

IN THE COURT OF APPEALS OF VIRGINIA

CAV Record No. 1062-22-4

AMBER LAURA HEARD,

Defendant-Appellant,

v.

JOHN C. DEPP, II,

Plaintiff-Appellee,

**OPENING BRIEF OF AMICUS CURIAE
IN SUPPORT OF APPELLANT AMBER HEARD AND
REVERSAL OF THE JUDGMENT**

ATTORNEYS:

Thomas F. Urban II, VSB #40540
Mark Malonzo, VSB #97692
Fletcher, Heald & Hildreth, PLC
1300 17th Street North, Suite 1100
Arlington, Virginia 22209
(703) 812-0462; (703) 812-0486 (fax)
urban@fhhlaw.com

Antonio R. Sarabia II (*pro hac vice*)
CA Bar #90109
IP Business Law, Inc.
320 via Pasqual
Redondo Beach, CA 90277
(310) 377-5171
asarabia2@gmail.com

November 23, 2022

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	1
SOURCE OF AUTHORITY TO FILE	1
INTRODUCTION	1
1. The “Publication” at Issue - The Washington Post Op/Ed.....	4
2. Other Negative “Publications” about Mr. Depp.....	7
3. Depp’s Unsuccessful British Lawsuit Against The Sun	9
4. The <i>Depp v. Heard</i> Trial	12
5. Post-Verdict Information	16
6. “Abuse” Can Refer to Many Types of Actions	17
7. Intimate Partner Violence is a Significant Problem in Virginia and the U.S.	17
8. Nearly a Quarter of Female Victims of Intimate Partner Violence Do Not Report the Violence Because They Fear Reprisal	20
9. The Verdict in the Present Case Communicates that Retaliation in the Form of a Defamation Action Is a Powerful Weapon Against Women Who Report Abuse	22
SUMMARY OF ARGUMENT	23
ARGUMENT	26
A. The Trial Verdict is Inconsistent with First Amendment Principles and Precedent.....	26
1. The Trial Court Should Have Ruled That Ms. Heard’s Op/Ed was Protected Speech	29

a.	Ms. Heard’s Op/Ed was Protected Opinion.....	29
b.	“Abuse” in The Op/Ed Was a Subjective Perspective.....	32
c.	The Alleged “Abuse” Defamation Was Not Based Upon “Facts” that Were Verifiable.....	37
2.	Statements in the Op/Ed Cannot be the Basis for a Finding of “Actual Malice”	39
3.	No Defamatory Facts Could Reasonably be Implied in the Op/Ed Written by Ms. Heard.....	41
B.	Republication of the Headline Written by a Washington Post Staffer Cannot be the Basis for Liability	43
C.	Mr. Depp Provided No Causal Connection Between the Op/Ed and Any Alleged Injury	45
D.	The Trial Court Should Have Dismissed This Action Based Upon Comity	47
	CONCLUSION	49

TABLE OF AUTHORITIES

Page(s)

VIRGINIA STATE COURT CASES

Alexandria Gazette Corp. v. West,
198 Va. 154, 93 S.E.2d 274 (1956)40

Am. Online, Inc. v. Nam Tai Elec., Inc.,
264 Va. 583, 571 S.E.2d 128 (2002)49

Barnes v. Graham Virginia Quarries, Inc.,
204 Va. 414, 132 S.E.2d 395 (1963)45

Bryant-Shannon v. Hampton Roads Cmty. Action Program, Inc.,
299 Va. 579, 856 S.E.2d 575 (2021)45

Carwile v. Richmond Newspapers,
196 Va. 1, 82 S.E.2d 588 (1954) 6, 30, 31

Chaves v. Johnson,
230 Va. 112, 335 S.E.2d 97 (1985) 29, 30, 31

Davenport v. Utility Trailer Manufacturing Company,
74 Va. App. 181, 867 S.E.2d 484 (Va. Ct. App. 2022)34

Depp v. Heard,
104 Va. Cir. 377, 2020 WL 8772348 (Fairfax Co. Cir Ct. Mar. 27, 2020).....6, 12

Depp v. Heard,
108 Va. Cir. 382, 2021 WL 8315070 (Fairfax Co. Cir. Ct. Aug. 17, 2021)48

Fuste v. Riverside Healthcare Ass'n,
265 Va. 127, 575 S.E.2d 858 (2003)30

Hyland v. Raytheon Tech. Servs. Co.,
277 Va. 40, 670 S.E.2d 746 (2009) 31, 32, 37, 38

McFarland v. McFarland,
179 Va. 418, 19 S.E.2d 77 (1942)48

Nunes v. Twitter,
Case No. CL19-1715-00 (Henrico Co. Cir Ct.).....26

<i>Pendleton v. Newsome</i> , 290 Va. 162, 772 S.E.2d 759 (2015)	31
<i>Saks Fifth Ave., Inc. v. James, Ltd.</i> , 272 Va. 177, 630 S.E.2d 304 (2006)	45
<i>Sandmann v. N.Y. Times Co.</i> , Civ. Action No. 2:20CV23 (WOB), 2022 WL 2960763 (E.D. Ky. July 26, 2022)	37, 38
<i>Sollie v. Sollie</i> , 202 Va. 855, 120 S.E.2d 281 (Va. 1961).....	17
<i>Stephens v. Rose</i> , 288 Va. 150, 762 S.E.2d 758 (2014)	17
<i>Titan Am., LLC v. Riverton Inv. Corp.</i> , 264 Va. 292, 569 S.E.2d 57 (2002)	36
<i>Ward v Comm.</i> , 264 Va. 648, 653, 570 S.E.2d 827 (Va. 2002).....	39
<i>Webb v. Virginian-Pilot Media Companies, LLC</i> , 287 Va. 84, 752 S.E.2d 808 (2014)	37, 41
<i>WJLA-TV v. Levin</i> , 264 Va. 140, 564 S.E.2d 383 (2002)	29, 40
<i>Yancey v. Hamilton</i> , 786 S.W.2d 854 (Ky. 1990).....	38
<i>Yeagle v. Collegiate Times</i> , 255 Va. 293, 497 S.E.2d 136 (1998)	30, 41

OTHER STATE CASES

<i>Sagaille v. Carrega</i> , 194 A.D.3d 92, 143 N.Y.S.3d 36 (N.Y. App. Div. 2021)	21, 28
--	--------

FEDERAL CASES

<i>Cardillo v. Doubleday & Co., Inc.</i> , 518 F.2d 638 (2d Cir. 1975)	9
<i>Croce v. Sanders</i> , 843 F. App'x 710 (6th Cir. 2021)	38
<i>Eramo v. Rolling Stone, LLC</i> , 209 F. Supp. 3d 862	44
<i>Fairfax v. CBS Broad., Inc.</i> , 534 F.Supp.3d 581 (E.D.Va. 2020)	35, 37
<i>Harte-Hanks Commc'ns v. Connaughton</i> , 491 U.S. 657 (1989).....	40
<i>Lokhova v. Halper</i> , 995 F.3d 134 (4th Cir. 2021)	44
<i>Milkovich v. Lorain Journal Co.</i> , 497 U.S. 1 (1990).....	29, 30, 31, 32, 39
<i>Morrissey v. William Morrow Co.</i> , 739 F.2d 962 (4th Cir. 1984)	44
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254, 84 S.Ct. 710 (1964).....	26, 40
<i>Nunes v. Cable News Network, Inc.</i> , Civ. Action No. 3:19-cv-889 (E.D. Va.).....	26
<i>Nunes v. Fusion GPS</i> , Civ. Action No. 1:19-cv-1148 (E.D. Va.).....	26
<i>Nunes v. WP Company</i> , Civ. Action No. 3:20-cv-146 (E.D. Va.);	26
<i>Sandmann v. WP Co. LLC</i> , 401 F. Supp.3d 781 (W.D. Ky. 2019).....	38
<i>Tavoulareas v. Piro</i> , 817 F.2d 762 (D.C. Cir. 1987).....	43

VIRGINIA STATE STATUTES

Va. Code § 16.1-22835

VIRGINIA STATE RULES

Virginia Rule 5A:231

OTHER AUTHORITIES

ACLU Artist Ambassador Project, ACLU (May 18, 2022), <https://www.aclu.org/issues/aclu-ambassador-project> [App. NN]42

Alyssa R. Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era*, 17 First Amend. L. Rev. 441 (2019) [App. LL]28

Brian A. Reaves, U.S. Dep't of Justice Bureau of Justice Stats., *NCJ 250231, Police Response to Domestic Violence, 2006-2015*, at 1, 5 (2017) [App. C]21

Centers for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report* (2017) [App. B]17, 18, 19

Cora Peterson et al., *Lifetime Economic Burden of Intimate Partner Violence Among U.S. Adults*, 55 Am. J. Preventive Med. 433, 443-44 (2018) [App. GG]20

Sarah J. Harsey & Jennifer J. Freyd, *Defamation and DARVO*, *Journal of Trauma & Dissociation*, 23:5, 481-89 (2022), <https://doi.org/10.1080/15299732.2022.2111510> [App. F]3

SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws, *Comm. Lawyer* (ABA), Mar. 2022 [App. MM]28

TABLE OF MEDIA PUBLICATIONS

Abigail Rowe, *The Backlash Against Amber Heard Follows a Sad, Predictable Pattern*, Complex (June 6, 2016), <https://www.complex.com/pop-culture/2016/06/hollywood-domestic-abuse-steps> [App. FF]42

Advocates Fear Depp-Heard Trial Will Have a Chilling Effect on Women Coming Forward with Abuse Claims, PBS: NewsHour (June 3, 2022, 6:23 PM), <https://www.pbs.org/newshour/nation/advocates-fear-depp-heard-trial-will-have-a-chilling-effect-on-women-coming-forward-with-abuse-claims> [App. CC]..... 12, 27

Amber Heard, Opinion, *A Transformative Moment for Women*, Wash. Post, Dec. 18, 2018..... *passim*

Amber Heard, *Amber Heard: I Spoke Up Against Sexual Violence – and Faced Our Culture’s Wrath*, Wash. Post (Dec. 18, 2018, 5:58 PM), https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html *passim*

Angelina Chapin, *Johnny Depp’s Playbook Won’t Work for Most Men*, New York Magazine: The Cut (June 10, 2022), <https://www.thecut.com/2022/06/johnny-depps-legal-playbook-wont-work-for-most-men.html> [App. D]2

Bohdan Zaveruha, *Johnny Depp and Amber Heard Trial – How Many Viewers Gathered on YouTube and How It Was Discussed on Twitch?*, StreamCharts (June 2, 2022), <https://streamscharts.com/news/johnny-depp-vs-amber-heard-trial-viewership> [App. DD]14

Dan Wootton, *Gone POTTY: How Can JK Rowling be ‘Genuinely Happy’ Casting Johnny Depp in the New Fantastic Beasts Film After Assault Claim?*, The Sun (Apr. 27, 2018, 10:00 PM), <https://www.thesun.co.uk/tvandshowbiz/6159182/jk-rowling-genuinely-happy-johnny-depp-fantastic-beasts/> [App. AA]9, 10

Doha Madani & Diana Dasrath, *Marilyn Manson Files Defamation Lawsuit Against Evan Rachel Wood Over Rape and Abuse Allegations*, NBC News (Mar. 2, 2022, 7:22 PM), <https://www.nbcnews.com/pop-culture/pop-culture-news/marilyn-manson-files-defamation-lawsuit-evan-rachel-wood-rape-abuse-al-rcna18436> [App. JJ].....27

