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UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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ALAN S. NOONAN,  
Plaintiff-Appellant,

v.

STAPLES, INC.  
Defendant-Appellee

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IN SUPPORT OF PETITION FOR REHEARING EN BANC  
OR CERTIFICATION TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

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BRIEF OF AMICI CURIAE

ABC, INC., ADVANCE PUBLICATIONS, INC., ALLBRITTON COMMUNICATIONS COMPANY,  
THE ASSOCIATED PRESS, ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES, ASSOCIATION  
OF AMERICAN PUBLISHERS, INC., THE BLETHEN MAINE NEWSPAPERS, INC., BLOOMBERG  
NEWS, BOSTON HERALD, INC., CABLE NEWS NETWORK, INC., CBS CORPORATION,  
CITIZEN MEDIA LAW PROJECT, COMMUNITY NEWSPAPER HOLDINGS, INC., DOW JONES &  
COMPANY, INC., ENTERCOM COMMUNICATIONS CORP., ESPN, INC., THE E.W. SCRIPPS  
COMPANY, GATEHOUSE MEDIA, INC., GLOBALPOST.COM, GREATER MEDIA, INC.,  
HARPER'S MAGAZINE FOUNDATION, THE HARVARD CRIMSON, INC., HEARST  
CORPORATION, HOME BOX OFFICE, INC., INCISIVE MEDIA, LLC, MAGAZINE  
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ASSOCIATION, THE MEDIA LAW RESOURCE CENTER, INC., METRO CORP., NATIONAL  
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ASSOCIATION OF AMERICA, NEWSPAPERS OF NEW ENGLAND, INC., THE NEW YORK TIMES  
COMPANY, NORTH JERSEY MEDIA GROUP INC., PMCG MANAGEMENT, LLC, REPORTERS  
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ABC, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, which is publicly held.

Advance Publications, Inc. is not publicly traded, and no publicly held entity owns 10 percent or more of its stock.

Allbritton Communications Company is an indirect, wholly owned subsidiary of privately held Perpetual Corporation which also indirectly wholly owns Westfield News Publishing, Inc.

The Associated Press has no parents, subsidiaries or affiliates that have any outstanding securities in the hands of the public.

The Association of Alternative Newsweeklies is a non-stock 501(c)(6) corporation with no parent company. No publicly held company holds 10 percent of the Association of Alternative Newsweeklies.

The Association of American Publishers has no parent company, and no publicly held company owns 10 percent or more of its stock.

The Blethen Maine Newspapers, Inc.'s parent company is the Seattle Times Company, which is not publicly traded. The McClatchy Company is a publicly traded company that owns 10 percent or more of the Seattle Times Company's stock. Portland

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Cable News Network, Inc. is a wholly owned subsidiary of Turner Broadcasting System, Inc., which itself is a wholly owned subsidiary of Time Warner Inc., a publicly traded corporation.

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The Harvard Crimson, Inc. is not publicly traded, and no publicly held entity owns 10 percent or more of its stock.

Hearst Corporation is a privately held company.

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Incisive Media, LLC is not publicly owned and no publicly held entity holds 10 percent or more of its stock.

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The Massachusetts Broadcasters Association does not issue stock or any other form of securities and does not have any parent corporation.

Massachusetts Newspaper Publishers Association (MNPA) is an unincorporated association.

The Media Bloggers Association is a New Jersey not-for-profit corporation with no affiliates.

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Newspaper Association of America is a non-stock corporation with no parent company. No publicly held company holds 10 percent of the Newspaper Association of America.

Newspapers of New England, Inc. is not publicly traded, and no publicly traded entity holds more than 10 percent of its stock.

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North Jersey Media Group Inc. is a privately held company. It is solely owned by Macromedia Incorporated, which is also a privately held company.

PMCG Management, LLC, through various affiliates, publishes weekly newspapers, including those entitled The Boston Phoenix, The Providence Phoenix, The Portland Phoenix, and El Planeta. All publications are 100 percent privately owned.

Reporters Committee for Freedom of the Press has no parent company and no publicly held company holds 10 percent or more of Reporters Committee for Freedom of the Press.

The Society of Professional Journalists has no parent company and does not issue stock. No publicly held company owns 10 percent or more of the Society of Professional Journalists.

Telegraph Publishing Company is a New Hampshire corporation wholly owned by Independent Publications, Inc. of Bryn Mawr, Pennsylvania.

Time Inc. is indirectly wholly owned by Time Warner, Inc., a publicly owned company. It has no affiliates or subsidiaries that are publicly owned.

Tribune Company is a privately held company; however, certain securities and bank loans of Tribune Company are publicly held.

Union Leader Corporation of Manchester, New Hampshire has a parent corporation, The Nackey S. Loeb School of Communications, Inc., also of Manchester, New Hampshire, a 501(c)(3) and 509(a) non-profit educational organization. Union Leader Corporation owns a subsidiary corporation, Neighborhood News, Inc., that publishes weekly newspapers in New Hampshire and publishes internet based materials.

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WGBH Educational Foundation is a charitable not-for-profit Massachusetts corporation. As such, it does not have any shareholders.

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## INTRODUCTION AND INTEREST OF AMICI

*Amici*, individually described in Appendix A, include news organizations and media both large and small, located in Massachusetts, greater New England, and throughout the United States, as well as related professional and trade associations. They are a diverse group of writers; newspaper, magazine, and book publishers; radio and television broadcasters; cable networks; and bloggers. What unites them is their shared interest in promoting and preserving the vitality of free, responsible, and independent journalism.

