

No. 24-0990

IN THE SUPREME COURT OF TEXAS

USA TODAY A/K/A GANNETT CO., INC.,
GANNETT PUBLISHING SERVICES, LLC, and
GANNETT SATELLITE INFORMATION NETWORK, LLC,
Petitioners,

v.

RYAN, LLC,
Respondent.

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND TEXAS PRESS ASSOCIATION
IN SUPPORT OF PETITION FOR REVIEW**

On Petition for Review from the
Ninth Court of Appeals at Beaumont
No. 09-22-00432-CV

Bruce D. Brown*
Lisa Zycherman*
Mara Gassmann*
Matthew Singer*
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, D.C. 20005
Tel: (202) 795-9300
Fax: (202) 795-9310
bruce.brown@rcfp.org

** Of Counsel*

James A. Hemphill
Texas State Bar No. 00787674
GRAVES DOUGHERTY HEARON & MOODY P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701
Tel: (512) 480-5762
Fax: (512) 536-9907
JHemphill@gdhm.com
Counsel for Amici Curiae

IDENTITY OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (“Reporters Committee”) and the Texas Press Association (“TPA”) (together, “amici”).¹

The federal and Texas Constitutions protect journalists’ ability to report on controversial and sensitive topics, and they safeguard the editorial freedom of the press to determine what material to include or omit from a work of journalism.

Amici, as representatives and advocates for the news media, including TPA’s members, have a strong interest in ensuring that the courts apply defamation principles consistent with the precedent of Texas’ and the United States’ highest courts, to protect and foster the exercise of those constitutional rights. Amici respectfully request that this Court accept this case and guide the lower courts in the application of the important doctrine of defamation by implication and Texas’ statutory protection for reporting on allegations by third parties.

Amici have extensive experience in this area of the law, as well as direct experience with the law’s impact on the real-world work of news reporting, and believe this brief will aid the Court in its consideration of the petition. Amici have appeared before this Court in cases implicating the rights of the press, including

¹ Amici or their counsel paid for all fees and costs associated with the preparation and filing of this brief. *See* Tex. R. App. P. 11(c). Statements of interest for all amici are set forth in the accompanying Appendix of Amici Curiae.

matters involving the Texas Citizen Participation Act (“TCPA”). *See, e.g.*, Br. of Amicus Curiae Reporters Comm. for Freedom of the Press, *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614 (Tex. 2018) (No. 16-0098), 2017 WL 2616476; Br. of Proposed Amici Curiae Texas Press Ass’n et al. in Supp. of Resp’ts, *Frazier v. Pro Publica, Inc.*, No. 20-0148 (Tex.) (media brief filed Mar. 24, 2021); Br. of Proposed Amici Curiae Reporters Comm. for Freedom of the Press et al. in Supp. of Pet’rs’ Mot. for Reh’g, *Azteca Int’l Corp. v. Ruiz*, No. 23-0044 (Tex. June 7, 2024) (media petition filed Mar. 14, 2023); Br. of Proposed Amici Curiae Reporters Comm. for Freedom of the Press & Other Media Orgs. in Supp. of Pet. for Review, *Netflix, Inc. v. Barina*, No. 22-0914 (Tex. Jan. 16, 2024) (media petition filed Nov. 16, 2022).

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INTRODUCTION

Gannett Co., Inc. and its related publishing arms (together, “Gannett” or “Petitioners”) seek review of a Court of Appeals decision affirming the denial of their motion under the Texas Citizen Participation Act (“TCPA”) to dismiss a defamation claim arising out of a five-part series led by the award-winning investigative reporter Craig Harris and published in *USA Today*. The series and related follow-up articles reported on controversies involving Ryan, LLC, a tax consulting company, pursuing potential tax refunds in Arizona and North Dakota through direct refund requests to state tax authorities. If permitted to stand, the lower court’s decision will not only chill investigative reporting into Ryan’s tax refund lobbying campaigns, but also will threaten a broad range of investigative journalism in the public interest in Texas.