EJ Dickson, *‘Men Always Win’: Survivors ‘Sickened’ by the Amber Heard Verdict*, Rolling Stone (June 1, 2022, 6:10 PM), <https://www.rollingstone.com/culture/culture-news/amber-heard-johnny-depp-verdict-metoo-trial-1361356/> [App. II] 22, 27

Emily Goddard, *Johnny Depp: ‘Wife Beater’ Libel Trial Enters Final Day as Lawyer Calls Allegation ‘Career-Ending’*, Independent (July 28, 2020, 12:18 PM), <https://www.independent.co.uk/news/uk/home-news/johnny-depp-libel-trial-the-sun-amber-heard-high-court-a9641651.html> [App. RR].....47

Holly Patrick, *Watch Live as Amber Heard’s Second Day of Testimony at Johnny Depp’s Defamation Trial Continues*, IndependentTV, at 1:05:20 (May 5, 2022), <https://www.independent.co.uk/tv/news/heard-testimony-depp-trial-live-b2072245.html>13

Kevin M. Goldberg, *SLAPP Lawsuits Pose Threat by Intimidation*, National Press Foundation (Oct. 6, 2016), <https://nationalpress.org/newsfeed/slapp-lawsuits-pose-threat-by-intimidation> [App. KK]27

Law&Crime Network, *Johnny Depp’s Lawyers Camille Vasquez & Ben Chew Pose for Pictures with Alpacas*, YouTube (May 20, 2022), <https://youtu.be/d7qh9NI5oc8>13

Mark Guarino & Doug Lantz, *Juror in Johnny Depp-Amber Heard Defamation Trial Speaks Out*, Good Morning America: Culture (June 16, 2022), <https://www.goodmorningamerica.com/culture/story/juror-johnny-depp-amber-heard-defamation-trial-speaks-85432281> [App. EE] 16, 24

Pauly, M., *She said, he sued*. *Mother Jones* (2020, March/April), <https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault/> [App. E]3

Sonia Rao, *A Timeline of Johnny Depp and Amber Heard’s Ongoing Legal Battle*, Wash. Post (May 22, 2019), <https://www.washingtonpost.com/arts-entertainment/2019/05/22/timeline-johnny-depp-amber-heards-ongoing-legal-battle/> [App. H]5

Sonia Rao, *Johnny Depp’s Dismissal from the Fantastic Beasts Franchise Marks a Major Career Repercussion for the Embattled Actor*, Wash. Post (Nov. 10, 2020, 3:23 PM), <https://www.washingtonpost.com/arts-entertainment/2020/11/10/johnny-depp-fantastic-beasts-grindelwald-dismissal/> [App. BB] 11, 12

Targeted Trolling and Trend Manipulation: How Organized Attacks on Amber Heard and Other Women Thrive on Twitter: Report, Bot Sentinel, <https://botsentinel.com/reports/documents/amber-heard/report-07-18-2022.pdf> [App. QQ]12

What You Need to Know About ACLU Artist Ambassadors, Including Amber Heard, ACLU (May 18, 2022), <https://www.aclu.org/news/civil-liberties/what-you-need-to-know-about-aclu-ambassadors-including-amber-heard> [App. G]4

IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

The entities, identified in Appendix A [Amicus Appendix (“App.”) A], who have signed onto this brief fall into three primary categories. First, organizations that support a vibrant First Amendment have joined to protect their ability to engage in reporting facts and opinions regarding important current issues, which is threatened by the verdict in this case. Second, civil rights and women’s groups have joined to address the significant diminution of reporting of abuse against women as a result of this verdict. Third, groups assisting persons who have been abused, especially involving intimate partner abuse, have joined to protect their clients from the devastating effect of this verdict. In addition, respected authorities in all three areas have added their voices to the brief.

SOURCE OF AUTHORITY TO FILE

Amici have moved for leave to file this brief in the accompanying motion pursuant to Supreme Court of Virginia Rule 5A:23.

INTRODUCTION

Amici are gravely concerned that the verdict for Johnny Depp in the *Depp v. Heard* case against his former wife, Amber Heard, casts an enormous shadow over

¹ No party or counsel for a party has authored this brief in whole or in part or made a monetary contribution to this brief’s preparation. The entities listed as Amici have consented to the filing of this amicus brief. Of the parties to this case, Ms. Heard has consented to and Mr. Depp has opposed the filing of this brief.

First Amendment law, intimate partner abuse victims' incentives to report abuse by their attackers, and the ability of Americans to speak out about injustices. If not reversed, this verdict will have profound effects on the jurisprudence of the Virginia and further effects on the ability of women nationwide to stand up to their abusers. The verdict will have a chilling effect on a wide range of commentators. Specifically, the verdict has already and will continue to deter women who have been abused by their partners from reporting such abuse, whether it be, among others, mental, psychological, verbal, physical, emotional, or sexual abuse.

Not only was this a highly publicized trial, but it became a social media sensation, possibly in a manner that was not wholly organic. It is a common tactic for an abuser to sue their victims for defamation, retraumatizing them and impoverishing them through the legal system. This problem only worsened during the #metoo movement and this tactic has accelerated due to the verdict in this case. *See* Angelina Chapin, *Johnny Depp's Playbook Won't Work for Most Men*, New York Magazine: The Cut (June 10, 2022), <https://www.thecut.com/2022/06/johnny-depps-legal-playbook-wont-work-for-most-men.html> [App. D]. Lawyers have noticed a substantial increase in defamation cases involving domestic violence and sexual abuse in recent years. Between 2014 and 2020, there were at least 100 defamation cases filed by those accused of sexual misconduct, most of which were filed after the #metoo movement began. Pauly, M., *She said, he*

sued. Mother Jones (2020, March/April), <https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault/> [App. E]; Sarah J. Harsey & Jennifer J. Freyd, *Defamation and DARVO*, *Journal of Trauma & Dissociation*, 23:5, 481-89 (2022), <https://doi.org/10.1080/15299732.2022.2111510> [App. F] (Equality Now, a rights organization, similarly reports seeing a worldwide increase in perpetrators filing defamation lawsuits against victims of gender-based violence).²

The argument of Mr. Depp’s counsel to the jury relied upon many assertions that are nowhere within the four corners of the editorial at issue or reasonably derived therefrom. The defamation by implication doctrine has been so unduly expanded in this case that it will lead to numerous meritless attacks on editorials and other publications that claimants will assert contain implied references regardless of how dubious the implication. In order to find Ms. Heard liable for defamation by implication, a court must make numerous leaps of logic that are not justified by the actual words of Ms. Heard’s Op/Ed or the reasonable implications therefrom. Requiring victims to defend against such lawsuits without proper 1ST Amendment protections will cause speakers to either choose not to speak or to

² While the trial of this case was incredible invasive into Ms. Heard’s privacy, with such irrelevant matter such as testimony about an alleged incident in the Seattle airport in her past, for most victims of abuse, it is the invasiveness of pre-trial discovery including depositions that is the most harmful.

incur significant costs, usually against litigants who have far superior assets.

1. The “Publication” at Issue - The Washington Post Op/Ed

On December 18, 2018, the Washington Post published (first online and then in print) an editorial written by Appellant Amber Heard with the assistance of the American Civil Liberties Union (ACLU) and her own private counsel. Amber Heard, Opinion, *A Transformative Moment for Women*, Wash. Post, Dec. 18, 2018, at A21 (“Heard Op/Ed”) [R. 38].³ Ms. Heard had been invited to become an ambassador by the ACLU, and to work with the ACLU on an Op/Ed to bring attention to gender-justice issues,⁴ as well as to galvanize support for changes in the treatment of women who came forward to speak out against abuse. Heard advocated that readers help elect politicians who would assist in fighting abuse and

³ The online version sported the headline “Amber Heard: I spoke up against sexual violence – and faced our culture’s wrath. That has to change,” which is the basis of one of the three defamation claims tried by Mr. Depp. Amber Heard, *Amber Heard: I Spoke Up Against Sexual Violence – and Faced Our Culture’s Wrath*, Wash. Post (Dec. 18, 2018, 5:58 PM), https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html (R. 7767-70). The evidence in the record showed that this was a headline written by a staffer for The Washington Post and Ms. Heard testified she never saw the headline prior to its online publication or any time prior to the filing of this lawsuit. R.27011. There was no contrary evidence introduced on this issue.

⁴ As the ACLU has explained, “[t]he op-ed also pushed for legislative and regulatory reforms that the ACLU has long supported as part of our women’s rights and gender justice work.” *What You Need to Know About ACLU Artist Ambassadors, Including Amber Heard*, ACLU (May 18, 2022), <https://www.aclu.org/news/civil-liberties/what-you-need-to-know-about-aclu-ambassadors-including-amber-heard> [App. G].

pave the way for better investigations by providing proper follow-through of complaints and assurances of no retaliation.

In the Op/Ed, Ms. Heard explained that because she had spoken out about domestic abuse, she had been ostracized and lost employment as an actress. As The Washington Post later wrote, the Op/Ed “urged readers to support women who come forward with allegations of abuse by taking them seriously and electing politicians who will fight for ‘changes to laws and rules and social norms.’” Sonia Rao, *A Timeline of Johnny Depp and Amber Heard’s Ongoing Legal Battle*, Wash. Post (May 22, 2019), <https://www.washingtonpost.com/arts-entertainment/2019/05/22/timeline-johnny-depp-amber-heards-ongoing-legal-battle/> [App. H] (quoting Heard Op/Ed). The Op/Ed never mentioned Heard’s former husband (Johnny Depp) by name or by reference (such as “former spouse”), nor ever stated that Heard had been subjected to any particular type of abuse. Instead, other than the contested passages, the Op/Ed merely explained that she had “been exposed to abuse at a young age” and that “[l]ike many women, [she] had been harassed and sexually assaulted by the time [she] was of college age.”⁵ The introduction of the Op/Ed listed Ms. Heard as “an actress and ambassador on women’s rights at the American Civil Liberties Union.” R. 38, 7768.

⁵ Ms. Heard did not meet Mr. Depp until long after she was “college age,” R. 25111, so this reference cannot be to him.

The Op/Ed itself contains two sentences written by Ms. Heard that Mr. Depp claimed were defamatory by implication:

- 1) “Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture’s wrath for women who speak out;” and
- 2) “I had the rare vantage of seeing, in real time, how institutions protect men accused of abuse.”

Id. Neither mentions Mr. Depp nor specifies any type of abuse (i.e., mental, psychological, verbal, physical, emotional, or sexual). The statements on their face do not assert that Ms. Heard was subjected to any abuse by Mr. Depp.⁶

The rest of the Op/Ed addressed the repercussions experienced by women who speak up regarding abuse. The Op/Ed took a broad view, referring to the #metoo movement and the history in Hollywood of facilitating abuse and punishing women who objected to it. It opined that “we are in a transformative political moment” in which “[w]omen’s rage and determination to end sexual violence are turning into a political force.” *Id.* Ms. Heard’s general description of

⁶ Mr. Depp also asserted yet another passage was defamatory, but that allegation was dismissed. The trial court held that “[t]he statement is too opinion-laden and representative of Defendant's own perspective for it to be actionable, and it notably lacks any implicit reference to the alleged meaning that Mr. Depp abused Ms. Heard. The Court simply cannot find that this statement has a defamatory charge without extending the meaning of the words far beyond their ordinary and common acceptance.” *Depp v. Heard*, 104 Va. Cir. 377, 2020 WL 8772348 (Fairfax Cir Ct. Mar. 27, 2020), at *5-6 (citing *Carwile v. Richmond Newspapers*, 196 Va. 1, 8, 82 S.E.2d 588 (1954)). As this brief argues, this holding should have been applied to all of the Op/Ed’s contested statements.

her own experience was limited to a few introductory sentences at the very beginning of the Op/Ed that were not associated with Mr. Depp.

