IN THE SUPREME COURT OF THE STATE OF OREGON

TOM LOWELL, d/b/a/ Piano Studios and Showcase,
Plaintiff-Petitioner,

v.

MATTHEW WRIGHT and ARTISTIC PIANO, an Oregon corporation,
Defendants-Respondents.

Jackson County Circuit Court
No. 13CV04582
CA A162785
SC S068129

Brief of *Amici Curiae* Institute for Free Speech, Electronic Frontier Foundation; Profs. William Funk, Ofer Raban, and Kyu Ho Youm; and Prof. Glenn Harlan Reynolds, Howard Bashman, SCOTUSblog, Inc., and Prof. Eugene Volokh

[Caption continued on next page]

December 2020

In support of petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Jackson County, the Honorable Dan Bunch.

Linda K. Williams OSB No. 78425 10266 S.W. Lancaster Road Portland, OR 97219 (503) 293-0399 Fax (855) 280-0488 linda@lindawilliams.net For Plaintiff-Appellant Tom Lowell Tracy M. McGovern OSB No. 935349 Alicia M. Wilson OSB No. 103397 Frohnmayer Deatherage 2592 E. Barnett Rd. Medford, OR 97501-3127 (541) 779-2333 Fax (541) 779-6379 mcgovern@fdfirm.com wilson@fdfirm.com For Defendants-Respondents Matthew Wright and Artistic Piano	Owen Yeates, OSB No. 141497 Institute for Free Speech 1150 Connecticut Ave. NW, Ste. 801 Washington, DC 20036 (202) 301-3300 Fax (202) 301-3399 oyeates@ifs.org Eugene Volokh Cal. State Bar #194464 *Pro hac vice* admission pending UCLA School of Law First Amendment Clinic 385 Charles E. Young Dr. E Los Angeles, CA 90095 (310) 206-3926 Fax (310) 206-7010 volokh@law.ucla.edu* Attorneys for *Amici Curiae* * Counsel would like to thank Samuel Gillen, a UCLA School of Law Student who worked on this brief.

December 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Treatises

Constitutional Provisions

INTEREST OF *AMICI CURIAE*

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

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

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

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

The remaining signatories are legal bloggers:

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

which was independently hosted until early 2014, was hosted at the Washington Post from early 2014 to late 2017, and has been hosted at the Reason Magazine site (http://reason.com/volokh) since late 2017.

INTRODUCTION

This case presents three important related questions:

(1) Does Oregon law unconstitutionally deny ordinary Oregonians the protections offered by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), which limits presumed damages in libel cases brought by private figures?

(2) Does Oregon law unconstitutionally discriminate in this respect against ordinary speakers, denying them the same First Amendment rights that the institutional media enjoy?

(3) Is it unsound for Oregon law to differ from the Ninth Circuit precedent that covers virtually identical lawsuits that happen to be within the federal courts' diversity jurisdiction?

The appellate court below, citing *Wheeler v. Green*, 286 Or 99 (1979), held that the First Amendment only requires proof of "actual malice" to recover presumed damages "in defamation actions brought by private parties against *media* defendants." *Lowell v. Wright*, 306 Or App 325, 347 (2020) (emphasis in original). But this analysis is not correct; to the extent *Wheeler* so holds, it fails to properly protect the First Amendment rights of nonmedia speakers.

This Court should grant review for three related reasons:

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

2. Oregon's rule departs from the view of the federal circuit courts. All seven circuits to consider the question presented here have held that the First Amendment applies equally to media and nonmedia speakers in defamation actions; six of those circuits, including the Ninth Circuit, held this after *Wheeler* was decided. Oregon's conflict with the Ninth Circuit is especially troublesome because it makes the First Amendment standard for Oregon defamation cases turn on whether the case is in state or federal court.

3. The *Wheeler* rule is also an aberration among state courts. Twenty state courts treat media and nonmedia speakers equally in defamation cases; only a few discriminate among them. Just last year, the Minnesota Supreme Court—one

of the few that had endorsed a media-nonmedia distinction—joined the prevailing approach in treating all speakers equally. This Court should also take a fresh look at *Wheeler*, in light of the developments since 1979.

This Court should therefore grant review of this case, because it "presents a significant issue of law" related to "[t]he interpretation of a constitutional provision," ORAP 9.07(1)(a); "the consequence of the decision is important to the public," ORAP 9.07(3); "the Court of Appeals decision appears to be wrong," ORAP 9.07(14); and "present case law is inconsistent," ORAP 9.07(9), though between this Court's decisions and those of the U.S. Supreme Court, the federal circuits, and other state high courts (rather than within Oregon cases).

ARGUMENT

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

In defamation cases, the U.S. Supreme Court has indicated that media and nonmedia speakers are equally protected by the First Amendment. Most recently, in *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court expressly endorsed the view that "the institutional press" has no "constitutional privilege beyond that of other speakers," in fact noting that it had "consistently rejected the proposition." *Id.* at 352 (internal quotation marks omitted). And in the process the Court endorsed the view of five concurring and dissenting Justices in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), a leading libel

law precedent: Writing for the four dissenters, Justice Brennan wrote that "the rights of the institutional media are no greater and no less than those enjoyed by other individuals engaged in the same activities," *id*. at 784, and Justice White, concurring in the judgment, "agree[d] with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech," *id*. at 773.

