No. 14-3876

In the

United States Court of Appeals

for the

Eighth Circuit

Jesse Ventura a/k/a James G. Janos,

Plaintiff-Appellee,

vs.

Taya Kyle, as Executor of the Estate of Chris Kyle

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
Civ. No. 12-cv-472 (RHK/JJK) – District Judge Richard H. Kyle

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BRIEF OF AMICI CURIAE THE FIRST AMENDMENT SCHOLARS IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici Curiae the First Amendment Scholars are law, journalism, and communications school faculty who research, study, write about, and teach media law and First Amendment law. They are interested in assisting the courts in interpreting the First Amendment, and the First Amendment decisions of the Supreme Court of the United States, in a manner that is conceptually sound, intellectually coherent, and practically efficacious. They are interested in this appeal to this court because they believe that the trial court in this case committed reversible errors of a constitutional magnitude. A list and brief biographical sketches of all amici appear at the end of this brief.

STATEMENT OF AUTHORSHIP

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting this brief. No person other than amici curiae and their counsel contributed money intended to fund preparing or submitting this brief.

ARGUMENT

I. The *Sullivan* Actual Malice Standard Provides Expansive and Critical Protection to Freedom of Expression but Poses Challenges in Jury Trials

In order to appreciate the significance of the errors committed by the court below, it is essential to understand the constitutional framework established by the Supreme Court of the United States in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny. It is also essential to understand the challenges that this framework presents in the context of a jury trial.

Sullivan involved a substantial jury verdict that was awarded to a Montgomery City Commissioner in a defamation action based on an advertisement published in the *New York Times.* The Supreme Court of the United States reversed a decision of the Alabama Supreme Court upholding the jury's verdict. In the course of doing so, the Court "revolutionized the law of libel and . . . signaled a critical shift in our first amendment jurisprudence." Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey*, 139 U. PA. L. REV. 1333, 1343 (1991).

Sullivan presented the question of whether, and to what extent, the First Amendment imposes limitations on defamation actions under state law. In deciding that issue, the Court "considered th[e] case against the background of a profound national commitment to the principle that debate on public issues should be

uninhibited, robust, and wide-open" and recognized that such debates may "include vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.* at 270. Of particular importance here, the Court acknowledged that false statements were "inevitable in free debate" and that such statements must receive substantial protection from liability "if the freedoms of expression are to have the 'breathing space' that they 'need to survive.' " *Id.* at 271–72 (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963) (alteration omitted)). The Court repeatedly noted that "factual error" was insufficient to remove the "constitutional shield" that protects speech, *id.* at 272, 273, because drawing the line of protection at the point of falsity would provide no room for error in public discourse.

In order to afford speech the desired breathing space, *Sullivan* endorsed an extraordinarily demanding standard for defamation actions against public officials.[1] The Court declared that, to prevail in such a case, a public official plaintiff must prove that the defendant spoke with "actual malice"—that is, with knowledge that the statement in question was false or with reckless disregard as to its falsity. *Id.* at 279–80. Furthermore, the Court held that this constitutional standard demands that the plaintiff prove actual malice with "convincing clarity"—a mere preponderance of the evidence does not provide sufficient protection. *Id.* at 285–86.

[1] *See* Harry Kalven, *The* New York Times *Case*: *A Note on "The Central Meaning of the First Amendment*," 1964 SUP. CT. REV. 191, 213.

In the cases that followed *Sullivan*, the Supreme Court expanded the scope and clarified the meaning of this standard. Thus, in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), its companion case *Associated Press v. Walker*, 388 U.S. 130 (1967), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court extended the actual malice standard to cases involving public figure plaintiffs.

Throughout those public figure cases, the Court echoed the theme sounded in *Sullivan* that we can foster and encourage free debate only by allowing space for error. *See*, *e.g., Butts*, 388 U.S. at 152 ("We have recognized 'the inevitability of some error in the situation presented in free debate' and that 'putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship.' ") (citation omitted); *Gertz*, 418 U.S. at 340–41 ("[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press . . . . The First Amendment requires that we protect some falsehood in order to protect speech that matters."); *see also St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.").

In the cases following *Sullivan*, the Court also provided important clarifications of the concept of "reckless disregard." Thus, in *St. Amant*, the Court

made clear that recklessness is not measured by what a "reasonably prudent person" would have said; such a standard would not allow adequate protection to false speech. *Id.* at 731. Rather, the Court declared, recklessness is established only where there is "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731; *see also Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times*" are actionable); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84 (1967) (plaintiff must show "a high degree of awareness of . . . probable falsity") (citation omitted).

