBNS-TV) and newspapers like *The Columbus*

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[1] *See* Jeffrey Gottfried & Elisa Shearer, *Americans' Online News Use is Closing in on TV News Use*, PEW RESEARCH CENTER (Sept. 7, 2017), http://www.pewresearch.org/fact-tank/2017/09/07/americans-online-news-use-vs-tv-news-use/{ TA \l "Jeffrey Gottfried & Elisa Shearer, *Americans' Online News Use is Closing in on TV News Use*, PEW RESEARCH CENTER (Sept. 7, 2017), http://www.pewresearch.org/fact-tank/2017/09/07/americans-online-news-use-vs-tv-news-use/" \s "Gottfried" \c 6 }.

[2] *Id*.; *see also* Ramsus Kleis Nielsen & Richard Sambrook, *What Is Happening to Television News?*, DIGITAL NEWS PROJECT, REUTERS INSTITUTE FOR THE STUDY OF JOURNALISM (2016), http://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-06/What%20is%20Happening%20to%20Television%20News.pdf{ TA \l "Ramsus Kleis Nielsen & Richard Sambrook, *What Is Happening to Television News?*, DIGITAL NEWS PROJECT, REUTERS INSTITUTE FOR THE STUDY OF JOURNALISM (2016), http://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-06/What%20is%20Happening%20to%20Television%20News.pdf" \s "Kleis" \c 6 }.

[3] Gottfried{ TA \s "Jeffrey Gottfried" }, *supra*.

[4] *See, e.g.*, Paul Grabowicz, *Tutorial: The Transition To Digital Journalism*, UC BERKELEY GRADUATE SCHOOL OF JOURNALISM ADVANCED MEDIA INSTITUTE, https://multimedia.journalism.berkeley.edu/tutorials/digital-transform/ (last visited Sept. 19, 2018){ TA \l "Paul Grabowicz, *Tutorial: The Transition To Digital Journalism*, UC BERKELEY GRADUATE SCHOOL OF JOURNALISM ADVANCED MEDIA INSTITUTE, https://multimedia.journalism.berkeley.edu/tutorials/digital-transform/ (last visited Sept. 19, 2018)" \s "Grabowicz" \c 6 }; Denali Tietjen, *Content Wars: How Television Networks are Fighting the Netflix Threat*, FORBES (June 9, 2015, 6:15 p.m.), https://www.forbes.com/sites/denalitietjen/2015/06/09/content-wars-how-television-

Dispatch, The New York Times, and *The Wall Street Journal* now publish websites to reach local, national and international audiences.[5] News organizations also reach audiences through social media platforms.[6] Online news sources are all the more important as long-standing publications have reduced or eliminated print production.[7] As the focus of viewer and reader attention shifts and the pace of news gathering and dissemination quickens, it would be impractical to saddle the news media with a "stronger duty" that would have been dysfunctional even in earlier generations.

If news organizations have a "stronger duty" to vet news that they publish online, as the Court of Appeals held, there will be a strong pragmatic incentive for hesitation to publish certain stories on the Internet or to maintain any online presence. This vague and unattainable standard creates uncertainty as to what amount of responsible journalistic investigation is required, leaving journalists with a difficult decision. They

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networks-are-fighting-the-netflix-threat/#7c6a9c9346f6**{** TA \l "Denali Tietjen, *Content Wars: How Television Networks are Fighting the Netflix Threat*, FORBES (June 9, 2015, 6:15 p.m.), https://www.forbes.com/sites/denalitietjen/2015/06/09/content-wars-how-television-networks-are-fighting-the-netflix-threat/#7c6a9c9346f6" \s "Tietjen" \c 6 **}**.

[5] *See, e.g.*, N.Y. TIMES, https://www.nytimes.com/ (last visited Sept. 19, 2018)**{** TA \l "N.Y. TIMES, https://www.nytimes.com/ (last visited Sept. 19, 2018)" \s "N.Y. Times" \c 6 **}**; Wall St. J., https://www.wsj.com/ (last visited Sept. 19, 2018)**{** TA \l "Wall St. J., https://www.wsj.com/ (last visited Sept. 19, 2018)" \s "Wall St. J., https://www.wsj.com/ (last visited Sept. 19, 2018)" \c 6 **}**; The Columbus Dispatch, http://www.dispatch.com/ (last visited Sept. 19, 2018)**{** TA \l "The Columbus Dispatch, http://www.dispatch.com/ (last visited Sept. 19, 2018)" \s "The Columbus Dispatch, http://www.dispatch.com/ (last visited Sept. 19, 2018)" \c 6 **}**.

[6] *See* Kristen Bialik & Katerina Eva Matsa, *Key Trends in Social and Digital News Media*, PEW RESEARCH CENTER (Oct. 4, 2017), http://www.pewresearch.org/fact-tank/2017/10/04/key-trends-in-social-and-digital-news-media/**{** TA \l "Kristen Bialik & Katerina Eva Matsa, *Key Trends in Social and Digital News Media*, PEW RESEARCH CENTER (Oct. 4, 2017), http://www.pewresearch.org/fact-tank/2017/10/04/key-trends-in-social-and-digital-news-media/" \s "Bialik" \c 6 **}** (stating that two-thirds of American adults now get at least some news via social media).

[7] *See* ASSOCIATED PRESS, *List: Newspapers that Have Cut Publication Days*, San Diego Union-Tribune (March 29. 2009, 2:20 p.m.), http://www.sandiegouniontribune.com/sdut-newspapers-list-032909-2009mar29-story.html**{** TA \l "ASSOCIATED PRESS, *List: Newspapers that Have Cut Publication Days*, San Diego Union-Tribune (March 29. 2009, 2:20 p.m.), http://www.sandiegouniontribune.com/sdut-newspapers-list-032909-2009mar29-story.html" \s "Associated Press" \c 6 **}** (listing newspapers cutting back on print production, including a dozen in Ohio alone).

can either refrain from publishing important news online or face increased risk of liability for defamation. This is especially true as a result of the 24-hour online news cycle, which requires reporters to get the news out in an expedient fashion so that the public can benefit from timely access.