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

The constitutional protection provided in *Gertz*—in particular, that private-figure defamation plaintiffs must show defendants' actual malice ("knowledge of

falsity or reckless disregard for the truth") to recover presumed damages—must therefore apply equally to media and nonmedia defendants. And this is consistent with *Gertz* itself: Nothing in the Court's discussion of presumed damages in *Gertz*, 418 U.S. at 349–50, turns on the speaker's status; the Court's references elsewhere in the opinion to "media" or "publishers" stemmed simply from the defendant in that case being a magazine publisher.

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

And this constitutional equal treatment makes sense, especially given developments since *Wheeler*. "With the advent of the Internet and the decline of print and broadcast media, * * * the line between the media and others who wish to

comment on political and social issues becomes far more blurred." *Citizens United*, 558 U.S. at 352.

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

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

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

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

How can the law sensibly and fairly decide which of the *amici* are "the media" (at least for certain purposes) and which are not?

And even if it were possible, drawing a media-nonmedia distinction would be unwise. As the Supreme Court explained in *Gertz*, juries in defamation cases might be tempted to use presumed damages (as opposed to provable compensatory damages) "to punish unpopular opinions rather than to compensate individuals for injury sustained." *Gertz*, 418 U.S. at 349. And by giving juries an "uncontrolled discretion" to award damages to reputation, the presumed damages

doctrine "unnecessarily exacerbates the danger of media self-censorship" and chills the exercise of First Amendment rights. *Id.* at 349, 350.

This logic applies even more clearly to nonmedia speakers. Media speakers are more likely than most nonmedia speakers to have considerable assets, enabling them to fight libel cases; they also often buy libel insurance, because that is needed for them to function (and is a tax-deductible business expense). They also have paid staff who are trained to investigate the facts, keep careful notes, and otherwise protect their institutions from liability. Nonmedia speakers generally lack these protections: They have fewer assets; they often lack libel insurance; and they have more limited investigatory resources. They are thus at least as subject to the chilling effect of presumed damages as are media speakers—and therefore need the same First Amendment protections as do the traditional media.

This case would not require this Court to reconsider the result in *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or 361 (1977). Though that decision also mentioned the media-nonmedia distinction, it did so with regard to speech said privately to a business rather than to the public, *id.* at 363, and on a matter where "there is no issue of public concern," *id.* In *Dun & Bradstreet*, the U.S. Supreme Court held that the First Amendment does not affect libel liability in cases where there is no issue of public concern, especially when the speech is conveyed just to a few listeners. 472 U.S. at 761–62 (lead opin.). The result in *Harley-Davidson* can thus be reconciled with the U.S. Supreme Court precedent

in *Dun & Bradstreet* (even though *Dun & Bradstreet* rejected the media-nonmedia distinction). But *Wheeler* cannot be reconciled with the U.S. Supreme Court precedent in *Gertz* and *Citizens United*.

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

All seven federal appellate courts to consider the issue have held that the actual-malice rule applies equally to private-figure defendants in defamation cases. *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014); *Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009), *aff'd as to other matters*, 562 U.S. 443 (2011); *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986); *Garcia v. Bd. of Educ.*, 777 F.2d 1403, 1410 (10th Cir. 1985); *Avins v. White*, 627 F.2d 637, 649 (3d Cir. 1980); *Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975). Six of those decisions postdate *Wheeler*.

Most importantly, the Ninth Circuit has held that "the First Amendment defamation rules in *Sullivan* and its progeny apply equally to the institutional press and individual speakers." *Obsidian Fin. Grp*, 740 F.3d at 1291. This means that federal and state courts in Oregon dealing with virtually identical cases now apply different rules:

- Non-Oregon speakers (such as the defendant in *Obsidian*) who allegedly libel an Oregonian can get the protections offered by *Gertz*, because they can litigate their cases in federal court.

- Oregon speakers who allegedly libel another Oregonian cannot get those protections, because their cases must be litigated in state court.

This Court should step in to decide whether this discrimination against Oregon speakers should remain in place.

