

Nos. 18-15295, 19-10261

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IN THE  
**United States Court of Appeals**  
**for the Eleventh Circuit**

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ALEKSEJ GUBAREV, XBT HOLDING S.A.,

*Plaintiffs-Appellants-Cross-Appellees,*

– v. –

BUZZFEED, INC. AND BEN SMITH

*Defendants-Appellees-Cross-Appellants.*

On Appeal from the United States District Court  
for the Southern District of Florida  
Case No. 17-cv-60426-UU

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**BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE  
FOR FREEDOM OF THE PRESS AND  
32 MEDIA COMPANIES AND ORGANIZATIONS  
IN SUPPORT OF APPELLEES SEEKING AFFIRMANCE**

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**CERTIFICATE OF INTERESTED PERSONS**  
**AND CORPORATE DISCLOSURE STATEMENTS**

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The International Documentary Association is an not-for-profit organization with no parent corporation and no stock.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

MPA – The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

The National Press Club Journalism Institute is a not-for-profit corporation that has no parent company and issues no stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

New England First Amendment Coalition has no parent corporation and no stock.

New England Newspaper and Press Association, Inc. is a non-profit corporation. It has no parent, and no publicly held corporation owns 10% or more of its stock.

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

The News Guild – CWA is an unincorporated association. It has no parent and issues no stock.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

Reporters Without Borders is a nonprofit association with no parent corporation.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

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Vox Media, Inc. has no parent corporation. NBCUniversal Media, LLC, a publicly held corporation, owns at least 10% of Vox's stock.

Counsel certifies that, in addition to those entities previously identified in appellants' and appellees' Certificate of Interested Persons, these people and entities have an interest in the outcome of this case:

1. ABC, Inc.
2. Abrams, Floyd
3. Abrutyn, Stephanie S.

4. Advance Publications, Inc.
5. American Society of News Editors
6. The Associated Press
7. The Associated Press Media Editors
8. Association of Alternative Newsmedia
9. AT&T Inc. (NYSE: T)
10. Bailen, Mark I.
11. Baker Hostetler LLP
12. Barr & Camens
13. Bernstein, Richard A.
14. Bertsche, Robert A.
15. Bralow, David
16. Brown, Bruce D.
17. Cable News Network, Inc.
18. Cahill Gordon & Reindel LLP
19. Californians Aware
20. Camens, Barbara L.
21. Covington & Burling LLP
22. Cregan, James
23. Conti, Jason P.

24. Donnellan, Jonathan
25. Dow Jones & Company, Inc.
26. Due, Johnita P.
27. The E.W. Scripps Company (Nasdaq: SSP)
28. First Look Media Works, Inc.
29. Fletcher, Heald & Hildreth, PLC
30. Francke, Terry
31. Giles, David M.
32. Goldberg, Kevin M.
33. Goldstein, Jacob P.
34. Hearst Corporation
35. Home Box Office, Inc.
36. Ibarguen, Diego
37. The Inter American Press Association
38. The International Documentary Association
39. The Investigative Reporting Workshop
40. Kaiser, Karen
41. Kirby, Kathleen A.
42. Kurtzberg, Joel
43. McCraw, David

44. The Media Institute
45. MPA – The Association of Magazine Media
46. The National Press Club
47. The National Press Club Journalism Institute
48. National Press Photographers Association
49. New England First Amendment Coalition
50. New England Newspaper and Press Association, Inc.
51. The New York Times Company (NYSE: NYT)
52. News Corporation (Nasdaq: NWS)
53. The News Guild – CWA
54. Nguyen, Lan
55. Online News Association
56. Osterreicher, Mickey H.
57. Prince Lobel Tye LLP
58. Radio Television Digital News Association
59. The Reporters Committee for Freedom of the Press
60. Reporters Without Borders
61. Ruby Newco, LLC
62. Sanford, Bruce W.
63. Sitwala, Ravi V.

64. Society of Environmental Journalists
65. Society of Professional Journalists
66. Tobin, Charles D.
67. Townsend, Katie
68. Vigilante, David C.
69. Univision Communications Inc.
70. Vox Media, Inc.
71. The Walt Disney Company (NYSE: DIS)
72. Wiley Rein LLP
73. Wimmer, Kurt
74. Zucker, John W.

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**STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE***

*Amici Curiae* are the Reporters Committee for Freedom of the Press, ABC, Inc., Advance Publications, Inc., American Society of News Editors, The Associated Press, The Associated Press Media Editors, Association of Alternative Newsmedia, Cable News Network, Inc., Californians Aware, Dow Jones & Company, Inc., The E.W. Scripps Company, First Look Media Works, Inc., Hearst Corporation, Home Box Office, Inc., The Inter American Press Association, The International Documentary Association, The Investigative Reporting Workshop, The Media Institute, MPA – The Association of Magazine Media, The National Press Club, The National Press Club Journalism Institute, National Press Photographers Association, New England First Amendment Coalition, New England Newspaper and Press Association, Inc., The New York Times Company, The News Guild – CWA, Online News Association, Radio Television Digital News Association, Reporters Without Borders, Society of Environmental Journalists, Society of Professional Journalists, Univision Communications Inc., and Vox Media, Inc. A supplemental statement of the identity of *amici* is included below as Appendix A, and a list of additional counsel is included below as Appendix B.

The issue presented in this appeal concerns the scope of the privilege for fair and true reports of official proceedings under New York Civil Rights Law § 74.

*Amici* are media companies, news organizations, or groups that advocate on behalf of news organizations and journalists. *Amici* or the news outlets and reporters whom they represent regularly report on governmental investigations and other official proceedings and depend on the protections of the fair report privilege to disseminate newsworthy information to the public. A resolution of this issue in Plaintiffs' favor would significantly affect the ability of the journalists on whose behalf *amici* advocate to report on significant official proceedings, notwithstanding that they do so accurately and fairly. Failure to recognize the proper scope of this privilege would stifle journalists' ability to report on matters of the greatest importance by threatening them with liability for republishing newsworthy documents that are the subject of important governmental investigations. The ultimate loser of any such ruling would be the public.

**SOURCE OF AUTHORITY TO FILE**

Counsel for Plaintiffs-Appellants-Cross-Appellees and Defendants-Appellees-Cross-Appellants have consented to the filing of this brief. *See* Fed. R. App. P. Rule 29(a)(2).

