No. M2017-00256-SC-R11-CV

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

GLENN R. FUNK,
Plaintiff-Appellant,

v.

SCRIPPS MEDIA, INC. and PHIL WILLIAMS,
Defendants-Appellees,

ON APPEAL FROM THE CIRCUIT COURT FOR
DAVIDSON COUNTY, TENNESSEE
CASE NO. 16C333

BRIEF OF AMICI CURIAE THE ASSOCIATED PRESS, CABLE NEWS NETWORK, INC., COURTHOUSE NEWS SERVICE, COX MEDIA GROUP NORTHEAST D/B/A WHBQ-TV, 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 DEFENDANTS-APPELLEES

Paul R. McAdoo, BPR No. 34066
Aaron & Sanders PLLC
605 Berry Road, Suite A
Nashville, TN 37204
Tel: (615) 577-0991
Fax: (615) 250-9807
paul@aaronsanderslaw.com

Attorney for *Amici Curiae*

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STATEMENT OF THE ISSUES

Pursuant to Tennessee Rule of Appellate Procedure 31, The Associated Press, Cable News Network, Inc., Courthouse News Service, Cox Media Group Northeast d/b/a WHBQ-TV, 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 (collectively, "Amici"), by and through their undersigned counsel, respectfully submit the following brief in support of Scripps Media, Inc. and Phil Williams (collectively, "Scripps"). Amici agree with the Statement of the Issues and arguments presented by Scripps and write separately to address the following issues:

> 1. Should this Court's precedent permitting defamation plaintiffs to overcome an assertion of the fair report privilege with a showing of express malice on the part of the defendant be overturned as unconstitutional?
>
> 2. Should this Court's precedent permitting defamation plaintiffs to overcome an assertion of the fair report privilege with a showing of express malice on the part of the defendant be overturned as illogical and against the public policy favoring the freedom of speech regarding public affairs?
>
> 3. Should this Court construe Tennessee Code Section 24-1-208(b)'s use of the word "source" as a person who provides information?

STATEMENT OF THE FACTS

Amici are publishers and broadcasters who operate in Tennessee along with a national non-profit association, all of whom are dedicated to preserving the freedoms of speech and the press guaranteed by the First Amendment. Amici have an interest in this case because it will have an impact on the fair report privilege and Tennessee's Shield Law, Tennessee Code Section

24-1-208, which are both critical protections for newsgatherers. Amici adopt the statement of facts set forth by Scripps in its Brief.

STANDARD OF REVIEW

The proper standard of review in this case is de novo. "Issues of constitutional interpretation are a question of law, which we review de novo without any presumption of correctness given to the legal conclusions of the courts below." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008). Similarly, in regard to the interpretation of the Shield Law, "[i]ssues of statutory construction are questions of law and shall be reviewed de novo without a presumption of correctness." *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 599 (Tenn. 1999) (emphasis in original) (citations omitted).

INTRODUCTION

When this Court's first case on defamation privileges was decided in *Lea v. White*, 36 Tenn. 111, 113-15 (1856), our country was made up of only 34 states, slavery was still legal, Vanderbilt University had not been founded, and the First Amendment had nothing to do with defamation. A lot has changed since then. Now, it is well established that the First Amendment plays an important role in defamation law by ensuring breathing space for speech, so it will not be chilled. But this Court's precedent on Tennessee's fair report privilege is largely unchanged. According to this Court's precedent, the privilege can still be overcome with a showing of express malice or ill will on behalf of the publisher. Express malice's role in the fair report privilege is a relic of time and should be overturned because it is inconsistent with the First Amendment, is illogical, and undercuts Tennessee's public policy in favor of robust discussion of public affairs.

The other central issue in this case is not of the same historical vintage but is equally vital to a free and vibrant press. In the wake of the U.S. Supreme Court's holding in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Tennessee General Assembly enacted a privilege to protect journalists from attempts to force them to disclose information and their sources, whether confidential or not. Tenn. Code Ann. § 24-1-208 (the "Shield Law"). The General Assembly included a specific, limited exclusion, which prevents a defamation defendant from keeping the identity of a source secret if the defendant asserts a defense based upon the source. *Id.* § 24-1-208(b). But in this case, the trial court incorrectly held the exception also applies to information – not just its source. Such a construction is inconsistent with the plain language of the statute and should be reversed.

ARGUMENT

I. This Court's Precedent Applying Express Malice to the Fair Report Privilege Should Be Overturned Because It Is Inconsistent with the First Amendment.