As reporters work to balance the public's need to know emergent information quickly with the time it takes to accurately report the news, they should not be required to conduct unnecessarily drawn-out investigations and second-guess trusted sources such as public officials before publishing online. The Court of Appeals' "stronger duty" standard threatens to slow public access to what is, at times, life-saving breaking news or sweeping news from the Internet entirely, just as a majority of working-age adults look to the web for news.

5. The Tenth District has also dealt a setback to the summary judgment standard in defamation litigation.

As a practical matter, the Court of Appeals appears also to have modified the summary judgment standard in private-figure defamation litigation in Ohio courts. The plaintiffs in this case submitted no evidence of fault whatsoever in response to the WBNS-TV summary judgment motion. They relied instead upon the mere incorrectness of their identification as "suspects" in the two early-morning broadcasts about the robbery (based upon credible information that WBNS-TV had received from the Columbus Division of Police), and an unauthenticated copy of a purported website posting (which was not even eligible for consideration under **{** TA \l "Ohio R. Civ. P. 56(C)" \s "Ohio R. Civ. P. 56(C)" \c 3 **}**Rule 56(C) of the Ohio Rules of Civil Procedure in opposition to the summary judgment motion) that included the word "robbers" in the headline along with a photograph of them in the story.

In denying the dispositive motion of WBNS-TV, the Court of Appeals thus allowed the mere fact of publication to serve as sufficient evidence of fault for the defamation claims to survive summary judgment. On a pretrial basis at least, this sort

of assumption will usher back into Ohio law a new era of strict liability -- the very sort of "liability without fault" that the Supreme Court of the United States condemned as unconstitutional in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)**{** TA \l "*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)" \s "Gertz" \c 1 **}**.

In *Gertz*, the court ruled that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual*." Id.* Here, however, the Court of Appeals has allowed an inference of fault from the fact of publication to salvage the defamation claims of the plaintiffs from their constitutional demise. Under *Gertz***{** TA \s "Gertz" **}** and *Lansdowne**{** TA \s "Lansdowne" **}***, there is no substitute for a showing of fault, at the summary judgment stage or any other dispositive step in a defamation case.

If allowed to spread beyond this case, the use of such an unconstitutional inference likewise will carve a significant exception for defamation actions into the standards for demonstration of a genuine issue of material fact under Rule 56**{** TA \l "Ohio R. Civ. P. 56" \s "Ohio R. Civ. P. 56" \c 3 **}**. Summary judgment "***shall be rendered***" based upon the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action," and "only from" those specified materials. Civ. R. 56(C)**{** TA \s "Ohio R. Civ. P. 56(C)" **}** (emphasis added). "When a motion for summary judgment is made and supported as provided in this rule," as set forth in Civ. R. 56(E)**{** TA \l "Ohio R. Civ. P. 56(E)" \s "Ohio R. Civ. P. 56(E)" \c 3 **}**:

> an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, ***shall be entered*** against the party.

(Emphasis added.) *See also Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996)**{** TA \l "*Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996)" \s "Dresher" \c 1 **}** ("If the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ. R. 56(E)**{** TA \s "Ohio R. Civ. P. 56(E)" **}** to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, ***shall be entered*** against the nonmoving party") (emphasis added).

Here, the Court of Appeals allowed the plaintiffs to proceed without any showing of fault by any competent "evidence or stipulation." That is contrary to not only the *Gertz**{** TA \s "Gertz" **}*** and *Lansdowne**{** TA \s "Lansdowne" **}*** decisions but also the Rule 56**{** TA \s "Ohio R. Civ. P. 56" **}** procedures for summary judgment. *See generally* Lackland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 Vand. L. Rev. 247, 341 (1985)**{** TA \l "Lackland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 Vand. L. Rev. 247, 341 (1985)" \s "Lackland H. Bloom, Jr., Proof of Fault in Media Defamation Litigation, 38 Vand. L. Rev. 247, 341 (1985)" \c 6 **}** ("Presumably, the court will provide the primary line of protection for first amendment values by factoring in the potential impact on free communication in determining whether a sufficient case of negligence has been presented for submission to the jury.").

6. The constitutional standard of care and the summary judgment process need repair by this Court.

Seven of the leading journalistic organizations in Ohio and the United States respectfully present this brief, therefore, in order to call to the attention of the Court the compelling need to take great care in addressing in this case the constitutional standard of liability and the proper use of summary judgment procedures in private-figure defamation actions against the news media in the State of Ohio.

B. The *amici curiae* work to protect the freedom of the press as guaranteed by the First Amendment of the United States Constitution and Article I, Section 11, of the Ohio Constitution.

Established in 1937, the **Ohio Association of Broadcasters** is one of the nation's oldest state broadcast associations. It is made up of over three hundred commercial and non-commercial station members. It functions to protect the ability of over-the-air radio and television stations to operate their businesses and serve their local communities.

The **Ohio News Media Association** is a trade association that has been advocating on behalf of newspapers and in support of local journalism and First Amendment rights in matters of public interest since 1933. Today the ONMA represents approximately three hundred daily and weekly newspapers as well as local news websites across the state of Ohio.

With approximately 450 members, the **American Society of News Editors** is an organization that includes editors of daily newspapers, editors of online news providers, and academic leaders throughout the Americas. Founded in 1922 as the American Society of Newspaper Editors, the ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers

The **Associated Press Media Editors** is a nonprofit tax-exempt organization of newsroom leaders and journalism educators that works closely with the Associated Press to promote journalism excellence. It is a champion of the First Amendment and promotes freedom of information.

The **Radio Television Digital News Association** is the world's largest professional organization devoted exclusively to broadcast and digital journalism. Its members include local and network news executives, news directors, producers, reporters, photographers, editors, multimedia journalist, digital news professionals, as well as journalism educators and students. Founded in 1946, it works to protect the

rights of broadcast and digital journalists in courts and legislatures throughout the country.

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.

The **Society for Professional Journalists** 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, it 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.