**FED. R. APP. P. 29(a)(4)(E) STATEMENT**

*Amici* state that:

1. No party's counsel authored the brief in whole or in part;
2. No party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. No person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

**STATEMENT OF THE ISSUES**

*Amici* adopt the statement of issues submitted by the Appellees-Cross Appellants BuzzFeed, Inc. and Ben Smith. Our brief specifically addresses:

1. Whether the district court properly found that BuzzFeed reported on an “official proceeding” subject to New York’s fair report privilege when it published an article on its website reporting on governmental inquiries into the truth of allegations in the Steele Dossier (the “Article”); and
2. Whether the district court properly found that BuzzFeed’s Article republishing the Dossier qualifies for protection under New York’s fair report privilege because the Article made it possible for the ordinary reader to understand that BuzzFeed was reporting on an investigation by officials from highest levels of the government.

## **SUMMARY OF THE ARGUMENT**

This case presents the issue of whether New York’s fair report privilege bars a defamation action against BuzzFeed for publishing an indisputably true and fair article about allegations compiled by an FBI informant in the “Steele Dossier” regarding an issue of the utmost public interest—Russian attempts to influence the 2016 presidential election. The article was published after the Dossier was becoming widely discussed publicly and was the subject of investigation at the highest levels of government, and it unambiguously stated that the Dossier’s allegations remained unverified. Docket Entry (“D.E.”) 214-4, Ex. 2, at 1 (the “BuzzFeed Article” or “Article”). Plaintiffs suggest—primarily through reliance on out-of-state cases—that New York’s fair report privilege does not protect BuzzFeed. New York law clearly establishes otherwise.

There can be no debate that, at the time BuzzFeed published the Article, the Dossier—a series of memos compiling allegations, including ones about President Trump—was of significant public interest. In fact, high-level government officials were circulating copies to such a degree that the Dossier “acquired a kind of legendary status among journalists, lawmakers, and intelligence officials who have seen [it].” *Id.* at 2. The Dossier had already been the subject of a vast amount of reporting, and some snippets of the Dossier had already been published months

earlier by another outlet.<sup>1</sup>

Nor is there any doubt that the Dossier was the subject of an ongoing federal investigation, and Plaintiffs make no claim to the contrary. Indeed, the government's investigation into the allegations contained in the Dossier was itself newsworthy. As BuzzFeed reported, it had circulated for months at the highest levels of the government, including among lawmakers and intelligence officials. BuzzFeed Article, D.E. 214-4, Ex. 2, at 1–2. Senator Harry Reid had received and reviewed the Dossier before writing a letter to the Director of the FBI about the allegations. *Id.* at 2. And Senator McCain had provided a copy of the Dossier to the FBI Director, but the FBI already had copies. *Id.*

BuzzFeed published the Article only after CNN reported that federal law enforcement agencies were investigating the Dossier's allegations and that the Dossier had been summarized in briefings to the President and President-elect by four of the senior-most US intelligence chiefs. D.E. 214-5, Ex. 1 (hereinafter, "CNN Article"). The Article referenced and hyperlinked to the CNN Article. BuzzFeed Article, D.E. 214-4, Ex. 2, at 2.

BuzzFeed published the full Dossier without endorsing any of the allegations in it. In fact, it highlighted that the allegations in the Dossier were

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<sup>1</sup> See David Corn, *A Veteran Spy Has Given the FBI Information Alleging a Russian Operative to Cultivate Donald Trump*, Mother Jones (Oct. 31, 2016), <https://www.motherjones.com/politics/2016/10/veteran-spy-gave-fbi-info-alleging-russian-operation-cultivate-donald-trump/> (hereinafter, "*Mother Jones* Article").

unverified and contained errors, including directly in the Article’s subtitle: “The allegations are unverified, and the report contains errors.” *Id.* at 1–2. The Article stated that it was including the full Dossier, given all the attention it had been given at the highest levels of government, “so that Americans [could] make up their own minds about allegations about the president-elect that have circulated at the highest levels of the US government.” *Id.* at 2.<sup>2</sup>

BuzzFeed’s Article and publication of the Dossier are the type of reporting that New York’s fair report privilege was designed to cover. Given that the Article was published to let the public know about the government’s investigation of allegations, many of which had not yet been verified, it furthered the rationale underlying New York’s fair report privilege: to allow the public to know what the government was doing. That very transparency, in turn, “has a tendency to keep officials up to the high mark of their calling.” *Briarcliff Lodge Hotel, Inc. v. C.-S. Publishers*, 183 N.E. 193, 197 (N.Y. 1932).

Plaintiffs primarily challenge the district court’s ruling that the government’s investigation into the allegations in the Dossier qualifies as an “official proceeding” for purposes of New York’s fair report statute. But New York courts interpret the scope of “official proceedings” far more broadly than Plaintiffs

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<sup>2</sup> While not all participants in this submission agree with BuzzFeed’s editorial decision to publish the entirety of the Dossier, all agree that the fair report privilege fully protects its conduct in doing so and that a ruling to the contrary would unduly limit reportage on significant official investigations.

suggest, and the case law overwhelmingly supports its application to the type of governmental investigations at issue in this case. *See Test Masters Educ. Servs., Inc. v. NYP Holdings, Inc.*, 603 F. Supp. 2d 584, 588–89 (S.D.N.Y. 2009).

Plaintiffs’ narrow proposed reading of the privilege is both inconsistent with New York law and bad policy. Plaintiffs’ suggestion that unsubstantiated allegations, even of the gravest nature, are not covered by the fair report privilege has no support in New York law. In fact, the privilege has long covered allegations, whether substantiated or not, made in judicial proceedings, *see, e.g., Branca v. Mayesh*, 476 N.Y.S.2d 187, 188 (N.Y. App. Div.), *aff’d*, 63 N.Y.2d 994 (1984), and equally covers fair reporting about such allegations in “official proceedings” of the type at issue in this case. Likewise, Plaintiffs’ argument that the privilege does not apply to publication of a document known to be subject to a government proceeding unless the reporter can first prove that every line of the document was relevant to the proceeding has never been the law in New York. *See Lee v. Brooklyn Union Pub. Co.*, 103 N.E. 155, 155–56 (N.Y. 1913). If Plaintiffs’ cramped reading of the privilege were to become law, it would seriously undermine the purpose of the privilege and long-lines of New York precedent.

