IN THE SUPREME COURT OF FLORIDA

CASE NO. 06-2491

JEWS FOR JESUS, INC.,

Petitioner,

v.

EDITH RAPP,

Respondent.

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL FOR THE FOURTH DISTRICT OF FLORIDA (Case No. 4D05-4870)

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

Gregg D. Thomas
James J. McGuire
Rachel E. Fugate
THOMAS & LOCICERO PL
400 N. Ashley Drive, Suite 1100
Tampa, Florida 33602
Telephone: (813) 984-3060
Facsimile: (813) 984-3070

Attorneys for Amici Curiae: Media General Operations, Inc.; The New York Times Company; Orlando Sentinel Communications Company; Sun-Sentinel Company; Florida Press Association; ABC, Inc.; ESPN, Inc.; E.W. Scripps Company; Association of American Publishers; and Cox Enterprises, Inc.

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IDENTITY AND INTEREST OF THE AMICI CURIAE

Amici curiae submitting this brief ("Amici") are publishers, a publishing trade association, news organizations, and news broadcasters.[1] Amici have a strong interest in this proceeding because recognition in Florida of false light invasion of privacy will inhibit the dissemination of news and information of public concern and will force Amici to spend time and resources defending lawsuits styled as false light claims that are, in reality, defective defamation claims. Amici urge the Court to refuse to recognize the largely duplicative and needlessly speech-inhibiting false light cause of action in Florida or, at a minimum, to limit its abuse by holding that other important procedural and substantive limitations applicable to defamation claims – including the statute of limitations and other defenses, privileges, conditions precedent, jurisdictional limits, and burdens of proof – apply equally to actions for false light invasion of privacy.

SUMMARY OF ARGUMENT

Today, across Florida, media entities are defendants in a large number of false light cases. Although arising in many different factual contexts, these cases all share one common characteristic: despite being labeled as false light claims, they are in fact defamation claims to which plaintiffs have applied the false light label for strategic reasons, including avoiding the substantive and procedural

[1] A complete list of Amici is set forth in Appendix A to this Brief.

protections of defamation law or simply to exploit the fact that the contours of false light are vague and unsettled and that false light claims, accordingly, are less readily subject to dismissal. If this Court recognizes false light as a viable cause of action in Florida to which all of the substantive and procedural protections of defamation law do not attach, the courts will continue to be repeatedly confronted with false light litigation brought by plaintiffs unable to state viable defamation (or intentional infliction of emotional distress) claims. This will create unnecessary confusion, tax judicial resources, and impair free speech by Florida media entities and others who are concerned that the publication of factually accurate and non-defamatory information might nevertheless give rise to a false light claim.

ARGUMENT

I. This Court Should Not Recognize A Cause Of Action For False Light Invasion Of Privacy.

This Court should not recognize the false light tort because false light claims are almost entirely duplicative of defamation and other torts and threaten to chill far more speech – including factually accurate and non-defamatory speech – than is justified by any otherwise unprotected interest. To the extent false light permits recovery based on non-defamatory publications, it creates an unnecessary and unwarranted tension with the First Amendment. As explained in greater detail below, the threat of false light litigation substantially intrudes upon free expression

because the standard for determining whether speech could be actionable under false light is so vague relative to the well-developed standard for defamation as to be unworkable, as several pending cases discussed below illustrate.[2]

A. False Light's "Highly Offensive To A Reasonable Person" Standard Is Unclear And Highly Subjective.

1. Courts Have Been Inconsistent In Applying The Highly Offensive Standard.

In those jurisdictions that recognize the false light tort, a defendant generally is liable if he (i) places the plaintiff before the public in a "false light" that is (ii) highly offensive to a reasonable person and (iii) acts with knowledge of or reckless disregard for the light in which the plaintiff will be placed and (iv) with knowledge of or reckless disregard for the falsity of that light. *See* RESTATEMENT (SECOND) OF TORTS § 652E (1977). The uncertainty engendered by this tort stems from the fact that a claim can arise from speech that is highly offensive to a reasonable person but is *not* defamatory. In defamation, of course, the plaintiff must prove that the false words were defamatory, meaning they tended to injure her reputation. *Id.* § 559.[3] By contrast, a false light plaintiff need only prove that the false light in

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[2] Moreover, Amici agree with the arguments set forth in Petitioner's Initial Brief against recognizing false light in Florida.

