IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT

Case No. 2D01-529
(Consolidated with Case No. 2D01-530)

L.T. No. 98-2439 Div. D

Judge Ralph Steinberg

NEW WORLD COMMUNICATIONS
OF TAMPA, INC., d/b/a WTVT-TV,

Appellant/Cross-Appellee,

vs.

JANE AKRE,

Appellee/Cross-Appellant.

BRIEF OF AMICI CURIAE BELO CORP., COX TELEVISION, INC., GANNETT CO., INC., MEDIA GENERAL OPERATIONS, INC., AND POST-NEWSWEEK STATIONS, INC. IN SUPPORT OF APPELLANT/CROSS-APPELLEE, NEW WORLD COMMUNICATIONS OF TAMPA, INC., d/b/a WTVT-TV

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Amici Curiae Belo Corp., Cox Television, Inc., Gannett Co., Inc., Media General Operations, Inc. and Post-Newsweek Stations, Inc., pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure, hereby submit this brief in support of Appellant New World Communications of Tampa, Inc. 1/

Preliminary Statement

This case arose from a dispute between a broadcast news reporter and her television station management about the editing of a news story. Under Florida's Private Whistle-Blower Act, §§ 448.101-105, Fla. Stat. (1997), a jury awarded the reporter $425,000 in damages based on her claim that she was terminated for threatening to disclose allegedly "illegal" editing of a news report by her employer, a broadcast news organization. The editing was alleged to violate a Federal Communications Commission ("FCC") policy against the intentional falsification of the news, known as the "news distortion policy."

Amici are concerned primarily about issues of law decided by the court below. To evaluate the validity of these decisions, it is sufficient to state the following: The case arose in the context of editorial disputes between the plaintiff and news management of her television station employer and its counsel. The

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1/ As a result of this week's tragic events, requests for consent to file the attached Brief *Amici Curiae* were not delivered to counsel for all parties in this proceeding until September 13, 2001. While consent has been obtained from counsel for Jane Akre and New World Communications of Tampa, Inc., counsel for *Amici* have yet to receive a response from Steve Wilson.

reporter claimed that she was terminated for threatening to disclose to the FCC a violation of its news distortion policy during the pre-broadcast review process of a potentially defamatory story. The station argued that it simply wanted to ensure that a news story about a scientific controversy regarding a commercial product was presented with fairness and balance, and to ensure that it had a sound defense to any potential defamation claim. To decide the case the jury had to understand the FCC's news distortion policy and apply it to the editorial disputes that occurred during the pre-broadcast review process. The court allowed the jury to make its decision in the absence of any deference or guidance from the FCC by way of the doctrines of preemption or primary jurisdiction. The jury was further instructed that it need only find that the plaintiff had a "reasonable, good-faith belief" that news management acted to falsify, slant, or distort the news, not that there was an actual violation of the FCC's news distortion policy.

As explained in detail below, this case raises grave questions under the First Amendment and federal law. To fail to defer in the first instance to the FCC disserved the delicate balance the FCC has attempted to strike in monitoring news content consistent with the First Amendment. To permit a state court to impose liability on a broadcast station based on a litigant's "reasonable belief" that a particular story was "slanted" is likewise constitutionally untenable, since news often is thought to be biased from someone's perspective. Entire organizations are

committed to combating what they perceive as conservative media bias, 2/ while others are dedicated to stamping out what they believe is the overwhelming liberal tilt of the media. 3/ Some groups are devoted to demonstrating that press coverage consistently favors Democrats, 4/ while others complain, no less vociferously, that the media agenda supports the Republican cause. 5/ Some argue that broadcast journalists tend to exaggerate and sensationalize stories in the race for ratings, 6/ others claim that broadcasters avoid or tone down stories so as to avoid lawsuits or curry favor with advertisers. But as Jane Kirtley, professor of media ethics and law, and former director of the Reporter's Committee for Freedom of the Press, has written :

> [C]ontroversial issues by their very nature invite complaints of bias, inaccuracy or distortion. Critics complain that broadcasters deal in fluff and sensationalism rather than substance. The few who do

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2/ *E.g*., Fairness and Accuracy in Reporting, www.fair.org; Citizens for Legitimate Government, http://www.legitgov.org/linksPmedia.html.

3/ *E.g*., Accuracy in Media, www.aim.org; Media Research Center, http://www.mrc.org.

4/ *E.g*., Campaign 2000 Media Reality Check, http://www.mediaresearch .org/Campaign2000/onestopshoppingvideos.html.

