No. 10-3352

United States Court of Appeals
for the
Third Circuit

ARTHUR ALAN WOLK, ESQUIRE

Plaintiff-Appellant,

v.

WALTER K. OLSON, ET AL.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
THE HONORABLE MARY A. MCLAUGHLIN

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 19 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANTS-APPELLEES

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STATEMENT OF INTEREST

Amici Curiae are national and local news organizations, nonprofit associations representing newsgatherers, and trade groups whose journalists and members regularly gather and disseminate news and information to the public through their newspapers, magazines, television and radio stations, and via the Internet.[1] *Amici*'s interest in this case is in assuring that they will not have to defend against defamation claims brought years, or even decades, after original publication of their work. The "marketplace of ideas" cannot achieve its goal of furthering and fostering public debate if the activities of those who gather and disseminate information about matters of public importance are chilled by such threats. Courts' strict application of limitations periods, including the U.S. District Court's application in this case, provides protection from the possibility of facing liability for potentially indefinite periods of time.

Appellant's action in this case was time-barred by the one-year statute of limitations for defamation unless some tolling mechanism had tolled the statute.

[1] *Amici* are The Reporters Committee for Freedom of the Press and 19 media organizations—American Society of News Editors, The Associated Press, The Association of American Publishers, Inc., Association of Capitol Reporters andEditors, Citizen Media Law Project, Daily News, L.P., The E.W. Scripps Co., Gannett Co., Inc., The McClatchy Co., The New York Times Co., Newspaper Association of America, The Newspaper Guild – CWA, North Jersey Media Group Inc., The Patriot-News Co., Pennsylvania Newspaper Association, Radio Television Digital News Association, Society of Professional Journalists, Stephens Media LLC, and The Washington Post. A description of each is set forth in the addendum to this brief.

Appellant claims that the "discovery rule," which tolls the limitations period until the plaintiff discovers the allegedly defamatory work, represents such a tolling mechanism. Moreover, he argues that the discovery rule may be applied in "all cases," thereby rejecting the mass media exception to the discovery rule that the District Court adopted. Such a holding by this Court would virtually eliminate publishers' protection from stale defamation claims. As such, *Amici*, many of whom publish material online as well as in more traditional formats, have a strong interest in being able to publish their material free from the chill of lawsuits brought years after distribution of the work.

SOURCE OF AUTHORITY TO FILE

Because Appellant declined to consent to the proposed filing of this brief, a motion for leave to file this *Amici Curiae* brief accompanies it, in accordance with Fed. R. App. P. 29(b).

INTRODUCTION

A recognition that free speech is indispensable to the discovery and spread of truth and, thus, entitled to protection is a hallmark of this country's heritage. As the nation's highest Court noted more than sixty years ago:

> [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

To that end, courts must protect the right of news media, authors, editors, and others to gather and disseminate information about matters of public importance to ensure that the marketplace of ideas achieves its goal of fostering free and transparent public discourse. In recent years, the Internet and its users have contributed vast amounts of information to the public dialogue—a modern trend that this Court has acknowledged. *See United States v. Fullmer*, 584 F.3d 132, 154 (3d Cir. 2009) (noting that because "the postings on the website speak to an issue of political, moral, and ethical importance in today's society … the issues [before the court] fit squarely within the rubric of the First Amendment because they contribute to the 'marketplace of ideas,' as well as educate and urge others to action"); *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 260 (3d Cir. 2003)

(holding unconstitutionally overbroad a statute with affirmative defenses that "[drove] … protected speech from the marketplace of ideas on the Internet").

A fundamental aspect of safeguarding the right to distribute information is the assurance that publishers will not have to defend against claims brought years after original publication of the material. A strict application of a statute of limitations to a cause of action provides that guarantee; conversely, application of the discovery rule forces publishers to face potentially unlimited periods of exposure to claims. Recognizing the unique nature of mass media publications and the need of modern society to protect publishers against the risk of liability years after the publication of a work, numerous courts across the country have held that the statute of limitations accrues on the publication of a work in the mass media and is not tolled by plaintiff's claimed lack of knowledge of the allegedly defamatory material.

