Case No. A17-1068

STATE OF MINNESOTA
IN SUPREME COURT

Ryan Larson,

Appellant/Cross-Respondent,

vs.

Gannett Company, Inc., et al.,

Respondents/Cross-Appellants.

BRIEF OF AMICUS CURIAE STAR TRIBUNE MEDIA COMPANY LLC, FOX/UTV HOLDINGS, LLC, on behalf of its television station KMSP FOX 9, THE E.W. SCRIPPS COMPANY, THE ASSOCIATED PRESS, DIGITAL FIRST MEDIA, on behalf of its newspaper the *Pioneer Press,* GRAY TELEVISION GROUP, INC., MEREDITH CORPORATION, THE MINNESOTA NEWSPAPER ASSOCIATION, THE MEDIA INSTITUTE, THE NATIONAL ASSOCIATION OF BROADCASTERS, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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> *A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism*.
>
> —Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)*

Introduction[1]

The epigraph of this brief implicitly acknowledges two independent—sometimes conflicting—"functions" of the press.

One is to simply keep the public apprised of what government officials say and do on matters of public concern. This is the function demonstrated by the facts of this case: In the first hours and days after Officer Thomas Decker's death, Defendants had no access to the crime scene, no access to physical evidence, and no access to key witnesses such as his partner. They certainly had no reason to doubt law enforcement's decision to book Ryan Larson on murder charges and to stop looking for other suspects. Meanwhile, it was imperative that a concerned, frightened public be updated on the status of the investigation.

Defendants thus assumed the role of government messenger, publishing and broadcasting news reports based not on an independent investigation or some "unofficial colloqu[y]," *see* Larson Brief at 32 n.5, but on what law enforcement officials said in a

[1] This brief was not authored in whole or in part by counsel for either party and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

public press release and at public press conference. It is hard to imagine a scenario involving a more straightforward application of the fair report privilege.

The other function of the press, though, is to be more than a "passive receptacle or conduit for news." *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). "[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials … responsible to all the people." *Mills v. State of Ala.*, 384 U.S. 214, 219 (1966). Stated differently, the press "serve[s] the governed, not the governors," and the Founding Fathers abolished the "[g]overnment's power to censor the press … so that the press would remain forever free to censure the Government." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

It did not take long for media covering the investigation into officer Decker's killing to begin fulfilling this second function. Minnesota Public Radio, for example, published a news report on December 21, 2012, about how law enforcement's initial response to the killing may have squandered its chance of solving the crime.[2] The news report interviewed law enforcement experts who criticized Officer Decker's partner for leaving the scene and the police department at large for a general lack of urgency, including in failing to secure the area and for failing to look for suspects other than Larson.

[2] *See, e.g.*, Conrad Wilson, "Initial response may have hurt chances of capturing Cold Spring cop killer," MPRNews.com (Dec. 21, 2012), https://www.mprnews.org/story/2012/12/21/news/tom-decker-investigation-first-moments.

This role—which some courts have referred to as that of "watchdog," *see, e.g.*, *Connaughton v. Harte Hanks Commc'ns, Inc.*, 842 F.2d 825, 834 n.4 (6th Cir. 1988), *aff'd*, 491 U.S. 65 (1989); *Castellani v. Scranton Times, L.P.*, 956 A.2d 937, 948 (Pa. 2008)—is not directly implicated by the facts of this case. But the willingness of the press to "bare the secrets of government and inform the people" and to "effectively expose deception in government," *New York Times*, 403 U.S. at 717, is vital to democracy. Indeed, Larson's own circumstances—he alleges in a separate lawsuit that his November 2012 arrest violated his Fourth Amendment rights[3]—demonstrate the need for journalists to engage in exactly this sort of "scrutiny and criticism." *See Sheppard*, 384 U.S. at 350.

Larson's brief, however, completely ignores that "[t]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches." Potter Stewart, "Or of the Press," 26 Hastings L.J. 631, 634 (1975). And if adopted by this Court, Larson's argument that the fair report privilege should apply only to "prepared" statements made at "recurring" and "regular" government proceedings, and not to "unscripted" statements, *see* Larson Brief at 26, 31–32, would chill the press not only from serving as government watchdog but also from doing what Defendants did here: simply attending and reporting upon official proceedings and records for the benefit of citizens who cannot be all places at all times.