[3] Actual reputational injury need not be shown. *See Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976).

which the defendant cast her was *highly offensive to a reasonable person*, whatever that may mean. *See Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003).

The meaning of "highly offensive to a reasonable person" is amorphous and unsettled. Unlike the reputational interest protected by defamation law, the interest protected by false light is hard to pin down. "Scholars writing on false light variously describe the protected interest as 'peace of mind,' 'injury to the inner person,' 'freedom from scorn and ridicule, freedom from embarrassment, humiliation and harassment, freedom from personal outrage, freedom from injury to feelings, freedom from mental anguish, freedom from contempt and disgrace, and the right to be let alone.'" *Denver Publ'g Co. v. Bueno*, 54 P. 3d 893, 901 (Colo. 2002) (quoting Nathan E. Ray, Note, *Let There be False Light: Resisting the Growing Trend Against an Important Tort*, 84 Minn. L. Rev. 713, 726 (2000) (citation omitted)). Or, as one court expressed it, "[f]alse light may be brought against any untruth to which the subject of the speech takes umbrage." *Cain v. Hearst Corp.*, 878 S.W.2d 577, 583 (Tex. 1994).

Florida courts have not yet defined the "highly offensive" standard other than to refer to the definition in the Restatement (Second) of Torts. *See, e.g., Rapp v. Jews for Jesus, Inc.*, 944 So. 2d 460, 467 (Fla. 4th DCA 2006). The Restatement declares, somewhat tautologically, that a communication is highly offensive to a reasonable person "when the defendant knows that the plaintiff, as a reasonable

man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity." RESTATEMENT (SECOND) OF TORTS § 652E cmt. c. The problem with the Restatement's definition, of course, is that it "beg[s] the central question of what makes untruths legally 'offensive'; as a result the standard fails as an intelligible screening device." Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. Rev. 364, 374 (1989).

Because the "highly offensive" standard is unclear, the reported cases are all over the map in terms of whether particular falsehoods qualify as highly offensive. In *Lane v. Random House, Inc.*, 985 F. Supp. 141 (D.D.C. 1995), for example, the statement that a Kennedy assassination conspiracy theorist was "guilty of misleading the American public" was found not to be highly offensive. *Id.* at 148-49. In *Zieve v. Hairston*, 598 S.E.2d 25 (Ga. 2004), however, the publication of a man's before-and-after hair transplant photographs satisfied the highly offensive standard. *Id.* at 32. "The subjectivity of the offensiveness element" in these cases "allows a wide range of results, often making it difficult to predict the outcome of a particular case." Robert D. Sack, *Sack on Defamation*, § 12.3.1, at 12-20 (3d ed. 2007). This subjectivity also calls into question the constitutionality of the false light tort. *See, e.g.*, *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964) ("[A] law forbidding or requiring conduct in terms so vague that men of common intelligence

must necessarily guess at its meaning and differ as to its application violates due process of law.").

In false light cases, as in defamation cases, the trial court must serve as a gatekeeper to determine whether a statement is capable of satisfying the highly offensive to a reasonable person standard. *See Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983). But the inability thus far of courts to provide a coherent and objective explanation of what the standard means suggests that this gatekeeping function necessarily will be performed in inconsistent ways that are contrary to the very goals of tort law, *see Denver Publ'g*, 54 P.3d at 897-98 (discussing tort law's role in encouraging socially acceptable behavior while deterring wrongful conduct), and that will intrude excessively on socially valuable speech.

2. False Light Would Create Enormous Uncertainty For The Media.

The lack of clarity as to what constitutes actionable false light necessarily creates significant problems for judges, juries, and practitioners, as the reported cases demonstrate. For Amici, the lack of clarity is even more problematic, as it threatens to interfere on a daily basis with the publication of non-defamatory (and factually accurate) news and information, *i.e.*, with the core, constitutionally protected business activities of Amici and their members. In fact,

> [t]his chill can be substantial given the hierarchical nature of the news and information media. News and information is normally gathered by reporters and researchers, and then presented to editors for processing and the decision whether to publish. Because defamatory material injures reputation, such material usually provides to the editors a red warning flag of legal danger that can be countered by careful verification of the questionable material or its modification or excision. But false statements that are neutral or even laudatory with respect to a subject's reputation or status provide no such warning to editors. Consequently, editors are unable to protect themselves and their publishers from liability except at the expense of laboriously checking the accuracy of *all* statements of fact about individuals presented by the reporters and researchers. There are thus two alternatives confronting editors because of the false light tort: either risk liability by failing to double check *every* asserted fact about individuals, or avoid liability at a great expenditure of time and money. The news and information media are burdened under either alternative.