2. Other Negative “Publications” about Mr. Depp

While the Washington Post Op/Ed did not mention Johnny Depp, numerous other publications reported in great detail about his drug and alcohol use, abuse of Ms. Heard and others, and his failure to honor obligations to show up on sets in a timely manner, resulting in financial losses to studios. *See* Def.’s 2d Supp. Ex. List (Exs. 1-122) [R. 19745-52]. These articles caused Mr. Depp’s poor reputation among various studios and others in the movie industry years before the Heard Op/Ed was published. Ms. Heard was prohibited from entering these into evidence based upon an erroneous hearsay objection ruling by the trial court. (R. 25557).

Had these articles been admitted into evidence, the jury would have learned about other reporting that would have affected Mr. Depp’s reputation:

- There were reliable predictions that Depp would not be in any more Pirates of the Caribbean movies almost 2 months before the Op/Ed was published. Def.’s Ex. 115 (Oct. 25, 2018) [App. I];
- Depp’s business managers filed pleadings in a lawsuit against him asserting they knew Depp had engaged in violence against Ms. Heard; Depp was described as “extremely volatile and had sometimes ‘gotten physical’ with Ms. Heard.” Def.’s Ex. 87 (May 25, 2017) [App. J], 106 (June 21, 2018) [App. K];
- Depp drank heavily and was constantly late to the set during the filming of “Pirates of the Caribbean 5: Dead Men Tell No Tales.” Def.’s Ex. 70 (May 10, 2017) [App. L];

- Depp went on 72-hour drug binges, was only intermittently lucid, spent \$30,000 per month on wine.⁷ Def.’s Ex. 107 (June 23, 2018) [App. M];
- Many of Depp’s movies were bombing at the box office. Def.’s Exs. 71 (May 10, 2017) [App. N], 77 (May 25, 2017) [App. O], 78 (May 27, 2017) [App. P], 88 (Jun. 23, 2017) [App. Q], 107 (Nov. 22, 2018) [App. M], 121 (Nov. 20, 2018) [App. R];
- Depp physically assaulted the location manager of his film “City of Lies” and was sued by the manager. Def.’s Ex. 121 (Nov. 20, 2018) [App. R];
- Depp joked about assassinating President Donald Trump and was rebuked by the White House and others, requiring an apology from Depp. Def.’s Exs. 82 (June 23, 2017) [App. S], 83 (June 23, 2017) [App. T], 85 (June 24, 2017) [App. U], 86 (June 25, 2017) [App. V];
- Depp was going broke and selling many of his assets because of grossly excessive spending related to his drug, alcohol use, and extreme eccentricities. Def.’s Exs. 71 (May 10, 2017) [App. N], 89 (Aug. 25, 2017) [App. W], 90 (Aug. 30, 2017) [App. X], 96 (Nov. 17, 2017) [App. Y], 106 (June 21, 2018) [App. K], 121 (Nov. 20, 2018) [App. R];
- Numerous articles mentioned Depp’s alleged abuse of Ms. Heard. *See* Def. Exs. 77 (May 25, 2017) [App. O], 95 (Nov. 4, 2017) [App. Z], 106 (June 21, 2018) [App. K], 107 (June 23, 2018) [App. M], 121 (Nov. 20, 2018) [App. R].

None of these articles were sought to be introduced for the truth of the matter asserted, but rather to demonstrate that other publications contained more damaging allegations about Mr. Depp and were more likely the basis of any difficulties experienced by him in obtaining movie roles. Yet, the trial court did not

⁷ Mr. Depp contested this allegation, claiming he spent far more than \$30,000 per month on wine. Def.’s Ex. 107 (June 23, 2018) [App. M].

permit the jurors to view these articles. R. 25557-58.

All the allegations Mr. Depp now contends were “implicit” within the Op/Ed provisions were not only public knowledge, but they had been circulated *ad nauseum* long prior to the publication of the Op/Ed. *Supra* pp. 7-8. By the time that Ms. Heard published her Op/Ed, Depp was nearly defamation or libel-proof and any alleged implication in the Op/Ed had little effect on Mr. Depp’s reputation.⁸

3. **Depp’s Unsuccessful British Lawsuit Against The Sun**

One of the most damning of the articles published before Ms. Heard wrote the Op/Ed at issue was written by Dan Wootton in The Sun, a British newspaper, published on April 27, 2018. Dan Wootton, *Gone POTTY: How Can JK Rowling be ‘Genuinely Happy’ Casting Johnny Depp in the New Fantastic Beasts Film After Assault Claim?*, The Sun (Apr. 27, 2018, 10:00 PM), <https://www.thesun.co.uk/tvandshowbiz/6159182/jk-rowling-genuinely-happy-johnny-depp-fantastic-beasts/> [App. AA]. Mr. Wootton expressly stated that “[o]verwhelming evidence was filed [in the California proceedings against Depp by Heard] to show Johnny Depp engaged in domestic violence against his wife Amber Heard.” *Id.* Wootton explicitly encouraged J.K. Rowling, the author of the Harry Potter book series, and Warner Brothers, the studio making the Harry Potter films, to fire Depp

⁸ See *Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638 (2d Cir. 1975). Virginia appellate courts have not yet considered this doctrine.

from his role playing one of the key characters in the “Fantastic Beasts” series. *Id.*

In response to this article, Mr. Depp, through his counsel in the current case, Brown Rudnick LLP, filed a lawsuit before the High Court of England and Wales on June 1, 2018, against Wootton and the publisher of The Sun, News Group Newspapers Ltd., *Depp II v. News Group Newspapers Ltd. (U.K. J.)* [2020] EWHC 2911 (QB) [R. 7806-934], claiming irreparable harm from The Sun article. The Defendants filed a Re-Amended Defence (“RAD”) that relied upon a truth defense, specifically that “the Claimant [Depp] beat his wife Amber Heard causing her to suffer significant injury and on occasion leading her to fear for her life.” *Id.* at ¶ 12. The Sun argued that

[t]he Claimant and Ms Heard began living together in or about 2012 and married on 3 February 2015. They separated on or around 22 May 2016. Throughout their relationship the Claimant was controlling and verbally and physically abusive towards Ms Heard, particularly when he was under the influence of alcohol and/or drugs.

Id. at ¶ 13 (quoting the RAD at ¶ 8a). The RAD was filed on March 6, 2020.

After 16 days of hearing in the case, on November 2, 2020, Mr. Justice Nicol sitting in the British High Court of Justice, Queen’s Bench Division, issued his judgment, a 129-page, 585 paragraph decision [R. 7806-7934], which found that the statements in The Sun that Depp beat his wife Amber Heard causing her significant injury and on occasion leading her to fear for her life were “substantially true.” *Id.* at ¶¶ 80, 455 (finding xi), 583, 585 [R. 7828, 7899, 7931].

In the judgment, the High Court noted that the burden of proof (to the “civil standard” of proof, namely the balance of probabilities) was on the Defendants to establish that the statements were true. *Id.* at ¶¶ 40-41. The High Court found that “the great majority [12 of 14] of alleged assaults of Ms. Heard by Mr. Depp have been proved to the civil standard.” *Id.* at ¶ 575. As a result, the High Court dismissed the claim brought by Depp against the Defendants. *Id.* at ¶¶ 583-84. On March 25, 2021, the Court of Appeals refused Mr. Depp’s application for permission to appeal the judgment.

More than two years after this article, Mr. Depp resigned from this role after losing his lawsuit in November 2020. Sonia Rao, *Johnny Depp’s Dismissal from the Fantastic Beasts Franchise Marks a Major Career Repercussion for the Embattled Actor*, Wash. Post (Nov. 10, 2020, 3:23 PM)[hereinafter, *Beasts*], <https://www.washingtonpost.com/arts-entertainment/2020/11/10/johnny-depp-fantastic-beasts-grindelwald-dismissal/> [App. BB].⁹ There was substantial adverse

⁹ The trial court’s rulings on the extent to which Ms. Heard’s counsel could mention or introduce evidence about the Sun article, lawsuit, and judgment was an arbitrary moving target. Although Mr. Depp filed a motion in limine seeking to exclude evidence about the UK “judgment” only, R. 15806-11, which was granted in part, R. 24343-44, the trial court barred Ms. Heard’s counsel from any mention of the Sun article, lawsuit, judgment, “or anything in the UK,” R. 24445, *see* R. 24444. Moreover, the court never permitted the Sun article itself to be introduced into evidence, despite its clear relevance to the issue of causation regarding any alleged damage to Mr. Depp’s reputation. Later in the trial, the court allowed some testimony about the Sun article, R. 26360-61, but still refused to allow the

press about Mr. Depp at the time of the filing of the *Sun* case by Depp in June 2018, during the hearings and trial in June and July 2020, and after the judgment was released on November 2, 2020.

4. The *Depp v. Heard* Trial

To say that the *Depp v. Heard* trial in Fairfax County Circuit Court and its surroundings was a circus is a gross understatement. As the unofficial video record has shown, the outside entrance drop-off gauntlet through which both parties entered the courthouse and through which Depp was championed and Heard was vilified,¹⁰ and the conduct of the courtroom audience – and some of the participants, R. 24488-89, 24566, 24579, 24938, created an atmosphere more appropriate for a trivialized wrestling match than a court trial impacting people’s lives. R. 24296-97, 25566, 25574, 28640. Social media lambasted Ms. Heard and viciously attacked anyone who expressed opposition to Depp. *Targeted Trolling and Trend Manipulation: How Organized Attacks on Amber Heard and Other*

article into evidence. R. 26361. This was particularly harmful given the fact that Mr. Depp lost his significant role in the Harry Potter movies the day after the UK judgment was released. R. 26157; Rao, *Beasts*.

¹⁰ As PBS noted, “[w]hile the jury deliberated, the streets outside the Fairfax, Virginia courtroom became a pro-Depp carnival.” *Advocates Fear Depp-Heard Trial Will Have a Chilling Effect on Women Coming Forward with Abuse Claims*, PBS: NewsHour (June 3, 2022, 6:23 PM) [hereinafter, *Chilling Effect*], <https://www.pbs.org/newshour/nation/advocates-fear-depp-heard-trial-will-have-a-chilling-effect-on-women-coming-forward-with-abuse-claims> [App. CC].