Although this case involves a libel claim against an employer, not against the news media, the panel's decision nevertheless threatens the interests of *amici* - and it does so in ways that have not been addressed by the parties or the court. The decision, if it stands, will create a precedent that hinders the media's ability to rely on truthful publication to avoid defamation liability.

The panel's decision resuscitates a little-known and less-used pre-Civil War statute, first enacted in the early days of the telegraph, before the invention of the telephone, motion pictures, radio, or television, and last revised more than a century ago. It then construes that statute (which was later amended several times and is now codified at Mass. Gen. Laws c.

231, § 92 ("Section 92")), in a manner that will work a significant and unfortunate change in modern libel law. It will make even *indisputably accurate* reporting subject to potential defamation liability if a judge or jury - second-guessing the media's contrary judgment - were to conclude that the subject matter did not implicate the public interest. Application of the statute will increase the length, cost, and risk of litigation for libel defendants, potentially allowing individuals displeased by the media's *true* accounts of their conduct to survive summary judgment based on thinly supported allegations that a writer or reporter was "out to get them" or was motivated by ill will toward them. In some quarters, it may even have the chilling effect of discouraging reporting and commentary on some of the most pressing issues of the day, such as the internal affairs of businesses coping with severe economic challenges, for fear that such matters might mistakenly be deemed to be of only "private concern."

Most fundamentally, the court's decision is of concern to *amici* because it violates hard-won protections for freedom of speech and of the press. The *en banc* Court of Appeals should reverse the panel's ruling and declare Section 92 unconstitutional, or else certify the question of the statute's applicability to the Massachusetts Supreme Judicial Court.

## ARGUMENT

### I. Because the Panel's Decision Makes New Law Implicating the First Amendment, It Is Appropriate That the *En Banc* Court Subject It to Plenary Review.

That this case arises in the employment context does not take it outside the realm of the First Amendment. Whether the employer's speech is deemed to be of public or merely private concern, it remains entitled to constitutional protection, and the government has an interest in shielding it from infringement.

The U.S. Supreme Court has acknowledged that even speech of purely private concern "is not totally unprotected by the First Amendment." Dun and Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 760 (1985) (involving private credit agency's dissemination of false credit report to its subscribers), citing Connick, 461 U.S. at 147.<sup>1</sup> There is no question, therefore, that

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<sup>1</sup>The state interest in protecting the speech in this case is in fact greater than the state interest was in Dun and Bradstreet, because there the speech in question was "wholly false and clearly damaging to the victim's business reputation," 472 U.S. at 762, whereas here the speech at issue was undisputedly true. Moreover, Dun and Bradstreet involved speech directed to a mere five subscribers who were each bound by a confidentiality agreement, such that there was no "strong interest in the free flow of commercial information" to be harmed by state-imposed restrictions on that speech. 472 U.S. at 762, citing Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764. The contrary is true here, not only because the

the panel's decision implicates First Amendment and Art. 16 concerns and must be reviewed in that light.

**II. Section 92 is an Anachronism That No Longer Serves a Substantial State Interest and Has Fallen Into Disrepute.**

Under the common law of Massachusetts, *criminal* libel caused offense not because it was inaccurate but because it "tends to provoke a breach of the peace." Comm. v. Blanding, 20 Mass. 304, 311 (1825). If an individual were permitted to wield "the power of public accusation" and spread word of the crimes or foibles of another, then the person accused would be likely "to avenge himself by unlawful means" with the result that "duels or assassinations would be the common occurrences of the times." Id. at 311, 313. Accordingly, in criminal prosecutions for libel, truth was not generally recognized as a defense - and proof of truth was usually inadmissible at trial - because whether the accuser's remarks were true or not, the threat to public order was the same. Id. at 315. Indeed, because true accusations were more likely to provoke a violent response, it was commonly acknowledged that the greater the truth, the

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employer sent the email to some 1,500 employees and encouraged feedback from them, but also because Massachusetts courts have acknowledged that there is an important public interest in "promoting the free flow of information in the workplace." Broomes v. Blue Cross Blue Shield of Mass., 2008 Mass. Super. LEXIS 58, \*18 (Mass. Super. 2008).

greater the libel. Leonard W. Levy, Emergence of a Free Press 12 (1985). Nor did it matter that the truths revealed were a "matter of public concern," because, by stating the accusation publicly rather than bringing it to law enforcement authorities, the defendant "did not select a proper vehicle" for communicating the message. Blanding, 20 Mass. at 319.

As to *civil* actions for libel, however, the common-law rule was that truth was an absolute defense. Perry v. Porter, 124 Mass. 338, 340 (1878); Lothrop v. Adams, 133 Mass. 471, 478 (1882). The difference reflected the different purposes of the civil and criminal remedies. A civil action for libel was not about protecting public safety, but about safeguarding private reputation. As English jurist William Blackstone noted in 1769 in his Commentaries on the Laws of England,

In a civil action, we may remember, a libel must appear to be false, as well as scandalous; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace: and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit.

4 William Blackstone, Commentaries \*150.

In the 1800's, however, the distinction began to blur, as the Massachusetts legislature altered the common law by making civil libel actions easier to win - and criminal prosecutions

more difficult. See St. 1826, c. 107, § 1, and St. 1855, c. 396, § 1, cited in Perry, 124 Mass. at 340-41. By 1855, the liability standard for the civil action became the same as that for the criminal prosecution, and truth was no longer enough to defeat a civil libel claim. Rather, a plaintiff could win a civil libel judgment the same way the government could win a criminal prosecution: by proving that the speaker, even if stating the truth, had acted with "malicious intention." Perry, 124 Mass. at 340-41, citing St. 1855, c. 396, § 1. The 1902 revision removed any specific reference to criminal or civil actions - the identical requirement was now understood to apply to both (and was codified with identical language in both the civil and criminal parts of the Annotated Laws, G.L. c. 231, § 92 (civil) and G.L. c.278, § 8 (criminal)) - and replaced the phrase "malicious intention" with "actual malice." Neither the civil nor the criminal statute have been further revised since then.

