



In support of this Motion, the movants show unto the Court the following:

1. *Amici* are:
  - **The Reporters Committee for Freedom of the Press** is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.
  - **ABC, Inc.** is a broad-based communications company. Alone or through its subsidiaries, it owns ABC News, abcnews.com, and local broadcast television stations such as WTVD in Raleigh, North Carolina, that regularly gather and report news to the public. ABC News produces the television programs *World News Tonight with David Muir*, *Good Morning America*, *Nightline*, *20/20*, and *This Week*, among others.
  - **The Associated Press, Inc.** ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's

newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. The AP covers news in all 100 North Carolina counties. On any given day, AP's content can reach more than half of the world's population.

- **Capitol Broadcasting Company, Incorporated** ("CBC"), is a North Carolina corporation located in Wake County. Among other things, CBC owns and operates three television stations in North Carolina, including WRAL-TV, which provides broadcast and online coverage of news about Raleigh and the surrounding area.
- **Community Newspapers Inc.** publishes 25 newspapers in Georgia, Florida and North Carolina. In North Carolina, Community Newspapers Inc. publishes *The Andrews Journal*, the *Cherokee Scout*, the *Clay County Progress*, the *Crossroads Chronicle*, *The Franklin Press*, *The Graham Star*, *The Highlander*, the *Mitchell News-Journal*, and the *Smoky Mountain Times*.
- **The Fayetteville Observer**, a division of DB North Carolina Holdings, Inc., is a news organization that maintains its principal place of business in Cumberland County, North Carolina. Among other things, the company publishes *The Fayetteville Observer*, a daily general interest newspaper that circulates in Cumberland

and surrounding counties. The company also publishes a news and information website at [www.fayobserver.com](http://www.fayobserver.com).

- **Gannett Co., Inc.** is a leading news and information company which publishes USA TODAY and more than 100 local media properties, including the *Asheville Citizen-Times*. Each month more than 120 million unique visitors access content from USA TODAY and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.
- **Nexstar Media Group, Inc.** ("Nexstar") is a leading diversified media company that leverages localism to bring new services and value to consumers and advertisers through its traditional media, digital and mobile media platforms. Nexstar owns, operates, programs or provides sales and other services to 169 television stations and related digital multicast signals reaching 100 markets or approximately 39% of all U.S. television households. Nexstar owns and operates television stations WNCT-TV in Greenville, North Carolina, and WNCN in Raleigh, North Carolina.
- **The North Carolina Association of Broadcasters** ("NCAB") is a trade association whose regular members include nearly all of the television and radio stations in North Carolina—some 32 television stations and 168 radio stations statewide. An

important function of NCAB is to represent the interests of its members in the state and federal courts of North Carolina in cases addressing issues of free speech and the First Amendment. NCAB has been granted leave to file *amicus curiae* briefs in numerous cases before the North Carolina Supreme Court and North Carolina Court of Appeals in matters involving First Amendment issues, public records, open meetings, and other matters that could impact on its members' various newsgathering and news reporting activities.

- **The North Carolina Press Association** is a trade association of 150 daily and weekly newspapers across the state. Since 1873 NCPA has supported North Carolina newspapers, readership and advertising. NCPA works to protect the public's right to know through the defense of open government and First Amendment freedoms, and NCPA helps maintain the public's access to local, state and federal governments.
- **The Pilot, LLC**, is a North Carolina corporation located in Southern Pines that publishes *The Pilot*, a twice-weekly newspaper, and [www.thepilot.com](http://www.thepilot.com), both of which provide coverage of news in Moore County and the surrounding area.
- **Tribune Media Company** ("Tribune") through its subsidiary Tribune Broadcasting Company, LLC, owns or operates 42 local

television stations, reaching more than 50 million households, making it the largest independent station group in the United States, with affiliates representing all of the major over-the-air networks, including CBS, ABC, FOX, NBC, the CW, and My TV. Tribune owns and operates WGHP in Greensboro.

- **WBTB, LLC** (“WBTB”) is a Delaware limited liability company that is authorized by the North Carolina Secretary of State to do business within the state and whose principal place of business is located in Charlotte, Mecklenburg County, North Carolina.

WBTB covers news in greater Charlotte and the surrounding areas of North Carolina and South Carolina, and statewide issues throughout North Carolina. WBTB also disseminates online coverage at [www.wbtv.com](http://www.wbtv.com). WBTB is owned by Gray Television.

2. This case raises critical constitutional issues affecting the exercise of free speech and freedom of the press in North Carolina. Among other issues, this case concerns whether a public official has met her constitutional burden to prove, by clear and convincing evidence, that a news organization published allegedly defamatory speech about her with actual malice, *i.e.*, with knowledge of its falsity or with reckless disregard as to its falsity. The actual malice standard must be correctly interpreted and applied to avoid chilling expression and seriously and negatively affecting the ability of journalists to report on matters of public interest.

