NO. 11-0228

IN THE SUPREME COURT OF TEXAS

BYRON D. NEELY, Individually, and BYRON D. NEELY, M.D., P.A.,

Petitioners

vs.

NANCI WILSON, CBS STATIONS GROUP OF TEXAS, L.P., d/b/a KEYE-TV, and VIACOM, INC.,

Respondents

On Appeal from the Court of Appeals for the Third District of Texas, Austin
No. 03-08-00495-CV

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE TEXAS ASSOCIATION OF BROADCASTERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press ("RCFP") is an unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. RCFP has provided representation, guidance and research in First Amendment litigation since 1970.

The RCFP is an unincorporated association that has no parent and issues no stock. The RCFP has not received, nor will it receive, any fee for preparing this brief, and will provide all attorney fees incurred in connection with this brief.

The Texas Association of Broadcasters ("TAB") is a non-profit association that represents more than 1,300 television and radio stations across the state of Texas with a tradition of community-oriented, free, over-the-air broadcasting. The association was founded in 1951 and incorporated one year later. TAB performs numerous services on behalf of its members, including sponsoring and promoting legislation relating to and affecting radio and television broadcasters and defending open government, as well as publishing guidebooks on various legal issues, including access to public information. TAB has not received, nor will it receive, any fee for preparing this brief.

STATEMENT OF THE CASE

Amici hereby adopt Respondent's Statement of the Case.

STATEMENT OF ISSUES PRESENTED

Amici hereby adopt Respondent's Statement of Issues Presented.

STATEMENT OF FACTS

Amici hereby adopt Respondent's Statement of the Facts.

SUMMARY OF THE ARGUMENT

The essence of journalism is the pursuit of truth through the competition of ideas. In line with this, journalists regularly report on accusations, defenses, reports and findings of third parties. The third-party allegation rule therefore protects a core function of journalists to report on such newsworthy developments. More than 20 years ago, in *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990), this Court recognized that when a journalist reports on accusations made by a third party, the relevant statement that must be evaluated to establish the truth of the report is not the *underlying* allegation, but the journalist's accurate report *of the allegations themselves.* This rule recognizes the role that journalists play in airing all sides of a public controversy, and appropriately protects their ability to do so.

Petitioner attempts to characterize the rule adopted by this Court in *McIlvain* as an aberration that conflicts with the republication doctrine in a way inconsistent with other jurisdictions. *Amici* strongly disagree. *McIlvain* is simply an application of the common maxim that substantial truth is a defense against a claim for libel.[1] Other jurisdictions, both state and federal, have applied the same analysis to third-party allegation reports and have reached the same results.

[1] Referring to the substantial truth doctrine as a "defense" is something of a misnomer. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the United States Supreme Court ruled that "a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant." *Id.* at 777. Because Respondents are media defendants and the broadcast involved a matter of public concern, Petitioners bear the ultimate burden of showing falsity, rather than truth being an affirmative defense asserted by Respondents. This is true regardless of whether Respondents are private or limited-purpose public figures. *See Id.* at 775-79. And, while both this Court and the United States Supreme Court have reserved judgment as to whether a public-figure plaintiff mush show falsity by clear and convincing evidence, *see Harte-Hanks Commc'n, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2 (1989); *Turner v. KTRK Television, Inc.*, 37 S.W.3d 103, 117 (Tex. 2000). Respondents have failed to produce sufficient evidence of falsity to withstand summary judgment under either a preponderance or clear and convincing evidence standard.

The third-party allegation rule also is consistent with the fair report and neutral reportage privileges. The law has struggled to balance the competing values to a healthy democracy of the reputational interests of individuals and the necessity of a vibrant and robust press. While it is true, as Petitioner suggests, that most jurisdictions have adopted some form of liability for the republishing of defamatory falsehoods, it is also true that this rule is tempered by some combination of common law, statutory, and/or constitutional privileges. The fair report and neutral reportage privileges both protect the republishing of potentially defamatory falsehoods to serve the greater goal of informing the public of what goes on in official proceedings, and to alert the public of what accusations are being made in public controversies. These protections are critical, as "[t]he public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them." *Edwards v. Nat'l Audubon Soc'y*, 556 F.2d 113, 120 (2d Cir. 1977). The third-party allegation rule serves the same policy goals as these privileges.