Throughout the first half of the twentieth century, the "truth-plus-motive" requirement was cited in criminal and civil actions alike, providing the authority for punishing those whose disparaging statements, though true, were not "written or published in good faith and without malice." Finnish Temperance Society Sovittaja v. Finnish Socialistic Publishing Co., 238



Mass. 345, 351-52 (1921) (civil action); Comm. v. Enwright, 259 Mass. 152, 156 N.E. 65 (1927) (affirming criminal libel conviction of publisher of the *Boston Telegraph* based on front-page political cartoon depicting "Curley the Thug"; prosecution overcame the newspaper's truth defense by showing publisher's common-law malice, pursuant to Section 92).<sup>2</sup>

In modern times, however, Section 92 has received little attention, while defamation law has moved in a different, more speech-protective direction. Like the now-discredited Sedition Act of 1798, the invalidity of Section 92 "has carried the day in the court of history," see New York Times, 376 U.S. at 276 - at least until the panel's decision in this case.

Starting with the watershed decision New York Times Co. v. Sullivan in 1964, and continuing with Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Supreme Court has essentially rewritten the common law of libel by imposing restrictions based on the First Amendment. The Massachusetts Supreme Judicial

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<sup>2</sup>The newspaper's article and cartoon referred to the true fact of former Boston Mayor Curley's brief stay in prison some 20 years before, as well as the recently deposed mayor's knock-out punch of the *Telegraph* publisher the day before, on the site of the 1770 Boston Massacre in the city's financial district. The publisher got eight months in jail. Curley got re-elected mayor, and then governor. The newspaper went out of business. Jack Beatty, The Rascal King: The Life and Times of James Michael Curley 251-253 (2000).

Court reflected those changes in Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 858-59 n.6 (1975), which characterized Gertz as an "apparently unprecedented modification . . . of the civil common law of the States." In the nearly half-century from 1964 until the panel's decision in this case, no court, state or federal, has relied on Section 92 to permit entry of a libel judgment based on a truthful statement. That fact alone should give this Court pause before revivifying the truth-plus-motive requirement.

### **III. The Massachusetts Courts Have Effectively Deemed Section 92 Unconstitutional.**

Even stronger grounds for this Court to refuse to apply Section 92 to this case comes from the Massachusetts Supreme Judicial Court, which has twice held that the statute "unconstitutionally infringes on . . . freedom of speech, as guaranteed by the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution." Shaari v. Harvard Student Agencies, Inc., 427 Mass. 129, 691 N.E.2d 925 (1998). In 1985, the court stated that it was "clear" that the Statute could not constitutionally be applied to a public figure or public official, Materia v. Huff, 394 Mass. 328, 333 n.6, 475 N.E.2d 1212, 1216 n.6 (1985). Thirteen years later, in Shaari, it

extended that conclusion to cases brought by private figures over matters of "public concern." 427 Mass. at 134. The court cited the Supreme Court's conclusion in Garrison v. Louisiana, 379 U.S. 64 (1964), that the First Amendment "absolutely prohibits punishment of truthful criticism" of public figures, and the Court's observation that in a case of public concern, "a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false." Id. at 78; see also Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69 (1986); Milkovich v. Lorain Journal Co., 497 U.S. 1, 19-20 (1990).

Although the Supreme Judicial Court has not had cause to rule definitively as to the constitutionality of Section 92 as applied only to matters of purely private concern, a well-reasoned Superior Court decision has declared, that "Gertz rendered M.G.L. c. 231, § 92 unconstitutional because that statute permits recovery in the absence of any falsehood if the statement at issue is defamatory and the defendant acted malevolently." Gilbert v. Bernard, 4 Mass. L. Rep. 143, 1995 Mass. Super. LEXIS 566, \*6 n.3 (Mass. Super. Ct. 1995) (Garsh, J.). Similarly, courts in other states have struck down "truth-plus-motive" statutes - even as applied to matters of private concern - without specifically deciding whether the statutes

would be constitutional if restricted to matters of private concern. See, e.g., Parmelee v. O'Neel, 145 Wn. App. 223, 235 n.9, 186 P.3d 1094, 1100 n.9 (Wash. Ct. App. 2008) (holding that because Washington's criminal libel statute does not explicitly distinguish between public and private individuals or issues "and there seems to be no way to construe the statutory language to do so, . . . we must either wholly uphold the statute or wholly invalidate it"), citing Tollett v. United States, 485 F.2d 1087, 1097-98 (8th Cir. 1973) (declining to rewrite defective libel statute to render it constitutional); Gottschalk v. State, 575 P.2d 289, 296 (Alaska 1978); Comm. v. Armao, 446 Pa. 325, 338, 286 A.2d 626, 632 (Pa. 1972); Eberle v. Municipal Court, 55 Cal. App. 3d 423, 433 (Cal. Ct. App. 1976); Weston v. State, 258 Ark. 707, 713-14, 528 S.W.2d 412, 416 (Ark. 1975); Fitts v. Wyrick, 779 F. Supp. 1502, 1516 (D.S.C. 1991).