[3] *See* Amended Complaint, *Larson v. Sanner*, 0:17-cv-00063-PAM-LIB (D. Minn., filed Sept. 10, 2017).

The Court should reject Larson's unsupported and unwise disfigurement of the privilege. It should affirm the Court of Appeals' decision that the privilege applies to official press releases and official press conferences, and it should further hold that, as a matter of law, Defendants did not abuse the privilege.

Identification of Amici

Amici are all news organizations or media industry trade associations dedicated to protecting and exercising their First Amendment rights of speech and of the press. More details about specific *Amici* are found in their July 31, 2018, request for leave to participate as *amicus curiae*. *The New York Times*, *The Washington Post*, and the Radio Television Digital News Association informally join *Amici* in the filing of this brief.[4]

Argument

As discussed in the brief that a subset of the present *Amici* filed with the Court of Appeals, the press plays a role in keeping the public informed about and safe from criminal activity. One local, relatively recent example of how the public benefits from press coverage of unsolved crimes involved the kidnapping of an Alexandria, Minnesota, teenager who was spotted by a farmer after she escaped her kidnappers and was seen running across a field. The farmer recognized her from the news, and police called it a "perfect example of what it's like to be transparent … to work with [the news media] to

[4] These organizations sought leave to formally join this brief as additional amici, which motion the Court denied as untimely on September 6, 2018.

share this information."[5] Reinstatement of the district court's order will chill the willingness of journalists to warn the public of an at-large criminal, enlist its help to catch a fugitive or find a missing child, and assure the public once the danger has passed. The Court should not lose sight of the significant impacts this would have on citizen safety and peace of mind.

Beyond this danger, Larson's latest brief raises the specter of—indeed, seems to welcome with open arms—an even greater threat to democracy: a press whose *only* role is to amplify what the government says, rather than question it. He does this in two ways. **First**, Larson argues that the fair report privilege extends only to carefully vetted, "prepared" remarks by government officials, and not "unscripted" responses to probing questions—even though it is the latter that often reveal the most about the inner workings of government. **Second**, Larson argues that the privilege is lost by even the slightest departure from what the government said; that the press is out of bounds and loses the privilege when it distills, simplifies, or interprets. These arguments distort both the law and the role of the press. The Court should reject them.

I. The Court should affirm the Court of Appeals' decision that the fair report privilege applies to news coverage of official press releases and official press conferences.

In arguing that the press conference and press release upon which Defendants based their news reports were not "official proceedings," *see* Larson Brief at 22, Larson takes the position that the fair report privilege should apply only to "recurring"

[5] Paul Walsh, "Police: Alexandria teen was held for weeks, sexually assaulted before she swam to freedom," StarTribune.com (Sept. 6, 2017), http://www.startribune.com/police-alexandria-teen-abducted-beaten-until-she-swam-to-freedom/442917073/.

government proceedings that are "essential to democracy," *see id.* at 26, and that it should not extend to "unscripted" remarks made at those proceedings, *id.* at 32. On this latter point, he states that information Defendants gleaned during the question-and-answer portion of the press conference did not "emanate strictly from prepared statements by law enforcement" and thus was "not entitled to the privilege." *Id.* at 31–32. The Court should reject these arguments for at least three reasons.

First, as a threshold matter, Larson cites no authority in support of these arguments and ignores controlling case law that definitively rebuts them. No Minnesota court has held that the applicability of the privilege turns on whether the reported statements were "scripted" or on whether the proceeding at which they were made "recurring." To the contrary, the comments at issue in *Moreno v. Crookston Times Printing Co.* were the epitome of "unscripted": They were made "[n]ear the end of the council meeting," by a "local citizen who wished to address the council," and who proceeded to accuse a police officer of dealing drugs—yet the Court still held that the privilege applied. 610 N.W.2d 321, 323–24 (Minn. 2000). The well-developed body of law surrounding the doctrine of absolute privilege also debunks Larson's apparent belief, *see* Larson Brief at 31, that government employees speak "official[ly]" only when speaking from a script. *See, e.g.*, *Bd. of Regents v. Reid*, 522 N.W.2d 344, 346 (Minn. App. 1994) (concluding that absolute privilege protected not only statements that

university administrators made at a press conference but also statements an administrator made in response to "follow-up telephone inquiries from the press").[6]

Likewise, multiple courts have held that the privilege applies in non-"recurring" situations, including in those where the plaintiffs had no opportunity to confront statements made about them. *See, e.g.*, *Conroy v. Kilzer*, 789 F. Supp. 1457, 1463–67 (D. Minn. 1992) (applying privilege to police and fire department reports); *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986) (applying privilege to correspondence with deputy commissioner of securities). Larson, incidentally, gave a jailhouse interview to the *St. Cloud* times, which published a news report containing his claims of innocence. His allegation that he had no ability to rebut law enforcement's accusations, *see* Larson Brief at 26, 34, is thus factually inaccurate even if it were material under the law (which it is not, as the case law establishes).

