ORAL ARGUMENT SCHEDULED NOV. 17, 2023

No. 22-7117

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHELLE FLORIO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STEVEN FLORIO, DECEASED; PATRICK COSTELLO; TIMOTHY MALLACH; WILLIAM MILLIOS,
Plaintiffs-Appellants,

v.

GALLAUDET UNIVERSITY; THE BOARD OF TRUSTEES OF GALLAUDET UNIVERSITY; ROBERTA CORDANO; WP COMPANY, LLC D/B/A THE WASHINGTON POST,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia
No. 21-CV-01565-CRC

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 31 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and amici curiae

Except for the following amici, all parties, intervenors, and amici appearing before the district court and in this Court are listed in Appellants' brief and the Court-Appointed Amicus' Supplemental Brief.

B. Rulings under review

References to the rulings at issue appear in Appellants' and Appellees' briefs.

C. Related cases

Counsel for amici are not aware of any related pending cases.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Reporters Committee for Freedom of the Press certifies that it is an unincorporated association of reporters and editors with no parent corporation and no stock.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

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National Newspaper Association is a non-stock nonprofit Florida corporation. It has no parent corporation and no subsidiaries.

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

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The News Leaders Association has no parent corporation and does not issue any stock.

News/Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

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.

No publicly held corporations own any stock in the Philadelphia Inquirer, PBC, or its parent company, the non-profit Lenfest Institute for Journalism, LLC.

Pro Publica, Inc. ("ProPublica") is a Delaware nonprofit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

Pulitzer Center on Crisis Reporting is a non-profit organization with no parent corporation and no stock.

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

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

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

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

Student Press Law Center is a 501(c)(3) not-for-profit corporation that has no parent and issues no stock.

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AMICI CURIAE, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

Amici are the Reporters Committee for Freedom of the Press ("Reporters Committee") and 31 media organizations. 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. Amici share an interest in laws impacting press freedom, and fuller disclosures of interest are set forth in the Motion.

After appointment of amicus for Appellants and in response to the supplemental briefing, amici believe issues have been raised on which they can offer information and perspective that the Court may find useful in its decisional process. This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a)(2) and D.C. Circuit Rule 29(b).

RULE 29(a)(4)(E) CERTIFICATION

Amici certify that no party or party's counsel authored this brief in whole or in part or contributed money to fund preparing or submitting this brief, and no person—other than amici, their members, or counsel—contributed money that was intended to fund preparing or submitting the brief.

CIRCUIT RULE 29(d) CERTIFICATION

Pursuant to D.C. Circuit Rule 29(d), amici certify that this brief is necessary to provide the unique perspective of media organizations and journalists. Amici are not aware of another amicus brief being filed in this appeal addressing the particular concerns of the news media.

INTRODUCTION AND SUMMARY OF ARGUMENT

This lawsuit arises out of reporting by The Washington Post about an issue of public concern: allegations of racism against a fraternity at Gallaudet University and the university's suspension of that fraternity in response. In reporting on that current, newsworthy controversy and the historical context in which it arose, The Post made reference to a photograph from the late 1980s of 34 fraternity members (two of whom were Appellants)—a photo relevant to the current controversy. The Post did not publish the photograph or direct readers to where it could be found. Nor did The Post identify any of the Appellants, who had been members of the fraternity approximately 30 years ago.

The district court correctly held that Appellants' subsequently-filed defamation claims against The Post failed because, among other reasons, it is black letter law that an individual cannot recover for alleged defamation of a group to which the individual belonged.[1] The district court also recognized, correctly, that the "narrow" exception for small groups did not apply here. Contrary to the arguments of Appointed Amicus in this case, to hold otherwise would upend nearly

[1] Amici agree with The Post that Appellants' claims arising out of The Post's reporting fail on several grounds. Amici write to specifically address the "group libel" doctrine, which requires that an alleged defamation be "of and concerning" the plaintiff. The correct application of that doctrine—upon which members of the media rely to report on the activities of organizations, institutions, and movements—is of significant concern to the press.

100 years of precedent and threaten to stifle news reporting any time a group with a large membership might become aggrieved, affecting many stories of public importance.