Respondent has not alleged any false statement of fact contained in Gannett’s reporting, including with respect to the assertion that one former public official in Arizona claimed to have been contacted by the FBI about Ryan’s lobbying efforts for a tax refund. Pet’rs Br. at 9. Instead, Ryan has alleged that the reporting, when considered as a whole, *implied* that Ryan engaged in criminal and unethical conduct and was under FBI investigation for these alleged wrongdoings involving the lobbying campaigns. *See id.* at 10. The Court of Appeals, agreeing with Respondent, concluded that Ryan had met its burden of producing prima facie

evidence that the “gist” of the reporting was false and defamatory, and it affirmed the trial court’s denial of Gannett’s motion to dismiss under the TCPA. *USA Today v. Ryan, LLC*, No. 09-22-00432-CV, 2024 WL 1914792, at *11–14 (Tex. App.—Beaumont May 2, 2024, pet. pending) (hereinafter “the Opinion” or “Op.”). It reached this conclusion even though the article not only contained no falsehoods but also reported Ryan’s viewpoint—that it had done nothing wrong—and accurately disclosed that whether an FBI investigation was underway was unknown.

The decision is sufficiently troubling for the above reasons, but the Court of Appeals’ holding is additionally concerning to investigative journalists because Ryan’s defamation-by-implication claims arise out of reporting on third-party allegations. Texas law expressly provides that truth is a defense in libel actions if based on the “accurate reporting of allegations made by a third party regarding a matter of public concern.” Tex. Civ. Prac. & Rem. Code § 73.005(b) (amended 2015); *see also id.* § 73.002(b)(1) (same affirmative defense for allegations involving official proceedings).² By ignoring this statutory provision, enacted to protect the kind of news reporting at issue here, the Court of Appeals’ decision

² Because Petitioners are media defendants and the articles at issue address matters of public concern, Ryan bore the burden of establishing substantial falsity. *See, e.g., Cox Media Grp., LLC v. Joselevitz*, 524 S.W.3d 850, 861 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (citing cases). Regardless of whether falsity is an essential element of Ryan’s claim, or whether substantial truth is considered an affirmative defense as provided in the third-party allegation statute, the result is the same: Petitioners’ TCPA motion should be granted.

risks chilling speech involving allegations about which the public should be aware.

If left undisturbed, the Court of Appeals’ decision would expose investigative journalism in Texas to the risk of protracted defamation litigation. The proper interpretation and application of substantial truth in a “gist” case under Texas law, in general, has been the subject of confusion in lower courts, prompting reversals by this Court. *See Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 641 (Tex. 2018) (reversing lower court and finding gist of challenged publication to be substantially true despite omissions); *KBMT Operating Co. v. Toledo*, 492 S.W.3d 710, 713–14 (Tex. 2016) (same). More recently, this Court has declined to review lower court decisions that failed to dismiss defamation-by-implication claims under the TCPA. *See, e.g., Azteca Int’l Corp. v. Ruiz*, No. 23-0044 (Tex.) (petition denied June 28, 2024); *Netflix, Inc. v. Barina*, No. 22-0914 (Tex.) (petition denied Jan. 26, 2024). Amici filed briefs in those cases to express concern over what amici believe is the lower courts’ disregard or misunderstanding of what Texas statute and this Court’s precedent require. The trend arising from these cases is concerning given that this state’s legislature and courts have led the way in recognizing strong protections for speech. Review of the Court of Appeals’ decision here would give this Court an opportunity not only to correct the lower court’s errors but also to clarify the law of substantial truth as applied to ascertaining the “gist” of a challenged publication when a defamation claim is

predicated on allegations made by third parties and public officials, as Respondent's is here. This would have the practical benefit of allowing newsrooms to better plan their investigations and report news stories with an understanding of what Texas law permits. And it would allow newsroom counsel to provide clearer guidance, informed by this Court's analysis.

For the reasons herein, amici urge the Court to grant review and reverse.

ARGUMENT

I. The Court of Appeals' erroneous defamation-by-implication holding misapplied Texas substantial truth law and jeopardizes investigative reporting in the public interest.

The Court of Appeals, below, held that Ryan had produced prima facie evidence that the “gist” of Petitioners’ reporting was defamatory and not substantially true because it “present[ed] Ryan in an unfavorable light . . . as a whole and in discrete sections by implication.” Op. at *13. In so holding, the lower court misapplied Texas and federal law as it relates to “gist.” As detailed herein, if the decision is not corrected it will inevitably “lead publishers to curtail protected speech in an attempt to ‘steer wider of the unlawful zone’ of unprotected speech.” *Tatum*, 554 S.W.3d at 632–33 (citing *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)); *see also id.* at 632 (instructing courts to be mindful not to “exert too great a ‘chilling effect’ on First Amendment activities”).

