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COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, SS.

No. SJC-12698

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JON BUTCHER,

*Plaintiff-Appellant,*

v.

UNIVERSITY OF MASSACHUSETTS, ET AL.,

*Defendants-Appellees.*

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ON FURTHER APPELLATE REVIEW OF A JUDGMENT OF  
THE SUPERIOR COURT FOR SUFFOLK COUNTY

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**AMICUS CURIAE BRIEF FOR  
GATEHOUSE MEDIA, LLC, THE ASSOCIATED PRESS,  
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,  
AND THE NEW ENGLAND FIRST AMENDMENT COALITION  
IN SUPPORT OF APPELLEES FOR REVERSAL OF COURT BELOW**

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## **DISCLOSURE STATEMENT**

GateHouse Media, LLC is a Delaware limited liability company. Its parent owner is New Media Holdings II, LLC. No publicly held corporation owns 10% or more of its stock.

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## **IDENTITY AND INTEREST OF AMICUS CURIAE**

GateHouse Media, LLC publishes one hundred thirty-five (135) town and community newspapers, in print and digital formats, throughout the Commonwealth of Massachusetts. Communities served by GateHouse's newspapers cover the breadth of the state, from Abington to Worcester. A complete list of GateHouse's Massachusetts newspapers is provided in the Addendum hereto.

The Associated Press ("AP") is a news cooperative organized under New York's Not-for-Profit Corporation Law. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the news media faced a wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The New England First Amendment Coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians, librarians and academicians, as

well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know, in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

Amici submit this brief to express their substantial concern with the Appeals Court's opinion below, which advances a misguided and unduly restrictive interpretation of the "fair report" privilege long recognized under Massachusetts law. The privilege is of fundamental importance to amici because it provides that news organizations who "fairly and accurately report certain types of official or governmental action [are] immune from liability for claims arising out of such reports." *ELM Med. Lab., Inc. v. RKO General, Inc.*, 403 Mass. 779, 782 (1983). The impact of the ruling appealed from, if permitted to stand, will be significant and adverse. Massachusetts journalists, unlike their counterparts in many other states, will no longer be able to report information contained in police blotters, a reliable and frequent source for news coverage about something that is of the utmost public importance – crime. This will necessarily have a chilling effect on the press's ability to report official government information, to the detriment of an informed public.

This Court has emphasized that the fair report privilege confers essential societal benefits because it protects the ability of news organizations like amici to "act[] as the public's eyes and ears" by "report[ing] on official actions and statements

that members of the public could have witnessed for themselves.” *Howell v. Enterprise Publ. Co.*, 455 Mass 641, 653 (2010). Further, the privilege “allow[s] the news media to serve as a check on the power of government by giving the public the opportunity to be informed citizens and voters.” *Id.*

The record presents a straightforward fact pattern where a newspaper published two reports about a person suspected of photographing women without their permission. The news articles reported information that a police department had published in its “police blotter,” as well as a photograph of the suspect released by the police. Despite the paradigmatic newsgathering and reporting activities reflected in the record, the ruling appealed from held that the newspaper’s publications were *not* protected by the fair report privilege because, according to the Appeals Court, the police blotter contained statements attributed to a witness, and the contents of the police blotter did not reflect “official police action.”

The foregoing holding cuts to the heart of local news organizations’ role as news providers to the communities they serve. Local newspapers in Massachusetts, and indeed across the country, routinely publish the contents of police blotters to their readers. They routinely publish stories about crimes and investigations derived from matters reported in local police blotters. They also routinely publish photographs of persons that the police have released for assistance in their investigations. Citizens, for their part, have a keen and immediate interest in being

kept informed about the daily activities of their local police departments. They reasonably expect that their local newspaper will report about potential criminal activity in their communities, as well as efforts of the police to keep their communities safe and secure. The disclosure of police blotters and release of criminal suspect photographs are standard “official” tools for police departments to inform the public about their work. Amici respectfully urge the Court that, in considering the scope of the fair report privilege, it should take into account that

[T]he intended beneficiary of the [fair report] privilege is the public, not the press. The privilege is not simply a convenient means for shielding the media from tort liability. Rather, the privilege springs from the recognition that in a democratic society, the public has both the right and the need to know what is being done and said in government – even if some of that is defamatory.

*Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985).

The Appeals Court’s holding seriously threatens and undermines news organizations’ ability to report to their communities about the workings and investigations of their police department. By holding that police blotters do *not* represent an “official action” of the police department, and therefore are *not* subject to the protections of the fair report privilege as a matter of course, the opinion below requires journalists to review information reported in police blotters to determine whether, from the contents of the blotter report, some other “official action” of the police is being reported and can be safely republished. It also creates perverse outcomes as to what can be reported: arrests qualify as an “official action,” but



police interviews leading to release of a suspect do not. The opinion below also creates uncertainty about when a photograph of a criminal suspect released by the police may be safely published in tandem with information from a police blotter.

