Nos. 19CA011563 and 20CA011632 (consolidated)

IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

OBERLIN COLLEGE, et al.,

Defendants-Appellants/Cross-Appellees.

APPEAL FROM THE COMMON PLEAS COURT
LORAIN COUNTY, OHIO,
CASE NO. 17CV193761

AMICUS BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, FREEDOM TO READ FOUNDATION, AMERICAN BOOKSELLERS ASSOCIATION, AND 19 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, Freedom to Read Foundation, American Booksellers Association, Advance Publications, Inc., Cox Media Group, The E.W. Scripps Company, Gannett Co., Inc., International Documentary Assn., Investigative Reporting Workshop at American University, The Media Institute, MediaNews Group Inc., MPA - The Association of Magazine Media, National Press Photographers Association, The News Leaders Association, Ohio Association of Broadcasters, Ohio Coalition for Open Government, Online News Association, Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, Tully Center for Free Speech, and The Washington Post (collectively, "amici"). Amici are members and representatives of the news media as well as associations that represent the interests of booksellers and libraries.

Every day, amici or their members engage in expressive activities in which they redistribute someone else's speech. Booksellers and libraries collect and curate books authored by writers coast to coast and make them available to the public in their communities. The news media redistributes advertisements and circulars written by individuals outside the news organization. Defendants-Appellees Oberlin College ("Oberlin") and Meredith Raimondo ("Raimondo") (collectively, the "Defendants") argue that they, too, were redistributing the speech at issue in this case. Accordingly, amici are concerned that the verdict in this case could set a precedent under which those who merely disseminate others' speech risk defamation liability unless they independently verify its accuracy, even if they have no reason to doubt its veracity. Amici therefore write to urge the Court to clarify that the actual malice standard of fault applies in defamation actions against redistributors, *see Varanese v. Gall*, 35 Ohio St.3d 78, 78, 518 N.E.2d 1177 (Ohio), paragraph two of the syllabus, in order to ensure that defamation

suits do not inhibit the First Amendment protected redistribution of speech by news outlets, booksellers, and libraries.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises out of a student protest at Oberlin College after a confrontation at Gibson's Food Market and Bakery between a bakery employee and three African American Oberlin College students. Entry and Ruling on Defendants' Motions for Summary Judgment at 1–2 (Apr. 22, 2019) ("Entry and Ruling on MSJ"). Plaintiffs-Appellees Gibson Bros. Inc., David R. Gibson, and Allyn W. Gibson (collectively, "Gibson") alleged that they were defamed in a flyer handed out at the protest and in an Oberlin Student Senate resolution passed on the day the protest began. Entry and Ruling on MSJ at 2. In response, Gibson filed suit not against the student protesters or Student Senate, but against Defendants-Appellees Oberlin and Raimondo. Some Oberlin employees were present at the protest, and Raimondo was found to have handed a copy of the allegedly defamatory flyer to a reporter from the Oberlin News Tribune. *Id.* The Student Senate resolution was posted in Wilder Hall on Oberlin College's campus. *Id.* Based on these activities, a jury found Defendants liable for defamation.

Defendants argue that they were, at most, redistributing students' speech when Raimondo handed the allegedly defamatory flyer to a reporter at a student protest and when a Student Senate resolution containing an allegedly defamatory statement was posted on Oberlin's campus. *See generally* Br. of Defs.-Appellants at 16. Ohio Supreme Court precedent establishes that redistributors of speech can be held liable for defamation only upon a showing of actual malice, *i.e.*, the long-recognized federal constitutional rule that requires knowledge of falsity or reckless disregard of the truth. *See Varanese*, 35 Ohio St.3d at 78, 84; *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 261, 280 (1964) (defining actual malice and holding that the First

Amendment protects *The New York Times*' publication of an allegedly defamatory advertisement concerning a public official).

The trial court, however, instructed the jury that it could find Defendants liable on the basis of mere negligence. Trial Tr. vol. 20 at 61–62. If Defendants were acting as redistributors, that instruction was mistaken. If permitted to stand, the verdict against Defendants would impose an extraordinary and erroneous duty of care upon those who redistribute others' speech, in conflict with Ohio law and well-established First Amendment jurisprudence. Applying a negligence standard to redistributors would chill the exercise of First Amendment rights by news organizations, booksellers, and libraries.

