No. A17-1068

STATE OF MINNESOTA

IN COURT OF APPEALS

Gannett Company, Inc., Gannett Satellite Information Network Inc., Multimedia Holdings Corporation, d/b/a KARE 11-TV and d/b/a St. Cloud Times,

Defendants/Appellants,

vs.

Ryan Larson,

Plaintiff/Respondent.

BRIEF OF AMICUS CURIAE STAR TRIBUNE MEDIA COMPANY LLC, THE ASSOCIATED PRESS, FOX/UTV HOLDINGS, LLC, on behalf of its television station KMSP FOX 9, THE MINNESOTA NEWSPAPER ASSOCIATION, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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Introduction

In September, just a month after this Court ruled that the district court's June 13, 2017, order was appealable as a matter of right,[1] the *Star Tribune* reported on the harrowing escape of an Alexandria, Minnesota, teenager who had, according to police, been kidnapped nearly a month prior.[2] After enduring repeated physical and sexual assault at the hands of her three alleged captors, the girl swam across a lake and was running across a field when a local farmer spotted her.

"I could make out her face, and I went, 'Oh my gosh, this is the gal from Alexandria that's been gone for 29 days,'" the farmer later said at a press conference. "It'd been on the news, it'd been online. It went national. It was on posters, in stores, her face, her picture. Right away I recognized her."[3]

On their drive into town, the girl spotted one of her suspected kidnappers, and by the end of the day all of them were in custody. The local police chief credited the happy ending to the "publicity campaign" surrounding the girl's disappearance. The farmer, he told the *Star Tribune*, was "able to name her before she was able to say any words

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**Amici* certify that no counsel for any party authored this brief in whole or in part. No person other than *Amici*, their members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[1] *See* Aug. 8, 2017, Order.

[2] Paul Walsh, "Police: Alexandria teen was held for weeks, sexually assaulted before she swam to freedom," StarTribune.com (Sept. 6, 2017), http://www.startribune.com/police-alexandria-teen-abducted-beaten-until-she-swam-to-freedom/442917073/.

[3] Tim Harlow, "Man who helped missing Alexandria teen gives $7,000 reward back to her family," StarTribune.com (Oct 9, 2017), http://www.startribune.com/man-who-helped-missing-alexandria-teen-gives-7-000-reward-back-to-her-family/450119733/.

because he knew what this story was all about. It's just a perfect example of what it's like to be transparent ... to work with [the news media] to share this information."[4]

The chief thus recognized what ought to go without saying: that the news media, by keeping the public apprised of important matters of public concern (including the activities and statements of law enforcement), play a crucial role in ensuring public safety. Police departments may have websites, but they otherwise are not equipped with tools of mass communication. Instead, the public turns to the evening news or the morning newspaper to keep it informed about official proceedings. Thus, when police need to warn the public about a dangerous, at-large suspect in a robbery, or enlist the public in finding a missing child, or assure a frightened public that a suspected shooter is in custody, the ability and willingness of the press to report on their official statements and actions play an important role in ensuring an adequately informed public.

If the district court's order is allowed to stand, it will chill the willingness of journalists to report on such matters in real time, and the public will suffer. The order should be reversed, and this Court should clarify that **when public officials, acting in their official capacities, discuss a matter of public concern—or when a public entity issues an official statement—the media may fairly and accurately report on those statements without fear of liability**.

[4] Walsh, *supra* note 2.

Identification of *Amici*[5]

The *Amici Curiae* are media companies and organizations of journalists, writers, and others dedicated to protecting the First Amendment freedoms of speech and of the press. All are concerned about the chilling effect the district court's June 13 order is likely to have on the ability and willingness of the press to report on breaking news of significant public interest and concern.

Star Tribune Media Company LLC ("Star Tribune") is the upper Midwest's largest source of news and information. In the 16th-largest U.S. market, Star Tribune reaches more consumers than any other media brand, with the country's fifth-largest Sunday newspaper, the most-visited local website, numerous mobile apps, and a portfolio of print and digital products. More than 250 full-time journalists contribute to its platforms. In 2013 the company was recognized with two Pulitzer Prizes and the Minneapolis Regional Chamber of Commerce "Best in Business" award.

The Associated Press ("AP") is an independent, not-for-profit news cooperative headquartered in New York City. It has teams in more than 100 countries that tell the world's stories, from breaking news to investigative reporting. More than 15,000 news outlets and a range of businesses worldwide connect with their audiences using the AP's multiformat content. The 170-year-old organization has won 52 Pulitzer Prizes.