Finally, under New York law, courts only require an article to provide enough context to make it *possible* for an ordinary reader to learn that the publication was reporting on an official proceeding. BuzzFeed’s Article qualifies

for protection because the text of the Article, when read in its full context—including hyperlinks to reports from other news outlets—easily made it possible for the ordinary reader to understand that the Dossier was subject to an official investigation by officials from highest levels of the government.

### **ARGUMENT**

#### **I. BUZZFEED’S ARTICLE REPORTED ON AN “OFFICIAL PROCEEDING” SUBJECT TO NEW YORK’S FAIR REPORT PRIVILEGE**

BuzzFeed’s Article plainly satisfies the statutory standard for New York’s fair report statute, which protects any “fair and true report of any judicial proceeding, legislative proceeding or other official proceeding.” N.Y. Civ. Rights Law § 74. BuzzFeed’s report that many high government officials were investigating the allegations in the Dossier easily qualifies as a report of an “official proceeding,” as that term has been defined under New York law and also serves the primary purpose of the fair report privilege: to expose “official proceedings” to the public, so the public can hold officials accountable for conducting a thorough investigation.

BuzzFeed’s Article disclosed that the allegations of the Dossier were being closely examined at the highest levels of our government. The investigative actions about the Dossier included that:

- After reviewing the Dossier, Senate Minority Leader Harry Reid wrote a letter to then-FBI Director James Comey about the Dossier's allegations. BuzzFeed Article, D.E. 214-4, Ex. 2, at 2; CNN Article, D.E. 214-5, Ex. 1.
- Senator John McCain learned of the Dossier, obtained a copy, and delivered it to then-FBI Director Comey for further investigation. BuzzFeed Article, D.E. 214-4, Ex. 2, at 2; CNN Article, D.E. 214-5, Ex. 1.
- The FBI asked for and received from Steele—an FBI informant—the Dossier he compiled, and the FBI subsequently investigated the credibility and accuracy of the Dossier. BuzzFeed Article, D.E. 214-4, Ex. 2, at 2; CNN Article, D.E. 214-5, Ex. 1.
- Federal intelligence agencies created a two-page synopsis of the Dossier's allegations after receiving a full copy. BuzzFeed Article, D.E. 214-4, Ex. 2, at 2; CNN Article, D.E. 214-5, Ex. 1.
- The directors of National Intelligence, the FBI, the CIA, and the NSA each provided the two-page synopsis about the allegations in the Dossier to President Obama and President-elect Trump as part of an intelligence briefing. BuzzFeed Article, D.E. 214-4, Ex. 2, at 2; CNN Article, D.E. 214-5, Ex. 1.

Focusing primarily on the FBI investigation and presidential briefings, the district court correctly concluded that the Article concerned “official proceedings”

under New York law.<sup>3</sup> In fact, each of these official governmental actions would have sufficed to qualify as “official proceedings” under New York’s fair report statute. Taken together, these investigative actions by high government officials concerning alleged ties by a presidential campaign with Russia—which are indisputably of the highest public concern—are the sort of reporting that New York’s fair report privilege is intended to protect.<sup>4</sup>

**A. New York’s Fair Report Privilege Applies to Reports of Unverified Allegations that Are Part of Official Proceedings**

Plaintiffs concede that “[c]onsiderations of the policies underlying the Fair Report Privilege is crucial to a proper analysis,” App. Br. at 29, but they fundamentally misconstrue what those policy considerations are. Citing primarily cases from Massachusetts and Nevada—states with very different conceptions of the fair report privilege than New York—Plaintiffs argue that “most [courts] have rejected the extension of the privilege to include unconfirmed allegations that have simply been provided to law enforcement by private individuals.” App. Br. at 29–

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<sup>3</sup> *Gubarev v. BuzzFeed, Inc.*, 2018 U.S. Dist. LEXIS 97246, at \*20 (S.D. Fla. June 5, 2018) (“*Gubarev I*”); *Gubarev v. BuzzFeed, Inc.*, 340 F. Supp. 3d 1304, 1315–17 (S.D. Fla. 2018) (“*Gubarev II*”).

<sup>4</sup> Because the Dossier was provided to the FBI Director and was a part of briefings to the President and President-elect, and because BuzzFeed “reported on an issue of national public interest,” a New York court ruled last year in a separate defamation action brought by other plaintiffs against BuzzFeed for its publication of the Dossier that “[p]laintiffs’ attempts to suggest that defendants failed to satisfy the ‘elements’ of the fair report privilege are meritless.” *Fridman v. BuzzFeed, Inc.*, 2018 WL 2100452, at \*2 (N.Y. Sup. Ct. May 7, 2018) (denying plaintiffs’ motion to dismiss defendants’ affirmative defense of protection under New York’s fair report privilege), *appeal filed*, No. 2018-04719 (N.Y. App. Div.).

30. That, however, is not the law in New York, where the New York Court of Appeals has long rejected Plaintiffs' proposed exception to the fair report privilege for republication of unconfirmed allegations. While the fair report privilege at common law applied only after judicial action was taken on preliminary allegations,<sup>5</sup> Judge Pound, writing for the New York Court of Appeals in 1927, found this position to be "indefensible," especially in the modern era of newspapers, where "the public has learned that accusation is not proof." *See Campbell v. N.Y. Evening Post, Inc.*, 157 N.E. 153, 155 (N.Y. 1927). The New York Court of Appeals expressly rejected the common law position Plaintiffs propose here more than 90 years ago in favor of a broader approach "consistent with practical experience" that protects reporting on unverified accusations as long as they are true and fair reports of the accusations. *Id.* at 156.<sup>6</sup>

That such reports about unconfirmed allegations are covered by the fair report privilege in New York is undeniable. The privilege has long been applied to true and fair reports of unsubstantiated allegations made in official *judicial* proceedings. *See, e.g., Branca*, 476 N.Y.S.2d at 188; *Fishof v. Abady*, 720

<sup>5</sup> *See Cowley v. Pulsifer*, 137 Mass. 392, 396, 1884 WL 10622, at \*3 (1884) (Holmes, J.); *see also* 2 Rodney A. Smolla, *Law of Defamation* § 8:70 (2d ed.).

