

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC NO. 11621
A.C. NO. 2013-P-1884

DONALD THOMAS SCHOLZ,
Plaintiff-Appellant

v.

BOSTON HERALD, GAYLE FEE,
AND LAURA RAPOSA,
Defendants-Appellees

**BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS AND 25 OTHERS AS *AMICI CURIAE***

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STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press and 25 additional *amici* listed below, through undersigned counsel, respectfully submit this brief as *amici curiae*.

Media organizations have an interest in the Court's interpretation of opinion in libel law. At times journalists may draw conclusions or pose questions based on the facts they disclose in their reporting. They have a strong interest in ensuring the Court continues to recognize that these statements cannot be the basis of a defamation suit, so that they may meaningfully contribute to the public discourse.

In addition to the Reporters Committee, the amicus parties are: Advance Publications, Inc., American Society of News Editors, Association of Alternative Newsmedia, The Association of American Publishers, Inc., Digital Media Law Project, Gannett Co., Inc., The Harvard Crimson, Inc., LIN Television Corporation (on behalf of WWLP and WPRI), Massachusetts Newspaper Publishers Association, MediaNews Group, Inc., d/b/a Digital First Media, Metro Corp. (Boston Magazine), MPA - The Association of Magazine Media, The National Press Club, National

Press Photographers Association, National Public Radio, Inc., The New England Center for Investigative Reporting, New England First Amendment Coalition, New England Newspaper and Press Association, Inc., Newspaper Association of America, North Jersey Media Group Inc., The Seattle Times Company, Society of Professional Journalists, Time Inc., Tully Center for Free Speech, and The Washington Post. Each is described more fully in Appendix A.

DISCLOSURE STATEMENTS

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

Advance Publications, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

American Society of News Editors is a private, non-stock corporation that has no parent.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

The Association of American Publishers, Inc. is a nonprofit organization that has no parent and issues no stock.

Digital Media Law Project ("DMLP") is an unincorporated association based at the Berkman Center for Internet & Society at Harvard University. DMLP is not a publicly held corporation or other publicly held entity. DMLP has no parent corporation, and no publicly held company owns 10% or more of DMLP.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company holds 10% or more of its stock.

The Harvard Crimson, Inc. is not publicly traded, and no publicly held entity owns 10 percent or more of its stock.

LIN Television Corporation d/b/a LIN Media is the wholly owned subsidiary of LIN TV Corp., a Delaware corporation whose Class A common stock is traded on the New York Stock Exchange under the ticker symbol TVL.

The Massachusetts Newspaper Publishers Association is a non-profit corporation. It has no parent, and no publicly held corporation owns 10% or more of its stock.

MediaNews Group, Inc. is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

Metro Corp. is a privately held corporation owned primarily by D. Herbert Lipson and David H. Lipson and trusts that were established for the benefit of their heirs. No publicly held corporation owns 10% or more of Metro Corp.'s stock.

MPA - The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

National Public Radio, Inc. is a privately supported, not-for-profit membership organization that has no parent company and issues no stock.

NECIR is incorporated as a nonprofit corporation under chapter 180 of the Massachusetts General Laws. It has no parent corporation and no stock.

New England First Amendment Coalition has no parent corporation and no stock.

New England Newspaper and Press Association, Inc. is a non-profit corporation. It has no parent, and no publicly held corporation owns 10% or more of its stock.

Newspaper Association of America is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

North Jersey Media Group Inc. is a privately held company owned solely by Macromedia Incorporated, also a privately held company.

The Seattle Times Company: The McClatchy Company owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

Society of Professional Journalists is a non-stock corporation with no parent company.

Time Inc. is a wholly owned subsidiary of Time Warner Inc., a publicly traded corporation. No publicly held corporation owns 10% or more of Time Warner Inc.'s stock.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

WP Company LLC d/b/a The Washington Post is a wholly owned subsidiary of Nash Holdings LLC. Nash Holdings LLC is privately held and does not have any outstanding securities in the hands of the public.