The District Court acknowledged some of this case law before it similarly declined to apply the discovery rule in a claim involving mass-media defamation. (District Ct. Mem. 6–8.) Perhaps recognizing the strong weight of authority for such a finding, Appellant, by relying on case law that does not involve defamation claims, let alone defamation claims against the mass media, shifts the inquiry from the nature of the communication to the reasonable diligence of the allegedly injured party—a subjective determination that he claims is a factual one for the

jury to decide. Appellant interprets this case law to hold that the discovery rule may be applied in "all cases," rejecting the existence of a mass-media exception to the discovery rule and effectively eliminating any pretrial defense based on the statute of limitations, no matter how implausible a plaintiff's claim that he or she only recently discovered the work. In the alternative, Appellant attacks the common assumption that Web logs ("blogs")[2] posted on the Internet are mass media. (Appellant's Br. 42–44.) In doing so, he ignores U.S. Supreme Court jurisprudence analogizing the Internet to the print, rather than the broadcast, medium, thereby affording it full First Amendment protections, and makes broad generalizations about journalism and the practice of blogging that do not accurately reflect modern newsgathering techniques. (Appellant's Br. 45–47.)

Amici submit that adoption of the argument that Appellant puts forth has severe implications for the mass media that extend beyond the Internet to include

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[2] The term "blog" has a "rapidly evolving and currently amorphous meaning." *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1464 n.21 (Cal. Ct. App. 2006). A law journal article described blogging as follows:

> Blogging is the act of writing or maintaining a "blog." A web log or simply a blog, a portmanteau of "web" and "log," is a website containing, at a minimum, posted entries often around a particular area of interest and that are typically time-stamped by blogging software. These posts are often, but not necessarily, in reverse chronological order, so that one would have to trace the thread of that topic back to the first posting. Such a website would usually be accessible to any Internet user. … [T]here are blogs of many kinds and addressing many topics.

Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 Fordham Intell. Prop. Media & Ent. L.J. 395, 396 (2006).

books, magazines, newspapers, and other publications that should not, in accordance with the important policies underlying the First Amendment and statutes of limitations, face the possibility of having to defend a lawsuit brought years after the original publication. *Amici* therefore ask this Court to affirm the U.S. District Court's finding that for defamation claims based on widespread publication, a cause of action accrues upon publication of the work at issue and that the statute of limitations is not tolled by the plaintiff's claimed ignorance of the publication.

ARGUMENT

The District Court did not err in ruling that the discovery rule is inapplicable in defamation claims against the mass media, which include the Internet and online publications.

A. Pennsylvania law is clear that the discovery rule does not apply to defamation actions involving widespread publication of the allegedly defamatory material.

At first glance, the question of whether the discovery rule applies to libel causes of action in Pennsylvania appears unsettled. However, a closer examination of the case law reveals that the nature of the communication—whether it is public or private—is dispositive of the issue. That is, each case that declines to apply the limitations-period tolling mechanism involves a communication widely available

to the public,[3] while each case that does apply the discovery rule involves a private communication or other unique circumstance not present when the alleged defamation is publicly distributed.

Three federal trial courts in Pennsylvania, each applying state law, have ruled that use of the discovery rule in a case against a media defendant engaged in widespread distribution of its publication is unavailable. *Drozdowski v. Callahan*, No. 07-cv-01233-JF, 2008 WL 375110, at *1 (E.D. Pa. Feb. 12, 2008) (declining to apply the discovery rule in a case involving a book that was distributed worldwide via Amazon.com, an online retail store, as well as by physical booksellers, despite the fact that the plaintiff learned, after the limitations period had expired, of the book's existence through happenstance when she conducted an online search of the author after seeing a television interview of him); *Barrett v. Catacombs Press*, 64 F. Supp. 2d 440, 446, 447 (E.D. Pa. 1999) (deeming the discovery rule "simply unavailable" where the allegedly defamatory statements were published in a book sold generally to the public and finding that publication occurs when 1) there is an actual release or distribution of media; and 2) the party

[3] One Pennsylvania court held that a plaintiff may choose any publication to represent his or her defamation cause of action, and the statute of limitations begins to run on the date of the publication chosen. *Dominiak v. Nat'l Enquirer*, 266 A.2d 626 (Pa. 1970). Although *Dominiak* involved statements in a national publication, it did not address the discovery rule but, rather, involved interpretation and application of the Uniform Single Publication Act, which is not at issue in this case. As such, *Dominiak* provides little authority for resolution of it.

authorizing that release or distribution intends to "bring about a mass sale to the public reasonably calculated to achieve such a mass sale"); *Bradford v. Am. Media Operations, Inc.*, 882 F. Supp. 1508, 1519 (E.D. Pa. 1995) (holding that the plaintiff could not apply the discovery rule to her claim against a national newspaper, noting that the widespread release or distribution of the material to the general public "is the objective triggering event for the statute of limitations in libel cases, and thus the happenstance of when one particular plaintiff happens to see the offending publication can be of no legal moment").