Petitioner presumes that a journalist reporting on a controversy can always know whether the accusations made by sources are valid. But the very purpose of journalism is to seek the positions of all sides to a controversy, and accurately and fairly report the positions of those parties. The third-party allegation rule serves precisely that core function of reporters: it does not protect the journalist who fails to accurately report the positions of the parties, but only the journalist who performs her proper role in

maintaining competition in the marketplace of ideas. *Amici* respectfully ask that this Court affirm this protection in Texas.

ARGUMENT AND AUTHORITIES

I. Texas's Third-Party Allegation Rule Protects a Core Function of Journalists to Report on Newsworthy Accusations

The law has struggled to balance the reputational interests of citizens with the long-recognized role of journalists to inform the public debate. Over time, this struggle has resulted in a mix of common law, statutory, and constitutional doctrines varying across jurisdictions, all of which — in different degrees and different formulations — limit the harshness of blanket republication liability premised on the notion that "talebearers are as bad as talemakers." *See Cavalier v. Original Club Forest*, 59 So. 2d 489, 490 (La. Ct. App. 1952). A broad range of courts have found that the media must be granted latitude to report on controversies without assuming responsibility for things said by the parties involved, for the public's right to know extends to live and active controversies in which acrimonious and charged accusations may be exchanged. As the Eighth U.S. Circuit Court of Appeals has observed, "[s]ometimes it is difficult to write about controversial events without getting into some controversy along the way." *Price v. Viking Price, Inc.*, 881 F.2d 1426, 1446 (8th Cir. 1989).

Petitioner goes to great length to paint this Court's decision in *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990), as an anomaly, arguing that the third-party allegation rule adopted in that case conflicts with the republication doctrine "followed in every U.S. jurisdiction," Pet. for Rev. at 12, and that this rule conflicts with "over 100 years of Texas

law." Pet. Br. at 21. This argument is overstated. To be sure, most jurisdictions in the United States have adopted a general rule of republication liability, but that broad rule is restricted in every jurisdiction by some combination of privileges. *McIlvain* is, in fact, consistent in both reasoning and methodology with several other jurisdictions' application of the substantial truth test, and is in harmony with the policy rationales underlying a body of reporting defenses which, under various names and with differing scopes of coverage, have been adopted by most jurisdictions.

Rather than a wholesale abandonment of republication liability, *McIlvain* simply recognizes that in cases in which the media reports upon allegations that are of public concern, the appropriate reference point with regard to the truth of the report is not the *underlying allegation*, but rather the media's accurate reporting of the *allegations themselves*. In *McIlvain*, the media defendants had accurately reported that an internal investigation was underway regarding Houston city employees doing private work on the city's payroll. *McIlvain*, 794 S.W.2d at 15. Specifically, the broadcaster accurately reported that four employees were suspected of having been sent to care for the elderly father of the plaintiff, who was their manager, on city time. *Id*. The court never reached the question of whether city time had actually been abused because the very fact that such an investigation was occurring was the gist of the story, was newsworthy, and had been accurately reported, and thus the report was substantially true.

This articulation of the substantial truth defense is not unique to Texas. Other jurisdictions have applied the same methodology to bar defamation claims on the grounds that news reports were true. And, more broadly, the outcomes derived from application

of the substantial truth defense as in *McIlvain* are consistent with the results other jurisdictions reach under the neutral reportage doctrine and the fair report privilege. Simply said, both in methodology and result, Texas' approach lines up with other jurisdictions. *Amici* strongly urge this court to recognize that journalists must be free to report on allegations of wrongdoing that are of public concern without being exposed to liability based on the accuracy of the allegations themselves.

a. Other Jurisdictions Have Applied the Substantial Truth Defense to Protect Reports of Third-Party Allegations

Truth is a complete defense to a claim for defamation. *See generally* Meiring De Villiers, *Substantial Truth in Defamation Law*, 32 AM. J. TRIAL ADVOC. 91 (2008); *see also* W. PROSSER & P. KEETON, PROSSER AND KEETON ON TORTS §116 (1984); RESTATEMENT (SECOND) OF TORTS §558. "The substantial truth doctrine states that '[t]ruth will protect the defendant from liability even if the precise literal truth of the defamatory statement cannot be established,' as long as the 'gist' or 'sting' of the statement is true." De Villiers, *supra*, at 99-100 (internal citations omitted). In *McIlvain*, this Court specifically applied the substantial truth analysis. 794 S.W.2d at 15-16. A number of state and federal courts have applied the substantial truth doctrine to situations similar to that in this case, namely where a news organization reports on newsworthy allegations without endorsing the veracity of the allegations themselves. These cases apply the same methodology as this court did in *McIlvain* to bar claims for libel based on the truth of the report.

