

IN THE  
SUPREME COURT OF VIRGINIA

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Record No. 140242

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YELP, INC.,

*Appellant,*

v.

HADEED CARPET CLEANING,

*Appellee.*

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**BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE  
PRESS AND 16 OTHERS AS *AMICI CURIAE* IN SUPPORT OF  
APPELLANT YELP**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST.....	iv
ARGUMENT .....	1
I.    Anonymous Online Commentary on Matters of Public Concern Is Vital to Public Participation and Debate. ....	1
A.    Commenting on News Websites Is a Primary Form of Public Participation That Must Be Protected with Heightened Evidentiary Standards.....	1
B.    Anonymous Speech Has a Long History of Protection Under the First Amendment.....	3
III.  The Virginia Unmasking Statute Must Be Interpreted Robustly, as Required by the First Amendment. ....	7
A.    The Statute’s “Supporting Material” Requirement Ensures a Heightened Evidentiary Standard, as Required by the First Amendment.....	7
B.    The Court Must Look at the Strength of the Party’s Underlying Claim to Ensure There Is a <i>Legitimate</i> , Good Faith Basis for Asserting a Claim. ....	10
C.    The Court Must Balance an Anonymous Speaker’s First Amendment Rights against the Plaintiff’s Interest in Unmasking Speakers.....	12
CONCLUSION.....	14
APPENDIX A: DESCRIPTION OF AMICI .....	15
APPENDIX B: ADDITIONAL COUNSEL .....	21

## TABLE OF AUTHORITIES

### Cases

<i>Buckley v. Am. Constitutional Law Found.</i> , 525 U.S. 182 (1999) .....	4
<i>Geloo v. Doe</i> , 2014 Va. Cir. LEXIS 36, 2014 WL 2949508 (Va. Cir. Ct. June 23, 2014) .....	9
<i>Indep. Newspapers, Inc. v. Brodie</i> , 966 A.2d 432 (Md. 2009) .....	3, 11
<i>Indiana Newspapers, Inc. v. Junior Achievement of Cent. Indiana, Inc.</i> , 963 N.E.2d 534 (Ind. Ct. App. 2012) .....	2, 3
<i>Kotlikoff v. Community News</i> , 444 A.2d 1086 (N.J. 1982) .....	2
<i>Krinsky v. Doe 6</i> , 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008) .....	11
<i>McIntyre v. Ohio Elections Comm'n</i> , 514 U.S. 334 (1995) .....	4, 7
<i>Talley v. California</i> , 362 U.S. 60 (1960) .....	4, 7
<i>Watchtower Bible &amp; Tract Soc'y v. Village of Stratton</i> , 536 U.S. 150 (2002) .....	4
<i>Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.</i> , 752 S.E.2d 554 (Va. Ct. App. 2014) .....	<i>passim</i>
<i>Ziglar v. Media Six, Inc.</i> , 61 Va. Cir. 173 (Cir. Ct. 2003) .....	1

### Statutes

Va. Code Ann. § 8.01-407.1 (2002) .....	8, 10
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### Other Authorities

Barbara Becker-Cantarino & Jeanette ClausenSource, <i>Gender Censorship: On Literary Production in German Romanticism</i> , 11 <i>Women in German Y.B.</i> 81 (1995) .....	4
Christopher Cooper, H. Gibbs Knotts, & Moshe Haspel, <i>The Content of Political Participation: Letters to the Editor and the People Who Write Them</i> , 42 <i>Pol. Sci. &amp; Pol.</i> no. 1, 2009 .....	2

*Contend Definition*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/contend> (last visited July 12, 2014).....10

David Cressy, *Book Burning in Tudor and Stuart England*, 36 *Sixteenth Century J.* 359 (Summer 2005) .....3

H. D. Traill, *The Anonymous Critic*, 34 *Nineteenth Century*, July–December 1893 .....6

Hans J. Hillerbrand, *On Book Burnings and Book Burners: Reflections on the Power (and Powerlessness) of Ideas*, 74 *J. Am. Acad. Religion* 593 (2006) .....4

Oscar Maurer Jr., *Anonymity vs. Signature in Victorian Reviewing*, 27 *Stud. in Eng.*, no. 1, 1948 .....5

Sarah Nash, *What’s in a Name? Signature, Criticism, and Authority in The Fortnightly Review*, 43 *Victorian Periodicals Rev.*, no. 1, 2010.....6

## STATEMENT OF INTEREST

Pursuant to Rule 5:30, the Reporters Committee for Freedom of the Press, through undersigned counsel, respectfully submit this brief as amicus curiae in support of appellant Yelp, Inc. This brief is filed with the written consent of all parties.