These defamation cases are easily distinguished from those Pennsylvania ones that do apply the discovery rule—the latter ones center on wholly private communications. *Tanzosh v. Inphoto Surveillance*, No. 3:05cv1084, 2007 U.S. Dist. LEXIS 6416, at *1, *8 (M.D. Pa. Jan. 30, 2007) (noting that the secrecy inherent in the communications and other activities of surveillance companies required application of the discovery rule in a defamation claim involving statements that employees of a surveillance company made to plaintiff's neighbors during its investigation of him, despite the fact that defamation "usually play[s] out in a public forum … and thus, [a] plaintiff should have no trouble discovering the injury or its cause"); *Chu v. Disability Reinsurance Mgmt. Servs.*, No. 06-91E, 2006 U.S. Dist. LEXIS 61244, at *1 (W.D. Pa. Aug. 29, 2006) (declining to grant defendants' motion to dismiss a defamation claim as time-barred by the statute of

limitations since a jury could find that the plaintiff-doctor had no reason to know about the statements—contained in a telephone conversation, follow-up letter, and addendum to an insurance medical-review file—at the time the insurance-company employee investigating a claim made them to the plaintiff's treating physician); *Smith v. IMG Worldwide, Inc.*, 437 F. Supp. 2d 297, 306 (E.D. Pa. 2006) (tolling the statute of limitations in a defamation suit based on a statement a sports agent made during a private meeting with a professional football player and a third person advising the athlete on his selection of an agent and specifically distinguishing this claim from those "based on written statements that [are] widely circulated at the moment of publication … ma[king] the plaintiffs' discovery of their injuries possible with the exercise of due diligence"); *Giusto v. Ashland Chem. Co.*, 994 F. Supp. 587 (E.D. Pa. 1998) (holding that statements an employee made to her employer could have been the basis of application of the discovery rule depending on when the plaintiff became aware, or reasonably should have become aware, of the statements).

Moreover, although this Circuit has not addressed in any useful manner statutes of limitations issues in cases involving media defendants or libel or slander causes of action, two federal courts of appeals have considered the discovery rule in a pair of cases that, although not binding on this Court, provides strong support for the unavailability of the tolling mechanism in defamation claims based on

widespread publication. *Schweihs v. Burdick*, 96 F.3d 917, 921 (7th Cir. 1996) (declining to apply the discovery rule in a claim involving a book, noting that in the defamation context, justice requires that the discovery rule be reserved for those situations "where the defamatory material is published in a manner likely to be concealed from the plaintiff, such as credit reports or confidential memoranda"); *Morrissey v. William Morrow & Co., Inc.*, 739 F.2d 962 (4th Cir. 1984) (affirming grant of summary judgment in favor of defendant book publisher since the allegedly defamatory books were available to the public in bookstores nationwide before the expiration of the limitations period).

Significantly, other federal appellate courts that have addressed the issue have declined to toll the statute of limitations even in those cases where the allegedly defamatory communication was private. The Second Circuit, for example, has consistently held that under New York's statute of limitations, a libel plaintiff must assert his or her claim within a year of the date on which the material was first published or displayed to a third party. *Shamley v. ITT Corp.*, 869 F.2d 167 (2d Cir. 1989). Further, in a case involving a letter, it declined to toll that limitations period even "where it would have been impossible for the plaintiff to discover the libel within the limitations period." *Hanly v. Powell Goldstein, LLP*, 290 Fed. App'x 435, 439 (2d Cir. 2008). *See also Bass v. E.I. DuPont De Nemours & Co.*, 28 Fed. App'x 201 (4th Cir. 2002) (rejecting plaintiff's argument that

Virginia's discovery rule should toll its one-year statute of limitations until she discovered the allegedly defamatory statements her employer made about her); *Catrone v. Thoroughbred Racing Ass'ns of N. Am., Inc.*, 929 F.2d 881, 885 (1st Cir. 1991) (declining to apply the discovery rule in a case involving reports not generally distributed but "widely disseminated" among racetracks and state racing commissions when the plaintiff learned of the existence of continuing published allegations against him during a licensing hearing held within the limitations period).