Alternatively, the Court should look to the Restatement (Second) of Torts § 581 (1977), which provides a heightened standard for redistributor liability in defamation suits that would apply in this case.

Finally, even if negligence were the proper standard for determining Defendants' fault—which it is not—Ohio is one of the few states to require a defamation plaintiff to prove negligence by clear and convincing evidence. Defendants' failure to verify the information in the flyer or Student Senate resolution in the fast-moving environment of the student protests does not rise to the level of clear and convincing evidence of negligence. For the reasons set forth herein, amici respectfully urge this Court to reverse the jury verdict below.[1]

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[1] The Amicus Brief of the First Amendment Scholars in Support of Appellant (hereinafter "Scholars Brief") argues that the verdict must also be reversed for the additional reasons that Defendants did not publish the allegedly defamatory statements and cannot be held liable for "aiding and abetting" their publication, as the trial court instructed the jury, *see* Scholars Br. at Section III.A, and because the statements at issue are opinion and therefore cannot be defamatory, *see id.* at Section III.B. Amici agree with the First Amendment Scholars and do not

ARGUMENT

I. The trial court erred in instructing the jury that Defendants could be found liable on the basis of mere negligence.

The trial court instructed the jury that, in order to find Defendants liable for defamation, it must find that they acted *either* with negligence or actual malice in publishing the allegedly defamatory statements. Trial Tr. vol. 20 at 61–62 (italics added).[2] This Court should reverse on the basis of this erroneous jury instruction and make clear that defendants who redistribute

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address these issues, as they are fully discussed in the Scholars Brief. If the Court does not find the statements to be protected opinion, Defendants may only be held liable upon a showing of actual malice, as detailed below.

[2] The trial was conducted in two phases: liability and punitive damages. Amici address the trial court's error in instructing the jury at the liability phase that it could find Defendants liable on the basis of either negligence or actual malice. *See* Trial Tr. vol. 20 at 61–62. The jury interrogatories returned at the liability phase indicated that the jury specifically found that Defendants acted with negligence and did *not* act with actual malice. *See* Jury Interrogatory #1–Allyn W. Gibson Libel Claim Against Oberlin College at 2; Jury Interrogatory #2–Allyn W. Gibson's Libel Claim Against Meredith Raimondo at 2; Jury Interrogatory #1–David R. Gibson Libel Claim Against Oberlin College at 2; Jury Interrogatory #2–David R. Gibson's Libel Claim Against Meredith Raimondo at 2; Jury Interrogatory #1–Gibson Bros., Inc. Libel Claim Against Oberlin College at 2; Jury Interrogatory #2–Gibson Bros., Inc.'s Libel Claim Against Meredith Raimondo at 2.

Amici acknowledge that, at the punitive damages phase, the jury interrogatories indicated that the jury found that the defendants acted with actual malice. *See* Jury Interrogatory No. 2 – Allyn W. Gibson's Punitive Damages on Claim for Libel Against Defendant Oberlin College at 2; Jury Interrogatory No. 4 – Allyn W. Gibson's Punitive Damages on Claim for Libel Against Defendant Meredith Raimondo at 2; Jury Interrogatory No. 2 – David R. Gibson's Punitive Damages on Claim for Libel Against Defendant Oberlin College at 2; Jury Interrogatory No. 4 – David R. Gibson's Punitive Damages on Claim for Libel Against Defendant Meredith Raimondo at 2; Jury Interrogatory No. 1 – Gibson Bros., Inc's Punitive Damages on Claim for Libel Against Defendant Oberlin College at 2; Jury Interrogatory No. 2 – Gibson Bros., Inc's Punitive Damages on Claim for Libel Against Defendant Meredith Raimondo at 2. In the trial court below and in this appeal, Defendants challenge the finding of actual malice in the punitive damages phase and the trial court's decision to permit Gibson's libel claims to proceed to the punitive damages phase of trial after the jury had already found that Defendants did not act with actual malice and, in doing so, allow the jury to consider the question of actual malice for the second time. *See* Defs. Br. in Support of Mot. for Judgment Notwithstanding the Verdict at 21–25, 39–41 (Aug. 14, 2019); *see generally* Br. of Defs.-Appellants at 17.

another's speech may be held liable for defamation only if they act with actual malice. In the alternative, the Court should adopt the Restatement (Second) of Torts § 581 (1977), under which a redistributor can be liable for defamation only if it knows or has reason to know of a statement's defamatory character.