The Seventh U.S. Circuit Court of Appeals addressed this issue in *Global Relief Found. v. New York Times*, 390 F.3d 973 (7th Cir. 2004) (interpreting Illinois law),[2] in which a non-profit humanitarian organization sued a number of media defendants for reporting that, in the wake of the September 11, 2001 terrorist attacks, the Treasury Department had considered adding it to a list of organizations suspected of funneling money to terrorist organizations. Arguing that it had never provided funding to terrorist organizations and that it had suffered severe reputational damage as a result of these articles, Global Relief Foundation ("GRF") sued for defamation. *Id*. at 979-80. Consistent with the two "levels" of truth at issue in this case, GRF "maintain[ed] that the defendants should be required to demonstrate not only that they accurately reported the government's suspicions but that GRF was actually guilty of the conduct for which the government was investigating the group." *Id*. at 980. The Seventh Circuit rejected this argument.

Recognizing that the principal focus of the reports at issue was that the government suspected GRF of funding terrorist organizations, the Court found irrelevant any question as to whether GRF *actually had* funded such organizations. *Id*. at 986-87 ("[A]ll of the reports were either true or substantially true recitations of the government's

[2] The Court decided this case on the basis of three prior decisions — two in Illinois state court and one in the Seventh Circuit — which it found to be directly on point. *See Gist v. Macon Cnty. Sheriff's Dep't*, 671 N.E.2d 1154, 1157-58 (Ill. App. Ct. 1996) (flyer stating that there was a warrant for plaintiff's arrest as of October 6 was substantially true, despite the fact that the warrant was rescinded after October 6 but before publication); *Sivulich v. Howard Publ'ns, Inc.*, 466 N.E.2d 1218, 1219 (Ill. App. Ct. 1984) (newspaper that reported that an aggravated battery lawsuit had been filed against the plaintiff did not have to prove that the aggravated battery actually took place, only that the civil action had been brought); and *Vachet v. Cent. Newspapers, Inc.*, 816 F.2d 313 (7th Cir. 1987) (newspaper that reported that plaintiff had been arrested for harboring a fugitive suspected of committing rape did not have to show that the fugitive actually had committed rape in order to defeat plaintiff's claim that he was wrongfully associated with a rapist).

suspicions about and actions against GRF."). Because the "gist" or "sting" of the reports was related to the allegations — indeed, the allegations were themselves newsworthy — the media defendants had no responsibility to determine whether GRF actually was a front for terrorist financing. The reports were accurate recitations of the fact that the government was investigating certain organizations believed to have links to terrorism, and that GRF was one such organization under investigation.[3]

The Eighth U.S. Circuit Court of Appeals applied a similar analysis to a report detailing prior allegations of rape that had been levied against South Dakota Governor William Janklow when he had been a practicing lawyer. In *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 646 (8th Cir. 1985) *rev'd in part on other grounds*, 788 F.2d 1300 (8th Cir. 1986) (en banc), *Newsweek* reported on an alleged "feud" between the Governor and an American Indian activist. The report said that the activist had, years before, brought charges alleging rape of an underage Native American girl against Janklow, that federal prosecutors had found insufficient evidence to press forward with the case, and that a tribal court had nonetheless determined that "probable cause" existed to support the charge and thereafter banned Janklow from practicing law on the reservation. *Id.*[4]

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[3] The Court noted that the Treasury Department did, in fact, add GRF to the list of entities with ties to terrorism, and later classified GRF as a Specially Designated Global Terrorist, but not until a few months *after* the publication of these reports. 390 F.3d at 987. Thus, in jurisdictions that follow a more restrictive interpretation of the fair reporting privilege, see Part I.C., *infra*, there may not have been a judicial or executive report which the media could refer back to in order to invoke the privilege. Put another way, Petitioner's argument would have hamstrung the media with liability for reporting this investigation. This illustrates the important role that the substantial truth defense fills, in that it allows the media to report on newsworthy allegations even if no charges have been brought or lawsuit filed.