3. *Amici* can aid the Court by describing the factual and legal basis upon which

the grounds for discretionary review exist under N.C.G.S. § 7A-31. Specifically, the brief describes legal principles of major significance to the jurisprudence of North Carolina involved in this case, which concerns the application of the actual malice standard in public official defamation actions. See N.C.G.S. § 7A-31(b)(2). In this case, the Court of Appeals erred in two respects in holding that the plaintiff had demonstrated actual malice: (1) the court failed to conduct an independent review of the record to determine that it established actual malice with convincing clarity; and (2) the court misapplied the actual malice standard by not requiring the plaintiff to prove that the Newspaper Defendants had serious subjective doubts about the veracity of the published statements. See *Desmond v. News & Observer Publ'g Co.*, 2018 WL 6613813, at \*13-15, \*24 (N.C. Ct. App. Dec. 18, 2018). In addition, the brief highlights the significant public interest in the subject matter of this appeal. See N.C.G.S. § 7A-31(b)(1). As members and representatives of the news media, *amici* are directly affected by the Court of Appeals' decision in this case, which interprets the actual malice standard in a manner that will chill news reporting about public officials. The brief explains the critical role of the actual malice standard in protecting robust public discussion of the conduct of public officials and government.

WHEREFORE, *amici* pray that they be permitted to file the attached brief of *amici curiae* in this action.

This the 11th day of January 2019.

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INDEX

TABLE OF CASES AND AUTHORITIES ..... ii

INTRODUCTION ..... 2

ARGUMENT .....3

    I.    This Court should grant discretionary review to correct misapplication of law that could have significant effects on North Carolina jurisprudence. ....3

        A.    The Court of Appeals failed to conduct an independent review of the record in determining the plaintiff had demonstrated actual malice, as the First Amendment requires. .... 5

        B.    The Court of Appeals misapplied the actual malice standard, as Desmond’s evidence of purported actual malice does not prove the Newspaper Defendants had knowledge of or serious doubts about the veracity of the statements. .... 6

        C.    This Court has not considered a defamation action involving the news media in over 30 years. ....10

    II.   This Court should grant discretionary review because the subject matter of this appeal is of significant public interest. .11

        A.    First Amendment protections are most robust in defamation cases related to public officials because of the harmful effects of chilling press coverage of government. ....11

CONCLUSION .....14

CERTIFICATE OF SERVICE .....16

CONTENTS OF APPENDIX ..... 17

APPENDIX A .....A-1

APPENDIX B ..... B-1

TABLE OF CASES AND AUTHORITIES

**Cases**

*Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) ..... 4, 5, 6

*Desmond v. News & Observer Publ'g Co.*, 2018 WL 6613813 (N.C. Ct. App. Dec. 18, 2018) ..... *passim*

*Garrison v. Louisiana*, 379 U.S. 64 (1964) ..... 7, 12

*Gertz v. Welch*, 418 U.S. 323 (1974) ..... 3, 11, 13

*Globe Newspaper Co. v. Superior Court*, 457 U.S. 569 (1982) ..... 13

*Griffin v. Holden*, 180 N.C. App. 129, 636 S.E.2d 298 (2006) ..... 7

*Hall v. Post*, 323 N.C. 259, 372 S.E.2d 711 (1988) ..... 10, 13

*Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) ..... 5, 11

*Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) ..... 12

*Lewis v. Rapp*, 220 N.C.App. 299, 725 S.E.2d 597 (2012) ..... 9

*Mills v. Alabama*, 384 U.S. 214 (1966) ..... 13

*N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) ..... *passim*

*N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) ..... 13

*Proffitt v. Greensboro News & Record, Inc.*, 91 N.C. App. 218, 371 S.E.2d 292 (1988) ..... 8

*Rosenblatt v. Baer*, 383 U.S. 75 (1966) ..... 12

*Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003) ..... 12

*Taylor v. Greensboro News Co.*, 307 N.C. 459, 298 S.E.2d 385 (1983) ..... 10, 11

*Time, Inc. v. Pape*, 401 U.S. 279 (1971) ..... 8

*Varner v. Bryan*, 113 N.C. App. 697, 440 S.E.2d 295 (1994) ..... 7

**Statutes**

N.C. Gen. Stat. § 7A-30.....3

N.C. Gen. Stat. § 7A-31..... 3, 4, 11

**Other Authorities**

Ben Railton, *Considering History: Walter Cronkite, David Halberstam, and Two Legacies of Adversarial Journalism*, Saturday Evening Post, Feb. 27, 2018, <https://perma.cc/Y4BA-RGVM>..... 7



Broadcasters, North Carolina Press Association, The Pilot, Tribune Media Company, and WBTV, LLC. A full description of *amici*'s respective principal places of business and their interests in this case are set forth in the Appendix.

