IN THE SUPREME COURT OF THE STATE OF OREGON

TOM LOWELL, d/b/a/ Piano Studios and Showcase, Plaintiff-Appellant, Respondent on Review, v. MATTHEW WRIGHT and ARTISTIC PIANO, an Oregon corporation, Defendants-Respondents, Petitioners on Review.	Jackson County Circuit Court No. 13CV04582 CA A162785 SC S068129

BRIEF OF *AMICI CURIAE* INSTITUTE FOR FREE SPEECH AND ELECTRONIC FRONTIER FOUNDATION; PROFS. WILLIAM FUNK, OFER RABAN, AND KYU HO YOUM; AND HOWARD BASHMAN, SCOTUSBLOG, INC., AND PROFS. GLENN HARLAN REYNOLDS AND EUGENE VOLOKH IN SUPPORT OF DEFENDANTS-RESPONDENTS, PETITIONERS ON REVIEW

On Review of the Decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Jackson County, Honorable Dan Bunch

Court of Appeals Opinion Filed: September 2, 2020
Disposition: Reversed and Remanded
Author of Opinion: Aoyagi, J.

[Caption continued on next page]

March 2021

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Interest of *Amici Curiae*

The Institute for Free Speech is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights to speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute acts as *amicus curiae* and represents individuals and civil society organizations in cases raising First Amendment objections to the regulation of core political activity. This case affects whether regular citizens have the right to engage in the same political activity as news organizations.

The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development, and works to ensure that rights and freedoms are enhanced and protected as our use of technology grows. EFF has frequently litigated with respect to the rights of all internet speakers to enjoy full First Amendment rights, including ensuring that the rights typically associated with traditional news media not be denied to online speakers; among other cases, it was lead counsel in the landmark decision, *O'Grady v. Superior Court*, 139 Cal App 4th 1423 (2006). EFF also publishes the *Deeplinks Blog* featuring posts addressing the full range of digital rights issues.

The three Oregon professor signatories are legal academics who have written extensively on constitutional law:

- Professor William Funk is Lewis & Clark Distinguished Professor of Law Emeritus at Lewis & Clark Law School.
- Professor Ofer Raban is Professor and Elmer Sahlstrom Senior Faculty Fellow at the University of Oregon School of Law.
- Professor Kyu Ho Youm is the Jonathan Marshall First Amendment Chair at the University of Oregon School of Journalism and Communication, and an affiliated faculty member at the University of Oregon School of Law.

The remaining signatories are legal bloggers:

- Glenn Harlan Reynolds is the Beauchamp Brogan Distinguished Professor of Law at the University of Tennessee; he founded (in 2001), and daily contributes to, InstaPundit (http://instapundit.com), a leading blog on law, public policy, and politics.
- Howard Bashman is an appellate lawyer and the author of How Appealing, the nation's leading blog on appellate litigation (founded in 2002).
- SCOTUSBlog, Inc., originally founded in 2002 by the law firm Goldstein & Howe, P.C., is the nation's leading blog on the U.S. Supreme Court.
- Eugene Volokh is the Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law; in 2002, he cofounded the Volokh Conspiracy blog, which was independently hosted until early 2014, was hosted at the Washington Post from early 2014 to late 2017, and has been hosted at the Reason Magazine site (http://reason.com/volokh) since late 2017.

Introduction

Gertz v. Robert Welch, Inc., 418 US 323, 349, 94 S Ct 2997, 41 L E 2d 789 (1974), limits presumed damages in libel cases brought by private figures by requiring proof of "actual malice." But the appellate court below, citing *Wheeler v. Green*, 286 Or 99, 593 P2d 777 (1979), held that the First Amendment only requires proof of "actual malice" to recover presumed damages "in defamation actions brought by private parties against *media* defendants." *Lowell v. Wright*, 306 Or App 325, 347, 473 P3d 1094 (2020) (emphasis in original). This analysis is not correct; to the extent *Wheeler* so holds, it fails to properly protect the First Amendment rights of nonmedia speakers:

1. *Wheeler* created a First Amendment double standard that conflicts with subsequent United States Supreme Court decisions. The U.S. Supreme Court has refused to create any media-nonmedia distinction in First Amendment cases. And, as that Court has said, this equal treatment is especially sensible in the internet era. Media participation has become increasingly decentralized and commonplace, making it impossible to draw meaningful distinctions between media and nonmedia speakers. Moreover, even if such distinctions were possible, First Amendment values are better served by treating both types of speakers equally.