[5] In addition to those entities listed here, Digital First Media supports the arguments raised in this brief and has filed a motion to officially appear as *amicus curiae* on behalf of its newspaper the *St. Paul Pioneer Press.* Assuming its motion is granted, and upon the Court's request, *Amici* would be happy to file an amended brief that lists Digital First Media in the caption.

Fox/UTV Holdings, LLC, on behalf of its station KMSP FOX 9 ("Fox 9"), is a local broadcast television station based in Minneapolis. Every week, FOX 9 produces approximately 60 hours of local news and provides around-the-clock coverage on its website. FOX 9 provides extensive coverage of matters of public significance and interest to its viewers, is well-known for its news excellence, including investigative reporting, and has received multiple Emmy awards for Best Newscast and Overall News Excellence.

The Minnesota Newspaper Association ("MNA") is the voluntary trade association of general-interest newspapers in the State of Minnesota. It acts on behalf of the newspaper press of the state, representing its members in the legislature and courts, managing local/regional/national newspaper advertising, operating a press release service, and working to enhance the quality of the state's newspapers. The MNA was founded in 1867.

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

Argument

When covering a quickly evolving criminal investigation, journalists must rely on law enforcement for information, and they are not in a position to independently verify the accuracy of what law enforcement tells them. If police say, for example, that they have booked a suspect on murder charges[6] and that they have no reason to believe anyone else was involved,[7] the press must take them at their word.

In the district court's view, this puts the press in the crosshairs if it turns out, as it did here, that police made a mistake. As it stated at page 6 of its order, defendants in a defamation case "are as liable for republication of a defamatory statement as if they had made the statements themselves." *Price v. Viking Press, Inc.*, 625 F. Supp. 641, 644–45 (D. Minn. 1985).

However, notwithstanding this maxim, the law protects journalists from the sort of vicarious liability for official mistakes that the district court would impose. It does so not only through the fair report privilege but also by requiring that libel plaintiffs prove both material falsity and fault (at least negligence). In concluding that the fair report privilege did not apply and in failing to hold Ryan Larson to his burden of proof, the district court's order confuses the law and ignores the important policies underpinning its development.

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[6] The November 30, 2012 press release stated, "Larson was booked into the Stearns County Jail on murder charges early this morning." ADD-86.

[7] At the November 30, 2012, press conference a journalist asked, "Is there any reason to believe there might be some other individual involved?" Police responded, "[W]e don't have any information to believe that at this time." Also at the press conference, a journalist asked, "Anybody else injured or were any other outstanding people involved?" Police answered, "No." ADD-79, 81.

This Court should, therefore, reverse the district court's June 13 order and clarify that the law of this State protects journalists when they perform the vital function of communicating to the public official statements by law enforcement made in the context of an ongoing criminal investigation.

I. The district court's conclusion that the fair report privilege "does not apply in this case" is inconsistent with its own summary judgment order and the weight of relevant authority.

The news reports at issue were based upon three publicly available sources of information:

- an *official* press conference,
- an *official* press release, and
- an *official* jail log.

In its post-verdict order, the district court focused only on the first source before concluding in sweeping terms that "the fair report privilege does not apply in this case." *See* Post-Verdict Order ("PV Order") (June 13, 2017) at 8. So confident was the court in this conclusion that it did not even analyze whether the statements at issue were fair and accurate summaries of the official sources (i.e., whether the privilege had been abused), finding that "entire discussion" to be "irrelevant." *See id.*[8]

[8] Because the district court does not address whether the privilege was abused, *Amici* do not separately address this issue except to emphasize that journalists should be encouraged to be more than the government's mouthpiece—i.e., to provide context on official actions and their impacts. To require verbatim recitation of government proceedings or to discourage journalists from telling the "bigger story" is to ignore the function and value of journalism in a democracy.

However, with regard to the jail log, the court's conclusion that "the fair report privilege does not apply in this case" is inconsistent with its own summary judgment order. With regard to the press release, such conclusion is inconsistent with controlling case law. And with regard to the press conference—an issue of first impression for this Court—such conclusion is neither compelled by precedent nor consistent with the public policy underlying the fair report privilege (the "privilege").

First, the district court concluded at summary judgment that the jail log fell within with the scope of the privilege. It even held that the news conference and press release were covered to the extent they "communicated the fact of Mr. Larson's arrest or of the charge of crime made by the officer in making or returning his arrest." *See* Summary Judgment Order ("SJ Order") (May 19, 2016) at 9, 18–19. The jail log states that Larson was booked on a charge of "Murder 2," ADD-87, the press release states that Larson had been booked on murder charges, ADD-86, and law enforcement officials stated at the press conference that Larson had been booked "in connection with this incident," ADD-77.