SUMMARY OF THE ARGUMENT

The ability to make conclusions or offer conjecture based on disclosed facts is an essential part of free speech. The freedom of speech and of the press would be severely curtailed if journalists were not allowed to interpret the information they present to the public, and, ultimately, it is the public that would suffer the loss of important information about current events.

While opinion is not categorically exempt from defamation liability, the news reports in the present case base their conclusions on clearly stated facts, allowing the reader to see that the conclusion was but one person's judgment based on these facts. No reasonable reader would see the conclusion itself as a statement of fact. And if the reader did, it is clear that the conclusion is not a statement that can be proven false, as it relates to the motivation for a sad, personal act by a now-deceased person. Thus, the law is clear that the articles in question should not be the subjects of a libel suit.

Massachusetts law is equally clear in this area, and the recognition of a broad right to engage in commentary can be found in Article 16 of the state

constitution. In a situation where limitations on a First Amendment right are not consistent with established state precedent, this Court applies the greater protection of the state constitution.

ARGUMENT

I. The lower court properly granted Defendants' motion for summary judgment.

This Court has solicited input from *amicus* parties on the question of "[w]hether the statements published by the defendants, suggesting that the plaintiff was responsible for his former colleague's suicide, were, as the judge concluded, matters of opinion and not actionable assertions of fact for defamation purposes."

Protection of opinion in libel law evolved from a narrow "fair comment" privilege under the common law, to a broad protection after the U.S. Supreme Court introduced constitutional parameters that have led to the modern-day framework. See Restatement (Second) of Torts § 566 cmt. a (1977) (explaining that the common law allowed defamation actions against opinion unless protected as "fair comment" on a matter of public concern); Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill*, "Defamation and Privacy Under the First Amendment," 100 Colum. L. Rev. 294 (2000) (delineating the progression of opinion principles from the common law, through *New York Times v. Sullivan* and *Gertz*, to the

Second Restatement, and finally to *Milkovich* and beyond).

As applied to this case, the parameters are straightforward. This libel claim cannot prevail because the statements at issue are utter speculation, incapable of being adjudged as true or false, and because the facts supporting the statements were disclosed to readers. Issues of public controversy can rarely be reduced to black-and-white statements of good and bad, right and wrong, true and false. Good journalism will often contain conclusions, theories, conjecture, and even speculation. A rule of law that would cause journalists to shy away from that type of expression for fear of libel suits would be detrimental to the public understanding of important public controversies. A court has every interest in ensuring that false facts do not masquerade as opinion, but it must be careful to allow for robust and complete reporting on controversies that lack a clear and knowable outcome.

A. Courts decide opinion cases based on whether statements are provably false or interpreted as asserting facts.

The distinction between fact and opinion has always been of concern to courts and to speakers. In

1974, the Supreme Court summarized the long-standing distinction in libel law between facts and ideas:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). Emphasizing the deep historical roots of this premise, the Court cited Thomas Jefferson's first Inaugural Address for support. *Id.* at 340, n.8. Courts throughout the country relied on *Gertz* to find that statements of fact can be actionable as defamation, whereas statements of opinion cannot be. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990); *Leading Cases*, 104 Harv. L. Rev. 129, 219 (1990).

In 1990, the Supreme Court in *Milkovich* turned away from what it called a "mistaken reliance on *Gertz* dictum" and held that opinion is not categorically exempt from defamation liability. *Milkovich*, 497 U.S. at 19. There are times, the Court said, when opinion can be actionable, such as when an opinion implies it is based on undisclosed defamatory facts. *Id.* at 18-19.

As applied by courts since 1990, *Milkovich* has not fundamentally changed the way courts evaluate opinion in libel law. Sack, *supra*, at 322 ("Most courts considering opinion since *Milkovich* have therefore reached the result that they likely would have before the Supreme Court decided the case."). Justice Brennan had predicted as much in his dissent, saying the criteria that the *Milkovich* majority proposed for determining when opinion is not actionable "are the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion." *Milkovich*, 497 U.S. at 24 (Brennan, J., dissenting); see also *Leading Cases*, *supra*, at 219 ("Because the criteria used by lower courts since *Gertz* to distinguish fact from opinion are consistent with *Milkovich's* limitations, the law of defamation will remain essentially the same in many jurisdictions.").