Harvey L. Zuckman, *Invasion of Privacy – Some Communicative Torts Whose Time Has Gone*, 47 Wash. & Lee L. Rev. 253, 257-58 (1990).[4]

In effect, recognition of false light by this Court would expand the range of libel and slander law to cover a wide and uncertain body of non-defamatory speech. This is of serious concern to Amici because "[w]hatever is added to the field of libel is taken from the field of free debate." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964). Given the questionable value of false light as a protection against real injury, as discussed below, the false light tort should not

[4] *See also Cain*, 878 S.W.2d at 583 ("Editors for the media may guard against defamation by being alert to facts which tend to diminish reputation; under false light, any fact in the story, no matter how seemingly innocuous, may prove to be the basis for liability.").

be permitted to intrude upon non-defamatory – and otherwise non-actionable – speech and debate.

B. The Pending Cases In Florida Demonstrate That False Light Is A Conceptually Empty But Dangerous Tort.

Some courts that have embraced false light as a viable cause of action have suggested that fears of a "parade of persons with hurt feelings clogging our courthouses" are unjustified. *See, e.g.*, *Welling v. Weinfeld*, 866 N.E.2d 1051, 1057 (Ohio 2007). Yet that is exactly what is occurring in the lower courts in Florida.

For example, in *Butler v. New York Times Co.*, 35 Med. L. Rep. 1894 (Fla. 8th Cir. Ct. 2007), a land developer sued for false light invasion of privacy claiming that a newspaper had published reports that, while literally true, falsely implied that he was unethical and had bribed elected officials. *Id.* at 1895. There is no doubt that if the newspaper in fact intentionally conveyed such a message, the plaintiff would have had a viable defamation claim. But, rather than bring a defamation claim, the plaintiff in *Butler* sued for false light invasion of privacy, presumably to avoid the requirement that before suing a newspaper or media entity for defamation the plaintiff must provide the newspaper with written notice and an opportunity to correct or retract the publication. If a retraction is printed, the newspaper can avoid punitive damages. *See* §§ 770.01, 770.02, Fla. Stat. (2006).

In other words, false light was not employed because it protected against conduct or injury different from that protected by defamation law, but simply because it seemed to provide a loophole to avoid a protection that the Florida Legislature afforded to media entities defending against defamation claims.[5]

Similarly, in *Sampson v. Media General Operations, Inc.*, No. 07-518-CI-19 (Fla. 6th Cir. Ct. filed Jan. 27, 2007), the plaintiff claimed that certain television news reports, although literally truthful, falsely implied that she had stolen federal grant funds for her own use and had defrauded the Veterans Administration. Despite the fact that the intentionally false implication that a person stole money or defrauded the government would be considered defamatory, the plaintiff sued in false light, not defamation. As in *Butler*, the plaintiff brought her claim without providing notice to the television station under Section 770.01 or affording the station an opportunity to correct or retract its report, as provided in Section 770.02. The reason the plaintiff labeled her claim as a false light claim was to avoid defamation law's statutory limit on punitive damages, as plaintiff's counsel told defense counsel in arguing against a motion to dismiss.

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[5] Based upon the decision in *Gannett Co. v. Anderson*, 947 So. 2d 1 (Fla. 1st DCA 2006), the trial court ultimately granted judgment on the pleadings in favor of defendants because the plaintiff failed to provide notice as required under Section 770.01. *See Butler v. New York Times Co.*, 35 Med. L. Rptr. 1894, 1896 (Fla. 8th Cir. Ct. 2007). That decision is now on appeal. *See Butler v. New York Times Co., appeal docketed*, No. 07-3366 (Fla. 1st DCA June 27, 2007).