For these reasons, as elaborated below, amici respectfully urge this Court to review and reverse the holding of the Appeals Court below, which will chill speech on matters of legitimate public concern and impair the public's ability to monitor its government. Consistent with its leading precedents construing the fair report privilege, this Court should hold, clearly and unequivocally, that when a newspaper republishes matters reported in a police blotter, or publishes photographs released by the police, the newspaper may do so subject to the protections of the fair report privilege, without fear of tort liability, so long as its reporting is fair and accurate.

## DECLARATION

Amici curiae and their counsel hereby certify and declare that:

- (A) This brief was not authored in whole or in part by counsel for the parties. It was authored in its entirety by counsel for amici curiae.
- (B) No party or parties' counsel contributed money towards the preparation or submission of this brief. It was funded entirely by amici curiae.
- (C) No person or entity other than the amici curiae, their members or their counsel contributed money that was intended to fund preparing or submitting this brief. It was funded entirely by amici curiae.
- (D) Amici curiae and their counsel have not represented one of the parties to the present appeal in another proceeding involving similar issues.

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## **STATEMENT OF ISSUES**

1. Is a police department's statutorily required publication of information in a police blotter an "official government action" such that a newspaper may report on that information subject to the protections of the fair report privilege?

2. Is a police department's release of a person's photograph to the public an "official government action" such that a newspaper may report on the photograph subject to the protections of the fair report privilege?

## **STATEMENT OF THE CASE**

Defendant Cady Vishniac was a student editor at Mass Media, the University of Massachusetts-Boston's (UMass-Boston) newspaper. Plaintiff Jon Butcher sued Ms. Vishniac, Mass Media and other defendants. He alleged that Mass Media's reporting of actions by the UMass-Boston police department constituted libel and intentional infliction of emotional distress, as well as other causes of action.

The facts relevant to this appeal are simple. Mass Media published two versions of the news article at issue. Mass Media's first report consisted of reprinting a "police blotter" entry prepared by the UMass-Boston police department. SAIII/22, 37-39. The police blotter entry republished by Mass Media read as follows:

"A suspicious white male in a black jacket took photographs and video of nearby women, as well as some buildings on campus. A witness stated that the party did not appear to be a student and was not wearing a backpack. The witness snapped a photograph of the suspect and shared that photograph with Campus Safety. Officers tried to locate the suspect at JFK/UMass Station, but could not find him." SAIII/38.

Mass Media's second version of the news story (published both online, and in the paper's print edition) included a photograph of the previously reported suspect released by the UMass-Boston police department. SAI/21, 33; SAIII/27-28. The department released the photograph to seek the public's assistance in identifying a person of interest in an investigation, as is customary. SAIII/28. Mass Media's second news story paraphrased its first report with additional details as follows:

“On the morning of March 13 [2013], the man in the photograph allegedly walked around the UMass Boston campus snapping pictures of female members of the university community without their permission. According to the student who reported him, he did not appear to be a student as he was not carrying a backpack. If you see him, please call Campus Safety at 617-287-7780.” SAI/33.

At the time of Mass Media's news reporting, the identity of the suspect referenced in the police blotter and depicted in the photograph released by the police was not known. It turned out to be Mr. Butcher, who disputed the truth of the allegations.

The record reflects that the information published in the UMass-Boston police blotter, and reported by Mass Media, arose from the police department's investigation of a report of suspicious activity at the JFK/UMass MBTA station. That investigation included interviews of two UMass-Boston employees who had reported or witnessed Mr. Butcher's actions. The police also responded to an email that Mr. Butcher sent anonymously to UMass-Boston public safety officials giving his side of the incident. Mr. Butcher did not reply to the police's request that he

schedule an appointment to speak with them, leading the police to release his photograph and seek assistance in identifying him. *See* SAIII/5, 8, 23, 25, 28.

The Appeals Court concluded that Mass Media’s first publication of the police blotter entry reporting on the ongoing investigation was not “of and concerning” Mr. Butcher, and therefore could not be a basis for liability. As to Mass Media’s second online and print news reports, however, it reversed the trial court’s grant of summary judgment in favor of Ms. Vishniac, reasoning as follows:

Here, the police made no arrest, no formal charges were filed, there was no police statement, and no search warrant was issued. In these circumstances, the Supreme Judicial Court has explained that “statements made ... by the complainant or other witnesses ... as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceedings or the arrest itself and are not privileged .... Accordingly, there is also no privilege to report the unofficial acts of such officials as policemen, as distinct from their official utterances or acts, such as an arrest. *Thus, the fair report privilege does not apply to witness statements to police, whether appearing in an official police report or not, where no official police action is taken.* Such unconfirmed allegations have neither the authority nor the importance to the public that other documents or statements shielded by the fair reporting privilege possess. *Extending the privilege to a witness’s allegations merely because they appear in a police blotter does not further the doctrine’s purpose of allowing the public to learn of official actions affecting the public interest.* AD64 (citations and internal quotations omitted; emphasis added).