In fact, the Court in *Milkovich* actually *reaffirmed* two broad principles relating to protection of opinion in libel law. The first is that "a statement on matters of public concern must be provable as false before there can be liability," a

rule from *Hepps*. *Milkovich*, 497 U.S. at 19-20 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986)). The second is that a statement is not defamatory if it "cannot 'reasonably [be] interpreted as stating actual facts' about an individual," a rule derived from what the Court termed the "*Bresler-Letter Carriers-Falwell* line of cases." *Milkovich*, 497 U.S. at 19-20. *Bresler* and *Letter Carriers* held that the use of the words "blackmail" and "traitor," respectively, were merely "rhetorical hyperbole" used in the "loose, figurative sense," and no reader would interpret them as implying a criminal offense. See *Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970); *Nat'l Ass'n Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974). The Court in *Falwell* held that a parody claiming Jerry Falwell had sex with his mother in an outhouse was protected as satire - even if "outrageous" and "offensive" - because readers would understand the parody was not stating facts about Falwell. *Hustler Magazine v. Falwell*, 485 U.S. 46, 53, 55 (1988).

Thus, *Milkovich* requires an analysis of (1) whether a statement can be proved true or false and (2) what a reader could interpret as fact. See

Milkovich, 497 U.S. at 19-20. These are two distinct principles independent of each other. Therefore, even if a statement is provable as false, it can still be protected opinion if a reader could not reasonably interpret it as stating "actual facts." See *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 729 (1992) (finding that the statements at issue could not reasonably be interpreted as stating actual facts regardless of "[w]hether or not the allegation of intentional deception meets the 'provable as true or false' criterion"). The lower court in this case held that the Boston Herald's statements were not actionable under either principle, though it could have made a determination under one but not the other. See *Scholz v. Boston Herald, Inc.*, 31 Mass. L. Rep. 315, 2013 Mass. Super. LEXIS 83, 26-28 (Super. Ct. 2013) (finding both that "no reasonable reader would understand that the insinuation running through all three articles that the plaintiff was responsible for Brad Delp's suicide was an assertion of fact" and that "it would be impossible for plaintiff to disprove the proposition that Scholz caused Delp to take his own life").

B. Statements by the Boston Herald regarding Brad Delp's death are not actionable because they are based on disclosed, nondefamatory facts.

Included in statements that cannot "reasonably be interpreted as stating actual facts" are opinions based on disclosed, nondefamatory facts. The majority in *Milkovich* did not squarely address this subset of opinion doctrine, but the First Circuit has held, and this Court has agreed, that the U.S. Supreme Court reaffirmed that "statements clearly recognizable as pure opinion because their factual premises are revealed" are not actionable, as they cannot be understood as stating "actual facts." *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 731 n.13 (1st Cir. 1992); *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 266-67 (1993) (citing *Phantom Touring*, 953 F.2d at 731 n.13). Several other federal circuit courts have also held that opinions based on disclosed, nondefamatory facts are not actionable under *Milkovich*. See, e.g., *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1187 (10th Cir. 2007) ("[W]e find little difference between [Restatement (Second) of Torts] § 566 [protecting opinion based on disclosed, nondefamatory facts] and

the *Milkovich* standard."); *Sullivan v. Conway*, 157 F.3d 1092, 1097 (7th Cir. 1998) ("The test is whether a reasonable listener would take him to be basing his 'opinion' on knowledge of facts of the sort that can be evaluated in a defamation suit." (citing *Milkovich*, 497 U.S. at 18-23, and Restatement (Second) of Torts § 566)); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 184 (4th Cir. 1998) ("*Milkovich* directs that an opinion may constitute actionable defamation, but only if the opinion can be reasonably interpreted to declare or imply untrue facts."); *Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997) (stating, after a discussion of *Milkovich*, "if a statement of opinion either discloses the facts on which it is based or does not imply the existence of undisclosed facts, the opinion is not actionable"); *Partington v. Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995) ("The courts of appeals that have considered defamation claims after *Milkovich* have consistently held that when a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment.").