These statements lead to only one logical inference: that police suspected Larson of killing Officer Decker—indeed, that they believed they had probable cause to arrest and jail him. Thus, statements to the effect that "police say" or "investigators believe" Larson killed Decker or that Larson was "accused" of killing Decker are fair and accurate reports of the information reflected in the jail log and provided through those portions of the press release and press conference that even the district court acknowledged fell within the scope of the privilege.

Second, the district court's decision that the jail log fell within the scope of the privilege was largely driven by its recognition that the jail log "is a publicly available law enforcement record" and that Minnesota "recognize[s] the general principle that fair and accurate reports of public records qualify for the fair report privilege." SJ Order 18. Of course, the press release is also a public record.[9] Yet in concluding in its SJ Order that the press release was *not* protected by the privilege, the district court made no attempt to explain why the privilege applied to one public record but not the other.

Moreover, the cases the district court cited in its SJ Order make clear that the privilege should apply to the public press release.[10] *See Conroy v. Kilzer*, 789 F. Supp. 1457 (D. Minn. 1992) (applying fair report privilege to "police memorandum," other law enforcement reports, and a fire department report); *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986) (holding that privilege applied to correspondence contained in Minnesota Commerce Department registration file); *see also Kortz v. Midwest Commc'ns Inc.*, 20 Med. L. Rptr. 1860, 1863 (Ramsey County Dist. Ct. 1992) (holding that the fair report privilege "extends to police investigations regarding potential criminal activity of individuals and private citizens").

The press release stated that "[w]ithin an hour" of the shooting, law enforcement "took Ryan Michael Larson ... into custody" and that he "was booked into the Stearns

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[9] *See* Minn. Stat. § 13.02 subd. 7 (defining "government data"); *id.*at § 13.03 (stating that all government data is presumptively public).

[10] *Nixon v. Dispatch Printing Co.*, 112 N.W. 258 (Minn. 1907), might be read to hold that certain public records—e.g., an unanswered civil complaint—fall outside the privilege because they are not "cloaked with official sanction." However, as discussed below, *Nixon* was decided before libel law was constitutionalized and its facts (it involved an *ex parte* complaint filed by a *private* litigant) are not on point.

County Jail on murder charges." ADD-86. Again, the only way to interpret these statements is that police believed Larson killed Decker, which was the gist of appellants' news reports.

Third, the district court's conclusion that the press conference and press release fall outside the scope of the privilege appears to result from its views that they were preliminary to some sort of "judicial proceeding" (though the court does not identify one) and/or that the privilege only applies to statements made in "judicial proceedings." *See* SJ Order at 17. Both views are misguided.

Moreno v. Crookston Times Printing Co., 610 N.W.2d 321 (Minn. 2000), the one case the PV Order cites on the issue of the privilege, makes clear that its protection extends to statements beyond those made in "judicial proceedings." The issue in that case was whether statements made by a *local citizen* at a *city council meeting* fell within the privilege. The court held that they did, *even though a city council meeting is not a "judicial proceeding*." *Id.* at 334; *see also id.* at 329 (noting that the case reflected an expansion of the law).

Further, although the *Moreno* court was careful to cabin its decision to the "legal questions presented by the facts of this case," *id.* at 332, it relied heavily on an articulation of the privilege found in the Restatement (Second) of Torts § 611:

> [t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged ... .

Id. at 331; *see also Schuster v. U.S. News & World Report, Inc.*, 459 F. Supp. 973, 978 (D. Minn. 1978) (assuming that Minnesota courts would apply this formulation of the

privilege). Comment i to § 611 explains that the privilege "also extends to a report of any meeting, assembly or gathering that is open to the general public and is held for the purpose of discussing or otherwise dealing with matters of public concern."

The press conference was, under any rational interpretation, "a meeting open to the public that deals with a matter of public concern." Indeed, the facts here make for a much easier case than those in *Moreno*: the statements here were made not by a local citizen but by *public officials*, acting in their *official capacity*, at a *formal* press conference they called to update the press and public about the ambush killing of a local police officer. To hold otherwise would mean that stand-alone press conferences held by law enforcement are not privileged, but that if the police can wait to update the public on the possibility of an at-large killer until the next city council meeting, then their statements will be privileged. That is an absurd rule of law.