As the chief coordinators of discourse on matters of public concern, media organizations have an interest in ensuring that the public debate that unfolds on their websites continues to be vigorous and uninhibited. To that end, amici support a robust interpretation of the Virginia unmasking statute so that anonymous commenters on media websites are adequately protected from exposure in unmeritorious cases.

The amicus parties are The Reporters Committee for Freedom of the Press, American Society of News Editors, Association of Alternative Newsmedia, First Amendment Coalition, First Look Media, Gannett Co., Inc., Investigative Reporting Workshop at American University, MediaNews Group, Inc., d/b/a Digital First Media, The National Press Club, National Press Photographers Association, National Public Radio, Inc., Newspaper Association of America, Online News Association, The Seattle Times Company, Student Press Law Center, Tully Center for Free Speech, and The Washington Post. Each is described more fully in Appendix A.

## ARGUMENT

### I. **Anonymous Online Commentary on Matters of Public Concern Is Vital to Public Participation and Debate.**

The present case concerns online reviews about a company's services. The Court's decision, however, will affect all online fora, including anonymous comments posted to news websites. The importance of anonymous commentary on news sites as well as anonymous speech generally are important factors that should guide the Court's decision in this case.

#### A. **Commenting on News Websites Is a Primary Form of Public Participation That Must Be Protected with Heightened Evidentiary Standards.**

News media have long been at the epicenter of debate on matters of public interest. Their online message boards today are an Internet-age extension of the letters to the editor that have always appeared in newspapers. Letters or comments from the public represent a distinct form of political participation that encourages discussion among people and can serve as a direct voice to public officials. *See Ziglar v. Media Six, Inc.*, 61 Va. Cir. 173, 178 (Cir. Ct. 2003) ("A newspaper's letters to the editor column often is an important forum for expression of passionately-held opinions about issues of public concern."); Christopher Cooper, H. Gibbs Knotts, & Moshe Haspel, *The Content of Political Participation: Letters to*

*the Editor and the People Who Write Them*, 42 Pol. Sci. & Pol. no. 1, 2009, at 131 (noting that politicians often look to news media to take the pulse of public opinion and that “people give rich and detailed explanations for what they believe and why they believe it” in letters to the editor).

As New Jersey’s highest court pointed out in 1982, public debate was no longer occurring in town squares or village meetings but in the opinion pages of a newspaper. *Kotlikoff v. Community News*, 444 A.2d 1086, 1091 (N.J. 1982). Over the past thirty years, that debate has naturally moved to the news media’s online commentary boards, even as the definition of “news media” has itself evolved dramatically. Unconstrained by print page space, news websites can allow a nearly limitless number of commenters, many of whom choose to remain anonymous. The forum has evolved, but the robust public debate that takes place online among anonymous commenters is no less important to a thriving democracy than those commenters who have appeared on newspaper pages for centuries.

As essential coordinators of discourse on public affairs, the news media have a strong interest in protecting the anonymity of those who post to their websites to ensure the continuation of robust debate. See *Indiana Newspapers, Inc. v. Junior Achievement of Cent. Indiana, Inc.*, 963 N.E.2d 534, 537 (Ind. Ct. App. 2012) (“[T]his practice facilitates discourse between

readers and interaction with their online news products . . .”). Courts in other jurisdictions have found that, in the context of a defamation case, news media do not have to identify those who anonymously or pseudonymously post to their websites unless the requester can produce sufficient evidence to support the underlying defamation claim. See *Indiana Newspapers*, 963 N.E.2d at 552; *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 454-56 (Md. 2009). The importance of public participation via commentary posted to news media websites must be considered here, as well, to ensure that anonymous commenters are not unmasked without a showing of sufficient evidence supporting a cause of action.