An opinion can be actionable "only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Restatement (Second) of Torts

§ 566 (1977); see also *Lyons*, 415 Mass. at 262-63 (noting that this Court adopted this Restatement principle in *National Association Government Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 227 (1979)). This Court must "give weight to cautionary terms" and "consider all the circumstances surrounding the statement." *Lyons*, 415 Mass. at 263; see also *Moldea v. New York Times Co.*, 22 F.3d 310, 314 (D.C. Cir. 1994) (holding that a court must consider the context of the statements to "determine the way in which the intended audience will receive them"). In *Lyons*, the Boston Globe reported on a police union picket outside the Massachusetts Democratic convention, which delayed the start of the convention by several hours. *Lyons*, 415 Mass. at 259. The Globe article listed three possible motivations for the picket, including one theory coming from critics of a candidate who speculated that the candidate's supporters staged the picket to aid the candidate. *Id.* at 259-60. The article listed several facts to support this conclusion: the candidate needed 15% of the vote, his supporters were not confident he would receive 15% of the vote, a cancellation of the convention might have eliminated the 15% rule, and the

police union was a member of an organization that supported the candidate. *Id.* at 264. This Court held that the reasonable reader would understand the newspaper "engaged in speculation and deduction based on the disclosed facts." *Id.* at 266. Therefore, the statements were not actionable. *Id.*

Here, the Boston Herald based its opinion on disclosed, nondefamatory facts, so its statements are not actionable. In its first article, the Herald wrote that "the cops were not told why [Brad Delp] took his life," establishing at the outset that the reason for his suicide is unknown. Gayle Fee & Laura Raposa, *Suicide Confirmed in Delp's Death*, Boston Herald, Mar. 15, 2007. The article then delves into possible motivations for why Delp may have taken his own life. *Id.* First, it notes the conjecture of "friends" who said his "constant need to help and please people . . . may have driven him to despair." *Id.* (emphasis added). Then it discusses the "bitter break-up" of the band Boston and how Delp was "pulled from both sides by divided loyalties." *Id.* The article describes band member and plaintiff Tom Scholz as being on one side, other band members on the opposite side, and Delp in the middle. *Id.* The

article quotes an "insider" as saying Delp and Scholz were "the best of friends," yet Delp's family did not invite Scholz to the private funeral service for Delp. *Id.* The article also quotes a "close pal" as saying Delp "was a sad character," "didn't think highly of himself," and "was always self-deprecating." *Id.*

Therefore, much like the article in *Lyons* that offered multiple motivations for why picketers delayed the convention, *Lyons*, 415 Mass. at 259-60, this article described factors that may have motivated Delp to commit suicide, including tensions within the band and Delp's depressive mental state. Fee & Raposa, Mar. 15, 2007, *supra*. It was clearly a speculative article, stating at the outset that police did not know why Delp committed suicide. Even if some of the statements suggested Delp took his own life because of the tension between Scholz and other bandmates, that conjecture was supported by nondefamatory facts disclosed in the article. Readers were free to draw their own conclusion, based on the facts presented to them, whether Delp may have committed suicide because of the band's discord or for another reason entirely.