Nixon v. Dispatch Printing Co., 112 N.W. 258 (Minn. 1907), likewise does not compel the district court's conclusion that the press conference and press release fall outside the scope of the privilege. As a threshold matter, the *Nixon* court acknowledged that Minnesota's criminal defamation statute,[11] using language akin to § 611 of the Restatement, prohibited prosecution of newspapers for publishing "a fair and true report of any judicial, legislative, *or other public and official proceeding.*" *Id.* at 311–12 (quoting Rev. Laws 1905, § 4920) (emphasis added). Again, under any reasonable interpretation, the press conference was a "public and official proceeding."

[11] Now codified at Minn. Stat. § 609.765.

Beyond that, *Nixon* was "decided nearly 60 years before the Supreme Court articulated the First Amendment implications of defamation sanctions in [*New York Times v.*] *Sullivan*." *Moreno*, 610 N.W.2d at 330. *Sullivan* recognized that the interest in redressing harms to reputation must sometimes bow to the "policy interests in free and open public discourse," *see id.* at 328–29, and ushered in a seismic shift in the adjudication of common law libel claims. Thus, the continuing constitutional validity of *Nixon* is open to serious question. *See, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) ("States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."); *Greenbelt Co-op. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13 (1970) (holding that newspaper could not be held liable for publishing accurate and truthful reports of what had been said at public hearings before city council); *see also* Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 7.3.5[B][4] at 7-31 through -32 (5th ed. 2017) (noting *Nixon* but stating that "[t]he 'modern' rule, that the privilege applies, is almost certainly now also the majority rule").

Given the sea change in libel law that has occurred since *Nixon*, any continued recognition of its holding should be strictly limited to its facts—and those facts are highly distinguishable from those at hand. *Nixon* involved a court filing and held that an unanswered *civil* complaint filed by a *private litigant* to commence a *divorce* did not fall within the scope of the privilege. This case, however, arose out of an hours-old homicide and relates to statements by *public* officials, made in their *official* capacity, on matters of significant *public concern*. In other words, "the matter reported fell within the control of

the proceeding." *Moreno*, 610 N.W.2d at 329 (citing *Nixon*, 112 N.W. at 258). The concern expressed in *Nixon* that extending the privilege to an *ex parte* complaint would permit one party to libel another with "impuity [sic] by entitling the libel in an action, labeling it a complaint, and filing it with the clerk," *Nixon*, 112 N.W. at 258—even if valid[12]—simply does not apply here.

Finally, the district court reads too much into comment h to § 611 of the Restatement and *Moreno*'s reference to it. That comment states, in its entirety:

> An arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest is therefore within the conditional privilege covered by this Section. On the other hand statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged under this Section.

Moreno referenced comment h in discussing *abuse* of the privilege, not its scope, *see* 610 N.W.2d at 332–33, and regardless, such discussion is pure *dicta*, *see id.* at 332 ("[O]ur decision here must be limited to the legal questions presented by the facts of this case."). Beyond that, read as broadly as the district court read it, comment h runs headlong into comment i, which makes clear that "public meetings" on "matters of public concern" fall within the privilege—without otherwise restricting the topics that may be covered at the meeting or making any distinction between public meetings held by law enforcement as opposed to other civil servants. The district court made no attempt to

[12] *Amici* question the validity of this concern even in the context of private litigation, given the availability of claims for malicious prosecution and abuse of process and the potential for sanctions under Minn. R. Civ. P. 11. *See also* Sack, *supra* § 7.3[B][4] at 7-32.

reconcile this conflict, which it unnecessarily created with its sweeping interpretation of comment h.

The better reading of comment h—and the only way to reconcile it with comment i—is to interpret it as warning against reliance on *unofficial* statements made by *unauthorized* police officers who speak out of turn and offer details about facts and evidence *beyond* what is contained in an *official* report or otherwise blessed for *official* release to the public. Indeed, the *Moreno* court's discussion of *Carradine v. State*, 511 N.W.2d 733 (Minn. 1994), in connection with comment h supports this reading: "In *Carradine*," the *Moreno* court explained, "[w]e stated that as long as the officer's comments only reiterated the contents of his official report, he was protected." 610 N.W.2d at 333.

Read as such, the limitations theoretically imposed by comment h do not come into play: This is not a case in which appellants relied upon unauthorized or otherwise "informal" statements by police or upon a private, one-on-one "conversation" between a reporter and an officer. *See* SJ Order at 15–16 (quoting Harper, James and Gray on Torts § 5.24 at 244–45). Rather, the statements at issue here were based on an official and public "report of the fact of the arrest or of the charge of the crime." Indeed, law enforcement primarily used the press conference and press release to convey background information on Decker and extend sympathy to his family, describe the manner in which he was killed (shot twice, during a welfare check), and provide the status of the investigation (ongoing, but suspect in custody). With regard to Larson specifically, law

enforcement said little more than what was reflected in the publicly available jail log and even less than what was contained in the soon-to-be-released application to detain.