Further, no Minnesota court has held that the applicability of the privilege turns on whether the proceeding is "essential to democracy," though if that were the rule, a government-sponsored press conference and press release regarding the exercise of police power would surely qualify. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587

[6] This case law also derails Larson's implicit argument that *Carradine* somehow subjects the law enforcement officers who spoke at the press conference to liability. *See* Larson Brief at 34–35. *Carradine v. State* involved informal statements to the media by a low-level highway patrolman whose duties did not include responding to press inquiries. *See* 511 N.W.2d 733, 737 (Minn. 1994). The situation would have been completely different—and likely immune from suit under the rule in *Reid*—if the patrolman's public affairs officer had held a press conference to discuss the plaintiff's arrest. That is precisely what happened here. *See also Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982) (concluding that statement by Commissioner of Public Welfare to newspaper reporter that plaintiff had been terminated for "sexual improprieties" was absolutely privileged).

(1976) (Brennan, J., concurring) ("Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government.").[7]

Second, beyond the lack of legal support for Larson's arguments, the rule of law he proposes would create absurd results. As the Court of Appeals acknowledged, Larson's proposal and the district court's ruling suggest "that the privilege would have applied had appellants reported on law-enforcement statements during a city council meeting" yet the intermediate court could "discern no meaningful distinction between citizen statements about criminal activity that are made at a city council meeting and police statements about a recent crime at an official press conference." *See* ADD018.

The absurdities do not stop there. Under Larson's construction of the privilege, it would apply at regularly scheduled, "recurring" city council meetings, but perhaps not at a specially scheduled, emergency city council meeting or at a press conference of the city council. And even at the "recurring" events, Larson argues the privilege should apply only when the government officials are speaking from a prepared statement, not when

[7] Larson also asserts that the privilege does not apply here for want of "proper attribution." *See* Larson Brief at 36. This argument ignores the facts—that the news reports at issue attributed the statements to "police," "investigators," "police reports," and "Cold Spring-Richmond Police Chief Phil Jones [] during a news conference," *see* ADD124, ADD130, ADD133, ADD142–145—and Minnesota law, *see Michaelis v. CBS, Inc.*, 119 F.3d 697, 701 (8th Cir. 1997) ("Minnesota law does not require a showing of actual reliance on the records of the prior proceeding before the [fair report] privilege attaches.").

they speak extemporaneously, whether in response to a question or otherwise, yet he provides no explanation as to how journalists are supposed to intuit the difference.

Third—and to get to the heart of the matter—Larson's view of the privilege is completely unmoored from the policies underlying the privilege and the role of the press in the United States of America.

Imagine if Bob Woodward and Carl Bernstein had naively accepted the premise that the 1972 break-in of the Watergate hotel was just a "third-rate burglary." That was, after all, the official response to the incident that the White House initially provided. Of course, we now know that the burglary brought down a President, and we know this because Woodward, Bernstein, and many other journalists refused to be appeased by the dismissive remarks of President Nixon's press secretary. *See* Carl Bernstein & Bob Woodward, *All the President's Men* at 26 (1974, 2d Touchstone ed. 1994).

The media's investigation of Watergate is widely considered an example of journalism at its best—and it was made possible only by what Larson pejoratively refers to as "unofficial colloquies," *see* Larson Brief at 32 n.5, between government sources and the media (most famously, with the source who came to be known as Deep Throat).

Amici are not suggesting here that the fair report privilege should extend to conversations with anonymous sources in parking garages. But Larson's suggestion that it should not even extend to the scenario at issue—to straightforward summaries of public, on-the-record comments by high-ranking government employees at official press briefings—ignores the reality that, given the opportunity and depending on the stakes, some government officials will choose and shape facts selectively and speak vaguely and

euphemistically. It is when the media challenges and tests the official position and prepared remarks with probing questions that a more complete, authentic picture is painted for the benefit of the news-consuming public.