II. STATEMENT OF THE CASE AND FACTS

The *amici curiae* adopt the Statement of Facts and Summary of Proceedings Below set forth in the brief of Defendant-Appellant WBNS-TV, Inc. ("WBNS-TV"), which sets forth the source material on which WBNS-TV reasonably relied and the fact that WBNS-TV took down the photograph in question promptly upon receipt of corrected information, and never connected the names of the plaintiffs (which were unknown to it at the time) with the headline in the briefly-posted website story.

III. LAW AND ARGUMENT

The Court should take the opportunity in this case to reinvigorate the "reasonable care" standard of fault that operates in defamation litigation to protect the freedom of the press in Ohio. If left intact, the Court of Appeals decision would significantly weaken that vital safeguard, both substantively and procedurally. And it would create an

unspecified and unworkable "stronger duty" of care that will operate to impede publication. It would also neutralize the summary judgment process, which plays an essential screening role in defamation cases. This Court should reverse the judgment below, confirm the "reasonable care" fault standard that it has prescribed for private-figure defamation litigation in Ohio for over three decades, and emphasize the central role that summary judgment plays when a private-figure plaintiff fails to provide the requisite evidence that a journalist has failed to use reasonable care in attempting to determine the truth or falsity or defamatory character of a publication.

Proposition of Law No. 1: First Amendment protections and jurisprudence extend to speech published on the Internet, and, specifically, this Court's decision in *Lansdowne{ TA \s "Lansdowne" } v. Beacon Journal Publ'g Co.*, which set the fault standard in private-figure defamation cases, applies equally to statements published on the Internet.

A. The Tenth District's decision runs afoul of this Court's interpretation of the constitutional requirement that a private-figure plaintiff make some showing of fault in a defamation action against a news media defendant.

1. The United States Constitution requires a defamation plaintiff to demonstrate fault on the part of a news media defendant.

The Supreme Court of the United States has set forth a constitutional floor for the standards of fault applicable to media defendants in private-plaintiff defamation cases. While leaving it to the states to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual," the Supreme Court prohibited states from "impos[ing] liability without fault." *Gertz{ TA \s "Gertz" }*, 418 U.S. at 347. This constitutional standard was intended to "shield[] the press and broadcast media from the rigors of strict liability for defamation." *Id.* at 348.

2. This Court has set a "reasonable care" standard of fault, which must be strictly enforced in order to effectuate the First Amendment, especially in this era of anti-media bias.

This Court has clearly defined the appropriate standard of liability in private-figure defamation cases against new media defendants. The Court originally specified in

Embers Supper Club, Inc. v. Scripps-Howard Broad. Co., 9 Ohio St.3d 22, 457 N.E.2d 1164 (1984)**{** TA \l "*Embers Supper Club, Inc. v. Scripps-Howard Broad. Co*., 9 Ohio St.3d 22, 457 N.E.2d 1164 (1984)" \s "Embers" \c 1 **}**, that "[i]n cases involving defamation of private persons, where a prima facie showing of defamation is made by the plaintiff, the question which a jury must determine by a preponderance of evidence is whether the defendant acted reasonably in attempting to discover the truth or falsity or defamatory character of the publication." (Syllabus). Three years later, in *Lansdowne**{** TA \s "Lansdowne" **}***, the Court retained the "reasonable care" standard but adjusted the burden of proof when it ruled that a plaintiff in a private-figure defamation action against the news media in Ohio "must prove by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character of a publication." *Lansdowne**{** TA \s "Lansdowne" **},* 32 Ohio St.3d at 180.

The Court recognized in *Lansdowne**{** TA \s "Lansdowne" **}* the need for Ohio courts to "provide adequate 'breathing space' for freedom of the press" and stated its "belie[f] that the Constitution requires [the Court] to tip [the scales between speech and a defamation plaintiff] in favor of protecting true speech." *Id.* at 180-81. Robust enforcement of this standard is essential. Indeed, the need for Ohio courts to protect the First Amendment and ensure the freedom of the press is stronger now than ever in the current political environment, which is flush with anti-media bias.[8]

3. The Tenth District deviated from the constitutional requirement of *Gertz{** TA \s "Gertz" **}* and the negligence**

[8] *See, e.g.,* Journalists Are Not the Enemy, THE BOSTON GLOBE (Aug. 15, 2018), https://www.bostonglobe.com/opinion/editorials/2018/08/15/editorial/Kt0NFFonrxqBI6Nqqennv L/story.html (last visited Sep 19, 2018)**{** TA \l "Journalists Are Not the Enemy, THE BOSTON GLOBE (Aug. 15, 2018), https://www.bostonglobe.com/opinion/editorials/2018/08/15/editorial/Kt0NFFonrxqBI6Nqqennv L/story.html (last visited Sep 19, 2018)" \s "Journalists are not the Enemy" \c 6 **}** (detailing public opinion on media and concerns with attacks on media and linking to hundreds of related editorials from across the country, including eight newspapers in Ohio).

standard of *Lansdowne{ TA \s "Lansdowne" },* when it conflated error with fault.

To survive summary judgment, given the *Gertz{ TA \s "Gertz" }* requirement to show fault and the "reasonable care" standard and "clear and convincing evidence" burden of proof set forth in *Lansdowne{ TA \s "Lansdowne" }*, the plaintiffs in this case were required to come forward with at least some evidence to demonstrate that there was a genuine issue of material fact regarding whether WBNS-TV had acted reasonably in determining the truth or falsity of its broadcast and publication. *See* Civ.R. 56**{** TA \s "Ohio R. Civ. P. 56" **}**. The Court of Appeals declined to enforce those requirements.

a. This Court should reaffirm its "reasonable care" standard.

The Court should use this case as an occasion to, at a minimum, reaffirm and elaborate upon the "reasonable care" standard. "[U]nless the courts describe the negligence standard with some precision," as one commentator has noted, "the purposes of the *Gertz{ TA \s "Gertz" }* privilege will be defeated just as surely as those of the [*New York Times v. Sullivan*, 376 U.S. 254 (1964)**{** TA \l "*New York Times v. Sullivan*, 376 U.S. 254 (1964)" \s "New York Times" \c 1 **}**] privilege would have been if the Court had left the determination of reckless disregard to the unquestioned judgment of juries." David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 457 (1975)**{** TA \l "David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 457 (1975)" \s "David A. Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 457 (1975)" \c 6 **}**. "Negligence as a constitutional prerequisite serves a function quite different from that of negligence as a common law basis of liability." *Id*. at 460. In defamation litigation, it is the role of the negligence standard to preserve "a minimum area of 'breathing space' for the press -- which it attempts to accomplish by freeing publishers and broadcasters from liability for innocent misstatements." *Id.* at 460.

