COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICAL COURT

NO. SJC-10359

JAMES F. HOWELL,

Plaintiff - Appellee,

V.

THE ENTERPRISE PUBLISHING COMPANY, LLC,

ELAINE ALLEGRINI AND ALLAN STEIN

Defendants - Appellants.

On Appeal from a Judgment of the Superior Court of Plymouth County

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AMICI CURIAE BRIEF OF THE ASSOCIATED PRESS AND REED ELSEVIER, INC., IN SUPPORT OF REVERSAL

William S. Strong*
BBO # 483520
Amy C. M. Burke, Esq.,
BBO # 657201
KOTIN, CRABTREE & STRONG, LLP
One Bowdoin Square
Boston, MA 02114-2925
(617) 227-7031

Paul Bender
Michael R. Klipper
Christopher A. Mohr
Meyer, Klipper & Mohr, PLLC
923 15th Street, N.W.
Washington, D.C. 20005
(202) 637-0850
Counsel for Amici Curiae
*Counsel of Record

September 22, 2009

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST AND IDENTITY OF THE AMICI 2

ARGUMENT 2

The Decision Below on Howell's Defamation Claim Is Inconsistent With the United States and Massachusetts Constitutions. A Newspaper Cannot be Held Liable for Defamation Based on Allegedly False Statements About a Public Official Pertaining to Matters of Public Interest Unless the Statements Were Made with Knowledge of Falsity, or With Reckless Disregard of the Truth 2

Conclusion 2

TABLE OF AUTHORITIES

Cases

ELM Medical Lab. v. RKO Gen., 403 Mass. 779 (1989) 3

Howell v. Enter. Publ'g Co., LLC, 72 Mass. App. Ct. 739 (2008) 5, 6, 7

King v. Globe Newspaper Co., 400 Mass. 705, *cert. denied*, 485 U.S. 962 (1988) 5

Lane v. Mpg Newspapers, 438 Mass. 476 (2002) 2, 4

Murphy v. Boston Herald, 449 Mass. 42 (2007) 4

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 2, 4

Opinion of Justices to the Senate, 436 Mass. 1201 (2002) 4

Rosenblatt v. Baer, 383 U.S. 75 (1966) 8

Rotkiewicz v. Sadowsky, 431 Mass. 748 (2000) 4, 7, 8

Sibley v. Holyoke Transcript-Telegram Publishing Co., 391 Mass. 468 (1984) 3

Stone v. Essex County Newspapers, Inc., 367 Mass. 849 (1975). 5

INTEREST AND IDENTITY OF THE AMICI

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. AP distributes news worldwide through its global network of 243 bureaus and offices, including two in Massachusetts. On any given day, AP's content can reach more than half of the world's population.

Reed Elsevier Inc. ("REI") owns a large number of media and entertainment business publications such as Variety, Publishers Weekly, Library Journal and Multichannel News, and through its LexisNexis news service republishes stories published by numerous newspapers.

As news organizations and information publishers that report on matters of public concern on a regular basis, *amici* are guided by the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and

public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *Amici* recognize, as the Court did in *Sullivan* and as this Court has on repeated occasions, see, *e.g.*, *Lane v. Mpg Newspapers*, 438 Mass. 476, 479 (2002), that an essential underpinning of that principle is the rule "that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'-- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 280-81. This fundamental tenet of constitutional law provides *amici* and others with the breathing space they need to comment on matters of public concern involving public officials. A contrary rule would induce self-censorship and a cautious and restrained press that is incompatible with our national commitment to freedom of speech.

Amici file this brief because they have a strong interest in ensuring that courts act against the background of this basic constitutional principle in cases involving allegedly defamatory statements concerning public officials involved in matters of

public concern. While *amici* agree with appellant Enterprise that appellee Howell's defamation claim should be resolved by application of Massachusetts's fair report privilege, we submit this brief to underscore that the instant case is exactly the type of situation to which the *New York Times* "actual malice" rule should apply, rather than the negligence standard applied by the Appeals Court.

ARGUMENT

The Decision Below on Howell's Defamation Claim Is Inconsistent With the United States and Massachusetts Constitutions. A Newspaper Cannot be Held Liable for Defamation Based on Allegedly False Statements About a Public Official Pertaining to Matters of Public Interest Unless the Statements Were Made with Knowledge of Falsity, or With Reckless Disregard of the Truth.

1. *Amici* agree with appellants that the fair report privilege provided by Massachusetts law insulates Enterprise from liability in this case and requires reversal of the decision below.[1] We file this brief because the parties have not addressed the application to this case of the First Amendment of the United States Constitution and Article XVI of the Massachusetts State Constitution, which also

[1] *See, e.g., ELM Medical Lab. v. RKO Gen.*, 403 Mass. 779, 782 (1989); *Sibley v. Holyoke Transcript-Telegram Publishing Co.*, 391 Mass. 468, 470-471 (1984).

require reversal.[2] Both Constitutions place "limits on the application of [state] defamation law with respect to any factual statement published in the news media about a public official or public figure, even when that statement is shown to be false and defamatory." *Murphy v. Boston Herald*, 449 Mass. 42, 48 (2007) (internal footnote omitted). For liability to be imposed, such a statement must be "made with 'actual malice,' that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S at 280; *see also Lane*, 438 Mass. at 479; *Rotkiewicz v. Sadowsky*, 431 Mass. 748, 752 (2000). This constitutional requirement permits the media to report on public issues and public officials in an "uninhibited, robust, and wide-open" manner. *New York Times*, 376 U.S. at 270.