However, if adopted by this Court, Larson's view of the privilege would chill the media from reporting revelatory answers to incisive questions. His view that the media can only safely report on "prepared," "scripted" remarks would turn the media into a conduit for unchecked government propaganda. Equally troubling, such a limited privilege could embolden certain government officials, not only to double-down on doublespeak but also, when venturing from their "script," to accuse and attack others with impunity, knowing the media will face liability if they dare to publish such statements.

On this latter point, incidentally, Larson has it absolutely backwards when he argues that the privilege should not apply to statements that are "not subject to judicial control" and that he has "no opportunity to confront." *See* Larson Brief at 25. Rather, it is in those situations where statements by government officials will otherwise go unchecked by the judiciary and unrebutted by those they disparage that the value of the media's monitoring and reporting is at its zenith. Indeed, Larson's argument that the media should not be able to report on an arrest until criminal charges are filed, *see id.*at 35—meaning that police can hold suspects *up to 36 hours in secret*—is particularly alarming and suggests that Larson, who purports to be a victim of false arrest, does not fully understand the import of his myopic arguments.

The media is not a government mouthpiece. Although it sometimes willingly serves as a passive conduit of government information—as Defendants did here—it is not *required* to regurgitate whatever carefully drafted (and potentially self-serving) statement the government produces. And when the government says "We can't discuss that at this time," it is the media's job to ask why and to press for more (and if the government does not provide satisfactory answers, to ask someone else). In 2018, when citizens want government officials' unchallenged view of a situation, there are multiple ways to get it, including through channels that allow government officials to speak directly to the public, such as Twitter. But when citizens want *news*—analysis and perspective and interpretation—they watch and read and listen to *Amici* and the Defendants.

At page 23 of his brief, Larson acknowledges the two principles upon which the fair report privilege rests: (1) coverage of a public proceeding simply relays information to readers they would have seen and heard themselves, had they been present and (2) there is an obvious public interest in having public affairs made known to all. Both of those principles clearly apply here. *See Moreno*, 610 N.W.2d at 331. Because the law, practicality, and public policy support application of the fair report privilege to official press releases and press conferences, the Court should affirm the Court of Appeals' decision.

II. A decision to paraphrase official statements or to provide context for those statements should not defeat the privilege and should not create a jury issue.

In Larson's view, even if the fair report privilege applies, the media can "abuse" and lose it in two ways: (1) when it "summari[z]es" official statements or reports instead

of quoting them verbatim or (2) when it "add[s] contextual material." *See* Larson Brief at 25, 29.

These standard journalistic practices are worth discussing separately, but the test for abuse of the privilege is the same for both: Whether the privilege has been abused—or whether statements that fall outside the privilege are actionable—turns not on a line-by-line comparison of an official report or proceeding with corresponding media coverage. Instead, it turns on substantial accuracy: whether the media coverage was a substantially accurate report of what officials said and did. And whether a report of official statements is "substantially accurate" should be determined using the same "gist" and "sting" analysis that applies in assessing "substantial truth" of allegedly defamatory statements that fall outside the fair report privilege.

Larson concedes this point in his opening brief, where he acknowledges that "[t]he legal test regarding whether the report is 'fair and accurate' . . . is whether the report is 'substantially accurate.' A statement is substantially accurate 'if its gist or sting is true, *that is, if it produces the same effect on the mind of the recipients which the precise truth would have produced*.'" Larson Brief at 38 (quoting *Jadwin v. Minneapolis Star Tribune*, 390 N.W. 2d 437, 441 (Minn. App. 1986)). To hold otherwise would have the same effect as adopting Larson's overly narrow view of when the privilege applies in the first place: it would chill the media's willingness to challenge and even to simplify and explain the official government position and deprive the public of important information about the conduct of government affairs.