### INTRODUCTION

At issue in this case is the proper application of the constitutional “actual malice” standard, which applies in public official and public figure defamation actions. This standard requires public official and public figure defamation plaintiffs: (1) to prove the alleged defamation is not substantially true, and (2) to prove by clear and convincing evidence that the defendant made the defamatory statement with either knowledge of its falsity or with reckless disregard for the truth. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). Understanding that people will otherwise “steer far wider of the unlawful zone” to avoid liability, the U.S. Supreme Court recognized this rigorous standard is necessary to protect and promote vital public debate about issues of public concern, especially regarding public officials’ activities. *Id.* at 270. The actual malice standard prevents the threat of liability from “dampen[ing] the vigor and limit[ing] the variety of public debate” on issues related to government. *Id.* at 279. Put another way, it guards against chilling speech critical of public officials, which is central to the public’s ability to hold government to account. *Id.*

In this case, the trial court misapplied, and the Court of Appeals upheld the misapplication of, the actual malice standard, leading to a multi-million dollar verdict that will surely chill future reporting on government activity—exactly the type of speech the First Amendment and the actual malice standard were designed to protect. As a

result, North Carolinians will suffer from reduced access to information about public officials' actions. Because this case presents serious questions regarding the operation of the actual malice standard in public official defamation actions and presents issues of significant public interest, this Court should grant the Newspaper Defendants' Petition for Discretionary Review.<sup>2</sup>

### ARGUMENT

#### I. THIS COURT SHOULD GRANT DISCRETIONARY REVIEW TO CORRECT MISAPPLICATION OF LAW THAT COULD HAVE SIGNIFICANT EFFECTS ON NORTH CAROLINA JURISPRUDENCE.

This Court should grant review because this case implicates legal principles of major significance to North Carolina jurisprudence regarding defamation law in general, and the constitutional actual malice standard specifically. *See* N.C. Gen. Stat. § 7A-31(b)(2) (stating a cause may be certified to the Supreme Court for review when it involves “legal principles of major significance to the jurisprudence of the State”). The U.S. Supreme Court has long recognized “that ‘breathing space’ [is] essential to [the] fruitful exercise” of First Amendment rights, including press freedom. *Gertz v. Welch*, 418 U.S. 323, 342 (1974) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). As a result, the Court recognized a heightened standard of fault—the actual malice standard—applicable in public official plaintiff defamation cases. *Sullivan*, 376 U.S. at 280. Specifically, public

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<sup>2</sup> Newspaper Defendants also argue they are entitled to an appeal as of right under N.C. Gen. Stat. § 7A-30(1) and North Carolina Rule of Appellate Procedure 14 because the Court of Appeals' decision involves a substantial question arising under the United States Constitution. In this brief, *amici* focus on Newspaper Defendants' alternative Petition for Discretionary Review, but *amici* agree that the Newspaper Defendants are entitled to an appeal as of right.

officials may recover for defamation only if they prove a substantially false statement was made either with knowledge of falsity or reckless disregard for the statement's truth or falsity. *Id.* This standard harmonizes defamation law with the First Amendment, honoring the bedrock principle that democracy flourishes in an environment in which "debate on public issues [is] uninhibited, robust, and wide-open, and [ ] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

In holding that the plaintiff had demonstrated actual malice, the Court of Appeals erred in two respects. First, the court failed to conduct an independent review of the record to determine that it established actual malice with convincing clarity. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984). Second, the court misapplied the actual malice standard by not requiring Desmond to prove the Newspaper Defendants had serious subjective doubts about the veracity of the published statements. *See Desmond v. News & Observer Publ'g Co.*, 2018 WL 6613813, at \*13-15, \*24 (N.C. Ct. App. Dec. 18, 2018). The Court of Appeals' misapplication of the actual malice standard is an issue of major significance to the jurisprudence of the State and warrants this Court's review. *See* N.C. Gen. Stat. § 7A-31(b)(2).

The significance of this case to the jurisprudence of North Carolina is heightened by the fact that this Court has not considered a defamation case involving a media defendant in more than 30 years. Given the dearth of recent caselaw from this Court concerning the application of the actual malice standard in a defamation action involving the news media, clarification by this Court regarding what constitutes actual malice is

needed to ensure the jurisprudence of North Carolina courts comports with First Amendment standards.

- A. The Court of Appeals failed to conduct an independent review of the record in determining the plaintiff had demonstrated actual malice, as the First Amendment requires.

The U.S. Supreme Court has repeatedly held “that in cases raising First Amendment issues . . . an appellate court has an obligation to ‘make an independent examination of the whole record’ . . . .” *Bose Corp.*, 466 U.S. at 499 (quoting *Sullivan*, 376 U.S. at 284–86). This requirement of independent appellate review is “a rule of federal constitutional law.” *Id.* at 510. Accordingly, in defamation actions, “[j]udges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice.” *Id.* at 511.