[4] The court also found that a disputed issue of material fact existed as to the accuracy of *Newsweek*'s report that Janklow improperly prosecuted another party, and overturned the district court on that issue. *See Janklow*, 759 F.2d at 649. The Eighth Circuit granted rehearing *en banc*,

The court applied the substantial truth analysis and affirmed summary judgment on those particular libel claims for *Newsweek*. *Id*. at 649. Even to the extent the article caused harm to Janklow's reputation, it did so only as "the result of a materially accurate report of historical fact, not of an assertion by *Newsweek* that Janklow committed the alleged crime." *Id*. Because *Newsweek* accurately reported the accusations but did not endorse or espouse the validity of the rape claim, it assumed no responsibility for the truth of the underlying allegation. *Newsweek* truthfully reported the allegations that had been brought, and thus Janklow could not make the showing of falsity that every claim for libel must include. *See also Price v. Viking Penguin, Inc*., 881 F.2d 1426 (8th Cir. 1989).[5]

There is arguably some overlap between the substantial truth defense and the fair report privilege. For example, though the *Janklow* court did not decide the case on such grounds, it is possible that the allegations reported on by *Newsweek* would be protected as a fair and accurate report of the official investigation into Janklow's conduct. *See* Part I.C., *infra*. But this area of commonality only further reinforces the fact that the

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addressing only this latter issue. The panel's decision with regard to the rape allegations was not disturbed. *See Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1301-02 n.2 (8th Cir. 1986) (en banc).

[5] A number of federal district courts have reached similar conclusions. *See, e.g.*, *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348 (S.D.N.Y. 1998) (holding substantially true newspaper reports that plaintiff was the "main" suspect in the 1996 Olympic Park bombing when plaintiff admitted that he was "a" suspect, and disregarding any question of whether plaintiff *actually had* committed the bombing); *Basilius v. Honolulu Pub'g Co.*, 711 F. Supp. 548, 551 (D. Haw. 1989) (magazine report that the family of assassinated Palauan president had received an anonymous letter suggesting that the plaintiff had commissioned the assassination substantially true because the report "does *not* allege that these underlying allegations are true; it simply reports that the relatives did receive such a letter"); *Kenney v. Scripps Howard Broad., Co.*, No. 98–1079–CV–W–BD, 2000 WL 33173915, at *4 (W.D. Mo. June 28, 2000) ("All the critical facts in the news broadcast were substantially true and not in dispute. The 'gist' of the newscast is that [the missing child] was last seen with plaintiff (a true fact) and that *family members* believe [the child] *may be* with plaintiff and her son (a true fact).").

substantial truth defense as adopted by Texas is consistent with the policies other states have used to limit journalists' liability for publishing newsworthy accusations.

The substantial truth defense has been employed by state courts as well as federal. For example, courts in Louisiana have applied the same methodology underpinning *McIlvain*. In *Thompson v. Emmis Television Broad.*, 894 So. 2d 480, 485 (La. Ct. App. 2005), *writ denied*, 899 So. 2d 580 (La. 2005), a pastor sued a television broadcaster for reporting on sealed court documents containing allegations that the pastor had embezzled funds from his church, allegations which he claimed were false. Recognizing that the broadcaster had not *accused* the pastor of embezzling money, but rather had reported on the fact that *others* had accused the pastor, the court found the broadcast to be true, absolutely barring the pastor's claim for defamation. *Id*. at 486. An Ohio court of appeals declined to find liability where a newspaper accurately quoted a policeman who said that the plaintiff "got away with murder," because the quote was an accurate report of what the officer said. *Stholmann v. WJW TV, Inc*., No. 86491, 2006 WL 3518121, at *6 (Ohio Ct. App. Dec. 7, 2006). And a Kentucky court found that no liability for defamation could lie in a case where a news station accurately reported that rumors existed in the community that the plaintiff, a city housing director, had displayed improper favoritism to a close female companion. *Hodge v. WCPO Television News*, No. 97-CI-02516, 2001 WL 1811681, at *2 (Ky. Cir. Ct. 2001) ("The fact that the television

Defendants reported the opinions or perceptions of those who were critical of Mr. Hodge and Ms. Johnson *is not actionable*.") (emphasis added).[6]