First, on the "summarizing" question: The name of the privilege is the *fair report privilege*. It is not the "exact quote privilege," or the "verbatim recitation privilege." Time and again, courts have held that media may paraphrase or summarize what the government said or what transpired at an official proceeding and that doing so is not "abuse" of the privilege. *See, e.g.*, *Moreno*, 610 N.W.2d at 333 (privilege applies to a "fair abridgement" of official proceedings); *Conroy v. Kilzer*, 789 F. Supp. 1457, 1464 (D. Minn. 1992) (finding reports were "substantially accurate" and "fairly summarize[d]" official records); *see also* Sack, *supra* § 7:3.5[B][6] at 7-43 through -44 ("Verbatim reports of proceedings are relatively uncommon and not required for the privilege to apply.").[8]

Indeed, courts readily acknowledge that they "must accord media defendants a 'certain amount of literary license' and exercise a 'degree of flexibility' in determining what is a 'fair report.'" *Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1436 (9th Cir. 1992) (quoting *McClatchy Newspapers, Inc. v. Superior Court*, 189 Cal. App. 3d 961,

[8] For a sampling outside of Minnesota, see *Riley v. Harr*, 292 F.3d 282, 296 (1st Cir. 2002)) ("A 'fair' report need not be a verbatim report; it is enough that the report be 'a rough-and-ready summary that is substantially correct'" (*quoting Hayes v. Newspapers of New Hampshire, Inc.*, 141 N.H. 464, 466 (1996)).); *accord Salzano v. N. Jersey Media Grp. Inc.*, 993 A.2d 778, 792 (N.J. 2010); *see also Cobin v. Hearst-Argyle TV, Inc.*, 561 F. Supp. 2d 546, 554-55 (D.S.C. 2008) ("paraphrasing is permissible"); *Trainor v. The Standard Times*, 924 A.2d 766, 772 (R.I. 2007) (stating that "a newspaper is not required to reprint an official report verbatim; it may instead summarize or abridge its contents." (internal citation omitted)); *Holy Spirit Ass'n v. New York Times Co.*, 399 N.E.2d 1185, 1187 (N.Y. 1979) ("When determining whether an article constitutes a 'fair and true' report, the language used therein should not be dissected and analyzed with a lexicographer's precision. This is so because a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author.").

976 (Cal. App. 1987)). "Any other ruling based on a further mincing of the words of [news publications] would effectively eviscerate the privilege." *Salzano*, 993 A.2d at 794; *see also Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1306 (8th Cir. 1986) ("Every news story … reflects choices of what to leave out, as well as what to include. … Courts must be slow to intrude into the area of editorial judgment, not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories."); *Jadwin*, 390 N.W.2d at 442 ("Courts allow reporters some leeway in accuracy when describing legal issues to the public."); Sack, *supra*, § 7:3.5[B][6] at 7-46 ("Because of the difficulties in condensing complex proceedings into communicable form, the privilege tends to be liberally applied. The privilege will thus not be lost because of vivid or opinionated reporting.").

Accordingly, and as the Court of Appeals rightly held, the question is not whether the news reports at issue recited the relevant reports and proceedings verbatim, but whether the statements at issue "were substantially accurate summaries or fair abridgements of law-enforcement statements at the press conference and in the news release." ADD021. Did the news reports have the same "gist" or "sting" as the words used in the official report or proceedings? *Jadwin*, 390 N.W. 2d at 441. Did they "produce[] the same effect on the mind of the recipient" that attendance at the press conference, a reading of the jail log, or a reading of the press release would have produced? *Id.*

This is the well-established test of substantial truth, and it is the correct test to apply in analyzing abuse of the fair report privilege with respect to "accuracy" of the

news coverage as contrasted with the "truth" of the underlying official report or proceeding. The Court should thus clarify that **summarizing does not constitute abuse of the fair report privilege so long as the summary is a substantially accurate recounting of what was said in the official record or what transpired at the official proceeding**.[9] To hold otherwise would defy law and logic and would eviscerate the role of the media—and of academics, documentarians, book authors, and the like—in distilling and simplifying information for the information-consuming public.

Consider one of the most common (and least controversial) applications of the fair report privilege: to news reports about judicial proceedings. In Larson's view, the privilege should only extend to reprints of official court publications or transcripts. Set aside that such publications and transcripts are rarely even available until weeks or months after a hearing or trial concludes. Even if they were immediately available, average citizens do not have the time to read them nor, in many cases, the education and experience required to understand them—and yet it is imperative to democracy that they at least have access to the "Cliff's Notes" version provided by the press. Do legal

[9] Although *Amici* largely leave to the parties application of the law to the present facts, they have difficulty seeing how application of the substantial truth doctrine leads anywhere but to the inescapable conclusion that Defendants' reporting had the same "gist" or "sting" as what the police actually said: that they believed they had their man in the murder of Officer Decker and that they were not looking for anyone else. As such, there was no need to submit the question of falsity—or whether the privilege was abused—to the jury. This is especially true when the statements at issue are read not in isolation but in context of the larger news reports, as the law requires. *See Aviation Charter, Inc. v. Aviation Research Grp./US*, 416 F.3d 864, 868 (8th Cir. 2005) ("In analyzing a defamation claim, we must consider the context within which the statement was made."). Any reasonable person exposed to the statements in context would understand that Larson was a suspect in an ongoing investigation—not a confirmed or convicted killer.

scholars lose the protections of the privilege if they publish case notes or other summaries containing defamatory matter? No. Otherwise, the exposure to, for instance, Judge Sack for his essential treatise on defamation law would be astounding.