5/ *E.g*., CounterCoup.org, http://www.geocities.com/countercoup/; Houston Fair Vote Organization, http://www.hal-pc.org/~edi/statement.html.

6/ David A. Logan, *"Stunt Journalism," Professional Norms, and Public Mistrust of the Media*, 9 U. FLA. J. L. & PUB. POL'Y 151 (1998).

> take on hard news stories must weigh heavily the risk of being sued for libel, invasion of privacy or worse. 7/

Charges of bias are by no means restricted to the world outside the newsroom. Disputes between reporters and their editors are the stuff of legend. Many reporters agree with the sentiment of 19th century writer Elbert Hubbard that editors "separate the wheat from the chaff, and then print the chaff." 8/ Or, as Mark Twain once put it, "I hate editors, for they make me abandon a lot of perfectly good English words." 9/ Such disputes are quite appropriate in the newsroom, but have no place in a court of law.

Interest of Amici

As licensees of broadcast stations and owners of numerous other media enterprises, *Amici* are vitally interested in the outcome of this appeal, which will determine the extent to which state whistleblower laws may incorporate federal policies that touch on sensitive questions of editorial judgment. The trial court decisions threaten to conflate a state rule governing employment with an FCC policy that goes to the heart of broadcast licensees' editorial discretion. If upheld by this Court, the decision below would convert personnel actions arising

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7/ Jane Kirtley, *Second-Guessing News Judgment*, 20 AMERICAN JOURNALISM REV., October 1, 1998 at 86.

8/ PORTABLE CURMUDGEON REDUX 97 (Jon Winoker, ed., 1992).

9/ Fisher, ABROAD WITH MARK TWAIN AND EUGENE FIELD (Nicholas L. Brown: New York 1922).

from disagreements over editorial policy into litigation battles in which state courts would interpret and apply federal policies that raise significant and delicate constitutional and statutory issues. Nearly forty states have whistleblower laws, 10/ and application of disparate burdens of proof in myriad proceedings in various jurisdictions, and the inevitable proliferation of decisions on the merits, would conflict with both the Communications Act and the First Amendment.

Amici include the following organizations:

Belo Corp. is one of the nation's largest media companies with a diversified group of market-leading broadcasting, publishing, cable and interactive media assets. Belo owns 17 television stations (six in the top 17 markets) reaching 13.7 percent of U. S. television households; owns or operates six cable news channels; and manages three television stations through local marketing agreements.

Cox Television, Inc. owns and operates 15 television stations, including WFTV-TV and WRDQ-TV in Orlando, Florida. Cox Television is a division of Cox Broadcasting, Inc., a subsidiary of Cox Enterprises, Inc., which includes among its other subsidiaries and affiliates several other Florida media outlets, including The Palm Beach Post and Palm Beach Daily News newspapers;

10/ "By one estimate, at least 39 states offer some sort of statutory protection to whistleblowers." Wayne N. Outten, *Overview of Workforce Claims: Perspective of Employees' Counsel*, 637 P.L.I. Lit. 807, 924-25 (2000).

22 radio stations owned by publicly traded subsidiary Cox Radio, Inc. in Jacksonville, Miami, Orlando and Tampa; and cable television systems owned by publicly traded subsidiary Cox Communications, Inc. in Pensacola/Fort Walton Beach and Gainesville/Ocala.

Gannett Co., Inc. is an international news and information company owning both print and broadcast operations. Gannett's 22 TV stations, covering 17.5 percent of the US market, include WTLV-TV and WJXX-TV in Jacksonville, and WTSP-TV in Tampa-St. Petersburg. In addition, Gannett's 98 daily newspapers, which include Florida Today, the News-Press at Fort Myers, the Pensacola News Journal and USA TODAY, have a combined daily paid circulation of 7.8 million.

Media General Operations, Inc. is an independent, publicly owned communications company situated primarily in the Southeast with interests in newspapers, television, interactive media, recycled newsprint, and diversified information services. Media General is the licensee of 24 television stations. In Florida, Media General owns four daily newspapers and three television stations, including the Tampa Tribune and WFLA-TV in Tampa.

Post-Newsweek Stations, Inc., is a subsidiary of The Washington Post Company. Post-Newsweek Stations, Inc. owns and operates six network affiliated television stations. The stations are located in Detroit, Michigan

(WDIV); Jacksonville (WJXT), Miami (WPLG) and Orlando (WKMG-TV), Florida; and Houston (KPRC-TV) and San Antonio (KSAT-TV), Texas.

