SC 95175

IN THE SUPREME COURT OF MISSOURI

MARY ANN SMITH, d/b/a SMITH'S KENNEL,

Plaintiff - Appellant,

vs.

THE HUMANE SOCIETY OF THE UNITED STATES and MISSOURIANS FOR THE PROTECTION OF DOGS,

Defendants - Respondents.

Appeal from the Circuit Court of Dent County, Missouri
Case No. 11DE-CC00004
The Honorable Ronald D. White (Special Judge)

THE HUMANE SOCIETY OF THE UNITED STATES' SUBSTITUTE RESPONDENT'S BRIEF

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STATEMENT OF FACTS

A. The campaign for Proposition B, the "Puppy Mill Cruelty Prevention Act".

On October 5, 2010—just 28 days before voters across Missouri were to go to the polls to vote on Proposition B, the "Puppy Mill Cruelty Prevention Act"—The Humane Society of the United States published a report titled "Missouri's Dirty Dozen: A report on some of the worst puppy mills in Missouri." (LF36) (A15). The purpose of the Dirty Dozen report was stated on page one: "The purpose of the report is to demonstrate current problems that could be addressed by the passage of Proposition B, which Missouri citizens will vote on in November." (LF36) (A15).

Demonstrating the rhetorical nature of its "Dirty Dozen" title, the report actually listed 20 puppy mills—twelve puppy mills identified as the "Dirty Dozen," along with eight additional puppy mills identified as "Dishonorable Mentions." (LF39) (A18). The report explained that the mills in the report were selected after researchers with The Humane Society "ha[d] spent weeks poring over state and federal inspection reports, investigators' photographs, and enforcement records received via the Freedom of Information Act to compile a list of some of the worst puppy mills in Missouri.'" (LF36) (A15).

While the report noted that many of the kennels on the list had page after page of state and/or federal enforcement records, *e.g.*, S&S Family Puppies (LF40) ("more than 500 pages of recent federal enforcement records"); B&B

Kennel (LF42) ("34 pages of USDA violations since July 2008"); Poodles Plus (LF56) ("68 state kennel violations"), others had few, if any.

For example, the report noted that Jesse and Sonja Miller's kennel was included on the list not because of its number of animal welfare violations, but because the Millers' license application stated that their proposed plan of euthanasia was "clubbing the dogs." (LF54) (A20). As the report disclosed: "While the Millers do not have as many violations on file as some of the other dealers on this list, the stated intention of clubbing unwanted dogs earned them a place in the dirty dozen." (LF54) (A20). The report also noted that "Proposition B would prohibit the euthanasia of unwanted dogs by anyone other than a licensed veterinarian." (LF54) (A20).

Another kennel, the kennel owned by Mary Ann Smith, was included not only for the number of reported violations, but also for its lengthy history of violations, which the report termed "A Decade of Problems." (LF48) (A19). Specifically, the report noted:

> Smith's Kennel has a history of repeat USDA violations stretching back more than a decade, including citations for unsanitary conditions; dogs exposed to below-freezing temperatures or excessive heat without adequate shelter from the weather; dogs without enough cage space to turn and move around freely; pest and rodent infestations; injured and bleeding dogs, dogs with loose, bloody stools who had not been treated by a vet, and much more.

(LF48) (A19). Like the Dirty Dozen report did for all of the kennels on the Dirty Dozen list, the report quoted from a half a dozen or so actual inspection reports of Smith's Kennel, including the following:

- *"In the big dog barn there is one dog that had a cherry eye on the right eye. There was one other dog that was noted to have multiple large interdigital cysts bilaterally in front paws and on the hind left paw." (USDA inspection June 2010)*
- *"In the adult building there are approximately 14 dogs with extremely long toenails. It is noted that some of these nails are turning the toes sideways as the dogs walk and hanging down through the wire flooring." (June 2009)*
- *"There is 1 bull terrier in a primary enclosure where bright red blood is noted in the feces […] there are three English Bulldogs that have green matter in their eyes [….] There are five English Bulldogs that are noted to have hair loss." (USDA inspection March 2009)*
- *"In the outdoor housing facility, the housing units have very little bedding. The temperature the past 2 nights have below freezing." (USDA inspection March 2009)*
- *"There are 3 outdoor pens that have igloos for housing units that have no bedding material in them. The weather has been reaching temperatures of 20-30 degrees F at night for approximately the past week.*" (USDA inspection Nov. 2008)

- *"The owner has issues with this facility that remain consistent with each inspection and more issues have surfaced since the last inspection*." (2008)

(LF48) (A19) (italics in original).