As the Supreme Court has acknowledged,

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491–92 (1975); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573–74 (1980) ("Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media."); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) ("For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government.").

Here, the official statements that served as the basis for Defendants' news reports were relatively brief, and perhaps Cold Spring residents were so interested in the killing of Officer Decker that they would have read the full press release and watched a

recording of the entire press conference had Defendants made them available. But that is not always the case. *Conroy* for example, involved two news reports published after a months-long investigation by the *Star Tribune* into corruption within the St. Paul Fire Department. The investigation involved review of hundreds of police and fire department records; the *Conroy* decision itself references reliance upon at least eight law enforcement reports of varying length. 789 F. Supp. 1464–65. More recently, an investigation by the *Star Tribune* about Minnesota's failure to adequately investigate rape cases has led the Attorney General to convene a sexual assault task force to recommend investigative reforms to the legislature.[10] The *Star Tribune*'s investigation involved review of *more than 1,000* police files.[11]

To tell these stories, *Star Tribune* journalists had to act as information curators—to zero in on and summarize for busy readers the key takeaways from thousands of pages of public documents. No citizen has the time (even if she had the interest) to personally monitor everything government does in real time—much less to go rummaging through old fire and police department files to try to discern whether problematic *patterns* might exist. If publishing such reports in their entirety—as opposed to paraphrasing and summarizing their key findings—is the only way to ensure the privilege is not abused, then certain, important stories will never be told, to the detriment of the public.

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[10] *See* Kelly Smith, "Attorney General Lori Swanson convenes sexual assault task force," StarTribune.com (Sept. 12, 2018), http://www.startribune.com/attorney-general-lori-swanson-convenes-sexual-assault-task-force/493077591/.

[11] *See* http://www.startribune.com/denied-justice-share-your-story-with-us/487932841/ (last visited Sept. 17, 2018).

On to the question of "additional context": Whether the privilege is abused and lost by including in a news report additional contextual material is not a question this Court has to reach. As discussed above, the news reports here were not investigative exposés based on private interviews with unofficial sources. Rather, they were straight summaries of what law enforcement said in an official press release and at an official press conference.

Nevertheless, *Amici* urge the Court to revisit language in *Moreno* that the fair report privilege "can be defeated if additional contextual material, not part of the proceeding, is added that conveys a defamatory impression or comments on the veracity or integrity of any party. *The entire report then would be subject to evaluation as any other allegedly defamatory statement*." 610 N.W.2d at 333 (emphasis added). This language is binding on the lower courts, as the Court of Appeals acknowledged at page 20 if its order, yet is confusing and dangerous.

As discussed elsewhere, journalism is at its best when it explains and interprets. Yet the language from *Moreno* discourages journalists from going beyond the four-corners of an official statement/proceeding to shed light on the "bigger picture" by stripping them of the privilege when they do. The most obvious risk posed by a blanket rule barring "additional context" is a press afraid to question authority and to speak truth to power, a scenario discussed at length above. The Court should thus take this opportunity to overrule *Moreno* and to hold that **the addition of contextual material does not *defeat* the privilege that otherwise applies to fair and accurate reports of**

official records/proceedings; the additional contextual material simply does not fall within the privilege to begin with.

Other courts have held exactly this. *See, e.g.*, *Furgason v. Clausen*, 785 P.2d 242, 246 (N.M. 1989) (holding that material in first two paragraphs of news report was "not drawn from the arrest report" and was thus "outside the permieters [sic] of the fair and accurate report privilege;" "[t]he remainder of the article, however, was either protected by the fair and accurate report privilege or is not challenged by appellant as being factually inaccurate or defamatory").