In *Tatum*, the Supreme Court of Texas explained that regardless of whether a plaintiff is pursuing claims based on “gist” or “discrete implications,” the plaintiff must present “‘additional, affirmative evidence’ within the publication itself that suggests the defendant ‘intends or endorses the defamatory inference’” to sustain a claim. 554 S.W.3d at 635 (quoting *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990)). This Court has instructed Texas courts to consistently followed this framework and conduct a textual analysis to determine whether each alleged defamatory inference is substantially true or endorsed by the publisher. *See, e.g., Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377–82 (Tex. 2019) (analyzing two separate alleged defamatory meanings and asking if a reader would draw the implications alleged); *ProPublica, Inc. v. Frazier*, No. 01-22-00281-CV, 2024 WL 1774224, at *9–16 (Tex. App.—Houston [1st Dist.] Apr. 25, 2024, no pet.) (applying substantial truth test for each alleged defamatory implication); *see also Polk Cnty. Publ’g Co. v. Coleman*, 685 S.W.3d 71, 76 (Tex. 2024) (“Assessing substantial truth requires more than merely asking whether one statement plucked from a lengthy article is true or false.”).

However, some courts – including the courts below – have skirted this Court’s direction when plaintiffs allege a defamatory “gist” purportedly arising from an entire article or series of articles. Here the lower courts essentially held that a plaintiff has stated a viable defamation claim if a reader, after reading an

accurately reported and sourced article or series, could infer that the allegations made by a third party are true, even in the absence of any textual “endorsement” by the publisher. Such a result would be devastating – not to mention contrary to this Court’s direction – because accurate reporting of such allegations is the bread and butter of both deep investigative reporting and day-to-day journalism.

While the Court of Appeals understood Ryan alleged that *USA Today*’s reporting included nine statements with defamatory implications, the lower court did not properly perform an “especially rigorous” textual analysis to determine whether each of these claims were substantially true or endorsed by Petitioners. *See Tatum*, 554 S.W.3d at 633; *see also* Op. at *13–14. In fact, the Court of Appeals *ignored* eight of these alleged defamatory implications and focused its limited analysis exclusively on *USA Today*’s reporting on an alleged FBI investigation of Ryan.³ Instead of conducting a thorough analysis of the alleged defamatory implications, as required by this Court, the Court of Appeals focused its analysis on the headlines of articles and cherry-picked sentences out of context, without providing any analysis regarding “how a hypothetical reasonable reader would understand the article,” *Coleman*, 685 S.W.3d at 77 (citation and internal quotation marks omitted), or considering the publication “as a whole in light of the

³ As discussed *infra*, the Court of Appeals’ analysis of this sole alleged defamatory implication mistakenly ignored the fact that *USA Today*’s reporting on an FBI investigation was sourced, and therefore is subject to the statutory protections regarding allegations made by third parties. *See* Tex. Civ. Prac. & Rem. Code § 73.005(b).

surrounding circumstances based upon how a person of ordinary intelligence would perceive it,” *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000). This lack of analysis is insufficient given that the *USA Today* articles at issue comprise over 20,000 words and are deeply reported, spanning numerous years, involving sourcing from a variety of public officials, and dealing with the intrinsic complexities of state regulatory bodies. *See* Pet’rs Br. at 9, 12–15. Such detailed investigative reporting requires a court’s review to be “especially rigorous” before subjecting a publisher to liability for defamation by implication. *See Tatum*, 554 S.W.3d at 633 (citation omitted).

Furthermore, the “potential chilling effect” of defamation claims on the exercise of First Amendment rights “is especially strong in defamation-by-implication cases,” where “[u]nlike [with] explicit statements, publishers cannot be expected to foresee every implication that may reasonably arise from a certain publication.” *Id.* at 632–33. Allowing the Court of Appeals’ ruling in this case to stand would endanger all manner of investigative reporting. Individuals involved in investigative journalism are called upon to make countless editorial choices, including decisions to make strong, critical inquiry into their chosen subjects. *See id.* at 628. As Petitioners correctly argue, and amici emphasize, if every hard-hitting, issue-driven work of journalism could become actionable in defamation for certain mischaracterized statements taken out of context, few if any journalists

would risk creating such works. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (“Freedoms of expression require breathing space[.]” (citation and internal quotation marks omitted)).

II. The third-party allegations rule is essential to news reporting, and the Court of Appeals’ decision undercutting it will chill journalism on matters of public concern.