A. Under Ohio law, redistributors can be held liable for defamation only if they act with actual malice.

The Ohio Supreme Court has held that a redistributor can be liable for defamation only upon a showing of actual malice. In *Varanese v. Gall*, a public official sued a newspaper for publishing an allegedly defamatory advertisement. 35 Ohio St.3d at 78. The Court held:

> [I]n defamation cases, a newspaper's liability for failure to check the accuracy of advertisements . . . is limited to those cases where the defendant actually knew the ad was false before publication, or where the ad is so inherently improbable on its face that the defendant must have realized the ad was probably false.

Id. at 84. The Court explained that the fact that advertisements are not "generated within the media organization itself . . . should *diminish* media responsibility for the accuracy of any statements contained in those ads." *Id.* (emphasis added). Thus, *Varanese* requires that a redistributor have subjective knowledge of falsity or act with reckless disregard for truth or falsity before it can be held liable for defamation. *Id.*; *see also Perez v. Scripps-Howard Broad. Co.*, 35 Ohio St.3d 215, 520 N.E.2d 198 (1988) (noting the actual malice inquiry focuses on the "publisher's attitude toward the truth rather than upon the publisher's attitude toward the plaintiff").

The actual malice standard provides important protection to redistributors, such as members of the news media, booksellers, and libraries. It is not practical for booksellers, libraries, and newspapers to vet every piece of externally-generated information they redistribute. Booksellers and libraries sell or loan books to the public without examining them to determine if they contain defamatory statements. *See* Restatement (Second) of Torts § 581(1)

cmt. e (1977). In addition, newsrooms across the country often redistribute advertisements or circulars generated outside the newsroom, without controlling their content. *See, e.g.*, *About Us*, Parade, https://perma.cc/C7G7-96CC?type=image (last visited June 4, 2020) (stating that "Parade magazine is distributed by more than 700 of the country's finest newspapers").

Application of the actual malice standard to redistributors ensures that booksellers, libraries, and news outlets will not be chilled from redistributing truthful information about matters of public concern for fear of defamation liability. It thus protects the "uninhibited, robust, and wide-open" debate that the First Amendment was designed to foster. *Sullivan*, 376 U.S. at 270; *see also Varanese*, 35 Ohio St.3d at 83 (explaining that First Amendment protections allow the press to carry out its role as "the custodian of all our liberties and the guarantor of our progress as a free society"). Because actual malice focuses "on the subjective belief of the author," *Jacobs v. Frank*, 60 Ohio St.3d 111, 119, 573 N.E.2d 609 (1991), it protects even false speech, as long as the speaker did not subjectively know it was false or act with reckless disregard as to its truth or falsity. The protection of false speech is necessary "if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Sullivan*, 376 U.S. at 271–72 (quoting *NAACP. v. Button*, 371 U.S. 415, 433 (1963)). As the U.S. Supreme Court has explained, in contrast to the mere defense of truth, the actual malice standard thus ensures that redistributors are not deterred from redistributing truthful speech on timely and relevant social issues, "because of doubt whether it can be prove[n true] in court or fear of the expense of having to do so." *See Sullivan*, 376 U.S. at 279.