While stare decisis generally counsels against overturning long-established precedent, it is not an absolute rule. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). When established precedent is inconsistent with a constitutional provision, the courts have a duty to re-examine that precedent. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-28 (1974) (Powell, J., concurring). Here, the precedent relied upon by Plaintiff Glenn Funk ("Funk"), which dates back to the 19th century, (Funk Supp. Br. at 6-8), is inconsistent with two different lines of First Amendment cases from the U.S. Supreme Court.[1] The first, with its origins in *Garrison v. Louisiana*, 379 U.S. 64 (1964), has generally found inclusion of express malice, as either an element or a counter to a defense, to be unconstitutional. The second, which traces its roots back to *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), has generally held that it is inconsistent with the First Amendment to punish truthful speech on a matter of public concern based on lawfully acquired information, absent a need of the highest order. The United States Supreme Court has yet to find a "need of the highest order" sufficient to satisfy this high hurdle,

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[1] The precedent is also inconsistent with Section 19, Article 1 of the Tennessee Constitution. This Court has explained that

> [t]his mandate of Tennessee's Constitution requires that any infringement upon the "free communication of thoughts" and any stumbling block to the complete freedom of the press "to examine [and publish] the proceedings . . . of any branch or officer of the government" is regarded as constitutionally suspect, and at the very threshold there is a presumption against the validity of any such impediment.

Press, Inc. v. Verran, 569 S.W.2d 435, 442 (Tenn. 1978).

and this case fails to do so as well. Combined, these cases should spell the end of express malice in the fair report privilege.[2]

A. Stare Decisis Is Not an Absolute Rule and Special Considerations Are in Play When Precedent Is Inconsistent with the Constitution.

This Court should reexamine its precedent on express malice as a means to defeat the fair report privilege under the well-settled maxim that "*[s]tare decisis* is not an inexorable command; rather it 'is a principal of policy and not a mechanical formula of adherence to the latest decision." *Payne*, 501 U.S. at 828. The Court's "oath is to do justice, not to perpetuate error." *Frazier v. State*, 495 S.W.3d 246, 253 (Tenn. 2016) (quoting *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 599 (Tenn. 1999)).

Generally, established precedent should be overturned "[w]hen there is obvious error or unreasonableness in the precedent, a change in the conditions that makes the precedent obsolete, the likelihood that adherence to precedent would cause greater harm to the community than would disregarding *stare decisis*, or, especially when there is an inconsistency between precedent and a constitutional provision." *Hooker v. Haslam*, 437 S.W.3d 409, 422 (2014) (citing *In re Estate of McFarland*, 167 S.W.3d 299, 306 (Tenn. 2005)); *see also Frazier*, 495 S.W.3d at 253 ("[T]he doctrine of stare decisis does not compel this Court to maintain erroneous, 'unworkable,' or 'badly reasoned' precedent."). The last of these is particularly relevant here since the express malice component of the fair report privilege is inconsistent with the First Amendment.

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[2] The Court of Appeals correctly held that actual malice is not a component of the fair report privilege. (App. Opinion at 8.) The "settled meaning of actual malice" is that a statement was made "'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Air Wis. Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 861 (2014) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964)). This Court has never held that this actual malice defeats the fair report privilege.

And just because the precedent relied upon by Funk dates to the 19th century does not mean that it is unassailable. "'[I]f an error has been committed, and becomes plain and palpable, th[is] [C]ourt will not decline to correct it, even though it may have been reasserted and acquiesced in for a long number of years.'" *Rye v. Women's Care Ctr. Of Memphis, MPLLC*, 477 S.W.3d 235, 263 (Tenn. 2015) (quoting *Arnold v. City of Knoxville*, 90 S.W. 469, 470 (Tenn. 1905). "Thus, even a 'long and unchallenged custom cannot constitutionalize a practice that is eventually shown to be repugnant to the fundamental law.'" *Hooker*, 437 S.W.3d at 423 (citing *Summers v. Thompson*, 764 S.W.2d 182, 199 (Drowota, J., concurring)). In fact, "[t]his Court has not hesitated when it became expedient and appropriate to modify aging common law principles." *Glass v. City of Chattanooga*, 858 S.W.2d 312, 314 (Tenn. 1993) (citing *Dodson v. Shrader*, 824 S.W.2d 545, 549 (Tenn. 1992)).

B. Express Malice Has Been Found to Be Unconstitutional When Used as an Element or Means of Overcoming a Defense in Defamation Law.

The U.S. Supreme Court has on three occasions discussed and rejected the use of express malice as a component of a defamation claim or defense, largely based on the chilling effect inclusion of such a requirement has on speech. This Court should do likewise.