Argument

I. First Amendment Principles Sharply Constrain Government Power to Review Editorial Decisions

This case confronts the bedrock First Amendment precept that the government cannot compel editors and publishers "to publish that which 'reason tells them should not be published.'" *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (citation omitted). To be sure, this case does not involve a government decree that WTVT air a particular story, or to make specific editorial changes. But the decision below applies a federal policy relating to news content to determine liability under a state whistleblower statute. 11/ The essence of the claim is alleged "illegal" editing by news management, a position that grates against the fundamental principle that the "choice of material to go into a newspaper" – or news broadcast – must be determined by "editorial control and judgment," not official decree. *Tornillo*, 418 U.S. at 258.

11/ It is well established that restrictions on the press "need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers," *Tornillo*, 418 U.S. at 256, and private causes of action under state law must conform to First Amendment commands. *E.g*., *N.Y. Times v. Sullivan*, 376 U.S. 254, 264 (1964).

Reliance on the FCC's news distortion policy as an exception to these basic First Amendment principles distorts both the theory and application of the rules governing broadcasting. Although Congress vested the FCC with the authority to regulate broadcasters "in the public interest," it also decreed that the federal agency lacks any power to "interfere with the right of free speech by means of radio communication" or to impose any "regulation or condition" that interferes with free expression. 47 U.S.C. §§ 303, 326. Accordingly, the Supreme Court has stressed that the Communications Act of 1934 was designed "to maintain – no matter how difficult the task – essentially private broadcast journalism." *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 120 (1973). *See generally* Harvey L. Zuckman, Robert Corn-Revere, Robert M. Frieden & Charles H. Kennedy, MODERN COMMUNICATIONS LAW 168-171 (West Group 1999).

Recognizing this delicate balance, courts have noted that the Commission must "walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act." *Democratic Nat'l Comm.*, 412 U.S. at 117; *See also Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied. sub. nom*. *Tobacco Institute, Inc. v. FCC*, 396 U.S. 842 (1969). Accordingly, under the Communications Act, licensees are to be held "only broadly accountable to public interest standards." *Democratic Nat'l Comm.*, 412 U.S. at 120. As the Supreme Court put it, "[f]or better or worse, editing is what editors are for; and editing is selection and choice

of material." *Id*. at 124. In light of these concerns, the FCC has avoided imposing specific programming requirements because doing so would create a "high risk that such rulings will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest," and "must be closely scrutinized lest they carry the Commission too far in the direction of the forbidden censorship." 12/

Such First Amendment considerations apply with particular force to the news distortion policy. 13/ Indeed, the inherent constitutional limitation on broadcast regulation has gained far greater importance since the news distortion policy first was articulated in 1969, and many of the FCC's content doctrines have been strictly limited or abandoned since that time. For example, in 1984 the Supreme Court struck down a ban on editorializing by public broadcast stations.

12/ *Banzhaf*, 405 F.2d at 1096. *See also Pub. Interest Research Group v. FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) ("we have doubts as to the wisdom of mandating . . . government intervention in the programming and advertising decisions of private broadcasters"); *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1967) ("the First Amendment demands that [the FCC] proceed cautiously [in reviewing programming content] and Congress . . . limited the Commission's powers in this area").

13/ Since 1969, the FCC has articulated a policy that it disserves the public interest for a broadcast licensee to engage in deliberate distortion, slanting or rigging of news reports. *See Complaints Covering CBS Program "Hunger in America*," 20 F.C.C.2d 143 (1969) ("*Hunger in America*"). The policy emerged from the Commission's administrative decisions, and is not a published rule in the Code of Federal Regulations.

FCC v League of Women Voters of Cal., 468 U.S. 364-373 (1984). Three years later, the FCC eliminated the "fairness doctrine" because it interfered with the editorial prerogatives of broadcasters. *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 659 (1989), *cert. denied*, 493 U.S. 1019 (1990) (it is important to avoid "having government officials second-guess editorial judgments"). And just last year, the Commission abandoned two remaining vestiges of the fairness doctrine – the personal attack and political editorial rules. *See Radio-Television News Directors' Ass'n. v. FCC*, 229 F.3d 269 (D.C. Cir. 2000). In short, out of a growing sensitivity to First Amendment values, the FCC and reviewing courts over the years have eliminated the primary theoretical support for the news distortion policy. 14/