II. The news reports in suit were reports of an investigation and, read in context, the statements at issue were not impliedly false.

The district court also erred by granting Larson a new trial based on a defamation-by-implication theory and by concluding, as a matter of law, that the allegedly defamatory statements were false.[13]

As explained by the leading treatise on libel law, news reports that a police investigation is underway are common and "[a]rguably such a report is, in substance, an implied allegation of the wrongdoing being leveled against the subject of the investigation." Sack, *supra* § 7.3.5[C] at 7-50. However, the treatise goes on, "[t]he law treats these accounts as *reports of events, not as republications of allegations of wrongdoing*, so that as a general matter, if there is in fact an investigation, the report of its existence is 'true.'" *Id.* at 7-50 through -51 (emphasis added). The reason is simple: "Investigations are often important governmental occurrences. *Permitting lawsuits for accurate reports of such events would threaten to black out significant news*." *Id.*

[13] Appellant asserts that even private plaintiffs should not be permitted to proceed on a defamation-by-implication theory when the relevant publication involves a matter of public concern. Opening Br. 45. Amici agrees, and directs the court to *Sassone v. Elder*, 626 So. 2d 345, 354 (La. 1993) (stating that in private-plaintiff cases against media defendants, "adequate protection of freedom of the press requires at least that the plaintiffs prove that the alleged implication is the *principal* inference a reasonable reader or viewer will draw from the publication as having been intended by the publisher."); *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112, 130 (Mich. 1991) (ruling that because plaintiffs had not established either a false statement or a specific "material omission[] which, if published, would have rendered" the statement nondefamatory, they had not carried their constitutionally imposed burden of proving falsity on an implied libel claim).

(emphasis added). As painful as it is to be cast "'as the target of an investigation where later events point to baseless or vexatious charges,' the greater societal harm is to 'shroud in secrecy, for want of publication, the government's scrutiny of its citizens.'" *Id.* (quoting *Sibley v. Holyoke Transcript-Telegram Publ'g Co.*, 461 N.E.2d 823, 826 (Mass. 1984)).

Further, it is hornbook law that "[t]he defamatory character of any particular statement must be construed in the context of the [publication] as a whole." *Jadwin*, 390 N.W.2d at 443; *see also Holler v. Hennepin Cnty.*, 2015 WL 7693563, at *6 (Minn. App. Nov. 30, 2015) (unpublished); *Schlieman v. Gannett Minnesota Broad, Inc.*, 637 N.W.2d 297, 304 (Minn. App. 2001). Here, any reasonable person exposed to the statements at issue both individually and as part of the larger context of the news reports would understand that Larson was a suspect in an ongoing investigation—not a confirmed or convicted killer. Each statement either expressly denotes *police or investigators as the source* of the statement, expressly describes Larson as being "*accused of*" certain acts, or expressly states that Larson *may be charged* with a crime (which, of course, necessarily implies that he has not yet been charged). Far from being impliedly false, the statements at issue are true and accurate reports of press and press conferences and statements made by the victim's relatives. There is no record evidence that police and investigators did *not* make the statements attributed to them, that Larson was *not* accused of the acts described above, or that Larson did *not* face the possibility of criminal charges.

Finally, the PV Order ignores a critical element of implied libel: proof that the defendant *intended* the allegedly false implications. Under Minnesota law, defamation by

implication occurs when "a defendant (1) juxtaposes a series of facts so as to imply a defamatory connection between them, *or* (2) creates a defamatory implication by omitting facts, ... even though the particular facts are correct." *Toney v. WCCO*, 85 F.3d 383, 387 (8th Cir. 1996) (emphasis added). Subsequent decisions have interpreted *Toney* as requiring a plaintiff to prove "not only that a statement is capable of being interpreted as defamatory, but also that the juxtaposition of facts or the omission of facts indicates that Defendant may be held responsible for the defamatory implication." *Johnson v. Columbia Broad. Sys., Inc.*, 10 F. Supp. 2d 1071, 1075–76 (D. Minn. 1998). In other words, in an implied libel case, the plaintiff "bears the burden of proving both that the broadcast is capable of being interpreted as alleged, and that Defendant intended the alleged implications." *Id.* at 1076. This element of proof is required because judges and juries cannot "presume with certainty that the defendants knew they were making a defamatory statement." *Kendall v. Daily News Publ'g Co.*, 716 F.3d 82, 90 (3d Cir. 2013); *see also White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990) ("[T]he court must first examine what defamatory inferences might reasonably be drawn from a materially true communication, and then evaluate whether the author or broadcaster has done something beyond the mere reporting of true facts to suggest that the author or broadcaster intends or endorses the inference.")