Other mills on the Dirty Dozen list had other problems. Those included dogs licking at frozen water bowls, *e.g.*, Gingerich Farms (LF47) ("There were two concrete receptacles, with frozen water. One of the dogs was observed trying to break the ice with its paw and another dog was trying to lick the ice."); obvious unsafe conditions, *e.g.*, Hidden Valley Farms (LF53) ("There are wires sticking in the cages at the eye level of the puppies. … There are two (2) Pekingese dogs that have one eye missing …."); and understaffed facilities, *e.g.*, Rabbit Ridge Kennel (LF27) ("the owner states that there is one full time employee and one part time employee [for] 279 adult[dogs] and 66 puppies.").

B. Proposition B passes.

On election day in November 2010, nearly one million voters in Missouri voted for Proposition B, and the ballot initiative passed. (LF99). Proposition B not only passed statewide, it also passed in a majority of state House and state Senate districts. (LF99). By its terms, Proposition B was to take effect in November 2011. (LF97).

C. The campaign to save Proposition B.

Before the ink was even dry on the election results, however, a group of state legislators—including Representative Jason Smith, the son of puppy mill

owner Mary Ann Smith and the then-Missouri Republican Majority House Whip (LF79) (A25)—began legislative efforts to weaken or repeal Proposition B. (LF97, LF98-LF99). To attract support for their position, the legislators claimed that licensed breeders were not a problem, and that the state should focus its enforcement efforts on unlicensed breeders. (LF98).

To rebut that claim, on March 8, 2011—while the General Assembly was actively considering various Proposition B-related bills—The Humane Society released an update to the Missouri Dirty Dozen report. (LF98-LF99). The updated report noted that since the original report came out in November 2010, 14 of the 20 puppy mills on the original list were still licensed, "indicating the ongoing need for the protections that Proposition B, The Puppy Mill Cruelty Prevention Act, will provide." (LF72-LF73) (A22-A23). In addition, the updated report explained: "Unfortunately, for every kennel on our original Dirty Dozen report that has gone out of business, there is one that we couldn't fit on our original list that continues to demonstrate ongoing severe violations." (LF89) (A27). The updated report then went on to list six new kennels, which it described as: "New candidates for some of the worst kennels in Missouri who were not covered in our original report." (LF89) (A27).

Like the original 20 kennels, these new additions displayed a wide array of problems, ranging from a history of violations, *e.g.*, Jinson Kennel (LF96) ("Problems as Jinson kennel have been longstanding"); to the receipt of an "Official Warning" from the USDA, *e.g.*, Zuspann Kennel (LF94); to the discovery of a

dead dog by inspectors, *e.g.*, Simply Puppies (LF89) ("the licensee was cited by USDA inspectors for a 'direct non-compliance' for a dead dog found by the inspector in a kennel with another dog").

As to Smith's Kennel, the updated report noted that "Smith's Kennel remains both USDA licensed and MDA licensed through 2011 despite ongoing repeat violations." (LF78) (A24). The report also noted that in "[t]he kennel's most recent USDA inspection … the owner was cited for a repeat violation for two dogs that had untreated veterinary problems, repeat violations for housing in disrepair, and sanitation problems." (LF79) (A25).

The updated report concluded with a section titled "What Citizens Can Do," and urged readers to "help by making brief, polite phone calls to their state senator, representative, and governor to ask them to respect the will of the voters – by voting 'NO' on any bill that seeks to weaken or overturn Prop B." (LF97) (A28).