The group libel doctrine protects the ability of the press to perform its constitutionally recognized and protected role of keeping the public informed about matters of public concern. If the long-standing rule against group libel were abandoned or weakened, courts would see an "unwarranted proliferation of litigation"—including litigation arising out of news reporting about organizations and groups—that would come with a significant "cost to free expression." Hon. Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:9:4, at 1-187 (5th ed. 2017); *see, e.g., Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 900 (W.D. Mich. 1980), aff'd sub nom. *Michigan United Conservation Clubs v. CBS News, A Div. of CBS, Inc.*, 665 F.2d 110 (6th Cir. 1981) ("If plaintiffs were allowed to proceed with this claim, it could invite any number of vexatious lawsuits and seriously interfere with public discussion of issues, or groups, which are in the public eye . . . [s]uch suits would be especially damaging to the media, and could result in the public receiving less information about topics of general concern."). This would be a troubling shift for the law of defamation, a significant departure from the law of this Circuit, and profoundly detrimental to news reporting on issues of public importance.

For the reasons herein, amici urge this Court to affirm.

ARGUMENT

I. An alleged libel must be "of and concerning" the plaintiff, a rule that is vital to protecting news reporting.

It is well-established in the law of defamation that unless a challenged statement is "of and concerning" the plaintiff, the plaintiff has no cause of action. *See Fowler v. Curtis Publ'g Co.*, 182 F.2d 377, 378 (D.C. Cir. 1950) (concluding that a plaintiff "had no cause of action even though he may have been financially injured by the publication" because it "'cannot be said that the publication is concerning him'" (quotations omitted)); *Diaz v. NBC Universal, Inc.*, 536 F. Supp. 2d 337, 342 (S.D.N.Y. 2008), *aff'd*, 337 F.App'x 94 (2d Cir. 2009) ("'Hornbook libel law requires that an allegedly defamatory statement must be 'of and concerning' a particular individual.'" (citations omitted)). In other words, the allegedly "defamatory words must refer to 'some ascertained or ascertainable person, and that person must be the plaintiff.'" *Serv. Parking Corp. v. Wash. Times Co.*, 92 F.2d 502, 504 (D.C. Cir. 1937) (quoting Odgers, *Libel and Slander*, at 123 (6th ed. 1929))). The burden of satisfying the "of and concerning" requirement rests on the plaintiff, who "must show that" the allegedly defamatory statement had "particular application" to him. *Alexis v. District of Columbia*, 77 F. Supp. 2d 35, 40 (D.D.C. 1999); *accord Serv. Parking Corp.*, 92 F.2d at 503–04. This important requirement for defamation is not only a common law prerequisite

but also—at least as regards to speech about matters of public concern, like the speech challenged in this case—a constitutional requirement. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964) (plaintiff's defamation claim was "constitutionally defective" because he could not show that the challenged statements were "of and concerning" him).

It follows from the foregoing, well-settled legal principles that:

> [A]llegations of defamation by an organization and its members are not interchangeable. Statements which refer to individual members of an organization do not implicate the organization. By the same reasoning, statements which refer to an organization do not implicate its members.

Jankovic v. Int'l Crisis Grp., 494 F.3d 1080, 1089 (D.C. Cir. 2007) (citing *Provisional Gov't of New Afrika v. ABC, Inc.*, 609 F. Supp. 104, 108 (D.D.C. 1985)). Simply put, "[d]efamation is personal." *Id.* (rejecting argument that "namesake of a corporation" was "defamed when false misdeeds [we]re attributed to his company"). And, accordingly, under the "group libel doctrine," a "plaintiff's claim is insufficient if the allegedly defamatory statement referenced the plaintiff solely as a member of a group" or was "broadly concerning the members of a large class or group, absent other circumstances specifically pointing to a particular member." *Alexis*, 77 F. Supp. at 40 (citations omitted).

The rule against group libel evolved from 18th and 19th century common law; by the early 20th century it was well settled that a "writing which inveighs . . . against a particular order of men, is no libel" and it instead "must descend to

particulars and individuals, to make it a libel." *Sumner v. Buel*, 12 Johns. 475, 477 (N.Y. Sup. Ct. 1815). In a decision that predates *New York Times v. Sullivan* by more than two decades, this Court in *Service Parking Corp. v. Washington Times Co.* observed that "courts have chosen not to limit freedom of public discussion except to prevent harm occasioned by defamatory statements *reasonably susceptible of special application to a given individual*." 92 F.2d at 505–06 (emphasis added) (affirming directed verdict for newspaper because parking lot owner not defamed by newspaper's "parking lot racket probe," which concerned D.C.'s "downtown parking lots and their owners as a class" but did not identify particular ones).