Application of the actual malice standard to redistribution of speech ensures that redistributors can fulfill their constitutional role of keeping Ohioans informed. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (stating that the press has a "special and

constitutionally recognized role of . . . informing and educating the public, offering criticism, and providing a forum for discussion and debate" (citation and quotations omitted)); *see also Lewis v. Time Inc.*, 83 F.R.D. 455, 464 (E.D.Cal.1979) (stating that "[t]he right to distribute newspapers and other periodicals lies 'at the heart' of First Amendment guarantees"), *aff'd*, 710 F.2d 549 (9th Cir.1983). For these reasons, and in accordance with Ohio Supreme Court precedent, this Court should make clear that a redistributor of speech cannot be found liable for defamation unless a plaintiff demonstrates that the redistributor had subjective knowledge of falsity or reckless disregard for truth or falsity. *See Varanese*, 35 Ohio St.3d at 78.

B. In the alternative, the trial court should have instructed the jury in accordance with the Restatement (Second) of Torts § 581 (1977).

If this Court concludes that the Ohio Supreme Court's holding in *Varanese* does not govern this case, it should hold that the heightened standard of fault under the Restatement (Second) of Torts § 581(1) (1977) (hereinafter "the Restatement") applies in defamation actions against a redistributor. The Restatement "analyze[s] the fault requirement for those involved in the publication and distribution process by placing those entities into categories based on their level of participation in the process." *Sandler v. Calcagni*, 565 F.Supp.2d 184, 193 (D.Me.2008). Thus, the Restatement explains that "one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character." Restatement (Second) of Torts § 581(1) (1977). Under the Restatement, redistributors are not held to the same standard as those who create the content and have "the opportunity to know the content of the material being published." *See Sandler*, 565 F.Supp.2d at 193 (citing W. Page Keeton et al., Prosser and Keeton on Torts § 113, 803 (5th ed. 1984)).

Ohio courts have used the Restatement of Torts to interpret Ohio defamation law. *See, e.g.*, *Wampler v. Higgins*, 93 Ohio St.3d 111, 123, 752 N.E.2d 962 (2001) (applying Restatement (Second) of Torts § 580(B) (1977)); *Lansdowne v. Beacon Journal Pub. Co.*, 30 Ohio St.3d 176, 182-183, 512 N.E.2d 979 (1987) (Douglas, J., concurring) (same). And courts of neighboring states have adopted or relied on the Restatement's standard for redistributor liability, specifically, as have other state supreme courts. *See Janklow v. Viking Press*, 378 N.W.2d 875, 881 (S.D.1985); *Church of Scientology of Minn. v. Minn. State Med. Ass'n Found.*, 264 N.W.2d 152, 156 (Minn.1978); *Combs v. Knott Cty. Pub. Co.*, Ky. App. No. 2003–CA–000372–MR, 2004 WL 2413579, at *2 (Oct. 29, 2004) (applying Restatement (Second) of Torts § 581 in defamation action against a newspaper that redistributed a local high school newspaper containing an allegedly defamatory article); *see also Hogan v. Herald Co.*, 84 A.D.2d 470, 477 (N.Y.App. Div.1982). Moreover, numerous federal courts outside of Ohio have relied on the Restatement's redistributor liability standard as well. *See, e.g.*, *Semida v. Rice*, 863 F.2d 1156, 1161 (4th Cir.1988); *Carafano v. Metrosplash.com Inc.*, 207 F. Supp. 2d 1055, 1073 (C.D.Cal.2002), *aff'd on other grounds*, 339 F.3d 1119 (9th Cir.2003) (stating that "[a] distributor of defamatory matter is blameless if the distributor has had no notice of its possible falsity" (citing Restatement (Second) Torts § 581)); *Sandler*, 565 F. Supp. 2d at 195–96 (holding that a book publisher that creates and distributes PDF copies, without any editorial communication with the author, may only be liable if it subjectively knew or had reason to know of the defamation); *Dworkin v. Hustler Magazine, Inc.*, 611 F. Supp. 781, 785 (D.Wyo.1985) (citing Restatement (Second) Torts § 581 and Prosser and Keeton on Torts, 5th Ed., p. 810).