<sup>6</sup> While the majority of states have since followed *Campbell* in extending the fair report privilege to reports of unconfirmed allegations (*see* 1 Hon. Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 7:3.5 at 7-34 n.114 (5th ed. 2017 & Supp. 2019)), Massachusetts still has not done so. *See Sanford v. Boston Herald-Traveler Corp.*, 61 N.E.2d 5, 6-7 (Mass. 1945). Likewise, the former Chief Judge of the Nevada Supreme Court urged that *Campbell* should not be followed. *Sahara Gaming v. Culinary Workers*, 984 P.2d 164, 169 (Nev. 1999) (Rose, C.J., concurring).

N.Y.S.2d 505, 506 (N.Y. App. Div. 1991). That is because the fact that an allegation is made in Court is, in itself, a proper subject of the democratic oversight protected by the privilege, even if the allegation itself turns out to be false. *See Branca*, 476 N.Y.S.2d at 188.

That same rationale applies in the context of unconfirmed allegations made in connection with “official proceedings,” which, since 1854 have been covered by the plain language of New York’s fair report privilege statute. *New York Laws*, 1854, Chap. 130.<sup>7</sup> Before 1854, New York had no statute extending the fair report privilege to “official proceedings,” and New York followed the common law of England, which held that *ex parte* testimony to police magistrates conducting an investigation were not covered by the fair report privilege because they were not “judicial proceedings.” *See* Ernst P. Seelman, *The Law of Libel and Slander in the State of New York* 261 & n.1 (2d ed. 1964) (citing *Stanley v. Webb*, 4 Sandford 21, 31 (N.Y. Super. Ct. 1850)). In *Stanley v. Webb*, 4 Sandford 21 (N.Y. Super. Ct. 1850), the New York Superior Court expressed concern that *ex parte* testimony may be “entirely groundless” and “made—often under excitement—by persons smarting under real or fancied wrongs,” and that publication of the allegations “may prejudice the public mind, and cause the judgment of conviction to be passed

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<sup>7</sup> The statute of 1854 provided that “[n]o reporter, editor, or proprietor of any newspaper shall be liable to any action, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public *official proceeding* for any statement, speech, argument, or debate in the course of the same, except upon actual proof of malice.” *Id.* (emphasis added).

long before the day of trial has arrived.” 4 Sandford at 31. But the New York Legislature disagreed and moved to broaden the fair report privilege in New York to protect reporting on *unverified* allegations made during a police magistrate’s investigation. The Legislature passed a statute—the first of its kind—to extend the fair report privilege, not only to reporting on judicial proceedings, but also to “legislative proceedings” and “official proceedings.” *New York Laws*, 1854, Chap. 130.<sup>8</sup>

Since then, the fair report privilege has consistently been applied to unsubstantiated allegations in “official proceedings,” as well as legislative and judicial proceedings. For example, in *Holy Spirit Association for Unification of World Christianity v. New York Times Co.*, 399 N.E.2d 1185 (N.Y. 1979), the New York Court of Appeals held that the New York fair report privilege protected a news report detailing unverified allegations by unidentified sources compiled in intelligence reports within a story about “a number of inquiries under way in courtrooms and on Capitol Hill” into Korean-American affairs. 399 N.E.2d at 1187–88. The intelligence reports, which were released by a congressional subcommittee, had been written by unidentified authors and contained both unevaluated information and information from an unidentified source. *Id.* The Court held that the news reports on the “unverified and unevaluated claims” fell

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<sup>8</sup> See also Kyu H. Youm, *Fair Report Privilege as a Libel Defense*, 3 U. Fla. J.L. & Pub. Pol’y 29, 34–35 (1990) (recounting “New York legislature’s liberal recognition of the privilege”).

within the ambit of New York’s fair report privilege because they “neither assigned to the intelligence reports allegations not contained in those documents, nor added, by virtue of word usage or otherwise, greater credence to those documents than was appropriate considering their nature as unverified and unevaluated claims linking appellant to Korean influences.” *Id.*<sup>9</sup>

In fact, a primary purpose of the fair report privilege is to serve a “public supervision” or “watchdog” function—i.e., the privilege recognizes that “[t]he public has a strong interest in receiving information about what occurs in official proceedings and public meetings so that it may oversee the performance of public officials and institutions.” 1 Hon. Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 7.3.5[B][2] at 7-28–30 (5th ed. 2017 & Supp. 2019); *see also* Bruce W. Sanford, *Libel & Privacy* § 10.2.1 at 10-5–6 (2d ed. 1996

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<sup>9</sup> New York courts apply this liberal standard to reporting on allegations that become subject to an investigation. In those instances, “‘the question is whether [the report] is a substantially accurate description’ of the complaint that led to the investigation.” *SentosaCare LLC v. Lehman*, No. 504407/2016, 2018 WL 692568, at \*7 (N.Y. Sup. Ct. Jan. 25, 2018), *appeal docketed*, 2018-03473 (N.Y. App. Div. 2018). On appeal, Plaintiffs do not contend that BuzzFeed’s Article is anything other than a “fair and true” report of the Dossier. And for good reason. The Article did not add any allegations not contained in the Dossier, nor did it “add[], by virtue of word usage or otherwise, greater credence to those documents than was appropriate considering their nature.” *Holy Spirit*, 399 N.E.2d at 1187–88. To the contrary, BuzzFeed repeatedly emphasized that it was republishing unverified—and even erroneous—*allegations*, including directly in the Article’s title and subtitle: “These Reports Allege Trump Has Deep Ties To Russia. A dossier, compiled by a person who has claimed to be a former British intelligence official, alleges Russia has compromising information on Trump. The allegations are unverified, and the report contains errors.” D.E. 214-4, Ex. 2, at 1. As the district court below properly concluded, the Article is “fair and true,” a proposition with which Plaintiffs do not take issue on this appeal. *Gubarev I*, 2018 U.S. Dist. LEXIS 97246, at \*26; *Gubarev II*, 340 F. Supp. 3d at 1318.