In *Lusczynski v. Tampa Bay Television*, No. 03-11424 (Fla. 13th Cir. Ct. 2006), the plaintiff sued a television station for false light, claiming that the station broadcast true statements about him that implied that he was a corrupt cop who was promoted based upon favoritism. He later amended his complaint to add a defamation claim based on precisely the same true statements. Once it became clear, however, that the plaintiff could not prove the actual malice necessary to support his defamation claim – and because the Second DCA's decision in *Heekin v. CBS Broadcasting, Inc.*, 789 So. 2d 355 (Fla. 2d DCA 2001), suggested that he would not need to prove it if he proceeded under a false light theory – he dismissed his defamation claim. Remarkably, the plaintiff prevailed on his argument that the single-action rule did not bar the false light claim because the defamation claim was voluntarily dismissed by the plaintiff himself rather than having been dismissed by the trial court. As a result, the defendants were required to go to trial on the false light claim (where, fortunately, they prevailed).[6]

[6] The *Lusczynski*, *Sampson*, and *Butler* cases are good examples of the consequences of the decision in *Heekin*, where the court suggested erroneously that falsity is not an element of a false light claim. This suggestion has provided plaintiffs a foothold for trying to argue that their defamation claims are not really defamation claims because they can be based on literally truthful speech. This distinction is wrong because "[t]here is no difference between a libel by implication claim and a false light invasion of privacy claim if the statements are defamatory in both cases." *Anderson*, 947 So. 2d at 11. "In either case, the falsity of what the publication communicates is the essence of the claim." *Id.* at 8. Moreover, *Heekin*'s suggestion that truth is not a defense to a false light claim is

In *Canonico v. Callaway*, 35 Med. L. Rep. 1549 (Fla. 13th Cir. Ct. 2007), a would-be a television producer sued a television station and others for defamation based upon a news report about the plaintiff's charging a fee to applicants for a reality television program but never producing the show. After the defendants argued that defamation law's two-year statute of limitations barred the claim, the plaintiff amended his complaint to add a false light claim. *Id.* at 1551. The factual basis for the false light claim was precisely the same as the factual basis for the defamation claim. *See id.* at 1552. The reason the claim has been re-labeled as false light is that the case is pending in the Second District, in which *Heekin* is controlling and which currently permits some false light claims to be governed by the four-year statute of limitations as opposed to the two-year period for defamation actions. *See Heekin*, 789 So. 2d at 358.

Similarly, in *Gutman v. Orlando Sentinel*, No. 2005-CA-4071 (Fla. 9th Cir. Ct. filed May 11, 2005), an Orlando psychiatrist sued a newspaper and its parent for defamation and false light based upon the publication of articles involving patient deaths resulting from overdoses of prescription painkillers that allegedly hurt the doctor's reputation. Because both causes of action stem from the same allegedly false and defamatory statements and/or implications, the false light

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certainly wrong. *See, e.g.*, *Florida Publ'g Co. v. Fletcher*, 340 So. 2d 914, 918 (Fla. 1977) (without falsity, there can "be no recovery under the 'false-light' doctrine of invasion of privacy").

claim is duplicative of the defamation claim. However, the gist of the plaintiff's false light argument is that if the defendants establish that the statements at issue are in fact true, then the cause of action sounds in false light, not defamation. Should the plaintiff prevail on this novel theory, it would deprive the defendants of a fundamental First Amendment defense to a defamation claim: truth.

These cases and many others currently pending illustrate that false light is not used by plaintiffs in Florida to protect a bona fide interest left unprotected by defamation law. Rather, they use it either as a means of avoiding limits the Constitution, the statutes of Florida, and Florida common law place on defamation claims or as a means of attempting to revive failed defamation claims. False light provides plaintiffs who cannot succeed under the law of defamation with the ability to present a moving target and thereby enables them to protract litigation without any justification rooted in a distinct, cognizable legal interest. This situation is highly detrimental to free expression. The pleading games fostered by false light law provide a powerful rationale for rejecting the tort in Florida.

II. Rapp's Claim Can Be Resolved Without Reference To False Light.

A. False Light Is Not Necessary To Redress Alleged Damage To Rapp's Reputation.

The instant lawsuit concerns an article by plaintiff Edith Rapp's stepson,

Bruce Rapp, about his visit with his ill father and Edith Rapp. The article, which was published by defendant Jews for Jesus, Inc., stated in part:

> I had a chance to visit with my father in Southern Florida before my Passover tour. He has been ill for sometime . . . . On this visit, whenever I talked to my father, my stepmother, Edie (also Jewish), was always close by, listening quietly. Finally, one morning Edie began to ask me questions about Jesus. I explained how G-d gave us Y'Shua (Jesus) as the final sacrifice for our atonement, and showed her the parallels with the Passover lamb. She began to cry, and when I asked her if she would like to ask G-d for forgiveness for her sins and receive Y'Shua she said yes! My stepmother repeated the sinner's prayer with me – praise G-d! Pray for Edie's faith to grow and be strengthened. And please pray for my father Marty's salvation.

