IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ONE

RICHARD SIMMONS, Plaintiff-Appellant, v. AMERICAN MEDIA, INC., et al., Defendants-Respondents.	2d Civil No. B285988 LASC Case No. BC 660633

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED *AMICI* BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 5 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANTS-RESPONDENTS

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION 1:

Pursuant to California Rule of Court 8.200(c), the Reporters Committee for Freedom of the Press, National Press Photographers Association, Online News Association, Radio Television Digital News Association, Reporters Without Borders, and Society of Professional Journalists (collectively, "*amici*") respectfully request leave to file the attached *amici curiae* brief in support of Respondents American Media, Inc., et al. All parties have consented to the filing of the attached *amici* brief.

I. INTEREST OF *AMICI CURIAE*

News organizations play an essential role in our political and cultural life by informing public discussion about matters of public concern. Newsworthy reports about transgender individuals and issues affecting the transgender community are matters of public interest and importance. Because defamation actions can chill discussion of such issues and undermine our

"profound national commitment" to the principle that public discourse "should be uninhibited, robust, and wide-open," (*N.Y. Times Co. v. Sullivan* (1964) 376 U.S. 254, 270), this case presents issues of significant concern to *amici*, who are groups that advocate on behalf of journalists and the news media.

The trial court's ruling below, that mistakenly identifying someone as transgender is not libelous per se, should be affirmed. As described in the attached *amici* brief, over time courts around the country have narrowed defamation doctrine to conform to advancing social norms. As customs and social understandings change, courts have removed certain statements—such as those about a person's political beliefs, race, and sexual orientation—from the category of libel per se. By doing so, courts have ensured that the press and public can freely discuss vital social and political issues that matter to contemporary society.

Any ruling that a plaintiff incorrectly identified as transgender can recover in a libel action without proof of special damages would reverse the direction of precedent and could lead journalists to self-censor and abstain from writing about transgender issues. For these reasons, *amici* write to emphasize

the negative consequences that would flow from a reversal of the trial court's order.

Amici respectfully request that the Court accept and file the attached *amici* brief. No party or counsel for any party in the pending appeal, other than counsel for *amici*, authored the proposed *amici* brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed *amici* brief.

Dated: July 30, 2018

/s/ Scott S. Humphreys

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208(e)(1) and (2), *amici* The Reporters Committee for Freedom of the Press, National Press Photographers Association, Online News Association, Radio Television Digital News Association, Reporters Without Borders, and Society of Professional Journalists certify that the following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

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

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

Reporters Without Borders is a nonprofit association with no parent corporation.

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

Dated: July 30, 2018

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I. INTRODUCTION

Plaintiff-Appellant Richard Simmons claims that Respondents defamed him by falsely identifying him as transgender. The trial court rejected Mr. Simmons' claim and granted Defendants-Respondents' Special Motion to Strike Plaintiff's First Amended Complaint pursuant to California Code of Civil Procedure § 425.15 (Respondents' "Anti-SLAPP Motion"), correctly holding that misidentifying someone as transgender is not libel per se. This Court should affirm.

Courts around the country have recognized that construing whether a publication is defamatory must be measured by current social norms. This ensures that defamation law keeps pace with social change, allowing people to freely discuss issues that matter to them and their contemporaries. The clear trend in the law of defamation is to narrow—not expand—what constitutes libel per se, in light of the constitutional concerns at stake and in recognition of changing social norms. Just as courts in other jurisdictions have, over time, concluded that allegedly false statements that a person is a communist, African-American, or gay are not libel per se, this Court should reach the same conclusion with regard to gender identity.

Conversely, a holding that misidentifying someone as transgender is libelous per se would chill important journalism. Issues affecting the transgender community are matters of legitimate and pressing public concern, and reporting on transgender individuals gives visibility to a historically marginalized group of people. If falsely referring to someone as transgender is found to be libelous per se, reporters may self-censor for fear of unintentionally misidentifying a person as transgender, to the detriment of public understanding.

For the reasons set forth herein, *amici*[1] respectfully urge this Court to affirm.

[1] A full description of *amici* is provided in Appendix A.