Amici urge this Court to reverse the Appeals Court’s holding above, as well as its attendant reversal of the trial court’s grant of summary judgment in favor of defendants on plaintiff’s claims for defamation and intentional infliction of emotional distress. The trial court’s decision should be reinstated in full.

## ARGUMENT

### I. PUBLIC INTEREST SERVED BY THE FAIR REPORT PRIVILEGE

The First Amendment to the United States Constitution reflects a “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.” *New York Times v. Sullivan*, 367 U.S. 254, 270 (1964); U.S. Const. Amend. I; *accord*, Mass. Const. Pt. 1, Art. XVI.

In furtherance of this fundamental constitutional principle, Massachusetts applies the “fair report” privilege, which provides that news organizations and others who “fairly and accurately report certain types of official or governmental action [are] immune from liability for claims arising out of such reports.” *ELM Med. Lab., Inc. v. RKO General, Inc.*, 403 Mass. 779, 782 (1983). The fair report privilege “establishes a safe harbor for those who report on statements or actions so long as the statements or actions are official and so long as the report about them is fair and accurate.” *Howell v. Enterprise Publ. Co.*, 455 Mass. 641, 653 (2010).

This Court has repeatedly recognized that the fair report privilege protects the public’s interest in being informed about governmental actions: “the only way news outlets would be willing to make [reports about government actions] is if they are free from liability, provided their report is fair and accurate.” *ELM Med. Lab.*, 403 Mass. at 783. According to a leading case from this Court, the privilege is supported by at least two important policy justifications. The first, called the “agency

rationale,” recognizes that the fair report privilege allows the press to “act[] as the public’s eyes and ears” by “report[ing] on official actions and statements that members of the public could have witnessed for themselves.” *Howell*, 455 Mass at 653. The second, called the “public supervision” rationale, holds that the fair report privilege “allow[s] the news media to serve as a check on the power of government by giving the public the opportunity to be informed citizens and voters,” which “frequently may require reporting on events outside the public eye or ear.” *Id.* (citing *ELM Med. Lab.*, 403 Mass. at 783; *Medco v. Time, Inc.*, 643 F.2d 134, 140-142 (3d Cir. 1981); 1 Robert D. Sack, *LAW OF DEFAMATION* § 7.3.2.2.2). This Court has emphasized that “given these policy rationales, it is important that the privilege be construed liberally and with an eye toward disposing of cases at an early stage of litigation.” *Howell*, 455 Mass at 653.

## **II. NEWS REPORTING OF INFORMATION IN POLICE BLOTTERS IS PROTECTED BY THE FAIR REPORT PRIVILEGE**

The Appeals Court determined that Mass Media’s news reports were not protected by the fair report privilege because “the fair report privilege does not apply to witness statements to police, whether appearing in an official police report or not, where no official police action is taken.” AD64. The Appeals Court likewise held that “extending the privilege to a witness’s allegations merely because they appear in a police blotter does not further the doctrine’s purpose of allowing the public to learn of official actions affecting the public interest.” These holdings contradict

several of this Court’s precedents, which make clear that a police department’s preparation and release of its police blotter represent “official government action” subject to the fair report privilege.

**A. Massachusetts Police Are Required by Statute to Prepare Police Blotters and Make Them Available to the Public.**

First, the Appeals Court’s holding below ignores that police departments like the UMass-Boston police department are *required by law* to prepare police blotters and make those logs available to the public.<sup>1</sup> Massachusetts General Laws c. 41, §98F. This statutory requirement establishes that, as a matter of law, police blotters are “official actions and statements that members of the public could have witnessed for themselves.” *Howell*, 455 Mass at 653. By definition, police blotters are therefore “official actions and statements” on which newspapers are free to report subject to the protections of the fair report privilege.

Pursuant to this statutory requirement, the UMass-Boston police department recorded a police blotter entry about a complaint against Mr. Butcher, which the Mass Media newspaper then republished verbatim in its first news report. SAIII/38.

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<sup>1</sup> Massachusetts General Laws c. 41, §98F provides that “each police department and each college or university to which officers have been appointed ... shall make, keep and maintain a daily log, written in a form that can be easily understood, recording, in chronological order, all responses to valid complaints received [and] crimes reported ....” The statute further provides that these logs “shall ... be public records available without charge to the public during regular business hours and at all other reasonable times ...” *Id.*



By law, the department was required to prepare this police blotter entry and make it available for public inspection. As such, the police blotter entry qualifies as an “official action” of the police department, part of its official governmental duties as dictated by statute. Police blotters are designated by law as public records that must be available for public inspection. This satisfies *Howell*’s mandate that the fair report privilege shall apply to “official actions and statements that members of the public could have witnessed for themselves.” *Howell*, 455 Mass at 653.

**B. Police Blotters Are Official Actions and Statements of the Police.**

Regardless of the foregoing statute, the inherent nature of a police department’s work in preparing its police blotter establishes that it is an “official action and statement” of the police, such that news organizations are free to report the contents of police blotters subject to the immunity of the fair report privilege.