Here, the Court of Appeals did not apply this standard of independent review. The court acknowledged it must “consider the factual record in full” and “examine for itself the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect,” *Desmond*, 2018 WL 6613813, at \*7 (quoting *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685–89 (1989)). Yet the court then analyzed the issue of actual malice viewing all of the evidence in the light most favorable to the plaintiff, citing a North Carolina case reviewing a motion for judgment notwithstanding the verdict that

did not involve a constitutional question. *Desmond*, 2018 WL at \*6 (citing *Springs v. City of Charlotte*, 209 N.C. App. 271 (2011)).

The Court of Appeals decision does not mention *Bose* or apply the constitutional requirement of independent review. By reviewing the evidence in the light most favorable to the plaintiff, rather than reviewing the evidence independently to determine if the record provides clear and convincing evidence of actual malice, the Court of Appeals neglected its constitutional duty. As the Supreme Court has held, “the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge.” *Bose*, 466 U.S. at 501. The Court of Appeals’ error threatens to undermine the important role of judges in defamation actions in ensuring “the judgment does not constitute a forbidden intrusion on the field of free expression.” *Id.* at 508 (quoting *Sullivan*, 376 U.S. at 285). This Court should grant review to reaffirm the requirement for independent review in appellate cases raising First Amendment questions.

B. The Court of Appeals misapplied the actual malice standard, as Desmond’s evidence of purported actual malice does not prove the Newspaper Defendants had knowledge of or serious doubts about the veracity of the statements.

The Court of Appeals misapplied the actual malice standard by failing to require Desmond to prove by clear and convincing evidence that the Newspaper Defendants in fact harbored serious doubts about the truth of the allegedly defamatory statements, instead allowing Desmond to rely on evidence that does not prove knowledge of falsity or serious doubts. *Desmond*, 2018 WL at \*13–14, \*24. Desmond did not provide clear and

convincing evidence of actual malice. Instead, Desmond relied upon evidence that does not prove the Newspaper Defendants knew the challenged statements were false or entertained serious doubts about their truthfulness at the time of publication. The Court of Appeals' holding that this evidence demonstrated actual malice, *see id.* at \*24, reflects a misapplication of the actual malice standard.

Desmond first relied in part on a July 29, 2010 email written by News & Observer photographer Shawn Rocco to Locke as evidence of the Newspaper Defendants' purported bias. The Court of Appeals, taking this evidence in the light most favorable to the plaintiff, determined this email "tended to show that the primary objective of defendants was sensationalism rather than truth." *Id.* at \*15. However, reliance on this evidence presents two problems: (1) evidence of bias or hostility is not evidence of actual malice; and (2) the skeptical attitude reflected in the email is appropriate and normal for an investigative journalist.

First, evidence of bias does not demonstrate knowledge of falsity or the harboring of serious doubts. In other words, alleged hostility toward a story subject is not evidence of actual malice. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 73-74 (1964); *Griffin v. Holden*, 180 N.C. App. 129, 137, 636 S.E.2d 298, 305 (2006); *Varner v. Bryan*, 113 N.C. App. 697, 704, 440 S.E.2d 295, 300 (1994).

Second, Rocco's attitude toward the SBI was appropriate for an investigative journalist. There is a long history in American journalism of reporters taking a skeptical, aggressive approach toward those in power. *See, e.g., Ben Railton, Considering History: Walter Cronkite, David Halberstam, and Two Legacies of Adversarial Journalism*, Saturday

Evening Post, Feb. 27, 2018, <http://perma.cc/Y4BA-RGVM> (describing adversarial journalism practiced during the Vietnam War). Evidence that a reporter believes he is serving the public interest by unveiling abuses within government is not evidence that the journalist knew or had serious doubts about the truth of the published work. To the contrary, it logically demonstrates belief in the truth—not falsity—of the statements.

Desmond also partially relied upon evidence that the Newspaper Defendants misunderstood information provided by sources to show actual malice, and the Court of Appeals, again analyzing the evidence in the light most favorable to the plaintiff, found these misinterpretations to be evidence of actual malice. *Desmond* 2018 WL at \*13-14. But misunderstandings do not demonstrate actual malice. *See, e.g., Proffitt v. Greensboro News & Record, Inc.*, 91 N.C. App. 218, 228, 371 S.E.2d 292, 297 (1988) (affirming summary judgment for defendants for a lack of clear and convincing evidence of actual malice when the evidence suggested the reporter may have misunderstood plaintiff's comments to the reporter). In fact, evidence that a reporter misunderstood source information goes against a finding of actual malice, as it shows the reporter subjectively believed the published information was true and did not seriously doubt its veracity. Further, as discussed by the U.S. Supreme Court in *Time, Inc. v. Pape*, the news media does not act with actual malice when it publishes information that is a “rational interpretation” of a large amount of source material. 401 U.S. 279, 290 (1971) (“The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of ‘malice’ under [*Sullivan*].”). In other words, proof that a journalists’ understanding of the facts was “wrong” does not show the journalist acted with actual

malice, as falsity and actual malice are two separate elements of a successful public figure defamation claim.