The Herald's second article quotes Delp's ex-wife, Micki Delp, as saying Delp was upset because his

longtime friend Fran Cosmo was "disinvited" from the summer tour and that Delp would "hurt himself before he would hurt somebody else." Gayle Fee & Laura Raposa, *Pal's Snub Made Delp Do It: Boston Rocker's Ex-Wife Speaks*, Boston Herald, Mar. 16, 2007. The article then quotes Scholz as saying the decision to disinvite Cosmo was not final, that it was a group decision to rehearse without Cosmo, and that Delp was not upset about it. *Id.* Additionally, the article quotes Delp's suicide notes, in which Delp wrote, "I am a lonely soul," "I take complete and sole responsibility for my present situation," and that he had "lost my desire to live." *Id.* It also quotes police reports saying Delp "had been depressed for some time." *Id.* Finally, the article discloses that Micki Delp's sister is married to one of the bandmates supposedly at odds with Scholz, alerting readers to any potential bias Micki Delp may have had in making her statements. *See id.*

Taken together, no reader could interpret the suggestion that Delp committed suicide because of his friend's disinvitation from tour as a statement of "actual facts." Surely after being told that police did not know why, that the suicide notes did not

reveal why, and that friends could only speculate why Delp committed suicide, readers could not reasonably believe that the writers of a short entertainment-news column were basing their conclusions on facts that readers did not know. Readers would clearly interpret the Herald's statements not as facts but as opinion and conjecture based on disclosed facts.

C. Statements by the Boston Herald regarding Brad Delp's death are not actionable because they are not provable as false.

A statement on matters of public concern is not actionable if it cannot be proved false. *Milkovich*, 497 U.S. at 19-20 (citing *Hepps*, 475 U.S. 767). The plaintiff bears the burden of proving falsity. *Hepps*, 475 U.S. at 776. The U.S. Supreme Court has recognized that placing this burden on plaintiffs would result in the protection of some false speech because it was not *provably* false. *Id.* at 778. However, the Court was willing to accept that risk, because the "First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.*

The plaintiff has a heavy burden in cases like this one where the publication offers a generalized statement about *potential* causes or actions. See

Dulgarian v. Stone, 420 Mass. 843, 847 (1995). To prove a speculative statement false, a plaintiff would have to show that the statement could not possibly be true. *See id.* In *Dulgarian*, a Boston TV station aired an investigative segment titled "Highway Robbery?" in which it suggested there may be conflicts of interest between body repair shops colluding with drive-in insurance appraisal services. *Id.* at 844. This Court ruled that the broadcast's statement that it "uncovered another area of potential abuse" was not provable as false. *Id.* at 847. Plaintiffs did not have a "reasonable expectation" of proving "there was no possibility, however slight, of any form of abuse in the matter under investigation." *Id.*

Here, Scholz cannot prove "there was no possibility, however slight" that Delp may have committed suicide because of tensions between Scholz and other bandmates. As the lower court rightfully held, "Delp's final mental state is truly unknowable; it can never be objectively verified." *Scholz*, 31 Mass. L. Rep. 315, 2013 Mass. Super. LEXIS 83 at *2. Perhaps his decision to commit suicide was caused by a combination of multiple factors, including being caught having concealed a camera in his fiancée's

sister's bedroom, struggling to keep the peace in a fractured band, learning that his friend may not tour with them, and suffering from a generally depressive mental state. See *id.* at *4-7.¹ It is impossible for Scholz to prove that his actions did not, in any way, contribute to Delp's decision to take his life. Delp himself may not have been able to pinpoint the exact moments that ultimately led to his breaking point. To say that tensions between Scholz and other bandmates could not possibly have been one of those moments leading to Delp's death is unprovable. See *Nat'l Ass'n of Gov't Emps. v. BUCI Television, Inc.*, 118 F. Supp. 2d 126, 131 (D. Mass. 2000) ("[T]he interpretation of another's motive does not reasonably lend itself to objective proof or disproof").

D. Offering analysis and conjecture is a core function of journalism that must be preserved to ensure a robust public discourse.