This Court’s seminal case on the fair report privilege holds that an “official action” subject to the fair report privilege occurs when “branches and institutions of government” engage in the “administration of public duties” or “exercise the power of government to cause events to occur or to impact the status of rights or resources.” *Howell*, 455 Mass. at 654. A police department’s preparation of a police blotter is, beyond argument, “administration of [the] public duties” of the police department. The blotters report on complaints, investigations, arrests, and other official business of the police department, and are available to the public as public records. Police

blotters can also “cause events to occur or impact the status of rights or resources.” Because they are available to the public, the blotters may lead to the discovery of witnesses or the arrest (or exoneration) of suspects. In short, police blotters fall squarely within *Howell*’s guidance as to what constitutes “official action.”

*Howell* reviewed news articles reporting on non-public hearings of a local sewer commission, which met to review whether its superintendent should be discharged for, among other things, storing pornographic images on his work computer. *Howell*, 455 Mass. at 645-47. The newspaper’s source was anonymous, and the commission had not yet publicly reported its deliberations, or its subsequent decision to fire the superintendent. *Id.* This Court nevertheless held that the commission’s hearings and deliberations constituted “official actions” of the sewer commission that were subject to the fair report privilege. *Id.* at 654-55. The record here presents a far easier question, because police blotters are public records of the official workings and investigations of the police in responding to complaints.

Other Massachusetts and federal First Circuit decisions confirm that police blotters should be treated as “official actions and statements” of the government on which news organizations may report while protected by the fair report privilege. In *ELM Medical Laboratory*, for example, this Court ruled that “the media are agents of the public and serve as its eyes and ears in matters of public concern. We hold that the rationale underlying the fair report privilege is served by extending the

privilege to public health warnings issued by a governmental agency.” 403 Mass. at 783. There is no sensible reason to treat a police blotter differently from a public health warning because they are functionally similar communications: police blotters gather information of potentially urgent and immediate relevance to the safety and welfare of the community, and police departments make that information available to the public as part of their official duties.

The U.S. Court of Appeals for the First Circuit, applying Massachusetts law, reached a similar conclusion in a case involving statements a police chief made to reporters about a domestic disturbance and the plaintiff’s subsequent arrest as a suicide risk. *Yohe v. Nugent*, 321 F.3d 35, 42-44 (1st Cir. 2003). The First Circuit, citing *ELM Medical Laboratory*, noted that the purpose of the fair report privilege was to “ensure that publications may perform the important function of informing the public of actions taken by government agencies and officials.” *Id.* at 43. The First Circuit readily concluded that the police chief’s statements to the press qualified as an “official statement” to which the fair report privilege applied. *Id.*

In *Yohe*, contrary to the reasoning of the Appeals Court below, it made no difference that the police chief’s statements included information provided by a complaining witness. 321 F.3d at 38-39. There was also no suggestion that the police chief regularly spoke to the media about every incident or investigation. Yet the Court concluded that the police chief’s statements, which related unproven and

potentially false allegations by a complaining witness, were nevertheless official statements and actions of the police department. *Id.* at 43. The facts regarding Mass Media's reporting here present an easier issue than those in *Yohe*, because police blotters are a mandatory part of the regular business of every police department in Massachusetts, and any witness statements reported in such blotters are made available to the public as part of the department's regular and official duties.

*Yohe* also illustrates why application of the fair report privilege should not turn on whether investigatory police actions culminate in an arrest. In *Yohe*, plaintiff was released after his arrest, and this made no difference to the fair report privilege's application. 321 F.3d at 38. Under the Appeals Court's reasoning, Mass Media's reporting of the police investigation of Mr. Butcher would have been protected by the fair report privilege without question if he had been arrested. AD64. But the result should be no different if he was interviewed and not charged, as happened on this record. In either instance, the police would be performing their governmental duty to investigate crimes and their official work would be reported to the public in the police blotter. There is no sound policy reason why the protection afforded by the fair report privilege should turn on whether a police department's official reporting about an investigation in a police blotter leads to an arrest, no charges, or, for that matter, to press interviews like those in *Yohe*. In all instances, investigating

crimes is the official business of the police department, and it is in the public interest for news organizations to fairly and accurately report the contents of police blotters.

The foregoing argument is supported by this Court's reasoning in *Sibley v. Holyoke Transcript-Telegram Pub. Co.*, 391 Mass. 468, 470-72 (1984). *Sibley* held that the fair report privilege extended to a newspaper's reporting of witness statements "presented by the investigating officer to justify the issuance of a search warrant." *Id.* at 471. Plaintiff argued that such witness statements should not be considered part of a "judicial proceeding," but this Court rejected that position:

Nor can we accept *Sibley's* argument that issuance of an arrest warrant, often coming at the end of an investigation, deserves the protection of the privilege, but that the issuance of a search warrant, often necessary at an investigation's inception, does not. The purpose of the privilege is to ensure that publications may perform the important function of informing the public of actions taken by the courts.

