No. M2016-01065-SC-R11-CV

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JEFFREY TODD BURKE,
Plaintiff-Appellant,

v.

SPARTA NEWSPAPERS, INC.,
Defendant-Applicant,

ON APPEAL FROM THE CIRCUIT COURT FOR
WHITE COUNTY, TENNESSEE
CASE NO. CC-2605

BRIEF OF AMICI CURIAE THE ASSOCIATED PRESS, CABLE NEWS NETWORK, INC., COX MEDIA GROUP NORTHEAST, LLC D/B/A WHBQ-TV, THE E.W. SCRIPPS COMPANY, GANNETT CO., INC., GATEHOUSE MEDIA, LLC, GRAY TELEVISION, INC., MEREDITH CORPORATION, NEXSTAR MEDIA GROUP, INC., RAYCOM MEDIA, INC., REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SINCLAIR BROADCAST GROUP, INC., TEGNA INC., AND TRIBUNE MEDIA COMPANY IN SUPPORT OF DEFENDANT-APPLICANT'S RULE 11 APPLICATION FOR REVIEW AND, IF REVIEW IS GRANTED, ON THE MERITS

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INTRODUCTION

The fair report privilege is one of the most important protections and incentives for news gatherers to keep the public informed.[1] The fair report privilege represents a policy compromise that balances two competing public interests. The first interest is in the dissemination of the news and information about government from a variety of government sources. This is a critical interest because "an informed public is the essence of working democracy." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). The competing interest is the prevention of reputational harm, which is protected by the fair report privilege's requirement that the information published from government sources be a fair and accurate summary of what the public official or governmental source said. When courts consider the scope of the fair report privilege, it is crucial to remember that

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

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

Given the critical role the press plays in dissemination of news, the Court of Appeals opinion in this case goes too far in restricting the scope and application of the fair report privilege. The lower court took a cramped view of the fair report privilege that is inconsistent with the policies underlying it and this Court's jurisprudence. Moreover, the Court of Appeals erroneously held that Applicant, Sparta Newspapers, Inc. ("Sparta"), waived its argument that

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[1] The fair report privilege is "considered to be 'one of the most powerful and frequently invoked common-law defenses,' and is widely recognized in judicial decisions and by statute." *Salzano v. North Jersey Media Grp. Inc.*, 993 A.2d 778, 786-87 (N.J. 2010) (quoting Rodney A. Smolla, *Law of Defamation* § 8.67 (2d Ed. 2008)).

the Plaintiff, Jeffrey Todd Burke ("Burke"), was a public figure who had not provided sufficient evidence of actual malice to survive summary judgment. Because of these serious common law and constitutional flaws, and the long-term and widespread impact on the dissemination of news to the public, the Amici[2] urge this Court to grant Sparta's application and reverse the Court of Appeals decision.

First, the Court of Appeals narrowed the concept of "official action or proceeding" far too restrictively. The Court of Appeals would tie the privilege to whether the official action or proceeding was open to the public. (App. Op. at 6.) "Official" is not synonymous with "open to the public." This restriction ignores the other public policy justifications for the fair report privilege, especially the critical concept that the privilege preserves public supervision of its government – which, of course, operates through both public proceedings and routine activities that are not, strictly speaking, "open to the public."

Here, the lower court's ruling resulted in a loss of the privilege for statements made in an everyday activity of the government: an official, on-the-record, one-on-one interview with the public information officer for White County's Sheriff and lead investigator in a criminal case. (*Id.* at 6-8.)

The impact of the lower court's ruling, if permitted to stand, will be significant. First, Tennessee journalists, unlike their counterparts in many other states, will no longer be able to rely on information from law enforcement officers, a formerly reliable and frequent source for stories about something that is of the utmost public importance – crime. This will have a chilling

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[2] The Amici are media organizations which report on news in Tennessee: The Associated Press, Cable News Network, Inc., Cox Media Group Northeast, LLC d/b/a WHBQ-TV, The E.W. Scripps Co., Gannett Co., GateHouse Media, LLC, Gray Television, Inc., Meredith Corporation, Nexstar Media Group, Inc., Raycom Media, Inc., Reporters Committee for Freedom of the Press, Sinclair Broadcast Group, Inc., TEGNA Inc., and Tribune Media Company.

effect on the press's willingness to conduct and publish accounts of one-on-one interviews with public officials at every level of government. For example, it is unclear under the ruling below whether the fair report privilege would protect a television station that broadcasts a live, one-on-one interview with the Governor of Tennessee because the public was not present at the interview.[3] A tape-delay might be necessary to conduct research on the Governor's statements to ensure that they are correct or found in a public record, which must then be checked, to help increase the chances that the broadcast came within the fair report privilege. And, in the end, the station may decide the liability risk is too high. This is contrary to one of the underlying principles of the fair report privilege – that "[i]n return for frequent and timely reports on governmental activity, defamation law has traditionally stopped short of imposing extensive investigatory requirements on a news organization reporting on a governmental activity or document." *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 712-13 (4th Cir. 1991) (citing *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 254 (4th Cir. 1988)).