Under the Restatement, the Defendants, if acting as redistributors, would be subject to liability only if they knew or had reason to know that the flyer or Student Senate resolution

contained defamatory falsehood. The decision of the Supreme Court of South Dakota in *Janklow v. Viking Press* is instructive. In that case, the court adopted the Restatement standard and held that a public figure plaintiff could not recover against booksellers for carrying an allegedly defamatory book unless the booksellers knew or had reason to know that the book contained some defamatory falsehood. 378 N.W.2d at 881. It further explained that "the knowledge or scienter [requirement] must be viewed against a First Amendment backdrop."[3] *Id.*

Similarly, in *Church of Scientology of Minnesota,* the Supreme Court of Minnesota, citing the Restatement's standard for redistributor liability, affirmed summary judgment in favor of the defendant Minnesota State Medical Association ("MSMA"), which had redistributed an allegedly defamatory article to various entities. 264 N.W.2d at 153–54. Because MSMA and its officers "merely acted as a conduit between the original publisher and the parties who had requested the information," and there was no reason to doubt the original publisher, the court held that they could not be held liable for redistributing the article. *Id.* at 156 ("the acts of MSMA and its officers were analogous to those of a library or news vendor and did not constitute publication").

If the Court determines that *Varanese* does not control this case, it should apply the Restatement's standard for redistributor liability. Under that standard, a redistributor may be

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[3] The court in *Janklow* also stated that any "privilege" enjoyed by the primary author of allegedly defamatory material is also enjoyed by the redistributor, as it would be "ridiculous to say that the author of a libel could escape any liability because malice could not be demonstrated, but that nevertheless, a book seller, or a public library for that matter, could be held liable simply on the basis of knowledge that the publication contains some defamatory material." *Id.* at 882. Thus, if the original author of allegedly defamatory material can be held liable only upon clear and convincing evidence of actual malice, the redistributor can be liable only upon the same showing.

liable for defamation only if the plaintiff proves the redistributor knew or had reason to know the speech being redistributed was false.

II. Even if this Court applies a negligence standard, Defendants did not act negligently.

A. Ohio law requires a defamation plaintiff to prove negligence by clear and convincing evidence.

The Ohio Supreme Court has purposefully departed from the "'majority of other jurisdictions'" that have "'set an ordinary negligence standard which must be shown by a preponderance of the evidence'" in private figure defamation actions. *Lansdowne*, 32 Ohio St.3d at 178 (quoting *Embers Supper Club, Inc. v. Scripps-Howard Broad. Co.*, 457 N.E.2d 1164 (1984)). Instead, the Court has held that proof of negligence in a private-figure defamation action must be made "by clear and convincing evidence." *Id.* at 180.[4]

In *Lansdowne*, the Court adopted the clear and convincing evidence standard specifically to ensure that private figure libel actions did not improperly chill freedom of speech. *Id.* (stating that a preponderance of the evidence standard is appropriate when an erroneous verdict in the defendant's favor is no more serious than an erroneous verdict in the plaintiff's favor, but "[i]n libel cases, however, we view an erroneous verdict for the plaintiff as most serious" (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 366 (1974) (Brennan, J., dissenting))). Although the Court had previously held in *Embers* that proof of negligence in a private figure defamation action could be made by a preponderance of the evidence, in *Lansdowne*, it noted that since that

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[4] Although the decision in *Lansdowne* was a plurality opinion, "a year after it was decided, a majority of the court acknowledged that the clear-and-convincing-evidence standard set forth in *Lansdowne* was the appropriate standard of proof." *Anderson v. WBNS-TV, Inc.*, 158 Ohio St.3d 307, 2019-Ohio-5196, 141 N.E.3d 192, ¶ 8 (citing *Oney v. Allen*, 39 Ohio St.3d 103, 106, 529 N.E.2d 471, n.2 (1988)).

decision, "both [it] and the United States Supreme Court have 'struggl[ed] . . . to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment.'" *Id.* (quoting *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768 (1986)). In light of its more recent decisions recognizing the unique protections afforded by the First Amendment and Section 11, Article I of the Ohio Constitution, the Court concluded in *Lansdowne* that "the standard of proof required should be heightened from the 'preponderance of evidence' standard established in *Embers*" to clear and convincing evidence. *Id.*

"Clear and convincing evidence is that measure or degree of proof . . . which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Id.* at 180-181. Clear and convincing evidence is "evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 531–32 (6th Cir.2014) (quoting *In re Martin*, 538 N.W.2d 399, 410 (Mich.1995) (internal brackets, citations, and quotation marks omitted)). Demonstrating clear and convincing evidence "ordinarily will not be an easy showing to make. The clear and convincing standard is the highest degree of proof available in civil cases." *In re Adoption of A.C.B.*, 2020-Ohio-629, ___ N.E.3d ___, ¶ 17 (citing *Stark Cty. Milk Producers' Ass'n v. Tabeling*, 129 Ohio St. 159, 171, 194 N.E. 16 (1934)).