The judgment below flies in the face of this trend in the law. It is based on an application of the FCC's news distortion policy that is far more intrusive than the FCC would have attempted even in that policy's heyday. It is no answer to suggest that the trial court was merely applying a state employment law, and only incidentally, the FCC news distortion policy. Liability in this case was based on whether a plaintiff "reasonably believed" that a broadcast news organization's editorial decisions violated federal policy. The fact that this

14/ *See Hunger in America*, 20 F.C.C.2d at 151 n.7 (FCC noted that the fairness doctrine "overl[ies] this entire area" of news distortion).

allegation occurs in the context of a termination dispute is immaterial; both the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit have made clear that even employment rules affecting broadcasters are subject to strict constitutional scrutiny if they are predicated on matters of broadcast content. 15/ Such regulations may be held unconstitutional even where they impose only indirect or "*sub silentio*" pressure on editorial decisions. *See MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 19 (italics in original).

These First Amendment considerations highlight the errors of the trial court. As explained in more detail below, the FCC exerts preemptive jurisdiction over all matters of broadcasting content in order to preserve the delicate balance

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15/ The D.C. Circuit twice has invalidated the FCC's equal employment opportunity rules as being unconstitutional. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (noting "enormous tensions with the First Amendment" and rejecting government purpose to use employment policies to promote "programming that reflects minority viewpoints or appeals to minority tastes"); *MD/DC/DE Broadcasters Ass'n. v. FCC*, 236 F.3d 13 (D.C. Cir. 2001) (striking down indirect regulations designed to promote "diverse" broadcast content). These decisions followed the Supreme Court's holding in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) that race-based employment decisions violate the Equal Protection Clause. Although *Adarand* was based on the Fifth, not the First Amendment, it overruled the Court's earlier decision in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) which had upheld against a First Amendment challenge FCC policies designed indirectly to promote minority-oriented programming. As Justice O'Connor (the author of the Court's opinion in *Adarand*) wrote in dissent in *Metro Broadcasting*, "the Court has never upheld a broadcasting measure designed to amplify a distinct set of views or a the views of a particular class of speakers. Indeed, the Court has suggested that the First Amendment prohibits allocating licenses to further such ends." 497 U.S. at 617 (O'Connor, J., dissenting).

between the statutory obligations of the Communications Act and constitutional limits of the First Amendment. Various state decisions that purport to interpret a broadcast station's public interest obligations, particularly those involving matters of editorial discretion, would make it impossible for the FCC to maintain this careful balance. Additionally, the trial court's decision violated the First Amendment directly by setting far too lenient a burden of proof. Basing liability on the Plaintiff's "reasonable belief" that WTVT violated the news distortion policy cannot be reconciled with basic First Amendment principles.

II. Federal Law Preempts State Interpretation and Application of the FCC's News Distortion Policy

A. FCC Authority Over Broadcast Regulation Supercedes Inconsistent State Laws

Interpretation of the FCC's news distortion policy as the trigger for liability under the Florida Private Whistle-Blower Law is preempted by federal broadcasting regulation. State laws that conflict with federal laws or regulations are preempted under the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI, cl. 2. The preempting federal scheme includes not only federal statutes, but also federal agency regulation. *La. PSC v. FCC,* 476 U.S. 355, 369 (1986). A conflict between the state and federal authority occurs, for example, when federal law occupies an entire field, *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 234 (1947), when it is impossible to comply with both the federal and state regulation, *Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43

(1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In this case, permitting state courts from across the country to interpret and apply federal policies that touch on broadcast content would destroy the "delicate balance" between regulation and free expression that Congress entrusted to the FCC.

Federal jurisdiction over broadcasting is comprehensive, and in many respects, exclusive. The Communications Act of 1934 grants to the FCC the sole authority to determine who should receive broadcast licenses,16/ a power that includes determining where a station may be located, what frequency it can use, when it can broadcast, and what area it can serve.17/ The FCC also is empowered to regulate certain aspects of broadcast content, although – as noted above – this authority is used sparingly because of statutory and constitutional constraints.18/ Because "the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area," *FCC v. League of Women*

16/ 47 U.S.C. §§ 307, 309. *See also* 47 U.S.C. § 301 ("It is the purpose of this Act . . . to maintain the control of the United States over all the channels of radio transmission . . . .").

17/ 47 U.S.C. § 303.

18/ The FCC's authority includes the power to impose political broadcasting regulations, 47 U.S.C. §§ 312, 315; children's programming requirements, 47 U.S.C. § 303a; programming accessibility rules, 47 U.S.C. § 613; and restrictions against "indecent" broadcasts. 18 U.S.C. § 1464.