Second, the Court of Appeals seeks to graft a strict attribution requirement onto Tennessee's fair report privilege, creating another potential landmine for news gatherers. In this case, the source was identified by name and as the lead investigator for the case, leaving no doubt regarding the attribution. But the Court of Appeals stripped the privilege from Sparta because the source was not identified as the "public information officer." The court's imposition of a strict labeling requirement, with the alternative being liability without legal privilege, strips

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[3] It is clear, however, that the Governor would be absolutely privileged for his comments during the interview if made pursuant to his official duties. *Jones v. State*, 426 S.W.3d 50, 58 (Tenn. 2013) (citation omitted) (holding that cabinet-level officials in state government are absolutely privileged "to publish defamatory matter concerning another in communications made in the performance of his official duties" and that the privilege "ensures that high-ranking state officials will enjoy 'complete freedom of speech when discharging their duties'").

the press of all editorial discretion in describing its sources. And even if attribution is necessary to invoke the fair report privilege, the newspaper in this case sufficiently attributed the source based upon the Court of Appeals' cited sources. No more should be required than what was done by Sparta here.

Finally, the Court of Appeals erroneously held that Sparta waived its constitutional arguments that Burke was a public figure and had not provided sufficient evidence to show actual malice. This ruling is contrary to the court's duty to review the entire record to ensure that First Amendment rights are not infringed, and it is inconsistent with the statement of issues in Sparta's brief in the Court of Appeals.

"Plainly, freedom of the press is illusory if a cloud of defamation liability darkens the media's reports of official proceedings." *Solaia Tech., LLC v. Specialty Publ'g Co.*, 852 N.E.2d 825, 848 (Ill. 2006) (citation omitted). And the same is true for reporting on official statements and actions. As courts have recognized, "the media must have 'breathing space' in order to act effectively and escape self-censorship." *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964)). The Court of Appeals decision would restrict the fair report privilege so far that it will chill speech about matters of public concern and impinge the public's ability to supervise its government.

ARGUMENT

I. This Court Should Review this Case Because the Court of Appeals' Restrictive View of the Fair Report Privilege Ignores Key Policy Justifications for the Privilege and Severely Limits the "Official Action" Component.

Three policies justify the fair report privilege, any one of which may support its application:

> (1) the agency rationale, by which the reporter acts as agent for an otherwise preoccupied public which could, if it possessed the time,

> energy or inclination, attend the proceeding; (2) the public supervision rationale, by which the reporter provides to the larger community data it needs to monitor government institutions; (3) or the public information rationale, by which the reporter provides information affecting the greater public welfare.

Rosenburg v. Helsinki, 616 A.2d 866, 873 (Md. 1992) (citations omitted). While at one time the agency rationale may have been most prevalent, the predominant rationale now is public supervision. 1 Hon. Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 7:3.5[B][2] (5th ed. 2018).[4]

> We recognize a fair report privilege, in part, because of the open relationship we seek to share with our own government. While the news media of necessity has something of an adversarial relationship with government officials, that relationship coexists with the function recognized by the fair report privilege simply to inform citizens of what the government is doing.

Reuber, 925 F.2d at 712 (internal citation omitted).

The Court of Appeals only discussed the agency rationale in restricting the fair report privilege to official actions or proceedings that are open to the public. (App. Op. at 8.) Even if the agency rationale does not support application of the fair report privilege to an on-the-record, official, one-on-one interview of a sheriff's public information officer and lead investigator on a case, the other rationales – public supervision and public information – by themselves do, and this Court should grant Sparta's application to remedy this restrictive interpretation of the fair report privilege.

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[4] The author of this leading treatise on defamation law, the Honorable Robert D. Sack, is a judge on the United States Court of Appeals for the Second Circuit.

A. The Public Supervision Rationale Supports Review and Reversal of the Court of Appeals Decision.

The public supervision rationale is considered the paramount interest justifying the fair report privilege.[5] Sack, § 7:3.5[B][2]. This rationale "recognizes that news organizations play an important role in providing the public with information it needs to monitor the operations of government." *Reuber.*, 925 F.2d at 713; *see also Yohe v. Nugent*, 321 F.3d 35, 43 (1st Cir. 2003) (citation omitted) ("The purpose of the [fair report] privilege is to ensure that publications may perform the important function of informing the public of actions taken by government agencies and officials."); *Crane v. Ariz. Republic*, 972 F.2d 1511, 1518 (9th Cir. 1992) ("The fair report privilege is required because of the public's need for information to fulfill its supervisory role over government."); *Solaia Tech., LLC*, 852 N.E.2d at 842 (citations omitted) ("The fair report privilege is a qualified privilege, which promotes our system of self-governance by serving the public's interest in official proceedings, including judicial proceedings."); *Steer v. Lexleon, Inc.*, 472 A.2d 1021, 1024 (Md. Ct. Spec. App. 1984) ("The public has a vital and legitimate concern in the affairs of government and the performance of governmental officials and agencies – executive, legislative, and judicial."); *Salzano*, 993 A.2d at 786 ("The fair report privilege reflects the judgment that the need, in a self-governing society, for free-flowing information about matters of public interest outweighs concerns over the uncompensated injury to a person's

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[5] This Court implicitly endorsed the public supervision rationale for the fair report privilege in *American Publishing Co. v. Gamble* when it explained that "since it is of the highest moment that the proceedings of courts of justice should at all times be open to fair inspection, to *the end that the public may have the means of knowing how the duties of their officers are performed, whether faithfully and intelligently or otherwise*." 90 S.W. 1005, 1008 (Tenn. 1905) (emphasis added); *see also Jones*, 426 S.W.3d at 55 (citation omitted) ("It is thought desirable to encourage free and uninhibited dissemination of information about governmental activities even if on occasions an individual suffers harm thereby.").

reputation."). This vital rationale alone is sufficient to justify application of the fair report privilege to the facts here. This Court should grant review and reverse the lower court's opinion.