Any fair reading of these cases makes plain that the two components of actual malice—knowledge of falsity and reckless disregard of falsity—are getting at the same thing: protection for false speech ends only at the extreme point of the "calculated falsehood," the "lie, knowingly and deliberately published," the "known lie," and their normative equivalent of a high degree of awareness of probable falsity. *Garrison*, 379 U.S. at 75. This severe standard can be met only by evidence of actual knowledge of falsity or by evidence that the speaker had such a high degree of awareness of contrary facts that he entertained serious subjective doubts about the truth of what he was saying or believed that what he was saying

was probably false. And, as noted above, this must be proved by clear and convincing evidence.

The actual malice standard does not align with where our common-sense intuitions about prudence and reasonableness might lead us. To the contrary, the Supreme Court has repeatedly conceded that this standard yields some counterintuitive incentives and results. Thus, in *St. Amant*, the Court admitted that "[i]t may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity." 390 U.S. at 731. And, in *Gertz*, the Court acknowledged that "[t]his standard administers an extremely powerful antidote to the inducement to media self-censorship . . . [a]nd it exacts a correspondingly high price from the victims of defamatory falsehood." 418 U.S. at 342. Indeed, the *Gertz* Court conceded that "[p]lainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test." *Id.* at 342. Nevertheless, the Court has consistently held fast to the notions that we can encourage public discourse only by giving speakers abundant room to make mistakes within it and that such space can be achieved only through a standard that protects falsehoods up until that extreme point where it can be

established, clearly and convincingly, that the speaker was acting with actual malice.

To compound the complexity, almost none of the language employed to describe this constitutional standard corresponds to the meanings of ordinary usage. As discussed above, actual malice is defined narrowly and technically and has nothing to do with malice in the ordinary sense of "hatred, ill will or enmity or a wanton desire to injure." *See Garrison*, 379 U.S. at 78; *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) ("Actual malice . . . should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will."). In this respect, actual malice is not malice at all, let alone actual in its literalness.

In the same vein, recklessness is not defined here by reference to familiar notions of irresponsibility or a lack of proper caution.[2] It does not even mean what it means in other legal settings, as when we use the phrase "reckless driving" or "reckless handling of a firearm" to describe egregiously negligent conduct.[3] Rather, as noted above, recklessness in this context means someone who has a high

[2] MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/reckless (last visited Mar. 2, 2015).

[3] For example, Minnesota defines reckless driving as driving with "a willful or a wanton disregard for the safety of persons or property." Minn. Stat. Ann. § 169.13 (2015); *see also id.* at 609.66 (reckless handling of dangerous weapons).

degree of awareness that what he is saying is probably false and who has serious doubt about its truth but who says it anyway.

In this setting, "serious doubt" too becomes a term of art with a specific and distinctive meaning. In common parlance, we often use "doubt"—even "serious doubt"—to describe a state of uncertainty.[4] If John tells Jane a story about his first date or his last vacation, and Jane asks whether the story is correct in all its details, John might smile and say that he seriously doubts it. This would not reflect a "high degree of awareness" of contrary facts indicating "probable falsity" in the narrative—as the actual malice standard requires. It would, instead, indicate an eyebrow-raising shoulder-shrugging uncertainty about the story's accuracy given the normal failings of human memory. In short, there is a vast and critical difference between the meaning of "serious doubt" in ordinary conversation (where it often suggests *un*certainty) and in the context of actual malice recklessness (where it indicates a relatively high level of certainty that the statement being made is untrue).

That these technical and highly nuanced terms of art can lead to juror confusion has often been noted—including by the Supreme Court itself. *See*, *e.g.*, *Masson*, 501 U.S. at 511 (1991) ("[T]he term [actual malice] can confuse as well

[4] Indeed, the primary dictionary definition of "doubt" is "to be uncertain about (something); to believe that (something) may not be true or is unlikely." MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/doubt (last visited Mar. 2, 2015).

as enlighten. In this respect the phrase may be an unfortunate one."); *see also Tavoulareas v. Piro*, 817 F.2d 762, 807–08 (D.C. Cir. 1987) (Ginsburg, J., concurring) (then-D.C. Circuit Judge Ruth Bader Ginsburg cataloging the evidence that jurors struggle to understand actual malice). Well-intentioned courts therefore frequently re-cast the actual malice standard into more easily comprehensible language for purposes of jury instructions. This is consistent with the direction given by the Supreme Court: "By instructing the jury 'in plain English' at appropriate times during the course of the trial concerning the not-so-plain meaning of the phrase, the trial judge can help insure that the *New York Times* standard is properly applied." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 n.7 (1989). It is essential, however, that nothing gets lost in the translation. A failure to capture the demands of the actual malice standard in the instructions will deprive the defendant of the protection the First Amendment affords to him and his speech.