Appellant's reliance on three cases that do not involve defamation claims, let alone defamation claims involving the widespread distribution of publications, is misplaced in light of the authority that squarely addresses the precise issue in this case. Moreover, nothing in the cases Appellant cites distinguishes or upsets these multiple decisions that clearly establish that the relevant determination to the applicability, or lack thereof, of the discovery rule is the nature of the communication—whether the defendant made his or her material available to the public or whether, because of a defendant's active intent to conceal or other unique circumstance, an impediment to the plaintiff's discovery of the work existed. There can be little doubt in this case that Appellees published the material in a manner intended to make it available to the public at large. They did not try to conceal it or address its contents to one person in a private letter, phone call, or conversation;

rather, they posted it to a medium that, in this modern technological era, is arguably the most public information disseminator of them all. And according to the case law addressing this issue, once the Appellees freely distributed their material to willing online users who could consume it simply through a few clicks of the mouse, a discussion regarding whether the discovery rule may be applied in a claim by a libel plaintiff who says he did not see the online work in time is over. No longer relevant are claims that plaintiff discovered the work only through happenstance or that he is not "computer savvy" (Appellant's Br. 47) enough to have located it, for widespread publication of the material is the "objective triggering event for the statute of limitations in libel cases" and, thus, "when one particular plaintiff happens to see the offending publication can be of no legal moment." *Bradford*, 882 F. Supp. at 1519. Perhaps recognizing this weight of authority, Appellant alternatively attacks the common assumption that Internet blogs are a mass medium, the hallmark of which is the widespread publication of information.

B. Internet blogs are mass media entitled to the same protection afforded other mass media excepted from application of the discovery rule in defamation claims against them.

Amici agree with Appellant that the unprecedented growth in size, scope, and popularity of the Internet has significantly increased the opportunity for the unscrupulous to defame, but only because it has significantly increased the

opportunity for all to find a voice for their thoughts. In their efforts to reconcile an ages-old cause of action with a modern and, at the time of its inception, utterly unimaginable technology, legislators and courts considering the issue of online defamation developed various rules to help balance one person's right to be free from reputational harm with another's right to free expression—a fundamental right that is remarkably easier to exercise now, given the accessibility of the Internet. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (holding that under Section 230 of the Communications Decency Act, which Congress enacted, in part, "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum," Internet service providers are immune from liability for defamatory content posted by their users); *Dendrite Int'l, Inc. v. Does*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (announcing a three-part test for lower courts to apply when faced with requests for court orders requiring that the identities of anonymous posters of allegedly defamatory material to the Internet be revealed).

Nowhere, however, does the law call for exposing Internet users to a tolled, potentially indefinitely, limitations period, thereby creating new and open-ended liability for publications that fall squarely within the protection of the First Amendment. In fact, doing so would seem to contravene U.S. Supreme Court jurisprudence establishing that the Internet is akin to the print, as opposed to the

broadcast, medium and, thus, entitled to strong First Amendment protections. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997). In striking down as unconstitutional a law that aimed to protect minors by criminalizing indecency on the Internet, the *Reno* Court said that "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Id.* at 885. The Court also noted that the overbroad regulation "threaten[ed] to torch a large segment of the Internet community" and recognized the particular speech-enhancing qualities of cyberspace:

> [T]he growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.

Id. at 882, 885.

Appellant first claims that Internet blogs are not mass media because they are subject to search devices and many, including the one that allegedly defamed him, are "obscure." (Appellant's Br. 47.) Paradoxically, he supports the argument that blogs can be obscure and, thus, not publications of mass consumption by evidence that at least 60 million people access the blogosphere. In putting forth this argument, however, Appellant fails to differentiate these 60 million blogs from the

more than 1,400 newspapers published nationwide each day;[4] or the more than 7,300 magazines published, some weekly, nationwide;[5] or the more than 400,000 books published each year, equating to more than 1,000 each day.[6] Appellant's claim that the prolific and obscure nature of the blogosphere justifies differential treatment is unpersuasive, since "[a] statement electronically located on a server which is called up when a web page is accessed, is no different from a statement on a paper page in a book lying on a shelf which is accessed by the reader when the book is opened." *Mitan v. Davis*, 243 F. Supp. 2d 719, 724 (W.D. Ky. 2003). How is trolling the "morass of blogosphere" (Appellant's Br. 46) different from trolling each and every opinion-editorial or sports page in more than 1,400 newspapers? As one court put it, the only variant seems to be the sheer scale of the Internet: its infinite ability to amass unparalleled amounts of information, as well as its ability to reach an immense and diverse audience, providing an ease of accessibility that "cuts two ways: while a defamed person's injury is potentially greater … *it is also easier for that person to identify defamatory content*." *Salyer v. S. Poverty Law*

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[4] Pew Project for Excellence in Journalism, The State of the News Media: An Annual Report on American Journalism, 2010, *available at* http://www.stateofthemedia.org/2010/.

[5] *Id.*

[6] Motoko Rich, *Self-Publishers Flourish as Writers Pay the Tab*, N.Y. Times, Jan. 28, 2009, at A1 (stating that nearly 480,000 books were published or distributed in the United States in 2008, up from about 375,000 in 2007).