Rapp, 944 So. 2d at 462. According to the district court, "[t]he core of [Rapp's] lawsuit is that Jews for Jesus falsely, and without her permission, portrayed her as a convert to the organization in a newsletter that it published and distributed." *Id.*

In her original Complaint and Amended Complaint, Rapp asserted claims for false light invasion of privacy, defamation, and intentional infliction of emotional distress. *Rapp*, 944 So. 2d at 462-63. In defamation cases, such as Rapp's, "[t]he court has a 'prominent function' in determining whether a statement is defamatory, and if a statement is not capable of a defamatory meaning, it should not be submitted to a jury." *Smith v. Cuban Am. Nat'l Found.*, 731 So. 2d 702, 704 (Fla. 3d DCA 1999). Acting in this gatekeeper role, the district court in this case found that to the reasonable reader the article did not portray Rapp in a negative manner

and, therefore, "the language in the Jews for Jesus newsletter was not defamatory." *Rapp*, 944 So. 2d at 465.[7]

Having properly rejected Rapp's defamation claim, the court then should have applied Florida's longstanding single-action rule and affirmed dismissal of Rapp's false light claim based on the same statements. *See, e.g.*, *Fridovich v. Fridovich*, 598 So. 2d 65, 69 (Fla. 1992). But the district court instead considered Rapp's false light claim as an independent cause of action and ignored the single-action rule. Without analyzing how or why the article was highly offensive to a reasonable person, and without citation to any case law, the court declared that "public misrepresentation of a person's religious beliefs" is sufficiently egregious to support a false light claim. *Rapp*, 944 So. 2d at 468. As a result, it reinstated Rapp's false light claim. *Id.*

The Fourth District's holding demonstrates again how false light permits unsuccessful defamation plaintiffs to avoid dismissal. In Rapp's case, it allows this because false light lacks defamation law's requirement that the language at issue be defamatory.

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[7] Rapp presumably disagrees with this conclusion and could argue that, as the District Court suggested, her claim might have been viable if the defamatory effect of the speech were viewed from the perspective of a substantial and respectable minority. *See Rapp*, 944 So. 2d at 465-66. Rapp has not, however, cross-appealed to this Court the dismissal of her defamation claim.

If affirmed, the effect of the Fourth DCA's decision would be to create a watered-down version of Florida defamation law in which defamatory meaning is no longer relevant. Amici urge this Court not to adopt a tort that throws open the door to claims based on statements or alleged insinuations that the plaintiff may not like but that are not injurious to her reputation in a manner that sounds in defamation. Rejection of false light would be consistent with this Court's deliberate and thoughtful balancing of all of the interests affected by laws that potentially limit or punish speech, including the historically-based interest in personal reputation.[8] It would also be consistent with this Court's intent not to create unnecessarily duplicative torts. *See Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003) ("the tort of invasion of privacy was *not* intended to be duplicative of some other tort") (emphasis added).

B. False Light Is Not Necessary To Redress Rapp's Alleged Mental Or Emotional Injury.

To the extent that Rapp might argue she suffered emotional distress and humiliation rather than reputational injury, her claim could still have been addressed by existing Florida tort law. Defamation law, while focused on

[8] This Court has noted that Florida tort law serves "the constitutionally protected liberty interest in one's reputation." *Milks v. State*, 894 So. 2d 924, 927 n.3 (Fla. 2005). *See also Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) ("[I]mportant social values . . . underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.").

reputational injury, undoubtedly permits a plaintiff to recover for non-reputational injury, such as mental suffering or anguish. *See, e.g., Miami Herald Publ'g Co. v. Ane*, 458 So. 2d 239, 242-43 (Fla. 1984). Thus, Rapp could recover in defamation for mental suffering or anguish, so long as she first pleaded an actionable defamation claim based on false and defamatory statements.