The Court of Appeals has also found that where a defamation defendant misunderstands a situation and therefore publishes false information, actual malice cannot be found. *Lewis v. Rapp*, 220 N.C.App. 299, 304, 725 S.E.2d 597, 601-02 (2012). In *Lewis*, an internet poster stated in an initial blog entry on April 9, 2010, that a judicial candidate had violated the Code of Judicial Conduct, believing the candidate to be a sitting judge. *Id.* at 303-04. Noting that “it appears from all accounts that defendant believed that plaintiff was a sitting judge and not running for office,” the Court of Appeals found that while the defendant may have acted negligently, his misunderstanding of the situation demonstrated he did not act with actual malice. *Id.* (citing *St. Amant v. Thompson*, 390 U.S. 727, 729 (1968) (holding evidence of failure to verify statements does not amount to reckless disregard).

Here, Locke’s reporting provided a rational interpretation of the information provided by her sources. Assuming *arguendo* that Locke misunderstood her sources, there is no evidence that she knew her misunderstandings were incorrect. Without proof of such knowledge, as with the defendant in *Lewis*, the Newspaper Defendants cannot be found to have acted with actual malice. Demonstrating misunderstanding does not show the Newspaper Defendants had subjective knowledge or serious questions that the statements at issue were false. Therefore, the Court of Appeals erred in affirming the finding that the Newspaper Defendants acted with actual malice based upon claims that Locke misinterpreted source information. This significant error in the Court of Appeals’

analysis of the actual malice standard has the potential to mislead future courts and warrants review by this Court.

C. This Court has not considered a defamation action involving the news media in over 30 years.

The potential effects on North Carolina jurisprudence of the Court of Appeals' misapplication of the actual malice standard in defamation actions involving the news media is exacerbated given that this Court has not considered a defamation case involving a media defendant in over thirty years, and has never fully described the actual malice standard under North Carolina law in a defamation case involving a media defendant.

The last time this Court discussed defamation law in a case involving the news media was in 1988, in *Hall v. Post*, 323 N.C. 259, 372 S.E.2d 711, 712 (1988), in which the Court held that North Carolina law does not recognize a cause of action for tortious invasion of privacy by the truthful public disclosure of "private" facts. *Hall*, which concerned the privacy tort commonly referred to as the "public disclosure of private facts," discussed U.S. Supreme Court caselaw extending certain defenses required by the First Amendment in defamation cases to other types of tort actions. *Id.* at 266.

The last time this Court considered a defamation case involving the news media in which actual malice was at issue was in 1983, in *Taylor v. Greensboro News Co.*, 307 N.C. 459, 298 S.E.2d 385 (1983) (*per curiam*). There, the Court of Appeals had affirmed the trial court's grant of the defendant's motion for summary judgment because the plaintiff could not show actual malice. *Id.* at 459. The plaintiff filed a petition for further review, and the defendant moved to dismiss the petition. *Id.* This Court initially denied the

defendant's motion to dismiss the plaintiff's petition for further review, but later reversed its denial, finding the plaintiff's petition had been improvidently granted. *Id.* The Court's decision in *Taylor* included no substantive discussion of the actual malice standard, and this Court has never published a full discussion of actual malice in a case involving the news media.

While the news media enjoys no special constitutional protections from defamation liability beyond that of other speakers, cases involving media defendants have traditionally given courts the opportunity to expound upon defamation law in general, and the actual malice standard specifically. *See, e.g., Sullivan*, 376 U.S. at 279–80; *Harte-Hanks Commc'ns, Inc.*, 491 U.S. 657, 685–89; *Gertz*, 418 U.S. at 339–48. Likewise, this case presents an important opportunity for this Court to further develop North Carolina jurisprudence on defamation law and the actual malice standard. Clarification by this Court on these important points of First Amendment law would surely assist courts across the state in correctly applying defamation law.

II. THIS COURT SHOULD GRANT DISCRETIONARY REVIEW BECAUSE THE SUBJECT MATTER OF THIS APPEAL IS OF SIGNIFICANT PUBLIC INTEREST.

A. First Amendment protections are most robust in defamation cases related to public officials because of the harmful effects of chilling press coverage of government.

The subject matter of this appeal is of significant public interest because the decision below could have a powerful chilling effect on North Carolina news outlets' reporting on the activities of public officials. *See* N.C. Gen. Stat. § 7A-31(b)(1) (stating a cause may be certified to the Supreme Court for review when “[t]he subject matter of the

appeal has significant public interest”). When the news media becomes reluctant to report about public officials for fear of unjustified liability for defamation, it is the public that loses valuable information it needs to hold the government to account.