2. The *Wheeler* rule departs from the view of the federal circuit courts. All seven circuits to consider the question presented here have held that the First

Amendment applies equally to media and nonmedia speakers in defamation actions; six of those circuits, including the Ninth Circuit, held this after *Wheeler* was decided. This makes the First Amendment standard for Oregon defamation cases turn on whether the case is in state or federal court.

3. The *Wheeler* rule is also an aberration among state courts. Decisions in twenty state courts treat media and nonmedia speakers equally in defamation cases; decisions in only two or three state courts discriminate among such speakers. Just last year, the Minnesota Supreme Court—one of the few that had endorsed a media-nonmedia distinction—joined the prevailing approach in treating all speakers equally.

This Court should therefore overrule *Wheeler*, in light of the developments since 1979.

Argument

I. *Wheeler* Conflicts with Subsequent U.S. Supreme Court Decisions, Which Reject Lesser First Amendment Rights for Nonmedia Speakers

Media and nonmedia speakers are equally protected by the First Amendment. Most recently, in *Citizens United v. FEC*, 558 US 310, 130 S Ct 876, 175 L Ed 2d 753 (2010), the Supreme Court expressly held that "the institutional press" has no "constitutional privilege beyond that of other speakers." *Id.* at 352 (internal quotation marks omitted). And in the process the Court endorsed the view of five concurring and dissenting Justices in *Dun & Bradstreet, Inc. v. Greenmoss*

Builders, Inc., 472 US 749, 105 S Ct 2939, 86 L Ed 2d 593 (1985), a leading libel-law precedent: Writing for the four dissenters, Justice Brennan wrote that "the rights of the institutional media are no greater and no less than those enjoyed by other individuals engaged in the same activities," *id*. at 784, and Justice White, concurring in the judgment, "agree[d] with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech," *id*. at 773.

Indeed, the Court has expressly refused to discriminate between media and nonmedia speakers in a wide range of First Amendment contexts. It has refused to provide the institutional media with "a testimonial privilege that other citizens do not enjoy," *Branzburg v. Hayes*, 408 US 665, 690, 92 S Ct 2646, 33 L Ed 2d 626 (1972), or "a constitutional right of special access to information not available to the public generally," *Pell v. Procunier*, 417 US 817, 834, 94 S Ct 2800, 41 L Ed 2d 495 (1974). And it has declined to grant the institutional media preferential First Amendment treatment under generally applicable antitrust, copyright, and labor laws. *See* Eugene Volokh, *Freedom for the Press as an Industry or Technology? From the Framing to Today*, 160 U Pa L Rev 459, 506–09 (2012). All speakers, whether the institutional media or ordinary people, are entitled to the same First Amendment protections when speaking to the public (whatever extra protection some speakers may enjoy under state law).

The constitutional protection provided in *Gertz*—in particular, that private-figure defamation plaintiffs must show defendants' actual malice ("knowledge of falsity or reckless disregard for the truth") to recover presumed damages—must therefore apply equally to media and nonmedia defendants. And this is consistent with *Gertz* itself: Nothing in the Court's discussion of presumed damages in *Gertz*, 418 US at 349–50, turns on the speaker's status; the Court's references elsewhere in the opinion to "media" or "publishers" stemmed simply from the defendant in that case being a magazine publisher.

This equal treatment of all speakers, media and nonmedia, as to First Amendment defamation rules is also consistent with broader First Amendment principles. The Court has rightly viewed the First Amendment's "freedom * * * of the press" as protecting the press as a *technology*—the printing press and its technological heirs—and as a *function* (gathering and reporting information to the public using mass communications technology) rather than giving special rights to a particular *industry*. *See generally* Volokh, 160 U Pa L Rev at 463–65. The freedom of the press is a "fundamental personal right[]" that is enjoyed by nonprofessional leafletters as much as by the professional media: "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 US 444, 450, 452, 58 S Ct 666, 82 L Ed 949 (1938).