II. ARGUMENT

A. Defamatory Meaning Must Evolve over Time to Ensure that the Law Supports and Keeps Pace with Social Change.

Defamation law—specifically, what can constitute defamation per se—must evolve with society, to allow the press and public to discuss changing social norms and to avoid entrenching biases and prejudices in outdated law. To that end, the trend in the law is to narrowly define what can constitute defamation per se, rejecting attempts to expand the law or to perpetuate outdated biases. Courts have restricted the per se classification to recognize changes in societal perceptions over time, and, for certain characteristics, such as race or sexual orientation, to avoid the prejudicial effect of enshrining such categorizations in law.

Here, Mr. Simmons' argument that misidentification as transgender should constitute defamation per se ignores these legal developments and asks the Court to endorse prejudices at the very time when society is moving away from them. *See* Section B (discussing public concern and growing societal understanding of transgender issues today). In keeping with legal precedent that has curtailed defamation claims as social

norms have evolved, this Court should reject Simmons' argument and affirm the trial court's decision.

1. Defamatory Meaning Must Change Along with Social Norms.

Defamation claims seek to redress injuries to reputation—that is, to one's standing in society—and so the question of what constitutes defamation invariably must evolve with societal norms. Defamation is "socially constructed: it is defined more by its effect on the 'others' who make up the plaintiff's 'community' than by its effect on the individual plaintiff." (Lidsky, *Defamation, Reputation, and the Myth of Community*, (1996) 71 Wash. L. Rev. 1, 6.)

Defamatory meaning is determined not by the sentiment of the plaintiff, but by the reaction of those who read the statements at issue. (*MacLeod v. Tribune Publ'g Co.*, (1959) 52 Cal.2d 536, 547 [considering "the natural and probable effect upon the mind of the average reader"]; *Selleck v. Globe Int'l, Inc.*, (1985) 166 Cal.App.3d 1123, 1131 ["[A] court is to place itself in the situation of the hearer or reader, and determine the sense or meaning … according to its natural and popular construction [citation]."]; *Corman v. Blanchard*, (1962) 211 Cal.App.2d 126, 132 [directing

courts to read statements "as a whole in order to understand its import and the effect which it was calculated to have on the reader"].)[2]

As discussed below, precedent is rife with examples of words that were found to be defamatory in earlier generations, but to courts in later generations, were simply not actionable. (See, e.g., *Washburn v. Wright*, (1968) 261 Cal.App.2d 789, 796 [ruling that identification of plaintiff as an "extremist" was not defamatory; noting consideration of "variations in time, place and circumstance" in evaluating defamatory meaning of political labels]; *see also* Resp. Br. at 39-40 [noting that allegations of illegitimacy and cancer are no longer considered defamatory].) Similarly, the offense taken by a single plaintiff or an outside

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[2] (See also *Ward v. Zelikovsky*, (N.J. 1994) 643 A.2d 972, 980 [describing the "listener's reasonable interpretation," considering context, as "the proper measure for whether the statement is actionable"]; *Nazeri v. Mo. Valley Coll.*, (Mo. 1993) 860 S.W.2d 303, 312 (en banc) ["The harm inflicted by defamation is particularly sensitive to the characteristics and situation of the injured party and of the society that surrounds him or her."]; Rest.2d Torts § 614, cmt. d ["In determining the defamatory character of language, the meaning of which is clear or otherwise determined, the social station of the parties in the community, the current standards of moral and social conduct prevalent therein, and the business, profession or calling of the parties are important factors."].)

minority may be outweighed by society's rejection of that minority's prejudice. (See Rest.2d Torts § 559(e), cmt. e ["The fact that a communication tends to prejudice another in the eyes of even a substantial group is not enough if the group is one whose standards are so anti-social that it is not proper for the courts to recognize them."].)

The law of defamation thus advances with the generational norms of the average reader, with courts using the societal norms in each era to determine what will and will not constitute defamation. Courts do not, as the Plaintiff-Appellant urges, fossilize outdated views, fixing them forever as legal standards.