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

Published appellate decisions in twenty states, plus the District of Columbia, have secured to media and nonmedia speakers the same First Amendment rights in tort lawsuits brought based on speech communicated to the general public.[1] This is consistent with the view that all who use "the press" in the sense of the technology of mass communication have equal First Amendment rights. Volokh,

---

[1] *Doe v. Alaska Superior Ct.*, 721 P.2d 617, 628 (Alaska 1986); *Antwerp Diamond Exch. of Am. v. Better Bus. Bureau*, 637 P.2d 733, 734 (Ariz. 1981); *Nizam-Aldine v. City of Oakland*, 47 Cal. App. 4th 364, 374 (1996); *Moss v. Stockard*, 580 A.2d 1011, 1022 n.23 (D.C. 1990); *Nodar v. Galbreath*, 462 So. 2d 803, 808 (Fla. 1984); *Rodriguez v. Nishiki*, 653 P.2d 1145, 1149–50 (Haw. 1982); *Kennedy v. Sheriff of E. Baton Rouge*, 935 So. 2d 669, 677–78 (La. 2006); *Jacron Sales Co. v. Sindorf*, 350 A.2d 688, 695 (Md. 1976); *Shaari v. Harvard Student Agencies, Inc.*, 691 N.E.2d 925, 928–29 (Mass. 1998); *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 878–79 (Minn. 2019); *Henry v. Halliburton*, 690 S.W.2d 775, 784 (Mo. 1985); *Williams v. Pasma*, 656 P.2d 212, 216–17 (Mont. 1982); *Wheeler v. Neb. State Bar Ass'n*, 508 N.W.2d 917, 921 (Neb. 1993); *Berkery v. Estate of Stuart*, 988 A.2d 1201, 1208 (N.J. Super. Ct. App. Div. 2010); *Poorbaugh v. Mullen*, 653 P.2d 511, 520 (N.M. Ct. App. 1982); *Gross v. N.Y. Times Co.*, 724 N.Y.S.2d 16, 17 (N.Y. App. Div. 2001) (endorsing *Hammerhead Enters. v. Brezenoff*, 551 F. Supp. 1360, 1369 (S.D.N.Y. 1982), which contains a more detailed First Amendment discussion); *Wampler v. Higgins*, 752 N.E.2d 962, 972 (Ohio 2001); *DeCarvalho v. daSilva*, 414 A.2d 806, 813 (R.I. 1980); *Trigg v. Lakeway Publishers*, 720 S.W.2d 69, 75 (Tenn. Ct. App. 1986); *Casso v. Brand*, 776 S.W.2d 551, 554 (Tex. 1989); *Long v. Egnor*, 346 S.E.2d 778, 783 (W. Va. 1986).

supra, at 463–65. On the other hand, only two states besides Oregon have published precedents denying full First Amendment protections to nonmedia speakers who communicate to the general public. *Fleming v. Moore*, 275 S.E.2d 632, 638 (Va. 1981); *Denny v. Mertz*, 318 N.W.2d 141, 152–53 (Wisc. 1982). One other state established a rule that certain subjects, when addressed by media defendants, are by definition matters of public concern, but this does not itself create a media/non-media distinction like that applied by the decision here.[2]

Indeed, other states that had previously rejected the prevailing view have since reversed course. Just last year, the Minnesota Supreme Court held that private-figure plaintiffs must prove actual malice to recover presumed damages against nonmedia defendants, *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 878-

---

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

79 (Minn. 2019), and departed from its contrary decades-old precedent in *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21 (Minn. 1996). Likewise, the Louisiana Supreme Court in *Kennedy v. Sheriff of E. Baton Rouge*, 935 So. 2d 669, 678 (La. 2006), held "that a private individual's right to free speech is no less valuable than that of a publisher, broadcaster or other member of the communications media," effectively overruling contrary Louisiana Court of Appeals precedent (*Gilbeaux v. Times of Acadiana, Inc.*, 693 So. 2d 1183, 1188 (La. Ct. App. 1997)).

CONCLUSION

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

DATED: December 4, 2020.

By: s/ Owen Yeates
Owen Yeates, OSB No. 141497
Institute for Free Speech
1150 Connecticut Ave. NW, Ste. 801
Washington, DC 20036
(202) 301-3300
Fax (202) 301-3399
oyeates@ifs.org

Eugene Volokh
Cal. State Bar #194464
UCLA School of Law
First Amendment Clinic
385 Charles E. Young Dr. E
Los Angeles, CA 90095
(310) 206-3926
Fax (310) 206-7010
volokh@law.ucla.edu

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length: I certify that (1) this brief complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 3,387 words.

Type size: I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

DATED: December 4, 2020

/s/ Owen Yeates
Owen Yeates, OSB 141497

CERTIFICATE OF FILING AND SERVICE

I certify that I filed this brief with the Appellate Court Administrator on this date. I further certify that service of a copy of this brief will be accomplished on the following participants in this case, who are registered users of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participant's email address as recorded this date in the appellate eFiling system:

Linda K. Williams
OSB No. 78425
10266 S.W. Lancaster Road
Portland, OR 97219
(503) 293-0399
Fax (855) 280-0488
linda@lindawilliams.net
For Plaintiff-Appellant
Tom Lowell

Tracy M. McGovern,
OSB No. 935349
Alicia M. Wilson
OSB No. 103397
Frohnmayer Deatherage
2592 E. Barnett Rd.
Medford, OR 97501-3127
(541) 779-2333
Fax (541) 779-6379
mcgovern@fdfirm.com
wilson@fdfirm.com
For Defendants-Respondents
Matthew Wright & Artistic Piano

DATED: December 4, 2020

/s/ Owen Yeates
Owen Yeates, OSB 141497