The Supreme Court decisions reflect the immense importance of getting jury instructions right in this context. Indeed, the Court's three foundational cases in this area—*Sullivan*, *Butts*, and *Walker*—all involved errors of law reflected in jury instructions. Errors in jury instructions matter here because the constitutional protections afforded by the actual malice standard are robust, but they are also

fragile. Those protections vaporize if a trial court fails accurately and adequately to convey them to the jury.

For these reasons, trials of public official and public figure defamation cases present a trifecta of serious concerns. The stakes are high: the jury must apply concepts designed to protect central First Amendment freedoms. The standard is counterintuitive: by design, the actual malice test will immunize speech that the jury believes to be false, negligent, obnoxious, and injurious. And the complexity of the standard and the language used to express it create substantial risks of jury error: malice does not mean malice, recklessness does not mean recklessness, and doubt does not mean doubt. This helps explain why appellate *de novo* review plays such an important role with respect to adverse jury verdicts in these cases. *See New York Times*, 376 U.S. at 285; *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984).

With this doctrinal framework in mind, we turn now to the issue of how and why the court below clearly erred and why those mistakes matter.

II. The Court Below Erred In Its Instructions to the Jury Regarding Reckless Disregard

The record below reflects that Appellant proposed a final instruction that labored to assist the jury in understanding the complex concept of reckless disregard:

> [Reckless disregard] is shown if a defendant actually recognized that the statement was probably false, but went ahead and made it ignoring the probability of falsehood.
>
> In determining whether Chris Kyle acted with subjective awareness of probable falsity, you should include the following considerations:
>
> That Chris Kyle was or might have been negligent in making the statements does not constitute the subjective awareness of probable falsity. Chris Kyle's conduct is not to be measured by whether a reasonably prudent person would have made the challenged statements, or would have been more careful in how the statement was worded, or would have investigated more before making the challenged statements.
>
> Disapproval, ill will, prejudice, hostility or contempt do not by themselves amount to knowledge of falsity or awareness of probable falsity. Evidence of ill will may be considered by you only if it is connected with evidence that Chris Kyle published a statement he knew to be false or published a statement with a high degree of awareness that the statement was probably false.
>
> Evidence that a party or a witness had a lapse in memory regarding one event while he clearly recalls other events is not implausible, nor does it demonstrate that he knew his statement was false or probably false. Anyone with a

> less-than-perfect memory will recall some things precisely and other things in a fog.

Appellant's Proposed Final Instruction 23. This proposed instruction accurately stated the law and rendered in plain English the complexities of reckless disregard. It even provided some direction regarding the concept that doubt, in this context, does not mean uncertainty or fogginess of recollection but rather means an actual recognition of probable falsity that the speaker disregards.

Unfortunately, the trial court judge rejected that helpful instruction in favor of this less helpful one:

> The third element is that Mr. Kyle published the story about Mr. Ventura despite:
>
> 1. Knowing the story was false; *or*
>
> 2. Believing the story was false; *or*
>
> 3. Having serious doubts about the story's truth.
>
> Mr. Ventura must prove this element by clear and convincing evidence (see Instruction No. 7).

ECF-362. Although this bare-bones instruction was not objectionable in itself, post-instruction questions from the jury demonstrated that it suffered from two important shortcomings. Unfortunately, the trial court failed to take the steps necessary to address them.

First, this instruction did not make clear that, to meet the actual malice standard, Ventura had to prove that Kyle *actually* believed the statements in

question were false or *actually* entertained serious doubts about their truth when he made them. Second, the instruction left open the possibility that the "serious doubts" standard could be satisfied by a finding that Kyle was simply uncertain about the truth of the statements at issue.[5]

The post-instruction questions that came from the jury to the court confirm that these flaws troubled the deliberations in this case. One juror asked the court: "Do we have to decide if Chris Kyle was telling the truth based on the evidence OR do we have to believe that Chris Kyle *thought* he was telling the truth?" ECF-378 (emphasis added). Of course, this question reflects a basic confusion regarding the actual malice standard and the requirement of *actual* knowledge or *actual* awareness of probable falsity. Nevertheless, the trial court simply directed the jury back to the same instructions that had prompted the confusion. ECF-379; *see also* T-2122-28. The Supreme Court has declared that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612–13 (1946). The trial judge made no such effort here.