2. The Law Narrowly Defines What May be Defamatory Per Se.

The clear trend in defamation law is towards narrowly defining what can constitute libel per se. "[P]er se damages, even if constitutional, are not favored." (*Hayes v. Smith*, (Colo. App. 1991) 832 P.2d 1022, 1025, citing *Gertz v. Robert Welch*, (1974) 418 U.S. 323, 340-41, 350-51). As the court in *Hayes* explained, *Gertz* and subsequent Supreme Court case law "further[] an earlier trend to limit and not expand the use of per se characterizations and presumed damages in defamation cases."

(*Ibid.*, citing *Gertz*, *supra*; *Time, Inc. v. Firestone*, (1976) 424 U.S. 448, 460); see also *Donovan v. Fiumara*, (N.C. Ct. App. 1994) 442 S.E.2d 572, 575 ["Consequently courts have consistently refrained from expanding the number or the scope of categories of spoken defamatory words which are actionable without allegation and proof of damages."].)

As explained by the Supreme Court, defamation cases must balance society's First Amendment interest in free press and the "need to avoid self-censorship by the news media," on the one hand, against the interest in an "individual's right to the protection of his own good name" on the other. (*Gertz*, *supra*, 418 U.S. at 340-41.) Courts should be "especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." (*Ibid.* at 342, quoting *NAACP v. Button*, (1963) 371 U.S. 415, 433.)

Broad legal categories of defamation per se necessarily constrain the breathing room for free expression, as they carry the threat of presumed damages, without proof of special damages. (See *Gertz*, *supra*, at 340-41, 350-51; *Barker v. Fox & Assocs.*, (2015) 240 Cal.App.4th 333, 351 ["Where the statement is defamatory on its face, it is said to be libelous per se, and

actionable without proof of special damage."]; *Ward*, *supra*, 643 A.2d at 984 ["Because the goal of defamation law should be to compensat[e] individuals for harm to reputation, the trend should be toward elimination not expansion of the per se categories [citations].]") Restricting the types of statements that courts will consider defamatory per se, and, conversely, holding plaintiffs to stricter burdens of proof for expanded categories of speech, maximizes speakers' and journalists' opportunities to engage in discussion and debate on contemporary issues of public concern.

Courts have also explained that, as a practical matter, per se categorizations in defamation cases may be less necessary, given that "new methods exist for proving economic and reputational damages in a defamation case, including testimony by economists, psychologists, and other expert witnesses," obviating the need for per se classifications to protect reputational and other damages that are difficult to quantify. (*Hayes*, *supra*, 832 P.2d at 1025; see also *Firestone*, *supra*, 424 U.S. at 460 [recognizing availability of mental anguish, suffering, and other damages with or without reputational harm in defamation cases].)

Finally, defamation per se assumes a greater degree of social harm, namely, that the statements at issue "expose[] a person to contempt or ridicule or certain other reputational injuries." (*Shively v. Bozanich*, (2003) 31 Cal.4th 1230, 1242, citing Cal. Civ. Code § 45; *Hayes*, *supra*, 832 P.2d at 1025.) As discussed below, each time a court categorizes statements as defamatory per se, it reinforces the general societal disapproval of people described in the manner of the offending speech. Courts are increasingly careful to avoid rubber-stamping prejudices and to ensure that only the most universally odious characterizations—again, as measured by contemporary standards—will be deemed libelous per se.

3. In Other Contexts, Defamatory Meaning has Changed over Time.

Courts have increasingly refused to recognize per se defamation where the statements at issue describe characteristics that, while once considered contemptible, no longer carry the opprobrium of society. For example, several courts have recognized that identifying someone as a communist or socialist is no longer defamatory per se. For certain characteristics, such as race or sexual orientation, courts have

also recognized that classifying them as defamation per se would only further prejudices that are disfavored by society.[3]

i. Defamation Based on Allegations of Communism or Socialism

The evolution of courts around the country about whether calling someone a communist is defamatory provides a quintessential example of how "what is defamatory changes over time." (*Gottschalk v. State*, (Alaska 1978) 575 P.2d 289, 293 n.11.) Shortly after World War II and during the Cold War, courts held that misidentifying someone as a communist was defamatory per se. (See, e.g., *Utah State Farm Bureau Fed'n v. Nat'l Farmers Union Serv. Corp.*, (10th Cir. 1952) 198 F.2d 20, 23 [stating that to write or speak of a person or an organization as