By contrast, "[i]f the common law concept of negligence is applied to defamation," as the commentator observed:

> the extent of a publisher's constitutional protection will depend on a jury's relatively unfettered, ex post facto appraisal of his conduct, and since the publisher has no way of knowing how large the jury will make the prohibited zone, he has no choice but to steer wide of it. To prevent this erosion of first amendment protection, *Gertz{ TA \s "Gertz" }* negligence must be defined more specifically than the common law concept applied to physical torts.

Id. at 460-61.

b. The Court also should reaffirm the proper role of summary judgment in defamation litigation.

The Court also should reaffirm the proper role of summary judgment in defamation litigation. "Summary judgment . . . should be granted . . . in *Gertz{ TA \s "Gertz" }* cases if the plaintiff fails to show facts from which negligence may be inferred." *Id.* at 469. *Gertz{ TA \s "Gertz" }* "permits any standard except strict liability." *Id.* at 458. "To permit an inference of negligence from the mere fact of publication would make the press the guarantor of the truth of its statements, a role *Gertz{ TA \s "Gertz" }* rejects." *Id.* at 465. "If *Gertz* does not permit an inference of negligence from the statement itself, then unless the plaintiff produces independent evidence of unreasonable conduct, he fails to raise a genuine issue of fact as to negligence." *Id.* at 468.

The Tenth District did not require plaintiffs to make such a showing, however. Instead, its decision unconstitutionally equates error with fault, essentially reverting to the strict liability standard that *Gertz{ TA \s "Gertz" }* and *Lansdowne{ TA \s "Lansdowne" }* rejected. Under its analysis, the Court of Appeals automatically assumed or inferred that proof of error alone would be sufficient as a matter of law to establish negligence, without requiring evidence from the plaintiffs of unreasonable behavior by WBNS-TV. *Anderson{ TA \s "Anderson" }*, 2018-Ohio-761, ¶ 11.

By contrast, the trial court examined the evidence to conclude that "[b]ecause the source of the information was reliable and the information itself limited any attempts to investigate, the Court concludes that WBNS' reliance on the Columbus Division of Police was reasonable and not negligent." *See* Dec. & Entry Granting Def's Mot. for Summ. J. (Aug. 21, 2017). Unlike the Court of Appeals, the trial court noted the plaintiffs' lack of evidence and their failure "to elucidate on what investigation they wanted WBNS to undertake." *Id.* at 8 n.3. A comparison of these two analyses demonstrates that the Tenth District has improperly and dangerously deviated from precedent.

The Court of Appeals reasoned from archaic principles. Indeed, it began its analysis by stating that "merely publishing a false, defamatory statement is sufficient to establish a traditional defamation claim." *Anderson**{ TA \s "Anderson" }***, 2018-Ohio-761, ¶ 8. It then analyzed whether a failure to print a retraction "supports the common law presumption of malice," despite the fact that Ohio courts no longer apply the element of common law malice to any defamation claims. *Id.*; *Jacobs v. Frank*, 60 Ohio St.3d 111, 119, 573 N.E.2d 609 (1991)**{** TA \l "*Jacobs v. Frank*, 60 Ohio St.3d 111, 573 N.E.2d 609 (1991)" \s "Jacobs" \c 1 **}**; *Varanese v. Gall*, 35 Ohio St.3d 78, 79, 518 N.E.2d 1177 (1988)**{** TA \l "*Varanese v. Gall*, 35 Ohio St.3d 78, 518 N.E.2d 1177 (1988)" \s "Varanese" \c 1 **}**. It concluded its analysis by imposing a "stronger duty" on media outlets than existed in *Lansdowne**{ TA \s "Lansdowne" }***. *Anderson**{*** TA \s "Anderson" ***}***, 2018-Ohio-761, at ¶ 11.

The plaintiffs failed to present any evidence that the reliance of WBNS-TV on the Columbus Division of Police report was unreasonable. They should not have survived summary judgment. The *amici curiae* respectfully urge the Court to reverse the judgment of the Court of Appeals and reinstate the judgment of the Common Pleas Court.

In doing so, the Court should specify that: (1) a private-figure plaintiff in an Ohio defamation action must prove by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character of a publication; and (2) when a news media defendant moves in a defamation action for summary judgment on the issue of fault and the private-figure plaintiff fails to introduce any competent evidence under Civil Rule 56(C)**{** TA \s "Ohio R. Civ. P. 56(C)" **}** that the defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character of a publication, the plaintiff has failed to establish the existence of any genuine issue of material fact.

B. The Tenth District's analysis conflicts with the plain language of *Lansdowne{ TA \s "Lansdowne" }*. To determine fault, the Court of Appeals improperly looked to external factors and post-publication decisions instead of examining the internal factors of what WBNS-TV knew and did at the time of publication.

1. This Court requires a plaintiff to establish negligence on the part of a news media defendant, which requires an examination of what the news media defendant knew or did not know and did or did not do at the time of publication.

This Court has established negligence as the standard of fault in private-figure defamation actions against the media, specifically holding that a "plaintiff must prove by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication." *Lansdowne**{** TA \s "Lansdowne" **}***, 32 Ohio St.3d at 180. The plain language of this standard focuses on ***what the defendant knew or did not know****,* and ***what the defendant did or did not do*** to determine the truth of the publication ***at the time of publication***. This follows basic tenets of negligence law articulated by this Court. *See, e.g., Hetrick v. Marion-Reserve Power Co.*, 141 Ohio St. 347, 358-359, 48 N.E.2d 103 (1943)**{** TA \l "*Hetrick v. Marion-Reserve Power Co.*, 141 Ohio St. 347, 48 N.E.2d 103 (1943)" \s "Hetrick" \c 1 **}** ("[n]egligence is not a matter to be judged after the occurrence." (quoting 1 SHEARMAN AND REDFIELD ON NEGLIGENCE (Rev. Ed.), 50, § 24**{** TA \l "Shearman and

Redfield on Negligence (Rev. Ed.), 50, § 24" \s "SHEARMAN AND REDFIELD ON NEGLIGENCE (Rev. Ed.), 50, Section 24" \c 6 **}**)).