**B. Anonymous Speech Has a Long History of Protection Under the First Amendment.**

Anonymous speech is protected under the First Amendment because it advances public participation and speech on matters of public concern. It was through the veil of anonymity and pseudonymity that many authors in the 1500s were able to criticize the English government without losing their limbs or lives for seditious libel. See David Cressy, *Book Burning in Tudor and Stuart England*, 36 *Sixteenth Century J.* 359, 364-65 (Summer 2005); Hans J. Hillerbrand, *On Book Burnings and Book Burners: Reflections on the Power (and Powerlessness) of Ideas*, 74 *J. Am. Acad. Religion* 593,



600 (2006). It allowed many women in the 1800s – including the Brontë sisters – to successfully publish their books. Barbara Becker-Cantarino & Jeanette ClausenSource, *Gender Censorship: On Literary Production in German Romanticism*, 11 *Women in German Y.B.* 81, 90 (1995). And it allowed the Founding Fathers of this nation to debate the adoption of the Constitution without fear of recourse in a tumultuous time. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 343 n.6 (1995).

“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.” *Talley v. California*, 362 U.S. 60, 64 (1960). Therefore, anonymous speech is given broad First Amendment protection. *McIntyre*, 514 U.S. at 342 (holding that “an author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment”); see also *Watchtower Bible & Tract Soc’y v. Village of Stratton*, 536 U.S. 150, 166–67 (2002) (recognizing the interests of canvassers to remain anonymous); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 200 (1999) (striking down a state law requiring petition circulators to wear identification badges).

While the debate about anonymous *online* commentary is still somewhat young, anonymous commentary generally has been the subject of debate for centuries. In the 1830s, for example, a movement began to

start signing magazine critics' literary reviews, which had a long history of being anonymous. Oscar Maurer Jr., *Anonymity vs. Signature in Victorian Reviewing*, 27 *Stud. in Eng.*, no. 1, 1948, at 2. Some welcomed the change while others fought vehemently against it. *Id.*

Journalist H. D. Traill wrote in 1893 that a reviewer can be more honest when he is anonymous and therefore "he has not to think of self, or friend or foe, of the political party to which he belongs, or of the social circle in which he moves, of the skins he may involuntarily prick, or the toes he may involuntarily tread on." *Id.* at 16. Traill's words are no less true today. Anonymous reviewers have the liberty to give their honest opinions without having to consider whether they will be embarrassed if someone they know sees it or whether they will be retaliated against by the person or business being reviewed.

Also as true today as it was in the 1800s is that some reviews are inevitably not authentic. The following was published in 1893 but could very well be said today: "No doubt in a few, a very few, instances the anonymous system permits personal spite to gratify itself with impunity. But these are, after all, but trifling sets-off against the great gain of liberating the critic from all those varied influences which deflect his

judgment . . . .” H. D. Traill, *The Anonymous Critic*, 34 *Nineteenth Century*, July–December 1893, at 942. Another writer argued in 1883 that:

Much of the literary criticism which we now have is very bad indeed . . . . Books are criticized without being read,—are criticized by favour,—and are trusted by editors to the criticism of the incompetent. If the names of the critics were demanded, editors would be more careful. But I fear the effect would be that we should get but little criticism, and that the public would put but little trust in that little.

Sarah Nash, *What’s in a Name? Signature, Criticism, and Authority in The Fortnightly Review*, 43 *Victorian Periodicals Rev.*, no. 1, 2010, at 61 (quoting Anthony Trollope, *An Autobiography* (1883)).

Society today faces the same trade-offs. Anonymous speech opens the door to a flood of valuable speech, and inevitably some false speech will enter through that same door. But without anonymity, consumers surely would think twice before reviewing a doctor who performed a personal medical procedure or discussing the snug fit of the clothing size purchased online. The products we use, the services we employ, and the places we visit are highly personal, and an effective review system can only exist where those reviewers are unnamed and free to speak openly about their experiences. Unmasking them is the same as laying bare their medicine cabinet, dresser drawers, and appointment calendar for the world to see. Even if they successfully defend themselves against a meritless

defamation claim, they've already lost their anonymity, which is a punishment in itself and sufficient to silence future speech.

### **III. The Virginia Unmasking Statute Must Be Interpreted Robustly, as Required by the First Amendment.**

The Court of Appeals failed to recognize the multiple indicators in the Virginia unmasking statute that require a greater showing of tortious conduct before an anonymous speaker may be identified. Individuals' right to speak anonymously has long been guaranteed by the First Amendment, see *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995); *Talley v. California*, 362 U.S. 60, 64-65 (1960), and a robust interpretation of the statute aligns with that right. The statute requires a party to submit "supporting material" bolstering its unmasking request, requires that the party have a "legitimate, good faith basis" for asserting a claim, and contains inherent balancing tests. The Court of Appeals failed to give weight to these components of the statute in its interpretation.