In addition, the jurors asked the court for direction regarding the meaning of "serious doubts" in the instruction. ECF-371, 373. Over Appellant's objection—

[5] Although we focus on those two flaws here, the instruction was inadequate in other respects as well, for example in its use of the vague term "the story" and in its failure to indicate that proof of negligence, spite, ill will, or enmity does not suffice to establish reckless disregard. *See* Brief of Appellant at 31-36.

and disregarding a supplemental instruction proposed by Appellant—the trial court responded: "There is no legal definition of 'serious doubt.' You will have to rely on your common sense in interpreting and applying the standard." ECF-374. The trial court's direction on this point was, of course, twice wrong. As discussed above, controlling decisions from the Supreme Court of the United States do, indeed, provide a definition of reckless disregard that clarifies the meaning of "serious doubt." And, as discussed above, the ordinary, "common sense" meaning of serious doubt differs substantially and importantly from the legal meaning of the term. If the trial court had urged the jury to use its common sense in determining the meaning of "actual malice" or "reckless disregard" there is no question that the jury would have gone astray. How could we possibly expect a jury to divine independently the technical and nuanced definitions of those terms? Urging the jury to use its "common sense" with respect to the meaning of the inadequately framed phrase "serious doubts" was no less an invitation to err. Leaving the jury to speculate about the meaning of so essential a term created an intolerable risk of confusion and prejudice. *See United States v. Whitehead*, 176 F.3d 1030, 1040 (8th Cir. 1999) (reversing a conviction in a criminal case because the trial court did not define a critical term and the jury was left to speculate about its meaning).

We do not suggest, and this court need not hold, that in all actual malice cases an instruction as detailed as that initially offered by the Defendant here must

be given—although we believe that instruction has much to recommend it. But it is clear that the instructions the court did offer failed to translate with sufficient clarity the demands of the actual malice standard. It is equally clear that this failure of translation confused the jury and pointed them toward the application of a less demanding test. And it is no less clear that the trial judge failed to take adequate measures to address these issues.[6]

III. The Court Below Erred in Its Instructions Regarding the Burden of Proof as to Falsity

Kyle proposed a jury instruction that would have required the jury to find that the statements at issue were false by clear and convincing evidence. *See* Kyle's Proposed Final Instructions 6 and 22. The trial court rejected that request and instead instructed the jury that it needed to apply a preponderance standard, finding falsity only by "the greater weight of the evidence." *See* Instruction 8B. The trial court erred in doing so.

The Supreme Court has not definitively and expressly declared which standard should apply in actual malice cases. *Harte-Hanks*, 491 U.S. at 661 n.2.

[6] One relatively simple measure that would have assisted the jurors, but that the trial judge declined to employ, is a special verdict form. As then-D.C. Circuit Judge Ruth Bader Ginsburg observed, "the special verdict . . . may be a particularly useful check against jury misconstruction or misapplication of a standard as uncommon as actual malice." *Tavoulareas*, 817 F.2d at 808 (Ginsburg, J., concurring).

And lower courts have split over the question. *See* R. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS §3:4 at 3-14 to -15 & n.52 (4th ed. 2010 & Supp. 2013). There are nevertheless at least four persuasive reasons to conclude that the clear and convincing standard is the better rule.

First, the clear and convincing standard is more consistent with *Sullivan*'s approach to placing constitutional limitations on the tort of defamation. In an often overlooked passage, the Court observed that (in addition to failing to prove actual malice) Sullivan had also failed to prove that the statements at issue were "of and concerning" him (i.e., that they identified him with sufficient specificity). Sullivan had satisfied the quirky and forgiving of-and-concerning requirements of Alabama state law. *Sullivan*, 376 U.S. at 290–91. But the Supreme Court held the proofs on this point to be "constitutionally defective." *Id.* at 288; *see also id.* at 292 ("[T]he evidence was constitutionally insufficient to support a finding that the statements referred to respondent."). It would make little sense to conclude that *Sullivan* attached constitutional significance to the fault element and to the of-and-concerning element, but not to the falsity element. This is particularly implausible given the Court's emphasis, discussed *supra* in Section I, on the importance under the First Amendment of affording latitude to false speech.