Ohio courts have successfully applied this standard for the past thirty years by looking to factors ***internal to the news media defendant*** as they existed ***at the time of publication***, such as what the news media defendant knew, whether it had reason to doubt the truth when it published the story, whether there was reason for the news media defendant to doubt the truth of the story, and what the news media defendant did to investigate the truth of the story. *See Smitek v. Lorain Cty. Printing & Publ'g Co.*, 9th Dist. Lorain No. 94CA006023, 1995 Ohio App. LEXIS 4527, at *9 (Oct. 11, 1995)**{** TA \l "*Smitek v. Lorain Cty. Printing & Publ'g Co.*, 9th Dist. Lorain No. 94CA006023, 1995 Ohio App. LEXIS 4527 (Oct. 11, 1995)" \s "Smitek v. Lorain" \c 1 **}** (finding news media members acted reasonably by relying on government records, even though those records turned out to be inaccurate); *Boddie v. Landers*, 10th Dist. Franklin No. 15AP-962, 2016-Ohio-1410**{** TA \l "*Boddie v. Landers*, 10th Dist. Franklin No. 15AP-962, 2016-Ohio-1410" \s "Boddie" \c 1 **}**, ¶ 28 (finding news media members acted reasonably after evaluating what they did to investigate the story); *Baby Tenda of Greater Cincinnati v. Taft Broad. Co.*, 63 Ohio App.3d 550, 553, 579 N.E.2d 522 (1st Dist. 1989)**{** TA \l "*Baby Tenda of Greater Cincinnati v. Taft Broad. Co.*, 63 Ohio App.3d 550, 579 N.E.2d 522 (1st Dist. 1989)" \s "Baby Tenda" \c 1 **}** (finding reporter acted reasonably based on who the reporter did or did not interview prior to the publication and why); *Taylor Bldg. Corp. of Am. v. Benfield*, 507 F.Supp.2d 832, 841 (S.D.Ohio 2007)**{** TA \l "*Taylor Bldg. Corp. of Am. v. Benfield*, 507 F.Supp.2d 832 (S.D.Ohio 2007)" \s "Taylor Bldg." \c 1 **}** (finding, in a non-media defamation case, a genuine issue of material fact regarding fault when defendant knew of contradictory information at time of statement).

2. The Tenth District impermissibly looked at external and post-broadcast factors to establish fault.

Contrary to this standard, the Tenth District focused on elements that were ***external*** to the news media defendant or that occurred ***after*** the broadcast and publication. The Tenth District imposed an indiscernible "stronger duty" on news media outlets after drawing the conclusion that a decision not to issue a retraction "supports the common law presumption of malice," and based on factors such as the technology by which the publication was made and the financial means of the parties. *Anderson**{ TA \s "Anderson" }***, 2018-Ohio-761, ¶¶ 8, 11. These types of considerations when evaluating fault are inconsistent with the negligence standard set by this Court and are improper bases upon which to create First Amendment jurisprudence.

a. Retractions and common law malice presumptions are irrelevant to this case and to the evaluation of a news media defendant's fault.

The Tenth District's discussion of presumptions of common law malice is irrelevant to this case and to any determination of whether WBNS-TV acted with the requisite care at the time of broadcast and publication. The applicable standard in this case, of course, is negligence and not malice. *See Lansdowne**{ TA \s "Lansdowne" }***, 32 Ohio St.3d at 180. Even in defamation cases where the standard of fault is malice, however, this Court has rejected the "common law malice" standard and instead requires a showing of "actual malice." *Jacobs**{ TA \s "Jacobs" }***, 60 Ohio St.3d at 119; *Varanese**{ TA \s "Varanese" }***, 35 Ohio St.3d at 79-80 (holding that common law malice is "constitutionally insufficient to prove actual malice" because the proper "focus of the inquiry is *not* on defendant's attitude toward the plaintiff, but rather on the defendant's attitude *toward the truth or falsity* of the statement alleged to be defamatory")(emphasis added).

This Court and other courts have held that refusal to print a retraction is irrelevant in defamation cases where the standard of fault is actual malice or negligence. *See Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 125, 413 N.E.2d 1187 (1980)**{** TA

\l "*Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 413 N.E.2d 1187 (1980)" \s "Dupler" \c 1 **}** (stating that failure to retract upon demand is not adequate evidence of actual malice "for constitutional purposes" because it did not have "any bearing on [publisher's] state of mind at the time of publication"); *Hegwood v. Cmty. First Holdings, Inc.*, 546 F. Supp. 2d 363, 367 (S.D. Miss. 2008)**{** TA \l "*Hegwood v. Cmty. First Holdings, Inc.*, 546 F. Supp. 2d 363 (S.D. Miss. 2008)" \s "Hegwood" \c 1 **}** (finding that refusal to retract does not support a "gross negligence" claim brought along with a defamation claim); *Walters v. Sanford Herald, Inc.*, 31 N.C. App. 233, 236, 228 S.E.2d 766 (N.C. Ct. App. 1976)**{** TA \l "*Walters v. Sanford Herald, Inc.*, 31 N.C. App. 233, 228 S.E.2d 766 (N.C. Ct. App. 1976)" \s "Walters" \c 1 **}** (holding that failure to retract could not demonstrate negligence because it "has no probative value or effect upon what a publisher did or failed to do at the time of the publication"). The *amici curiae* urge the Court to make clear that it was improper for the Court of Appeals to consider the lack of a retraction in its fault analysis.

b. The technology used for a publication and the financial status of the plaintiff are irrelevant to the fault analysis.

Neither the technology used to publish a story nor the financial status of a plaintiff makes a publication more or less true. These factors are unrelated to a news media defendant's attempts to discover the truth or falsity or defamatory character of a publication, and are therefore irrelevant to the negligence analysis required by *Lansdowne**{** TA \s "Lansdowne" **}***.