The First Amendment affords robust protections for speech about public officials because such speech is “the essence of self-government.” *Garrison*, 379 U.S. at 74. Criticism of the government requires that the public be permitted to freely discuss the actions of government officials. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966); *see also Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (describing “criticism of [ ] official conduct” as the “heart” of the First Amendment). Therefore, public figure plaintiffs must prove both falsity and actual malice to succeed on a claim for defamation. *Garrison*, 379 U.S. at 74; *see also Sullivan*, 376 U.S. at 280. These requirements have been applied to public official defamation cases to prevent the “undoubted ‘chilling’ effect” that defamation liability otherwise would have on discussion of government actions. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

By placing a high burden on public official plaintiffs in defamation cases, the actual malice standard recognizes the critical importance of virtually unencumbered public conversation about public officials. Therefore, where—as here—the actual malice standard is misapplied, the result is an intolerable chilling effect on speech and press activities, which are critical to the public interest in a democratic society. This poses grave dangers to public discourse by not only punishing protected speech, but also by chilling an unquantifiable amount of future speech that otherwise would allow the public

to scrutinize government conduct. This is precisely the “intolerable self-censorship” that the First Amendment protects against. *See Gertz*, 418 U.S. at 340.

Here, the public interest in review by this Court is especially strong, as the reporting at issue concerned the operation of the criminal justice system, which is a matter of significant public concern. Press coverage of the justice system allows for essential public scrutiny, which “enhances the quality and safeguards the integrity” of the criminal justice process. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 569, 606 (1982) (finding a First Amendment right of access to criminal trials). Here, the News and Observer articles at issue raised important questions about the reliability of SBI investigatory techniques and about the quality of Desmond’s official work. The public has an interest in overseeing such investigatory work in order to hold the criminal justice system accountable. *Cf. Hall v. Piedmont Publ’g Co.*, 46 N.C. App. 760, 763, 266 S.E.2d 397, 400 (1980) (declaring a medical examiner a public official under defamation law because of the “potential for great social harm if [the position was] abused”).

It is the province of the press to bring to light potential problems within government in general, and within the criminal justice system specifically. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs.”); *see also N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (noting that the press plays an “essential role in our democracy”). Because the actual malice standard was misapplied below, the Court of Appeals’ decision, if allowed to stand, will discourage North Carolina journalists from fulfilling this watchdog function. This case will therefore have the

troubling effect of preventing the citizens of North Carolina from accessing information about the functioning of its government.

Because the speech at issue in this case serves the public's interest in examining government conduct within the criminal justice system, a chilling effect stemming from this case would be particularly detrimental to the public interest. The verdict in this case is particularly dangerous because its crippling size will weigh on the shoulders of all North Carolina news organizations. *See Sullivan*, 376 U.S. at 294 (Black, J., concurring) (“The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials.”)

The Court of Appeals decision, if allowed to stand, puts at risk the public's right to know of the activities of government officials, as facilitated by the press. Aggressive journalism is the oxygen of democracy. When news organizations are chilled from reporting on issues related to government and public officials, the public is deprived of the important information it needs to hold its government and public officials accountable. Therefore, in order to protect the public interest, this Court should grant review and correct the misapplication of the actual malice standard in this case.

#### CONCLUSION

The Court of Appeals decision below, and specifically its misapplication of the actual malice standard, threatens significant effects on important principles within North Carolina law and also threatens to harm the public interest. For the reasons set forth above, *amici* respectfully urge this Court to certify this case for discretionary review.

Respectfully submitted, this 11th day of January, 2019.

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CONTENTS OF APPENDIX

Statements of Interest for *Amici Curiae* ..... A-1

Ben Raiton, *Considering History: Walter Cronkite, David Halberstam, and Two Legacies of Adversarial Journalism*, Saturday Evening Post, Feb. 27, 2018, <https://perma.cc/Y4BA-RGVM> ..... B-1

APPENDIX A

STATEMENTS OF INTEREST OF AMICI CURIAE

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

**ABC, Inc.** is a broad-based communications company. Alone or through its subsidiaries, it owns ABC News, abcnews.com, and local broadcast television stations such as WTVD in Raleigh, North Carolina, that regularly gather and report news to the public. ABC News produces the television programs *World News Tonight with David Muir*, *Good Morning America*, *Nightline*, *20/20*, and *This Week*, among others.

**The Associated Press, Inc.** ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100

countries. The AP covers news in all 100 North Carolina counties. On any given day, AP's content can reach more than half of the world's population.

**Capitol Broadcasting Company, Incorporated** ("CBC"), is a North Carolina corporation located in Wake County. Among other things, CBC owns and operates three television stations in North Carolina, including WRAL-TV, which provides broadcast and online coverage of news about Raleigh and the surrounding area.