Voters of Cal., 468 U.S. at 378, the overall thrust of FCC regulation is to ensure that "television broadcasters enjoy the 'widest journalistic freedom' consistent with their public responsibilities." *Ark. Educ. Television Comm'n. v. Forbes*, 523 U.S. 666, 673 (1998), quoting *Democratic Nat'l Comm.*, 412 U.S. at 110. "The unifying theme of these various statutory provisions is that they substantially reduce the risk of governmental interference with the editorial judgments of local stations without restricting those stations' ability to speak on matters of public concern." *League of Women Voters of Cal.*, 468 U.S. at 390.

For this reason, reviewing courts overwhelmingly preempt local regulations that touch on questions of broadcast content regulation. In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984), for example, the Supreme Court held that an Oklahoma prohibition against broadcasting advertisements for alcoholic beverages was preempted, finding it to be "wholly at odds with the regulatory goals contemplated by the FCC." The Court found that local advertising restrictions would jeopardize the full accomplishment of FCC efforts to increase program diversity by relaxing cable television regulations. *Id*. at 704. Similarly, in *Farmers Educational and Cooperative Union of America v. WDAY*, 360 U.S. 525 (1959), the Court held that the Communications Act preempted defamation law in cases where it would diminish broadcasters' willingness to air political speeches. It emphasized that "we have not hesitated to abrogate state law where satisfied that its enforcement would stand 'as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress.'" *Id*. at 535 (quotation omitted).

Consistent with this authority, lower courts have preempted various local laws that touch on editorial policies and/or broadcast content. For example, the United States Court of Appeals for the Third Circuit held that the Communications Act barred a Pennsylvania law requiring state review of television programs by a board of censors. *Allen B. Dumont Labs, v. Carroll,* 184 F.2d 153 (3d Cir. 1950). The court found that while Section 326 "declares it to be a national policy that nothing in the Act shall be understood to give the Federal Commission 'power of censorship' over radio communications and that no regulation or condition shall be promulgated or fixed by the Commission which shall interfere 'with the right of free speech by means of radio communication,' this does not mean that the States may exercise a censorship specifically denied to the Federal agency." *Id*. at 156. Other courts have followed suit. 19/ They have preempted state laws that intrude on FCC jurisdiction, as well as claims under

19/ *E.g.*, *KVUE, Inc. v. Austin Broadcasting Corp*., 709 F.2d 922, 934 (5th Cir. 1983), *aff'd*. *mem. sub nom*. *Texas v. KVUE-TV, Inc.*, 465 U.S. 1092 (1984) (preempting state statute regulating sponsorship identification requirements for federal candidates or committees and setting rates for political advertising); *Sagan v. Pa. Pub. Television Network*, 544 A.2d 1309, 1312-13 (Pa. 1988) (preempting local law governing political broadcasting); *State v. University of Maine,* 266 A.2d 863, 869 (Me. 1970) (preempting state statute that barred public television stations from carrying interviews with political candidates).

common law. *E.g.*, *Dicks v. Capital Cities/ABC, Inc.*, 933 F. Supp. 694, 697 (S.D. Ohio 1996) ("The images shown on television programs such as *Nightline* are not a matter subject to resolution via state-law tort suits, but instead, by the Federal Communication Commission ("FCC") pursuant to its enabling statute, the Federal Communications Act of 1934.").

B. The Trial Court's Interpretation of the News Distortion Policy Stands in Direct Conflict With FCC Policy

The trial court permitted the jury to award substantial damages to the plaintiff by finding that she "reasonably believed" a broadcast news organization had violated the FCC's news distortion policy and that she threatened to "blow the whistle" on the "violation." Where, as here, litigation incorporates a hypothetical violation of the FCC's news distortion policy as an essential element of a state cause of action, federal preemption necessarily is implicated.