D. Smith sues the chief supporters of Proposition B.

Also in March of 2011—at the same time her son was whipping up support in the Missouri House of Representatives for bills repealing Proposition B (*see* LF79) (A25)—Mary Ann Smith sued The Humane Society of the United States and Missourians for the Protection of Dogs[1] for defamation and false light inva-

[1] Missourians for the Protection of Dogs is a political action committee formed to support Proposition B. (LF 67).

sion of privacy. (LF1). The Defendants moved for a more definite statement as to Smith's defamation claims, and to dismiss her false light invasion of privacy claim. (LF1-LF2). Smith responded by voluntarily dismissing her false light invasion of privacy claim, and filing an Amended Petition as to her defamation claims. (LF2).

Over the course of the next three years, Smith would file a Second Amended Petition (LF15), a Third Amended Petition (LF17), and finally a Fourth Amended Petition, adding back in her previously abandoned false light invasion of privacy claim. (LF19). Defendants moved to dismiss each of these amended petitions (LF15, LF17-LF18, LF19), but only Defendants' motion to dismiss Smith's Fourth Amended Petition was ruled on, due to repeated changes of judge and the eventual need for this Court to appoint a Special Judge from outside the Circuit. (*See* LF15, LF16).

On June 4, 2014, the Honorable Ronald D. White, Special Judge, took up Defendants' motion to dismiss Smith's Fourth Amended Petition, and granted the motion. (LF141).

E. The court of appeals opinion.

The court of appeals reversed, ruling that Smith made out a prima facie case for defamation because the Dirty Dozen report "impl[ied] an assertion of objective fact" because the report "called Plaintiff's business a 'puppy mill.'" *Smith v. Humane Society of the United States*, No. SD33431, 2015 WL 3946781, *8 (Mo. App. June 29, 2015). The court of appeals reversed the dismissal of the

false light invasion of privacy claims, ruling that "[e]ven if being a 'puppy mill' is not a defamatory term, per se, these statements allegedly placed Plaintiff before the public in a false light." *Id*. at *9.

In its opinion, the court of appeals made an important observation, noting that "Plaintiff does not allege in her fourth amended petition that any of the information specifically about Plaintiff's kennel in the [Dirty Dozen] Report was false." *Id*. at *5.

ARGUMENT

In the sections below, The Humane Society of the United States will show that the trial court properly dismissed Smith's claims. Specifically, as to Smith's defamation claims, all speakers are protected by an absolute privilege for statements of opinion, *i.e*., statements which cannot be objectively proven true or false, but which merely represent the author's opinion. Here, given the inherently subjective nature of The Humane Society's ranking of dog kennels in Missouri, the inclusion (or non-inclusion) of a kennel on the Dirty Dozen list is the paradigm of a protected statement of opinion, for that process necessarily requires a subjective balancing of a host of factors, including the number of violations, the severity of violations, the length of the violations, etc. Which is worse: ten minor violations, two major violations, or a history of more than a decade of violations?

This protection for opinions is particularly appropriate here, where the challenged speech is political speech—which is entitled to the "highest protection" under the First Amendment, *see Henry v. Halliburton*, 690 S.W.2d 775, 784 (Mo.

banc 1985), and which furthers our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

As to Smith's false light invasion of privacy claim, over the last thirty years this Court has consistently refused to recognize a claim for false light invasion of privacy for allegedly false statements which injured the plaintiff's reputation, and has instead held that "[r]ecovery for untrue statements that cause injury to reputation should be in defamation." *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 317 (Mo. banc 1993). Smith proffers no valid reasons to reject this unbroken line of precedent so as to allow her to proceed on such a theory when Smith's false light claim is based on the exact same statements she claims in her defamation counts are false and injured her reputation.

Standard of review for all points.

"A motion to dismiss for failure to state a claim on which relief can be granted is an attack on the plaintiff's pleadings." *In re T.Q.L.*, 386 S.W.3d 135, 139 (Mo. banc 2012). Rule 55.12, however, provides that "[a]n exhibit to a pleading is a part thereof for all purposes." Accordingly, "exhibits attached to the petition … are a part of plaintiffs' petition for all purposes … and are to be considered in passing upon its sufficiency." *Commonwealth Ins. Agency, Inc. v. Arnold*, 389 S.W.2d 803, 806 (Mo. banc 1965); *Windle v. Bickers*, 655 S.W.2d 86, 87 (Mo. App. 1983) ("the sufficiency vel non of a petition upon a motion to dismiss must be determined by the facts alleged in the petition or an exhibit thereto").