& Supp. 2019). To allow the public to supervise the government, the privilege shields the press from liability for reporting allegations being investigated by governmental officials, even if they turn out to be false, as long as the reports are true and fair, i.e., the reports disclose that the allegations are just allegations. The public's knowledge of unverified allegations is just as crucial to their watchdog function as when officials ultimately determine that the allegations are corroborated, because it is just as important to be sure that officials deal with allegations appropriately and ethically (i.e., without favoritism) when they find them to lack merit.

In light of that purpose, it is clear that Plaintiffs fundamentally misconstrue the privilege when suggesting that the policy reasons underlying the privilege do not support applying it to unsubstantiated allegations. App. Br. at 29–31. Because a purpose of the privilege is to allow the press to serve a “supervisory” or “watchdog” function in connection with governmental action, it is beyond dispute that “reports on allegations that lead to a government investigation are fully protected” under New York’s fair report privilege. *SentosaCare*, 2018 WL 692568, at \*7 (applying New York’s fair report privilege to report of patient’s “complaint that led to the investigation” by the N.Y. Department of Health, even when the investigation ultimately found no violations of any applicable rules); *see also Miller v. Dep’t of Educ.*, No. 0104848/2001, 2007 WL 2176407 (N.Y. Sup.

Ct. July 5, 2007) (protecting news report of existence of Department of Education investigation into students' allegations that teacher made negative remarks into children's country of origin because "the DOE was empowered to investigate allegations of inappropriate actions by its employees"); *Baranov v. World-Wide Anti-Doping Agency*, No. 155881/2017, 2018 WL 5043893 (N.Y. Sup. Ct. Oct. 16, 2018) (protecting republication of whistleblower allegations made to Russian government investigative agency), *appeal docketed*, No. 155881/2017 (N.Y. App. Div. 2018).

Plaintiffs' argument that the fair report privilege does not apply to BuzzFeed's Article because the privilege does not extend to fair and true reports about unsubstantiated allegations in an official proceeding is wrong as a matter of New York law.

**B. New York's Fair Report Privilege Protects Reports on Non-Public Official Investigations**

The governmental investigations concerning the allegations in the Dossier qualify as "official proceedings," as that term is used in N.Y. Civil Rights Law § 74. Since New York's first fair report statute was enacted over 150 years ago, "New York courts have broadly construed the meaning of an official proceeding as used in [New York Civil Rights Law] Section 74." *Penaherrera v. N.Y. Times Co.*, No. 150336/2012, 2013 WL 4013487, at \*12 (N.Y. Sup. Ct. Aug. 5, 2013) (quoting *Test Masters*, 603 F. Supp. 2d at 588); *see also SentosaCare*, 2018 WL

692568, at \*7 (same). New York’s broad construction of “official proceedings” is closely tied to the supervisory rationale underlying New York’s modern fair report privilege, as discussed above. Thus, in *Briarcliff Lodge*, the New York Court of Appeals held that proceedings and actions taken by village officials constituted “official proceedings” under New York’s fair report statute because “[v]illage officers have a duty to perform which must be impartially administered. ***The fact that the press is ever ready to publish any irregularities or acts of favoritism has a tendency to keep officials up to the high mark of their calling.***” 183 N.E. at 197 (emphasis added).

With this supervisory rationale in mind, New York “courts have extended the Fair Report Privilege to include reporting on official investigations,” as Plaintiffs are forced to concede. App. Br. at 29. The district court cited no less than ten cases in which New York courts have applied the fair report privilege to reporting on official investigations, and there are many others.<sup>10</sup> To take just one,

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<sup>10</sup> See *Gubarev I*, 2018 U.S. Dist. LEXIS 97246, at \*17–18 (citing *Fine v. ESPN*, 11 F. Supp. 3d 209 (N.D.N.Y. 2014) (police investigation); *Ibrahim v. Fox Television Stations, Inc.*, 936 N.Y.S.2d 59 (N.Y. Sup. Ct. 2011) (UN investigation into allegations of employee misconduct); *Test Masters*, 603 F. Supp. 2d at 588 (consumer protection agency investigation into consumer complaints); *Muscarella v. Berkshire Hathaway, Inc.*, 721 N.Y.S.2d 432 (2000) (federal agency audit); *Komarov v. Advance Magazine Publishers*, 691 N.Y.S.2d 298 (N.Y. Sup. Ct. N.Y. Cty. 1999) (internal FBI report); *Easton v. Pub. Citizen, Inc.*, 19 Media L. Rep. (BNA) 1882, 1884 (S.D.N.Y. 1991), *aff’d mem.*, 969 F.2d 1043 (2d Cir. 1992) (investigation of New York State Commission on Quality of Care for the Mentally Disabled regarding finances of Brooklyn psychiatric facility); *Law Firm of Daniel P. Foster, P.C. v. Turner Broadcasting System d/b/a CNN*, 844 F.2d 955 (2d Cir. 1988) (FBI investigation); *Freeze Right Refrigeration & Air Conditioning Services v. City of New York*, 475 N.Y.S.2d 383 (N.Y. App. Div. 1984) (investigation by the New York City Department of Consumer Affairs); *Baumann v. Newspaper*

in *Farrell v. New York Evening Post, Inc.*, a New York court recognized in 1938 that an internal investigation by an administrator of the short-lived Civil Works Administration was an “official proceeding” under New York’s fair report privilege. 3 N.Y.S.2d at 1022. The court explained that the statute should be read broadly given the important supervisory function of the modern press:

To spread . . . enlightenment is one of the prime functions of the press. In the exercise of that function, the right of the press to report matters of public concern should be free and untrammelled, save only by the obligation to report them fairly and truthfully. . . . With the tremendous growth of governmental boards and agencies in recent years, it becomes increasingly important that their actions should not be hidden under the cloak of bureaucratic secrecy where they are dealing with matters of common interest. ‘The fact that the press is ever ready to publish any irregularities or acts of favoritism has a tendency to keep officials up to the high mark of their calling.’ . . . The desirability of that result doubtless has helped to establish the public policy of our State, which today finds full expression in the principle embodied in section 337 of the Civil Practice Act [the predecessor to New York Civil Rights Law § 74].

*Id.* (quoting *Briarcliff*, 183 N.E. at 197).