The district court did not even address the issue of intent, let alone identify evidence demonstrating that Appellants intended to imply that Larson killed Decker. Ignoring the intent element is particularly troublesome here, where in addition to reporting on official statements by law enforcement and the victim's family members, the

Appellants' coverage of the events also included Larson's protestations of innocence and his subsequent vindication as the focus of the investigation shifted elsewhere.

In *Woods v. Evansville Press Co.*, the Seventh Circuit noted, "A publisher reporting on matters of general or public interest cannot be charged with the intolerable burden of guessing what inferences a jury might draw from an article and ruling out all possible false and defamatory innuendoes that could be drawn from the article." 791 F.2d 480, 487–88 (7th Cir. 1986). This holds especially true where, as here, journalists have justifiably relied on official statements from law enforcement in their reporting. The district court's erroneous rulings on implied libel should be overturned and its order of a new trial vacated.

III. In ordering a new trial, the district court did not explain how appellants could possibly have been negligent.

The district court also erred in ruling that a jury question on negligence remains. *Amici* agree with Appellants that Larson failed to meet his burden of proof on negligence. *See* Opening Br. 50–52. What is more, Appellants' reliance on official statements by law enforcement cannot, as a matter of law, constitute negligence.

In adopting a negligence standard in private-figure defamation actions more than thirty years ago, the Minnesota Supreme Court explained that "[c]ustoms and practices within the profession are relevant in applying the negligence standard." *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 491–92 (Minn. 1985). And courts across the nation have ruled that media defendants are not negligent when they publish purportedly defamatory matter derived from law enforcement, including official

statements, police records, and case files. *See, e.g.*, *Wiley v. Ohio/Oklahoma Hearst-Argyle TV, Inc.*, 33 F. Appx. 434, 437 (10th Cir. 2002) (affirming summary judgment for journalist who relied on official police statements); *Garza v. Hearst Corp.*, 1995 U.S. Dist. LEXIS 22346, at *11, 23 Media L. Rep. 1733 (W.D. Tex. 1995) (granting summary judgment to newspaper that relied on photographic identification of plaintiff provided by sheriff's office); *Torres-Silva v. El Mundo, Inc.*, 1977 WL 50788, 3 Media L. Rep. 1508 (P.R. 1977) (wire service, which erroneously reported that arrested individual was the son of the plaintiff, did not act negligently in relying on statements of police officers who identified family relationship).

Given that the allegedly defamatory statements at issue here merely reflect statements made by law enforcement to the press and public, "it cannot [] be claimed that [Appellants are] guilty of any departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Greenbelt Co-op.*, 398 U.S. at 12–13 (internal quotation marks omitted) (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) and *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)). The absence of negligence is confirmed by the fact that there is no record evidence whatsoever that the law enforcement sources of the statements at issue were unreliable. *See, e.g.*, *Jones v. Taibbi*, 512 N.E.2d 260, 269 (Mass. 1987). The district court thus erred in ruling that a jury question on negligence remains, and this Court should rule that, as a matter of law, defendants did not negligently publish the statements at issue.

IV. The district court's order undermines the important public policy goals of ensuring the wide dissemination of information about matters of public concern.

Taken to its illogical conclusion, the PV Order would put journalists at risk of liability even when they publish *exact* copies of official press releases and/or when they publish *verbatim* transcripts of official press conferences. As discussed above, this result is not compelled by any controlling authority, and the district court's view of the fair report privilege is inconsistent with the plain language of the Restatement, the expansion of the privilege in *Moreno*, and the weight of authorities discussing the privilege in the modern, post-*Sullivan* world. This, together with the district court's view of implied libel and negligence, completely undermines the public policy goals of fostering a safe and informed citizenry.

As the U.S. Supreme Court has held, "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media." *Cox*, 420 U.S. at 495. The Minnesota Supreme Court has echoed this sentiment: "the public interest is served by the fair and accurate dissemination of information concerning the events of public proceedings." *Moreno*, 610 N.W.2d at 332.