In this case, a public information officer for the White County Sheriff's office, who was also the lead investigator on the case, discussed a criminal case of interest to the local community because of its relationship with a local youth football league. (Sparta's Appl. at 1.) By learning more about the crimes that are prosecuted and the nature of the crimes themselves, the public is better informed about the operations of government in White County. This alone justifies application of the fair report privilege under the public supervision rationale.

The public supervision theory also supported a district attorney's on-the-record, private interview in *Hudak v. Times Publishing Co.* 534 F. Supp. 2d 546, 572 (W.D. Pa. 2008). The court explained that it was an "official action" under the public supervision theory because the district attorney had "an indisputable obligation to inform the public as to matters occurring within his office." *Id.*; *see also Salzano*, 993 A.2d at 797-98 (emphasis added) (citation omitted) ("With respect to reports of public, official *statements* and proceedings, the public's supervisory rights over government require that the people have as full a view as possible of the conduct of public officials…."). Detective Isom in this case, as the public information officer for the sheriff's department, had a similarly indisputable obligation to inform the public.

And *Hudak* is hardly an outlier. Courts in multiple states have found that reporting the statements of public officials, including law enforcement personnel, are protected by the fair report privilege.[6] *Yohe*, 321 F.3d at 39, 43 (finding fair report privilege applied to interviews

[6] In fact, at least one Tennessee appellate opinion has noted that that the fair report privilege has broad application. In *Evans v. Nashville Banner Publishing Co.*, the court, relying on Dean Prosser, explained that the fair report privilege "extends to all legislative proceedings, including the investigations of committees and the deliberations of municipal councils, and to the acts of administrative and executive officials of the national, state and municipal governments,

with police chief); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1097 (4th Cir. 1993) ("a fair and accurate report of the public remarks of a member of Congress fits within the 'fair report' privilege..."); *Bailey v. Corbett*, No. 3:11-cv-1553 (JCH), 2013 U.S. Dist. LEXIS 34492, at *12 (D. Conn. Mar. 13, 2013) (holding that fair report privilege applied to communications by a police public information officer); *Seymour v. A.S. Abell Co.*, 557 F. Supp. 951, 953, 955 (D. Md. 1983) (holding that Maryland fair report privilege applied when newspaper article was based on statements by a state assistant attorney general); *Gawel v. Chicago Am. Publ'g Co.*, 274 N.E.2d 628, 629 (Ill. Ct. App. 1971) (citation omitted) ("It is also true, that the courts have consistently held that news reports based on the records and utterances of police and other law enforcement officers are protected by the report privilege."); *Koren v. Capital-Gazette Newspapers, Inc.*, 325 A.2d 140, 143 (Md. Ct. Spec. App. 1974) (holding that statements from an interview with FBI agents was privileged); *Howell v. Enter. Publ'g Co.*, 920 N.E.2d 1, 13 (Mass. 2010) (citation omitted) ("When an official of sufficient authority to speak memorializes alleged defamation in an official statement, a republication of that official statement is privileged so long as the report of it is fair and accurate"); *ELM Med. Lab v. RKO Gen., Inc.*, 532 N.E.2d 675, 678 (Mass. 1989) ("Whether [public health] warnings are issued in a news release or in interviews with officials, the privilege should attach so long as the media reports are fair and

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including their official reports and communications." 1988 WL 105718, at *4 (Tenn. Ct. App. Oct. 12, 1988) (quoting W. Keeton, *Prosser and Keeton on the Law of Torts* § 155, at 836 (5th Ed. 1984)). While the *Evans* court did not address the issue here, on the face of the quote from Prosser, a law enforcement officer would be an "administrative and executive official of ... municipal governments" and a statement by a public information officer and lead investigator about a crime he has investigated would be an "official...communication[]." Similarly, the Arkansas Supreme Court has broadly explained that "[c]ase law from various jurisdictions supports the principle that, generally, information released by the police, including reports and records, is considered to be a report of an official action subject to the fair-report privilege." *Whiteside v. Russellville Newspapers, Inc.*, 295 S.W.3d 798, 802 (Ark 2009) (citations omitted).

accurate."); *Woolbright v. Sun Commc'ns, Inc.*, 480 S.W.2d 864, 866 (Mo. 1972) (predicating fair report privilege on statements made by a prosecutor with no indicia that the statements were part of a press conference). Federal courts in Tennessee are in agreement with this position: "[t]he fair report privilege applies to news reports made in reliance on police communications regarding the arrest of a criminal suspect." *Archibald v. Metro. Gov't of Nashville & Davidson Cnty.*, No. 3:11-0728, 2012 U.S. Dist. LEXIS 102870, at *13 (M.D. Tenn. July 23, 2012) (citing *Milligan v. U.S.*, 644 F. Supp. 2d 1020, 1034 (M.D. Tenn. 2009)).

Some states have an even broader rule. In Florida, "[t]he news media has been given a qualified privilege to accurately report on the information they receive from government officials." *Stewart v. Sun Sentinel Co.*, 695 So. 2d 360, 362 (Fla. Dist. Ct. App. 1997) (quoting *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502 (Fla. Dist. Ct. App. 1993)); *see also Huszar v. Gross*, 468 So. 2d 512, 516 (Fla. Dist. Ct. App. 1985) (applying fair report privilege to remarks made by a government attorney relating to the prosecution of a case). Kansas has broadly held that the privilege applies to reports on all matters involving the police:

> to publish as current news all matters involving open violations of the law which justify police interference, and matters in connection with inquiries regarding the commission of crime, even though the publication may reflect on the individuals concerned and tend to bring them into public disgrace.

