No. 12-35238, 12-35319

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

OBSIDIAN FINANCE GROUP, LLC, *ET AL.*,

Plaintiffs-Appellees and Cross-Appellants,

v.

CRYSTAL COX,

Defendant-Appellant and Cross-Appellee.

Appeal from the United States District Court for the District of Oregon, Case No. 3:11-cv-00057-HZ The Honorable Marco A. Hernandez

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c)(1), *amicus* states that The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae The Reporters Committee for Freedom of the Press ("The Reporters Committee" or "*amicus*") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. *Amicus* has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Amicus has a strong interest in ensuring that courts apply broad constitutional protections to all manner of journalists subject to defamation suits, whether mainstream reporters or bloggers. *Amicus* has concerns about the lower court's interpretation and application of Oregon's defamation law, particularly its analysis concerning when speakers can be classified as members of the media and what speech constitutes matters of public concern.

SOURCE OF AUTHORITY TO FILE

Counsel for Cox consented to the filing of this brief amicus curiae. Counsel for Plaintiff-Appellee and Cross-Appellant Obsidian Finance Group, LLC ("Obsidian") did not. As such, *amicus* has submitted a motion for leave to file this brief, pursuant to Fed. R. App. P. 29(a)

FED. R. APP. P. 29(c)(5) STATEMENT

Amicus states that:

(A) no party's counsel authored this brief in whole or in part;

(B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) no person — other than the *amicus curiae*, its members or its counsel — contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision in the trial court below turned on whether a blogger defendant was a journalist and whether her speech involved a matter of public concern – both of which affects the standard of liability under Oregon law.

In addressing the question of who qualifies as a member of the news media, the lower court adopted several restrictive criteria that do not take into account the fast-evolving nature of the journalism profession and that severely limited the class of individuals who can take advantage of the increased First Amendment protections that limit the law of defamation. The determination of whether a particular person qualifies for such protections cannot be based on what a journalist's job traditionally has been; rather, any test must be closely matched to the constitutionally protected function journalists perform.

In assessing whether the speech in this case involved a matter of public concern, the lower court focused on the status of the plaintiffs and pointed out the lack of public debate in the subject matter of the speech. But speech that has yet to stir any public controversy may be no less a matter of public concern than speech that arises after a public dispute develops. To hold otherwise has the potential to provide newsgatherers who are first to alert the public to potential misconduct – breaking the story before there is any public awareness, much less interest – a lesser degree of constitutional protection than individuals who speak out only after

the public is already aware of the facts of the story. Such a rule would turn First Amendment jurisprudence on its head. The lower court is in error and should be reversed.

ARGUMENT

I. The distinction between media and non-media defendants in private-figure libel suits creates a heightened interest in broadly defining the term "news media."

In *New York Times v. Sullivan*, the United States Supreme Court made its first foray into grafting First Amendment protections onto state common law rules that had allowed strict liability in defamation actions, holding that a state cannot award public officials damages for defamatory statements concerning their official conduct without proof that such statements were made with "actual malice" – that is, with knowledge of falsity or reckless disregard of the truth. 376 U.S. 254 (1964). The Court's *New York Times* constitutional fault protections were subsequently extended to public figures. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). With respect to private figures, the Supreme Court in *Gertz v. Robert Welch* held 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 which injures a private individual and whose substance makes substantial danger to reputation apparent." 418 U.S. 323, 347

(1974). Further, the Court held that no award of punitive and presumed damages may be awarded without a showing of actual malice. *Id.* at 349.

The Supreme Court in *Dun & Bradstreet v. Greenmoss Builders, Inc*. later interpreted *Gertz's* holding prohibiting strict liability in state defamation laws to apply specifically to matters of public concern. 472 U.S. 749, 757 (1985) ("We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern."). Yet one issue left unresolved by the Supreme Court is whether *Gertz'* prohibition on strict liability concerning speech on matters of public concern is limited to media defendants. While referring multiple times to the interests of the press and broadcast media, the Court in *Gertz* did not expressly state that its holding applies only in situations involving media defendants. 418 U.S. at 347. The dissenting justices in *Dun & Bradstreet* noted their agreement with the Court's decision to avoid any media/nonmedia distinction in concluding that the speech at issue did not involve matters of public concern. 472 U.S. at 784 ("[I]n the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." (Brennan, J., dissenting)).