*Id.* at 472. It seems obvious and beyond serious question that the public has an interest in "actions taken by the police" that is at least equal to its interest in "actions taken by the courts." This Court's decision in *Sibley* unequivocally supports reversing the Appeals Court and holding that news organizations may report the contents of police blotters subject to the full protections of the fair report privilege.<sup>2</sup>

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<sup>2</sup> This Court's decision in *Jones v. Taibbi*, 400 Mass. 786 (1987), is inapposite for the same reasons that this Court distinguished that case in *Howell*: "Our decision in *Jones* ... is not to the contrary. That case arose when a reporter broadcast numerous reports about the plaintiff's arrest on suspicion of committing several murders in California. The reporter had an early break on the story because he received a tip from a Massachusetts prisoner. The first report was broadcast immediately

**C. Mass Media’s News Reports Fairly and Accurately Republished the Contents of the UMass-Boston Police Blotter.**

Based on the foregoing, Mass Media’s first news report is protected by the fair report privilege because it reproduced the contents of a public police blotter. *See* SAI/22 (blotter appended to complaint); SAIII/22, 38 (affidavit attesting to contents of “UMass Media Blotter” entries).<sup>3</sup> As for Mass Media’s second news story, the Appeals Court held that it accurately reported the contents of the police report: “[w]hile there are discrepancies between the police records and the newspaper articles, the articles were ‘substantially true’ accounts of the contents of the police reports.” AD63. This determination is fully supported by the record below.

The first report (from the blotter) stated that “a suspicious white male in a black jacket took photographs and video of nearby women as well as some buildings on campus.” SAIII/38. The second story reported that that “the man in the photograph allegedly walked around the UMass Boston campus snapping pictures

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following the plaintiff’s arrest and included a ‘background report’ with a description of the prisoner’s allegations, information about how the police believed the prisoner because he had passed several polygraph tests, and interviews with members of the prisoner’s family who expressed faith in his truthfulness. Thus, what was conveyed by the reporter’s coverage was more than an account of official action; his were reports about the prisoner’s allegations and the degree to which the police and others could rely on them.” *Howell*, 455 Mass. at 658 n. 14. In the present appeal, everything reported by Mass Media came from official police statements. The record does not reflect any publication of “unofficial statements” by others.

<sup>3</sup> Amici agree with the Appeals Court’s holding that the first report cannot be a basis for defamation liability because it is not “of and concerning” Mr. Butcher. AD63.

of female members of the university community without their permission.” SAI/33. The second story added the details “walked around campus” and “without their permission.” However, the first report characterized the subject as “a *suspicious* white male” – a pejorative description that did not appear in the second story. The first report also stated that the suspect took pictures of “nearby women as well as some buildings on campus,” leading the reader to infer that he took pictures of women on campus. Both reports stated that the suspect “did not appear to be a student” and “was not carrying a backpack,” but the second story ascribed this observation to “the student who reported him.” Based on the foregoing record, the differences between the first and second versions of Mass Media’s news reports are immaterial. The Appeals Court below correctly concluded that the second news story ““did not create a substantially greater defamatory sting”” than the police report quoted in the first story. AD63, quoting *Jones*, 400 Mass at 795.

### **III. NEWS PUBLICATION OF A PHOTOGRAPH RELEASED BY THE POLICE IS PROTECTED BY THE FAIR REPORT PRIVILEGE**

The only remaining question of import is whether, in applying the fair report privilege, it makes any difference that Mass Media included a police photograph of Mr. Butcher with its online and print versions of the second news story. The answer is a resounding no. The UMass-Boston police department released a photograph of a person of interest, then unknown, in an ongoing police investigation. The release of that photograph to the public was, manifestly, part of the department’s exercise

of its official duties. This Court’s decision in *ELM Medical Lab* (regarding public health warnings), and the First Circuit’s decision in *Yohe* (regarding a police chief’s statement to the press), fully support holding that a police department’s release of a photograph to the public is an “official action or statement” such that republication of the photograph falls within the purview of the fair report privilege.

While amici do not wish to unduly burden the Court, they call the Court’s attention to certain decisions outside this jurisdiction which support holding that a police department’s release of a photograph may be reported on as an “official action or statement” of the department. In *McDonald v. Raycom TV Broad., Inc.*, 665 F.Supp.2d 688, 689-90 (S.D. Miss. 2009), the police department issued an alert seeking information about a suspect in an alleged statutory rape. The alert stated that the suspect’s photograph could be obtained from the sheriff. The sheriff then mistakenly released a picture of a different individual, which the broadcaster aired in its news report. *Id.* The court concluded that “numerous cases recognize the principle that information released by the police, including reports and records, is generally considered to be a report of an official action subject to the fair report privilege.” *Id.* at 690. The court held that “[defendant] did no more than accurately broadcast information that had been furnished directly by law enforcement officials .... As a matter of law, [defendant] was entitled to rely on these ‘official reports,’ and its broadcast was patently a fair and accurate representation of the material



provided by law enforcement.” *Id.* at 691-92, citing *Martinez v. WTVG, Inc.*, 2008 Ohio 1789, 2008 WL 1700443 (Ohio Ct. App. 2008) (affirming application of fair report privilege to broadcast of wrong mug shot mistakenly released by police).