This is particularly true here, where Smith expressly stated in her Fourth Amended Petition that each of the exhibits she attached to her petition were "incorporated herein as if fully set forth in this petition." (LF22-LF25) (A2-A5).

I. Smith cannot maintain a defamation claim based on The Humane Society's ranking of Smith's Kennel as one of the "worst puppy mills in Missouri" because both the use of the term "puppy mill" and the ranking of Smith's Kennel as one of the "worst" are constitutionally protected statements opinion. (Responding to Appellant's Point I).

Counts I and II of Smith's Fourth Amended Petition each assert claims for defamation, with Count I alleging a negligent publication (*see* LF25-LF26) (A5-A6) and Count II an intentional or reckless publication (*see* LF26-LF28) (A6-A8).

In ruling on a motion to dismiss a claim for defamation, a court must engage in a two-step process. First, it must determine whether the plaintiff has set forth the elements of a defamation claim under Missouri law, which are:

1. Publication of,
2. A defamatory statement,
3. That identifies the plaintiff,
4. That is false,
5. That is published with the requisite degree of fault, and
6. That damages the plaintiff's reputation.

Farrow v. St. Francis Med. Ctr., 407 S.W.3d 579, 598-99 (Mo. banc 2013); *see also* M.A.I. 23.06(2) (2012).

Second, if the plaintiff has adequately pled these elements, the court "must also inquire if one or more privileges would shelter the defendant from legal action." *Castle Rock Remodeling, LLC v. Better Business Bureau of Greater St. Louis, Inc.*, 354 S.W.3d 234 (Mo. App. 2011) (granting motion to dismiss where challenged statement was found to be opinion and, therefore, privileged).

A. The First Amendment privilege for statements of opinion protects statements which are not provably false.

In 1974, Justice Powell, writing for the majority in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), wrote:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Id. at 339-40. While the *Gertz* case did not involve opinions, courts all across the country—including this Court—relied on this language to find that statements of opinions (which had long been privileged under the common law) were now constitutionally privileged as well. In *Henry v. Halliburton*, for example, this Court wrote that "[i]mportant dicta in the [*Gertz*] opinion added a[] caveat to the law of defamation" and noted that "[t]his language has served as the genesis for the evolving principle that … expression of opinion cannot be the subject of a defamation action." 690 S.W.2d at 782.

Then, in 1990, the United States Supreme Court decided *Milkovich v. Lorain Journal Co*., 497 U.S. 1 (1990). In *Milkovich*, the Court wrote: "[W]e do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'" *Id*. at 18. In her Brief, Smith seizes upon this sentence and argues that statements of opinion are no longer constitutionally protected after *Milkovich*. (App. Br. at 17-20). Smith, however, reads too much into this single sentence, for the remainder of the *Milkovich* decision shows that all the Court did was to dispel any talismanic meaning to the term "opinion"—and plainly did not change the longstanding view that statements of opinion are constitutionally protected.[2]

For example, in *Milkovich*, the Court wrote that "a statement on matters of public concern must be provable false before there can be liability under state defamation law." *Id*. at 19. The Court went on: "[A] statement of opinion relating to

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[2] It is interesting to note that while Smith is more than ready to throw *Gertz* to the wind when she refers to *Milkovich*, she has no hesitancy in quoting *Gertz* for the proposition that "there is no constitutional value in false statements of fact." (App. Br. at 18) (citing *Gertz*, 418 U.S. at 340). What Smith fails to tell this Court, however, is that *Gertz* goes on to state that "[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate" and therefore "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U.S. at 340-41.

matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Id*. at 20. The Court also said that given the requirement that any challenged statement must be provably false to be actionable, "imaginative expression" and "rhetorical hyperbole" would continue to be protected. *Id*.