Moreover, Massachusetts has developed a considerable body of post-Sullivan case law incompatible with giving effect to law that would permit defamation liability based on a true statement motivated by (as the panel decision would have it) "actual malevolent intent or ill will." Noonan, supra, slip op. at 15. For example, the Supreme Judicial Court has expressly required that a private plaintiff prove "negligent publication of a defamatory falsehood" in order to recover for libel, even as to

a private matter. Stone, 367 Mass. at 858 & n.6; New England Tractor-Trailer Training of Connecticut, Inc. v. Globe Newspaper Co., 395 Mass. 471, 477 n.4, 480 N.E.2d 1005, 1009 n.4 (1985) ("We view the fault requirement of Gertz to be intact regardless whether the private parties are suing on matters of public or private concern."); Ravnikar v. Bogojavlensky, 438 Mass. 627, 630, 782 N.E.2d 508, 510-11 (2003). This Court explicitly recognized that negligence requirement in Andresen v. Diorio, 349 F.3d 8, 17 (1st Cir. 2003) (private-figure libel case over matter of private concern). Although at the federal level it is still "formally unsettled" whether a private figure suing a non-media defendant for libel over statements of purely private concern is required to prove fault, Massachusetts, "apparently assuming that such a constitutional requirement exists, has already reshaped its own defamation law to require negligence." 349 F.3d at 17 & n.4. This Court should give effect to that reshaping rather than ignore it, as the panel did.

The negligence requirement contained in Massachusetts law makes a nullity of Section 92's suggestion that a defendant can be liable for defamation despite publishing the truth. Logically, it is impossible to conclude *both* that a defendant published the truth, G.L. c. 231, § 92, and that the same defendant acted with "negligent disregard for the truth," see

Brown v. Hearst Corp., 862 F. Supp. 622, 627 (D. Mass. 1994), aff'd, 54 F.3d 21 (1st Cir. 1995). As Massachusetts Superior Court Judge Garsh ruled in Gilbert, "Negligence, after all, is not an abstract concept. It cannot be proven in a vacuum. To establish fault, the plaintiff must prove that the defendant knew the statement was false or, in the exercise of reasonable care, should have known that the defamatory statement was false." 1995 Mass. Super. LEXIS 566 at \*8-9.

Enforcing Mass. Gen. Laws c. 231, §92 creates other conceptual problems as well. To say that a plaintiff was "defamed" by a true statement requires a measure of linguistic calisthenics. It presumes that a court should award a plaintiff damages for the "harm" of having his or her reputation recalibrated to reflect the actual truth. Just as Massachusetts recognizes that a plaintiff can be "libel-proof" based on an existing bad reputation, Jackson v. Longcope, 394 Mass. 577, 476 N.E.2d 617 (1985), and just as this Court has recognized the principle of "incremental harm," Brown v. Hearst Corp., 54 F.3d 21, 26 (1st Cir. 1995), so this Court - applying Massachusetts law - should decline to use the rubric of libel to award compensation to a plaintiff whose only injury is to suffer public knowledge of his admitted misdeeds. See, e.g., Mulvihill v. Top-Flite Golf Co., 335 F.3d 15, 28 n.5 (1st Cir. 2003)

(noting that there is "no discernible defamation" in saying that plaintiff - whose employment was terminated after the employer determined he had violated its sexual harassment policy - was "fired for sexual harassment").

Finally, applying Section 92 to award damages to plaintiffs claiming injury from speech involving matters of only private concern, while withholding the statute's privileges from those injured by speech of public concern, requires a court to engage in exactly the line-drawing that the U.S. Supreme Court rejected when, in Gertz, it overruled Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 78-79 (1971), which would have set the fault standard for libel cases according to whether or not the speech involves a matter of "public or general concern." As the Court stated then,

The extension of the New York Times test proposed by the Rosenbloom plurality would . . . occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest" and which do not - to determine, in the words of Mr. Justice Marshall, "what information is relevant to self-government." Rosenbloom v. Metromedia, Inc., 403 U.S. at 79 . . . . We doubt the wisdom of committing this task to the conscience of judges.

Gertz, 418 U.S. at 346. The hazard foreseen by the Gertz court was that under the Rosenbloom rule, a "publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even

if it took every reasonable precaution to ensure the accuracy of its assertions." Id. The same hazard is posed by the panel's application of Section 92 to matters of private concern, while withholding it from matters of public concern - and this Court should follow the Supreme Court's lead in rejecting such an approach.

#### **IV. This Court Should Address the Serious Constitutional Issues Raised by the Panel's Ruling.**

In granting summary judgment to Staples, the District Court relied on this Court's unambiguous statement, repeated in varying formulations in case after case, that truth is "an absolute defense to a defamation action under Massachusetts law." Noonan v. Staples, Inc., 539 F.3d 1, 7 (1st Cir. 2008) (citing Massachusetts School of Law at Andover, Inc. v. American Bar Assoc., 142 F.3d 26, 42 (1st Cir. 2006)). See Damon v. Moore, 520 F.3d 98, 103 (1st Cir. 2008) (noting that plaintiff must show that defendant "was at fault for the publication of a false statement"); Stanton v. Metro Corp., 438 F.3d 119, 124 (1st Cir. 2006) (same). Nevertheless, when faced with Noonan's protest that Gen. Laws c. 231, § 92 allows him to recover libel damages even for a true statement, the panel declined to examine the statute's constitutionality, because it found that Noonan had failed to prove "actual malice" - which the panel then understood to mean reckless disregard of the



truth. Noonan, 539 F.3d at 9-10. Only on rehearing, after concluding that "actual malice" as used in the statute meant "malicious intent," did the panel have occasion to apply the statute - and in doing so, it declined to consider Staples' argument that the statute was unconstitutional, ruling that although the argument had been made, it had not been developed and was not raised in the initial briefing. Noonan, No. 07-2159, slip op. at 15 n.7. Staples has disputed that finding, noting that it referred to the statute's dubious constitutionality in its initial brief (at page 26) and that it argued the point in its opposition to Noonan's petition for rehearing (at pages 4-7). Defendant-Appellee's Petition for Rehearing at 4.