Meanwhile, the authorities cited in *Moreno* do not compel its conclusion that additional contextual material "defeats" the privilege. *Carradine v. State*, 511 N.W.2d 733 (Minn. 1994), which *Moreno* cites as having adopted a "similar rule," *see* 610 N.W.2d at 333, does no such thing. *Carradine* did not involve the fair report privilege; instead, it involved the scope of absolute immunity extended to statements by police officers, and this Court held that although absolute immunity applied to statements in an arrest report it did not apply to statements the arresting officer made to the media. However, it did *not* hold that the officer's statements to the media somehow *defeated* the absolute privilege that applied to his arrest report. To the contrary, it expressed skepticism that the statements to the media "significantly added to any injury sustained by plaintiff over and above any injury sustained as a result of the absolutely privileged statements." 511 N.W. 2d at 737.

Likewise, *Moreno*'s reliance on the Restatement (Second) of Torts § 611 (1977) and its comments f and h was misplaced. *See Moreno*, 610 N.W.2d at 333. Comment f

makes the rather unremarkable observation that "a reporter is not privileged … to make additions of his own that would convey a defamatory impression, nor to impute corrupt motives to any one, nor to indict expressly or by innuendo the veracity or integrity of any of the parties." It does not, however, state that such additions *defeat* the privilege that attaches to other portions of a news report that fairly and accurately summarize official documents and proceedings. Likewise, comment h addresses the *scope* of the privilege—stating that certain statements simply "are not privileged"—and not its abuse.

Under a framework where "additional contextual material" falls outside of—but does not defeat—the fair report privilege, the inevitable question becomes whether the additional contextual material changes the "gist" or "sting of the story" and/or materially increases the reputational harm sustained by the plaintiff? In many, if not most cases, the answer will be no—as the Court seemed to suspect in *Carradine.*

Consider the following hypothetical news report, which is a twist on what Defendants here published. The headline reads:

Larson Booked for Murder
Police say no reason to believe anyone else involved

Then, the lead of the story reads,

> Police believe that 34-year-old Ryan Larson ambushed Officer Tom Decker and shot him twice, killing him, according to officials involved in the investigation who asked not to be named because they are not authorized to comment on the case.

First, the headline is taken straight from the jail log, press release, and press conference and clearly constitutes a fair and accurate reports of what officials said.

Second, even if we assume the lead—which is completely hypothetical; Defendants did *not* base their news reports on private conversations with police officers—falls outside the privilege as "additional contextual material,"[12] the lead should not "defeat" the privilege that attaches to the headline.

Instead, the Court must set the headline aside as nonactionable and then look at the what remains and decide whether, as to those statements, the plaintiff has met his burden to prove they are materially false and defamatory and that they caused harm to his reputation separate and apart from the substantially true, privileged, or otherwise nonactionable statements. If the answer to any of those questions is no, then no recovery can be had. *See* Sack, *supra*, § 10:5.3 at 10-51 through -52 ("When a defendant's statement contains both true and false elements, a defamation plaintiff may *not* recover damages if the damages would have occurred without the false portions. …Indeed, there would be serious constitutional problems if a plaintiff were allowed to recover for injury done to him or her by truthful statements, which are themselves constitutionally protected.").

[12] Defendants make this assumption for the sake of argument but note that various jurisdictions have held that the fair report privilege may extend to even one-on-one interviews. *See Orso v. Goldberg*, 665 A.2d 786, 789 (N.J. App. Div. 1995) (extending fair report privilege to statements made by city councilperson during nonpublic interviews). The Court need not reach that question here because, again, Defendants did *not* base their news reports upon nonpublic interviews or upon any independent investigation whatsoever; they simply reported what high-level public officials said at a formal press conference and in an official press release.

Conclusion

Every journalist has heard the bromide: "If your mother says she loves you, check it out." Journalists are trained to be skeptical, to ask hard questions, and to then distill complex answers and realities into clear, concise news reports.

They are not infallible. Sometimes journalists get things wrong and sometimes they miss the story altogether. But as government watchdogs go, the press is the best we've got—and at its best, it is formidable. It is "one of the great interpreters between the government and the people" and "[t]o allow it to be fettered is to fetter ourselves." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

For the sake of democracy, this Court should *empower* journalists to do their jobs—not subject them to liability when they fairly and accurately report on an official press conference and press release. This Court should reaffirm a robust privilege for fair and accurate reports of official documents and proceedings.

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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this Brief of Amicus Curiae conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3(c), for a brief produced with a proportional font. The length of this brief is 6,514 words and was prepared using Microsoft Word 2016 software.

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