Ctr., Inc., No. 3:09-cv-44-H, 2009 WL 1036907, at *1, *3 (W.D. Ky. Apr. 17, 2009) (emphasis added).

Moreover, Appellant wholly ignores the significant amount of case law—concededly, none of which is binding on this Court but is persuasive nonetheless—holding that "the posting of information on the web should be treated in the same manner as the publication of traditional media (i.e., books, newspapers, magazines, and radio and television broadcasts) . . . ." *Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1130 (9th Cir. 2006). *See Nationwide Bi-weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 144 (5th Cir. 2007) ("While we recognize that important differences exist between print media and the Internet, we agree that the similarities between the two media support application of a consistent rule."); *Salyer*, 2009 WL 1036907, at *3 ("[N]o facts seem to persuasively distinguish the Internet from other publication sources."); *Holt v. Tampa Bay Television, Inc.*, 34 Media L. Rep. 1540, No. 03-11189, 2006 WL 5063132, at ¶ 15 (Fla. Cir. Ct. Mar. 17, 2006), *aff'd by*, 976 So.2d 1106 (Fla. Dist. Ct. App. 2007) ("This Court finds no legitimate justification for interpreting the broad term 'other medium' to exclude the Internet, which has become a recognized medium for communication to the masses."); *Churchill v. State*, 876 A.2d 311, 319 (N.J. Super. Ct. App. Div. 2005) (holding that the single publication rule applies to a publication on a website because the Internet "is rapidly becoming (if it has not yet already become) the

current standard for the mass production, distribution and archival storage of print data and other forms of media"); *Woodhull v. Meinel*, 202 P.3d 126, 130 (N.M. Ct. App. 2008) (stating that because "[a]s with traditional mass media, content on a public website is broadly available and easily reproduced … and may be viewed by literally millions in a broad geographic area for an indefinite time period … there is a similar if not greater need for [a] policy" that protects defendants from an almost endless tolling of the statute of limitations); *Firth v. State*, 706 N.Y.S.2d 835, 843 (N.Y. Ct. Cl. 2000) ("This court sees no rational basis upon which to distinguish publication of a book or report through traditional printed media and publication through electronic means . . . .").[7]

Appellant next claims that the Internet should not be considered a mass medium because blogs posted to it do not conform to his definition of journalistic standards. This argument likewise fails for two reasons. First, the test of whether a particular publication qualifies as one of mass communication is the nature and size of the distribution, not the subject matter of the material. For example, a purely fictional novel based on nothing but the author's own imagination that is widely distributed to the public is certainly a mass medium, despite the fact that the

[7] *Amici* note that 1) this is not an exhaustive list of all cases to state that the Internet should be treated like traditional media; and 2) many of these cases involve the single-publication rule, which is not at issue in this case.

author engaged in no journalism whatsoever in creating it. In other words, a publication does not have to be a journalistic one to be considered a mass one.

Even if *Amici* were to accept Appellant's inaccurate contention that the content of the publication is the relevant factor in determining whether a particular publication is one of mass distribution, they cannot abide his unsupported generalizations about the practice of journalism. Appellant puts forth a number of qualities that he would require bloggers to exhibit before they could be considered members of the mass media entitled to exception from application of the discovery rule in defamation claims against them and other protections under the First Amendment.[8] However, these criteria include characteristics that do not apply to traditional journalism, let alone Internet reporting. Yet, Appellant would require that before a blogger may invoke the constitutional protection afforded to those who gather and disseminate information, he or she must demonstrate the following qualities:

- Adherence to a code of journalistic standards that regulates the industry and subjects journalists "to the rigors of fact checking, sourcing, editing and other well-known journalistic safeguards." (Appellant's Br. 45.) While most news organizations subscribe to a code of ethics providing significance guidance on these issues, others do not. These directives are aspirational and voluntary, and

[8] For a more in-depth discussion of the policies underlying the First Amendment, see discussion *infra* Part C.

nothing in the First Amendment mandates that media adopt them. Society of Professional Journalists, Code of Ethics (1996), *available at* http://www.spj.org/pdf/ethicscode.pdf ("The code is intended not as a set of 'rules' but as a resource for ethical decision- making. It is not—nor can it be under the First Amendment—legally enforceable.").