There are important reasons for "the limitations the concept of group libel imposes on actions for defamation" by members of an organization when the organization is subjected to scrutiny. *Provisional Gov't of New Afrika*, 609 F. Supp. at 108 (citation omitted). Chief among these is "the social interest in free press discussion of matters of general concern." *Service Parking Corp.* 92 F.2d at 505. News organizations routinely report on the activities of companies, organizations, associations, and other large groups as part of their reporting on such matters. *See, e.g.*, *Schuster v. U.S. News & World Rep., Inc.*, 602 F.2d 850, 853 (8th Cir. 1979) (group libel doctrine protects magazine reports on drug smuggling); *Riss & Co. v. Ass'n of Am. Railroads*, 187 F. Supp. 323, 325 (D.D.C

1960) (same, for newspaper reports on illegal cargo carried by railroads); *O'Brien v. Williamson Daily News,* 735 F. Supp. 218 (E.D. Ky. 1990), *aff'd,* 931 F.2d 893 (6th Cir. 1991) (same, for wire service report on high school teachers allegedly having affairs with students, when there were between 27-35 total teachers, "too large [a group] to bring libel claim). These press organizations depend on the "journalistic freedom in investigating and reporting on matters of public interest" afforded by the group libel doctrine, which alongside similar speech-protective rules, guards against the "proliferation of libel actions that could have a devastating effect on the financial viability of the media and a chilling effect on the presentation of public issues." *Schuster*, 602 F.2d at 853 (no cause of action for plaintiffs not identified by name but referenced as part of "background information on the controversy" that "was primarily directed toward" broader social issues) (citing *Riss & Co.*, 187 F. Supp. at 325). Expanding the universe of individuals able to file defamations claims, as Appellants and their Court-appointed amicus advocate, poses a threat to legitimate newsgathering.

In sum, well-settled legal rules grounded in both the Constitution and common law support affirmance of the district court's application of the "of and concerning" element of Appellants' defamation claims, and its determination that the group libel doctrine barred those claims.

II. Neither narrow exception to the rule against group libel applies to the news reporting at issue here.

The group libel doctrine is, by design, "not . . . easy for group members to overcome." *Alexis*, 77 F. Supp. 2d at 40. To do so, and thus satisfy the requirement that an alleged defamatory statement be "of and concerning" the plaintiff, the plaintiff must demonstrate that one of two narrow exceptions applies: (1) that "the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the [plaintiff] member[,]" *id.* (emphasis removed) (citing Restatement (Second) of Torts § 564A (1977)); or (2) that "the group or class is so small that the matter can reasonably be understood to refer to the member[,]" *Id.* (citing Restatement (Second) of Torts § 564A). This latter exception to the group libel doctrine is known as the "small group exception." *Id*. Neither exception is applicable here.

For the first exception to apply, "a statement about a group 'must contain some special application of the defamatory matter to the individual,'" and "[a]bsent evidence" of such "particular application" to the plaintiff, dismissal is required. *Id.* (quoting *AIDS Counseling & Testing Ctrs. v. Grp. W Television, Inc.*, 903 F.2d 1000, 1005 (4th Cir.1990)). As Appellants' own recitation of the facts makes clear, the Post's coverage contained no "particular" reference to Appellants. *See* Appellants' Br. at 19–20. The photograph featuring Appellants was not included in the Post articles. No names or other identifying information about the

Appellants (or any of the other former fraternity members in the photograph) were included in the Post's reporting. Appellants acknowledge that the Post's coverage about allegations of racism leveled at the fraternity referenced many images circulating online of fraternity members, and one Post article expressly noted that a photograph of fraternity members who appeared to be giving the Nazi salute (the one featuring Appellants) was not a factor in the fraternity's suspension. *Id.*

Appellants' defamation claims against the Post come down to the theory that a reader of the Post's reporting might do additional research to track down the 30-year-old photograph that it referenced in a general away and then could have, with additional research, learned who appeared in the photo. This attenuated argument is a far cry from "evidence" that the alleged defamation at issue here is of "particular application" to Appellants; it fails, as a matter of law, to establish that the alleged defamation is "of and concerning" them. *Alexis*, 77 F. Supp. at 43 ("someone reading the newspaper article there readily could have found out the identities of the few parking-lot owners the article disparaged. Without undue effort, such a person then would have known exactly who had been disparaged in the article. . . . [But] plaintiffs . . . do not gain the right to sue for defamation of the group merely because a listener could have gone on to find out who comprised the group.") (citation omitted)).