This Court has rejected previous attempts to modify First Amendment standards based on the "emergence of the Internet." *State ex rel. Toledo Blade Co.* v. *Henry Cty. Court of Common Pleas*, 125 Ohio St. 3d 149, 2010-Ohio-1533, 926 N.E.2d 634**{** TA \l "*State ex rel. Toledo Blade Co.* v. *Henry Cty. Court of Common Pleas*, 125 Ohio St. 3d 149, 2010-Ohio-1533, 926 N.E.2d 634" \s "State ex rel. Toledo Blade Co." \c 1 **}**, ¶ 25. In *Toledo Blade*, this Court warned that "if courts base their constitutional interpretations

on the rapidly changing concept of technology, our constitutional rights [would be] in the hands of unpredictable technological trends instead of in the hands of sound judicial reasoning." *Id.* (quoting SIDMAN, GAGGING LOUISIANA'S POLITICIANS: THE FIFTH CIRCUIT REVIEWS THE CONSTITUTIONALITY OF GAG ORDERS AGAINST TRIAL PARTICIPANTS IN UNITED STATES V. BROWN (2001), 76 Tul. L. Rev. 233, 244-245**{** TA \l "SIDMAN, GAGGING LOUISIANA'S POLITICIANS: THE FIFTH CIRCUIT REVIEWS THE CONSTITUTIONALITY OF GAG ORDERS AGAINST TRIAL PARTICIPANTS IN UNITED STATES V. BROWN (2001), 76 Tul. L. Rev. 233, 244-245" \s "Sidman, Gagging Louisiana's Politicians" \c 6 **}**.);**{** TA \l "*United States v. Brown* (2001), 76 Tul.L.Rev. 233, 244-245.)" \s "United States v. Brown" \c 1 **}** *see also Citizens United v. Fed. Election Comm'n*., 558 U.S. 310, 130 S.Ct. 876, 891, 175 L.Ed.2d 753 (2010)**{** TA \l "*Citizens United v. Fed. Election Comm'n*., 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010)" \s "Citizens United" \c 1 **}** ("[Courts] will decline to draw, then redraw, constitutional lines based on the particular media or technology used.").

Courts have also not looked to the relative wealth of the parties to define the standard of care in defamation cases. On the contrary, other courts have ***prohibited*** comments or evidence regarding the relative wealth of the parties in defamation, libel, and slander cases because those comments and evidence are irrelevant and prejudicial. *See Hall v. Rice*, 117 Neb. 813, 822, 223 N.W. 4 (1929)**{** TA \l "*Hall v. Rice*, 117 Neb. 813, 223 N.W. 4 (1929)" \s "Hall" \c 1 **}** (finding references to relative size of defendant in a libel and slander case to be prejudicial error); *Sherwood v. Evening News Ass'n*, 256 Mich. 318, 326, 239 N.W. 305 (1931)**{** TA \l "*Sherwood v. Evening News Ass'n*, 256 Mich. 318, 239 N.W. 305 (1931)" \s "Sherwood" \c 1 **}** (finding reversible error where plaintiffs made reference to defendant as "big corporation" and argued that the plaintiff "hasn't great amount to spare").

The Court in this case should vindicate the impartiality of the law and restore the principle of equality before the law to the fault analysis in defamation cases. Otherwise,

a rule that the relative wherewithal of the parties is a legitimate factor in determining whether a broadcaster or other publisher has taken sufficiently "extraordinary care" in vetting a story would open the door to intensive discovery of the financial resources of the plaintiff in private-figure defamation cases -- an undesirable and presumably unintended consequence of the Court of Appeals decision. Such unnecessarily invasive discovery would necessarily be a standard element of any such case. The duty owed should never be a function of the wherewithal of the parties.

The need for such information prior to publication, moreover, would be an obvious impediment to publication of almost any information. If the news media's duty of care were dependent upon the asset portfolios of the people about whom they are reporting, it would behoove editors to run a probing background check on the individual subjects of nearly every story -- a process that neither time nor personal privacy interests ordinarily would have allowed, even before the emergence of the Internet. The technology used to make a publication and the relative financial status of the parties are improper bases to determine fault under the *Lansdowne{ TA \s "Lansdowne" }* decision. The Tenth District's imposition of a "greater duty" based upon those factors is flawed and must be reversed.

Proposition of Law No. 2: The Tenth District's "stronger duty" requirement is unlawfully vague -- it sets a "standard" that is untethered to principles of First Amendment jurisprudence.

A. Vague liability standards operate with a chilling effect upon the news media.

Lansdowne{ TA \s "Lansdowne" } sets forth the Ohio standard of fault and burden of proof in private individual defamation cases against the news media. *Lansdowne*, 32 Ohio St. 3d at 180. In place of this well-settled standard, the Court of Appeals has determined that, among other things, the advent of the Internet now imposes "a stronger duty" upon news media outlets. *Anderson{ TA \s "Anderson" }*,

2018-Ohio-761 at ¶ 11. The court provided no details as to the requirements of this "stronger duty," what it entails, how it is met, and how courts should apply it.

The members of the *amici curiae* who submit this brief cannot operate to fully and freely provide news to the public under such a vague standard. The Supreme Court of the United States has warned of the chilling effects of such unintelligible First Amendment standards:

> where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'

Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)**{** TA \l "*Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)" \s "Grayned" \c 1 **}**.