- Provision of "**advanced** notice of the publication." (Appellant's Br. 45.) The First Amendment does not require journalists to inform any member of the public, including the subject of a particular story, of the planned dissemination of information.
- Performance of an "independent fact check … to determine accuracy." (Appellant's Br. 46.) Perhaps the biggest misperception about newspapers and online news sources is that they have the luxury of so-called fact checkers who verify every factual assertion in a story. Fact checkers are significantly more common in the magazine and book industries, where unrelenting daily deadline pressures do not exist. Rather, newspapers and Internet news sources rely on questioning from editors and self-verification by reporters.[9]

[9] Michael Kinsley, Column, *The Shaky War on Errorism*, Wash. Post, Sept. 4, 2009, *available at* 2009 WLNR 17366337 ("'Fact checking' is a tradition of some publications, mainly magazines, in which one set of employees, called fact checkers, is called upon to reconfirm every fact in an article by another set of employees, called writers, generally by finding these facts in newspapers, which don't have fact checkers. … In short, most complainers [about errors in

- Solicitation of "comment from [subjects and] … interview[s]" of them. (Appellant's Br. 46.) While this factor may be relevant in other contexts—whether a reporter acted with actual malice, for example—the First Amendment does not require that a news story contain comments from its subjects or require interviews with them to be considered journalism. In fact, imposing such a requirement actually resembles the dangerous practice of dictating the substance of editorial coverage.[10]

Nothing in case law or First Amendment jurisprudence requires this behavior by traditional journalists—though certainly laudable and worthy of attainment—as a condition of their entitlement to First Amendment protections. Therefore, requiring bloggers, who also are engaged in the public dissemination of information, to exhibit these characteristics as a condition of entitlement to protection under the mass-media exception to the discovery rule is improper. While *Amici* concede that not all blogs qualify as journalism, they cannot accept Appellant's contention that bloggers "do not even remotely resemble journalists in the mass media." (Appellant's Br. 45.) In fact, in light of the continuing migration

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newspapers] tend to be ideologues whose vision of an accurate newspaper is far different from that of the professionals.").

[10] It is worth noting that these factors are even less applicable to blogs, many of which, including the one at issue in this case, do not purport to be unbiased news reports but, rather, opinion pieces or commentaries that provide analysis and, in some cases, advocacy.

of Americans to online news, mainstream news organizations increasingly rely on their websites to deliver information and attract readers; Appellant seemingly would have a difficult time arguing that the contributors to the nearly 60 *New York Times* blogs "do not even remotely resemble journalists."

Perhaps most significantly, the U.S. Supreme Court warned long ago, and with good reason, of the dangers of courts' interference with the journalistic practice:

> We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we … remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring). If the nation's highest court has consistently refused to judge the quality of editorial publications or the decisions their leaders make in determining what news is worthy of distribution to the public, Appellant should not base his argument that a particular publication is not one of mass distribution on his inaccurate speculations about appropriate ethical behavior for journalists. Doing so imposes far more restrictions on the rights of free expression and information

dissemination than First Amendment jurisprudence permits.[11] As such, this Court should reject Appellant's argument that Internet blogs are not entitled to protection under the mass-media exception to the discovery rule since they violate journalistic standards and, thus, are not mass media.

C. The public policy underlying the First Amendment, as well as statutes of limitations, mandates rejection of application of the discovery rule in defamation actions rising from mass-media publications.

The important policies underlying the First Amendment take precedence over competing interests in a variety of ways. As the U.S. Supreme Court stated in one of its most significant decisions:

> [I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964) (citations and internal quotation marks omitted). The Court further noted that some interests must be

[11] For example, requiring a journalist to produce evidence of a fact-checking scheme to prove his or her status as such would necessarily contradict case law of the U.S. Supreme Court that has protected reporters and editors from attacks on the quality of their work by finding that an alleged "[f]ailure to investigate [a story] does not in itself establish bad faith" under the actual malice standard. *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968).

sacrificed to protect this fundamental principle, stating, "erroneous statement is inevitable in free debate, and … it must be protected if the freedoms of expression are to have the breathing space that they need to survive." *Id.* at 271–72 (citation and internal quotation marks omitted).

This Court also has recognized that the interests in free expression warrant special protection. For example, it ruled long ago that free speech has a "favored status," noting that freedom of speech and expression occupy an "exalted niche in the empyrean of personal liberties guaranteed by the Constitution. This special position may be a function of democratic theory. The right is viewed as one of 'those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society.' " *Alderman v. Phila. Hous. Auth.*, 496 F.2d 164, 167–68 (3d Cir. 1974) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)). *See also McCauley v. Univ. of the V.I.*, 618 F.3d 232, 248 (3d Cir. 2010) ("The desire to protect the listener cannot be convincingly trumpeted as a basis for censoring speech for university students."); *United States v. Stevens*, 533 F.3d 218, 233 (3d Cir. 2008) ("[W]e do not see how a sound argument can be made that the Free Speech Clause is outweighed by a statute whose primary purpose is to aid in the enforcement of an already comprehensive state and federal anti-animal-cruelty regime.); *Am. Civil Liberties Union v. Reno*, 217 F.3d 162, 180 (3d Cir. 2000) ("We are convinced that in