Petitioner argues that affirming the third-party allegation rule would conflict with United States Supreme Court jurisprudence. Pet. Br. at 16 (citing *Harte-Hanks Commc'n v. Connaughton*, 491 U.S. 657, 688 (1989)). As a threshold matter, "the states are free to reject federal holdings as long as state action does not fall below the minimum standards provided by federal constitutional protections." *Heitman v. State*, 815 S.W.2d 681, 682-83 (Tex. Crim. App. 1991) (discussing the scope of coverage of TEX. CONST. art. I, § 9 of the Texas Constitution relative to the U.S. CONST. amend IV); *see also* Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1045-46 (1985) (discussing federalism's preservation of state autonomy). Petitioner's argument that *McIlvain* is precluded by *Connaughton* is therefore misplaced.

More importantly, however, the use by other jurisdictions of the substantial truth defense demonstrates that Texas does not sail in uncharted waters by affirming that rule. And, when considered in tandem with the results derived under other jurisdictions' particular sets of privileges, as discussed *infra*, the propriety of *McIlvain* becomes even more apparent.

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[6] Although involving the related tort of false light invasion of privacy rather than defamation, a Nebraska court of appeals applied the same methodology as above to bar a claim on the grounds of truthfulness. *See Wadman v. State*, 510 N.W.2d 426, 432 (Neb. Ct. App. 1993) (statement that the plaintiff had been "accused" by private persons of child abuse held non-actionable under false light because the plaintiff had in fact been accused).

b. KEYE-TV's Broadcast Would Be Protected Under the Neutral Reportage Privilege

The substantial truth defense as articulated in *McIlvain* functions similarly to the neutral reportage doctrine pioneered by the Second U.S. Circuit Court of Appeals in *Edwards v. Nat'l Audubon Soc'y, Inc*., 556 F.2d 113 (2d Cir. 1977), and neutral reportage has been applied by courts in several jurisdictions.[7] Petitioner's concession on this point belies their larger argument that the third-party allegation rule dismantles the concept of republication liability and would place Texas at odds with the laws "followed in every U.S. jurisdiction." *See* Pet. Br. at 17, 19. To concede the similarities between the two doctrines is to concede that Texas is not an outlier.

The neutral reportage principle recognizes that there are instances in which serious accusations by credible sources levied against public figures will have an impact on the public interest, in and of themselves, important enough to justify news coverage. And because of that, the news media must be able to accurately report these accusations without exposure to liability based on the veracity of the underlying allegations

[7] *See., e.g., Wilson v. Birmingham Post Co.*, 482 So.2d 1209 (Ala. 1986) (stating in dicta that "although [*Edwards* was] decided under the 'neutral reportage' doctrine arising from the First Amendment itself, these cases, like [Alabama Code] § 13A-11-161, stand for the proposition that substantially accurate reports of official investigations are privileged"); *Barry v. Time*, 584 F. Supp. 1110, 1122-28 (N.D. Cal. 1984) (emphasizing the public's "right to know" discussed in *Edwards*); *McCracken v. Gainesville Tribune*, 246 S.E.2d 360 (Ga. Ct. App. 1978) (interpreting Georgia's "fair and honest report" privilege to be commensurate with "neutral reportage" as defined in *Edwards*); *Krauss v. Champaign News Gazette*, 375 N.E.2d 1362, 1363 (Ill. Ct. App. 1978) ("If the journalist believes, reasonably and in good faith, that his story accurately conveys information asserted about a personality or a program, and such assertion is made under circumstances wherein the mere assertion is, in fact, newsworthy, then he need inquire no further."); *Freyd v. Whitfield*, 972 F. Supp. 940, 946 n.11 (D. Md. 1997) ("Additionally, it goes without saying that Dr. Whitfield's neutral descriptions of the Freyd family saga are not actionable, because it is not defamatory to report a third party's allegations of misconduct."); *Sunshine Sportswear & Elec., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499 (D.S.C. 1989); *Burns v. Times Argus Ass'n, Inc.*, 139 Vt. 381, 389-90 (1981) (citing and extending *Edwards* to apply to quotations from an anonymous letter making accusations); *In re United Press Int'l*, 106 B.R. 323, 328-29 (D.D.C. 1989).

themselves. "What is newsworthy about such accusations is that they were made." *Edwards*, 556 F.2d at 120. "The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them." *Id*.