Stice v. Beacon Newspaper Corp., 340 P.2d 936, 400 (Kan. 1959) (citation omitted).[7]

Even states that take a narrower view of "official action" would support a finding of privilege here. In *Thomas v. Telegraph Publishing Co.*, the New Hampshire Supreme Court took the middle ground and held that "[t]he privilege also protects reports that … are based upon press

[7] The articles in *Stice* "were obviously news stories based upon interviews of police officials…" and fell within the privilege. *Id.*

conferences, interviews with a police chief, or other types of official 'conversations.'" 929 A.2d 991, 1010 (N.H. 2007) (citations omitted). The court explained in rejecting application of the privilege to conversations with some police officers that there was "no evidence that the officers were given the official imprimatur of their departments to function as spokesmen or even to speak with [the reporter]." *Id.* In this case, the undisputed evidence was that the source was the Sheriff's public information officer, as well as the lead investigator on the matter, and thus he would have the "official imprimatur" to speak with the press about the case, which would be sufficient under New Hampshire's fair report privilege.

The importance of the statement in this case coming from the public information officer should not be discounted. In *Steer*, the Maryland intermediate appellate court explained the important role that a public information officer plays in relaying official information to the public:

> The designation of certain public officials, on a full-time or on a part-time basis, as public relations or press affairs officers is no mere frill or extracurricular indulgence but a recognition of the important role played by effective communication between government and the public. We take significant notice of the fact that in this case we are not dealing with some unofficial version of events furnished by a policeman at a crime scene, with some unattributed "leak" or offhand prediction, with some characterization or interpretation of events by a prosecutor in a courtroom corridor, but rather with the authorized release of important information through an established and official channel.

472 A.2d at 1024. In this case, it is uncontroverted that the statements published came from the Sheriff's public information officer, the official spokesperson for the department. "The fair report privilege establishes a safe harbor for those who report on statements and actions so long as the statements or actions are official and so long as the report about them is fair and accurate." *Howell*, 920 N.E.2d at 13 (citation omitted). The public supervision rationale is the most

important one in our system of self-government for application of the fair report privilege. The privilege should apply to reporting of an on-the-record, official, one-on-one interview between a journalist and a public information officer and lead investigator.[8] Because the Court of Appeals ignored this crucial rationale for the fair report privilege, this Court should grant Sparta's application to correct this error.

B. The Public Information Rationale Also Supports Action by this Court to Correct the Court of Appeals' Narrow View of the Fair Report Privilege.

"The informational rationale, or the public's right to know, focuses on the public's interest in important matters." *Lee v. Dong-A Ilbo*, 849 F.2d 876, 878 (4th Cir. 1988) (citing *Medico v. Time, Inc.*, 643 F.2d 134, 141 (3d Cir. 1981)); *see also Dameron*, 779 F.2d at 739-40 (noting the importance of "[t]he public's strong interest in keeping abreast of public affairs"). While this rationale overlaps with the public supervision rationale, it covers an even broader set of information. *Medico*, 643 F.2d at 142 (citation omitted). This rationale does not support "mere curiosity in the private affairs of others," which "is of insufficient importance to warrant granting the privilege...." *Id.* But that is not the case here where it was alleged that Burke was indicted for theft. And it is unquestioned that reporting on crime is of significant public concern and importance. *E.g.*, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 597 (1976) (Brennan, J., concurring) (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions [...] are without question events of legitimate concern to the public"). "The fair-report privilege reflects the judgment that the need, in a self-governing society, for free-flowing information

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[8] While in this case the source being interviewed was the public information officer, the broader view of the fair report privilege should be adopted by this Court if review is granted. The broader view, like in Florida, would also apply the privilege to other law enforcement officers, such as a case's lead investigator.

about matters of public interest outweighs concerns over the uncompensated injury to a person's reputation." *Salzano*, 993 A.2d at 786. Here, the Court of Appeals unnecessarily restricts the flow of information to the public through its extreme construction of the fair report privilege and this Court should grant review.

C. The Court of Appeals' Reliance Solely on the Agency Rationale Is Inconsistent with the Public Supervision Rationale and This Court's *Lambdin* Decision.

In 1884, future Supreme Court Justice Oliver Wendell Holmes explained when discussing the fair report privilege that "[i]t used to be said sometimes that the privilege was founded on the fact of the court being open to the public. This, no doubt, is too narrow..." *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (citations omitted). But the Court of Appeals decision would make it a threshold issue whether something was open to the public before the fair report privilege could be applied. Its ruling would significantly narrow this important protection for news gatherers and harm the public, who is the real beneficiary of the privilege.

Judge Sack has explained that applying the fair report privilege to official, non-public proceedings "is consistent with the theory that the privilege is meant to protect oversight of the performance of public officials and to encourage communication about matters of public interest." Sack, § 7:3.5[B][4]. For example, the public supervision rationale was sufficient to justify protection for a news story based on non-public FBI files under the fair reporting privilege. *Medico*, 643 F.2d at 141. Similarly, in regard to a non-public reprimand letter, the Court of Appeals for the Fourth Circuit found that "[w]e do not think that scope of the agency rationale would be dispositive here because the other rationales for a fair report privilege, public supervision and public information, are plainly present." *Reuber*, 925 F.2d at 713 (citation

omitted); *see also Thomas*, 929 A.2d at 1006-07 (rejecting the argument that non-public materials are not subject to the fair report privilege). The same should be true here.