This Court should not permit the panel's decision to become law without rigorously reviewing the constitutional issues it raises. The imperative is similar to that which the Supreme Court recognized in mandating independent appellate review of "defamation issues that are tinged with constitutional implications." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984); Levinsky's, 127 F.3d at 127 (1st Cir. 1997). There is no impediment to doing so, regardless of this Court's conclusion as to Staples' preservation of the issue, because "an appellate court has discretion, in an exceptional case, to reach virgin issues," United States v. La Guardia, 902 F.2d 1010, 1013

(1st Cir. 1990), quoted in Chestnut v. City of Lowell, 305 F.3d 18, 21 (1st Cir. 2002). That is particularly so when, as here:

- A constitutional issue is involved, see Nat'l Ass'n of Soc. Workers v. Harwood, 69 F.3d 622, 625 (1st Cir. 1995);
- The panel failed to consider "governing and plainly applicable" precedent (here, from the Massachusetts state courts), see Chestnut, 305 F.3d at 21, and United States v. Krynicki, 689 F.2d 289, 291-92 (1st Cir. 1982);
- The pertinent issue is purely legal in nature, Chestnut, 305 F.3d at 24 (Torruella, J., concurring); Harwood, 69 F.3d at 628;
- The omitted argument is persuasive and implicates "a matter of great public concern," Chestnut, 305 F.3d at 24; and
- Allowing the issue of the statute's constitutionality to be considered on appeal will not cause any special procedural prejudice to Noonan, who addressed the issue in his submissions in support of rehearing (see Defendant/Appellee's Pet'n for Reh'g at 6, 8-9), id.; Harwood, 69 F.3d at 628.

In light of the complexity, novelty, and seriousness of the issues presented, it is incumbent upon this Court to engage in

rehearing to obtain additional briefing from the parties and from *amici* to "ensure judicial accuracy." See SEC v. Tambone, 2009 U.S. App. LEXIS 3516 (1st Cir. Feb. 23, 2009) (allowing appellees' petitions for rehearing en banc and submissions from *amici*); see also De Jesus-Mangual v. Rodriguez, 383 F.3d 1, 5-6 (1st Cir. 2004) (remanding to district court to ensure full argument as to constitutionality of criminal libel statute), and In re Sulfuric Acid Antitrust Litigation, 446 F. Supp. 2d 410 (N.D. Ill. 2006) (rehearing by district court). Indeed, the D.C. Circuit Court of Appeals did just that in a case with parallels to this one. See Moldea v. New York Times Co., 22 F.3d 310 (D.C. Cir. 1994) (granting rehearing, modifying appellate panel's ruling, and dismissing defamation claims after determining, as a matter of law, that defendant's book review was substantially true).

#### CONCLUSION

For all of the foregoing reasons, the undersigned *amici curiae* respectfully urge this Court to rehear this matter en banc and to grant summary judgment to Staples or, in the alternative, to certify to the Massachusetts Supreme Judicial

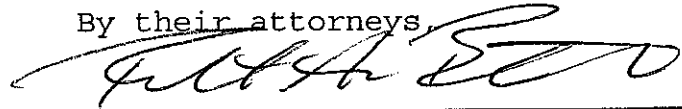
Court the question of Section 92's constitutionality and enforceability.

Respectfully submitted,

ABC, INC.  
ADVANCE PUBLICATIONS, INC.  
ALLBRITTON COMMUNICATIONS COMPANY  
THE ASSOCIATED PRESS  
ASSOCIATION OF ALTERNATIVE  
NEWSWEEKLIES  
ASSOCIATION OF AMERICAN PUBLISHERS,  
INC.  
THE BLETHEN MAINE NEWSPAPERS, INC.  
BLOOMBERG NEWS  
BOSTON HERALD, INC.  
CABLE NEWS NETWORK, INC.  
CBS CORPORATION  
CITIZEN MEDIA LAW PROJECT  
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DOW JONES & COMPANY, INC.  
ENTERCOM COMMUNICATIONS CORP.  
ESPN, INC.  
THE E.W. SCRIPPS COMPANY  
GATEHOUSE MEDIA, INC.  
GLOBALPOST.COM  
GREATER MEDIA, INC.  
HARPER'S MAGAZINE FOUNDATION  
THE HARVARD CRIMSON, INC.  
HEARST CORPORATION  
HOME BOX OFFICE, INC.  
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NATIONAL PUBLIC RADIO, INC.  
NBC UNIVERSAL, INC.  
NEW ENGLAND CABLE NEWS  
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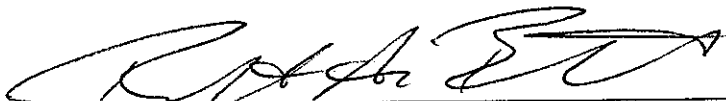
CERTIFICATE OF SERVICE

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APPENDIX A: LIST OF AMICI CURIAE

ABC, Inc. is a broad-based communications company with significant holdings in the United States and abroad. Alone or through its subsidiaries, it owns ABC News, abcnews.com, and local broadcast television stations that regularly gather and report news to the public. ABC News produces the television programs *World News with Charles Gibson*, *20/20*, *Primetime*, *Good Morning America* and *Nightline*, among others.