balancing the parties' respective interests, [Child Online Protection Act]'s threatened constraint on constitutionally protected free speech far outweighs the damage that would be imposed by our failure to affirm this preliminary injunction."). The reason this and other courts afford such strong protection to the First Amendment is both clear and basic: America exists as it is today because people may speak and think freely. As the *Sullivan* Court recognized, the marketplace of ideas, and the competition of widely various ideas in the marketplace, will eventually create a better society. *Sullivan*, 376 U.S. at 270. Thus, courts afford greater protection to those who are exercising their right of free speech than might be available under other circumstances.

Free-speech considerations must prohibit application of the discovery rule to mass-media defendants. Sometimes, to further a significant public policy that can only be advanced by bright-line rules, an otherwise viable claim must be sacrificed. Here, the bright-line rule must be that the statute of limitations commences, without tolling, on the date of publication. Newspapers, books, magazines, and, recently, the Internet, are conduits of the ideas, debates, and discussions that comprise the marketplace of ideas. The nature of these mass-media publications is that they are widely and almost indefinitely available to the general public. As such, numerous courts recognized that they warranted a different rule and adopted a mass-media exception to the discovery rule. A

necessary corollary of this rule is that a plaintiff is deemed to have discovered the statement when it is first available to the public, and the cause of action is not tolled by his or her claimed ignorance of the work. Such a bright-line test is necessary to ensure a predictable limit on potential claims, thereby allowing the marketplace of ideas to continue to flourish.[12]

This rule also finds support in the purposes generally underlying statutes of limitations, a firmly entrenched principle that protects significant rights. As the Pennsylvania Supreme Court explained:

> The defense of the statute of limitations is not a technical defense but substantial and meritorious. Such statutes are not only statutes of repose, but they supply the place of evidence lost or impaired by lapse of time, by raising a presumption, which renders proof unnecessary. Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation.

Schmucker v. Naugle, 231 A.2d 121, 123 (Pa. 1967) (internal citation and quotation marks omitted). However, because of society's paramount interest in protecting free expression, the interests underlying statutes of limitations take on a deeper significance and must be afforded greater weight when applied to claims that implicate First Amendment rights. For example, in a discussion of the single-publication statute, the Pennsylvania Supreme Court noted:

[12] While such protection from stale claims is essential in all defamation cases, it is particularly so in cases like this one, where the allegedly defamatory statements are not capable of provable falsity and thus protected as opinion.

> This legislation was adopted to eliminate such successive, oppressive harassment by protecting publishers from a multitude of lawsuits based on one tortious act. If this protection was not afforded publishers, then at a minimum the statute of limitations would be meaningless in that an action could be filed any time a defamatory article was read, no matter the time lag between the actual printing of the article and the reading of the article by a third party.

Graham v. Today's Spirit, 468 A.2d 454, 457 (Pa. 1983) (internal citations and quotation marks omitted). Applying this reasoning, application of the discovery rule is a very narrow device that should be the exception, rather than the rule, and used in those circumstances such as medical malpractice claims, where the injury sometimes truly is unascertainable without the passage of time—time that may extend beyond the limitations period. A defamation claim based on a widely published, generally available article posted on the Internet is not that exception. To hold otherwise would defeat the purpose behind the statute of limitations and overcome the finality that the Legislature intended in adopting it. The allegedly defamed plaintiff has an entire year to locate the material, and even if he or she is unable to do so—or claims to be unable to do so—any claim still should be barred since the important interests served by the mass-media exception to the discovery rule outweigh the saving of an occasional stale claim.

If this Court were to adopt Appellant's argument that the discovery rule is applicable to "all cases," including defamation ones against mass-media defendants, the chilling effect on speech would be significant, for such a rule

would present a virtually insurmountable bar to asserting timeliness as a means for the early disposal of claims that threaten First Amendment rights. Even the stalest claims might have to be litigated through trial because defendants are unlikely to be able to conclusively contradict plaintiff's claimed late discovery of the work. With the passage of time, investigation becomes more difficult as memories fade, witnesses disappear, and documents are discarded. Thus—in a very frightening scenario for *Amici*—the major metropolitan newspaper would not be able to use the statute of limitations to bar a claim from a resident of that city who was the subject of a front-page article ten years before if the resident merely offered a declaration that he or she was unaware of the article until recently. No evidence of distribution of work, no matter how extensive, could negate the question of fact that such a declaration would create. Surely, such a scenario is wholly contrary to the Pennsylvania Supreme Court's mandate that "successive, oppressive harassment" against publishers be eliminated through recognition and observation of the public policy underlying the statutes of limitations. *Graham*, 468 A.2d at 457.