Limiting the fair report privilege to official actions or proceedings that are open to the public is also inconsistent with this Court's opinion in *Lambdin Funeral Service, Inc. v. Griffith*, 559 S.W.2d 791 (Tenn. 1978), on the related litigation privilege. In *Lambdin*, the Court explained that "[t]he 'judicial proceeding to which the immunity attaches ... includes any hearing before a tribunal which performs a judicial [f]unction, ex parte, or otherwise, *and whether the hearing is public or not*." *Id.* at 792 (quoting Prosser, *Law of Torts* at 799 (3d Ed. 1964)) (emphasis added). In other words, the definition of a judicial proceeding for the litigation privilege does not require that the proceeding be public.

The Court of Appeals for the Second Circuit used this same Prosser definition when interpreting the California statutory fair report privilege in *Reeves v. American Broadcasting Cos.*, 719 F.2d 602, 605 (2d Cir. 1983). There, the question before the court was whether a publication based on secret grand jury proceedings was covered by the fair report privilege. *Id.* The court explained that the same public interest served by Prosser's broad definition of judicial proceeding for the litigation privilege was also served by application of the same definition to protect reports of secret grand jury proceedings under the fair report privilege. *Id.* at 605-06.

Just like the Massachusetts Supreme Court, this Court should "never limit[] the [fair report] privilege to the agency rationale [because] [s]erving as a check on the power of government frequently may require reporting on events outside the public eye or ear." *Howell*, 920 N.E.2d at 13 (citation omitted)). The Court of Appeals' approach to this question turns a blind eye to the paramount public supervision rationale in favor of a cramped and limiting interpretation that requires a statement, action, or proceeding to be open to members of the

public before the fair report privilege is applicable. Review by this Court is warranted to address this important question regarding the breadth of the fair report privilege.

D. One-On-One, On-The-Record, Official Interviews Serve the Same Purpose as Press Releases and Press Conferences and Should Not Be Treated Differently.

The Court of Appeals held that "[t]he requirement that official actions or proceedings be open to the public serves the underlying rationale behind the privilege, allowing the press to be 'the eyes and ears of the members of the public *who would have been able to witness the proceeding or obtain the information.*'" (App. Op. at 8 (emphasis in original) (citation omitted).) But what real purpose does that serve other than to limit the amount of speech protected by the fair report privilege? On a practical level, none.

The lower court's opinion suggests that the result would have been different if the information had been obtained from a press release or press conference, instead of a one-on-one, on-the-record, official interview with the public information officer. (App. Op. at 7-8.) This distinction is untenable since that type of interview serves the same purpose as the press conference or press release – to get information out to the public. *Hudak*, 534 F. Supp. 2d at 572 ("While [a district attorney's] on-the-record comments were made in the context of an informal, one-on-one meeting with [the reporter], they served the same purpose as a press release or press conference."). In fact, a one-on-one, on-the-record, official interview is likely to result in more and better information for the public than a press release or press conference because it is easier to ask follow-up questions in a one-on-one interview. The distinction drawn by the Court of Appeals is a flawed one that should not be sufficient to defeat an assertion of the fair report privilege. Both press conferences and press releases have a practical obscurity for members of the public. The public either can't or won't go to a press conference, and often, may not even

know about them until after the fact. And unless the individual has a particular interest in a matter, they are also unlikely to be aware of a press release, unless a member of the media brings it to their attention by publishing or broadcasting a story.

Some press conferences and press briefings, such as those held by the spokesperson for President Trump or the President himself, are open only to credentialed members of the press. It is unclear whether, under the ruling below, the fair report privilege would apply to those press conferences or briefings. Likewise, the public does not attend sit-down interviews between the President and a television outlet or newspaper; under the Court of Appeals' rationale, these interviews would not be protected by the fair report privilege because members of the public would not be allowed to attend.[9] The same would be true for one-on-one interviews at the local and state level too. Surely that is not how Tennessee's fair report privilege is supposed to work.

As Judge Learned Hand explained, the press

> serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

United States v. AP, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). The fair report privilege is a crucial protection that encourages the dissemination of news from many different sources.

> The privilege recognizes that (1) the public has a right to know of official government actions that affect the public interest, (2) the only practical way many citizens can learn of these actions is through a report by the news media, and (3) the only way news

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[9] President Trump and his spokesperson would be privileged in making their statements during those press conferences, press briefings, and one-on-one interviews so long as they were within the "outer perimeter of [the official's] line of duty." *Barr v. Matteo*, 360 U.S. 564, 574-75 (1959) (affirming finding of absolute privilege for high ranking federal official).

> outlets would be willing to make such a report is if they are free from liability, provided that their report was fair and accurate.

ELM Med. Lab, 532 N.E.2d at 678 (citation omitted). It is the public's right to monitor their government and matters of public interest that are paramount here. The Court of Appeals took a constricted view of the fair report privilege that would reduce the number of news sources, and the public discourse will be the poorer for it. The fair report privilege should not be so limited that it can be lost because the public was not invited to an interview.

III. The Court of Appeals Decision Regarding Very Specific Identification of the Law Enforcement Officer Serves No Purpose and Treads on the Newspaper's Editorial Discretion.