The U.S. Court of Appeals for the Eighth Circuit reached a similar result in *Kenney v. Scripps Howard Broad. Co.*, 259 F.3d 922 (8th Cir. 2001). In *Kenney*, the defendant TV station reported a story about the alleged abduction of a child. The broadcast included a picture of the plaintiff which the station had obtained from police records provided by the child’s mother. *Id.* at 923. Even though the station did not obtain the photograph directly from the police, the court concluded that the broadcast was “was a fair and accurate report of the police reports ....” *Id.* at 924.

The record here presents none of the challenges found in the above cases. Mr. Butcher was not mistakenly connected to an investigation by Mass Media’s publication of his photograph released by the police. Instead, he was exactly the person the police were looking for. The photograph’s release helped the police to identify him, interview him, and decline to bring any charges against him. There is also no suggestion that Mass Media obtained its picture of Mr. Butcher from a source other than the police. Accordingly, the reasoning of the foregoing cases applies *a fortiori* here: in accordance with standard journalistic practice, Mass Media simply republished facts reported in a police blotter entry along with a photograph released by the UMass-Boston police department. Both the police blotter, and the

photograph released by the police, are properly considered “official actions and statements” of the police on which a news organization may fairly and accurately report, subject to the protection of the fair report privilege.

It also seems beyond argument that, as a policy matter, it is in the public interest for media organizations to have unambiguous protection, under the fair report privilege, to publish photos that the police release seeking aid in identifying suspects. While it is the police who release such photos, it is the news media who have access to the public, and can widely publish photos seeking the public’s help in locating a suspect or person of interest. While the person photographed here did not appear to present any imminent threat to the public, that should not limit this Court’s analysis of the public’s interest at stake. Police departments routinely release photographs of persons suspected of committing serious and violent crimes, including armed robbery, carjacking, or kidnapping. In such circumstances, time is of the essence. For the police to secure effective assistance from releasing a photograph, the media must be free to report it to the public immediately, without independent investigation or review. Absent the protection of the fair report privilege, the police’s ability to transmit vital information to the public on an immediate basis, via the news media, may be delayed or thwarted altogether.

While the decision below did not specifically attack Mass Media’s release of the photograph, under the Appeals Court’s reasoning, the photograph was the only

thing that connected Mass Media’s reporting of the police blotter to Mr. Butcher. This, in the Appeals Court’s view, made the second news story “of and concerning” Mr. Butcher, and hence subject to the Appeals Court’s misguided analysis that Mass Media was not free to report the contents of the police blotter in tandem with Mr. Butcher’s photograph. In sum, the holding below seriously undermines the news media’s ability to perform its long-recognized and protected function of communicating promptly to the public information released by the police, without fear of tort liability to persons mistakenly depicted or identified by the police.

### **CONCLUSION**

For the reasons set forth above, and for the additional reasons argued in Appellee Vishniac’s brief from the Attorney General of Massachusetts, amici respectfully urge this Court to (i) reverse the Appeals Court’s decision holding that the fair report privilege did not apply to the news reports at issue, (ii) overturn the Appeals Court’s reversal of the trial court’s award of summary judgment in favor of defendants on plaintiff’s claims for defamation and intentional infliction of emotional distress, and (iii) reinstate the trial court’s order granting summary judgment in favor of all defendants on all counts.

Dated: September 9, 2019

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 17 and Rule 20 of the Massachusetts Rules of Appellate Procedure. This brief has been prepared in proportionally-spaced 14-point Times New Roman font using the word processing program Microsoft Word 2016, and the non-excluded word count is 4,489, as counted by the word processing program's "word count" feature.

*/s/ Zachary C. Kleinsasser*

Zachary C. Kleinsasser

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 9, 2019, I served two paper copies of this brief by first-class mail, and one PDF copy by email, on Plaintiff-Appellant pro se Jon Butcher and Defendant-Appellee Cady Vishniac at the addresses listed below.