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[3] The trial court explained that its rejection of the idea that misidentification as transgender could be defamatory was, in part, "because courts have long held that a misidentification of certain immutable characteristics do not naturally tend to injure one's reputation, even if there is a sizeable portion of the population who hold prejudices against those characteristics." (5 AA 1281.) At least one set of commentators has also noted that these cases, rejecting defamatory per se categorization for race and sexual orientation, suggest that statements or inferences about immutable characteristics should be non-defamatory as a matter of law. (See Bunker, Shenkman & Tobin*, Not That There's Anything Wrong with That: Imputations of Homosexuality and the Normative Structure of Defamation Law*, (2011) 21 Fordham Intell. Prop. Media & Ent. L.J. 581, 603.)

being "communist" or a "communist sympathizer" is libelous per se and noting that "*[i]n the temper of the times*, the communist label is even more odious and defamatory than the pro-Nazi and pro-Fascist label of another day"] (italics added)); *MacLeod*, *supra*, 52 Cal.2d at 546 [stating that "a charge of membership in the Communist Party or communist affiliation or sympathy is libelous on its face" but recognizing that the rule may be different "when anti[-]communist sentiment was less crystallized"]; see also Ardia, *Reputation in A Networked World: Revisiting the Social Foundations of Defamation Law*, (2010) 45 Harv. C.R.-C.L. L. Rev. 261, 289 n.176.) Such a statement today, however, would likely not be defamatory per se. [See Miller, *Homosexuality As Defamation: A Proposal for the Use of the "Right-Thinking Minds" Approach in the Development of Modern Jurisprudence*, (2013) 18 Comm. L. & Pol'y 349, 354.)

ii. Defamation Based on Racial Misidentification

It was once defamatory per se to falsely identify a white person as African-American. (See, e.g., *Flood v. News & Courier Co.*, (1905) 50 S.E. 637, 639 ["To call a white man a negro, affects the social status of the white man so referred to."].) Now,

however, courts sensibly and resoundingly have rejected this idea, as it is now "equally obvious that such an allegation is not defamatory." (Lidsky, *supra*, 71 Wash. L. Rev. at 31; see also Brenner, *"Negro Blood in His Veins": The Development and Disappearance of the Doctrine of Defamation Per Se by Racial Misidentification in the American South*, (2010) 50 Santa Clara L. Rev. 333, 391 [tying the "disappearance of the doctrine of defamation per se by racial misidentification after the late 1950s" in part to societal changes].)

As society moved towards acceptance, courts began to reject claims for defamation based on racial misidentification, explaining that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (*Thomason v. Times-Journal, Inc.*, (Ga. Ct. App. 1989) 379 S.E.2d 551, 553, quoting *Palmore v. Sidoti*, (1984) 466 U.S. 429, 433.) In *Thomason*, the Georgia Court of Appeals rejected defamation claims based on a newspaper's incorrect publication of a plaintiff's obituary. (*Ibid.* at 552-53.) Along with the false report of her death, plaintiff took issue with the suggestion that her funeral would take place at a funeral home with "primarily black clientele." (*Ibid.* at 553.) The Georgia Court of Appeals rejected

the argument that this association was defamatory per se, explaining, "It is not libelous to charge a person with the doing of a thing which he may legally and properly do. [Citation]." (*Ibid*.)

California courts also have rejected the idea that associations with a racial group could constitute defamation per se, describing the argument as "utterly untenable." (*Polygram Records, Inc. v. Super. Ct.*, (1985) 170 Cal.App.3d 543, 557 [rejecting claim based on supposed association of plaintiff's brand of wine with African Americans]; see also *Albright v. Morton*, (D. Mass. 2004) 321 F.Supp.2d 130, 138 [discussing change in defamation law: "statements falsely linking a plaintiff to racial, ethnic or religious groups, which plainly would not qualify as defamation per se today"], affd. sub nom. *Amrak Prods., Inc. v. Morton*, (1st Cir. 2005) 410 F.3d 69.) As the *Polygram Records* decision so clearly stated, "Courts will not condone theories of recovery which promote or effectuate discriminatory conduct." (170 Cal.App.3d at 557.)