In *Edwards*, the Second U.S. Circuit Court of Appeals pioneered the principle that, within the ambit of the First Amendment, there exists a privilege for the media to report upon newsworthy allegations by responsible sources without adopting them as their own. The case arose in the height of the controversy over use of the insecticide DDT that pitted environmental advocates against pesticide industry representatives. A representative of the National Audubon Society accused pesticide industry scientists of misrepresenting bird-count data to suggest that DDT was not environmentally harmful. *Id*. at 116-17.[8]

The New York Times reported that the National Audubon Society was accusing pesticide industry spokesmen of being "paid liars," and the scientists so accused sued the *Times*. Accepting that the newspaper had accurately reported the names of the scientists and the specific allegations that were made against them, the court found that a libel judgment would be constitutionally impermissible. *Id* at 120.

> The contours of the press's right of neutral reportage are, of course, defined by the principle that gives life to it. Literal accuracy is not a prerequisite: if we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made. It is equally clear, however, that a publisher who in fact espouses or concurs in the charges made by others, or who

[8] Specifically, the spokesman said: "Any time you hear a 'scientist' say [that increased bird counts are the result of more birds, and not more people counting birds], you are in the presence of someone who is being paid to lie, or is parroting something he knows little about." *Id.* at 116-17.

> deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage.

Id. at 120 (internal citations omitted).

The Second Circuit further demarcated the limits of the neutral reportage privilege in *Cianci v. New Times Publ'g Co.*, 639 F.2d 54 (2d Cir. 1980). In *Cianci*, a newspaper published a story that went beyond the mere accurate reporting of accusations of wrongdoing, but "espoused or concurred in them." *Id*. at 69. *The New Times* ran a story purportedly reporting that accusations of rape had once been levied at Vincent "Buddy" Cianci, then mayor of Providence, Rhode Island, while he had been in law school. *Id*. at 56-59. Moreover, the article suggested that Cianci had avoided felony charges by buying the alleged victim's silence for a $3,000 settlement. Upon Cianci's suit for libel, *The New Times* asserted the *Edwards* neutral report privilege.

In declining to grant the defendant the privilege, the court articulated the boundaries of neutral reporting, which the broadcast at issue in this case falls neatly within. *The New Times* went far beyond simply reporting charges, but by virtue of "ingenious construction of the article," a failure to adequately communicate Cianci's response to the allegations, as well as the decision not to reveal facts undermining the credibility of Cianci's accusers, *id*. at 69, failed to present the story in such a neutral and detached way as to be entitled to protection under the neutral report privilege.

Considering the sphere of neutral reportage created by *Edwards* and *Cianci*, it is clear that the broadcast at issue in this case would fall within the privilege's protection. While the court in *Edwards* did partially rest its analysis on the prominence of the

National Audubon Society as an institution, that factor was not prevalent in the court's analysis in *Cianci*. The *Cianci* court focused principally on the fact that *The New Times* report was in no way "neutral." *See id*. More to the point, even to the extent that the credibility of the source of the accusations is a principal component of the neutral reportage analysis, KEYE-TV's report in this case relied on credible, reliable sources. As the Third District Court of Appeals correctly noted, KEYE-TV's broadcast was "plainly calculated to raise questions regarding how effectively the Texas Board of Medical Examiners and the medical peer review process ensure patient safety by taking action against doctors who endanger patients." *Neely v. Wilson*, 331 S.W.3d 900, 915 (Tex. App. 2011). It did so by accurately reporting the allegations against Neely raised by the Medical Board, Paul Jetton, Peter Gao, and Wei Wu's estate, as well as the findings of the Medical Examiner who performed the autopsy on Wei Wu. *See id.* at 910. These are all credible sources. And, as serious as these accusations may be, *KEYE-TV did not make them*. They simply reported on the fact that serious allegations had been raised against Neely, which brought into question both Neely's fitness to practice medicine and the efficacy of the Texas Board of Medical Examiners in policing the medical profession.

Wilson's report, while communicating questions about an issue of paramount public concern — namely, how effectively the body charged with regulating the medical profession performs — was nonetheless fair and balanced with regard to the accusations against Neely. As Wilson reported,

> We contacted Dr. Neely for his side to the story. He declined to participate, but his attorney told us that two highly qualified neurosurgeons who reviewed the case agree with the medical decisions made by Dr.