The freedom to report on newsworthy allegations made by third parties is essential for the press to perform its democratic function. Texas law recognizes this and expressly protects against defamation claims arising out of accurate reporting on third-party allegations about matters of public concern. *See* Tex. Civ. Prac. & Rem. Code § 73.005(b). By permitting Ryan’s claims—premised on *USA Today*’s accurate reporting of years of Ryan’s lobbying efforts to secure increased tax refund contingency fees—to proceed, the Court of Appeals ignored the plain language of this statute. *See* Op. at *19. Such uncertainty in Texas defamation law, if undisturbed, will chill news reporting.

In actions against the media, “the defense [of truth] applies to an accurate reporting of allegations made by a third party regarding a matter of public concern.” Tex. Civ. Prac. & Rem. Code § 73.005(b); *see also Hall*, 579 S.W.3d at 380 (“[M]edia outlets that accurately report allegations made by a third party about

matters of public concern can assert the truth as a defense.”⁴ When the statements at issue “were made by a media defendant over a [matter of] public concern,” it is the burden of the “plaintiff to prove [they] were false.” *Toledo*, 492 S.W.3d at 713–14 (citing *Phila. Newspapers*, 475 U.S. at 767).⁵ Moreover, under the TCPA, “the plaintiff has the burden . . . to show falsity at the motion-to-dismiss stage.” *Hall*, 579 S.W.3d at 380.

Importantly, when the allegations covered by the provision are “accurate[ly] report[ed],” they are, for purposes of the statute’s application, true. Tex. Civ. Prac. & Rem. Code § 73.005(a)–(b); see *Hall*, 579 S.W.3d at 381 (discussing protections for reporting “without regard for whether the information” from proceedings or allegations “is actually true” (citing, *inter alia*, Tex. Civ. Prac. & Rem. Code § 73.005(b))).⁶ The third-party allegation rule is designed to allow the freedom to report on matters of public concern, including “providing context for readers.” *Hall*, 579 S.W.3d at 382. It recognizes that often the existence of allegations alone

⁴ The statutory amendment “codifie[d] 25 years of Texas common law . . . so long as the defendant-media can establish that the underlying allegations: (1) were made, and (2) were accurately reported.” Bill Analysis: Sponsor’s Statement of Intent, S. Rsch. Ctr. (S.B. 627) (filed Feb. 25, 2015), <https://capitol.texas.gov/tlodocs/84R/analysis/pdf/SB00627I.pdf>.

⁵ A defendant’s “statement need not be perfectly true; as long as it is substantially true, it is not false.” *E.g.*, *Toledo*, 492 S.W.3d at 714.

⁶ This likewise applies to the official proceeding defense, Tex. Civ. Prac. & Rem. Code § 73.002(b)(1). See *Toledo*, 492 S.W.3d at 717 (explaining “the truth of the report” about an official investigation or proceeding is “measured by the scope of the [official] investigation, not by whether the misconduct being investigated could ultimately be proved” and affirming dismissal where gist of broadcast discussing medical board’s investigation into alleged “unprofessional conduct” of plaintiff-doctor was substantially true when compared to board’s report and press release).

makes them newsworthy. *See Frazier*, 2024 WL 1774224, at *11, 13, 14, 16 (finding no liability for article that asserted plaintiff has been accused of violating federal research rules); *Lowry v. Fox Television Stations, LLC*, No. 01-20-00627-CV, 2022 WL 2720509 (Tex. App.—Houston [1st Dist.] July 14, 2022, no pet.) (no liability when defendants’ reporting substantially reflected allegations against plaintiff in criminal case). Courts need not decide whether the speaker is right or wrong, only whether the speaker accurately reported what was alleged. *Gallagher v. Denton Media Co.*, No. 02-21-00164-CV, 2022 WL 2071779, at *9 (Tex. App.—Fort Worth June 9, 2022, no pet.) (holding that media defendant only has to show its accurate reporting of allegations, not allegations’ underlying truth).

Here, the challenged passages in *USA Today*’s reporting are based on third-party allegations; they are not direct accusations of wrongdoing by Gannett. For instance, Petitioners note that their reporting about the FBI’s involvement with respect to a Ryan refund campaign was attributed to a former Arizona public official, Grant Nülle. *See Pet’rs Br.* at 28–29. And while Ryan argues that *USA Today*’s reporting on the firings of Woodruff and Nülle misled readers into believing that Ryan had caused Governor Ducey to fire them, *Resp’t Br.* at 5–7, it simply ignores that this reporting was based on statements made by third parties. Here, Woodruff and Nülle alleged that they were terminated due to their opposition to the Arizona refund campaign. *See Pet’rs Reply Br.* at 15. Rather

than misleading readers, this is the exact type of accurately sourced reporting that the Texas Legislature intended the media to conduct when it passed the third-party allegation statute. Tex. Civ. Prac. & Rem. Code § 73.005(b). Moreover, Gannett further noted that (i) Governor Ducey’s office had not been contacted by the FBI, (ii) the FBI did not confirm whether there was an investigation, (iii) that Nülle’s boss, Carlton Woodruff, had not been contacted by the FBI, and (iv) Ryan could not be reached for comment. Pet’rs Br. at 28–29. Thus, this reporting detailed—but did not endorse—statements from third parties regarding whether the FBI was investigating individuals involved in the Ryan refund campaign.