iii. Defamation Based on Allegations of Homosexuality

Similarly, courts have increasingly rejected outdated decisions ruling that allegations of homosexuality could be

defamatory per se. (See, e.g., *Hayes*, *supra*, 832 P.2d at 1025; *Albright*, *supra*, 321 F.Supp.2d at 132 ["In 2004, a statement implying that an individual is a homosexual is hardly capable of a defamatory meaning."]; *Cornelius-Millan v. Caribbean Univ., Inc.*, (D.P.R. 2016) 261 F.Supp.3d 143, 155 [gathering cases from various jurisdictions].)

Indeed, the vast majority of courts to address the issue recently have rejected categorizing statements that a person is homosexual as defamation per se. (See Bunker, et al., *supra*, 21 Fordham Intell. Prop. Media & Ent. L.J. at 594; *Boehm v. Am. Bankers Ins. Grp., Inc.*, (Fla. Dist. Ct. App. 1990) 557 So.2d 91, 94 ["[T]he modern view considering the issue, has not found statements regarding sexual preference to constitute slander per se...."]; *Donovan*, *supra*, 442 S.E.2d at 580 [finding that false imputation of homosexuality may be defamation per quod rather than per se].)

Courts have reached these decisions in response to changing social norms and in recognition of the potential to reinforce disfavored prejudices by allowing such defamation claims. For instance, in rejecting arguments that misidentifying a plaintiff as gay could be slanderous, a New York appellate court

evaluated the "prevailing attitudes of the community," "the tremendous evolution in social attitudes regarding homosexuality," and the "respect that the people of this state currently extend to lesbians, gays and bisexuals." (*Yonaty v. Mincolla*, (N.Y. App. Div. 2012) 97 A.D.3d 141, 145-46.) The federal district court in Massachusetts similarly pointed to state law and Supreme Court decisions prohibiting discrimination against same sex couples as indications of changing opinion in society. (*Albright*, *supra*, 321 F.Supp.2d at 138.) As that court explained, "If this Court were to agree that calling someone a homosexual is defamatory per se—it would, in effect, validate that sentiment and legitimize relegating homosexuals to second-class status." (*Ibid.*)

Overwhelmingly, courts reviewing this question have agreed that "defamation per se should be reserved for statements linking an individual to the category of persons deserving of social approbation like a thief, murderer, prostitute, etc. [Citations.]" (*Albright*, *supra*, 321 F.Supp.2d at 139;[4] see also

[4] While earlier decisions were often based on laws criminalizing same-sex sexual relationships, this logic was "extinguished" by the Supreme Court's decision in *Lawrence v. Texas*, (2003) 539 U.S. 558, 584-86. (*Albright*, *supra*, 321 F.Supp.2d. at 137.)

Stern v. Cosby, (S.D.N.Y. 2009) 645 F.Supp.2d 258, 275 ["Moreover, the fact of such prejudice on the part of some does not warrant a judicial holding that gays and lesbians, merely because of their sexual orientation, belong in the same class as criminals."]; *Hayes*, *supra*, 832 P.2d at 1025 ["A court should not classify homosexuals with those miscreants who have engaged in actions that deserve the reprobation and scorn which is implicitly a part of the slander/libel per se classifications."]; *Yonaty*, *supra*, 97 A.D.3d at 144 [rejecting per se categorization for statements of homosexuality because "such a rule necessarily equates individuals who are lesbian, gay or bisexual with those who have committed a 'serious crime'—one of the four established per se categories"].)

These courts have all refused to extend defamation per se, with its implication of criminal or socially unacceptable behavior, to allegations of homosexuality. As noted earlier, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect." (*Albright*, *supra*, 321 F.Supp.2d at 138, quoting *Palmore*, *supra*, 466 U.S. at 433; see also *Lawrence*, *supra*, 539 U.S. at 584 ["A legislative classification that threatens the creation of an underclass . . . cannot be

reconciled with the Equal Protection Clause."], quoting *Plyler v. Doe*, 457 U.S. 202, 239 (conc. opn. of Powell, J).)