This leads to the second argument: the clear and convincing standard is more consistent with *Sullivan*'s expressly and repeatedly stated goal of allowing space

for error in public discourse. Defining falsehood as that which is shown to be wrong by the marginally greater weight of the evidence does nothing to advance that goal. As one commentary observes, "Because the demarcation between the truth and falsity of the statement is of constitutional dimension, imposition of a preponderance of the evidence standard on the plaintiff is inadequate . . . . Unless the courts require clear and convincing proof on the issue of the statement's falsity, a public plaintiff would be able to prevail in the case simply by creating sufficient doubt in the jurors' minds as to the truth of the statement and then persuading those jurors to disbelieve the defendant's protestations about honest belief or lack of recklessness." Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 864 (1984). A forgiving preponderance standard would dilute the "extremely powerful antidote" promised by *Gertz* into a thin and ineffectual tonic. 418 U.S. at 342; *cf. Speiser v. Randall*, 357 U.S. 513, 525 (1958) (noting that "more sensitive tools" are required when "separat[ing] . . . legitimate from illegitimate speech").

Third, it is not at all clear that imposing different standards on the falsity and fault elements holds up logically. Certainly, if we take both elements of the tort in splendid isolation we can declare that different standards apply to them: "you must determine falsity by a preponderance of the evidence and fault by clear and convincing evidence." But the doctrine does not place the two elements in such

isolation—it inextricably intertwines them. As a result, any effort to apply different standards to the two elements yields something bordering on gibberish: "he clearly and convincingly knew that it was marginally more likely than not that the statement was false" seems curiously at odds with itself, giving up with one phrase what it insists upon in the other.

To put the matter differently, a requirement of clear and convincing proof of falsity is implicit within a requirement of clear and convincing proof of knowledge about it, and any effort to treat these elaborately entangled concepts as distinct and unrelated will result in an incoherent doctrine. *See Firestone v. Time, Inc.*, 460 F.2d 712, 722–23 (5th Cir. 1972) (Bell, J., concurring) (the clear and convincing standard of proof as to falsity "seems implicit . . . in the stated requirement in *New York Times* that plaintiff has the burden of showing by clear and convincing proof that publication was with knowledge of falsity or with reckless disregard as to falsity"). Indeed, in a number of cases—including one decided just last year—the Supreme Court has emphasized the close connection between the actual malice and falsity issues. *See Masson*, 501 U.S. at 513 (1991) (noting that an evaluation of the evidence of actual malice "requires [the Court] to consider the concept of falsity; for we cannot discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability"); *Air Wis. Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 861 (2014) ("[A]ctual malice entails falsity.").

Fourth, and finally, applying different standards to different elements, particularly such closely associated elements, is a recipe for jury confusion in a context where the Supreme Court has urged us to try to avoid it. *See Robertson v. McCloskey*, 666 F. Supp. 241, 248 (D.D.C. 1987) ("[D]efendants' argument has more than merely a logical or symmetrical appeal. To instruct a jury that a plaintiff must prove falsity by a preponderance of evidence, but must also prove actual malice, which to a large extent subsumes the issue of falsity, by a different and more demanding standard is to invite confusion and error."). In the face of such confusion, there is a substantial risk that the jury will simply default to the lower and more easily understood standard. As one state court observed, "[p]ractically speaking, it may be impossible to apply a higher standard to 'actual malice' than to the issue of falsity." *Nev. Indep. Broad. Corp. v. Allen*, 664 P.2d 337, 343 n.5 (Nev. 1983). Instructions that ask a jury to do something that is, at best, conceptually confounding, and, at worst, practically impossible are obviously inadequate—particularly when core constitutional rights are at stake.

CONCLUSION

Jury instructions in public figure and public official defamation actions are not procedural window dressing. They are essential to the preservation of First Amendment protections. In this case, the trial court got very wrong two instructions that it needed to get exactly right.

For these reasons, amici curiae join Appellant in urging this court to reverse the judgment below in its entirety and to direct entry of judgment in Appellant's favor, or, in the alternative, to reverse the judgment and remand for a new trial.

Dated: March 9, 2015

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with the type-volume limitations of Federal Rules of Appellate Procedure, 29(d), and Rule 32, because it is proportionately spaced, has a typeface of 14 points, and contains 4,579 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure, Rule 32(a)(7)(B)(iii).

Dated: March 9, 2015

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PROOF OF SERVICE

I hereby certify that on March 9, 2015, I served the foregoing documents described as the Motion of The First Amendment Scholars to File Amici Curiae Brief in Support of Appellant and For Reversal, and [proposed] Brief of Amici Curiae The First Amendment Scholars in Support of Defendant-Appellant and Reversal, by United States First Class Mail, postage fully prepaid, upon the following:

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I hereby certify that on March 9, 2015, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Eight Circuit by using the appellate CM/ECF syste.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I declare under penalty of perjury that the above is true and correct.

/s/Leonard M. Niehoff
Leonard M. Niehoff