And this constitutional equal treatment makes sense, especially given developments since *Wheeler*. "With the advent of the Internet and the decline of print and broadcast media, * * * the line between the media and others who wish to comment on political and social issues becomes far more blurred." *Citizens United*, 558 US at 352.

Ordinary consumers like Wright can now speak to the public the same way that reviewers writing for newspapers or magazines could, such as by reviews on Google and Yelp. They can also set up review sites that are essentially online magazines. No First Amendment line can be drawn between, say, a free alternative newspaper that publishes reviews, a consumer group's site, an individual's own complaint site, or a one-off review posted by the individual on a third-party site.

Indeed, the *amici* exemplify how blurry the media-nonmedia line would have to be:

- The Institute for Free Speech and the Electronic Frontier Foundation are not usually thought of as "media," but they maintain web sites (http://ifs.org/ and http://www.eff.org) on which they publish their views to the world, just as online magazines do.
- Howard Bashman is a lawyer, but his How Appealing blog is likely the nation's leading news source related to appellate litigation.

- SCOTUSblog is published by lawyers, but it has become the nation's leading news source on the Supreme Court.
- Prof. Reynolds publishes the InstaPundit blog, one of the leading political and public policy blogs in the country; he has also often written in newspapers such as *USA Today* and the *New York Post*, and has sometimes excerpted material from those articles on his blog.
- Prof. Volokh publishes the Volokh Conspiracy blog, also a leading blog on law; for some years it was independently hosted but since 2014 it has been hosted at mainstream media sites (the *Washington Post* and then *Reason* magazine).
- Profs. Youm and Volokh publish their views to the public via Twitter, at @MarshallYoum and @VolokhC.
- And Profs. Funk, Raban, Youm, Reynolds, and Volokh have regularly conveyed their analyses to lawyers, judges, and academics by publishing law journal articles.

First Amendment law cannot sensibly and fairly decide which of the *amici* are "the media" and which are not.

And even if it were possible, drawing a media-nonmedia distinction would be unwise. As the Supreme Court explained in *Gertz*, juries in defamation cases might be tempted to use presumed damages (as opposed to provable compensa-

tory damages) "to punish unpopular opinions rather than to compensate individuals for injury sustained." *Gertz*, 418 US at 349. And by giving juries an "uncontrolled discretion" to award damages for harm to reputation, the presumed damages doctrine "unnecessarily exacerbates the danger of media self-censorship" and chills the exercise of First Amendment rights. *Id.* at 349, 350.

This logic applies even more clearly to nonmedia speakers. Media speakers are more likely than most nonmedia speakers to have considerable assets, enabling them to fight libel cases; they also often buy libel insurance, because that is needed for them to function (and is a tax-deductible business expense). They also have paid staff who are trained to investigate the facts, keep careful notes, and otherwise protect their institutions from liability.

Nonmedia speakers generally lack these protections: They have fewer assets; they often lack libel insurance; and they have more limited investigatory resources. They are thus at least as subject to the chilling effect of presumed damages as are media speakers—and therefore need the same First Amendment protections as do the traditional media.

This case does not require this Court to reconsider the result in *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or 361, 568 P2d 1359 (1977). Though that decision also mentioned the media-nonmedia distinction, it did so with regard to speech said privately to a business rather than to the public, *id.* at 363,

and on a matter where "there is no issue of public concern," *id.* In *Dun & Bradstreet*, the U.S. Supreme Court held that the First Amendment does not require a showing of "actual malice" for presumed or punitive damages in libel cases where there is no issue of public concern, especially when the speech is conveyed just to a few listeners. 472 US at 761–62 (lead opin.). The result in *Harley-Davidson* can thus be reconciled with the U.S. Supreme Court precedent in *Dun & Bradstreet* (even though *Dun & Bradstreet* rejected the media-nonmedia distinction).