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**ADDENDUM**

List of Massachusetts Newspapers Published by GateHouse.....AD32

## GHS MASTER LIST OF PUBLICATIONS

8/6/2019

Masthead	City	County	State
ABINGTON MARINER	Norwell	Plymouth	MA
ADVOCATE	New Bedford	BRISTOL	MA
ALLSTON/BRIGHTON TAB	NEEDHAM	Norfolk	MA
BARNSTABLE INFORMATION HANDBOOK	Hyannis	BARNSTABLE	MA
BARNSTABLE PATRIOT	Hyannis	BARNSTABLE	MA
BEDFORD MINUTEMAN	CONCORD	Middlesex	MA
BELMONT CITIZEN-HERALD	LEXINGTON	Middlesex	MA
BEVERLY CITIZEN	Beverly	Essex	MA
BILLERICA MINUTEMAN	CONCORD	Middlesex	MA
BOSTON HOMES	NEEDHAM	Norfolk	MA
BOURNE COURIER (launched 6/07)	HYANNIS	Barnstable	MA
BRAINTREE FORUM	RANDOLPH	Norfolk	MA
BRIDGEWATER INDEPENDENT	RANDOLPH	Norfolk	MA
BROOKLINE TAB	NEEDHAM	Norfolk	MA
BURLINGTON UNION	CONCORD	Middlesex	MA
CAMBRIDGE CHRONICLE	LEXINGTON	Middlesex	MA
CANTON JOURNAL	RAYNHAM	Norfolk	MA
CAPE ANN BEACON [GLOUCHESTER]	Beverly	Essex	MA
CAPE COD TIMES	Hyannis	BARNSTABLE	MA
CARVER REPORTER	PLYMOUTH	Plymouth	MA
CHELMSFORD INDEPENDENT	CONCORD	Middlesex	MA
CHRONICLE	New Bedford	BRISTOL	MA
COHASSET MARINER	HINGHAM	Plymouth	MA
COUNTRY GAZETTE	MILFORD	Worcester	MA
CRANBERRY COAST HOMES	PLYMOUTH	Plymouth	MA
DANVERS HERALD	Beverly	Essex	MA
DEDHAM TRANSCRIPT	WALPOLE	Norfolk	MA
DENNIS INFORMATION HANDBOOK	Hyannis	BARNSTABLE	MA
DOLLARSAVER/TMC	Hyannis	BARNSTABLE	MA
DOVER/SHERBORN PRESS	WALPOLE	Norfolk	MA



EASTON JOURNAL	TAUNTON	Bristol	MA
FRAMINGHAM TAB	FRAMINGHAM	Middlesex	MA
GEORGETOWN RECORD	Beverly	Essex	MA
HAMILTON-WENHAM CHRONICLE	Beverly	Essex	MA
HANOVER MARINER	Norwell	Plymouth	MA
HANSCONIAN	CONCORD	Middlesex	MA
HERALD NEWS	FALL RIVER	Bristol	MA
HINGHAM JOURNAL	HINGHAM	Plymouth	MA
HOLBROOK SUN	RANDOLPH	Norfolk	MA
HOPKINTON CRIER	FRAMINGHAM	Middlesex	MA
HUDSON SUN	FRAMINGHAM	Middlesex	MA
IPSWICH CHRONICLE	Beverly	Essex	MA
KINGSTON REPORTER	PLYMOUTH	Plymouth	MA
LEXINGTON MINUTEMAN	LEXINGTON	Middlesex	MA
LINCOLN JOURNAL	CONCORD	Middlesex	MA
LITTLETON INDEPENDENT	CONCORD	Middlesex	MA
MALDEN OBSERVER	Beverly	Essex	MA
MANSFIELD NEWS	RANDOLPH	Norfolk	MA
MARBLEHEAD REPORTER	MARBLEHEAD	Essex	MA
MARLBOROUGH ENTERPRISE	FRAMINGHAM	Middlesex	MA
MARSHFIELD MARINER	Norwell	Plymouth	MA
MASHPEE INFORMATION HANDBOOK	Hyannis	BARNSTABLE	MA
Massachusetts Lawyers Weekly	Boston	Suffolk	MA
MEDFIELD PRESS	WALPOLE	Norfolk	MA
MEDFORD TRANSCRIPT	Beverly	Essex	MA
MELROSE FREE PRESS	Beverly	Essex	MA
METROWEST DAILY NEWS	FRAMINGHAM	Middlesex	MA
MIDDLEBORO GAZETTE	Middleboro	BRISTOL	MA
MIDDLEBORO GAZETTE EXTRA/TMC	Middleboro	BRISTOL	MA
NANTUCKET RESTAURANT GUIDE	Nantucket	NANTUCKET	MA
NANTUCKET TODAY	Nantucket	NANTUCKET	MA
NATICK BULLETIN & TAB	FRAMINGHAM	Middlesex	MA
NEEDHAM TIMES	NEEDHAM	Norfolk	MA