As such, as Prof. Smolla has pointedly stated: "*Milkovich* did *not* eliminate the first amendment protection for 'opinion.'" 1 R. Smolla, Law of Defamation § 6:2, at 6.8 (2d ed. 2015) (emphasis added). "Rather, the Court chose to articulate the constitutional rules in terms of the requirement that state defamation actions be based upon statements of fact provable as false." *Id*. Prof. Smolla explained: "The Court in *Milkovich* was primarily rejecting only the *terminology* of 'fact v. opinion.' The Court actually *endorsed* rather than rejected the essential substance of the previously existing constitutional protection for opinion." *Id*. at 6-37 (emphasis in original). "[I]t would misread *Milkovich* and be a grave encroachment on First Amendment freedoms to treat the case as opening the door to defamation actions based upon what most courts had come to treat as constitutionally protected 'opinion.' 'Opinion' by any other name is still free speech." *Id*. § 6:21, at 6-40.

Other commentators agree. For example, Judge Sack writes: "[I]n *Milkovich*, the Court gave with one hand what it took away with the other: Opinion is not protected per se by the Constitution, yet because opinion can be proved neither true nor false and a plaintiff must prove falsity to succeed, it remains nonactionable as a matter of constitutional law." 1 R. Sack, Sack on Defamation § 4:2.4, at 4-

15 to 4-16 (4th ed. 2015). "Thus, the syllogism inferred from *Gertz* stands after *Milkovich*: Defamation is actionable only if false; opinions cannot be false; opinions are not actionable." *Id*.

This Court recognized the limited effect of *Milkovich* when, in 1993—three years after *Milkovich* was decided, the Court in *Nazeri v. Missouri Valley College* wrote: "The First Amendment's guarantee of freedom of speech makes expressions of opinion absolutely privileged." 860 S.W.2d at 314. The Court went on to discuss that while *Milkovich* rejected the notion there is a wholesale defamation exemption for anything "labeled" opinion, a defamation plaintiff must still establish that "the underlying statement about the plaintiff is demonstrably false." *Id*. Seven years later, the Court reaffirmed this holding: "The test to be applied to an ostensible 'opinion' is whether a reasonable factfinder could conclude that the statement implies an assertion of **objective fact**." *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 73 (Mo. banc 2000) (emphasis added).

B. The Humane Society's use of the name "puppy mill" to refer to Smith's Kennel—and the other kennels in the Dirty Dozen report—is a non-actionable statement of opinion.

As the court of appeals noted in its opinion, "Plaintiff does not allege in her fourth amended petition that any of the information specifically about Plaintiff in the [Dirty Dozen] report was false." *Smith*, 2015 WL 3946781 at *5. Nevertheless, Smith argues—and the court of appeals agreed—that The Humane Society's use

of the name "puppy mill" to refer to Smith's Kennel (along with all of the other kennels in the Dirty Dozen report) is somehow defamatory.

In fact, the court of appeals went so far as to suggest the term "puppy mill" is "a defamatory term, per se." *Smith v. Humane Society of the United States*, No. SD33431, 2015 WL 3946781, *9 (Mo. App. June 29, 2015). Additionally, the court of appeals found that "[a]lthough many of the statements made by Defendants are 'opinion,' such as whether Plaintiff's kennel was the 'worst' of the puppy mills, the contention that Plaintiff's kennel was a puppy mill with the definition given as to what constitutes a puppy mill was, under the totality of the circumstances in this case, a factual contention." *Id*. at *8.

1. The term "puppy mill" is not defamatory when construed in its most innocent sense.

To begin with, it is important to recall that in order to be actionable, a challenged statement must be defamatory. *See Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579, 598-99 (Mo. banc 2013). "'A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Henry v. Haliburton*, 690 S.W.2d 775, 779 (Mo. banc 1985) (quoting Restatement (Second) of Torts § 559). In *Nazeri*, this Court explained that in determining whether a statement is defamatory, the defamatory words must be considered in context, giv-

en their plain and ordinarily understood meaning, and "**construed in their most innocent sense**." 860 S.W.2d at 311 (emphasis added).[3]

The Merriam-Webster Dictionary defines "puppy mill" as "a commercial farming operation in which purebred dogs are raised in large numbers." http://www.merriam-webster.com/dictionary/puppy%20mill. Under this definition, referring to Smith as the owner of a puppy mill is simply not defamatory, for it plainly does not injure one's reputation to accuse them of being a "farm[er]" who "raise[s]" a "large number[]" of "purebred dogs."