As with its other content rules or policies, the FCC historically has exercised its authority under the news distortion policy with great deference to the First Amendment issues at stake. When it articulated the policy initially, the Commission stated its intention "to exercise care in entering this sensitive area," recognizing that "in this democracy, no

Government agency can authenticate the news, or should try to do so." 20/ The FCC has acknowledged that "[i]t would be unwise and probably impossible for the Commission to lay down some precise line of factual accuracy – dependent always on journalistic judgment – across which broadcasters must not stray," and that "any presumption on our part would be inconsistent with the First Amendment" and "would involve the Commission deeply and improperly in the journalistic functions of broadcasters." 21/

The FCC generally has lived up to this promise in the various cases in which it has been called upon to apply the news distortion policy. Its practice has been to give the policy against news distortion "an extremely limited scope." *Galloway v. FCC*, 778 F.2d 16, 20-21 (D.C. Cir. 1985). For example, in rejecting a complaint filed about a network news report by the Central Intelligence Agency, the Commission noted that it was being asked to "second-guess the journalistic judgment and editorial workings of ABC news" and stressed that "under no circumstances will the Commission

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20/ *Hunger in America*, 20 F.C.C.2d at 150-151. *See also Complaints Concerning Network Coverage of the Democratic National Convention*, 16 F.C.C.2d 650, 654 (1969) ("we do not sit in review of the broadcaster's news judgment, the quality of his news and public affairs reporting, or his taste").

21/ *Complaint Concerning The CBS Program "The Selling of the Pentagon,"* 30 F.C.C.2d 150, 152 (1971).

engage in assessments of truth or falsity when considering whether news programming was deliberately distorted. Nor will it sit in judgment of the way particular news programming was handled." The FCC described such choices as "the very essence of the journalistic process." 22/

As a general matter, the FCC has been most circumspect in its enforcement of the news distortion policy. One recent analysis of all such complaints filed with the agency during a 30-year period (1969-1999) found that complaints were rejected 90 percent of the time. 23/ This figure, while significant, greatly overstates the degree to which the Commission is willing to regulate in this area, since the study used an expansive definition of a "finding" of news distortion and it did not count unreported dismissals of complaints. 24/ More importantly, the number of complaints upheld by the

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22/ *Complaints of Central Intelligence Agency*, 58 Rad. Reg. 2d (P&F) 1544, 1549 (1985). Confirming the adage that all news is biased from someone's perspective, the FCC has also rejected a news distortion complaint alleging that major media organizations slanted the news at the CIA's request. *Complaint of Peter Gimpel*, 3 FCC Rcd. 4575 (1988).

23/ *See* Chad Raphael, *The FCC's News Distortion Rules: Regulation by Drooping Eyelid*, 6 COMM. L. & POL. 485, 501 (Summer 2001) ("Of the 120 reported decisions on distortion in this period, the FCC found against broadcasters in 10% (12) of them.").

24/ The study counted as "findings" complaints that resulted in "rhetorical rebukes of licensees," as in letters of admonishment. It identified only five cases in which news distortion complaints resulted in adverse licensing decisions, and even then only when "distortion was compounded by numerous other infractions"

FCC dropped off precipitously after the Commission began scale back its intervention into matters of broadcast content in the 1980s because of First Amendment concerns. The FCC has issued only one finding of news distortion since 1982, and that instance did not involve any adverse licensing action. Raphael, *supra*, at 501, 506.

Against this backdrop, any imposition of liability based on that a reporter's "reasonable belief" of news distortion by her editors is untenable. In point of fact, the Commission has *never* found that journalists' complaints about their employers "trumps a licensee's editorial rights." 25/ In case after case involving disgruntled former staff members who were dismissed for various reasons, the FCC has rejected news distortion complaints. 26/

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of FCC rules. *Id*. at 501-502. Using this more accurate measure of a Commission "finding," the FCC declined to take action in 96 percent of the cases.

25/ *Id*. at 510. *See* Lilli Levy, *Reporting the Official Truth: The Revival of the FCC's News Distortion Policy*, 78 WASH. U. L. Q. 1005, 1090 (2000) ("[T]he history of Commission decisions even in the perfect 'employee affidavit' case is instructive: Simply put, the Commission has not always rushed to credit the proffered accounts.").

26/ *E.g*., *Tri-State Broadcasting Co.*, 59 F.C.C.2d 1240, 1244-45 (1976); *Michael D. Bramble*, 58 F.C.C.2d 565, 573 (1976); *Miami Valley Broadcasting Corp*., 56 F.C.C.2d 399, 407 (1975). *Cf. KMAP, Inc.*, 72 F.C.C.2d 241, 244-45 (1979).

There is a good reason for the Commission to be cautious: "In some cases, whistleblowers' claims may result from misinterpretations or even personal disgruntlement or ideological agendas of the employees." Levy, *supra* at 1092. Moreover, while editorial changes to avoid potential defamation liability may be infuriating to a reporter, they simply do not rise to the level of news distortion. 27/ Quite to the contrary, they are precisely the kind of "judgment that the licensee may reasonably make." *The NBC "Today" Program*, 31 F.C.C.2d at 847.