New York’s fair report privilege has routinely been applied to cover reporting on official investigations, even if they are not open to the public, so the

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*Enterprises*, 60 N.Y.S.2d 185 (App. Div. 1946) (district attorney’s investigation); *Farrell v. N.Y. Evening Post, Inc.*, 3 N.Y.S.2d 1018 (N.Y. Sup. Ct. 1938)).

The district court’s extensive compilation is far from exhaustive. *See, e.g., Baranov*, 2018 WL 5043893 (whistleblower report to a Russian government investigative body published as attachment to independent report prepared for World-Wide Anti-Doping Agency); *SentosaCare*, 2018 WL 692568, at \*1–11 (Department of Health investigation); *Rodriguez v. Daily News, L.P.*, 37 N.Y.S.3d 613 (N.Y. App. Div. 2016) (police investigation); *Bernacchi v. County of Suffolk*, No. 19861/2008, 2010 WL 4806119 (N.Y. Sup. Ct. Nov. 8, 2010) (police investigation); *Miller*, 2007 WL 2176407 (Department of Education investigation).

press can fulfill its supervisory role. *See, e.g., Freeze Right*, 475 N.Y.S.2d at 388 (non-public investigation by the New York City Department of Consumer Affairs); *Komarov*, 691 N.Y.S.2d at 300 (confidential FBI report “not prepared for public consumption”). For example, a New York court recently held that a New York’s fair report privilege protected the publication of an independent report prepared by a Canadian lawyer for the World-Wide Doping Agency into allegations of state-run doping in Russia. *Baranov*, 2018 WL 5043893, at \*1–3. At issue was a statement attached to the independent report that contained allegedly defamatory statements made by a whistleblower to a Russian government investigative agency. *Id.* at \*1. The court concluded, “[t]he report and the investigation advance public interest of revealing illegal steroid use in sporting events. Permitting a defamation action under the circumstances of this case would have a deleterious effect on that public interest.” *Baranov*, 2018 WL 5043893, at \*3 (citing *Freeze Right*, 475 N.Y.S.2d at 389–90).

The same is true here. BuzzFeed’s Article advanced the public interest by revealing allegations about an issue of the most significant public concern—potential Russian interference in American elections—that was being investigated at the highest levels of government. The Article made clear that the allegations were unproven, and in some cases, even false. The public had a right to know what the government was investigating. To permit a defamation case to proceed

notwithstanding those realities would “have a deleterious effect on that public interest.” *Id.*

**C. New York’s Fair Report Privilege Protects Reporting on Documents Subject, Even in Part, to Government Investigation**

Plaintiffs incorrectly argue that, even if the fair report privilege applies to BuzzFeed’s publication of the Article and Dossier because the Dossier is the subject of a governmental investigation, it should only apply to those portions of the Dossier that BuzzFeed has proven were investigated by the FBI, rather than the Dossier as a whole. App. Br. at 50–54. Plaintiffs’ narrow approach, however, would undermine the supervisory rationale behind the protection. As the district court correctly recognized, “such a line-by-line review would curtail the scope of the privilege and thus restrict the press’s ability to serve its basic function. . . . [T]he privilege exists to protect the media while they gather the information needed for the public to exercise effective oversight of the government.” *Gubarev II*, 340 F. Supp. 3d at 1317. As the district court further explained, “[t]o go line-by-line to determine if official action existed with respect to each statement . . . would impose on BuzzFeed a duty to investigate extensively the allegations of the Dossier and to determine whether the government was investigating each separate allegation. Defamation law does not impose that requirement on the press.” *Id.*

New York courts have long-rejected Plaintiff’s proposed line-by-line approach. Under New York law, a reporter “could not be expected to know . . .

whether everything said in the course of the proceeding was strictly relevant to the subject of the inquiry. He was required, if he made any report at all, to make it full, fair and impartial. . . .” *Lee v. Brooklyn Union Pub. Co.*, 103 N.E. 155, 156 (N.Y. 1913). And it is of no distinction under New York law that Plaintiffs were not the direct subject of the official actions taken by senior government officials, because New York’s fair report privilege protects allegedly defamatory statements made about those who are not parties to an official or judicial proceeding. *See Ackerman v. Jones*, 37 N.Y. Super. Ct. 42, 54 (N.Y. Super. Ct. 1874) (“The fact that the character of a third person was affected by the affidavit does not affect the privilege. . . . [N]o action lies against a party who in the course of a cause makes an affidavit . . . which is scandalous, false and malicious, though the person scandalized, and who complains, is not a party to the cause.”). Thus, BuzzFeed’s publication of the full Dossier “do[es] not remove the Article from the protection of Section 74.” *El Greco Leather Products Co. v. Shoe World, Inc.*, 623 F. Supp. 1038, 1043 (E.D.N.Y. 1985) (rejecting argument regarding publication of “further allegations not contained in the court papers”).

**II. THE FAIR REPORT PRIVILEGE PROTECTION APPLIES WHENEVER THE CONTEXT OF THE REPORT MAKES IT POSSIBLE FOR THE ORDINARY READER TO UNDERSTAND THAT THE DEFENDANT IS REPORTING ON AN OFFICIAL PROCEEDING**

On appeal, Plaintiffs critically misstate New York’s low threshold requirement that the publication purport to comment on an official proceeding. New York does not, as Plaintiffs argue, “require[] that the average reader understand the article in question to be reporting on an official proceeding.” App. Br. at 31–32. Rather, the privilege applies unless “the context in which the statements are made *makes it impossible* for the ordinary viewer, listener, or reader to determine whether the defendant was reporting on a judicial or other official proceeding.” *Gillings v. New York Post*, 87 N.Y.S.3d 220, 223 (N.Y. App. Div. 2018) (emphasis added) (citing *Saleh v. New York Post*, 915 N.Y.S. 571, 574 (N.Y. App. Div. 2010) (same), *Cholowsky v. Civiletti*, 887 N.Y.S.2d 592, 596 (N.Y. App. Div. 2009) (same), and *Wenz v. Becker*, 948 F. Supp. 319, 323 (S.D.N.Y. 1996) (same)).<sup>11</sup> In other words, New York’s fair report privilege applies as long as it is *possible* for the ordinary reader to determine whether the publication reported on an official proceeding.