Advance Publications, Inc., directly or through subsidiaries, publishes daily newspapers in more than twenty cities throughout the United States, including *The Republican* in Springfield, Massachusetts and more than forty weekly business journals, including the *Boston Business Journal* and *Mass High Tech*. Advance Publications, Inc. also owns *Condé Nast Publications*, which publishes more than twenty-five magazines with nationwide circulation, and has interests in American cable television systems serving over 2.3 million subscribers.

Allbritton Communications Company, through its subsidiaries and affiliates, owns local broadcast television stations throughout the country, a cable television news service, newspapers, and information/news Internet web sites, including the *Westfield Evening News* in Westfield, Massachusetts

and *Longmeadow News* in Longmeadow, Massachusetts along with the national newspaper *Politico* and *Politico.com*.

The Associated Press ("AP") is a mutual news cooperative organized under the Not-for-Profit Corporation Law of New York. AP gathers news worldwide through its global network of 243 bureaus and offices, including two in Massachusetts.

The Association of Alternative Newsweeklies is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like *The Village Voice*, *Boston's Weekly Dig*, *Boston Phoenix* and the *Valley Advocate*. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of 7 million and a reach of over 25 million readers.

The Association of American Publishers 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 non-profit 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.

The Blethen Maine Newspapers, Inc. is the largest newspaper publisher in the State of Maine and, as such, is the largest news-gathering organization in the State. Blethen publishes the *Portland Press Herald* (the State's largest circulation daily newspaper), *Maine Sunday Telegram* (the State's largest circulation Sunday paper), *Kennebec Journal*, and the *Central Maine Morning Sentinel*.

Bloomberg News is a 24-hour global news service with more than 1800 journalists in 108 bureaus around the world. Bloomberg News supplies real time business, financial and legal news to more than 200,000 desktop subscribers world-wide. As a wire service, Bloomberg provides news to more than 400 newspapers in 63 countries with a combined circulation of 76.2 million readers. Bloomberg also provides daily radio and television programming throughout the world through its 750 radio affiliates. Bloomberg News operates eleven 24-hour cable news television outlets globally, which often brings to the public video coverage of important trials in the public interest. Bloomberg also publishes four monthly magazines. Its Bloomberg Press division publishes more than 50 book titles each year, and its internet website *www.bloomberg.com* receives 3.5 million individual user visits each month. Bloomberg supplies news to

many newspapers in the First Circuit, including *The Boston Globe*, *Boston Herald*, and the *Worcester Telegram & Gazette*.

Boston Herald, Inc. is the publisher of *The Boston Herald*, a daily newspaper serving Boston and the surrounding communities.

Cable News Network, Inc. ("CNN"), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news Web sites in the United States; CNN Newsource, the world's most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

CBS Corporation is a mass media company with constituent parts that reach back to the beginnings of the broadcast industry, as well as newer businesses that operate on the leading edge of the media industry. CBS Broadcasting Inc. and CBS Radio Inc. are indirect, wholly owned subsidiaries of CBS Corporation. CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. Its CBS News division produces morning, evening and weekend news programming, as well as news and public affairs magazine shows such as *60 Minutes* and *48 Hours Investigates*. CBS Corporation itself

directly owns WBZ-TV and WSBK-TV in Boston, Massachusetts. CBS Radio Inc. owns and operates radio stations nationwide, including WBCN-FM, WBMX-FM, WBZ-AM, WODS-FM, and WZLX-FM in Boston, Massachusetts.

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. CMLP is an unincorporated association hosted at Harvard Law School, a non-profit educational institution. The CMLP has previously appeared as an amicus on legal issues of importance to the media, including in *Bank Julius Baer & Co. v. Wikileaks.org*, No. 08CV824 (N.D. Cal. Feb. 26, 2008), *Jones Day v. Blockshopper LLC*, No. 08CV4572 (N.D. Ill. Sept. 19, 2008), and *Hatfill v. Mukasey*, No. 08-5049 (D.C. Cir. March 28, 2008).

Community Newspaper Holdings, Inc. ("CNHI"), through its subsidiaries, owns newspapers, television stations, Web sites and niche publications that serve more than 150 communities throughout the United States. Its titles in Massachusetts

include *The Eagle-Tribune*, *The Salem News*, *The Newburyport Daily News*, and *The Gloucester Daily Times*.

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over 2 million, *WSJ.com*, a news website with more than 1 million paid subscribers, *Barron's*, a weekly business and finance magazine, and through its Ottaway Newspapers subsidiary, community newspapers throughout the United States, including *The Inquirer and Mirror* in Nantucket and the *Cape Cod Times*. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

Entercom Communications Corp. produces and broadcasts news, public affairs, and entertainment programming. Entercom (through its indirect, wholly owned subsidiaries) operates more than a hundred stations nationwide, including five stations in the Boston metropolitan area and one station in Springfield, Massachusetts. Programming originated on Entercom's WEEI-AM, located in Boston, is broadcast throughout the greater New England area over a network of affiliated stations.

ESPN, Inc. is a multinational, multimedia sports entertainment company featuring the broadest portfolio of multimedia assets in sports marketing with over 40 business

entities. The company is comprised of multiple domestic television networks (including the flagship "ESPN" networks, as well as ESPN2, ESPN Classic, ESPNEWS, ESPN Deportes and ESPNU), ESPN HD, ESPN2 HD, ESPNEWS HD and ESPNU HD (high-definition services), ESPN Regional Television, ESPN International (25 owned or joint venture international networks and syndication), ESPN Radio, *ESPN.com*, *ESPN The Magazine*, ESPN Enterprises, and other growing new businesses including the ESPN360 broadband services and ESPN Wireless. Through its signature *SportsCenter* program and several other specialized programs, such as *Outsides the Lines* and *E:60*, as well as numerous single-sport programs, such as *Baseball Tonight* and *NASCAR Now*, ESPN is a major distributor of sports news and information, investigative reporting and sports commentary.