Similarly, a plaintiff claiming emotional injury may pursue an intentional infliction of emotional distress claim, as Rapp did in this case. In fact, non-defamatory but outrageous speech is actionable whether or not the speech casts a plaintiff in a false light. *See, e.g., Ford Motor Credit Co. v. Sheehan*, 373 So. 2d 956 (Fla. 1st DCA 1979) (emotional distress case in which defendant falsely told plaintiff that one or more of her children had been involved in a serious car accident). Here, the district court found that the conduct of Jews for Jesus was not beyond all possible bounds of decency and therefore "[fell] short of conduct required to support the tort of intentional infliction of emotional distress." *Rapp*, 944 So. 2d at 467. As a result, the court affirmed the dismissal of Rapp's emotional distress claim. *See id.*

Should Rapp, under a false light theory, be permitted to pursue a claim for emotional injury based upon conduct that might be "highly offensive to a reasonable person" but not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious,

and utterly intolerable in a civilized community,"[9] then the requirement of outrageous conduct for emotional distress claims could be readily circumvented by pleading false light, just as the requirement of defamatory meaning for defamation claims could be circumvented by the recognition of false light. This Court's decisions construing the outrageous conduct standard make clear that this requirement should not be so casually swept aside. *See, e.g.*, *Eastern Airlines, Inc. v. King*, 557 So. 2d 574, 576 (Fla. 1990) (holding that airline did not act outrageously when it failed properly to maintain and operate its aircraft, resulting in aircraft's nearly crashing with passengers on board).[10]

If the Fourth DCA was wrong and Rapp's emotional distress claim (or her defamation claim) was viable, then existing tort law would provide Rapp a remedy without any need for false light. If, on the other hand (and as Amici believe), the district court found correctly that Rapp's allegations failed to state a claim for intentional infliction of emotional distress or defamation, then Rapp is simply in the same position as any other plaintiff who fails to state a claim for relief. Rapp's

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9 *See Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278-79 (Fla. 1985) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

10 The high standard for prevailing on an emotional distress claim is based, at least in part, on the fact that emotional harm is difficult to establish, damages are not easily quantifiable, and the precise cause of injury is elusive. *See, e.g.*, *R.J. v Humana of Fla., Inc.*, 652 So. 2d 360, 362 (Fla. 1995). These same problems concerning the highly subjective nature of emotional harm also counsel against recognition of false light as a viable cause of action, particularly where the "highly offensive" false light does not qualify as "outrageous."

case presents no basis for recognizing a new cause of action, as she claims no injury not already redressable by defamation or intentional infliction of emotional distress.

III. If This Court Recognizes False Light, It Must Apply The Limits Of Defamation Law.

Amici urge the Court not to recognize false light. If, however, the Court does so, it must be constrained so as to comport with the Constitution and with well-established defamation protections. *See, e.g*, *Howard v. Antilla*, 294 F.3d 244, 248-49 (1st Cir. 2002) ("Where a false light invasion of privacy action involves a public figure plaintiff and a media defendant, the federal constitution imposes the same requirements that would apply to an analogous claim for defamation . . . ."); *cf. Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (holding that a public figure plaintiff, whose libel claim failed, cannot succeed on a claim for intentional infliction of emotional distress without first proving "actual malice" as required in a libel action). Indeed, because of the vast similarities between false light and defamation, it makes little sense to treat the claims differently in most respects.

> As a matter of policy, the fact that the tort deals with injury to feelings rather than injury to reputation ought not to affect whether a privilege is mandated, whether distribution of many copies of a communication constitutes more than a single publication, the period of time during which a plaintiff may bring suit, or perhaps the effect of correction or retraction.

Robert D. Sack, *Sack on Defamation*, § 12.3.4, at 12-27 (3d ed. 2007).

At a minimum, then, if false light is recognized in Florida, the right to receive pre-suit notice and the right to publish a retraction should apply to such claims. *See* §§ 770.01, 770.02, Fla. Stat. The two-year statute of limitations should similarly apply. *See* Fla. Stat. § 95.11(4)(g). False light plaintiffs should be required to prove that the speech at issue is false, *see* Restatement (Second) of Torts § 652E, cmt. a ("it is essential to the rule stated in this Section that the matter published concerning the plaintiff is not true"), and the burden of proving falsity should rest with the plaintiff, *see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

Similarly, statements of opinion or rhetorical hyperbole that are not provably false should not be actionable. Also, the same fault standard – knowledge of or reckless disregard for falsity in public-figure plaintiff cases – must be proved in all false light cases, *see Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967), and defamation privileges must apply with equal force to false light claims, *see* Restatement (Second) of Torts §§ 652F, 652G.