Plaintiffs cite only one case applying New York law that found that this standard was not met. App. Br. at 32–34. In *Corporate Training Unlimited, Inc.*

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<sup>11</sup> See also *Penaherrera*, 2013 WL 4013487, at \*12 (same); *Corp. Training Unlimited, Inc. v. Nat’l Broadcasting Co.*, 868 F. Supp. 501, 509 (E.D.N.Y. 1994) (same).

*v. National Broadcasting Co.*, 868 F. Supp. 501 (E.D.N.Y. 1994), the court held that facts in a television broadcast that were “testified to by witnesses in [an] Icelandic criminal court” were not protected by New York’s fair report privilege because the fifteen-minute-long broadcast was styled “as a succession of interviews with participants in the incident” and told in a “narrative fashion,” rather than a report about the Icelandic trial. 868 F. Supp. at 508–09. The district court contrasted the challenged broadcast—in which “the references to the Icelandic court proceedings occur mostly in passing and *only towards the end of the [b]roadcast*” (*id.* at 509) (emphasis added)—with a separate episode of the broadcast that was protected by New York’s fair report privilege because it detailed allegations made in court filings and displayed the corresponding documents where the allegations were made “[a]t the beginning of the broadcast.” *Id.* at 509 n.6.

Unlike the challenged broadcast in *Corporate Training*, the standard is easily satisfied by alerting readers that the reported allegations were in the hands of government investigators and that officials were taking action, as BuzzFeed did here. From the leading sentence, the Article makes clear that the Dossier “has been *circulating among elected officials, intelligence agents, and journalists for weeks.*” D.E. 214-4, Ex. 2, at 1–2 (emphasis added). BuzzFeed informs its readers that “a two-page synopsis of the report was *given to President Obama and Trump.*”

*Id.* at 2 (emphasis added). The Article also states that “BuzzFeed News is publishing the full document so that Americans can make up their own minds about allegations about the president-elect that have *circulated at the highest levels of the US government.*” *Id.* (emphasis added). BuzzFeed further informs its readers that “[t]he documents have *circulated for months and acquired a kind of legendary status among journalists, lawmakers, and intelligence officials who have seen them.*” D.E. 214-4, Ex. 2, at 2 (emphasis added). And the Article reports that “the former Senate Democratic leader [Harry Reid] had *seen the documents* before writing a public letter to FBI Director James Comey about Trump’s ties to Russia.” *Id.* (emphasis added). The Article continues, “Arizona Republican John McCain gave a ‘full copy’ of the memos to Comey on Dec. 9, but that *the FBI already had copies* of many of the memos.” *Id.* (emphasis added). When read in context, these reported details made it—at the very least—more than *possible* for an ordinary reader to understand that official action had been taken on the Dossier. *Gillings*, 87 N.Y.S.3d at 223.

Plaintiffs ask this Court to ignore embedded hyperlinks in BuzzFeed’s Article to separate articles posted by CNN and *Mother Jones* and reporting on these official actions, primarily relying on statistics that purportedly demonstrate how many BuzzFeed readers actually clicked on the hyperlinks. App. Br. at 38–50. But under New York law, courts must examine not only what the language in

the report itself states, but whether “the *context* in which the statements are made *makes it impossible* for the ordinary . . . reader to determine whether the defendant was reporting on a . . . official proceeding.” *Gillings*, 87 N.Y.S.3d at 223; *see also Saleh*, 915 N.Y.S. at 574 (same); *Cholowsky*, 887 N.Y.S.2d at 596 (same); *Wenz*, 948 F. Supp. at 323 (same). Clicked on or not, BuzzFeed’s embedded hyperlinks to the CNN and *Mother Jones* Articles made it *possible* for the ordinary reader to receive additional information about the official actions that Senators and intelligence officials had taken on the Dossier, including the recent briefing to the President and President-elect.

As the district court correctly determined, because the hyperlinked CNN Article reported “that the Dossier was the subject of official actions in the form of classified briefings by four intelligence directors to the President and President-elect, and an FBI investigation,” BuzzFeed’s Article “satisf[ied] the fair report privilege by conspicuously hyperlinking to the CNN article.” *Gubarev I*, 2018 U.S. Dist. LEXIS 97246, at \*25. The CNN Article, for example, states:

The allegations came, in part, from memos compiled by a former British intelligence operative, whose past work US intelligence officials consider credible. The FBI is investigating the credibility and accuracy of these allegations, which are based primarily on information from Russian sources, but has not confirmed many essential details in the memos about Mr. Trump. . . . [I]n preparing this story, CNN has spoken to multiple high ranking intelligence, administration, congressional and law enforcement officials . . . with direct knowledge of the memos.

D.E. 214-5, Ex. 1. And the *Mother Jones* Article linked in BuzzFeed's Article discusses a letter written to former FBI Director James Comey from former Senate Majority Leader Harry Reid, which refers to their official communications about the Dossier's allegations:

[Reid] sent Comey a fiery letter saying the FBI chief may have broken the law and pointed to a potentially greater controversy: "In my communications with you and other top officials in the national security community, it has become clear that you possess explosive information about close ties and coordination between Donald Trump, his top advisors, and the Russian government . . . . The public has a right to know this information."

As the district court recognized, one recent court has "reasoned that 'the hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law, because it has become a well-recognized means for an author or the internet to attribute a source and the hyperlink instantaneously permits the reader to verify an electronic articles claim.'" *Gubarev I*, 2018 U.S. Dist. LEXIS 97246, at \*23–24 (quoting *Adelson v. Harris*, 402 P.3d 665, 669 (Nev. 2017)).

Plaintiffs argue that the district court erred in following *Adelson* in light of the treatment of hyperlinks in an earlier case applying Florida law. *See* App. Br. at 40 (citing *Klayman v. City Pages*, 2015 U.S. Dist. LEXIS 49134 (M.D. Fla. Apr. 3, 2015)). But that case did not even address the relevance of hyperlinks to educate readers about an ongoing investigation. *Klayman* instead held that language in a

cited hyperlink could not itself basis for a libel claim as if the citing entity had itself used alleged defamatory language. 2015 U.S. Dist. LEXIS 49134, at \*36. Extending defamation liability solely on that basis would discourage hyperlinking and result in what the New York Court of Appeals has warned is “a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise.” *Firth v. State*, 775 N.E.2d 463, 466 (N.Y. 2002).