Less than a year later, the Supreme Court in *Philadelphia Newspapers v. Hepps* declined to resolve the question of whether media defendants and their nonmedia counterparts receive equal First Amendment protections in defamation

law. 475 U.S. 767 (1985). Justice Sandra Day O'Connor's majority opinion left open the possibility of a different outcome for nonmedia defendants in holding that a private figure plaintiff could not recover damages without first proving the defamatory statements made by a media defendant on an issue of public concern were false. *Id*. at 779, n.4. The Supreme Court has yet to definitively decide whether the constitutional protection afforded by *Gertz* applies to nonmedia defendants, leaving lower courts split on the issue. Several states do not apply *Gertz* in situations where there is a nonmedia defendant.[1] Other jurisdictions, however, have eliminated the distinction between media and nonmedia defendants.[2]

In Oregon, whose law the lower court applied in this diversity jurisdiction case, the state Supreme Court has interpreted the *Gertz* fault standards to apply only to media defendants. *Bank of Oregon v. Indep. News, Inc.*, 298 Or. 434 (Or. 1985), *cert. denied*, 474 U.S. 826 (1985). The distinction between the standard of

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[1] *See, e.g., Denny v. Mertz*, 106 Wis. 2d 636, 660-61 (Wis. 1982) (Gertz inapplicable to nonmedia defendants), *cert. denied*, 459 U.S. 883 (1982); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257-59 (Minn. 1980) (same); *Rowe v. Metz*, 195 Colo. 424 (Colo. 1978) (same).

[2] *See, e.g., Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986); *Antwerp Diamond Exchange, Inc. v. Better Business Bureau*, 130 Ariz. 523 (Ariz. 1981); *Jacron Sales Co. v. Sindorf*, 276 Md. 580 (Md. 1976).

liability for a media defendant and a nonmedia defendant thus makes the definition of that term critically important in libel cases decided under Oregon law.

II. Courts must interpret the term "media defendant" broadly enough to include any content providers who have the intent, when gathering information, to disseminate it to the public.

Long before the advent of the Internet, the Supreme Court recognized that the definition of "press" does not depend on the medium of distribution of the speech in question. In *Lovell v. City of Griffin*, the Court made clear that "[t]he liberty of the press is not confined to newspapers and periodicals. … The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." 303 U.S. 444, 452 (1938). Indeed, many courts and legal scholars have openly expressed their concerns with the difficulties of defining who may fairly be classified as a journalist.[3]

Many courts, including this one[4], have adopted workable definitions of news media in reporter's privilege cases, holding that a testimonial privilege applies to

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[3] *See, e.g., Dun & Bradstreet*, 472 U.S. at 782 (Brennan, J., dissenting); Thomas D. Brooks, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 Rutgers Computer & Tech. L.J. 461, 479 (1995) (stating that reliance on whether defendant belongs to media "would confront the Court with the slippery-slope task of defining 'the media'"); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 935 (1978) (stating that affording less First Amendment protection to nonmedia defendants "would require difficult determinations as to which communications would and would not merit the label 'press' or 'media'").

[4] *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

individuals engaged in the practice of compiling information for public dissemination. The criteria adopted encompass not simply the traditional press but also nontraditional newsgatherers such as those who, without any affiliation with a recognized media entity, publish their material online.

The U.S. Court of Appeals for the Second Circuit was among the first to establish that a nontraditional journalist can invoke a reporter's privilege when, at the time of the newsgathering, he or she has the intent to investigate and disseminate news to the public. *Von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987). The *von Bulow* case involved a civil lawsuit that Sunny von Bulow's children brought against her husband, Claus von Bulow, who allegedly drugged her and caused an irreversible coma. *Id.* at 138-40. The plaintiffs sought information from the author of a book about the investigation into the crime. *Id.* In determining whether it should apply a reporter's privilege to the book author, the court stated that:

> [T]he individual claiming the privilege must demonstrate, through competent evidence, the intent to use material-sought, gathered or received-to disseminate information to the public and that such intent existed at the inception of the newsgathering process. … Further, the protection from disclosure may be sought by one not traditionally associated with the institutionalized press.

Id. at 144-145. On the facts, the court found that the author did not have the benefit of the reporter's privilege because she was not independent of the von Bulows and

did not have the intent to disseminate news. Indeed, the author had a close relationship with Claus von Bulow and admitted during oral argument that her intent in writing a book was to vindicate him, not to publish an account of the situation. *Id.* at 145. The Third Circuit also adopted this test in *In re Madden*, 151 F. 3d 125, 129 (3d Cir. 1998) (holding that an employee of World Championship Wrestling who recorded reports about professional wrestlers for a paid telephone hotline was not a journalist entitled to the reporter's privilege because he was not independent of World Championship Wrestling and did not have the requisite "intent at the inception of the newsgathering process to disseminate investigative news to the public").