Similarly, this Court "requires more specificity of a statute potentially applicable to expression sheltered by the First Amendment than in other contexts," elaborating that this demand for specificity "is a product of the concern for a statute's chilling effect." *In re Harper*, 77 Ohio St.3d 211, 222, 673 N.E.2d 1253 (1996)**{** TA \l "*In re Harper*, 77 Ohio St.3d 211, 673 N.E.2d 1253 (1996)" \s "In re Harper" \c 1 **}**. Ohio's lower courts have followed course. *See City of Huber Hts. v. Liakos*, 145 Ohio App.3d 35, 42, 761 N.E.2d 1083 (2d Dist. 2001)**{** TA \l "*City of Huber Hts. v. Liakos*, 145 Ohio App.3d 35, 761 N.E.2d 1083 (2d Dist. 2001)" \s "City of Huber Hts." \c 1 **}** (quoting *Grayned**{** TA \s "Grayned" **}***); *City of Cincinnati v. Thompson*, 96 Ohio App.3d 7, 25, 643 N.E.2d 1157 (1st Dist. 1994)**{** TA \l "*City of Cincinnati v. Thompson*, 96 Ohio App.3d 7, 643 N.E.2d 1157 (1st Dist. 1994)" \s "City of Cincinnati" \c 1 **}** (recognizing the importance of utilizing vagueness doctrine to "minimiz[e] the chilling effect of the law on constitutionally protected expression"); *City of Cleveland v. Daher*, 8th Dist. Cuyahoga No. 76975, 2000 Ohio App. LEXIS 5937, at *11 (Dec. 14, 2000)**{** TA \l "*City of Cleveland v. Daher*, 8th Dist. Cuyahoga No. 76975, 2000 Ohio App. LEXIS 5937 (Dec. 14, 2000)"

\s "City of Cleveland" \c 1 **}** (recognizing that “where First Amendment rights are at issue, we require a greater degree of specificity to avoid chilling protected conduct”).

Yet the Tenth District now requires media outlets to adhere to an unarticulated “stronger” standard, which (under the Tenth District’s analysis) will constantly shift (in some manner) based on what technology is used for publication and the relative wealth of the parties. This standard would place every phase of the news reporting process under a microscope, without providing the news media itself with any guidelines. Journalists who have no idea what type of investigation is sufficient prior to publishing a story would have a strong incentive to refrain from publication rather than risk liability.

Are editors required to run financial background checks on the subjects of a story before they determine if the story will run? Is a story reasonably researched when the subject is a homeowner, but not when the subject rents an apartment? Will an investigation into a story be sufficient when it is to be published in a print newspaper and the subject is a wealthy individual, but insufficient when it is to be published online? Or when the subject is less wealthy? On a more practical level as relevant in this case, how is a broadcaster supposed to determine the financial position of a suspect in a crime, when not even the police yet know the identity of that suspect? The courts should not, and may not, force the news media to ask these types of unanswerable questions before publishing the news. The Tenth District’s decision cannot stand and must be overruled.

<u>Proposition of Law No. 3</u>: The law does not require the news media to conduct their own investigation or withhold publishing the news until they are able to contact the persons implicated or otherwise inquire into and corroborate official information supplied by law enforcement.

The Court of Appeals decision references a broadcaster’s “duty to research the facts” under the circumstances raised in this case. Even assuming that the Court of Appeals had correctly applied the negligence standard, which it did not, the concept that WBNS-TV was required to conduct more research in this case is unsupportable and

unworkable as a practical matter. This ruling displays a misunderstanding of the news media's relationship with law enforcement. It also imposes on the news media an impossible-to-meet standard in situations where a crime has been committed, the police are just beginning their investigation, and there is no ability of the news media to investigate further. If more facts were readily available to investigate, there would be no need for the story seeking help to identify suspects or help solve a crime.

A. The news media is both entitled to, and expected to, rely upon information provided by law enforcement.

1. WBNS-TV relied on a "Media Information Sheet" from the Columbus Division of Police.

For the news report at issue in this case, WBNS-TV relied on a "Media Information Sheet" from the Columbus Division of Police ("CDP") that included the following information about an alleged robbery:

> The victims were walking in the parking lot of Fort Rapids waterpark watching their eight year old daughter ride her "hoverboard". The suspects approached on foot, put a gun to the eight year olds [sic] head and demanded the hoverboard. The suspects then ran to a white PT cruiser and fled out of the parking lot.
>
> Anyone that can help identify the persons in the attached photographs who may have been involved are asked to contact the Columbus Police Robbery Unit at 614-645-4665. If they wish to remain anonymous can contact Central Ohio Crime Stoppers at 614-645-TIPS (8477).

Aff. of Michael Gravely at ¶ 2 and Ex. 1 (attached as Ex. A to Def's. Mot. for Summ. J.).

The Media Information Sheet also included two pictures, at least one of which showed the plaintiffs. The Court of Appeals held that a genuine issue of material fact exists as to whether WBNS-TV acted negligently because it broadcast "an accusation that the Andersons were robbers without investigation by WBNS based on a set of police documents which claimed only that some of the Andersons were suspects." *Anderson***{** TA \s "Anderson" **}** *v. WBNS-TV, Inc.*, 10th Dist. Franklin No. 17AP-660, 2018-Ohio-761, ¶ 11. This conclusion will both undermine the vital interest of law

enforcement and the public in the timely and widespread dissemination of information about matters of public concern and is contrary to established precedent holding that the news media does not act negligently in relying on information from the police.

2. Law enforcement operations rely on the news media to quickly publish information regarding crimes and urgent situations. The press must be permitted to rely on information from law enforcement personnel when serving this function.

Law enforcement officials often rely on the news media to keep the public apprised of breaking news concerning crime and threats to public safety. Police departments can hold press conferences and release information on their websites, but it is the daily newspaper and the broadcast news that actually reach the public. When the police seek the public's help in identifying criminal suspects, enlist the public to find witnesses to crimes or a missing child, or wish to alert the public that a dangerous criminal is in custody, they turn to the news media. *See, e.g.,* Manuel Gamiz Jr., Allentown Police Seek Identity of Angry Customer Who Vandalized Chuchifrito Restaurant, MORNING CALL (Sept. 7, 2018, 2:35 p.m.)**{** TA \l "Manuel Gamiz Jr., Allentown Police Seek Identity of Angry Customer Who Vandalized Chuchifrito Restaurant, MORNING CALL (Sept. 7, 2018, 2:35 p.m.)" \s "Manuel Gamiz Jr." \c 6 **}**, Alex Riggins, Police Seek Witnesses, Cellphone Footage from Gaslamp Quarter Tourist Attack, SAN DIEGO UNION-TRIBUNE (Sept. 5, 2018, 8:20 p.m.), http://www.sandiegouniontribune.com/news/public-safety/sd-me-gaslamp-tourist-attack-20180905-story.html**{** TA \l "Alex Riggins, Police Seek Witnesses, Cellphone Footage from Gaslamp Quarter Tourist Attack, SAN DIEGO UNION-TRIBUNE (Sept. 5, 2018, 8:20 p.m.), http://www.sandiegouniontribune.com/news/public-safety/sd-me-gaslamp-tourist-attack-20180905-story.html" \s "Alex Riggins" \c 6 **}**; Billings Police Ask Public's Help Finding Missing Boy, KTVQ (Sept. 3, 2018, 11:48 a.m.)**{** TA \l "Billings Police Ask Public's Help Finding Missing Boy, KTVQ (Sept. 3, 2018, 11:48 a.m.)" \s "Bilings Police" \c 6 **}**; Christina Tkacik, Ann Arundel County Police: Suspect in Custody After Barricade