Women Thrive on Twitter: Report, Bot Sentinel, <https://botsentinel.com/reports/documents/amber-heard/report-07-18-2022.pdf> [App. QQ]. The lack of decorum was further exacerbated by social media postings which belittled Heard and heralded Depp. Attorneys for Depp were shown making inappropriate gestures and harassing witnesses when they were on the stand,¹¹ while being praised by the mob, *see, e.g.*, <https://www.youtube.com/watch?v=IC3hDcugTDA> (Depp attorney gets rock star treatment leaving court). All of these elements, which are predictable results of defamation suits improperly filed and involving public figures, chill speakers who should be protected by the 1st Amendment. It is difficult to overstate the amount of historical interest the case attracted and its long-term impact. “Broadcast of Youtube [sic] segments amassed a total of 83.9 million hours watched with a 3.5 million Peak Viewers during the announcement of the

¹¹ The video of the trial showed Depp’s counsel making inappropriate gestures toward Ms. Heard, *see, e.g.*, Holly Patrick, *Watch Live as Amber Heard’s Second Day of Testimony at Johnny Depp’s Defamation Trial Continues*, IndependentTV, at 1:05:20 (May 5, 2022), <https://www.independent.co.uk/tv/news/heard-testimony-depp-trial-live-b2072245.html>, as well as engaging in inappropriate celebration during certain testimony by Ms. Heard. <https://www.nytimes.com/2022/05/25/arts/kate-moss-johnny-depp-trial.htm> (on May 5, Mr. Depp’s lead lawyer, Mr. Chew, pumped his fist [in front of the jury], appearing to celebrate the mention, which opened the door for Ms. Moss to be called to testify about her relationship with Mr. Depp.”)

verdict.”¹²

The opening argument of Mr. Depp’s counsel, the evidence presented by Depp, and Depp’s closing argument would lead a reasonable juror to believe that the defamation being sued on by Mr. Depp was not the Op/Ed itself, but rather the allegations of abuse by Ms. Heard in 2016 in her California court filings and subsequent press coverage of those filings at that time.

As Benjamin Chew, Depp’s attorney, stated in his opening, “the evidence will show that Ms. Heard’s false allegation[s] [in 2016] had a significant impact on Mr. Depp’s family and his ability to work....” (R. 24423).¹³ Depp’s counsel later argued that “what is at stake in this trial . . . is a man’s life, the life that he lost when he was accused of a heinous crime....” (R. 28628). Only later did Mr. Depp’s counsel correctly argue that “[t]his case is about what Ms. Heard said in her Op/Ed,” but then went on to distort what Ms. Heard said, even by implication. (R. 24426). Depp’s counsel argued that “Ms. Heard painted a picture of herself as a heroic, innocent survivor of the abuse by Mr. Depp, a beaten woman who finally

¹² Bohdan Zaveruha, *Johnny Depp and Amber Heard Trial – How Many Viewers Gathered on YouTube and How It Was Discussed on Twitch?*, StreamCharts (June 2, 2022), <https://streamcharts.com/news/johnny-depp-vs-amber-heard-trial-viewership> [App. DD].

¹³ Mr. Depp’s Complaint did not seek any damages for any injury to his family. Complaint [R. 23-24, 26, 28-29]. Moreover, damage done in 2016 should not have been considered by the jury and instead would be an alternative causality.

stood up to her tormentor.” (R. 24426). “[T]he evidence will show that Ms. Heard portrayed Mr. Depp as a representative of abusers everywhere. The agent of her suffering, the villain in her heroic journey.” (R. 24426).

Evidence in the case was presented over 23 trial days. Interestingly, Depp did not introduce into evidence a copy of the Op/Ed that was the basis of the lawsuit until April 20, 2022, the 7th day of evidence,¹⁴ and his counsel mentioned it only in passing during their opening statement. During trial, Mr. Depp asserted that when Ms. Heard made abuse accusations against him in May 2016, these accusations had an immediate impact on his career, saying that when she made those accusations, he “lost nothing less than everything...” R. 28640. His counsel repeatedly argued that Mr. Depp’s claims were focused on the allegations that Ms. Heard made in 2016. *See* R. 28628, 28629 (twice referencing “six years to the day” of the argument), 28633, 28643 (“six years ago” Depp’s “life ended”), 28644, 28645, 28677, 28681, 28682, 28683, 28684.

Mr. Depp’s counsel began the closing argument by asserting that

On May 27, 2016, Ms. Heard walked into a courthouse in Los Angeles, California to get a no notice ex-parte restraining order against Mr. Depp, and in doing so, ruined his life by falsely telling the world that she was a survivor of domestic abuse at the hands of

¹⁴ The print version of the Op/Ed was entered into evidence for the first time by Ms. Heard’s counsel during his cross-examination on April 20, R. 25223, after Depp’s direct examination (and the questioning of ten other witnesses) had been completed. Depp’s counsel did not introduce the online version of the Op/Ed, Pl.’s Ex. 1, until April 25, the 9th day of trial, during his redirect testimony. R. 25563.

Mr. Depp. Today, on May 27, 2022, exactly six years later, we ask you to give Mr. Depp his life back by telling the world that Mr. Depp is not the abuser Ms. Heard said he is and hold Ms. Heard accountable for her lies.

(R. 28628). Thus, Mr. Depp and his counsel asked the jury to hold Ms. Heard “accountable” for filing the restraining order in 2016, not for the Op/Ed.

5. Post-Verdict Information

Despite the fact that the identity of the jurors had been sealed,¹⁵ after the trial ended, one juror chose to speak out in response to various comments made by Ms. Heard and her counsel. The juror said “[that] they [Depp and Heard] were both abusive to each other. . . . But to rise to the level of what she was claiming, there was not enough or any evidence. . . .” Mark Guarino & Doug Lantz, *Juror in Johnny Depp-Amber Heard Defamation Trial Speaks Out*, Good Morning America: Culture (June 16, 2022), <https://www.goodmorningamerica.com/culture/story/juror-johnny-depp-amber-heard-defamation-trial-speaks-85432281> [App. EE]. The juror further stated that “Heard’s team failed to prove Depp’s abuse was physical,” *id.*, thereby demonstrating the juror’s misunderstanding of the burden of proof on this claim and the full scope of the term “abuse.”

¹⁵ The trial court entered an Order sealing the names of the jurors for at least one year in order to avoid any harassment of the jurors during the trial or after the verdict was rendered. Order Granting Def. and Countercl. Pl.’s Motion to Seal Records Relating to Jurors’ Identities, at 1, May 18, 2022. R. 20143-45.

6. “Abuse” Can Refer to Many Types of Actions

Abuse can take many forms. More than half a century ago, the Virginia Supreme Court recognized the power of abusive language during a relationship: “angry words, coarse and abusive language, humiliating insults, and annoyances in all the forms that malice can suggest, may as effectually endanger life or health as personal violence, and afford grounds of relief to the injured spouse....” *Sollie v. Sollie*, 202 Va. 855, 860, 120 S.E.2d 281, 285 (Va. 1961) (citation omitted). Virginia courts, recognizing the serious nature of psychological abuse, have granted protective orders against abusive family members even without the threat of violence. *Stephens v. Rose*, 288 Va. 150, 154-55, 762 S.E.2d 758, 761 (2014).

During his trial testimony, Mr. Depp acknowledged the various forms that “abuse” may take including emotional abuse, verbal abuse, physical abuse, and psychological abuse. R. 25543.

7. Intimate Partner Violence is a Significant Problem in Virginia and the U.S.

Understanding of abuse, especially domestic or intimate partner abuse, has increased in recent years. There are at least several categories of intimate partner abuse, each of which causes lasting harm and can escalate. According to the Centers for Disease Control in their 2010-2012 State Report, The National Intimate Partner and Sexual Violence Survey (NISVS), “Intimate partner violence (IPV) includes physical violence, sexual violence, stalking, psychological aggression

(including coercive tactics), and control of reproductive or sexual health by a current or former intimate partner.”¹⁶ The CDC State Report supports defining emotional, coercive, verbal, and mental abuse, among others.

Within intimate partner abuse is “[p]sychological aggression [which] includes expressive aggression (such as name calling, insulting, or humiliating an intimate partner) and coercive control, which includes behaviors that are intended to monitor and control or threaten an intimate partner.”¹⁷ Similarly, as the CDC explained in the NISVS, “sexual violence” includes non-contact abuse such as non-contact unwanted sexual experiences of verbally sexually harassing the victim, making a victim look at or participate in sexual photos or movies, and sexual coercion, e.g., threatening to spread rumors and sexual pressure due to someone using their influence or authority.¹⁸

The CDC report determined that abuse has multiple types and recovery from abuse is not only a matter of healing physical bruises. As the report found, while “[p]sychological aggression by an intimate partner was experienced by 47.1% of

¹⁶ Centers for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (2017)* [App. B], at 117. The CDC has also identified five types of sexual violence: rape, sexual coercion, being made to penetrate another, unwanted sexual contact and non-contact unwanted sexual experiences. *Id.* at 17.

¹⁷ *Id.* at 117.

¹⁸ *Id.* at 17, 117.

women....,”¹⁹ “[p]hysical violence by an intimate partner was experienced by almost a third of women (32.4%)” surveyed.²⁰ Both of these types of abuse were found to have profound effects on women.

Intimate Partner Abuse of Women During 12 months - CDC

	Virginia	US
Sexual violence, physical violence and/or stalking	176,000 ²¹	7,919,000 ²²
Psychological aggression	423,000 ²³	17,022,000 ²⁴
Totals	599,000	24,941,000

Combining sexual violence, physical violence and/or stalking by an intimate partner, and psychological aggression, there were almost 600,000 female victims in Virginia, in 12 months, and almost 25 million female victims in the country.

The levels of intimate partner abuse over lifetimes are even higher. “The majority of female (73.4%) and over a third of male (35.7%) lifetime intimate partner violence victims have experienced one or more IPV [intimate partner

¹⁹ *Id.*

²⁰ *Id.* at 2.

²¹ *Id.* at 133 (“12-Month Prevalence of Contact Sexual Violence, Physical Violence, and/or Stalking Victimization by an Intimate Partner, by State of Residence — U S Women, NISVS 2010-2012 Average Annual Estimates”) (footnotes omitted).

²² *Id.* at 132.

²³ *Id.* at 137 (“12-Month Prevalence of Psychological Aggression by an Intimate Partner, by State of Residence — U S Women, NISVS 2010-2012 Average Annual Estimates”) (footnotes omitted).

²⁴ *Id.* at 136.

violence]-related impacts. Commonly reported IPV-related impacts for both women and men were feeling fearful, being concerned for safety, and experiencing symptoms of post-traumatic stress disorder.”²⁵

According to the CDC report, “Sexual violence, stalking, and intimate partner violence are important public health problems that have an enormous and long-term physical and mental health impact on victims.”²⁶

The CDC Report establishes that intimate partner abuse is a significant problem in Virginia and the United States. A recent medical journal study placed an economic value on the losses to American society because of intimate partner abuse,²⁷ concluding that the losses to the U.S. economy in lost wages, impaired health, property damage, treatment costs, and lost productivity caused by intimate partner violence are more than \$3.6 trillion over the victims’ lifetime.²⁸ In this research, “[e]ven more adults reported other forms of intimate partner violence (IPV), including noncontact sexual violence and psychological aggression.”²⁹ This staggering number conveys the high cost of intimate partner violence to society.

8. Nearly a Quarter of Female Victims of Intimate Partner Violence Do Not Report the Violence Because They Fear Reprisal

²⁵ *Id.* at 198.

²⁶ *Id.* at 1.

²⁷ Cora Peterson et al., *Lifetime Economic Burden of Intimate Partner Violence Among U.S. Adults*, 55 *Am. J. Preventive Med.* 433, 443-44 (2018) [App. GG].

²⁸ *Id.* at 443.