In *Garrison v. Louisiana*, the Supreme Court considered a criminal libel conviction of a local district attorney for speech critical of the local judges. 379 U.S. 64, 64-66 (1964). One of the key questions for the Court was whether permitting a defense of truth to be defeated by express malice was constitutional. *Id.* at 70-72. The Court rejected this notion: "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs was concerned." *Id.* at 74. The Court agreed with a decision from the New Hampshire Supreme Court in 1837 that explained

> "[i]f upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice ..."
>
> "It has been said that it is lawful to publish truth from good motives, and for justifiable ends. But this rule is too narrow. If there is a lawful occasion – a legal right to make a publication – and the matter true, the end is justifiable, and that, in such case, must be sufficient."

Id. at 73 (quoting *State v. Burnham*, 9 N.H. 34, 42-43 (1837)). The Court emphasized its concern about the self-censorship that would result if a defense of truth could be defeated by a finding of express malice:

> [d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.

Id.

In *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966), the Court rejected as unconstitutional a jury instruction on the fair comment privilege that included express malice: "'defamatory matter which constitutes comment rather than fact is justified if made without malice ...,' and defined malice to include 'ill will, evil motive, intention to injure.'" "This definition of malice is constitutionally insufficient where discussion of public affairs is concerned...." *Id.*

Finally, the Court took up the role of express malice in defamation in *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970). There, a local newspaper had truthfully reported on "several tumultuous city council meetings ... at which many members of the community freely expressed their views." *Id.* at 7. In those articles, the word "blackmail" was used to describe a local real estate developer's negotiating position. *Id.* He claimed that the article's meaning was that he had committed the crime of blackmail. *Id.* at 8. At trial, the judge

repeatedly instructed the jury that the plaintiff "could recover if the … publications had been made with malice *or* with reckless disregard of whether they were true or false." *Id.* at 9 (emphasis in original). The judge defined malice as including "spite, hostility or deliberate intention to harm." *Id.* at 10. In other words, the jury could find for the plaintiff "merely on the basis of a combination of falsehood and general hostility." *Id.* Just as the instruction had been unconstitutional in *Rosenblatt*, it was also unconstitutional in *Bresler*. *Id.*

But the *Bresler* Court went even further. It explained that the articles were "accurate and truthful reports of what had been said at the public hearings," *id.* at 12, and that "[t]he very subject matter of the news reports … is one of particular First Amendment concern," *id.* at 11. The Court concluded that "[t]o permit the infliction of financial liability upon the petitioners for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." *Id.* at 14.

Whether it is as an element of a defamation claim or a means for defeating a defense to one, the U.S. Supreme Court has held that inclusion of express malice is unconstitutional. Applying this logic to Tennessee's fair report privilege demonstrates the constitutional problem with permitting a plaintiff like Funk to defeat a defendant's assertion of the fair report privilege with a showing of express malice.

C. Application of Express Malice to Defeat the Fair Report Privilege Is Inconsistent with U.S. Supreme Court Precedent That Protects Publication of Truthful Information on Matters of Public Concern Based on Lawfully Acquired Information.

In a series of cases spanning more than twenty-five years, the U.S. Supreme Court repeatedly has held that punishment of truthful speech based on lawfully acquired information on

matters of public concern violates the free speech provisions of the First Amendment.[3] While the Court has stopped short of saying that such speech can never be punished, these cases illustrate something akin to a federal constitutional privilege for truthful speech upon matters of public concern. Express malice cannot overcome this right.

The first of these cases is *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975). Six youths were indicted for the murder and rape of a young woman. *Id.* at 471. While covering the plea hearing for the accused, a reporter for a local television station learned the name of the victim when he asked the courtroom clerk to see a copy of the indictment, which included the victim's name. *Id.* at 473 n. 3. The clerk permitted the inspection. *Id.* In violation of state law, the station aired a story that included the victim's name. *Id.* at 473-74. The victim's father sued the station for invasion of privacy, based upon the statute. *Id.* at 474. The station asserted that the broadcast was "privileged under both state law and the First and Fourteenth Amendments." *Id.* The state courts ruled in favor of the father. *Id.* at 474-75. The Supreme Court disagreed.

The question for the Court was "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records...." *Id.* at 491. The Court observed that "[w]ith respect to judicial proceedings ..., the function of the press serves to

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[3] The decision in *Craig v. Harney* may have foreshadowed these opinions when it explained that

> A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. *Those who see and hear what transpired can report it with impunity.*

331 U.S. 367, 374 (1947) (emphasis added).

guarantee the fairness of trial and to bring to bear the beneficial effects of public scrutiny upon the administration of justice" and that "[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 and consequently fall with the responsibility of the press to report the operations of government." *Id.* at 492 (citation omitted). The Court held that "the First and Fourteenth Amendments command nothing less than that the State may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."[4] *Id.* at 494-95.