CONCLUSION

The unavailability of the discovery rule in claims involving widespread distribution of an allegedly defamatory publication is settled law in Pennsylvania, as well as numerous other jurisdictions. Those cases that do apply the limitations-

period tolling mechanism in defamation claims involve, without exception, private communications or other circumstances not present when the statement is generally available to the public; and such a rule does not apply with any less force to the Internet context. To hold otherwise, for whatever inaccurate reason Appellant puts forth, belies common sense and ignores the U.S. Supreme Court observation that the Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." *Reno*, 521 U.S. at 853. Allowing the discovery rule to apply in "all cases," including those based on online publications, threatens the free exchange of ideas and defeats the purpose of statutes of limitations in a manner this country, consistent with its recognition of the necessity of a thriving marketplace of ideas, simply cannot tolerate. Thus, *Amici* urge this Court to affirm the District Court's ruling that the discovery rule is not applicable in defamation claims against the mass media, which include the Internet.

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Respectfully Submitted,
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CERTIFICATES OF COMPLIANCE

The undersigned *Amicus* counsel certifies all of the following:

- This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,306 words, excluding the portions exempted by Fed. R. App. P. 32 (a)(7)(B)(iii);
- *Amici* provided, via first-class mail, a copy of this brief to all parties and 10 copies to the Court;
- *Amici* provided a PDF version to the Court and scanned it for viruses using Norton Internet Security version 17.8.0.5, which detected no viruses; the text of that electronic brief is identical to the text in the paper copies; and
- The undersigned *Amicus* counsel is a member of the bar of this Court.

/s/ Lucy A. Dalglish

Lucy A. Dalglish
Counsel for The Reporters Committee for Freedom of the Press

ADDENDUM

Descriptions 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, the **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 the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as the 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.

The Associated Press ("AP") is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP news reports in print and electronic formats of every kind, reaching a subscriber base

that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Association of Capitol Reporters and Editors was founded in 1999 and has approximately 200 members. It is the only national journalism organization for those who write about state government and politics.

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

Daily News, L.P. publishes the New York Daily News, a daily newspaper that serves primarily the New York metropolitan area and is the sixth-largest paper in the country by circulation. The Daily News' website, nydailynews.com, receives approximately 22 million unique visitors each month.

The E.W. Scripps Co. is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information Web sites, and licensing and syndication. The company's portfolio of locally focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the Washington, DC-based Scripps Media Center, home of the Scripps Howard News Service.

Gannett Co., Inc. ("Gannett") is an international news and information company that publishes 84 daily newspapers in the United States, including USA TODAY, and nearly 850 non-daily publications, including USA Weekend, a weekly newspaper magazine. Gannett also owns 23 television stations, and over 100 U.S. websites that are integrated with its publishing and broadcast operations.

The McClatchy Co. publishes 31 daily newspapers and 46 non-daily newspapers throughout the country, including the Sacramento Bee, the Miami Herald, the Kansas City Star, the Charlotte Observer, and the Centre Daily Times

in State College, Pa. The newspapers have a combined average circulation of approximately 2,500,000 daily and 3,100,000 Sunday.

The New York Times Co. is the publisher of The New York Times, the International Herald Tribune, The Boston Globe, and 15 other daily newspapers. It also owns and operates more than 50 websites, including nytimes.com, Boston.com and About.com.

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 percent 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.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: The Record (Bergen County), the state's second-largest newspaper, and The Herald News (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties, including some of the best weeklies in the state. Its magazine group produces high-quality glossy magazines including "(201) Best of Bergen," nearly a dozen community-focused titles, and special-interest periodicals such as The Parent Paper. The company's Internet division operates many news and advertising websites and online services associated with the print publications.

The Patriot-News Co. publishes The Patriot-News, central Pennsylvania's largest daily newspaper.

Pennsylvania Newspaper Association ("PNA") is a Pennsylvania nonprofit member corporation with its headquarters in Harrisburg, Pa. The Association represents the interests of over 300 daily and weekly newspapers and other media organizations across the Commonwealth of Pennsylvania in ensuring that the press can gather information and report to the public. A significant part of the Association's mission is to defend our members' constitutional and statutory rights in the court system.

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.

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.

Stephens Media LLC is a nationwide newspaper publisher with operations from North Carolina to Hawaii. Its largest newspaper is the Las Vegas, Nevada, Review-Journal.

The Washington Post is a leading newspaper with nationwide daily circulation of over 623,000 and a Sunday circulation of over 845,000.