²⁹ *Id.*

An important ten-year Department of Justice study³⁰ reveals that nearly one-quarter of women abused by an intimate partner do not report their abuse because they are afraid of retaliation. In Virginia and the United States, many abused women are too fearful to report their abuse. Not reporting the abuse makes it more likely that the abuse will continue and escalate, because it will remain hidden in the shadows. The abuser can continue to abuse because there have not been any adverse consequences. Over a 10-year period, almost half of nonfatal domestic violence victimizations were not reported to police.³¹

The light of disclosure reduces abuse. There is a large amount of intimate partner abuse hidden by the shadow of non-disclosure, and much of that is based on the fear of retaliation. If society wants to reduce intimate partner abuse, a key tool is encouraging and supporting reports of abuse. This verdict means that juries may ignore abuse unless it is extreme physical violence witnessed by third parties. In several recent cases, even admissions by an abuser have been insufficient for a finding of abuse in defamation cases, causing doubt in the minds of many women that the legal system can provide them with justice. *See Sagaille v. Carrega*, 194 A.D.3d 92, 94, 143 N.Y.S.3d 36, 38 (N.Y. App. Div. 2021) (dismissing defamation claim filed by accused abuser against victim).

³⁰ Brian A. Reaves, U.S. Dep't of Justice Bureau of Justice Stats., NCJ 250231, *Police Response to Domestic Violence, 2006-2015*, at 1, 5 (2017) [App. C].

³¹ *Id.* at 1.

9. The Verdict in the Present Case Communicates that Retaliation in the Form of a Defamation Action Is a Powerful Weapon Against Women Who Report Abuse

The verdict punishes Ms. Heard for being brave enough to write about the abuse of women. The message is clear -- no woman who voices her opinion about abuse is safe from retaliation. This verdict will likely decrease the reporting of intimate partner abuse. With even less reporting of intimate partner abuse, a heinous problem for Virginia and the United States, such abuse will worsen.

Because this case received such widespread attention both in traditional and social media, some women have already received the message that they should hide the intimate partner abuse in their life:

[Dr. Jessica Taylor, a psychologist, forensic psychology Ph.D., and author of two books on misogyny and abuse] says she has already been contacted by “hundreds” of survivors [since the Depp verdict] wishing to retract public statements they have made in the press, or pulling out of court cases against their abusers. She says the verdict “opens the floodgates” for future defamation cases.³²

For these women, this appeal is an opportunity to erase the message of the verdict - that reporters of abuse will be punished. Reversal in this case will communicate that retaliation against women who report abuse is not acceptable in Virginia.

³² EJ Dickson, *‘Men Always Win’: Survivors ‘Sickened’ by the Amber Heard Verdict*, Rolling Stone (June 1, 2022, 6:10 PM), <https://www.rollingstone.com/culture/culture-news/amber-heard-johnny-depp-verdict-metoo-trial-1361356/> [App. II].

SUMMARY OF ARGUMENT

The statements made by Ms. Heard were speech protected by the First Amendment to the U.S. and Virginia Constitutions. The Op/Ed was an opinion piece, with no direct connection or citation to Mr. Depp. It reflected Ms. Heard's opinion that society in general and Hollywood in particular have failed to support women who come forward advocating against abuse. Ms. Heard, like any other American, is entitled to express her opinion on the issues of public concern.

Mr. Depp has alleged that statements by Ms. Heard using the terms "abuse" and "domestic abuse" implied a defamatory statement about Mr. Depp. Based upon the uncontroverted evidence at trial, those statements cannot be the basis for a finding of "actual malice" by any reasonable jury³³ because they were subjectively true from the perspective of Ms. Heard. Moreover, there was sufficient uncontroverted evidence at trial of actions that satisfied most reasonable definitions of "abuse" to be considered objectively true.

Mr. Depp alleged Ms. Heard defamed him based upon implications contained in three separate statements from the Washington Post Opinion Editorial. Complaint [R. 1, 24-25]. Mr. Depp contends they included implicit innuendo, "readily apparent to any reader," Complaint [R. 25], implying Mr. Depp engaged

³³ Amici are not contending that the jury in the present case was not "reasonable," but rather rendered an unreasonable verdict based upon errors by the trial court and improper argument by Mr. Depp's counsel.

in physical and sexual violence against Ms. Heard to restrict the known meaning of her choice of words on abuse to his viewpoint, not hers. *See R.* 24420, 24422-23.

If this defamation by implication verdict is allowed to stand, it will have detrimental effects on the ability of commentators to make factually true statements that could be somehow twisted by a public figure into an allegation that they had engaged in conduct not specified in their statement.

Amici are concerned about this application of the doctrine of “defamation by implication.” The freedom to truthfully speak about abuse in general statements will be restricted if the Op/Ed’s use of the term “abuse” is held to imply actions that allegedly occurred and were reported more than two years before the Op/Ed was published. The term “abuse” was not defined in the Jury Instructions (over the objections of Ms. Heard), as the court refused to give the jury guidance regarding this vague term that lacks a self-evident definition. *See Revised Jury Instrs.*, July 15, 2022 [R.22472-22577]; *see Guarino & Lantz, supra* pp. 16 (Juror Interview).

It is also alarming that the verdict was allowed to stand given the utter lack of causation evidence showing that this one Op/Ed was the source of Depp’s financial troubles. No evidence was presented by Mr. Depp that any reader of the Op/Ed who would have employed him, but chose not to, had read the article, much less made a connection between the general statements in the Op/Ed and Depp. It is next to impossible to say that any alleged harm to Mr. Depp was due to some

alleged innuendo in the Op/Ed, as opposed to the dozens of other articles published in the three years prior to the Op/Ed that discussed improper behavior by Mr. Depp. *See* Def.'s Exs. 1-122 (Def.'s 2nd Supp. Exhibit List) [R. 19745-19752]; pp. 7-8, *supra*. The necessity of such a connection between any alleged defamation and real injury is crucial to protecting the press and commentators.

Last, the Amici are concerned that a claimant has been permitted to litigate the same exact factual issues in two different fora and obtain different and contradictory findings. The UK proceeding was Mr. Depp's preferred forum and had a more favorable (to Depp) burden of proof than Virginia. Even though the UK proceeding was against a different defendant, the exact same facts regarding the abuse in question supported the English court's determination that it was "substantially true" that Mr. Depp engaged in psychological, verbal, sexual, and physical abuse against Ms. Heard. R. 7931 (¶ 583). The UK High Court found that Depp engaged in spousal abuse. *Id.* The outcome in the United Kingdom cannot be reconciled with the verdict in Virginia. The message of this Virginia verdict to abusers is that re-litigating defamation strike back suits in different courts until a favorable verdict can be obtained is profitable, without regard to whether an adverse outcome is obtained in the first case.

ARGUMENT

A. The Trial Verdict is Inconsistent with First Amendment Principles and Precedent

Prior to 1964, defamation actions were guided in Virginia, like most jurisdictions, solely by state common law. After the U.S. Supreme Court issued its decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964),³⁴ Virginia courts have been required to factor in the interests of the First Amendment in defamation claims, especially those involving public figures and matters of public concern. This lawsuit involves both.

Amici are concerned that the threat of frivolous and expensive lawsuits by claimants is significant and increasing, especially in Virginia.³⁵ People, especially

³⁴ It is interesting to note that *Sullivan*, like the present case, involved allegations of defamation by implication. 376 U.S. at 288-289 (“There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements—the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him—did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word ‘They,’ it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts in question.”) In *Sullivan*, the Court held that there was insufficient evidence to connect the statements with plaintiffs and thus the evidence was constitutionally insufficient for defamation.

³⁵ Because Virginia is perceived to have overly favorable defamation law for claimants, many claimants, such as former Congressman Devin Nunes, have attempted to file defamation actions in the Commonwealth's courts that would not likely survive motions in other jurisdictions. *Nunes v. Cable News Network, Inc.*, Civ. Action No. 3:19-cv-889 (E.D. Va.); *Nunes v. Fusion GPS*, Civ. Action No. 1:19-cv-1148 (E.D. Va.); *Nunes v. WP Company*, Civ. Action No. 3:20-cv-146 (E.D. Va.); *Nunes v. Twitter*, Case No. CL19-1715-00 (Henrico Co. Cir Ct.).

those who have been the victims of abuse, are afraid of speaking out against those who have more power and money.³⁶ The current case has exacerbated that fear with its precedent. Experts in abuse have already seen a real-world chilling effect on women coming forward with abuse claims. *Chilling Effect*, *supra* note 8; EJ Dickson, *supra* note 29. Even before the verdict in this case, First Amendment advocates expressed concern that:

these suits, frivolous or not, take their financial and emotional toll on the defendants, even if they ultimately win. Especially when those defendants aren't The New York Times. . . . in reality, it is a suit or threat used to silence and harass critics by forcing them to spend money to defend a baseless lawsuit – something that is intended to intimidate, not win. Someone faced with a SLAPP action generally ends up agreeing to retract their statements, apologize, or refrain from further comment on the matter in order to stay out of court....

Kevin M. Goldberg, *SLAPP Lawsuits Pose Threat by Intimidation*, National Press Foundation (Oct. 6, 2016), <https://nationalpress.org/newsfeed/slapp-lawsuits-pose-threat-by-intimidation> [App. KK]; *see also* Alyssa R. Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too"*

³⁶ For example, Mr. Depp's close friend and the godfather of his daughter Lily Rose, Marilyn Manson, is in the process of suing two of his sexual abuse victims for defamation, using the Depp playbook of attacking the victim. Doha Madani & Diana Dasrath, *Marilyn Manson Files Defamation Lawsuit Against Evan Rachel Wood Over Rape and Abuse Allegations*, NBC News (Mar. 2, 2022, 7:22 PM), <https://www.nbcnews.com/pop-culture/pop-culture-news/marilyn-manson-files-defamation-lawsuit-ewan-rachel-wood-rape-abuse-al-rcna18436> [App. JJ].

Era, 17 First Amend. L. Rev. 441, 447 (2019) [App. LL] (discussing the effect of SLAPP lawsuits in abuse cases as “silenc[ing] speech through the inconvenience and cost of litigation ... [producing] a chilling effect by preventing others from making similar statements in the future for fear of facing a lawsuit.” (footnotes omitted)); *SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws*, Comm. Lawyer (ABA), Mar. 2022, at 29 [App. MM] (wealthy and influential plaintiffs can “punish their [less well-resourced] targets with time-consuming and costly litigation, thereby deterring similar speech in the future.”).

A New York decision accurately assessed the problem when it dismissed a defamation claim by an accused abuser, holding that the lower court’s decision allowing the claim to proceed “has the effect of emboldening sexual assaulters who seek to weaponize the legal system in order to silence their victims.” *Sagaille*, 194 A.D.3d at 94, 143 N.Y.S.3d at 38. As the *Sagaille* court noted,

sexual assaults remain vastly underreported, primarily due to victims' fear of retaliation. It does not escape us that defamation suits like the instant one may constitute a form of retaliation against those with the courage to speak out; most victims cannot afford years of litigation, nor do they wish to have their personal information disclosed through invasive discovery or to relive their personal trauma through litigation, including depositions, filings, and testimony in court. They do not wish to endure continued unwanted interaction with the person alleged to have assaulted them through the litigation process.

Id. at 194 A.D.3d 94 (footnote omitted).

1. The Trial Court Should Have Ruled That Ms. Heard’s Op/Ed was Protected Speech

a. Ms. Heard’s Op/Ed was Protected Opinion

Amici believe that this Court should hold as a matter of law that the Opinion Editorial drafted by Ms. Heard was “opinion” written to address the problem of retaliation in Hollywood when women speak about men who abuse their power to harass and assault women. The point of the Op/Ed was to illustrate this problem and to encourage advocacy for political and social reform. Ms. Heard wrote about having suffered abuse at an early age, including being harassed and sexually assaulted “by the time [she] was of college age” (long before she met Mr. Depp).