The clear and convincing evidence standard thus affords significant protection to speech. As the Court stated in *Lansdowne*, under the clear and convincing evidence standard, where the evidence is in "an uncertain balance," "the Constitution requires [courts] to tip them in favor of protecting true speech." *Lansdowne*, 32 Ohio St.3d at 181 (quoting *Hepps*, 475 U.S. at 776).

Only through a strict application of the clear and convincing evidence standard can courts "achieve the proper balance between the protection to private persons from injuries to reputation" and "adequate 'breathing space' for freedom of the press and freedom of speech." *Id.*

B. Proof that defendants did not verify the information in the flyer or Student Senate resolutions in the face of fast-moving events is not clear and convincing evidence of negligence.

The trial court instructed the jury that, to find in favor of Gibson, it must find by clear and convincing evidence that Defendants acted either with negligence or actual malice in publishing the allegedly defamatory statements. Trial Tr. vol. 20 at 61. It further instructed the jury that negligence is "a failure to use reasonable care," and that "[e]very person is required to use reasonable care to avoid causing injury to others or their property." *Id.* at 61–62. The jury instructions defined "reasonable care," as "the care that a reasonably careful person would use under the same or similar circumstances." *Id.* at 62.

These instructions were insufficient to instruct the jury on what constitutes negligence in a defamation action. In a defamation action, a defendant acts negligently only if he or she "failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication." *Lansdowne*, 32 Ohio St.3d at 180. Rather than instructing the jury that Defendants must have acted negligently in attempting to discover the truth or falsity of the allegedly defamatory speech, however, the trial court used the common law definition of negligence. The trial court should have instructed the jury to consider the Defendants' conduct with respect to their attempts to discover the truth of the speech in question. Because the trial court's instruction was inadequate and misleading, the jury's verdict must be reversed. *See Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 30.

When negligence is properly defined under Ohio law, it is clear that Gibson did not prove by clear and convincing evidence that Defendants acted negligently. A failure to verify information, without more, is insufficient to establish negligence in a defamation action. *See, e.g., Amann v. Clear Channel Commc'ns*, 165 Ohio App.3d 291, 2006-Ohio-714 846 N.E.2d 95, 1st Dist. (declining to impose the "onerous requirement" that broadcasters verify the content of their advertisements in general negligence lawsuit); *Young v. Russ*, 11th Dist. Lake No. 2003-L-206, 2005-Ohio-3397, ¶ 55 (holding that news anchor who merely introduced a defamatory news story and had no role in drafting or editing it did not act negligently). In other words, a defamation defendant does not act unreasonably simply because he or she could have done a more thorough investigation. *See Horvath v. Telegraph*, 11th Dist. Lake No. CA-8-175, 1982 WL 5841, at *8–9 (Mar. 8, 1982) (holding that a newspaper publisher and reporter did not act negligently in failing to interview subject of article when article relied on numerous other reliable sources).

These cases recognize that requiring redistributors, who are not involved in the creation of an allegedly defamatory statement, to verify the information that is redistributed would impose a standard greater than that of a reasonable person, and would place intolerable burdens and costs on them. *See id.* at *9 (noting that corroboration of news received from others is an "expensive step in terms of money, time and personnel, which can only be demanded when from the face of the information there exists doubt as to its veracity"). Indeed, requiring redistributors such as booksellers, libraries, or newspapers to independently verify all of the speech generated by others that they regularly redistribute would lead to "apprehensive self-censorship" that is "repugnant to the [F]irst [A]mendment." *Brown v. Courier Herald Publ'g Co., Inc.*, 700 F.Supp. 534, 537 (S.D.Ga.1988) (quoting *Appleby v. Daily Hampshire Gazette*, 478 N.E.2d 721, 725–26

(Mass.1985)); *see also Boladian v. UMG Recordings, Inc.*, 123 F. App'x 165, 169 (6th Cir.2005) (stating that to impose a duty on redistributors such as "retailers of books and music" to "screen . . . products for potential defamatory material" would be "onerous" and "could potentially have a chilling effect upon protected speech").