But *Wheeler* cannot be reconciled with the U.S. Supreme Court precedent in *Gertz* and *Citizens United*. Oregon is generally free, of course, to extend greater protections to media speakers than the Federal Constitution requires; but it cannot give nonmedia speakers less protections than the Federal Constitution.

II. *Wheeler* Also Conflicts with Every Federal Appellate Court to Consider the Same Question, Including the Ninth Circuit

All seven federal appellate courts to consider the issue have held that the actual-malice rule applies equally to private-figure defendants in defamation cases. *Obsidian Fin. Grp., LLC v. Cox*, 740 F3d 1284, 1291 (9th Cir 2014); *Snyder v. Phelps*, 580 F3d 206, 219 n.13 (4th Cir 2009), *aff'd as to other matters*, 562 US 443 (2011); *Flamm v. Am. Ass'n of Univ. Women*, 201 F3d 144, 149 (2d Cir 2000); *In re IBP Confidential Bus. Documents Litig.*, 797 F2d 632, 642 (8th Cir 1986); *Garcia v. Bd. of Educ.*, 777 F2d 1403, 1410 (10th Cir 1985); *Avins v.*

White, 627 F2d 637, 649 (3d Cir 1980); *Davis v. Schuchat*, 510 F2d 731, 734 n.3 (DC Cir 1975). Six of those decisions postdate *Wheeler*.

Most importantly, the Ninth Circuit has held that "the First Amendment defamation rules in *Sullivan* and its progeny apply equally to the institutional press and individual speakers." *Obsidian Fin. Grp*, 740 F3d at 1291. This means that federal and state courts in Oregon dealing with virtually identical cases now apply different rules:

- Non-Oregon speakers (such as the defendant in *Obsidian*) who allegedly libel an Oregonian can get the protections offered by *Gertz*, because they can litigate their cases in federal court.
- Oregon speakers who allegedly libel another Oregonian cannot get those protections, because their cases must be litigated in state court.

Thus, *Wheeler* results in Oregonian speakers having less freedom of speech protection than non-Oregonian speakers *in Oregon*. This Court should abolish such unequal treatment, by harmonizing Oregon's approach with the Ninth Circuit's.

III. *Wheeler* Also Conflicts with the Great Majority of State Courts

Published appellate decisions in twenty states, plus the District of Columbia, have secured to media and nonmedia speakers the same First Amendment rights in tort lawsuits based on speech communicated to the general public.[1] This is

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[1] *Doe v. Alaska Super. Ct.*, 721 P2d 617, 628 (Alaska 1986); *Antwerp Diamond Exch. of Am. v. Better Bus. Bureau*, 130 Ariz 523, 527, 637 P2d 733, 737

consistent with the view that all who use "the press" in the sense of the technology of mass communication have equal First Amendment rights. *See* Volokh, 160 U Pa L Rev at 463–65. On the other side, only two states besides Oregon have published precedents denying full First Amendment protections to nonmedia speakers who communicate to the general public. *Fleming v. Moore*, 221 Va 884, 893, 275 SE2d 632, 638 (1981); *Denny v. Mertz*, 106 Wis 2d 636, 660, 318 NW2d 141, 152–53 (1982). One other state established a rule that certain subjects, when addressed by media defendants, are by definition matters of public