Generally, “a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection” and not be considered defamatory. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *WJLA-TV v. Levin*, 264 Va. 140, 156, 564 S.E.2d 383, 392 (2002). “Pure expressions of opinion, not amounting to ‘fighting words,’ cannot form the basis of an action for defamation.” *Chaves v. Johnson*, 230 Va. 112, 119, 335 S.E.2d 97, 102 (1985). The First Amendment to the U.S. Constitution and article 1, § 12 of the Constitution of Virginia “protect the right of the people to teach, preach, write, or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander.” *Id.* at 101-02. One of our most important Virginia founding fathers explained, “error of opinion may be tolerated

where reason is left free to combat it.” *Id.* at 404 n.8 (quoting Thomas Jefferson, First Inaugural Address (Mar. 4, 1801)).

In evaluating defamation, courts must consider “the general tenor of the [publication],” *Carwile*, 196 Va. at 7 (quoting *Milkovich*, 497 U.S. at 21), not just the specific words out of context. Generally, “[s]tatements that are relative in nature and depend largely upon the speaker's viewpoint are expressions of opinion.” *Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 132, 575 S.E.2d 858, 861 (2003) (citing *Chaves*, 230 Va. at 119). Whether a statement is “opinion” or “fact” requires the court to evaluate whether a statement can be proven to have a false connotation. *Fuste*, 265 Va. at 133-33; *Yeagle v. Collegiate Times*, 255 Va. 293, 295, 497 S.E.2d 136, 137 (1998); *Chaves*, 230 Va. at 102 (whether allegedly defamatory statement is one of fact or opinion is a matter of law for courts to determine, not juries). In the present case, the trial court erred in its analysis and evaluation of the nature of these alleged implicit statements.

Although every fair inference must be drawn in favor of Plaintiff-Appellee in determining whether the words and statements complained of in this case are reasonably capable of the meaning ascribed to them by the alleged innuendo, the

meaning of the allegedly defamatory language can not, by innuendo, be extended beyond its ordinary and common acceptation. The province of the innuendo is to show how the words used are defamatory, and how they relate to plaintiff, but it can not introduce new matter, nor extend the meaning of the words used, or to make that certain which is in fact uncertain.

Carwile, 169 Va. at 8 (citations omitted). Any matter that can be considered in evaluating the statement must be within the publication itself or within the public's knowledge in the immediate past. *See Pendleton v. Newsome*, 290 Va. 162, 171-74, 772 S.E.2d 759, 763-64 (2015) (innuendo established at the pleading stage when facts relevant to innuendo were still in the news and statements specifically referred to those facts); *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 48, 670 S.E.2d 746 (2009) (looking within the full statement for the defamatory meaning).

Ms. Heard's Opinion Editorial focused on the treatment that women who spoke out regarding abuse received from the public. The Op/Ed, taken on its face and in the proper context, was not an attack on Mr. Depp, but an indictment of society in general and Hollywood in particular, for not supporting women who spoke up about a wide range of abuses. Because the statements by Ms. Heard in that Op/Ed did not "contain a provably false factual connotation," *Milkovich*, 497 U.S. 20, and were not "fighting words," but were "pure expressions of opinion," *Chaves*, 335 S.E.2d at 102, they should not have been considered by the trial court or this Court as defamatory. Were it to be held otherwise, this precedent would have profound effects on the Amici and their ability to opine on the prominent issues of the day. To affirm the verdict in this case is to chill the First Amendment right to express one's opinion and encourage frivolous defamation claims based upon what a claimant can imply from what is spoken, rather than the actual words

of the speaker.³⁷ Taken in this context, the two statements contained in the Op/Ed that were actually written by Ms. Heard, which do not mention Mr. Depp, are merely a summary of her opinion and view regarding her life experiences.

b. “Abuse” in The Op/Ed Was a Subjective Perspective

Ms. Heard’s reference to “abuse” and “domestic abuse” are subjective opinions of her perspective, not a verifiable fact that could be defamatory. *Milkovich*, 497 U.S. at 20. Demonstrating that the Op/Ed contained only “opinion,” Ms. Heard only used the vague and undefined terms “abuse” and “domestic abuse” in the Op/Ed in the two contested non-headline statements and in neither instance mentioned Mr. Depp. The statements represented her viewpoint regarding her experiences. In both cases, the Op/Ed contained Ms. Heard’s true opinion as an advocate speaking out against domestic abuse. The term “abuse” as used by Ms. Heard is subjective – it is an opinion in the eye of the person who has been subjected to a wide range of conduct – and not subject to a clear true/false analysis. *See Hyland*, 277 Va. at 47, 670 S.E.2d at 751 (2009) (statement relative in nature and depending largely on a speaker's view, is an expression of opinion).

During the trial, there was uncontroverted evidence regarding actions by Mr. Depp that constituted “abuse” from the perspective of any woman. For example, a

³⁷ For example, a commentator speaking generally about racial violence perpetrated in the past by white supremacists could be sued by a white nationalist group that had “only” engaged in verbal, not physically, racially violent attacks.

video showed Mr. Depp storming through the couples' kitchen in a drunken rage swearing at Ms. Heard. R. 25351-25352; Def.'s Ex. 638. In that uncontested video, Mr. Depp expressed severe anger at Ms. Heard for an alleged transgression by, in Mr. Depp's own words, "assaulting kitchen cabinets" with kicking and slamming and then confronts her when he sees that she has videotaped the incident. (R. 25352). He threatened Ms. Heard with "I'll show you crazy," (R. 25352), picked up her phone and slammed it down, ending the taping. Def.'s Ex. 638, at 1:35-2:00. Other uncontested examples of "abuse" proven during trial included:

- Mr. Depp admitted to having punched a bathroom sconce during an argument with Ms. Heard in the Hicksville trailer incident which caused her intimidation and apprehension of injury from displaced anger of destroying property turning towards her. R. 25316; Def.'s Ex. 143;
- Mr. Depp told Ms. Heard to "shut-up fat ass" when she complained that he had put out a cigarette on her or in apprehension of that injury. Trial R. 25543; Def.'s Ex. 582;
- Mr. Depp called Ms. Heard a "fucking cunt" during a dispute with Ms. Heard. R.25546; Pl.'s Ex 366;
- Mr. Depp sent Ms. Heard texts lambasting her while she was at a "coffee meeting," stating that the meeting is for 'whores,' (part of his attempt to control the types of meetings she took regarding her career). R. 25551; Def.'s Ex 195;
- Mr. Depp wrote incoherent, sexually harassing messages attacking Ms. Heard on mirrors, walls, and lamp shades while causing \$70,000 worth of property damage. Mr. Depp admitted he wrote "She loves...naked Hollywood," R. 25572; Def.'s Ex. 375, and "Billy Bob and [E]asy Amber," R. 25338; Def.'s Ex. 374; while stating he knew she did not want to be objectified in that way. R. 25338; Def.'s Ex. 375;

- Mr. Depp accused Ms. Heard of “bitching,” and called her a “fucking pain in the ass and...a cunt,” while accusing her of having a “goddamn...fucking lover.” R. 25581; Pl.’s Ex. 342A;
- Mr. Depp called Ms. Heard a “stupid fuck” during another dispute. R. 25546; Pl.’s Ex 396B;
- Mr. Depp’s bodyguard admitted to Mr. Depp “rearranging” Ms. Heard’s closet by pulling all of the clothes off the rack and throwing them on the floor in their shared Los Angeles apartment after the bodyguard was shown photos of the destroyed room. R. 26341.

During the trial, an audio tape was played for Mr. Depp:

MR. DEPP: I headbutted you in your fucking –
 MS. HEARD: I couldn’t believe you did that.
 MR. DEPP: -- forehead. That doesn’t break a nose.
 (R. 25347); Def.’s Ex. 587A.

Mr. Depp was asked about this interaction and admitted that he said those words. R. 25347. In follow-up questioning, Mr. Depp asserted that it “was not an intentional headbutt.” R. 25347.

Although Mr. Depp claims that he did not “intentionally” head-butt Ms. Heard, under Virginia law, Mr. Depp’s testimony was an admission by Mr. Depp that he abused Ms. Heard. *Davenport v. Utility Trailer Manufacturing Company*, 74 Va. App. 181, 867 S.E.2d 484, 499-500 (Va. Ct. App. 2022). His statement at trial that the headbutt was not intentional reiterated that he did headbutt Ms. Heard. The definition of “family abuse” under the Virginia Juvenile and Domestic Relations statutes does not require intent or willfulness. Va. Code § 16.1-228. It

does not matter if the headbutt was or was not intentional to be “abuse.”³⁸

An analogous situation was at issue in *Fairfax v. CBS Broad., Inc.*, in which Virginia’s then-lieutenant governor sued a television network based upon its interviews with women who alleged that he had raped them many years before they announced their allegations. 534 F.Supp.3d 581 (E.D.Va. 2020). Mr. Fairfax also complained about sympathetic comments by the co-hosts of CBS’s morning show after the interviews were aired. *Id.* The federal court granted a motion to dismiss the defamation claims in that case, explaining that “the relied upon commentary, when read in context, does not ascribe to any particular view of the underlying events, but rather on how persons who believe they are victims of sexual abuse are affected.” *Id.* at 594.

These exact same words could be said of the Op/Ed published by Ms. Heard. The crux of the Op/Ed was not to rehash the allegations that Ms. Heard had previously made regarding Ms. Depp’s conduct, but rather to express Ms. Heard’s experience after she made those allegations. At no time in the Op/Ed text did Ms. Heard talk about the specifics of any alleged abuse by Mr. Depp (even without mentioning his name), but rather, she talked about the effect of coming forth as an

³⁸ Moreover, given that it was clear that Ms. Heard considered the headbutt to be intentional, even if it was not intentional, her use of the term “abuse” in this regard could not be the basis of a finding by a reasonable jury of “actual malice.”

advocate for women who had been exposed to abuse.³⁹

In her Op/Ed, Ms. Heard used the term "abuse" to summarize her experience, not as a reference to any specific event. Looking at this, anytime a person would publish a comment about a topic (not a specific incident regarding that topic) such as "discrimination" or "suppression," numerous claimants may mistake or interpret the mention of that overall topic for a specific allegation and bring a lawsuit. If this type of "defamation" is permitted to state a valid claim in Virginia courts, Virginia newspapers, television stations, commentators, and citizens will be severely limited in their ability to speak about important matters facing Virginians on a wide range of issues, not just abuse such as those discussed in Ms. Heard's Op/Ed, but also racial discrimination, issues involving the suppression of political speech, and any other issues involving public debate.

As the trial and subsequent comments of the jury illustrate, the term "abuse" is one that is subjective and is open to interpretation depending upon one's vantage point. R. 24325, 25568, 25714, 25737, 26343, 26507, 26525, 27899, 27912, 28507, 28650, 28684. Amici maintain that, as a matter of law, the term "abuse" in

³⁹ Ms. Heard became a "spokesperson" for abuse in the context of filing an abuse complaint in a California court, which cannot be the basis for a defamation claim. *Titan Am., LLC v. Riverton Inv. Corp.*, 264 Va. 292, 308, 569 S.E.2d 57, 66 (2002) (statement made in the course of a judicial proceeding is absolutely privileged if it is material and relevant to the proceeding).

the Op/Ed is “not reasonably capable of the defamatory meaning” that Mr. Depp ascribes to it, *Webb v. Virginian-Pilot Media Companies, LLC*, 287 Va. 84, 91, 752 S.E.2d 808, 812 (2014), but rather is Ms. Heard’s subjective opinion.

c. The Alleged “Abuse” Defamation Was Not Based Upon “Facts” that Were Verifiable

In reviewing a publication to determine whether it is defamatory, a reviewing court must consider the entire published statement, not just an excerpt thereof out of context. *Hyland*, 277 Va. at 47-48. The federal district court in the *Fairfax v. CBS* case achieved the correct balance by reviewing the entire publication and the alleged defamatory passages in context rather than focusing on certain passages and is consistent with Virginia precedent. 534 F.Supp.3d at 594.