This Court in *Shoen v. Shoen* adopted a test similar to the one in *von Bulow* when it held that a reporter's privilege applied to an investigative book author. 5 F.3d 1289, 1295 (9th Cir. 1993). It reiterated the *von Bulow's* reasoning that "[t]he journalist's privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public." *Id.* at 1293. In noting that "[w]hat makes journalism journalism is not its format but its content," the *Shoen* court concluded that "the critical question for deciding whether a person may invoke the journalist's privilege is whether she is gathering news for dissemination to the public." *Id.*

Similarly, the U.S. Court of Appeals for the First Circuit applied the privilege to two academic researchers, *Cusmano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998):

> [T]he medium an individual uses to provide his investigative reporting to the public does not make a dispositive difference in the degree of protection accorded to his work. … Whether the creator of the materials is a member of the media or of the academy, the courts will make a measure of protection available to him as long as he intended "at the inception of the newsgathering process" to use the fruits of his research "to disseminate information to the public."

Id. at 714 (quoting *von Bulow*, 811 F.2d at 144). The court went on to say that the authors were protected by the privilege because their intent had been to "compile, analyze, and report their findings." *Id.* at 715.

More recently, the New Hampshire Supreme Court found that the reporter's privilege derived from the state constitution's guarantee of freedom of the press protected a website providing information about the mortgage industry. *Mortgage-Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 999 A.2d 184 (N.H. 2010). The court rejected an argument that the website was ineligible for protection under the privilege because it was neither an established media entity nor engaged in investigative reporting. *Id.* at 189. Rather, because the website "serve[d] an informative function and contribute[d] to the flow of information to the public … [it was] a reporter for purposes of the newsgathering privilege." *Id.*

The medium in which an author offers news or information to the public is irrelevant, as these cases indicate. An author's function, not the chosen medium of publication, is what triggers a shield law's protection.

Similarly, it is the author's function that determines whether he or she could be fairly classified as a member of the media and therefore entitled to the constitutional protections afforded by *Gertz*. Indeed, such nontraditional authors have made significant contributions to the public interest throughout this nation's history, from the reform of the meat industry in the early 20th century, to exposing the health hazards of tobacco, to shaping public opinion about the Vietnam War. *See* Leon Harris, *Upton Sinclair: American Rebel* 85-90 (1975); Carl Jensen, *Stories That Changed America: Muckrakers of the 20th Century* 78-81 (2000). In light of the recent evolution in the media industry and its shift toward online publication, this case presents an opportunity for this Court to recognize that nontraditional journalists can claim the constitutional protections of *Gertz*.

III. Courts must apply a broad definition of whether speech is in the public interest for purposes of establishing the standard of fault in libel cases.

The question of what constitutes a matter of public concern must be answered broadly to protect constitutional interests. One commentator has noted that:

> Whether a statement is about a matter of public concern, and therefore falls within the *Hepps* doctrine [that truth is an absolute defense on matters

> of public concern], is not always easy to answer. Authority on the subject is sparse. The Supreme Court has said little beyond its observation that content, form, and context must be taken into account.
>
> A broad reading of the term is required. The courts would otherwise be called upon repeatedly to play the constitutionally suspect role of super-editor, deciding on a case-by-case basis what is newsworthy. This is a function that the Supreme Court has, under First Amendment principles, explicitly eschewed.

Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems*, § 3-3.2 (Westlaw 2012) (internal footnotes omitted). Judge Sack's reference to "content, form, and context" comes from *Dun & Bradstreet*, 472 U.S. at 761 (plurality opinion) (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)) ("[W]hether a publication addresses a matter of public concern 'must be determined by the content, form, and context of a given statement, as revealed by the whole record.'"). The Court's citation to *Connick*, a public employee speech case, shows its willingness to look beyond libel law for standards in this area.

The federal district court in Oregon has broadly defined an issue of public interest. In *Higher Balance, Inc. v. Quantum Future Group, Inc.*, the court rejected a defendant's contention that because comments posted to an online forum discussing the quality of a plaintiff's products and services were of interest only to a limited subsection of the public, they did not constitute matters of public interest. 2008 WL 5281487 (D.Or. Dec. 18, 2008).