**Community Newspapers Inc.** publishes 25 newspapers in Georgia, Florida and North Carolina. In North Carolina, Community Newspapers Inc. publishes *The Andrews Journal*, the *Cherokee Scout*, the *Clay County Progress*, the *Crossroads Chronicle*, *The Franklin Press*, *The Graham Star*, *The Highlander*, the *Mitchell News-Journal*, and the *Smoky Mountain Times*.

**The Fayetteville Observer**, a division of DB North Carolina Holdings, Inc., is a news organization that maintains its principal place of business in Cumberland County, North Carolina. Among other things, the company publishes *The Fayetteville Observer*, a daily general interest newspaper that circulates in Cumberland and surrounding counties. The company also publishes a news and information website at [www.fayobserver.com](http://www.fayobserver.com).

**Gannett Co., Inc.** is a leading news and information company which publishes USA TODAY and more than 100 local media properties, including the *Asheville Citizen-Times*. Each month more than 120 million unique visitors access content from USA TODAY and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.

**Nexstar Media Group, Inc.** ("Nexstar") is a leading diversified media company that leverages localism to bring new services and value to consumers and advertisers through its traditional media, digital and mobile media platforms. Nexstar owns, operates, programs or provides sales and other services to 169 television stations and related digital multicast signals reaching 100 markets or approximately 39% of all U.S. television households. Nexstar owns and operates television stations WNCT-TV in Greenville, North Carolina, and WNCN in Raleigh, North Carolina.

The **North Carolina Association of Broadcasters** ("NCAB") is a trade association whose regular members include nearly all of the television and radio stations in North Carolina—some 32 television stations and 168 radio stations statewide. An important function of NCAB is to represent the interests of its members in the state and federal courts of North Carolina in cases addressing issues of free speech and the First Amendment. NCAB has been granted

leave to file *amicus curiae* briefs in numerous cases before the North Carolina Supreme Court and North Carolina Court of Appeals in matters involving First Amendment issues, public records, open meetings, and other matters that could impact on its members' various newsgathering and news reporting activities.

**The North Carolina Press Association** is a trade association of 150 daily and weekly newspapers across the state. Since 1873 NCPA has supported North Carolina newspapers, readership and advertising. NCPA works to protect the public's right to know through the defense of open government and First Amendment freedoms, and NCPA helps maintain the public's access to local, state and federal governments.

**The Pilot, LLC**, is a North Carolina corporation located in Southern Pines that publishes *The Pilot*, a twice-weekly newspaper, and [www.thepilot.com](http://www.thepilot.com), both of which provide coverage of news in Moore County and the surrounding area.

**Tribune Media Company** ("Tribune") through its subsidiary Tribune Broadcasting Company, LLC, owns or operates 42 local television stations, reaching more than 50 million households, making it the largest independent station group in the United States, with affiliates representing all of the major over-the-air networks,

including CBS, ABC, FOX, NBC, the CW, and My TV. Tribune owns and operates WGHP in Greensboro.

**WBTV, LLC** (“WBTV”) is a Delaware limited liability company that is authorized by the North Carolina Secretary of State to do business within the state and whose principal place of business is located in Charlotte, Mecklenburg County, North Carolina. WBTV covers news in greater Charlotte and the surrounding areas of North Carolina and South Carolina, and statewide issues throughout North Carolina. WBTV also disseminates online coverage at [www.wbtv.com](http://www.wbtv.com). WBTV is owned by Gray Television.

APPENDIX B

NEWS ARTICLE CITED BY *AMICI CURIAE*



[Home](#) / [History](#) / [Considering History: Walter Cronkite, David Halberstam, and Two Legacies of Adversarial Journalism](#)

## Considering History: Walter Cronkite, David Halberstam, and Two Legacies of Adversarial Journalism

By: [Ben Railton](#)

Published: February 27, 2018

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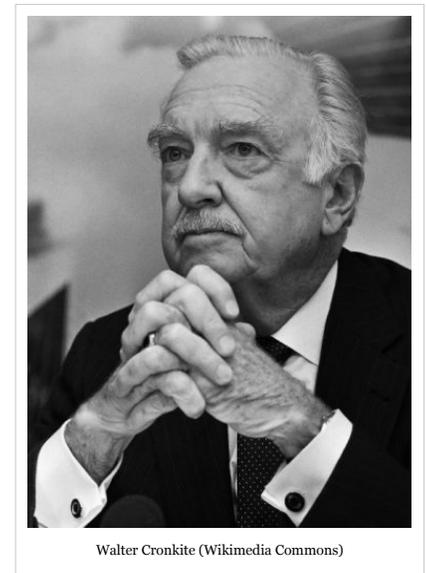
*This series by American studies professor Ben Railton explores the connections between America's past and present.*

Fifty years ago this evening, on February 27, 1968, legendary CBS News anchor Walter Cronkite concluded a special report on the ongoing conflict in Vietnam with a [striking three-minute commentary](#). The special report had cast a long and searching look at the haphazard progress and challenges of the “police action” in Southeast Asia, but Cronkite’s closing commentary went much further still.