In line with these statements of policy, "the purpose of the fair and accurate reporting privilege is to ensure that the public interest is served by the dissemination of information about events occurring at public proceedings and public meetings." *Id.* at 331; *see also Britton v. Koep*, 470 N.W.2d 518, 520–21 (Minn. 1991) ("debate about the conduct of public officials is privileged 'not for the protection of the defendant, but rather

in the interests of the promotion of public welfare.'" (quoting *Hammersten v. Reiling*, 115 N.W.2d 259, 264 (Minn. 1962))); *see also* Sack, *supra* § 7.3.5[B][2] at 7-26 through -28 (identifying rationales for privilege).

Thus, whether based on the privilege, the essential elements of material falsity and fault, or some other doctrine,[14] this Court should bring clarity to the case law by announcing the following rule of law:

> **When public officials, acting in their official capacities, discuss a matter of public concern—or when a public entity issues an official statement—the media may fairly and accurately report on those statements without fear of liability.**

To hold otherwise would seriously undermine the role of the press in society while guaranteeing little relief to those wrongly accused in the future. The tradeoff simply is not worth it.

A. There is much to lose from upholding the district court's order …

The district court's order will undoubtedly chill responsible, well-financed media organizations from reporting on matters of significant public concern—including the performance of public officials and institutions—to the detriment of public safety and democracy writ large.

[14] Illinois, for example, has a "governmental report privilege," which "protects news accounts based on statements of governmental agencies and officials in their official capacities." *Maple Lanes, Inc. v. News Media Corp.*, 751 N.E.2d 177, 179 (Ill. App. 2001). Similarly, the Second and Eighth Circuits recognize a "neutral reporting" privilege, which precludes liability for "the recitation of official actions or statements by public bodies, if substantially accurate ... even if the implications are harmful." *Price v. Viking Penguin*, 881 F.2d 1426, 1434 (8th Cir. 1989).

As discussed in the introduction to this brief, the ability and willingness of the press to report on law enforcement's official statements and actions play an important role in ensuring an adequately informed and safe public. In the example from Alexandria, the farmer recognized the kidnapped girl as she ran across the field because she had been on the news. Other times, the media enhance public awareness and safety by disseminating the description of a suspect. For example, in the days after the 2013 Boston Marathon bombing, the FBI released photos of two suspects and asked for the media's help in publicizing them: "For more than 100 years," an FBI agent said at a press conference, "the FBI has relied on the public to be its eyes and ears. With the media's help, in an instant, these images will be delivered directly into the hands of millions around the world. We know the public will play a critical role in identifying and locating them."[15]

He was right, and by the end of the next day, one suspect had been killed and the other was in custody.[16] Obviously, no "judicial proceeding" had commenced at the time of the manhunt for the marathon bombers. Equally obvious, the "implication" that the men who appeared on front pages across the country the next day were responsible for the marathon bombing was just as strong as the "implication" in the statements at issue

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[15] *See* Remarks of Special Agent in Charge Richard DesLauriers at Press Conference on Bombing Investigation, FBI.gov (April 18, 2013), https://archives.fbi.gov/archives/boston/press-releases/2013/remarks-of-special-agent-in-charge-richard-deslauriers-at-press-conference-on-bombing-investigation-1.

[16] Annie Gowen & David A. Fahrenthold, "Police capture second Boston bombing suspect," WashingtonPost.com (April 19, 2013), https://www.washingtonpost.com/world/national-security/massive-police-operation-under-way-in-boston/2013/04/19/979ec6dc-a8c6-11e2-a8e2-5b98cb59187f_story.html?tid=a_inl&utm_term=.7bf88d534663.

here. Under the district court's analysis, however, if the FBI had, by mistake, produced pictures of innocent men, the media might have been liable. If that is the law, journalists will begin to hold back or second guess at times when they should instead be aggressively pursuing stories on matters of significant public concern.

Equally serious is the potential for the district court's decision to hinder the press in its role as government "watchdog." The media regularly reports on police brutality, racial profiling, or other official mistakes or misconduct. This case provides a perfect example: In the days after Larson's release, the media reported on the bungling of the investigation—pointing out, for example, that Decker's partner claimed he saw the killer holding handgun and police arrested Larson after finding a handgun near his bed—when in fact Decker was killed by a shotgun.[17] Such news coverage holds public officials, including law enforcement, accountable, and often leads to meaningful changes in how they operate.