NEWBURYPORT CURRENT	Beverly	Essex	MA
NEWTON TAB	NEEDHAM	Norfolk	MA
NORTH ANDOVER CITIZEN	Beverly	Essex	MA
NORTH SHORE SUNDAY	Beverly	Essex	MA
NORWELL MARINER	Norwell	Plymouth	MA
NORWOOD TRANSCRIPT & BULLETIN	WALPOLE	Norfolk	MA
O'JORNAL	FALL RIVER	Bristol	MA
OLD COLONY MEMORIAL	PLYMOUTH	Plymouth	MA
ORLEANS INFORMATION HANDBOOK	Hyannis	BARNSTABLE	MA
PATRIOT LEDGER	Quincy	Norfolk	MA
PEMBROKE MARINER & EXPRESS	Norwell	Plymouth	MA
PRIMETIME MAGAZINE	Hyannis	BARNSTABLE	MA
RANDOLPH HERALD	RANDOLPH	Norfolk	MA
RAYNHAM CALL	RANDOLPH	Norfolk	MA
Rhode Island Lawyers Weekly	Boston	Suffolk	MA
ROCKLAND MARINER	Norwell	Plymouth	MA
ROSLINDALE TRANSCRIPT	NEEDHAM	Norfolk	MA
SALEM GAZETTE	Beverly	Essex	MA
SANDWICH BROADSIDER (launched 6/07)	HYANNIS	Barnstable	MA
SANDWICH INFORMATION HANDBOOK	Hyannis	BARNSTABLE	MA
SAUGUS ADVERTISER	Beverly	Essex	MA
SCITUATE MARINER	Norwell	Plymouth	MA
SHARON ADVOCATE	WALPOLE	Norfolk	MA
SHREWSBURY CHRONICLE	FRAMINGHAM	Middlesex	MA
SOMERVILLE JOURNAL	Beverly	Essex	MA
SOUTHCOAST MARKETPLACE/TMC	New Bedford	BRISTOL	MA
STONEHAM SUN	Beverly	Essex	MA
STOUGHTON JOURNAL	RANDOLPH	Norfolk	MA
SWAMPSCOTT REPORTER	MARBLEHEAD	Essex	MA
TAUNTON GAZETTE	TAUNTON	Bristol	MA
TELEGRAM & GAZETTE	WORCESTER	WORCESTER	MA
TEWKSBURY ADVOCATE	CONCORD	Middlesex	MA
THE ARLINGTON ADVOCATE	LEXINGTON	Middlesex	MA

THE BEACON	CONCORD	Middlesex	MA
THE BEACON-VILLAGER	CONCORD	Middlesex	MA
THE BULLETIN (launched 6/07 Falmouth/Mashpee)	HYANNIS	Barnstable	MA
THE CAPE CODDER	ORLEANS	Barnstable	MA
THE CONCORD JOURNAL	CONCORD	Middlesex	MA
THE DAILY NEWS TRANSCRIPT	NEEDHAM	Norfolk	MA
THE ENTERPRISE	BROCKTON	Plymouth	MA
The Gardner News	Gardner	Worcester County	MA
THE INQUIRER & MIRROR	Nantucket	NANTUCKET	MA
THE ITEM	CLINTON	WORCESTER	MA
THE MILFORD DAILY NEWS	MILFORD	Worcester	MA
THE NORTH ATTLEBOROUGH FREE PRESS	NORTH ATTLEBOROUGH	Bristol	MA
THE PROVINCETOWN BANNER (PW)	PROVINCETOWN	Barnstable	MA
THE READING ADVOCATE	CONCORD	Middlesex	MA
THE REGISTER	HYANNIS	Barnstable	MA
THE SENTINEL	PLYMOUTH	Plymouth	MA
THE SPECTATOR	New Bedford	BRISTOL	MA
THE STANDARD-TIMES	New Bedford	BRISTOL	MA
THE SUDBURY TOWN CRIER	FRAMINGHAM	Middlesex	MA
THE VILLAGER-NORTHBOROUGH/SOUTHBOROUGH	FRAMINGHAM	Middlesex	MA
THE WALPOLE TIMES	WALPOLE	Norfolk	MA
THE WAYLAND TOWN CRIER	FRAMINGHAM	Middlesex	MA
THE WELLESLEY TOWNSMAN	NEEDHAM	Norfolk	MA
THE WESTON TOWN CRIER	FRAMINGHAM	Middlesex	MA
TRI-TOWN TRANSCRIPT	Beverly	Essex	MA
WAKEFIELD OBSERVER	Beverly	Essex	MA
WALTHAM NEWS TRIBUNE	NEEDHAM	Norfolk	MA
WAREHAM COURIER	PLYMOUTH	Plymouth	MA
WATERTOWN TAB	NEEDHAM	Norfolk	MA
WEST ROXBURY TRANSCRIPT	NEEDHAM	Norfolk	MA
WESTBOROUGH NEWS	FRAMINGHAM	Middlesex	MA
WESTFORD EAGLE	CONCORD	Middlesex	MA
WESTWOOD PRESS	WALPOLE	Norfolk	MA

WEYMOUTH NEWS	RANDOLPH	Norfolk	MA
WILMINGTON ADVOCATE	CONCORD	Middlesex	MA
WINCHESTER STAR	LEXINGTON	Middlesex	MA
WOBURN ADVOCATE	CONCORD	Middlesex	MA
YARMOUTH INFORMATION HANDBOOK	Hyannis	BARNSTABLE	MA
YELLOW JACKET (S)	TAUNTON	Bristol	MA