#### **A. The Statute's "Supporting Material" Requirement Ensures a Heightened Evidentiary Standard, as Required by the First Amendment.**

The statute provides various provisions that indicate a heightened evidentiary burden is required beyond a mere declaration of a good faith belief that tortious conduct occurred. First, the statute says:

[A] party seeking information identifying an anonymous communicator shall file with the appropriate circuit court a complete copy of the subpoena and all items annexed or incorporated therein, *along with supporting material showing*:

a. That one or more communications that are or may be tortious or illegal have been made by the anonymous communicator, or that the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit was filed.

Va. Code Ann. § 8.01-407.1(A)(1)–(A)(1)(a) (2002) (emphasis added). The statute therefore requires that the party seeking a subpoena submit “supporting material showing” that the communications may be tortious or that the party has a “legitimate, good faith basis” to assert a claim. *See id.* Merely stating one believes the speech is tortious is insufficient without supporting evidence. As a Virginia trial court recently noted,

[S]imply by signing a complaint Plaintiff would satisfy the second subpart of *Yelp* [i.e., the statute’s good faith requirement]. If this were the case all signed pleadings would always override First Amendment considerations because the signed pleadings would meet the requirements of the second subpart of *Yelp*. This Court is unwilling to allow such a casual disregard of a fundamental right. Further analysis of the second subpart, therefore, is necessary to safeguard the First Amendment.

*Geloo v. Doe*, 2014 Va. Cir. LEXIS 36, at \*16, 2014 WL 2949508 at \*5 (Va. Cir. Ct. June 23, 2014) (citing *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554 (Va. Ct. App. 2014)).

The Court of Appeals in this case recognized that the plaintiff must submit evidence to satisfy the first subpart of section 8.01-407.1(A)(1)(a): “If there is direct evidence demonstrating that the communications are tortious, and the plaintiff provides that evidence to the circuit court, then there is no need to analyze the second subpart of this prong.” *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554, 564 (Va. Ct. App. 2014); *see also Gelo*, 2014 Va. Cir. LEXIS 36, at \*6, 2014 WL 2949508 at \*2 (*citing Yelp*, 752 S.E.2d at 564) (“Subpart one requires the Court to look at whether there is direct evidence demonstrating that the communications are tortious or illegal.”).

It is incongruous, then, that the court would not also require the plaintiff to produce sufficient evidence in support of the second subpart, that is, to demonstrate a legitimate, good faith basis for asserting a tort claim. As Judge Haley points out in dissent, Hadeed Carpet Cleaning offered no evidence to suggest the substance of the speech was false, and its belief that the reviewers are not customers is founded on nothing more than speculation. *See Yelp*, 752 S.E.2d at 570 (Haley, S.J., dissenting). The statute requires the submission of evidence beyond “simply . . . alleging that those commentators may not be customers because they cannot identify them in their database.” *See id.*

**B. The Court Must Look at the Strength of the Party's Underlying Claim to Ensure There Is a *Legitimate*, Good Faith Basis for Asserting a Claim.**

Throughout its opinion, the Court of Appeals continually paraphrases the statute as requiring the plaintiff to show it has “a legitimate, good faith basis for *its belief* that the conduct is tortious,” see *Yelp*, 752 S.E.2d at 564–67 (emphasis added), but that is not an accurate substitution of words. The statute requires a showing that the plaintiff “has a legitimate, good faith basis *to contend* that such party is the victim of conduct actionable in the jurisdiction where the suit was filed.” § 8.01-407.1(A)(1)(a) (emphasis added). Merriam-Webster defines “contend” as “to argue or state (something) in a strong and definite way” and “maintain; assert.” *Contend Definition*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/contend> (last visited July 12, 2014). The court is not simply looking at what the plaintiff believes to be true but whether the plaintiff has a *legitimate* basis for asserting a claim.