The Court of Appeals in this case creates a new hurdle for speakers who seek to rely upon the fair report privilege in their discourse – that the statements must be very specifically and correctly attributed. (App. Op. at 9-10.) There is no support in Tennessee law for this requirement, and there is no mention of it in the Restatement (Second) of Torts § 611. And, from a policy perspective, even if attribution is worthy of consideration, the Court of Appeals' cramped interpretation of that requirement goes too far. The article in question would actually satisfy the test relied upon by the Court of Appeals. Furthermore, the Court of Appeals' advocated rule treads too closely to the editorial discretion courts traditionally give the press pursuant to the First Amendment.

A. The Court of Appeals Ruling Is Inconsistent with the Authority Upon Which It Relied.

The crux of the lower court's holding is that by failing to identify the source for the story as the public information officer for the White County Sheriff's office, the newspaper forfeited the fair report privilege. (App. Op. at 9-10.) Instead of identifying the source in that manner, the newspaper prefaced its story with "[a]ccording to the case's lead investigator, Detective Chris

Isom of the White County Sheriff Department." (Sparta's Appl. at 7.) The article then goes on to repeatedly attribute the allegedly false and defamatory statements to Detective Isom. (*Id.*) This attribution should be more than sufficient for the fair report privilege to apply.

The purpose of an attribution requirement is so "the reader can judge the veracity of statements..." *Trover v. Kluger*, No. 4:05CV-014-H, 2008 U.S. Dist. LEXIS 80900, at *14 (W.D. Ky. Oct. 8, 2008). The primary case that the Court of Appeals relied upon for this requirement was *Dameron*. (App. Op. at 9.)[10] The District of Columbia specifically requires that the source of information for a claim of fair report privilege "be apparent either from specific attribution or from the overall context." *Dameron*, 779 F.2d at 739. This is measured by what the "average reader" would be likely to understand regarding the source. *Id.* Failure to properly attribute defeats the privilege. *Id.*

The Massachusetts Supreme Court applied the attribution requirement from *Dameron* in *Howell*. 920 N.E.2d at 20. The attribution requirement was met, despite the newspaper not attributing every statement to the named public official and broad references in the article to "officials." *Id.* The court reasoned that "[a]n average reader ... would understand [the challenged portions of the article] to be a summary of an official statement because the [newspaper] was clearly paraphrasing official statements instead of continuing to quote them directly." *Id.* (citation omitted).

Here, the average reader knew the name of the source, Detective Isom, and his relationship to the case, lead investigator. (App. Op. at 9-10.) As a result, it is abundantly clear

[10] The other judicial opinion relied upon by the Court of Appeals, *Rushford*, 846 F.2d at 254 relies exclusively on *Dameron* for its attribution requirement. And *Rushford* requires only proper attribution, not perfect or complete attribution, which is what the Court of Appeals requires in this case.

from the article that the case's lead investigator for the White County Sheriff's office was making the statements. The newspaper did not describe its source as an unnamed sheriff's deputy or fail to explain who it was quoting.[11] The newspaper's description is more than sufficient under the District of Columbia's *Dameron* case.

Despite the clarity regarding the source in the article, the Court of Appeals held that "the average reader would not have understood Ms. Claytor's article, either from its context or specific attribution, to have been based upon an official act of government." (*Id.* at 10.) The Court of Appeals reasoned that if the newspaper had identified Detective Isom in his other official role, as public information officer, the attribution would have been proper. (*Id.* at 9-10.) But this assumes that the "average reader" would think that a public information officer is more "official" when speaking to the press than the lead investigator on the case. As a practical matter, the reverse may be true. Readers might consider information coming directly from the source, the lead investigator, to be more official, authoritative and informed, than a public information officer, who may or may not have first-hand knowledge regarding the matter. Either way, the article should be protected by the fair report privilege.

The average reader of the article at issue here would plainly understand who the source of the information was so that they could judge the veracity of the statements. Even if the application of the privilege turns on Detective Isom being the public information officer, to the average reader that would have little or no impact on their understanding regarding the source. Such stringent attribution standards should not apply to the fair report privilege, and the Court should grant review.

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[11] Although, if Sparta had attributed in a more general manner, such as without using Detective Isom's name, and only used "lead sheriff's investigator" or "sheriff's press officer," such a description still would have satisfied the *Dameron* test.

B. Even if Attribution Is Required, the Court of Appeals' Strict Interpretation of It Treads on Editorial Discretion.

"First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Based on this principle, courts are reluctant to mandate the use of specific language. But the Court of Appeals ruling fails to provide any "breathing space" and ignores this principle. Stripping a speaker of a common law privilege for failing to identify one of the two public roles a law enforcement officer has in a story is a cramped notion of the privilege and treads on the newspaper's editorial discretion.

Because of the breathing space required by the First Amendment, courts are loath to sit as "super editors" for the media. The U.S. Supreme Court has explained that

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974). Similarly, the Court of Appeals for the Eighth Circuit sitting en banc has held that

> We believe that the First Amendment cautions courts against intruding too closely into questions of editorial judgment, such as the choice of specific words. Editors' grilling of reporters on word choice is a necessary aggravation. But when courts do it, there is a chilling effect on the exercise of First Amendment rights.

Janklow v. Newsweek, Inc., 788 F.2d 1300, 1304 (8th Cir. 1986) (en banc) (internal citation omitted); *see also Woodcock v. Journal Publ'g Co.*, 646 A.2d 92, 100 (Conn. 1994) ("The First Amendment cautions courts against intruding too closely into questions of editorial judgment, such as the choice of specific words."); *Martin v. State Journal-Register*, 612 N.E.2d 1357, 1365 (Ill. App. Ct. 1993) (permitting courts to become super-editors "is both too heavy a price to pay

and one which our Nation's Founders rejected"). This common refrain is echoed by the Court of Appeals for the Fifth Circuit:

> judges, acting with the benefit of hindsight, must resist the temptation to edit journalists aggressively. Reporters must have some freedom to respond to journalistic exigencies without fear that even a slight, and understandable, mistake will subject them to liability. Exuberant judicial blue-pencilling after-the-fact would blunt the quills of even the most honorable journalists.