The vast difference between the FCC's administration of its news distortion policy and the finding by the court below illustrates why preemption is imperative in this case. As the Commission found when it preempted state litigation based on its political broadcasting rules, "[r]ulings by courts in numerous jurisdictions around the country almost certainly would produce varying and possibly conflicting determinations among state courts and between those courts and the Commission, thereby frustrating the objectives of certainty and uniformity." *See Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements*, 6 FCC Rcd. 7511, 7512 (1991). Such uneven administration of the law is

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27/ *E.g.*, *National Citizens' Comm. for Broadcasting*, 49 F.C.C.2d 83, 88 (1974); *The NBC "Today" Program*, 31 F.C.C.2d 847 (1971); *Complaint by Mark Lane*, 36 F.C.C.2d 551, 555 (1972).

even more threatening here, where the policy at issue affects broadcast content. Differing decisions by state courts interpreting the news distortion policy and applying different standards of proof would stand as an obstacle to the FCC's purpose to ensure that "television broadcasters enjoy the 'widest journalistic freedom' consistent with their public responsibilities." *Forbes*, 523 U.S. at 673 (citation omitted).

C. The Trial Court Should Have Sought Guidance From the FCC Under the Doctrine of Primary Jurisdiction

To the extent the court below was unwilling to find that it was entirely without jurisdiction to interpret or apply the FCC's news distortion policy, it nevertheless should have sought the Commission's views under the primary jurisdiction doctrine. The doctrine of primary jurisdiction operates "to postpone judicial consideration of a case to administrative determination of important questions involved by an agency with special competence in the area." *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086, 1091-92 (5th Cir. 1973). By invoking the doctrine, the Court would not have ceded its jurisdiction over the case, but rather would have coordinated with the FCC to obtain the benefit of its expertise on the dispositive question of federal regulation. *See, e.g., REO Industries v. Natural Gas Pipeline Co.*, 932 F.2d 447, 456 (5th Cir. 1991) (court "defers to an administrative agency for an initial decision on questions of fact or law within the peculiar competence of the agency"). The primary jurisdiction

doctrine is well-established under Florida law. *E.g*., *Humana of Fla. v. McKaughan*, 652 So.2d 852, 860 (Fla. 2d DCA 1995); *State ex rel. Shevin v. Tampa Electric Co.*, 291 So. 2d 45 (Fla. 2d DCA 1974), *cert. denied*, 297 So. 2d 571 (1974).

The doctrine recognizes the value of obtaining "the expert and specialized knowledge of the [relevant] agencies" prior to judicial consideration of a legal claim. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). Its purpose is to ensure "[u]niformity and consistency in the regulation of business entrusted to a particular agency." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303-04 (1976), quoting *Far East Conference v. United States*, 342 U.S. 570, 574 (1952). In cases such as this one, deferral to the FCC is "essential to further the purposes of the delicately balanced system of broadcast regulation." *Writers Guild of America, West, Inc. v. ABC, Inc.*, 609 F.2d 355, 366 (9th Cir. 1979).

In *Writers Guild*, the Ninth Circuit held that the FCC had primary jurisdiction over questions relating to broadcast content, and it reversed a lower court decision that failed to seek out the Commission's views. Precisely the same considerations apply here. The trial court should have deferred any decision pending a determination by the FCC as to the merits of any news distortion complaints on the facts of this case. *Writers Guild*, 609 F.2d at 366.

III. The First Amendment Prohibits Finding Liability Based on Plaintiff's "Good Faith Belief" Regarding a Violation of the News Distortion Policy

The decision below, while dependent on an interpretation of the FCC's news distortion policy, was not based on a jury finding that the policy had in fact been violated. Rather, the jury awarded the plaintiff $425,000 based on the instruction that it could impose liability if it found that the plaintiff "had a reasonable good faith belief that defendant's conduct in connection with the editing of the news report was in violation of the FCC's prohibition against deliberate falsification or distortion of the news." This standard of proof falls far short of constitutional requirements. *See Veilleux v. NBC*, 206 F.3d 92, 106-107 (1st Cir. 2000) (where First Amendment issues are raised, appellate courts must conduct an independent review of the record and deference to jury findings is "muted").