In *Landmark Communications v. Virginia*, a newspaper reported the name of a sitting judge being investigated by a state commission. 435 U.S. 829, 830 (1978). Both the state constitution and a state statute made the proceedings of the commission confidential. *Id.* How the newspaper acquired the information is not clear. But, the Court was clear that criminal punishment of the newspaper for the publication was unconstitutional.[5] *Id.* at 838

The *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), decision took these cases a step further. A West Virginia statute barred the publication of juvenile offenders' names "without written approval of the juvenile court." *Id.* at 98. Two local newspapers learned the

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[4] The Supreme Court reinforced the *Cox* ruling the next year when it explained that when reporting on judicial proceedings "demonstration that an article was true would seem to preclude finding the publisher at fault." *Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976) (citing *Cox*, 420 U.S. at 498-500 (Powell, J., concurring)). Similarly, in *Nebraska Press Association v. Stuart*, the Court explained that "[t]ruthful reports of public judicial proceedings have been afforded special protection against subsequent punishment." 427 U.S. 539, 559 (1976) (citing *Cox*, 420 U.S. at 492-93).

[5] In fact, Justice Stewart explained in his concurrence that "[t]hough government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming." *Landmark*, 435 U.S. at 849 (Stewart, J., concurring).

name of a 14-year old shooter that killed a classmate; the newspapers learned the name through regular reporting techniques, including speaking with witnesses, police, and an assistant prosecutor at the school after the shooting. *Id.* at 99. Both papers published the name of the accused and were indicted for violation of the statute. *Id.* at 99-100. The newspapers challenged the constitutionality of the provision. *Id.* at 100.

Relying on *Cox* and *Landmark*, the Court noted that "[o]ur recent decisions demonstrate that state action to punish publication of truthful information seldom can satisfy constitutional standards." *Id.* at 102. But the Court did not see these cases as being dispositive despite the fact the precedent "all suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 103. The Court explained that "[t]hese cases involved situations where the government itself provided or made possible press access to the information." *Id.* But the government's role in permitting access to the information was "not controlling" because "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Id.* at 103-04 (citations omitted). In other words, even where the information was not learned in open court or from open court records, the result was the same. The Court held that "[i]f the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here." *Id.* at 104.

In 1989, the Court once again took up the question of punishing publication of a rape victim's name, this time when the information was made available to the press by the sheriff's department. *Florida Star v. B.J.F.*, 491 U.S. 524, 526-27 (1989). Despite the similarities, the Court did not consider *Cox* controlling because the information was provided by law

enforcement, not as part of a judicial proceeding. *Id.* at 532. Relying upon the *Daily Mail* opinion, the Court engaged in a two-step inquiry. First, "whether the newspaper 'lawfully obtain[ed] truthful information about a matter of public significance'" and second, "whether imposing liability ... serves 'a need to further a state interest of the highest order.'" *Id.* at 536-37 (quoting *Daily Mail*, 443 U.S. at 103).

The first step favored the newspaper because the information was lawfully acquired, truthful, and a matter of public significance. *Id.* at 536. With respect to the latter, the focus was not on the revelation of the name in particular, but rather was on the article's general subject which was "a matter of paramount public import: the commission and investigation of a violent crime which had been reported to authorities." *Id.* at 536-37.

As to the second inquiry, the victim argued that there were three, related state interests that imposition of liability would serve that were of the highest order: "the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure." *Id.* at 537. The Court held that these are "highly significant interests," but ultimately found that "imposing liability for publication under the circumstances of this case is too precipitous a means of advancing these interests to convince us that there is a 'need' within the meaning of the *Daily Mail* formulation for Florida to take this extreme step." *Id.*

The final case in this series presented the Court with a distinct set of facts when compared to *Cox* and its earlier progeny. In *Bartnicki v. Vopper*, the published information was not learned from the courts or law enforcement, but instead came from an anonymous source who had illegally intercepted cell phone conversations in violation of federal and state law. 532

U.S. 514, 517-18 (2001). The broadcaster who ultimately published the information "did not participate in the interception, but they did know – or at least had reason to know – that the interception was unlawful." *Id.* And the disclosure of the contents, including by the initial recipient and radio stations he disclosed the tape to, was also illegal under the federal and state statutes.[6] *Id.* at 523-25. The broadcaster claimed that the First Amendment protected their actions. *Id.* at 520.