A recent decision from the Western District of Kentucky regarding another highly publicized incident is instructive. *Sandmann v. N.Y. Times Co.*, Civ. Action No. 2:20CV23 (WOB), 2022 WL 2960763 (E.D. Ky. July 26, 2022).⁴⁰ In that case, a student wearing a MAGA hat (Sandmann) stood in front of an older Native American man (Phillips) while the latter attempted to go to the Lincoln Memorial to engage in a tribal ritual. *Id.* After the incident, Phillips was quoted by a newspaper as stating that “[Sandmann] just blocked my way and wouldn’t allow me to retreat.” *Id.* at *6. The plaintiff initially filed cases against several news

⁴⁰ Mr. Sandmann filed an appeal of this decision on August 24, 2022.

organizations on several grounds, but the court dismissed all other claims, narrowing the issues to whether the newspaper’s publication of this discrete quote was defamatory. *Id.* at *1-2, *8.

In analyzing this question, the Kentucky federal court applied Kentucky state law on defamation, which is similar to that of Virginia.⁴¹ Holding this statement as not defamatory, the court concluded that

“Phillips’ statements that Sandmann ‘blocked’ him and ‘wouldn’t allow him to retreat’ were objectively unverifiable and thus unactionable opinions. Instead, a reasonable reader would understand that Phillips was simply conveying his view of the situation.” *Id.* at *6. The court further explained that “[g]enerally, ‘blocking’ is an imprecise term capable of different meanings that ‘lacks a plausible method of verification.’”

Id. (quoting *Croce v. Sanders*, 843 F. App’x 710, 715 (6th Cir. 2021)).

Here, as in *Sandmann*, the word “abuse” is an imprecise term capable of different meanings that lacks “a plausible method of verification.” *Id.*; see *Sandmann v. WP Co. LLC*, 401 F. Supp.3d 781, 792 (W.D. Ky. 2019) (statements containing terms such as “swarming,” “taunting,” “disrespect,” “aggressive,” and others protected by the 1st Amendment because they are not “susceptible of being

⁴¹ Like Virginia, “[u]nder Kentucky law ‘alleged defamatory statements should be construed as a whole’ in ‘the whole context of the publication.’” *Sandmann*, 2022 WL 2960763, at *5 (quoting *Yancey v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1990). Compare this to *Hyland*, 277 Va. at 47, 670 S.E.2d at 751 (“a court must consider the statement as a whole.”).

proven true or false”) (*citing Milkovich*, 497 U.S. at 17, 21). In the present case, Depp’s counsel focused on just a few words and then merged those comments out of context with statements and acts that occurred more than two years before.⁴²

2. Statements in the Op/Ed Cannot be the Basis for a Finding of “Actual Malice”

In order to find a person liable for defamation when the matter at issue, as here, involves a public figure, a claimant must establish by clear and convincing evidence “actual malice,” which requires that “the plaintiff show[] that the

⁴² The trial court exacerbated its erroneous ruling allowing the case to proceed to trial despite the fact that Ms. Heard’s opinions were protected speech by refusing to give a jury instruction that would have provided some definition to the term “abuse” despite its vastly different meanings. Ms. Heard’s counsel submitted a proposed jury instruction that would have provided guidance to the jury regarding the vast range of “abuse” that could be considered as evidence of her belief in the truth of her statements in the Op/Ed. Def.’s Proposed Jury Instr. NN (formerly 39) [R. 21406-07]. The proposed jury instruction explained that “abuse” not only consisted of “acts of physical violence,” but also “angry words,” “coarse or abusive language,” “humiliating insults,” “an accumulation of cruel conduct,” “placing a person [or another] in reasonable apprehension of imminent serious bodily injury,” and “disturbing a person’s peace . . . based upon the totality of the circumstances,” with substantial detail regarding the latter. *Id.*

The trial court’s reasoning for rejecting this instruction was flawed. The trial judge’s rationale for denying the instruction was that “it’s not an abuse case. I understand there’s evidence of defamation of abuse. Your experts have testified to that, of what abuse is.” R.27788 [97:12-16] (May 20, 2022). The crux of the defamation claim was whether Mr. Depp “abused” Ms. Heard. Moreover, the experts could not provide testimony “of what abuse is,” because whether abuse occurred is not for an expert to define because that would usurp the province of the factfinder. *See Ward v Comm.*, 264 Va. 648, 653, 570 S.E.2d 827, 830 (Va. 2002) (expert’s testimony cannot “invade the province of the fact-finder on the ultimate issue of fact to be decided in the case”). Instead, it was the court that needed to provide the jury with guidance on that crucial issue through its jury instructions.

defendant knew the publication to be false or evidenced reckless disregard for the truth.” *Harte-Hanks Commc’ns v. Connaughton*, 491 U.S. 657, 659 (1989); *Levin*, 264 Va. at 155, 564 S.E.2d at 391; see *Sullivan*, 376 U.S. at 279-80. While there may be a debate as to whether the word “abuse” is a “verifiable fact” or an “opinion” (see below), in the present case, there was unrefuted evidence that Mr. Depp engaged in actions that could be considered “abusive” to Ms. Heard under any reasonable definition of the term. Thus, as a matter of law, the trial court should have held, and this Court must hold, that Ms. Heard’s statements about “abuse” were a legitimate subjective articulation of her perspective and cannot be considered to constitute “actual malice” in any defamation analysis.⁴³

Based upon the objective uncontested evidence of the actions described above that can only be considered abusive, the alleged implication of Ms. Heard’s statements that Mr. Depp had engaged in “abuse” and “domestic abuse” were reasonable and could not be found by a reasonable jury as uttered in “actual malice” under *Sullivan* and its progeny.⁴⁴ As a result, these defamation claims

⁴³ In fact, the evidence of “abuse” and “domestic abuse” was so strong that a reasonable jury should have found that Mr. Depp failed to prove the falsity of the alleged defamatory implications. As the axiom has long been stated, “truth[] is a complete defense to an action for [defamation].” *Alexandria Gazette Corp. v. West*, 198 Va. 154, 154, 93 S.E.2d 274, 275 (1956).

⁴⁴ Similarly, even had Ms. Heard written the headline to the online version, it is reasonable to believe that in Ms. Heard’s view, sexual harassment and non-contact sexual experiences, such as instances of sexualized degrading words that

should have been and now must be dismissed.

3. No Defamatory Facts Could Reasonably be Implied in the Op/Ed Written by Ms. Heard

In considering a claim of defamation by implication, the question is whether the article is reasonably capable of the defamatory meaning to which the claimant ascribes to it and is a legal issue for resolution by the court in its gatekeeping function prior to being submitted to the jury. *Webb*, 287 Va. at 90-91, 752 S.E.2d at 812. Where the statements of fact are literally true but by an implication arising from them are alleged to be false, the alleged implication must be reasonably drawn from the words actually used. *Id.* To be defamatory, a statement must be based upon the reasonably implied interpretation of the statement. *Yeagle*, 255 Va. at 297, 497 S.E.2d at 138 (1998) (holding no defamation where an allegedly defamatory statement “cannot reasonably be understood as stating an actual fact about [Plaintiff’s conduct].”).

In the present case, the statements made by Ms. Heard⁴⁵ were, on their face,

Depp used against her, including wanting to control her coffee meeting for a movie role and the incoherent, sexually harassing messages about her and Billy Bob Thornton, would be types of “sexual violence” described in the online Opinion Editorial headline. Thus, it would not be reasonable for a jury to consider that headline to have been written with actual malice.

⁴⁵ As previously explained, these statements were the headline referring to “sexual violence,” the passage about Ms. Heard being a “public figure representing domestic abuse,” and the reference to Ms. Heard having seen “how institutions protect men accused of abuse.” See, *infra*, at 7-8.

true. First, in 2016, Ms. Heard did become a “public figure” representing domestic abuse who eventually spoke out on behalf of the ACLU about abuse and eventually speaking out on behalf of the ACLU on sexual abuse and domestic violence.

ACLU Artist Ambassador Project, ACLU (May 18, 2022), <https://www.aclu.org/issues/aclu-ambassador-project> [App. NN]. For this advocacy, she was subjected to severely adverse responses. Abigail Rowe, *The Backlash Against Amber Heard Follows a Sad, Predictable Pattern*, Complex (June 6, 2016), <https://www.complex.com/pop-culture/2016/06/hollywood-domestic-abuse-steps> [App. FF].

Second, Ms. Heard has seen that institutions provide protection to men who have been accused of abuse. *Id.* Third, as an individual and later an ACLU representative, she spoke up about sexual violence and has received negative responses and further believes that this should change.

There was no mention of Ms. Heard’s marriage to Mr. Depp or any mention of him in the Op/Ed. Nonetheless, Mr. Depp alleges that each of these statements were defamatory by implication. Depp asserts that

[t]hese [three] statements are of and concerning Mr. Depp, and as he is Ms. Heard’s former husband and she publicly (and falsely) accused him of domestic abuse in May 2016. Moreover, Ms. Heard intended to refer to Mr. Depp in these statements, and those who know Mr. Depp or who read the ‘Sexual Violence’ op-ed understood these statements to be about Mr. Depp.

Complaint ¶¶ 77, 88, 99 [R. 22, 25, 27]. Depp further claimed that “[t]hese statements, which imply that Ms. Heard was the victim of domestic violence at the

hands of Mr. Depp, are false.” *Id.* ¶¶ 78, 89, 100 [R. 22-23, 25, 27].

There was no temporal relationship between the allegations of abuse by Ms. Heard with the resulting publicity and the Op/Ed article. The trial court allowed these claims to move forward despite the fact that the information that Mr. Depp used to establish the implications were made when Ms. Heard obtained a temporary restraining order over two years prior to the Op/Ed being published.

Moreover, there was no evidence presented that the Washington Post, the forum for the Op/Ed, had ever published any of the information relied upon to flesh out the alleged defamation. There was no evidence that the Washington Post had previously published articles about these allegations which were protected in 2016 and beyond the statute of limitations any time in near proximity to the Op/Ed. There can be no implication that the readers of the Op/Ed would have had a reasonable basis to assume these facially true and unrelated comments were about Mr. Depp. Mr. Depp stretches the meaning of the words used by Ms. Heard beyond their normal meaning and reasonable construction in the Op/Ed. *See Tavoulaareas v. Piro*, 817 F.2d 762, 779-80 (D.C. Cir. 1987) (statement that Mobil Oil president “set up his son in business” could not be extended to interpret that president had set up entire business relationship to benefit son).