Finally, because false light purports to be a form of invasion of privacy, such claims should not be recognized if they involve speech on matters of public concern. As the name suggests, a cause of action for false light *invasion of privacy* protects an individual's right to be let alone. Thus, to state a claim for false light

invasion of privacy, the publicity that places a person in a false light in the public eye must relate to the plaintiff's private life. In essence, a plaintiff must have a reasonable expectation of privacy or a legitimate privacy interest for the claim to stand. A finding that the publicity related to a matter of legitimate public concern should be fatal to any claim. *See, e.g.*, 62A Am. Jur 2d. *Privacy* § 130 (1990) ("In order to be actionable, an action for false-light must involve the private affairs of the subject, and cannot relate to any matter which is inherently 'public' or 'of legitimate interest to the public.'"); *Sturgeon v. Retherford Publ'ns, Inc.*, 987 P.2d 1218, 1227 (Okla. Ct. App. 1999) (in a false light invasion of privacy case, "[t]he disclosure must be a public disclosure, and the facts must be private and of no legitimate public concern"); *Cox Commc'ns, Inc. v. Lowe*, 328 S.E.2d 384, 386 (Ga. Ct. App. 1985) (rejecting false light claim because it was "based upon [defendant's] publication of [plaintiff's] likeness in the course of a news report about a subject of legitimate public interest").

CONCLUSION

Amici respectfully urge the Court not to recognize false light in Florida. But if the tort is to be recognized, it must be limited so as to comport with the First Amendment and with well-established limitations on defamation claims under Florida law.

Respectfully submitted,

Gregg D. Thomas
Florida Bar No. 223913
James J. McGuire
Florida Bar No. 0187798
Rachel E. Fugate
Florida Bar No. 0144029
THOMAS & LOCICERO PL
400 N. Ashley Drive, Suite 1100
Tampa, Florida 33602
Telephone: (813) 984-3060
Facsimile: (813) 984-3070

Attorneys for AMICI CURIAE

Of counsel:

David S. Bralow
Florida Bar No. 0802727
TRIBUNE COMPANY
220 East 42nd Street, Ste. 400
New York, NY 10017
Telephone: (212) 210-2893
Facsimile: (212) 210-2883

Henry S. Hoberman
ABC, INC.
77 W 66th St
New York, NY 10023-6201
Telephone: (212) 456-6371
Facsimile: (212) 456-7753

Andrew C. Carington
MEDIA GENERAL
OPERATIONS, INC.
333 E. Franklin Street
Richmond, Virginia 23219
Telephone: (804) 649-6957
Facsimile: (804) 649-6500

David Giles
E.W. SCRIPPS COMPANY
312 Walnut Street, Suite 3800
Cincinnati, OH 45201
Telephone: (513) 977-3891
Facsimile: (513) 977-3892

David McCraw
THE NEW YORK TIMES COMPANY
Legal Department
229 W. 43rd St.
New York, NY 10036
Telephone: (212) 556-4031
Facsimile: (212) 556-4634

Dale Cohen
COX ENTERPRISES, INC.
6205 Peachtree Dunwoody Rd.
Suite 16
Atlanta, GA 30328
Telephone: (678) 645-0848
Facsimile: (678) 371-7553

Sam Morley
FLORIDA PRESS ASSOCIATION
2636 Mitcham Drive
Tallahassee, Florida 32308
Telephone: (850) 521-1199
Facsimile: (850) 577-3629

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 31st day of October, 2007, a true and correct copy of the foregoing was furnished by U.S. First Class mail to each of the following:

Erik W. Stanley, Esq.
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506-1108

Mary E. McAlister, Esq.
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506-1108

Anita L. Staver, Esq.
Liberty Counsel
PO Box 540774
Orlando, FL 32854

Mathew D. Staver, Esq.
Liberty Counsel
PO Box 540774
Orlando, FL 32854

David M. Corry, Esq.
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506-1108

Barry M. Silver, Esq.
1200 S. Rogers Circle, Suite 8
Boca Raton, FL 33487

_____
Attorney

CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210

Undersigned counsel hereby certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) inasmuch as the brief is printed in Times New Roman, 14 point and otherwise meets the requirements of the rule.

_____

Attorney

APPENDIX A

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