Yet the PV order—by holding the media responsible—threatens to blanket ongoing criminal investigations in a veil of secrecy. Meanwhile, we live at a time when movements such as Black Lives Matter are raising serious questions about police motives and methods. Whether the problem is real or only perceived, the law of this State should *incentivize* the media to serve as a check on police—to bring their activities out of the

[17] *See, e.g.*, "Troubling Details Emerge in Cold Spring Officer's Killing," Minnesota.CBSLocal.com (Dec. 14, 2012), http://minnesota.cbslocal.com/2012/12/14/troubling-details-emerge-in-cold-spring-officers-killing-thomas-decker/.

shadows and into the sunlight—*especially* during that time period when there is no check in the form of judicial oversight.

B. … and little to gain.

Given these examples, *Amici* find it difficult to believe the district court fully considered the import of its holding that Larson's right to a remedy outweighed "[t]he need for public dissemination of information during the brief period of time before arrestees are brought before a judge." *See* PV Order at 7.

Amici have the utmost sympathy for Larson and others wrongly accused of crimes. But, starting with *Sullivan*, the U.S. Supreme Court has recognized time and again that in this country we are willing to tolerate some false speech—even some libelous speech—in the interest of fostering wide-open debate on matters of public concern. *See, e.g.*, *Sullivan*, 375 U.S. at 270.

Even if that were not the case—even if we devalued the importance of "uninhibited, robust, and wide-open" debate on public issues, *see id.*, in the interest of protecting reputations—the district court's order over promises. There simply is no reason to believe that holding the media liable when police make a mistake will prevent the sort of reputational harm Larson alleges he sustained or that it will ensure people such as Larson a meaningful remedy. There are at least two reasons.

First, the district court's order is likely to make sophisticated—meaning deep-pocketed—media organizations more hesitant in their coverage of breaking crime stories. But news, like nature, abhors a vacuum. When a high-profile crime occurs and when the

public is demanding information, someone is going to fill the void—and in the age of social media, it may not be the most responsible actors.

The Boston marathon bombing again provides a prime example: As the BBC reported, prior to the FBI's release of the actual suspects' photographs, "Internet users tried for days to piece together clues about the culprits of the Boston bombings. The result? They got it wrong—and left innocent people fearing for their safety."[18] The article went on to discuss how Reddit, Twitter, and other social media users singled out photographs of innocent people and how some of those photographs eventually found their way to the front page of the *New York Post*.[19] It was later reported that one of the leading reasons the FBI decided to release photos of the *actual* suspects to the media and to request their help in publicizing them was to shut down this rumor mill.[20] In sum, although the PV Order might give responsible news organizations pause, in an age of social media, it is not likely to reduce the spread of reputation-harming misinformation.

Second, for all the PV Order puts in jeopardy in the name of ensuring defamation plaintiffs a "constitutional right to a remedy," ADD-7, it is unlikely to deliver on that promise. Consider the recourse, for example, Salah Barhoun, the Boston bombing "suspect" identified by Reddit would have against his online accusers. Reddit is likely immune, given the protections of Section 230 of the Communications Decency Act (47

[18] Dave Lee, "Boston bombing: How internet detectives got it very wrong," BBC.com (April 19, 2013), http://www.bbc.com/news/technology-22214511.
[19] *Id.*
[20] Connor Simpson, "F.B.I. Released the Tsarnaevs' Photos Because of Reddit and the Post," TheAtlantic.com(April 21, 2013), https://www.theatlantic.com/national/archive/2013/04/fbi-released-tsarnaev-brothers-photos-because-reddit-and-post/316075/.

U.S.C. § 230). And its well-intentioned but misguided users? Though theoretically liable, these ordinary people are likely to be all but judgment-proof.

In sum, as a matter of policy, there is little to gain from the district court's order, but much to lose. As a society, we should want respectable media in the lead on high-profile crime stories, not a cabal of crowd-sourcing amateurs—especially in cases like this one, where the police mess up.

Conclusion

Minnesota has long been "in the forefront for protection of public debate." *Britton*, 470 N.W.2d at 520. The district court's June 13 order is a step backward and one we cannot afford to take. We live in an age of mass shootings, of Twitter, of systemic racism (real or perceived). We live in an age of "fake news"—a useful label when referring to rumors that circulate on social media, but also the euphemism of the moment for real news that just happens to be unflattering.

Perhaps never before has the role of the media to keep the public informed been more important—or more in jeopardy. This Court should give the press the protection it needs to fulfill that role. As a matter of not only law but also policy, the PV Order should be reversed.

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Certificate of Compliance with Rule 132.01

I certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3. The length of this brief is 7,000 words. The brief was prepared in a proportionally spaced typeface using Microsoft Office Word 2010 and 13-point Times New Roman font.

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