Similarly, Petitioners explain how their descriptions of Ryan’s legal arguments made in Arizona and North Dakota judicial proceedings were reports of how state officials characterized those arguments. *See id.* at 30–31.⁷ Yet, because there is no indication that the Court of Appeals considered this article as a whole, as required, *see Tatum*, 554 S.W.3d at 628–29 (discussing how “substantial truth” analysis requires court to consider publication as a whole), the Court of Appeals

⁷ Moreover, these *characterizations* of Ryan’s legal arguments are subjective and not verifiable statements of fact, and thus are protected assertions of opinion. *See Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989) (“All assertions of opinion are protected by the [F]irst [A]mendment of the United States Constitution and article I, section 8 of the Texas Constitution.”); *see Johnson v. Phillips*, 526 S.W.3d 529, 535 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (“[T]o be actionable, a statement must assert an objectively verifiable fact rather than an opinion.”); *see also Tatum*, 554 S.W.3d at 624 (“[E]ven when a statement *is* verifiable as false, it does not give rise to liability if the entire context in which it was made discloses that it is merely an opinion masquerading as a fact.” (citation and internal quotation marks omitted)).

could not determine the “gist” of the article or assess whether it was an accurate report of the third-party allegations it described.

Dallas Morning News, Inc. v. Hall illustrates the lower court’s error here. In *Hall*, this Court found that the reporting of third-party allegations regarding a compounding pharmacy involved in a kick-back scheme, as well as the details of search warrants and lawsuits against the pharmacy, “fell within the [statutory] protections.” 579 S.W.3d at 382. The Court agreed with the plaintiffs that “assertions” made by their critics and published as part of the defendants’ coverage “are certainly not flattering, especially when placed in proximity to the notion that [plaintiffs’ pharmacy] is under federal investigation. But not flattering is not defamatory—especially in the face of the third-party-allegation rule and the official-proceeding privilege.” *Id.* at 381. Given that the “plaintiff has the burden under the [TCPA] to show falsity at the motion-to-dismiss stage,” and the defendants’ articles were accurate representations of the allegations, the reporting was “not a ground for a libel action,” and dismissal was appropriate. *Id.* at 380–82.

Numerous courts have applied the same analysis and—after comparing the gist of news reporting with the allegations made by third parties—dismissed libel claims against media defendants. *See Frazier*, 2024 WL 1774224, at *11, 13, 14, 16 (reversing trial court and dismissing defamation claims where article’s reporting on allegations regarding doctor’s violations of federal research rules and ethical

guidelines, conflicts of interest, and the above-average mortality rate of his patients was substantially true and “[was] not more damaging to [plaintiff’s] reputation than a truthful statement would have been” (citation omitted)); *Bostic v. Daily Dot, LLC*, No. 1:22-CV-158-RP, 2023 WL 2317789, at *8 (W.D. Tex. Mar. 1, 2023) (dismissing based on finding that reporting of third-party allegations was substantially true); *Gallagher*, 2022 WL 2071779, at *9 (same); *Broder v. Nexstar Broad. Grp., Inc.*, No. 03-19-00484-CV, 2021 WL 2273470, at *11 (Tex. App.—Austin June 4, 2021, no pet.) (same).

Newsrooms around the country report on allegations every day. Permitting claims against *USA Today*’s accurate reporting on third-party allegations contravenes this Court’s precedent and the clear statutory language and produces worrisome potential consequences for the media and the public at large. As this Court has observed, “[t]he media does not simply report on individual events in isolation. Commonly, reporting involves investigating, tracking down related stories, and providing context for readers.” *Hall*, 579 S.W.3d at 382. A failure to protect the reporting of allegations as the statute intended “will chill First Amendment speech.” *Id.* It is critical that investigative journalists are allowed to include third-party-provided information and opinions in their stories, as such reporting offers context and allows readers to draw their own conclusions about individuals and events of public importance. Without protections for the

disclosure of third-party allegations, there will simply be less public interest reporting—which will lead to a less informed citizenry.