Ross v. Midwest Commc'ns, Inc., 870 F.2d 271, 275 (5th Cir. 1989).

But that is what the Court of Appeals did. It held that the newspaper lost the fair report privilege because it described its source only by name and as the "case's lead investigator," but did not include that he was also the "public information officer." (App. Op. at 9-10.) The newspaper should have the editorial discretion to decide how to describe Detective Isom for its readers. To have the important legal protection provided by the fair report privilege hang by such a thin thread goes too far, does not provide sufficient breathing space for the media and other speakers who rely upon the fair report privilege, and would put the Courts in the position to act as super editors. Courts dictating how sources must be attributed is improper and infringes upon the editorial discretion the First Amendment provides to the media.

III. Review is Warranted Because, Contrary to the Court of Appeals Decision, Tennessee Broadly Construes Defamation Privileges, and the Fair Report Privilege Should Be No Exception.

This Court has broadly construed defamation privileges, including the litigation privilege and the fair report privilege. This has led the Court of Appeals to note that the litigation privilege "is to be liberally construed so as to insure unfettered access to the judicial process." *Tabor v. Eakin*, No. 03A01-9902-CV-00043, 1999 Tenn. App. LEXIS 328, at *7 (Tenn. Ct. App. May 26, 1999) (citing *Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152, 161 (Tenn. Ct. App. 1997)). This same broad construction should apply to the fair report privilege since "[t]he fair

report privilege flows from the absolute privilege which attaches to statements made 'in the due course of a judicial proceeding.'" *Lacomb v. Jacksonville Daily News Co.*, 543 S.E.2d 219, 221 (N.C. Ct. App. 2001) (citation omitted); *see also Rosenberg*, 616 A.2d at 872 (noting that the fair report privilege operates "in tandem" with absolute privileges); *Molnar v. Star-Ledger*, 471 A.2d 1209, 1212-13 (N.J. Super. Ct. App. Div. 1984) (supporting finding of official action for privilege analysis by discussing qualified immunity the source would have for the statements). This Court should grant review in this case to provide guidance to the courts of Tennessee on this important issue.

This Court has consistently taken a broad view of defamation privileges, and the Court of Appeals decision was inconsistent with this jurisprudence, taking a very narrow view of the fair report privilege. Three cases highlight this Court's broad application of defamation privileges: *Jones*; *Simpson Strong-Tie Co. v. Stewart, Estes & Donnell*, 232 S.W.3d 18 (Tenn. 2007); and *Langford v. Vanderbilt University*, 287 S.W.2d 32 (Tenn. 1956). In each of these cases, the Court looked at the policy implications of the defamation privileges at issue and decided that more protected speech was of sufficient public benefit to justify extension of that privilege. The Court has an opportunity to do the same here.

In *Jones*, the question was "whether cabinet-level state executive officials are absolutely immune from defamation claims arising out of statements made while performing their official duties." 426 S.W.3d at 51. Crucial to the Court's decision was that "'[t]he effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.'" *Id.* (quoting *Barr*, 360 U.S. at 577 (Black, J. concurring)). This Court "agree[d] that the public has a vital interest in receiving information

from public officials about the effective, or ineffective, functioning and performance of the government."[12] *Id.* Relying upon these policy considerations, the Court extended an absolute privilege to cabinet-level state officials in Tennessee.[13] *Id.* at 58.

In *Simpson Strong-Tie*, this Court addressed whether "the [litigation] privilege encompasses an attorney's solicitous statements made prior to the filing of a lawsuit." 232 S.W.3d at 23. The Court explained that the litigation privilege is generally necessary

> because "access to the judicial process, freedom to institute an action, or defend, or participate therein without fear of the burden of being sued for defamation is so vital and necessary to the integrity of our judicial system that it must be made paramount."

Id. (quoting *Jones v. Trice*, 360 S.W.2d 48, 51 (Tenn. 1962)). The Court held that "an attorney is privileged to publish what may be defamatory information prior to a proposed judicial proceeding, even though communication may be received by individuals who are unconnected with the proposed proceeding." *Id.* at 27. If attorneys may be absolutely privileged to publish defamatory information when soliciting clients, why shouldn't speakers be protected when repeating what the lead detective and public information officer has to say regarding a pending criminal case?

In *Langford*, this Court's most recent opinion on the fair report privilege, the Court tackled whether to overturn 50-plus year-old precedent that limited the privilege to judicial filings that had been acted upon by the judiciary. 287 S.W.2d at 35-36. The Court cited

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[12] The *Jones* Court also noted that "[u]ninhibited communication with the public about governmental affairs is essential and must be protected." 426 S.W.3d at 56 (citing *Barr*, 360 U.S. at 577 (Black, J., concurring)).