The Court relied upon three factual predicates for its decision. First, the publishers "played no part in the illegal interception." *Id.* at 525. Second, the receipt of the information on the tapes was not itself illegal, "even though the information itself was intercepted unlawfully by someone else." *Id.* And, finally, the information was a matter of public concern. *Id.*

The government asserted two interests in support of the constitutionality of the application of the wiretap statute in these circumstances: eliminating the incentive to intercept private conversations and "minimizing the harm to persons whose conversations have been illegally intercepted." *Id.* at 529. In rejecting the former, the Court explained that "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law abiding third party." *Id.* at 529-30. The Court considered the government's second argument, "[p]rivacy of communication," "considerably stronger," but it was still insufficient to justify imposing liability because "privacy concerns give way when balanced against the interest in publishing matters of public importance." *Id.* at 532-34. As a result, the defendants could not be found liable consistent with the First Amendment. *Id.* at 535.

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[6] But the receipt of the tape was not itself prohibited by the statute. *Id.* at 538 (Breyer, J., concurring).

Together, these cases essentially create a constitutional fair report privilege. For this protection to apply, the published information must be truthful, the information must be about a matter of public concern, and the information must have been lawfully acquired.[7] Express malice plays no role in this constitutional analysis. The Supreme Court has not created a categorical rule on this point because it is "mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily." *Florida Star*, 491 U.S. at 532. Thus, the Court qualifies this privilege with the possibility that it might be overcome by a state interest of the highest order. No such state interest is at play here.

Funk is not a juvenile criminal defendant whose name was published in violation of a state statute. Funk is not a judge whose name was released in relation to a state inquiry that is required by the state's constitution and statutes to be private. Funk is not someone whose cell phone communications were published after being illegally intercepted. Funk is not a rape victim whose name has been published. Funk is a public official who was criticized for his handling of a high profile domestic violence allegation. With this suit, Funk seeks to defend his reputation. But the U.S. Supreme Court has explained that "our decisions establish that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful

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[7] At this stage it is clear that the allegedly defamatory articles are of utmost public concern – the alleged commission, investigation, and prosecution of violent crime and the operation of our judicial system as well as the actions of a public official in that role. *Florida Star v. B.J.F.*, 491 U.S. 524, 536-37 (1989) (holding that the commission and investigation of violent crime that has been reported is "of paramount public import."); *Landmark*, 435 U.S. at 839 ("The operations of courts and the judicial conduct of judges are matters of utmost public concern."); *Neb. Press Ass'n*, 427 U.S. at 597 (Brennan, J., concurring) (quoting *Cox Broad. Corp.*, 420 U.S. at 492 (1975) ("[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public"); *Garrison*, 379 U.S. at 77 (noting that the "free flow of information to the people concerning public officials" is a "paramount public interest").

speech." *Butterworth v. Smith*, 494 U.S. 624, 634 (1990). This is not a state interest of the highest order sufficient to overcome this constitutional privilege.

The *Garrison* and *Cox* lines of cases demonstrate the constitutional problem with permitting plaintiffs to overcome the fair report privilege with a showing of express malice. *Garrison* and its progeny show that express malice is a concept that is generally inconsistent with the First Amendment. *Cox* and its related cases established that truthful reporting on matters of public concern based on lawfully acquired information is generally protected by the First Amendment, and, whatever the State's interest may be in continuing to include express malice as a part of the fair report privilege analysis, it is insufficient to justify the imposition of liability. Together, this U.S. Supreme Court precedent should be the death knell of express malice in the fair report privilege.

II. The Express Malice Component of the Fair Report Privilege Should be Rejected Because It Is Illogical and Against Public Policy Favoring Free Speech.

"The common law of America is evolutionary; it is not static and immutable. It is in constant growth, going through mutations in adapting itself to changing conditions and in improving and refining doctrine. By its very nature, it seeks perfection in the achievement of justice." *Dodson v. Shrader*, 824 S.W.2d 545, 549 (Tenn. 1992) (citation omitted). The Court of Appeals has on several occasions, as it did in this case, recognized that express malice should be excised from the fair report privilege and Amici urge this Court to do the same.

The last time this Court took up the fair report privilege was to overrule a 50-plus year precedent because it was "completely illogical" to only apply the fair report privilege to court filings that had been acted upon by the court. *Langford v. Vanderbilt Univ.*, 287 S.W.2d 32, 35-37 (Tenn. 1956). Like in *Langford*, continuing to permit a defamation plaintiff to defeat an assertion of the fair report privilege with a showing of express malice is illogical.