### **CONCLUSION**

For the reasons set forth above, this Court should affirm the district court’s ruling that New York’s fair report privilege prohibits Plaintiffs’ defamation action against Defendants for the publication of its Article attaching the Dossier.

Dated: April 26, 2019

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,340 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in a 14-point font, Times New Roman.

Dated: April 26, 2019

/s/ Floyd Abrams

Floyd Abrams

**APPENDIX A**

**SUPPLEMENTAL STATEMENT OF IDENTITY OF AMICI CURIAE**

**ABC, Inc.** is a broad-based communications company with significant holdings in the United States and abroad. Alone or through its subsidiaries, it owns ABC News, abcnews.com, and local broadcast television stations including WABC-TV, New York, that regularly gather and report news to the public. ABC News produces the television programs *World News Tonight with David Muir*, *Good Morning America*, *Nightline*, *20/20*, and *This Week*, among others.

**Advance Publications, Inc.** is a diversified privately-held company that operates and invests in a broad range of media, communications and technology businesses. Its operating businesses include Conde Nast's global magazine and digital brand portfolio, including titles such as Vogue, Vanity Fair, The New Yorker, Wired, and GQ, local news media companies producing newspapers and digital properties in 10 different metro areas and states, and American City Business Journals, publisher of business journals in over 40 cities.

With some 500 members, **American Society of News Editors ("ASNE")** is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of

Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

**The Associated Press (“AP”)** is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP’s members and subscribers include the nation’s newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP’s content can reach more than half of the world’s population.

**The Associated Press Media Editors** is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

**Association of Alternative Newsmedia (“AAN”)** is a not-for-profit trade association for approximately 110 alternative newspapers in North America. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

**Cable News Network, Inc. (“CNN”)**, a Delaware corporation, is a wholly owned subsidiary of Turner Broadcasting System, Inc., which is ultimately a wholly-owned subsidiary of AT&T Inc., a publicly traded company. CNN is a portfolio of two dozen news and information services across cable, satellite, radio, wireless devices and the Internet in more than 200 countries and territories worldwide. Domestically, CNN reaches more individuals on television, the web and mobile devices than any other cable TV news organization in the United States; internationally, CNN is the most widely distributed news channel reaching more than 271 million households abroad; and CNN Digital is a top network for online news, mobile news and social media. Additionally, CNN Newsource is the world’s most extensively utilized news service partnering with hundreds of local and international news organizations around the world.

**Californians Aware** is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public’s rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

**Dow Jones & Company, Inc.** is a global provider of news and business information, delivering content to consumers and organizations around the world across multiple formats, including print, digital, mobile and live events. Dow Jones has produced unrivaled quality content for more than 130 years and today has one of the world's largest newsgathering operations globally. It produces leading publications and products including the flagship Wall Street Journal; Factiva; Barron's; MarketWatch; Financial News; Dow Jones Risk & Compliance; Dow Jones Newswires; and Dow Jones VentureSource.

**The E.W. Scripps Company** serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 33 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

**First Look Media Works, Inc.** is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

**Hearst** is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the San Francisco Chronicle, Houston Chronicle, and Albany Times Union; hundreds of magazines around the world, including Cosmopolitan, Good Housekeeping, ELLE, Harper's BAZAAR and O, The Oprah Magazine; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in Monterey/Salinas, CA, which reach a combined 19 percent of U.S. viewers; ownership in leading cable television networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency Fitch Group; Hearst Health; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

**Home Box Office, Inc.** owns and operates the HBO and Cinemax premium pay television services, serving an extensive array of programming to 140 million subscribers globally. HBO curates over 3000 hours of content, including award-winning documentary films and original series covering sports, news, politics and current events.

**The Inter American Press Association (IAPA)** is a not-for-profit organization dedicated to the defense and promotion of freedom of the press and of

expression in the Americas. It is made up of more than 1,300 publications from throughout the Western Hemisphere and is based in Miami, Florida.

**The International Documentary Association (IDA)** is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

**The Investigative Reporting Workshop**, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at [investigativereportingworkshop.org](http://investigativereportingworkshop.org) about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

**The Media Institute** is a nonprofit research foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

**MPA – The Association of Magazine Media (“MPA”)** is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900

magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

**The National Press Club** is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

**The National Press Club Journalism Institute** is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

**The National Press Photographers Association ("NPPA")** is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously

promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

**New England First Amendment Coalition** is a non-profit organization working in the six New England states to defend, promote and expand public access to government and the work it does. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians and academicians, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know in our region. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

**New England Newspaper and Press Association, Inc. ("NENPA")** is the regional association for newspapers in the six New England States (including Massachusetts). NENPA's corporate office is in Dedham, Massachusetts. Its purpose is to promote the common interests of newspapers published in New England. Consistent with its purposes, NENPA is committed to preserving and ensuring the open and free publication of news and events in an open society.

**The New York Times Company** is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

**The News Guild – CWA** is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the the editorial and online departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America’s largest communications and media union, representing over 700,000 men and women in both private and public sectors.

**The Online News Association** is the world’s largest association of digital journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

**Radio Television Digital News Association (“RTDNA”)** is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries.

RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

**The Reporters Committee for Freedom of the Press** is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

**Reporters Without Borders** has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 130 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 15 offices and sections worldwide.

**The Society of Environmental Journalists** is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

**Society of Professional Journalists ("SPJ")** is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and

stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

**Univision Communications Inc. (UCI)** is the leading media company serving Hispanic America. UCI is a leading content creator in the U.S. and includes the Univision Network, UniMás and Univision Cable Networks. UCI also includes the Fusion Media Group, a division that serves young, diverse audiences, which includes cable networks and a collection of leading digital news sites including Gizmodo, Deadspin, The Root, Splinter and Jezebel.

**Vox Media, Inc.** owns several web sites, including Vox, The Verge, SB Nation, and Eater, with 170 million unique monthly visitors.

**APPENDIX B**

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**CERTIFICATE OF SERVICE**

I hereby certify that I have filed the foregoing Brief of *Amici Curiae* electronically with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system on April 26, 2019.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Floyd Abrams

Floyd Abrams