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(1981); *Nizam-Aldine v. City of Oakland*, 47 Cal App 4th 364, 374, 54 Cal Rptr 2d 781 (1996); *Moss v. Stockard*, 580 A2d 1011, 1022 n.23 (DC 1990); *Nodar v. Galbreath*, 462 So 2d 803, 808 (Fla 1984); *Rodriguez v. Nishiki*, 65 Haw 430, 437, 653 P2d 1145, 1149–50 (1982); *Kennedy v. Sheriff of E. Baton Rouge*, 2005-1418 (La 7/10/06), 935 So 2d 669, 677–78 (2006); *Jacron Sales Co. v. Sindorf*, 276 Md 580, 591–92, 350 A2d 688, 695 (1976); *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass 129, 134, 691 NE2d 925, 928–29 (1998); *Maethner v. Someplace Safe, Inc.*, 929 NW2d 868, 878–79 (Minn 2019); *Henry v. Halliburton*, 690 SW2d 775, 784 (Mo 1985); *Williams v. Pasma*, 202 Mont 66, 76, 656 P2d 212, 216–17 (1982); *Wheeler v. Neb. State Bar Ass'n*, 244 Neb 786, 791, 508 NW2d 917, 921 (1993); *Berkery v. Estate of Stuart*, 412 NJ Super 76, 88, 988 A2d 1201, 1208 (App Div 2010); *Poorbaugh v. Mullen*, 99 NM 11, 20, 653 P2d 511, 520 (1982); *Gross v. N.Y. Times Co.*, 281 AD2d 299, 300, 724 NYS2d 16, 17 (2001) (endorsing *Hammerhead Enters. v. Brezenoff*, 551 F Supp 1360, 1369 (SDNY 1982), *aff'd*, 707 F2d 33 (2d Cir 1983), which contains a more detailed First Amendment discussion); *Wampler v. Higgins*, 93 Ohio St 3d 111, 121, 752 NE2d 962, 972 (2001); *DeCarvalho v. daSilva*, 414 A2d 806, 813 (RI 1980); *Trigg v. Lakeway Publishers*, 720 SW2d 69, 75 (Tenn Ct App 1986); *Casso v. Brand*, 776 SW2d 551, 554 (Tex 1989); *Long v. Egnor*, 176 W Va 628, 633, 346 SE2d 778, 783 (1986).

concern, but this does not itself create a media/non-media distinction like that applied by the decision here.[2]

Indeed, other states that had previously rejected the prevailing view have since reversed course. Just last year, the Minnesota Supreme Court held that private-figure plaintiffs must prove actual malice to recover presumed damages against nonmedia defendants, *Maethner v. Someplace Safe, Inc.*, 929 NW2d 868, 878–79 (Minn 2019), and departed from its contrary decades-old precedent in *Richie v. Paramount Pictures Corp.*, 544 NW2d 21 (Minn 1996). Likewise, the Louisiana Supreme Court in *Kennedy v. Sheriff of E. Baton Rouge*, 2005-1418 (La 7/10/06), 935 So 2d 669, 678 (2006), held "that a private individual's right to free speech is no less valuable than that of a publisher, broadcaster or other member

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[2] In *Senna v. Florimont*, 196 NJ 429, 958 A2d 427 (2008), the court concluded that the commercial speech in that case (*see id.* at 430) was not entitled to the protections that the court had given in a few situations to media defendants. Commercial speech in general merited less protection, as it "predominantly relate[s] to the economic interests of the speaker." *Id*. at 444. On the other hand, speech by the media, when it concerns "public health and safety, a highly regulated industry, or allegations of criminal or consumer fraud or a substantial regulatory violation will, by definition, involve a matter of public interest or concern." *Id.* at 443–44. Because speech on those subjects intrinsically involved matters of public concern, the actual-malice standard would therefore apply. But that standard is just as applicable to any speech on such subjects that is published through mass communications technology, whether by the media or otherwise, as it would also concern a matter of public interest. And, as since recognized by a New Jersey appellate court, *Senna* did not disturb prior precedent "that the actual-malice standard can apply to non-media defendants," and that in fact it "'*will* apply when the alleged defamatory statement . . . involves a matter of public concern.'" *Berkery*, 988 A2d at 1208 (quoting *Senna*, 945 A2d at 443).

of the communications media," effectively overruling contrary Louisiana Court of Appeals precedent (*Gilbeaux v. Times of Acadiana, Inc.*, 96-360 (La App 3 Cir 3/26/97), 693 So 2d 1183, 1188 (1997)).

Conclusion

Wheeler is inconsistent with subsequent Supreme Court precedent, federal appellate precedent, and the prevailing view in almost all state courts. *Wheeler* conflicts with fundamental First Amendment values: It chills the speech of nonmedia speakers in an electronic age, when that speech has become indistinguishable from that of media speakers, and is often just as significant to the public. And *Wheeler*'s inconsistency with Ninth Circuit precedent leads to different First Amendment rules being applied in libel cases depending on whether they are filed in state or federal court. This Court should therefore overrule *Wheeler*.

DATED: March 19, 2021

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