Take the example of a newspaper reporter and a blogger who both observe a criminal proceeding. The criminal defendant is the blogger's neighbor. Both the blogger and the reporter fairly and accurately report on the proceeding. In a defamation suit, the neighbor sues both, and they both assert the fair report privilege. The reporter, who has no relationship with the neighbor, prevails on his defense. The blogger, however, does not prevail on the fair report privilege because he held a grudge against his neighbor for cutting down a tree on the property line without discussing it with him. In publishing his report on the neighbor's day in court, the blogger was "actuated by ill will or personal spite."[8] These disparate results are illogical. Elimination of express malice from the fair report privilege would resolve the problem.

Removal of the express malice requirement would also be consistent with the approach this Court took in *Jones v. State*, 426 S.W.3d 50 (Tenn. 2013). 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." *Id.* at 51. The Court saw two policy arguments supporting extension of an absolute privilege. First, "the absolute privilege represented 'an expression of a policy designed to aid in the effective functioning of government.'" *Jones* at 54 (quoting *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959)).

The other argument is based upon the freedom of speech: "'[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

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[8] This is the standard Funk argues applies in this case. (Funk Supp. Brief at 7.)

from public officials about the effective, or ineffective, functioning and performance of the government."[9] *Id.* Relying upon these policy considerations, the Court extended an absolute privilege to cabinet-level state officials in Tennessee. *Id.* at 58.

The same free speech policy argument that supported the Court's conclusion in *Jones* supports elimination of express malice from the fair report privilege. The people are not limited to receiving their information about the government from the government.

> The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars ... to play an important role in the discussion of public affairs. Thus the 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 elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change ... muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

Mills v. Ala., 384 U.S. 214, 218-19 (1966) (internal citation omitted); *see also Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) ("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."). And the watchdog function that the press plays is not limited to members of the media, but applies to the blogger talking about his town council or the individual who attends a local zoning meeting and reports back to her neighbors. The press and other citizens play a crucial role in informing the public regarding their government. Just as the freedom of speech supported the extension of an absolute privilege to

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

cabinet-level state officials in Tennessee, it likewise supports elimination of express malice from the fair report privilege calculus.

The Court of Appeals in this case recognized that express malice has been omitted from several of its recent decisions on the fair report privilege. (App. Opinion at 6-8.) Chief among these was *Eisenstein v. WTVF-TV*, 389 S.W.3d 313 (Tenn. Ct. App. 2012) in which the appellate court omitted express malice from its description of the privilege and noted that "at one time the fair report privilege required an absence of malice," but "subsequent Tennessee cases do not require it." *Id.* at 323 n.8.

This is consistent with the modern view on the fair report privilege. The Restatement (Second) of Torts § 611 (1977) does not include a requirement that the publication be made without malice and explains that "[a]buse of the privilege takes place … when the publisher does not give a fair and accurate report of the proceeding." *Id.*, cmt. a; *see also id.*, Reporter's Notes ("This Section has been changed from the First Restatement … by the deletion of Clause (b), which made it a condition of the privilege that the publication not be 'made solely for the purpose of causing harm.'"). Dean Smolla agrees with the Restatement's approach, explaining that "[t]he more sound view is that application of the fair reports privilege should turn on whether the report is fair and accurate, and not on the motivation of the reporter." 2 Rodney A. Smolla, *Law of Defamation* §8:70.50 (2d ed. 2018). Similarly, Professor Dobbs explained that the use of express malice to defeat the fair report privilege only "made sense if the purpose of the courts was to punish sinful states of mind as in the early cases of slander, or to imprison political enemies as in the 16th and 17th century libel cases." Dan B. Dobbs, *The Law of Torts* 1167 (2000). An express malice exception to the fair report privilege does not make sense today.

III. The Exception to Tennessee's Shield Law Is Very Limited and Does Not Apply in this Case.

The scope of the exception to Tennessee's Shield Law, Tennessee Code Section 24-1-208(b), is also at issue here. Based upon the plain language of the statute, the exception in section (b) is limited to forcing news gatherers to provide the name of their source if a defamation defendant asserts a defense based upon the source. That is not the case here, and both the Circuit Court and the Court of Appeals construed the provision too broadly.

"In interpreting statutes the legislative intent must be determined from the plain language it contains, read in the context of the entire statute, without any forced or subtle construction which would extend or limit its meaning." *Nat'l Gas Distribs., Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991) (citing *Metro. Government of Nashville, etc., v. Motel Systems*, Inc., 525 S.W.2d 840, 841 (Tenn.1975)). In addition, in statutory construction "[w]e are constrained to interpret statutes so that no part or phrase of a statute will be rendered inoperative, superfluous, void, or insignificant." *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 600 (Tenn. 1999) (citing *Tidwell v. Collins*, 522 S.W.2d 674, 676 (Tenn. 1975)). Similarly, "it should be assumed that the legislature used each word purposefully and that those words convey some intent and have a meaning and a purpose." *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004) (citing *Tenn. Growers, Inc. v. King*, 682 S.W.2d 203, 205 (Tenn. 1984)). "Further, the language of a statute cannot be considered in a vacuum, but 'should be construed, if practicable, so that its component parts are consistent and reasonable.'" *In re Estate of Tanner*, 295 S.W.3d 610, 614 (Tenn. 2009).