The E.W. Scripps Company is a diverse media concern with interests in newspaper publishing, broadcast television, syndication and interactive media. Nationwide, it operates 14 daily newspapers, 10 broadcast television stations and a variety of interactive Web sites.

GateHouse Media, Inc., headquartered in Fairport, New York, is one of the largest publishers of locally based print and online media in the United States as measured by its 92 daily publications. GateHouse Media currently serves local audiences

of more than 10 million per week across 21 states through hundreds of community publications and local websites.

GlobalPost.com, wholly owned by Global Enterprises Inc., is a web-based for-profit international news organization which gathers primary news from around the world and disseminates it via the world wide web.

Greater Media, Inc., through its subsidiaries, is the owner and operator of 23 radio stations and 12 community newspapers. Its radio stations are located in Boston, Charlotte, Detroit, Philadelphia, and New Jersey. Its newspapers are published and distributed in Central New Jersey. In Boston, Greater Media owns five FM radio stations, including 92.9 WBOS, 96.9 WTKK, 102.5 WKLB-FM, 105.7 WROR and "Magic" 106.7 WMJX, and broadcasts a number of live and local political talk programs.

Harper's Magazine Foundation owns and publishes *Harper's Magazine*. *Harper's Magazine* is the oldest general interest monthly in America having been continually published since June 1850. The Harper's Magazine Foundation is an entirely independent organization—unaffiliated with other philanthropies and solely dedicated to promoting *Harper's Magazine* as an independent voice in American culture. With its emphasis on fine writing and original thought, *Harper's Magazine* provides readers with a unique perspective on politics, society, the environment, and culture. *Harper's Magazine* publishes articles by many

noted journalists and authors and has been a long-standing advocate of the protections afforded and guaranteed to the press by the United States Constitution.

The Harvard Crimson, Inc. publishes *The Harvard Crimson*, Harvard University's only student-run daily newspaper and the oldest continually operating college daily in the country. Its print publication reaches Harvard's students, faculty, staff, and administrators in addition to residents of Cambridge, Mass. The publication's website, [thecrimson.com](http://thecrimson.com), gets 15,000 visits daily during the week.

Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include ownership of 16 daily and 49 weekly newspapers, including *The (Stamford) Advocate*, *Connecticut Post*, *Greenwich Time*, *The (Danbury) News-Times* and *Albany Times Union*; as well as interests in an additional 43 daily and 72 non-daily newspapers owned by MediaNews Group; nearly 200 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations through Hearst-Argyle Television (NYSE:HTV), including WCVB-TV in Boston; ownership in leading cable networks, including Lifetime, A&E, History and ESPN; as well as business publishing, including a minority joint venture interest in Fitch Ratings; Internet businesses,

television production, newspaper features distribution and real estate.

Home Box Office, Inc. is America's most successful premium television company, delivering two 24-hour pay television services—HBO and Cinemax—to over 40 million U.S. subscribers. HBO/Cinemax documentary films offers a full spectrum of non-fiction programming by acclaimed documentary filmmakers and has earned virtually every major programming award. HBO Sports produces, among other things, the award-winning *Real Sports with Bryant Gumbel*, a magazine program that explores issues, controversies, and personalities in the sports world.

Incisive Media, LLC is one of the world's fastest growing business-to-business information providers, serving the financial and professional services markets globally. Incisive Media's Legal division is the world's leading legal news and information organization. The division's broad range of products deliver timely and vital content to law firms, corporate attorneys, and legal professionals in North America, Europe and around the world. Incisive Media's integrated suite of products and resources include: *Law.com*, *The American Lawyer.com*, *Legal Week*, *Legal Tech*, *Corporate Counsel*, *Law Journal Press*, *The National Law Journal*, *Law Technology News*, *New York Law Journal* and more.



Magazine Publishers of America, Inc. ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 240 domestic publishing companies that produce more than 1,400 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The Massachusetts Broadcasters Association is a voluntary trade association representing over 200 over the air broadcasters in the Commonwealth of Massachusetts. The MBA assists members with broadcast industry related challenges, offers educational seminars, and networking opportunities.

Massachusetts Newspaper Publishers Association (MNPA) is a voluntary association composed of daily and weekly newspapers published throughout the Commonwealth. Its membership includes virtually all Massachusetts daily and weekly newspapers and it represents those newspapers on legal and legislative matters of common concern. MNPA has filed briefs as amicus curiae in Massachusetts appellate courts on numerous occasions over more than 20 years in matters affecting the interests of Massachusetts newspapers. The MNPA is dedicated to supporting a free, vigorous and diverse press and is committed to preserving

and ensuring the news media's ability to report factually about people, places, and events.

The Media Bloggers Association is a nonpartisan non-profit organization dedicated to promoting, protecting and educating its members; supporting the development of "blogging" or "citizen journalism" as a distinct form of media; and helping to extend the power of the press, with all the rights and responsibilities that entails, to every citizen.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for media and media defense lawyers, providing a wide range of information and support on media law and policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues.

Metrocorp is the publisher of *Boston Magazine*, the nation's second largest city magazine. *Boston Magazine* is published monthly and has been reporting on Boston's cultural and political trends since 1963.

