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 9TH APPELLATE DISTRICT
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**IN THE COURT OF APPEALS
 NINTH JUDICIAL DISTRICT
 LORAIN COUNTY, OHIO**

GIBSON BROS., INC., et al

Plaintiffs-Appellees/Cross-Appellants,

OBERLIN COLLEGE, et al.,

Defendants-Appellants/Cross-Appellees.

C.A. Nos. 19CA011563 and
20CA011632 (consolidated)

REPLY IN FURTHER SUPPORT
 OF MOTION FOR LEAVE TO
 FILE BRIEF OF AMICI
 REPORTERS COMMITTEE FOR
 FREEDOM OF THE PRESS,
 FREEDOM TO READ
 FOUNDATION, AMERICAN
 BOOKSELLERS ASSOCIATION,
 AND 19 MEDIA
 ORGANIZATIONS IN SUPPORT
 OF DEFENDANTS-
 APPELLANTS



Pursuant to Rule 15(A) of the Ohio Rules of Appellate Procedure, 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"), file this reply in support of amici's motion for leave to file an amicus brief (the "Motion") in support of Defendants-Appellees Oberlin College and Meredith Raimondo (collectively, the "Defendants") in this matter.

Plaintiffs-Appellees Gibson Bros. Inc., David R. Gibson, and Allyn W. Gibson (collectively, "Gibson") devotes the majority of its seventeen-page opposition to amici's Motion to responding to the substantive arguments amici make in the proposed amicus brief, rather than providing argument as to why amici's Motion should be denied. *See generally* Pls.-Appellees' Resp. in Opp'n to the Reporters Committee for Freedom of the Press' Mot. for Leave to File Amicus Curiae Br. ("Opp'n"). Because amici do not have a substantial connection to Defendants and the proposed amicus brief provides the court with "points of view that may bear on important legal questions,"¹ the Court should grant the Motion.

I. Amici do not have substantial connections to Defendants.

Gibson argues that amici have "substantial connections" to Defendants because Ron Holman, II, one of Oberlin's trial attorneys, previously "worked for" WEWS-TV, which is owned by one of the amici, The E.W. Scripps Company. Opp'n at 9. Mr. Holman did not work for WEWS-TV; rather, he previously "appeared as a legal analyst and commentator on News Channel 5 – WEWS-TV."² Mr. Holman's former appearances as a legal analyst and commenter on a television station owned by one of the twenty-two amici is, at best, an exceedingly tenuous "connection" and is irrelevant to the Court's evaluation of the Motion. Gibson also notes that WEWS-TV and another one of the amici, Ohio Coalition for Open Government, are parties in an appeal seeking public access to documents sealed by the trial court in this matter. Opp'n at 8. Again, this fact does not demonstrate any connection between amici and Defendants. It is unsurprising that an Ohio news media organization and Ohio organization

¹ 4 Am. Juris. 2d, Amicus Curiae § 1; *see also Columbus v. Tullos*, 1 Ohio App.2d 107, 108-109, 204 N.E.2d 67 (10th Dist.1964) (citing same provision).

² *See* <https://www.taftlaw.com/people/ronald-d-holman-ii> (last visited July 1, 2020).

that advocates in support of open records would seek to unseal judicial records in a high profile and newsworthy lawsuit in the Ohio courts.

As members and representatives of the news media, amici seek to file the proposed amicus brief to inform the Court of the potential effect of its decision on news organizations and journalists. *See* Mot. at 2–3. Amici’s brief is not part of any coordinated effort to circumvent the Ohio rules of procedure, including appellate brief page limitations. If any party is seeking to evade the appellate brief page limitations, it is Gibson, as plainly demonstrated by its seventeen-page opposition brief which mostly contains substantive arguments concerning Defendants’ appeal. Contrary to Gibson’s claims, amici have no substantial connection to Defendants, and the Motion should be granted.

II. Gibson’s remaining arguments in response to the legal arguments amici make in the proposed amicus brief are immaterial and, in any event, incorrect.

Gibson devotes the remainder of its lengthy opposition to the Motion to attempting to refute the legal arguments in the proposed amicus brief. *See* Opp’n at Sections II.B., II.D., II.E. These arguments are irrelevant to the Court’s determination of amici’s Motion, which should be granted because amici have “unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Nat’l Air Traffic Controllers Ass’n, MEBA, AFL-CIO v. Mineta*, N.D. Ohio No. 99CV1152, 2005 WL 8169395 at *1 (June 24, 2005). Gibson will have the opportunity to address the substance of the proposed amicus brief in its Appellees’ Brief. *See* Ohio R. App. P. 17. Although Gibson’s arguments concerning the substance of the proposed amicus brief are irrelevant to the Court’s determination of the Motion, amici briefly respond to some of Gibson’s erroneous claims.³

³ Because Gibson’s arguments in this respect are unconnected to the determination of this Motion, amici do not respond to each of Gibson’s arguments, individually, in the interest of

First, Gibson conflates publishers and distributors to argue that “liability for defamation is based on publication, not authorship.” Opp’n at Section II.B.1. However, as courts have recognized, publishers and distributors are distinct, and legal liability for publication and distribution differs. *See, e.g., Roe v. Amazon.com*, 170 F. Supp. 3d 1028, 1040 (S.D. Ohio 2016) (holding that online booksellers offering a self-publishing service are not “publishers”). The quintessential example of a distributor is the bookseller, though other entities, like the news organizations among the amici, can also act as distributors in some instances.⁴ *See, e.g., Varanese v. Gall*, 35 Ohio St.3d 78, 84, 518 N.E.2d 1177 (1988) (discussing a newspaper’s liability for defamation for statements in a political advertisement “not generated from within the media organization itself”). And, as the Court in *Roe* explained:

The First Amendment protects the right to distribute books. To prevent chilling and self-censorship, bookstores and other distributors generally have no duty to monitor the content of the material they distribute . . . States may not impose criminal or civil liability against booksellers or other distributors for distribution where the distributor neither knew nor had any reason to know of alleged wrongdoing pertaining to specific content.