Acknowledging that his “analysis must be speculative, personal, subjective,” he nonetheless laid bare the stark realities of the situation in Vietnam: “For it seems now more certain than ever, that the bloody experience of Vietnam is to end in a stalemate. To say that we are closer to victory today is to believe in the face of the evidence, the optimists who have been wrong in the past.”

Cronkite’s sober realism wasn’t just an overarching attempt to counter such optimistic narratives of the war—it was also quite specifically adversarial to the perspectives coming out of the American military and political leadership. “With as much restraint as I could,” Cronkite narrated, “I turned to our own leaders whose idea of negotiation seemed frozen in memories of General McArthur’s encounter with the Japanese aboard the Battleship Missouri. ... We’ve been too often disappointed by the optimism of the American leaders.” As he so often did, Cronkite presented this adversarial stance in a restrained and civil way, a tone befitting his role as an elder statesman of American journalism. But his opposition to the narratives coming out of Washington was clear and crucial nonetheless.

That restrained, civil, and statesmanlike form of rebuke could be called public adversarial journalism, and was a key facet of [Cronkite’s voice and role](#) throughout his decades on the air. It had the ability to shift national conversations in a gentle but very real way, framing a new way of understanding unfolding histories and issues for both Cronkite’s listeners and the powerful figures to whom he was speaking his truths. Building on the legacy of influential predecessors like [Edward R. Murrow](#), and making this critical tone a more consistent part of his efforts as anchor than any of his contemporaries, Cronkite’s public adversarial journalism became a vital component of the television news landscape throughout the 1960s and 70s.



Walter Cronkite (Wikimedia Commons)



David Halberstam in 1978. (William H. Mortimer, Wikimedia Commons)

Yet while such public adversarial journalism has vital roles to play in changing national conversations by speaking uncomfortable truths, it is not necessarily as well-equipped for investigating and uncovering such truths. For that, a more private adversarial journalism is needed, one that confronts leaders and spin artists directly, calls them out on their partial or false representations, and works to find the truth that lies behind them. In the same period as Cronkite’s public stance on the Vietnam War, a young [investigative journalist named David Halberstam](#) modeled this form of private adversarial journalism, helping shift the relationship of war journalists to the military effort in the process.

Halberstam told the story of his most striking and inspiring moment of private adversarial journalism in a [2005 speech to the Columbia School of Journalism](#):

Probably the moment I am proudest of in my career is this: By the fall of 1963, I was one of a small group of reporters in Saigon— we had enraged Washington and Saigon by filing pessimistic dispatches on the war. In particular, my young colleague, Neil Sheehan, and I were considered the enemy. The president of the United States, JFK, had already asked the publisher to pull me.

One day that fall, there was a major battle in the Delta (the Americans were not yet in a full combat role; they were in an advising and support role). MACV—the American military command— tried to keep out all reporters so they could control the information. Neil and I spent the day pushing hard to get there—calling everyone, including Ambassador Henry Cabot Lodge and General Paul Harkins. With no luck, of course.

In those days, the military had a daily late afternoon briefing given by a major or a captain, called the Five O’clock Follies, because of the generally low value of the information.

On this particular day, the briefing was different, given not by a major but by a major general, Dick Stilwell, the smoothest young general in Saigon. It was in a different room and every general and every bird colonel in the country was there. Picture if you will rather small room, about the size of a classroom, with about 10 or 12 reporters there in the center of the room. And in the back, and outside, some 40 military officers, all of them big time brass. It was clearly an attempt to intimidate us.

And I stood up, my heart beating wildly—and told him that we were not his corporals or privates, that we worked for *The New York Times* and UP and AP and *Newsweek*, not for the Department of Defense.

I said that we knew that 30 American helicopters and perhaps 150 American soldiers had gone into battle, and the American people had a right to know what happened.

Through this and many other moments of private adversarial journalism, Halberstam and colleagues like Sheehan were able to uncover the truth of what was happening with US forces and efforts in Vietnam—a truth that became a crucial influence on shifting the perspectives of the war of public journalists and figures like Cronkite.

While they differ in tone, role, and other specifics, Cronkite's and Halberstam's public and private adversarial journalism are ultimately complementary, each a necessary part of a journalistic enterprise that pursues truth and presents it to its audiences and society. The legacies of both these men and moments remain vital models for American journalism.



The Saturday Evening Post History Minute: The Man Who Saved Andrew Johnson's Presidency



The People Machine: A History of Elections and Algorithms



8 of History's Most Destructive Lies

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