Simply put, the law cannot be used to reinforce prejudices and bigotry. (*Polygram Records*, *supra*, 170 Cal.App.3d at 557.) And yet, Mr. Simmons' present appeal asks the Court to do exactly that.[5] Disregarding defamation's focus on reputation *as defined by society*, modern society's growing understanding of transgender issues, and the trend away from fixed, per se definitions of damages, Mr. Simmons asks the court to expand the definition of defamation per se to include allegations of transgender status. Doing so would only serve to affirm prejudicial opinions towards transgender individuals, by equating them with criminals or "miscreants…that deserve the reprobation and scorn which is implicitly a part of the slander/ libel per se classifications." (*Hayes*, *supra*, 832 P.2d at 1025.) Further, as discussed below, allowing the presumed damages that accompany this per se status risks a chilling effect on

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[5] Mr. Simmons' reply brief implicitly acknowledges this, going so far as to argue that transgender individuals are not entitled to the Court's protection *yet*, as they "have not yet had their equivalent of a civil rights movement or Stonewall riots" or "earned hard-won legal protection after decades of protest and activism." (Reply Br. at 6.)

important First Amendment discussions of transgender issues, which might serve to further societal understanding and lessen the prejudices of which Mr. Simmons complains.

B. Vital Journalism will be Chilled if the Court Holds that Misidentifying Someone as Transgender is Libelous Per Se.

1. Reporting on Transgender People and Issues Fosters Informed Discussion of Matters of Public Importance.

The First Amendment presupposes that journalists will play a leading role in informing the public about matters of public concern, which include policy and other issues affecting transgender members of our communities. (*Mills v. Alabama* (1966) 384 U.S. 214, 219 ["The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs."].)

To serve that vital purpose, it is often necessary for news reports profiling or reporting on transgender celebrities or other public figures to identify the subject of the story as transgender. For example, the 2017 election of Danica Roem, a transgender woman, to the Virginia General Assembly received national attention, in part because of its historic nature. (See Smith et al., *Democrat Danica Roem, a Transgender Woman, Elected to*

Virginia State Legislature, NBC News (Nov. 8, 2017), <https://perma.cc/N6A2-A8FJ> [as of July 19, 2018] [discussing Roem's victory in Virginia's 13th district and highlighting that she is the first openly transgender state legislator to be seated in U.S. history].)

Chelsea Manning's transition has similarly been the subject of extensive news coverage. (See, e.g., Huetteman, *'I am a Female,' Manning Announces, Asking Army for Hormone Therapy*, N.Y. Times (Aug. 22, 2013), <https://nyti.ms/2HJXec5> [as of July 19, 2018].) A former Army PFC, Manning received national attention after she was convicted of violating the Espionage Act for providing classified information to WikiLeaks, sentenced to thirty-five years' imprisonment, and had her sentence later commuted by President Obama. In the past few years, Manning has been the focus of numerous articles that have reported on her gender identity. (See, e.g., Heller, *Chelsea Manning Changed the Course of History. Now She's Focusing on Herself*, Vogue (Aug. 10, 2017), <https://perma.cc/UV4Y-AR3T> [as of July 9, 2018]; Grinberg, *Chelsea Manning will undergo gender transition surgery, lawyer says*, CNN (Sept. 14, 2016), <https://perma.cc/FF8X-JYR3> [as of July 19, 2018].)

And the announcement by former Olympic athlete and reality television star Caitlyn Jenner of her transition received significant news coverage—much of it focused on informing the public about her life as a famous transgender woman. (See, e.g., Bissinger, *Caitlyn Jenner: The Full Story*, Vanity Fair (June 25, 2015), <https://perma.cc/3W7L-ZESD> [as of July 19, 2018] [presenting the first full print account of Jenner's transition through extensive interviews with Jenner herself].) And continued media coverage of Jenner's transition has prompted meaningful public discussion about how the experiences of transgender individuals differ. (See, e.g., Tourjée, *Caitlyn Jenner's Quest for Acceptance*, Broadly. (May 22, 2018), <https://bit.ly/2GGRRKa> [as of July 19, 2018] [discussing Jenner's complicated place within the transgender community, as well as criticism that Jenner has been insulated from many of the challenges faced by other transgender individuals].)