Other courts have explored why a “good faith” standard alone is insufficient to protect First Amendment speech. A California appellate court found “it offers no practical, reliable way to determine the plaintiff’s good faith and leaves the speaker with little protection.” *Krinsky v. Doe 6*,

72 Cal. Rptr. 3d 231, 241 (Cal. Ct. App. 2008). Maryland's highest court likewise found that a "good faith" or "motion to dismiss" standard was too low a bar and would inhibit the free flow of ideas on the Internet. *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456 (Md. 2009).

The Court of Appeals incorrectly decided that, because Hadeed made some attempt to compare Yelp reviewers against its customer database and selected seven to sue, it demonstrated a legitimate, good faith belief that the reviews were defamatory. *See Yelp*, 752 S.E.2d at 567. First, the court gave no cognizable regard to the word "legitimate." One might very well have a good faith belief that reviewers are not customers, but the court must look at whether this is a *legitimate* belief, presumably based on sufficient evidence, which was not presented here. Second, a plain reading of the statute would disregard the paraphrased "belief" language and instead look at whether a party has a "legitimate, good faith basis to contend," i.e., to assert, a cause of action. In that case, the court necessarily must look at the merits of the underlying claim to determine whether the party has a legitimate cause of action that merits the unmasking of anonymous speakers. That was not done here.



**C. The Court Must Balance an Anonymous Speaker's First Amendment Rights against the Plaintiff's Interest in Unmasking Speakers.**

The Court of Appeals noted two places in the statute where a balancing test is inherent, yet it never gave proper weight to the First Amendment interests at stake. First, the court wrote: "Turning to the second prong, it is without dispute that the Doe defendants have a constitutional right to speak anonymously over the Internet. However, that right must be balanced against Hadeed's right to protect its reputation." *Yelp*, 752 S.E.2d at 566; see also *Geloo*, 2014 Va. Cir. LEXIS 36 at \*6, 2014 WL 2949508 at \*2 ("In addressing the second prong, the Court must balance the Defendants' constitutional right to speak anonymously over the Internet against the Plaintiff's right to protect her reputation."). But the court never conducted a balancing analysis.

Second, the court noted that to make a determination on the "fourth prong" of the statute – which requires the plaintiff to show that the identity of the speaker is important, is centrally needed, relates to a core claim, or is directly and materially relevant – "a circuit court must necessarily balance the interests of the anonymous communicator against the interests of the plaintiff in discovering the identity of the anonymous communicator." *Yelp*,

752 S.E.2d at 565. Yet the court conducted no such analysis. When it came time for the court to rule on the fourth prong, it simply wrote:

Turning to the fourth prong, we find that the identity of the Doe defendants is important, is centrally needed to advance the claim, is related to the claim or defense, or is directly relevant to the claim or defense. Without the identity of the Doe defendants, Hadeed cannot move forward with its defamation lawsuit. There is no other option. The identity of the Doe defendants is not only important, it is necessary.

*Id.* at 568. Aside from saying the rights must be balanced, the court did not appear to give any weight to the reviewers' First Amendment rights.

The Court of Appeals, instead, discounted the reviewers' First Amendment rights throughout the opinion. The court concluded, without either party having raised or briefed the issue, that the reviews were commercial speech "related solely to the economic interests of the speaker and its audience," which garners a lower bar of protection. *Yelp*, 752 S.E.2d at 560, 560 n.4. The court's assumption is highly problematic and a mischaracterization of the Yelp reviews. Online reviewers volunteer their time to share their experiences solely for the benefit of public. While *some* reviews *might* be false and financially motivated, all reviewers should not be denied the full force of their First Amendment protections without meaningful proof that their speech is commercially motivated.

Therefore, while the court suggested a balancing test is inherent in making determinations under the statute, the court gave no weight to the First Amendment interests at stake here.

### CONCLUSION

For the foregoing reasons, the Court of Appeals decision should be reversed.

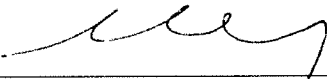
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## **APPENDIX A: DESCRIPTION OF AMICI**

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.

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.

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

First Look Media, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

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

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

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.

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.

Online News Association (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

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.

Student Press Law Center (“SPLC”) is a nonprofit, nonpartisan organization which, since 1974, has been the nation’s only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance,



information and educational materials for student journalists on a variety of legal topics.

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](http://www.washingtonpost.com), that is read by an average of more than 20 million unique visitors per month.

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