The Supreme Court has recognized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

¹ The incident with the camera was only disclosed during this litigation and was not known at the time of the articles. See *Singer's Last Days Detailed in Court Papers*, Boston Globe, May 27, 2012, available at <http://bit.ly/lhF5o0L>.

open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (U.S. 1964). Journalists cannot meaningfully contribute to that debate when they fear that every inference they utter or conjecture they make could form the basis of a defamation claim. The very essence of journalism lies in journalists' ability to quote sources, observe and describe events, and summarize information. Sometimes the totality of the facts presented forms an unflattering picture of somebody or leads some readers to a conclusion that might harm somebody's reputation. But journalists cannot and should not withhold truthful facts from the public domain simply because one possible conclusion in a range of conclusions is in some way negative. Even if the conclusion is wrong, the facts were right, and readers were free to make their own assessment.

As the First Circuit has noted, if writers are not allowed to offer a personal perspective to the facts they present, then they "would hesitate to venture beyond 'dry, colorless descriptions of facts, bereft of analysis or insight.'" *Riley v. Harr*, 292 F.3d 282, 290-291 (1st Cir. 2002) (quoting *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995)).

Allowing defamation recovery for statements offering

personal perspectives and conjecture would chill the speech of "commentators, experts in a field, figures closely involved in a public controversy, or others whose perspectives might be of interest to the public." *Id.*; see also *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995) ("[T]he robust debate among people with different viewpoints that is a vital part of our democracy would surely be hampered."). Journalists' core duties extend beyond a recitation of facts. They offer commentary and debate. They pose questions that may not have answers. When the media ask a question that implies an answer, and when that answer is plausible "within the wide range of possibilities, [then that] is precisely why we need and must permit a free press to ask the question." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1096 (4th Cir. 1993).

II. The Massachusetts common law and state constitution protect opinions based on disclosed nondefamatory facts, independent of the First Amendment.

This Court has made clear that Article 16 of the state constitution at times provides greater protection for speech than the First Amendment of the U.S. Constitution, holding that in comparing the analysis under the First Amendment and Article 16,

we leave open the possibility that, as here, art. 16 will call for a different result. In our weighing the ordinance in this case and the Supreme Court's reasoning in upholding a similar ordinance, we conclude that the Federal rule does not adequately protect the rights of the citizens of Massachusetts under art. 16.

Mendoza v. Licensing Bd., 444 Mass. 188, 201 (2005).

In evaluating whether a state constitutional provision provides greater protection than the federal Bill of Rights, the Court "look[s] to the text, history, and our prior interpretations" of the law. *Commonwealth v. Mavredakis*, 430 Mass. 848, 858, 725 N.E.2d 169, 177 (2000). The language of Article 16 is broad and affirmatively protects speech: "The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged." Mass. Const. pt. 1, art. XVI. The First Amendment, on the other hand, is worded as a restriction on congressional action: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

In examining "prior interpretations" of the speech right, it is clear that even if there were no federal constitutional protection, the rule protecting opinions based on disclosed nondefamatory facts "is by

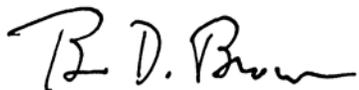
now an integral part of [Massachusetts] common law" and Article 16 of the commonwealth's Declaration of Rights. *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 267-69 (1993). Massachusetts has a strong public policy favoring "expressions of opinion based on disclosed information because we trust that the recipient of such opinions will reject ideas which he or she finds unwarranted by the disclosed information." *Id.* at 267. It is not for the courts to decide whether an opinion is right or wrong but for the "marketplace of ideas" to be the judge. *Id.* at 268. When supplied with a set of facts, readers are equipped to decide whether an opinion is true or false, and the statements are not actionable.

Therefore, even if the Boston Herald's statements were not protected by the federal constitution, they are protected by Massachusetts law.

CONCLUSION

For the reasons given above, as well as those given in the response of the appellee Boston Herald, the court should affirm the superior court's grant of summary judgment.

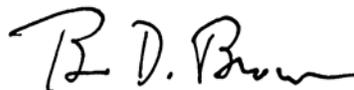
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CERTIFICATE OF COMPLIANCE

I, Bruce D. Brown, hereby certify that the foregoing brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of amicus briefs, including but not limited to: Mass. R. A. P. 17, 19, and 20.