In keeping with the constitutionally recognized role of the press in our society, (see *N.Y. Times Co. v. United States* (1971) 403 U.S. 713, 717 (conc. opn. of Black, J.) [noting that the First Amendment protects the news media's "essential role in our democracy"]), journalists act as watchdogs for the public by

reporting on government actions and policies concerning transgender individuals. Journalists have, for example, kept the public informed about changes to government policy that affect the ability of transgender men and women to serve in the U.S. military. A series of *New York Times* articles from May 2014 to July 2017, collected in *How U.S. Military Policy on Transgender Personnel Changed Under Obama*, traced the evolution of U.S. government policy toward the service of transgender military personnel under the Obama and Trump administrations. (See Bromwich, *How U.S. Military Policy on Transgender Personnel Changed Under Obama*, N.Y. Times (July 26, 2017), <https://nyti.ms/2sRbcUP> [as of July 19, 2018].) The Obama administration first reviewed existing policies affecting transgender military personnel in May 2014 and officially removed the ban on transgender personnel serving openly in the military in June 2016. (*Ibid.*) President Trump reversed that policy in July 2017, prompting widespread public discussion about the acceptance of transgender individuals in the U.S. military. (*Ibid.*) Media coverage of these policy changes has played a critical role in informing that public discussion.

Journalists also reported extensively on North Carolina's so-called "bathroom bill," which restricted transgender individuals' ability to use the restroom matching their preferred gender identity. (See, e.g., Berman & Phillips, *North Carolina governor signs bill repealing and replacing transgender bathroom law amid criticism*, Wash. Post (Mar. 30, 2017), <https://wapo.st/2JLKdUz> [as of July 19, 2018] [describing the North Carolina legislature's decision to repeal the controversial "bathroom bill" in the face of economic pressure].) This issue, too, was the subject of widespread public discussion—discussion that was better informed as a result of the news media's coverage of the bill and its impact on the transgender community. (See, e.g., Associated Press, *Lawsuit says North Carolina 'bathroom bill' effects still felt*, L.A. Times (July 21, 2017), <https://perma.cc/F43N-X43R> [as of July 19, 2018] [describing an ACLU-led lawsuit challenging the constitutionality of the law that replaced the "bathroom bill"].)

Members of the news media have also reported on the government's decision to place transgender people in federal prison populations that match their "biological" sex, informing the public about the real-world impact of that decision on the

lives of transgender men and women in prison. (See, e.g., Tourjée, *Trump's Prison Guidance Puts Trans Inmates at Greater Risk of Abuse*, Broadly. (May 14, 2018), <https://perma.cc/P8PL-2FDD> [as of July 19, 2018]; Reuters Staff, *U.S. rolls back protections for transgender prison inmates*, Reuters (May 12, 2018), <https://perma.cc/R34Y-KAQF> [as of July 19, 2018]; Burns, *The Dire Realities of Being a Trans Woman in a Men's Prison*, them. (Feb. 12, 2018), <https://perma.cc/JWV9-NLQQ> [as of July 19, 2018] [discussing challenges faced by transgender women housed in men's prisons, including high rates of sexual violence and long periods of time in solitary confinement].)

Finally, news media coverage plays an important role in documenting violence against transgender people. For example, research indicates that transgender women and men are the victims of homicide and violence at rates higher than the general population. (See Talusan, *Unerased: Counting Transgender Lives: A comprehensive look at transgender murders since 2010. The number is rising – and likely far higher than we know.*, Mic. (Dec. 8, 2016), <https://perma.cc/DG4Y-S2EJ> [as of July 19, 2018].) However, the FBI does not track gender identity alongside its homicide statistics, (*ibid.*), and no government

agency consistently collects data on homicides of transgender people. Relatedly, many states do not require that crimes based on gender identity be reported as hate crimes and allow police reports to identify victims according to the gender identity on their official identification. (See Morrison, *Covering the Transgender Community: How newsrooms are moving beyond the "coming out" story to report crucial transgender issues*, Nieman Reports (Jan. 12, 2016), <https://perma.cc/P68Y-72KY> [as of July 19, 2018].) As a result, news reports provide data and anecdotal evidence of violence against transgender people that is not available from other sources. Without reporting, the scope of such violence might not be measured or understood.