[13] Under the lower court's decision, however, a one-on-one, official, on-the-record interview with the same official in *Jones* would not be covered by the fair report privilege. This result is illogical given the public policy considerations behind both privileges.

favorably to a New York decision which explained that the publication of allegations in a complaint has "become so general a practice 'that the public has learned that accusation is not proof ...'" *Id.* at 397 (citation omitted). Along the same lines, the Court noted that "[i]t is common knowledge that in this State the press has for time out of mind published the contents of a pleading filed in Court, though no further action has been taken thereon, and that the privilege of so doing has not been questioned...." *Id.* at 36. "This unchallenged practice through the years is some evidence that it has not been regarded by the bar or laity that the right to publish within the limits stated without liability for damages does not apply to mere pleadings filed in Court." *Id.* Ultimately, the Court held that fair report privilege extended "to mere contents of pleadings filed in Court though no judicial action has been taken thereon..."[14] *Id.* at 399.

These three cases demonstrate this Court's willingness to protect more speech, not less, to the benefit of the public. The Court grounded these decisions on concerns regarding access to courts, the freedom of speech, and longstanding practices of the media. These types of concerns are at issue here where the Court of Appeals would hold Sparta responsible for the allegedly false and defamatory statements of Detective Isom. This would chill speech and upset the long-standing practice of relying upon not just public records, like indictments, to report on crime, but also law enforcement officers involved in the investigation of the allegations. The fair report privilege should be broadly construed, just as the privileges in these three cases were. *Howell*, 920 N.E.2d at 13 (citation omitted) ("Given these policy rationales, it is important that the [fair report] privilege be construed liberally and with an eye toward disposing of cases at an early

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[14] *Langford* was, in many ways, ahead of its time in rejecting the initial pleading exception. "[T]oday ... there is a clear trend away from recognizing the initial pleadings exception. Indeed, most modern court decisions have rejected that exception." *Salzano*, 993 A.2d at 789 (citations omitted). This is true, despite the fact, that the Restatement (Second) of Torts § 611 cmt. e (1977), adopted the initial pleadings exception.

stage of litigation."). The privilege was narrowly construed here and this Court should grant Sparta's application and reverse the lower court's opinion.

IV. The Court of Appeals Erroneously Refused to Address Sparta Newspapers' Alternative Grounds for Summary Judgment.

"[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (quoting *N.Y. Times Co.*, 376 U.S. at 284-286)). In this case, Sparta argued at both the trial and appellate levels that Burke was a public figure and that he had failed to proffer sufficient evidence of actual malice to survive summary judgment. (Sparta's Appl. at 26-27.) The level of fault applicable to a defamation plaintiff and whether the fault standard is met clearly raises First Amendment issues. *E.g.*, *N.Y. Times*, 376 U.S. at 279-80.

The Court of Appeals ruling of waiver on the actual malice issue appears to be based upon a flawed understanding of Sparta's Statement of the Issues below and of the fair report privilege itself. Specifically, the lower court held that "[a]lthough it argues that summary judgment was appropriate on an alternative ground, Sparta Newspapers did not designate the alternative ground for summary judgment in its statement of issues on appeal." (App. Op. at 11.) But this is inconsistent with Sparta's Statement of the Issues below, which read

> [w]hether the White County Circuit Court correctly granted Defendant-Appellee's Motion for Summary Judgment finding that the fair report privilege applies to Plaintiff-Appellant's claims and that Plaintiff failed to demonstrate evidence of actual malice?

(Sparta's App. Brief at 1.) The Court of Appeals appears to have interpreted this statement of the issues to mean that the actual malice issue was tied to the fair report privilege, which

although it may be one reading of the statement, is not the only reading of it.[15] And such a reading is inconsistent with this Court's jurisprudence on the fair report privilege.

This Court has never held that actual malice is sufficient to overcome the fair report privilege, and the Court of Appeals made it abundantly clear in its recent opinion in *Funk*, Tenn. App. LEXIS 779, at *15-16, that actual malice is not a component of the fair report privilege.[16] "Recognizing that the fair report privilege has evolved over time, we conclude that under the current state of the law the privilege cannot be defeated by a showing of actual malice by the plaintiff and that the trial court erred when it ruled otherwise." *Id.* at *15.

Sparta's briefing in the Court of Appeals makes clear that it argued in the trial court and sought a ruling in the appellate court on whether Burke was a public figure, and, if he was, whether he had satisfied the actual malice standard. (Sparta's App. Brief at 24-26.) This should be sufficient to raise this important constitutional issue and warrants review by this Court.

CONCLUSION

"[S]ociety has struck a balance when official actions and statements are at issue. It has determined that its interest in subjecting official actions and statements to public scrutiny outweighs the defamatory harm that would otherwise be actionable." *Howell*, 920 N.E.2d at 14. The Court of Appeals ruling disrupts this balance and drastically alters the fair report privilege. Its ruling will reduce the incentive to gather the news from long-held sources to the detriment of the public discourse.

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[15] The Court of Appeals cited to a Seventh Circuit opinion, *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 535 (7th Cir. 1982) for the proposition that the fair report privilege "may be overcome, however, by a showing that the publication was motivated by actual malice." (App. Op. at 11.) But that is not the law in Tennessee. *Funk v. Scripps Media, Inc.*, No. M2017–00256–COA–R3–CV, 2017 Tenn. App. LEXIS 779, at *15-16 (Tenn. Ct. App. Nov. 30, 2017).

[16] The *Funk* case is currently under review by this Court, Case No. M2017-00256-SC-R11-CV.

Amici respectfully request that this Court grant Sparta's Application for review and, on the merits, reverse the Court of Appeals constrained interpretation of the fair report privilege and review the constitutional fault question in this case.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2018, a true and correct copy of the foregoing was furnished by First Class U.S. Mail and email to each of the following:

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