If not corrected, the lower court’s decision will discourage reporting about newsworthy allegations made by third parties against public figures and organizations—an important and routine task of journalists—by raising the specter that such reporting will lead to protracted, expensive defamation litigation. This Court should grant review and reverse the lower court’s decision as it relates to statements made by third parties, the reporting of which is protected under a straightforward application of the third-party allegation defense codified in Section 73.005(b).

CONCLUSION

For these reasons, amici respectfully urge the Court to grant the petition and reverse the decision of the Court of Appeals.

Date: May 27, 2025

Respectfully submitted,

/s/ James A. Hemphill

James A. Hemphill

Texas State Bar No. 00787674

GRAVES DOUGHERTY HEARON & MOODY P.C.

401 Congress Avenue, Suite 2700

Austin, Texas 78701

Tel: (512) 480-5762

Fax: (512) 536-9907

jhemphill@gdhm.com

Counsel for Amici Curiae

Bruce D. Brown, Esq.*

Lisa Zycherman, Esq.*

Mara Gassmann, Esq.*

Matthew Singer, Esq.*

REPORTERS COMMITTEE FOR

FREEDOM OF THE PRESS

1156 15th Street NW, Suite 1020

Washington, D.C. 20005

Tel: (202) 795-9300

Fax: (202) 795-9310

bruce.brown@rcfp.org

** Of Counsel*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 3,427 words, exclusive of those sections identified in Tex. R. App. P. 9.4(i)(1) as excluded from the word count, and was produced in 14-point Times New Roman font with 12-point footnotes.

Date: May 27, 2025

/s/ *James A. Hemphill*

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In accordance with the Texas Rules of Appellate Procedure, I certify that a true and correct copy of this document was served via e-service and/or e-mail on the following counsel of record:

Paul C. Watler
Marc A. Fuller
JACKSON WALKER LLP
2323 Ross Avenue, Suite 600
Dallas, Texas 75201
pwatler@jw.com
mfuller@jw.com
Counsel for Petitioners

Bethany Pickett Shah
JACKSON WALKER LLP
1401 McKinney St., Suite 1900
Houston, Texas 77010
bpickett@jw.com
Counsel for Petitioners

Constantine Z. Pamphilis
Steven Owens
KASOWITZ BENSON TORRES LLP
1415 Louisiana Street, Suite 2100
Houston, Texas 77002
DPamphilis@kasowitz.com
SOwens@kasowitz.com
Counsel for Respondent

Edward E. McNally
KASOWITZ BENSON TORRES LLP
1633 Broadway
New York, New York 10019
EMcNally@kasowitz.com
Counsel for Respondent

Date: May 27, 2025

/s/ James A. Hemphill
James A. Hemphill

APPENDIX OF AMICI CURIAE

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.

The **Texas Press Association** is a non-profit industry association representing more than 400 daily and weekly newspapers in Texas, each of which upholds a strong tradition of journalistic integrity and community service. TPA, founded more than 130 years ago, performs numerous services on behalf of its members, including advocating on legislation relating to free speech and press and taking legal action to protect the First Amendment.

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Nancy Karnes on behalf of James Hemphill

Bar No. 787674

nkarnes@gdhm.com

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Freedom of the Press and Texas Press Association in Support of Petition
for Review

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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Paul Watler		pwatler@jw.com	5/27/2025 11:16:20 AM	SENT
Constantine Pamphilis	794419	dpamphilis@kasowitz.com	5/27/2025 11:16:20 AM	SENT
Steven Owens	24098212	sowens@kasowitz.com	5/27/2025 11:16:20 AM	SENT
Dalia Vicencio		dvicencio@jw.com	5/27/2025 11:16:20 AM	SENT
Bethany Pickett		bpickett@jw.com	5/27/2025 11:16:20 AM	SENT
Marc A Fuller		mfuller@jw.com	5/27/2025 11:16:20 AM	SENT
Edward E. McNally		EMcNally@kasowitz.com	5/27/2025 11:16:20 AM	SENT
Juana Saucedo		jsauceda@jw.com	5/27/2025 11:16:20 AM	SENT
Jim Hemphill		jhemphill@gdhm.com	5/27/2025 11:16:20 AM	SENT

Associated Case Party: USA TODAY A/K/A GANNETT CO., INC.

Name	BarNumber	Email	TimestampSubmitted	Status
Yolanda Lopez		ylopez@jw.com	5/27/2025 11:16:20 AM	SENT