> Neely. In addition, the State Board of Medical Examiners office investigated the Jetton case and found no wrong doing. We also contacted St. David's Medical Center, its chief medical officer believes they have a strong peer review process. That's where individual doctors review each other's work and decide who should have privileges.

Id. at 911. Not only did Wilson clearly communicate that other parties, not the reporter, made these allegations, but they prominently stated exculpatory information about Neely, to wit, that two highly qualified neurosurgeons concurred in his medical judgment. Indeed, Neely admitted that he was happy with the response his lawyer gave to Wilson, and that he would not have added anything to it. To what extent the allegations presented in the report are meritorious is a question left for the viewer to determine. This is the essence of the neutral reportage privilege.

Courts in several jurisdictions have, to varying degrees and in different formulations, applied the neutral report privilege. Petitioner and Respondent in this case disagree over to what extent courts in Texas have recognized neutral reporting. *See* Pet. Br. at 19. *Amici* express no opinion on the state of Texas law with regard to this privilege. Petitioner argues that the many Texas appellate courts that have applied the substantial truth defense have somehow diverged from a national tradition of unrestricted republication liability, but the body of cases applying neutral reportage suggests the contrary.

c. *McIlvain* is Consistent With Other Jurisdictions' Application of the Fair Report Privilege

The policy rationales underlying the fair report privilege are similar to those that motivate the neutral reportage privilege and the substantial truth doctrine. Its purpose is

to provide individuals observing public proceedings with an unfettered right to repeat what happened and what was said — provided their reports are fair and accurate — in order to protect the public's interest in knowing what occurs there. 50 Am. Jur. 2d *Libel and Slander* § 298. The privilege is rooted in the fact that the person relaying what occurred in the public proceeding is merely conveying to the public statements that members of the public would have heard themselves had they been present at the meeting. *Id*.

Under the fair report privilege, "[t]he publication of defamatory matter concerning another in a report of an official action or proceeding … is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." RESTATEMENT (SECOND) OF TORTS § 586 (1977). In most states, the privilege is not absolute but qualified, and may be defeated by a showing "that the publisher [did] not give a fair and accurate report of the official statement, or malice." *Yohe v. Nugent*, 321 F.3d 35, 44 (1st Cir. 2003). Some states — including Texas — have codified this privilege in statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 73.002; *see also* CAL. CIV. CODE ANN. § 47(d)-(e); *Kilgore v. Younger*, 30 Cal. 3d 770, 777 (1982). However, in most jurisdictions, it remains a creation of the common law.

States vary in the scope of coverage of their fair report privilege, and it can encompass principles of both neutral reportage and substantial truth. For example, some jurisdictions construe the privilege quite narrowly, protecting only fair and accurate reports of qualified government sources that have been properly attributed to by the publication. *See Jankovic v. Int'l Crisis Group*, 593 F.3d 22, 26 (D.C. Cir. 2010). Others

extend the privilege to both "'a fair and true report in, *or a communication to*,' … a public journal of judicial and other proceedings." *Rothman v. Jackson*, 49 Cal. App. 4th 1134, 1144 n.3 (Cal. Ct. App. 1996) (quoting CAL. CIV. CODE. § 47(d)). A news report may still be fair and accurate even if written with a certain amount of literary license. *See Read v. News-Journal Co.*, 474 A.2d 119, 121 (Del. 1984) (per curiam) ("An action for defamation cannot be premised solely on defendant's style or utilization of vivid words in reporting a judicial proceeding."). Most states construe the definition of an official report or proceeding broadly, applying the privilege to reports on proceedings before any administrative, judicial, executive, or legislative body. *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88-89 (D.C. 1980); *see also Swate v. Schiffers*, 975 S.W.2d 70 (Tex. App. 1998) (Texas Medical Board proceedings are "official proceedings" within the Texas privilege).

Other jurisdictions construe the fair report privilege more liberally, incorporating elements of substantial truth and neutral reportage. For example, in a case factually similar to that here, the Oklahoma Court of Appeals dismissed a defamation action against a television station brought by a dentist in response to a news story that was based on a disciplinary proceeding brought against him. *Johnson v. KFOR-TV*, 6 P.3d 1067 (Okla. Civ. App. 1999). Despite the plaintiff's argument that the news report included factual allegations *beyond* those covered in the official proceedings, the court nonetheless ruled that it was a substantially accurate report of an official proceeding, and was thus within the bounds of the fair report privilege. *Id*. at 1069. And, as noted above, the Georgia Court of Appeals interpreted that state's statutory fair report privilege to require

"neutral reportage" as contemplated by *Edwards*. *See McCracken v. Gainesville Tribune*, 246 S.E.2d 360, 362 (Ga. Ct. App. 1978).