Situation in Annapolis, BALTIMORE SUN (Sept. 19, 2018, 11:15 p.m.)**{** TA \l "Christina Tkacik, Ann Arundel County Police: Suspect in Custody After Barricade Situation in Annapolis, BALTIMORE SUN (Sept. 19, 2018, 11:15 p.m.)" \s "Christina Tkacik, Ann Arundel County Police: Suspect in Custody After Barricade Situation in Annapolis, Baltimore Sun (Sept. 19, 2018, 11:15 p.m.)" \c 6 **}**.

The ability and willingness of the press to report on information from law enforcement plays an important role in informing the public. For the relationship between police and news organizations to function, reporters must be able to rely on information provided by police without additional investigation without fear of legal liability. Investigations take time, and in a breaking news situation -- such as when the police are seeking suspects in a robbery -- there is no time to waste. If the Court of Appeals' decision were allowed to stand, it would chill the willingness of the press to report on such matters in real time, jeopardizing the public policy goals of fostering a safe and informed citizenry.

3. Case law permits the news media to rely on information from public officials.

Moreover, case law from Ohio and throughout the United States provides that a news organization does not act negligently when it relies on information from public officials. *See, e.g., Horvath v. Telegraph*, 11th Dist. Lake No. CA-8-175, 1982 Ohio App. LEXIS 15776 (Mar. 8, 1982)**{** TA \l "*Horvath v. Telegraph*, 11th Dist. Lake No. CA-8-175, 1982 Ohio App. LEXIS 15776 (Mar. 8, 1982)" \s "Horvath" \c 1 **}**; *Phillips v. Washington Post Co*., 8 Media L. Rep. (BNA) 1835 (D.C. Super. Ct. 1982)**{** TA \l "*Phillips v. Washington Post Co*., 8 Media L. Rep. (BNA) 1835 (D.C. Super. Ct. 1982)" \s "Phillips" \c 1 **}** (holding that a newspaper was not negligent in reporting incorrect information based upon written "hot-line report" provided by police); *Torres-Silva v. El Mundo, Inc.,* 106 D.P.R. 415, 424-25, 6 P.R. Offic. Trans. 581, 598 (P.R. 1977)**{** TA \l "*Torres-Silva v. El Mundo, Inc.,* 106 D.P.R. 415, 6 P.R. Offic. Trans. 581 (P.R. 1977)" \s

"Torres-Silva" \c 1 **}** (holding that publication of erroneous information that a wire service obtained from a police officer was not negligent); *Lovett v. Caddo Citizen*, 584 So.2d 1197, 1198 (La. Ct. App. 1991)**{** TA \l "*Lovett v. Caddo Citizen*, 584 So.2d 1197 (La. Ct. App. 1991)" \s "Lovett" \c 1 **}** (holding that reliance on police for information is not negligent); *see also Benson v. Griffin Television, Inc.,* 593 P.2d 511 (Okla. Ct. App. 1978)**{** TA \l "*Benson v. Griffin Television, Inc.,* 593 P.2d 511 (Okla. Ct. App. 1978)" \s "Benson" \c 1 **}** (concluding that a reporter was not negligent when he relied on police statements as well as other observations in reporting an individual was a suspect in a robbery).

For example, in *Lovett**{** TA \s "Lovett" **}** v. Caddo Citizen*, the Louisiana Court of Appeals held that a newspaper was not negligent in relying on information provided by the police chief to publish a story incorrectly stating that the plaintiff had been arrested in connection with a burglary. *Lovett**{** TA \s "Lovett" **},* 584 So. 2d at 1198. In so holding, the court rejected the trial court's conclusion that the newspaper was required to "verify the verbal information given to [its reporter] by the chief of police." *Id.* Rather, the court noted, the newspaper was under no obligation to verify the information "unless it has knowledge which would make it aware further research was necessary to insure the veracity of the information." *Id.; see also Torres-Silva**{** TA \s "Torres-Silva" **}** v. El Mundo*, 106 D.P.R. at 426 (holding that corroboration of news may be required only when the very face of the information raises doubts).

In this case, WBNS-TV did exactly what a reasonable news organization would normally do: It consulted a reliable source -- CDP -- and reported what it had learned from that source. It is clear from the Media Information Sheet that CDP considered the individuals pictured to be suspects in a robbery in which the robbers placed a gun to a child's head and stole a hoverboard. WBNS-TV had no reason to believe that CDP was unreliable or that the information it provided was inaccurate. Moreover, WBNS-TV could not have conducted any additional investigation or verification because the entire

point of the story was to try and uncover additional information for the police. By definition, WBNS-TV did not act negligently in relying upon information from CDP.

IV. CONCLUSION

For these reasons, the seven *amici curiae* organizations urge this Court to reject the Tenth District's ambiguous and unworkable new standard of care for news media outlets, its redefinition of malice, the technological and demographic factors that it has added to the fault analysis, and its dilution of the summary judgment procedure. This Court should reverse the judgment below, confirm the "reasonable care" fault standard that it has prescribed for private-figure defamation litigation in Ohio, and emphasize the central role that summary judgment plays when a private-figure plaintiff fails to provide the requisite evidence that a journalist has failed to use reasonable care in attempting to determine the truth or falsity or defamatory character of a publication.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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