The district court correctly rejected Appellants' claims that because two of them appear in a decades-old photograph of 34 fraternity brothers that was referenced, however obliquely, in the alleged defamatory articles the Post wrote about the current controversy surrounding the fraternity at Gallaudet, they have been identified with sufficient particularity. As the district court determined, the articles were about the suspension of the fraternity as a result of new information, the history of criticisms that had dogged the fraternity and school, and broader social shifts. Appellants failed to establish that the alleged defamatory statements in this series of context pieces were "of and concerning" them, merely because two of them appeared, unnamed, in a photograph more than 30 years old that was referenced without being published.[2] The district court was correct to conclude

[2] Court-appointed amicus for Appellants tries to side-step dispositive details from decisions out of this Circuit, and instead relies on decisions of other courts. *See* Court-Appointed Amicus Suppl. Br. at 19-20; *see also* Appellants' Br. at 14-16 (urging adoption of New York's "intensity of suspicion test," and factors like the size of the communities where individual members are readily associated with the defamed group and 'the prominence of the group and its individual member'"). As the district correctly found, this out-of-circuit authority is neither persuasive nor binding. *Florio v. Gallaudet Univ.*, 619 F.Supp.3d 36, 44 n.3 (D.D.C. 2022). For example, in *Elias v. Rolling Stone*, cited by Court-appointed amicus, the article in question was about a 2013 graduating class of fraternity members at the University of Virginia—a smaller group than the Gallaudet group—and "of and concerning" a particular plaintiff who had a "prominent role" in initiating new members and frequented the school pool. 872 F.3d 97, 104–06 (2d Cir. 2017). Beyond the facile similarity that might exist between two libel cases involving two fraternities, no analogous facts make Appellants "particularly" identifiable. *See Fowler*, 182 F.2d at 378.

that "[n]o 'reasonable listener' or reader 'could conclude that the statement[s] referred to each member' in the salute photograph 'or "solely or especially" to' any individual in the photo, including Costello or Millios." *Florio*, 619 F. Supp. at 45 (quoting *Browning v. Clinton*, 292 F.3d 235, 248 (D.C. Cir. 2002)).[3]

Nor does the "small group" exception to the rule against group libel apply here. This "narrowly construed" exception is applicable if "the group or class is so small that the matter can reasonably be understood to refer to the member." *Alexis*, 77 F. Supp. 2d at 40 (citing Restatement (Second) of Torts § 564A). The traditional "rule of thumb" is that "unnamed group members generally are not permitted to sue for group defamation" when the group is more than 25 members. *Id.* at 41; *accord Serv. Parking Corp.*, 92 F.2d at 502 (no defamation claim for parking lot owner where 20 to 30 parking lots implicated in statement and "the class was not so small as to render defamation of the class essentially the same as defamation of the plaintiff."). While the particulars of a case may give rise to exceptions, this general rule, observed with consistency in this Circuit, is

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[3] Appellant Florio argues that his claim should not have been dismissed because even though he was not actually in the photograph, one of his co-workers had mistakenly identified him as being in it and he was "taint[ed]" as a result. Appellants' Brief at 33–34. The district court correctly rejected that argument. *Florio*, 619 F. Supp. 3d at 44. It is "not enough . . . that the defamatory matter is actually understood as intended to refer to the plaintiff; the interpretation *must be reasonable in the light of all the circumstances*." Restatement (Second) of Torts § 564, cmt. b. (emphasis added).

commonsense; the likelihood of identification of a particular individual (as well as any damage from the alleged defamation) *decreases* as the size of a group *increases*. *See Jankovic*, 494 F.3d at 1089 (observing the larger the group, the less there is a risk of injury to an individual member of it); *Clark v. Maurer*, 824 F.2d 565, 567 (7th Cir. 1987) (publication that referenced 24 sanitation works was not "stigmatizing the plaintiffs" specifically); Rodney A. Smolla, *Law of Defamation* § 4:50 (2d ed.) (one rationale behind group libel doctrine is that "disparagement is too diffuse to create a realistic likelihood of reputational injury to any individual member"). As courts have observed once a group gets too large, even if identification is possible, "[t]hat reasonable persons may or in fact do understand that the plaintiff is being referred to individually becomes irrelevant" as the sting is inherently lessened. *Sack on Defamation* § 2:9:4, at 2-186 Here, there were 34 persons in this three-decade-old (unpublished) photograph. Meanwhile, the fraternity itself boasts hundreds, if not thousands, of alumni from the last four decades. The district court correctly concluded that neither narrow exception to the group libel doctrine applied. *Fowler*, 182 F.2d at 378 (affirming dismissal of claims brought by 60 taxicab drivers over taxicab photo because when allegedly "defamatory publication [is] directed against a class, without in any way identifying any specific individual, no individual member of the group has any redress" unless statement applies to every group member).

CONCLUSION

Accordingly, and for all the reasons herein, amici urge the Court to affirm the district court's holding that the alleged defamation is not "of and concerning" Appellants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because it contains 3,120 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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Dated: November 3, 2023
Washington, D.C.