The trial record's indication that Defendants did not verify the information in the flyer or Student Senate resolution is not clear and convincing evidence of negligence. In addition to the onerous burden of reviewing prior to redistribution, the jury must also consider whether Defendants acted negligently in the context of the fast-paced nature of the events at issue. As the Restatement (Second) of Torts § 580B cmt. h (1977), explains, in determining whether a defendant acted negligently in publishing an allegedly defamatory statement on the basis of his failure to verify its accuracy, one of the factors to consider is whether "time and opportunity were freely available to investigate." *See also* B. Sanford, Libel and Privacy: The Prevention and Defense of Litigation § 8.4.7 (2d ed. 1999) (2011 Supplement) (stating that "courts evaluating whether a libel defendant exercised due care must consider the time constraints under which the defendant operated"). Indeed, high courts in other states have long held that the element of time should be considered in evaluating whether a defamation defendant acted negligently by failing to verify information. *See, e.g.*, *Jones v. Palmer Commc'ns, Inc.*, 440 N.W.2d 884, 898 (Iowa 1989), *overruled on other grounds by Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 224 (Iowa 1998); *Triangle Pubs., Inc. v. Chumley*, 317 S.E.2d 534, 537 (Ga.1984); *Cahill v. Hawaiian Paradise Park Corp.*, 543 P.2d 1356, 1366 n.7 (Haw.1975); *see also Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 158–59 (1975) (plurality opinion) (considering "the necessity for rapid dissemination" of a news story in holding that the Associated Press was not liable for defamation against a public figure).

The incident at Gibson's Food Market and Bakery occurred on the afternoon of November 9, 2016. *See* Entry and Ruling on MSJ at 1. That same evening, students began to organize a protest. *Id.* By 11:00 a.m. the following day—fewer than 24 hours after the initial incident—hundreds of students supporting the protest were outside the bakery, passing out copies of the flyer in question. *Id.* at 2. As Raimondo testified, less than two minutes passed between the time she received the flyer at the protest to the time she handed it to a reporter. Trial Tr. vol. 13 at 17:10–14. In addition, the Oberlin Student Senate approved the resolution at issue in this case on the same day as the protest. Entry and Ruling on MSJ at 1. While the trial court found that Defendants should have explored whether there was a pattern of similar incidents at Gibson's Food Market and Bakery, *id.* at 21, the evidence at trial showed that neither Oberlin or Raimondo had time to do so either before Raimondo redistributed the flyer or before the Student Senate passed its resolution.[5]

For these reasons, the Court should make clear that in a situation that is unfolding swiftly, a redistributor's failure to verify the content of speech, the accuracy of which it had no reason to doubt, is not clear and convincing evidence of negligence.

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[5] As discussed above, the governing standard is actual malice and, accordingly, Defendants' state of mind is to be assessed at the time of publication. *See Sullivan*, 376 U.S. at 286 (holding that the evidence falls short of overcoming First Amendment protections, as "[t]he statement does not indicate malice at the time of publication"); *Varanese*, 35 Ohio St.3d at 80 (same). Even if the governing standard is negligence, however, caselaw suggests that Defendants' conduct should still be evaluated at the time of publication. *See Brooks v. Am. Broad. Cos.*, 999 F.2d 167 (6th Cir.1993) (holding that, under Ohio law, actual malice is determined at the time of publication and the rule for negligence "should be the same").

CONCLUSION

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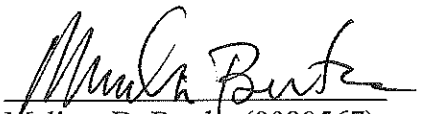

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