Roe, 170 F. Supp. 3d at 1040; *see also Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 139 (2d Cir. 1984) (stating that “national distributor of hundreds of periodicals has no duty to monitor each issue” and that “[s]uch a rule would be an impermissible burden on the First Amendment”). The well-recognized limitations on distributor liability adopted by courts around the country and explained in the proposed amicus brief are necessary to ensure that the public benefits from the free flow of ideas and information. *See Smith v. California*, 361 U.S. 147, 153 (1959) (“If the

saving the Court’s time. Amici do not concede any of the arguments made by Gibson that they do not specifically respond to in this reply.

⁴ In the proposed amicus brief, amici refer to these entities as “redistributors.”

contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.”)

Second, Gibson argues that the Ohio Supreme Court’s decision in *Varanese v. Gall*, 35 Ohio St.3d 78, 518 N.E.2d 1177 (1988), was limited to “the narrow context of newspaper advertisements” and that the Court applied the actual malice standard in that case only because the plaintiff was a public official. Opp’n at 5–6. Both of these claims are incorrect. The logic of *Varanese*’s holding, which addressed a newspaper’s liability for defamation when it “failed to check the accuracy” of a political advertisement, *id.* at 83, is not limited to that context. In determining that the plaintiff must prove actual malice, the court in *Varanese* noted that “[s]uch ads, unlike many news stories, are not generated from within the media organization itself—a fact which, practically speaking, should diminish media responsibility for the accuracy of any statements contained in such ads.” *Id.* at 84. The same is true for any redistribution of content “not generated” by the speaker herself, including outside the context of newspapers and advertisements. In addition, while *Varanese* involved a defamation claim by a public official, the Court held that actual malice was required specifically because the newspaper defendant was redistributing an advertisement, independent from its holding that actual malice was also required because the plaintiff was a public official. *See id.*

Third, Gibson argues that Ohio courts have not adopted the Restatement (Second) of Torts § 581. Opp’n at 7. Amici acknowledge that Ohio courts have yet to adopt that specific section of the Restatement (Second) of Torts. However, as Gibson knows, *id.* at 7 n.6, Ohio courts have relied on other sections of the Restatement (Second) of Torts in defamation actions. *See* Br. of Amici at 8. Amici urge the Court to adopt the Restatement (Second) of Torts § 581 in

this case to ensure that booksellers, libraries, and news outlets will not be chilled from redistributing truthful information about matters of public concern.

Fourth, in the alternative, Gibson argues that, even if the Court applies the Restatement (Second) of Torts § 581 to the redistribution of speech, this standard does not apply in this case. Opp'n at 2, 8. In support of this argument, Gibson cites an opinion column by George Will published by one of the amici *The Washington Post*, in which Mr. Will expressed his opinion about Gibson's claims against Defendants. Opp'n at 2 & Ex. 1. Mr. Will's column is published in the Opinions section of *The Washington Post* and represents the opinion of Mr. Will, not *The Washington Post*.⁵ The statements in the column are irrelevant to the Court's determination of whether the actual malice standard or Restatement (Second) of Torts § 581 apply in this case. Moreover, even if redistributor liability does not apply on the facts of this case, the proposed amicus brief is still necessary to educate the Court concerning the important issue of redistributor liability so that the Court does not inadvertently issue a ruling that creates confusion in this area of the law.

Fifth, Gibson argues that the negligence instruction at trial was proper and that the evidence demonstrated that Defendants acted with negligence. For the reasons stated in the proposed amicus brief, the negligence instruction was insufficient, *see* Amicus Br. at 12, and Defendants' failure to verify the allegedly defamatory statements in the flyer and Student Senate resolution, without more, is not evidence of negligence, *id.* at 14–15. In addition, while Gibson

⁵ See Help Center, Wash. Post, <https://helpcenter.washingtonpost.com/hc/en-us/articles/115003675788-Submit-an-op-ed> (last visited July 1, 2020) (“[A]n op-ed is an opinion essay written by a staff columnist or an outside contributor. . . . It does not represent the opinions of The Washington Post — in fact, it may often contradict the opinion of The Post's Editorial Board.”). Gibson also cites an opinion column by Nicholas Kristof published by *The New York Times* in support of its argument that Defendants participated in the creation of the

is dismissive of “the temporal aspects of negligence liability for defamation under Ohio law,” Opp’n at 14, as amici argue, under Ohio law, Defendants’ state of mind should be assessed at the time of the alleged publication, regardless of whether the Court applies the actual malice or negligence standard. *See* Amicus Br. at 15 n.5.

For these reasons, and the reasons stated in the Motion, amici respectfully request that the Court grant its motion for leave to file an amicus brief in support of Defendants in this matter.

Dated: July 10, 2020

Respectfully submitted,

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allegedly defamatory statements at issue. Opp’n at 16. Mr. Kristof’s opinion column is irrelevant for the same reasons.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing was served on July 10, 2020, via email, pursuant to App.R. 13(C)(6) of the Appellate Rules of Civil Procedure, upon the following:

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