An Oregon appellate court similarly relied on the expansive meaning of what defines public interest issues, but ultimately found that the speech in the case before it did not qualify. In *Cooper v. Portland Gen. Elec. Corp.*, the Oregon Court of Appeals did not recognize a public interest in a power company's letter about an employee because the statements "involved a question of personnel management, not a publicly debatable question concerning security policies at Trojan [nuclear facility]. The statements were not published in a way that made them available to the general public and they were not a subject for public discussion or comment. They involved a purely private matter between private parties." 110 Or. App. 581, 588 (Or. App. Ct. 1992).

The U.S. Supreme Court in *Snyder v. Phelps* recently reiterated the need, in analyzing whether speech is of public interest, for a set of "principles that accord broad protection to speech to ensure that courts themselves do not become inadvertent censors," 131 S.Ct. 1207, 1216 (2010). Both the Supreme Court and this Court have held that courts must make an independent examination of the entire record to review "the content, form, and context of a given statement" in analyzing whether speech addresses matters of public or private concern. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983); *Brownfield v. Yakima*, 612 F.3d 1140, 1149 (9th Cir. 2010). "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to

the community,' *Connick*, 461 U.S. at 146, or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *San Diego v. Roe*, 543 U.S. 77, 83-84 (2004).

In *Snyder*, the Supreme Court concluded that despite the crude nature of the "social or political commentary" contained in signs reading "Thank God for IEDs," "America Is Doomed," and "God Hates Fags" carried by members of a Topeka church protesting the funerals of dead soldiers, the content of the signs plainly spoke to broader public concerns relating to the state of society, not to private issues pertaining to a particular funeral. 131 S.Ct. at 1216-17. In light of these circumstances, the Court found that the church speech involved matters of public concern. *Id*. at 1219.

This Court in *Ulrich v. City and County of San Francisco* found that a physician's protests of the layoffs of fellow doctors "touched on the ability of the hospital to care for its patients" and therefore constituted information of public concern because it could help the public make "informed decisions about the functioning of government." 308 F.3d 968, 978 (9th Cir. 2002). This Court stated that "[t]he scope of the public concern element is defined broadly in recognition that 'one of the fundamental purposes of the first amendment is to permit the public to decide for itself which issues and viewpoints merit its concern.' *Id*. at 978 (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir.1983).

In evaluating the public nature of the speech in question, particularly with respect to the context prong of *Connick*, this Court looks to the "point" of the speech, evaluating factors such as the targeted audience and the motivations of the speaker. *Id*. This Court relied on these same factors in *Gilbrook v. City of Westminster*, concluding that a firefighter's comments to the press claiming that a casualty from a fire resulted from the acts of city officials in "placing politics above public safety" was clearly a matter of public concern. 177 F.3d 839, 850 (9th Cir. 1999). In *Chateaubriand v. Gaspard*, this Court also found that communicating to a subset of the public – in this case, complaints to staff – rather than to the general public "does not remove [the speech] from the realm of public concern." 97 F.3d 1218, 1223 (9th Cir. 1996).

In the present case, the analysis the lower court undertook in determining that Crystal Cox's speech was not a matter of public concern was too narrow to comply with the broad principles outlined by both this Court and the Supreme Court. *Obsidian Finance Group, LLC v. Crystal Cox*, No. 3:11-cv-57-HZ (D. Or. March 27, 2012). The lower court attempted to distinguish Cox's case with several cases she cited in her brief in support of her motion for a new trial by emphasizing that those cases demonstrated a higher level of public concern by exposing political corruption. *Id*. Such a narrow interpretation of the public concern test is at odds with both this Court and the Supreme Court.

Therefore, this Court should reverse the lower court's ruling and remand with instructions for a more thorough assessment of whether Cox meets the public concern test under the proper constitutional standards.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court reverse the lower court's denial of Defendant-Appellant Crystal Cox's motion for a new trial.

Dated: October 17, 2012
Arlington, VA

Respectfully Submitted,
By: */s/ Bruce D. Brown*

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I hereby certify that the foregoing brief *amicus curiae*:

1) Complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 3,550 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-processing system used to prepare the brief; and

2) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: October 17, 2012
Arlington, VA

/s/ Bruce D. Brown

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2012, I electronically filed in searchable Portable Document Format the foregoing brief *amicus curiae* with the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system, thereby affecting service on the following counsel of record, all of whom are registered for electronic filing:

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