Bruce D. Brown

May 1, 2014

APPENDIX A: DESCRIPTION OF AMICI

The Reporters Committee for Freedom of the Press 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. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Advance Publications, Inc., directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in 10 states, and leading business journals in over 40 cities throughout the United States. Through its subsidiaries, Advance also owns numerous digital video channels and internet sites and has interests in cable systems serving over 2.3 million subscribers.

With some 500 members, American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news

providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, 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.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic

products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Digital Media Law Project ("DMLP") provides legal assistance, education and resources for individuals and organizations involved in online and citizen media. DMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media.

Gannett Co., Inc. is an international news and information company that publishes more than 80 daily newspapers in the United States - including USA TODAY - which reach 11.6 million readers daily. The company's broadcasting portfolio includes more than 40 TV stations, reaching approximately one-third of all television households in America. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

The Harvard Crimson, Inc. publishes The Harvard Crimson, Harvard University's only student-run daily newspaper and the oldest continually operating college daily in the country. Its print publication reaches Harvard's students, faculty, staff, and administrators in addition to residents of Cambridge, Mass. The publication's website, thecrimson.com, gets 15,000 visits daily during the week.

LIN Television Corporation d/b/a LIN Media, which joins on behalf of its NBC affiliate in Springfield, MA (WWLP) and its CBS affiliate in Providence, RI (WPRI)(which market includes Massachusetts counties), is a local multimedia company that owns, operates or services 43 network-affiliated broadcast television stations, interactive television stations and niche websites and mobile platforms in 23 U.S. markets.

The Massachusetts Newspaper Publishers Association is the legal and legislative organization representing newspapers in Massachusetts.

MediaNews Group's more than 800 multi-platform products reach 61 million Americans each month across 18 states.

Metro Corp., the publisher of Boston magazine, is the nation's second largest publisher of city

magazines. Boston magazine is published monthly and has been reporting on Boston's cultural and political trends since 1963.

MPA - The Association of Magazine Media, ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization

dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations that are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and 10 years of archived audio and information.

The New England Center for Investigative Reporting ("NECIR") is a non-profit journalism center based at Boston University and with offices at the studios of WGBH News in Boston, Massachusetts. NECIR produces high-impact, public interest-oriented investigative reporting written by experienced, professional journalists with the assistance of student researchers. NECIR's stories appear in newspapers and on television and radio stations across Massachusetts, New England, and the nation.

New England First Amendment Coalition is a non-profit organization working in the six New England states to defend, promote and expand public access to government and the work it does. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians and academicians, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know in our region. In collaboration with other like-minded advocacy organizations, NEFAC also

seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

New England Newspaper and Press Association, Inc. ("NENPA") is the regional association for newspapers in the six New England States (including Massachusetts). NENPA's corporate office is in Dedham, Massachusetts. Its purpose is to promote the common interests of newspapers published in New England. Consistent with its purposes, NENPA is committed to preserving and ensuring the open and free publication of news and events in an open society.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing

company, parent of two daily newspapers serving the residents of northern New Jersey: The Record (Bergen County), the state's second-largest newspaper, and the Herald News (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County's premiere magazine. All of the newspapers contribute breaking news, features, columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper The Seattle Times, together with The Issaquah Press, Yakima Herald-Republic, Walla Walla Union-Bulletin, Sammamish Review and Newcastle-News, all in Washington state.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works

to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Time Inc. is the largest magazine publisher in the United States. It publishes over 90 titles, including Time, Fortune, Sports Illustrated, People, Entertainment Weekly, InStyle and Real Simple. Time Inc. publications reach over 100 million adults, and its websites, which attract more visitors each month than any other publisher, serve close to two billion page views each month.

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

WP Company LLC (d/b/a The Washington Post) publishes one of the nation's most prominent daily newspapers, as well as a website, www.washingtonpost.com, that is read by an average of more than 20 million unique visitors per month.

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