For nearly four decades the law has been clear that a private party who sues a media defendant for damages caused by defamation bears the burden of showing that the speech at issue is false. *N.Y. Times*, 376 U.S. at 279; *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). The First Amendment requires that defamation plaintiffs prove that the media defendant was at fault. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974). Imagine the situation if the law were otherwise; if defamation plaintiffs could recover damages if they proved they had a "reasonable good faith belief" that a media defendant defamed them. Such dilution of the burden of proof "would be antithetical to the First

Amendment's protection of true speech on matters of public concern" because it would deter media defendants from exercising their rights "because of the fear that liability will unjustifiably result." *Hepps*, 475 U.S. at 777.

This reasoning is not limited to the defamation context. Courts have required plaintiffs to meet the stringent requirement of proof without regard to the label on the state law remedy. *E.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46, 52-53 (1988). First Amendment protections apply "regardless of the name of the tort" and "regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast." *Desnick v. ABC, Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995). Although the stringent burdens of proof were set forth initially in defamation cases, "they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement." *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1182 (Cal. 1987) (applying First Amendment protections to reject claims of interference with prospective economic advantage, negligence and trade libel); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999) (plaintiff cannot avoid First Amendment evidentiary burdens by recasting claims as "breach of duty of loyalty" or "trespassing").

It is true that courts have not applied heightened scrutiny in cases involving certain "run-of-the-mill torts" that "had 'no more than [an] incidental' effect on the press's ability to gather or report news." *Food Lion*, 194 F.3d at 521, quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671-672 (1991) (normal

burden of proof applied in promissory estoppel case). Here, however, the sole basis of Plaintiff's claim, while framed as an employment action, is that WTVT's editorial decisions violated FCC policies. This is an issue that goes to the heart of the journalistic enterprise. Absent the element of WTVT's allegedly "illegal" editing, there is no possible liability under the Florida statute. Thus, heightened First Amendment scrutiny applies in this case even though the Private Whistle-Blower Act otherwise is a law of general application. *See, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991); *Food Lion*, 194 F.3d at 520-521.

The FCC has recognized that allegations of news distortion require a heightened burden of proof because of First Amendment concerns. Accordingly, it has applied a "particularly high threshold" for intervention in the news distortion matters area "because news and comment programming are at the core of speech which the First Amendment is intended to protect." *Liability of NPR Phoenix, L.L.C. Licensee*, 13 FCC Rcd. 14,070, 14,072 (Mass Media Bureau 1998). *See also Complaint of Denny Mulloy*, FCC 86-360, 1986 WL 290825 (Aug. 13, 1986) ("The first amendment does not permit the Commission to investigate a news distortion complaint unless it receives extrinsic evidence of deliberate distortion of news programming."). 28/ Consistent with the First Amendment, the FCC has

28/ *Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998) is not to the contrary. Although the court in that case remanded the FCC's dismissal of a news distortion case to the agency, it did not propose "to determine just how much evidence the

required intentional falsification of the news by the licensee's top station or news management before any finding of news distortion.

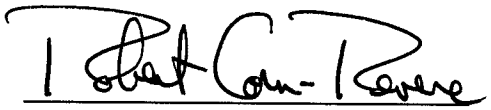
The trial court below, by focusing the jury's finding solely on the state of mind of the reporter and not requiring any finding of an actual violation of the news distortion policy ignored fundamental principles of First Amendment law. Accordingly, it was error for the court below to find liability based on nothing more than the plaintiff's "reasonable belief" that WTVT violated FCC policy. Just as the FCC historically has recognized that the news distortion policy implicates core constitutional principles, the trial court could not eliminate the First Amendment from the standard for decision.

Commission may require or whether Serafyn has produced it." *Id*. at 1220. Nor did the court consider any First Amendment issues. It found only that the Commission should have conducted a further investigation on the facts of that case, pursuant to the Communications Act. *Id.* at 1219.

Conclusion

For the foregoing reasons, *Amici* respectfully requests that this Court reverse the decision of the trial court.

Respectfully submitted,



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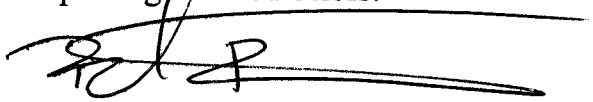

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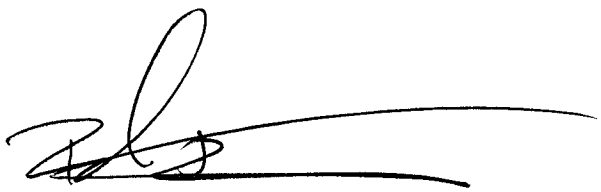

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