2. Holding that Misidentifying Someone as Transgender is Libel Per Se may Chill Reporting on Transgender Issues.

The trial court below correctly held that misidentifying an individual as transgender is not actionable absent proof of special damages. (5 AA 1281.) If this holding is reversed, journalists might self-censor for fear of mistakenly misidentifying a person's gender identity and being subjected to liability for defamation even if the plaintiff cannot prove special damages. This concern will cover the full range of stories from in-depth profiles of the

transgender community to routine reporting on any number of subjects.

Covering transgender issues often requires journalists to educate themselves in order to accurately represent transgender individuals' stories and be responsive both to the transgender community and readers who may have limited knowledge about that community. (See Jensen, *Lots of Transgender Stories; Not As Many Transgender Voices*, NPR (May 16, 2016), <https://n.pr/2LsEbJ2> [as of July 19, 2018] [reviewing NPR's coverage of transgender issues and noting the challenges of accurately representing transgender individuals' stories even despite efforts to provide accurate and respectful coverage]; Morrison, *supra*.) Given the historical lack of media coverage of transgender issues, journalists must frequently learn appropriate terminology and build rapport with subjects they interview and report on. (See Morrison, *supra*.)

If misidentifying a person's gender identity is held to be libel per se, a journalist may simply choose not to report a story addressing transgender issues at all or may choose to omit certain information from a story that may be important for readers. When journalists self-censor in this way, it is the

public that loses. Countless stories that would otherwise have informed the public are never written or published, and, therefore, never read.

For example, a 2014 investigation by Fusion into the treatment of transgender individuals by Immigration and Customs Enforcement ("ICE") reported the names and stories of several transgender women in ICE custody who were forced to live in cells with men. (See Constantini et al., *Why Did the U.S. Lock Up These Women with Men?*, Fusion (Nov. 17, 2014), <https://perma.cc/8K28-AY8V> [as of July 19, 2018].) The article, which won an award for outstanding digital journalism from GLAAD, offered a powerful illustration of the dangers faced by transgender women who are housed with men in immigration detention. (*Ibid.*) Following the Fusion investigation, ICE implemented new policies for housing transgender people in ICE custody in 2015. (See Morrison, *supra*.).

If mistakenly misidentifying an individual as transgender is deemed libel per se, stories that name transgender people and describe their particular stories, like the Fusion article, would create an increased risk of defamation liability. Rather than run this risk, news organizations may choose not to publish similar

reporting in the future that relies on the personal stories of transgender people. In turn, public awareness of important issues affecting transgender people will suffer.

III. CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm.

Dated: July 30, 2018

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that the foregoing *amicus curiae* brief was produced using 13-point Roman type including footnotes and contains 5,300 words. In making this certification, I have relied on the word-count function of the Microsoft Word computer program used to prepare this brief.

Dated: July 30, 2018 */ s/ Scott S. Humphreys*
Scott S. Humphreys

APPENDIX A

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

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.

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.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities

are carried out on five continents through its network of over 150 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

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.

PROOF OF SERVICE

Case No. 2d Civil No. B285988

I, Debra Smith, do hereby affirm that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above-captioned action. My business address is 2029 Century Park East, Suite 800, Los Angeles, CA 90067.

On July 30, 2018, I caused the foregoing documents entitled **APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED *AMICI* BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 5 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANTS-RESPONDENTS** and ***AMICI CURIAE* BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 5 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANTS-RESPONDENTS** to be served on the person(s) below by the following means and as indicated on the attached Service List:

☒ **By Mail.** I deposited a true and correct copy of the foregoing documents in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Los Angeles, California addressed as set forth below.

☒ **By Electronic Delivery**: I consigned a true and correct electronic copy of said document for service via TrueFiling on July 30, 2018.

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 30, 2018, Los Angeles, California.

/s/ Debra Smith
Debra Smith

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