Although interpretation of Section 24-1-208(b) is the central issue, it is necessary to start with section (a) to understand section (b)'s scope. Section (a) provides a broad statutory privilege to a wide variety of news gatherers to refuse "to disclose…any information or the

source of any information procured for publication or broadcast." Tenn. Code § 24-1-208(a).[10] In other words, reporters cannot be compelled to testify about two types of evidence: (1) "any information ... procured for publication or broadcast" and (2) "the source of any information procured for publication or broadcast." *Id.* The phrasing of section (a) demonstrates that there is a difference between information and the source of information for purposes of this statute.

In contrast with section (a), section (b) only discusses the source of information. It reads:

> (b) Subsection (a) shall not apply with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information.

Tenn. Code § 24-1-208(b). Thus, section (b) applies only when "a defense based on the source of [any allegedly defamatory] information" is asserted, not when a defense is based on any information *or* the source of any information. "Information" and "the source of any information" are not the same things. But this broader interpretation is the meaning that the Court of Appeals gave it when it held that "source" in section (b) includes both people and documents. (App. Opinion at 10.)

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[10] Section (a) reads:

> (a) A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, *shall not be required* by a court, a grand jury, the general assembly, or any administrative body, *to disclose* before the general assembly or any Tennessee court, grand jury, agency, department, or commission *any information or the source of any information* procured for publication or broadcast.

Id. § 24-1-208(a) (emphasis added).

In the Shield Law, "source" means a person from whom a reporter received information. Section (b) creates a limited exception to the privilege in a defamation suit that applies only where the reporter bases his defense on the source of some allegedly defamatory information, and – even when it applies – that exception does not remove the privilege so the reporter must reveal the information itself.[11] Thus, a reporter could be compelled to provide the name of a source, but could still refuse to reveal the information provided by the source.

In this case, the trial court erroneously held that Section 24-1-208(b) stripped Scripps of its statutory rights based on section (b). (Scripps Br. at 33 (citing Jan. 13, 2017 Judge's Ruling at T.R. 1035).) Similarly, the Court of Appeals erred by construing the reference to "source" in section (b) as referring to documents. (App. Opinion at 10.) But if a document is a "source," what is the statutory distinction between "information" and "source of … information?" If a

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[11] The historical context of the passage of Section 24-1-208 sheds additional light on the meaning of "source." In *Austin v. Memphis Publishing Co.*, 655 S.W.2d 146, 149 (Tenn. 1983), this Court noted that Section 24-1-208 was passed in the wake of the U.S. Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). This Court explained that the drafters of Section 24-1-208 were considering the opinion in *Branzburg* during the legislative process. *Id.* at 147 n.2. In discussing *Branzburg*, the *Austin* Court strongly suggested that the "source" in this context denotes a person. *Id.* at 149 (explaining that in *Branzburg* the reporter "had promised not to reveal the identities of the violators," but "requiring a newsman to testify before a grand jury did not abridge the freedom of speech and press… nor did the newsman's confidentiality agreement, to conceal the sources, the material and the criminal acts, invoke a constitutional privilege"). In fact, the *Branzburg* Court itself regularly used the word source to refer to a person relied upon by a reporter for information. *E.g.*, 408 U.S. at 691, ("Only where news sources themselves are implicated in crime or possess information…" and "nor does it threaten the vast bulk of confidential relationships between reporters and their sources"). Similarly, in *Moman v. M.M. Corp.*, C.A. No. 02A01-9608-CV00182, 1997 Tenn. App. LEXIS 233, at *5 (Tenn. Ct. App. Apr. 10, 1997), the defendant "refused to answer questions during his deposition because he did not want to disclose the identity of his sources." The plaintiff sought to compel answers pursuant to section (b). *Id.* at *4. Even an appellate court in Indiana has described Tennessee's reporter's privilege as being waived under section (b) where a defendant attempts "to prove their defense through witnesses whose identities are protected by the shield law." *Jamerson v. Anderson Newspapers, Inc.*, 469 N.E.2d 1243, 1248 (Ind. Ct. App. 1984) (citations omitted).

reporter is forced to provide all the documents it relied upon for any allegedly defamatory information, that is the same as providing the information. This construction makes "information" and "source of … information" co-extensive, which was not the intent of the Legislature.