B. Republication of the Headline Written by a Washington Post Staffer Cannot be the Basis for Liability

Although the Supreme Court of Virginia has not formally addressed the

issue, Amici believe that the Fourth Circuit is correct that Virginia would follow “[t]he great majority of states” that now follow the “single publication rule.” *See Morrissey v. William Morrow Co.*, 739 F.2d 962, 967 (4th Cir. 1984) (citation omitted). Under the “single publication rule,” “a statement on a website is not republished unless the statement itself is substantively altered or added to, or the website is directed to a new audience.” *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 879, *reh’g granted on other grounds*, 2021 WL 5942328 (W.D. Va. 2016). “[A] mere hyperlink, without more, cannot constitute republication.” *Lokhova v. Halper*, 995 F.3d 134, 143 (4th Cir. 2021).

It is uncontested that a Washington Post staffer wrote the headline “Amber Heard: I spoke up against sexual violence – and faced our culture’s wrath. That has to change,” or that Ms. Heard did not participate in the creation of that headline. (R. 27011). It is uncontroverted that Ms. Heard sent out a “tweet,” a message on the social platform Twitter forwarding an online copy of her article to her “followers” on that platform, without adopting or addressing the heading. (R. 27011-12). Nonetheless, the jury in its verdict found not only that she was liable for the headline, but that the republication was with actual malice.

In the present case, the facts are not sufficient to establish that Ms. Heard’s lone tweet was a republication for which she can be liable in defamation as it did not alter the headline, did not add to the headline, nor did it discuss the headline in

any manner. Further, no reasonable jury could have found that Ms. Heard's retweet of the article was done with "actual malice" to defame Mr. Depp. If this tweet is considered "republication" under Virginia law, then numerous other links on social media platforms to publications would create liability for millions of Virginians.

C. Mr. Depp Provided No Causal Connection Between the Op/Ed and Any Alleged Injury

Damages are not normally awarded when they are "uncertain, contingent or speculative." *Barnes v. Graham Virginia Quarries, Inc.*, 204 Va. 414, 418, 132 S.E.2d 395, 397 (1963) (actions *ex contractu* or actions *ex delicto*); see *Saks Fifth Ave., Inc. v. James, Ltd.*, 272 Va. 177, 188-91, 630 S.E.2d 304, 311-13 (2006) (breach of fiduciary duty and statutory conspiracy to injure business). Likewise, causation must be established in order to support a defamation verdict. *Bryant-Shannon v. Hampton Roads Cmty. Action Program, Inc.*, 299 Va. 579, 585-87, 856 S.E.2d 575, 578-79 (2021) (in Virginia, "[a] statement must contain the requisite defamatory sting to be actionable"). Given that Mr. Depp was awarded \$10 million in compensatory damages by the jury, due process requires some basis for such an award. If large claims for defamation can be awarded in the absence of evidence of causation of harm, media organizations across the Commonwealth have good reason to shut down their editorial and news departments in fear of such an enormous potential verdict.

Mr. Depp's counsel presented a distorted view of whether the Op/Ed

actually caused harm to Mr. Depp. There is no evidence that any Hollywood (or other) movie executive relied upon Ms. Heard's vague references to her being ostracized for becoming "a public figure representing domestic abuse" to deny Mr. Depp any role. *See* R. 27586 (no evidence that Disney had a copy of Op/Ed or considered it). On the contrary, there were numerous prior publications demonstrating the risks and dangers of employing Mr. Depp. *See supra* pp. 7-8. In fact, although Mr. Depp asserted that most of his damages from the Op/Ed were the result of Disney refusing to hire him for "Pirates of the Caribbean 6" (a movie that has yet to be made), Disney's corporate designee testified that Disney had found no copies of the Op/Ed or emails discussing the Op/Ed in its files, R. 27583, 27586, despite having copies and discussions of many other negative articles about Mr. Depp and a copy of the UK Judgment in its files. R. 27584-86. There can be little doubt that Mr. Depp's reputation and actions were well known long before the publication of the Op/Ed.⁴⁶

It is also alarming that the verdict was allowed to stand given the utter lack of causation evidence showing that this one Op/Ed was the source of Depp's financial troubles, especially given Depp's previous unsuccessful defamation suit

⁴⁶ It is likely that Mr. Depp's Virginia lawsuit, The Sun article, and the UK Lawsuit, did more for making the connection for readers (including Hollywood executives) between Mr. Depp and the "abuse" than did Ms. Heard's Op/Ed itself.

regarding statements from the English newspaper The Sun in another court. R. 7806-7934. Mr. Depp’s counsel in that case claimed that the “wife beater” assertion in The Sun article was a “reputation-destroying, career ending allegation.” Emily Goddard, *Johnny Depp: ‘Wife Beater’ Libel Trial Enters Final Day as Lawyer Calls Allegation ‘Career-Ending’*, Independent (July 28, 2020, 12:18 PM), <https://www.independent.co.uk/news/uk/home-news/johnny-depp-libel-trial-the-sun-amber-heard-high-court-a9641651.html> [App. RR]. How could anything said by innuendo by Ms. Heard in the December 18, 2019 Op/Ed have damaged Mr. Depp if his reputation had allegedly already been “destroyed” and his career “ended” in April 2018, when The Sun article was published?

It is understandable that the jury was misled into believing that there was such a connection between changes in Mr. Depp’s career trajectory and Ms. Heard’s previous statements (long before the publication of the Op/Ed) given that the jury was not permitted to see evidence of other publications which were strongly critical of Mr. Depp, especially The Sun article and subsequent High Court trial. For six weeks, the jury was exposed only to the alleged statements by Ms. Heard from April 2016 up through the Op/Ed’s publication in December 2018 without the context of other critical publications regarding Mr. Depp.

D. The Trial Court Should Have Dismissed This Action Based Upon Comity

In addition to the First Amendment concerns regarding this verdict, there is

reason for the Amici to be concerned that the trial court gave short shrift to the UK High Court’s decision finding that it was “substantially true” that Mr. Depp engaged in spousal abuse against Ms. Heard causing her to suffer significant injury and on occasion leading her to fear for her life. R. 7806, 7808, 7828, 7900, 7931 [¶¶ 12, 80, 455(xi), 583, 585]. The UK court further found the abuse to have sexual dimensions and prodigious amounts of property damage caused during jealous sexual accusations in non-contact sexual violence against Ms. Heard which created a probable balance for sexual assault. *See, e.g.*, R. 7881, 7900 [¶¶ 370(i) (sexual dimensions), 455(xii) (property damage)]. The Fairfax trial court held that

the libel laws of Virginia are starkly different than those of England. The Declaration of Independence and the First Amendment of the United States Constitution represent major departures from the English Common Law with respect to freedom of speech and freedom of the press.

Depp v. Heard, 108 Va. Cir. 382, 2021 WL 8315070 at *7 (Fairfax Cir. Ct. Aug. 17, 2021) (citation omitted). This is illogical given that any First Amendment protections implicated by the alleged defamation in the Op/Ed would have protected Heard’s speech, not Depp’s interests.⁴⁷ The considerations regarding comity and the UK judgment supported its application in the present case. *See McFarland v. McFarland*, 179 Va. 418, 430, 19 S.E.2d 77, 84 (1942) (Supreme

⁴⁷ How the Declaration of Independence affects the parties’ legal interests regarding defamation in this matter is a mystery to Amici.

Court of Virginia recognizing comity); *Am. Online, Inc. v. Nam Tai Elec., Inc.*, 264 Va. 583, 591-92, 571 S.E.2d 128, 133 (2002) (factors to be considered in evaluating whether to grant comity).⁴⁸

In the current age, when a fact is published in one forum, it is often picked up and republished in various other media. A claimant should not be able to sue one publisher in one jurisdiction, lose, and then sue another publisher regarding the exact same facts in another jurisdiction, hoping to get a better result. While there may be exceptions to this rule (such as jurisdictions in which the rule of law is not given the same respect as that of our Commonwealth), here Mr. Depp got a “second bite at the apple” on the very same facts upon which he had already lost in a case in the United Kingdom. What is more galling is that Mr. Depp was the one who filed the UK action and he was the one who chose to litigate that case first, relying on the more favorable standard of review. When he lost in the UK, that decision should have shut down any further actions based upon the same facts.

CONCLUSION

The trial in this case was not about any defamatory statements made by Ms. Heard within her Op/Ed itself, but rather was a vendetta for all of the publicity surrounding the allegations of abuse by Mr. Depp from the date that Ms. Heard

⁴⁸ Depp demanded that the UK action be tried first because of the favorable burden of proof in the UK.

sought and obtained a restraining order in May 2016 up to December 18, 2018.

A defamation lawsuit based upon this Op/Ed was not the legitimate vehicle for remedying Mr. Depp's dissatisfaction with how his career has developed, how his marriage ended, and the negative publicity he has received (much of it warranted by his own actions, as evidence excluded would have shown). He cannot seek retribution for the allegations that were made in the California courts regarding his alleged physical abuse of Ms. Heard, their divorce, and subsequent publicity from various venues including The Sun. Defamation by implication is a limited doctrine that does not allow a litigant to rehash dissatisfaction with his public coverage from years ago and from all sources. The doctrine further does not allow the claimant to twist the meaning of the words in a publication that is alleged to be defamatory. When evidence establishes that the defendant has a subjective basis, considering their vantage point, for the statements they have made, actual malice cannot be reasonably found.

The damage that will be done if the verdict is upheld to First Amendment jurisprudence, the ability of Virginians to express their opinions, and the ability of women to report domestic violence for fear of retribution and an expensive lawsuit would be no less than catastrophic. For these reasons, the Amici respectfully request that this Honorable Court reverse the judgment against Ms. Heard with instructions to dismiss all of Mr. Depp's claims.

Respectfully submitted,

Thomas F. Urban II, VSB #40540
Mark Malonzo, VSB #97692
Fletcher, Heald & Hildreth, PLC
1300 17th Street North, Suite 1100
Arlington, Virginia 22209
(703) 812-0462; (703) 812-0486
urban@fhhlaw.com

Antonio R. Sarabia II (*pro hac vice*)
CA Bar #90109
IP Business Law, Inc.
320 via Pasqual
Redondo Beach, CA 90277
(310) 377-5171
asarabia2@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and accurate copy of the foregoing was sent via email and/or U.S. First Class Mail to:

J. Benjamin Rottenborn (VSB No. 84796)
Joshua R. Treece (VSB No. 79149)
Elaine D. McCafferty (VSB No. 92395)
Karen M. Stemland (VSB #47167)
WOODS ROGERS VANDEVENTER
BLACK PLC
10 S. Jefferson Street, Suite 1400
P.O. Box 14125
Roanoke, Virginia 24011
Tel.: (540) 983-7540
brottenborn@woodsrogers.com

Benjamin G. Chew (VSB #29113)
Andrew C. Crawford (VSB
#89093)
BROWN RUDNICK LLP
601 Thirteenth Street NW, Suite
600
Washington, DC 20005
Tel.: (202) 536-1785
Fax: (617) 289-0717
bchew@brownrudnick.com
acrawford@brownrudnick.com
*Counsel for Appellant, John C.
Depp, II*

Jay Ward Brown (VSB No. 34355)
BALLARD SPAHR LLP
1909 K Street NW, 12th Floor
Washington, DC 20006-1157
brownjay@ballardspahr.com
Counsel for Appellee, Amber Laura Heard

on this the 23rd day of November, 2022.

/s/ Thomas F. Urban II

Thomas F. Urban II

I further certify that this Brief does not exceed the longer of 50 pages or 12,300 words, excluding those portions that by rule do not count toward the limits.

/s/ Thomas F. Urban II

Thomas F. Urban II