Summary judgment was proper independent of *McIlvain* because KEYE-TV's broadcast was privileged under Texas' fair report privilege. *See* Resp. Br. at 46. The existence of a statutory privilege does not preclude this Court's affirmation of the common law substantial truth doctrine in this case. *See* TEX. CIV. PRAC. & REM. CODE §73.006 ("This chapter does not affect the existence of common law, statutory law, or other defenses to libel."). Moreover, while states differ in the precise manner in which they apply the privilege of fair report, the privilege's ubiquity is evidence of the widespread recognition that the public's right to know about public controversies requires that journalists be free to report on such events without fear of liability.

II. The Practical Realities of News Reporting Illustrate that Journalists Must be Able to Report on Live Controversies Without Assuming Responsibility for Defamatory Statements Made By Third Parties

It is axiomatic that the news media serves a critical role in informing the public debate. *See Roth v. United States*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); *Stromberg v. California*, 283 U.S. 359, 369-70 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."). To that end, it is often the case that accusations are made — be they against an individual or institution –

that implicate some matter of public interest. In order to pursue their proper function in a democracy, journalists must be able to accurately report upon such allegations without exposure to liability based upon the ultimate truthfulness of the claim.

Though the broadcast in this case would likely be protected under many jurisdictions' articulations of the fair report or neutral reportage privileges, *McIlvain* nonetheless fills a critical gap often left open in jurisdictions that apply strict versions of the fair report privilege and fail to augment it by recognizing neutral reportage. It allows journalists to report on matters of public concern that include potentially defamatory allegations where the *allegations themselves* are newsworthy, even if no lawsuit has been filed or official government action taken.

The third-party allegation rule offers clarity to journalists by making clear precisely they are responsible for when reporting on controversial disputes. It is impractical and unrealistic to require journalists to be responsible for the ultimate truth of every statement made by a source. Petitioner presumes that a journalist, in reporting upon a story, will always be able to determine who is telling the truth. But the very essence of journalism is to promote the search for truth by adequately airing the positions of all sides to a controversy.[9] It is not always the case that a reporter — or anyone else, for that matter — will know what side will ultimately prevail in a dispute. The Fourteenth District Court of Appeals succinctly recognized why Petitioner's position is untenable:

[9] This principle is enshrined in the Code of Ethics of the Society of Professional Journalists: "Journalists should be honest, fair and courageous in gathering, reporting and interpreting information." Society of Professional Journalists, CODE OF ETHICS (1996), *available at* http://www.spj.org/pdf/ethicscode.pdf.

> [T]he media would be subject to potential liability every time it reported an investigation of alleged misconduct or wrongdoing by a private person, public official, or public figure. Such allegations would never be reported by the media for fear an investigation or other proceeding might later prove the allegations untrue, thereby subjecting the media to suit for defamation. Furthermore, when would an allegation be proven true or untrue for purposes of defamation? After an investigation? After a court trial? After an appeal? Undoubtedly, the volume of litigation and concomitant chilling effect on the media under such circumstances would be incalculable.

KTRK Television v. Felder, 950 S.W.2d 100, 106 (Tex. App. 1997); *see also Green v. CBS, Inc.*, 286 F.3d 281 (5th Cir. 2002) ("In cases involving media defendants, such as this, the defendant need not show the allegations are true, but must only demonstrate that the allegations were made and accurately reported.").

Amici respectfully ask this Court to affirm, as has each court of appeals to confront the issue over the past twenty years, that in order to pursue their proper role in a democracy, journalists must be able to accurately report the allegations of third parties without exposure to liability.

PRAYER

Amici pray that the Court deny Petitioner's Petition for Review. Alternatively, *Amici* pray that this Court affirm the judgment of the court of appeals and for such other and further relief to which Respondents may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 13th day of December, 2011, the foregoing document was filed electronically and as such, this document was served on all counsel who are deemed to have consented to electronic service. All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by facsimile.

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