National Public Radio, Inc. ("NPR") is an award winning producer and distributor of noncommercial news programming. A

privately supported, not-for-profit membership organization; NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information.

NBC Universal is one of the world's leading media and entertainment companies in the development, production, and marketing of news, entertainment and information to a global audience. Among other businesses, NBC Universal owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks including MSNBC and CNBC, and a television stations group consisting of 10 owned-and-operated television broadcast stations that produce substantial amounts of local news, sports and public affairs programming. There are more than 200 independently owned affiliates across the United States, as well. NBC News produces the *Today* show, *NBC Nightly News with Brian Williams*, *Dateline*, and *Meet the Press*.

New England Cable News (NECN) is a for-profit news network gathering primary news information in the New England region for

distribution via cable to its subscribers. It is the largest cable news network in the country.

New England Newspaper Association is the regional association for the newspapers in the six New England States which includes Massachusetts. The corporate office is in Salem, Massachusetts. Its purpose is to promote the common interests of newspapers published in New England and Massachusetts. Consistent with its purposes NENA is committed to preserving and ensuring the open and free publication of news and events in an open society.

New England Press Association ("NEPA") is a volunteer organization comprised of more than 460 member newspapers with a total circulation of 4.7 million and 9.5 million readers in the six-state region. NEPA was founded in 1950 for the purposes of sharing information and ideas, while promoting professionalism, growth and excellence in community journalism. NEPA administers a legal hotline offering pre- and post-publication advice free of charge, publishes a monthly bulletin distributed to every member newspaper and journalism school in New England concerning developments and trends in the newspaper industry, and offers other services designed to promote excellence in journalism.

Newspaper Association of America is a nonprofit organization representing more than 2,000 newspapers in the United States and Canada. NAA members include daily newspapers,

as well as non-dailies, other print publications and on-line products. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of journalists and the media to provide the public with news and information on matters of public concern.

Newspapers of New England, Inc., through its subsidiaries, publishes newspapers in Massachusetts and New Hampshire, including the *Daily Hampshire Gazette* in Northampton, Massachusetts, *The Recorder* in Greenfield, Massachusetts, the *Amherst Bulletin* in Amherst, Massachusetts, and the *Valley Advocate* in Northampton, Massachusetts, as well as the *Concord Monitor*, in Concord, New Hampshire. Newspapers of New England, Inc. also publishes several magazines with circulation throughout northern New England.

The New York Times Company is publisher of *The New York Times*, *The Boston Globe*, the *Worcester Telegram & Gazette*, the *International Herald Tribune* and 15 other regional newspapers, and operates WQXR-FM and more than 50 websites, including *Boston.com*, *NYTimes.com* and *About.com*.

North Jersey Media Group Inc. 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 *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) *The 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 Web sites and online services associated with the print publications.

PMCG Management, LLC, through the company's affiliates, publishes weekly newspapers focusing principally on in-depth news stories and investigative reporting, as well as local art and entertainment events and reviews.

Distribution focuses primarily on greater metropolitan areas in and around Boston, MA., Providence, RI, and Portland, ME.

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 litigation in state and federal courts since 1970.

The Society of Professional Journalists 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.

Telegraph Publishing Company publishes *The Telegraph*, a daily newspaper of general circulation in southern New Hampshire.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 135 magazines in the United States and abroad. Its major titles include *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money*, and *Entertainment Weekly*.

Tribune Company operates businesses in publishing, interactive and broadcasting, including nine daily newspapers, such as the *Los Angeles Times*, *Chicago Tribune*, *Baltimore Sun*, and *Hartford Courant*, nineteen television stations, WGN America, and WGN-AM. Popular news and information websites extend Tribune's nationwide audience.

Union Leader Corporation publishes New Hampshire's only statewide daily newspaper, *The New Hampshire Union Leader*. It also publishes two internet based news sites, *unionleader.com*, and *newhampshire.com*. *Neighborhood News, Inc.*, a subsidiary of

Union Leader Corporation, publishes weekly newspapers in New Hampshire and other special interest publications.

The U.S. News Media Group, an operating unit of U.S. News & World Report, L.P., is a multi-platform digital publisher of news and analysis, which includes the monthly *U.S. News & World Report* magazine, the digital-only *U.S. News Weekly* magazine, *www.usnews.com*, and *www.rankingsandreviews.com*. Focusing on health, money & business, education, and public service/opinion, the U.S. News Media Group has earned a reputation as the leading provider of service news and information that improves the quality of life of its readers. The U.S. News Media Group's signature franchises include its News You Can Use(R) brand of journalism and its "America's Best" series of consumer guides that include rankings of colleges, graduate schools, hospitals, health plans, and more.

The Washington Post. WP Company LLC publishes *The Washington Post*, a leading daily newspaper with an average paid circulation of over 866,000 on Sundays and over 622,000 on weekdays, mostly in the Washington, D.C. metropolitan area.

Wenner Media LLC, through its subsidiaries, Rolling Stone LLC, Us Weekly LLC and Men's Journal LLC, publishes *Rolling Stone* magazine, *Us Weekly* magazine, and *Men's Journal* magazine. Each magazine has nationwide circulation.



WGBH Educational Foundation is the leading producer of national programming for public broadcasting, including the television documentary series Frontline, American Experience, and NOVA, and the radio daily news program The World. In Massachusetts, WGBH is the licensee of noncommercial educational stations WGBH-TV, WGBX-TV and WGBH(FM) in Boston; WGBY-TV in Springfield; WCAI (FM) in Woods Hole; WNAN in Nantucket; and WZAI (FM) in Brewster.