2. The fundamental error in the Appeals Court's opinion is its conclusion that Howell "may recover if Enterprise was negligent in ascertaining the truth or falsity of the material published."

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[2] The Massachusetts Constitution provides protection for free expression that is at least as broad as that given by the First Amendment. *Opinion of Justices to the Senate*, 436 Mass. 1201 (2002).

Howell v. Enter. Publ'g Co., LLC, 72 Mass. App. Ct. 739, 742 n.2 (2008). To the contrary, Howell can constitutionally recover only if he meets the *Times v. Sullivan* "actual malice" standard. A plaintiff who is a public official or public figure must prove, by clear and convincing evidence, that the defendant published the allegedly false and defamatory material with "actual malice" -- that is, "with knowledge that it was false or with reckless disregard of whether it was false." *King v. Globe Newspaper Co.*, 400 Mass. 705, 719 (1987)(citing *New York Times*), *cert. denied,* 485 U.S. 962 (1988); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 867 (1975).

The *Times* actual-malice standard applies in the present case because, as the Appeals Court recognized in its discussion of Howell's invasion of privacy claim, the publications that Howell complains about were reports about "allegations of misconduct leveled against a public employee in the performance of his public duties." *Howell*, 72 Mass. App. Ct. at 750.[3] As the Appeals Court explained:

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[3] In a footnote placed at the beginning of its consideration of Howell's defamation claim, the Appeals Court stated that, because the issue had not been raised in the appellant's motion for

> The articles concerned the employee's past performance and his fitness for his public duties, as well as his possible continued employment and receipt of unemployment compensation following his termination. The story thus pertained to the execution and oversight of public employee performance, the effective administration of town operations, and potential fiscal obligations occasioned by the unemployment compensation program and the investigation and legal proceedings associated with Howell's termination. All of these are matters as to which members of the public, as residents and taxpayers, have a legitimate interest.

Id.

The Appeals Court was "not persuaded that Howell's termination from public employment on August 3, 2005, stripped away the public's legitimate interest in these matters." *Id.* n.5. It went on to note that "Howell's past performance of his public duties, the circumstances surrounding his

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summary judgment, "for purposes of our analysis, we assume without deciding that Howell is a private individual who may recover if Enterprise was negligent in ascertaining the truth or falsity of the material published." *Howell*, 72 Mass. App. Ct. at 742 n.2. However, that assumption is inconsistent with the facts that the Appeals Court itself noted. In its analysis of Howell's invasion of privacy claim the court determined that appellant's articles "reported on allegations of misconduct leveled against a public employee in the performance of his public duties." *Id.*

termination, the town's handling of the matter, and the fiscal obligations associated with the incident all retained their significance as matters of legitimate public concern after Howell's termination from public employment." *Id.*

The lower court's characterization is clearly correct, but did not go far enough. Mr. Howell was a public official, not merely a public employee. The publications in question related to Howell's role as superintendent of sanitation for a Department whose responsibilities included the collection of wastewater in the municipal system, maintenance and inspection of the Town's sewer lines, and oversight of the town's sewer collection system. These matters were directly linked to the health and welfare of the residents of Abington. A failure to perform these duties properly "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general interest in the qualifications and performance of all government employees." *Sadowsky,* 431 Mass. at 753 (citing *Rosenblatt v. Baer,* 383 U.S. 75, 86 (1966) ("the 'public official'

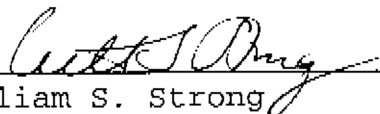
designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.")).

Consequently, Howell can recover for defamation in this case only if he can prove, by clear and convincing evidence, both that defendant's publications were false, and that they were made with knowledge of their falsity or in reckless disregard of their truth. *See Sadowsky*, 431 Mass at 755. Negligence cannot constitutionally be a basis of liability here.

Conclusion

The decision of the Appeals Court, affirming the denial of Enterprise's motion for summary judgment on Howell's defamation claim, should be reversed as contrary to the Massachusetts fair report privilege. The decision below is also contrary to the Massachusetts and United States Constitutions and the Court should so hold if, for some reason, the State-law privilege is not dispositive.

Respectfully submitted,



William S. Strong
BBO# 483520
Amy C. M. Burke
BBO# 657201
KOTIN, CRABTREE & STRONG
One Bowdoin Square
Boston, MA 02114-2925

Of Counsel:
Paul Bender
Michael R. Klipper
Christopher A. Mohr
Meyer, Klipper & Mohr
923 15th Street NW
Washington, DC 20005
202-637-0850

Date: September 23, 2009