The fair report privilege in this case is not "based on the source of [any allegedly defamatory] information." "For that defense, Defendants are relying upon the pleadings, deposition testimony and documents produced and filed in the Williamson County lawsuit filed by David Chase." (Scripps Br. at 33 (citing T.R. 41-164).) Those documents are not a "source" as that word is used in the Shield Law. As such, the exception to the Shield Law is not applicable.

The understanding of the statutory meaning of "source" in both sections (a) and (b) that gives meaning to both "information" and "source of … information," is a person or persons from whom information is received. The exception in section (b) is narrow and is limited to situations in which the identification of a person is the basis of a defense, and only when that happens can a journalist be required to disclose the identity of that source to a defamation plaintiff. That is not the case here.

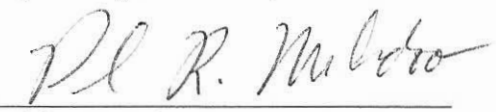
CONCLUSION

Permitting a showing of express malice to overcome the fair report privilege treats speakers differently based solely upon their intent and motivation. If a partisan political pundit publishes truthful information about a political opponent based on government records or proceedings for the purpose of harming the political opponent, that could be sufficient to defeat the fair report privilege. But a reporter with no axe to grind against the politician who publishes the same information could successfully rely upon the fair report privilege. This is not only illogical, it is also unconstitutional.

Just as it is time to update the law on the fair report privilege, this Court has an opportunity to construe the exception in Tennessee's Shield Law as being limited in scope, just as it is written. To give meaning to "source" in section (b), it is essential to understand the use of the same word in section (a). "Source" should be construed as the person who provided the information.

Amici respectfully request that this Court find that the use of express malice as a means for defeating the fair report privilege is inconsistent with the First Amendment, that express malice should also be removed from the fair report privilege because it is illogical and against public policy, and that Section 24-1-208(b) only applies when a defamation defendant is relying upon the identity of a person for its defense.

Respectfully submitted,



Paul R. McAdoo, BPR No. 034066)
Aaron & Sanders PLLC
810 Dominican Dr., Ste. 208
Nashville, TN 37228
Tel: (615) 734-1188
Fax: (615) 250-9807
paul@aaronsanderslaw.com

Attorney for the Amici

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2018, a true and correct copy of the foregoing was furnished by First Class U.S. Mail and email to each of the following:

James D. Kay
John B. Enkema
Michael A. Johnson
Kay, Griffin, Enkema & Colbert, PLLC
222 Second Ave. North, Suite 340M
Nashville, TN 37201

Ronald G. Harris
Jon D. Ross
William J. Harbison II
Neal & Harwell, PLC
1201 Demonbreun Street, Suite 1000
Nashville, TN 37203

Paul R. McAdoo

APPENDIX OF RELEVANT PROVISIONS

Pursuant to Tennessee Rule of Appellate Procedure 27(e), below are the constitutional provisions and statutes relevant to this matter.

The First Amendment of the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article I, Section 19 of the Tennessee Constitution

That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.

Tenn. Code § 24-1-208. Persons gathering information for publication or broadcast -- Disclosure.

(a) A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required by a court, a grand jury, the general assembly, or any administrative body, to disclose before the general assembly or any Tennessee court, grand jury, agency, department, or commission any information or the source of any information procured for publication or broadcast.

(b) Subsection (a) shall not apply with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information.

(c) (1) Any person seeking information or the source thereof protected under this section may apply for an order divesting such protection. Such application shall be made to the judge of the court having jurisdiction over the hearing, action or other proceeding in which the information sought is pending.

(2) The application shall be granted only if the court after hearing the parties determines that the person seeking the information has shown by clear and convincing evidence that:

(A) There is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law;

(B) The person has demonstrated that the information sought cannot reasonably be obtained by alternative means; and

(C) The person has demonstrated a compelling and overriding public interest of the people of the state of Tennessee in the information.

(3) (A) Any order of the trial court may be appealed to the court of appeals in the same manner as other civil cases. The court of appeals shall make an independent determination of the applicability of the standards in this subsection (c) to the facts in the record and shall not accord a presumption of correctness to the trial court's findings.

(B) The execution of or any proceeding to enforce a judgment divesting the protection of this section shall be stayed pending appeal upon the timely filing of a notice of appeal in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure, and the appeal shall be expedited upon the docket of the court of appeals upon the application of either party.

(C) Any order of the court of appeals may be appealed to the supreme court of Tennessee as provided by law.