Moreover, the Dirty Dozen report was issued in connection with public debate on Proposition B, the "Puppy Mill Cruelty Prevention Act." (LF36). That Act provided as follows: "The purpose of this Act is to prohibit the cruel and inhumane treatment of dogs in **puppy mills** by requiring large-scale dog breeding operations to provide each dog under their care with basic food and water, adequate shelter from the elements, necessary veterinary care, adequate space to turn around and stretch his or her limbs, and regular exercise." (A29) (emphasis added).[4]

Given the Act's definition of a "puppy mill" as a "large-scale dog breeding operation," it was clearly appropriate—and not defamatory—for The Humane So-

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[3] Whether a statement is capable of a defamatory meaning is a question of law for the court to decide. *See Henry*, 690 S.W.2d at 789.

[4] *See* http://www.sos.mo.gov/elections/2010petitions/2010-085. (A29-A30).

ciety to refer to the kennels on its list as "puppy mills." This is particularly so given that all of the kennels on the Dirty Dozen list were commercial facilities "licensed by the USDA, the state, or both" (LF36) (A15) and, as such, would be covered by Proposition B. (LF72) (A22).

As such, when properly construed in its most innocent sense, the term "puppy mill" is simply not defamatory.

2. The term "puppy mill" is not subject to being objectively proven true or false and therefore is a protected statement of opinion.

Despite the dictionary definition of "puppy mill"—and the Act's similar definition—as a large-scale dog breeding operation, both Smith and the court of appeals believe the term means something else. But what? Neither Smith nor the court of appeals have come forward with a definition of a puppy mill and, more importantly, how to objectively prove whether a particular kennel is a puppy mill or not. Instead, they assert that based on the "totality of the circumstances," the term "puppy mill" means something bad. *Smith*, 2015 WL 3946781, at *9 & App. Br. at 24 n.2. Smith and the court of appeals are correct that the trial court should look at the "totality of the circumstances," *see Henry*, 690 S.W.2d 775 at 787-90, but wrong on the results of the application of that test to the facts alleged in the Fourth Amended Petition.

In *Henry*, this Court explained that in determining whether a challenged statement is a statement of fact or an opinion, the Court should look at the "totality of the circumstances," including:

- "the statement's verifiability—is the statement capable of being objectively characterized as true or false;"
- "the particular First Amendment concerns implicated by the case;" and
- "the nature of [the] publication," for "even apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor disputes, or other circumstances in which an 'audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole.'"

Id. As shown below, each of these factors supports the trial court's conclusion that The Humane Society's ranking of Smith's Kennel as one of the "worst puppy mills in Missouri" is a protected statement of opinion.[5]

a. It is impossible to ascertain the truth or falsity of whether a particular dog kennel is a "puppy mill."

As discussed above, the ultimate test for whether a statement is a protected statement of opinion is whether the statement is "capable of being objectively

[5] The determination of whether an allegedly defamatory statement is a non-actionable expression of opinion is a question of law for the trial court. *Nazeri*, 860 S.W.2d at 314.

characterized as true or false." *Henry*, 690 S.W.2d at 788; *see Nazeri*, 860 S.W.2d at 314 (describing the relevant test as "whether the underlying statement about the plaintiff is **demonstrably** false") (emphasis added). Using Smith's and the court of appeal's definition of a "puppy mill" as being something bad, it is impossible to objectively prove whether a particular dog kennel is a puppy mill or not.

In this regard, the name "puppy mill" is no more actionable than the term "trash terrorist," which the court of appeals found was not actionable. *See State ex rel. Diehl v. Kintz*, 162 S.W.3d 152 (Mo. App. 2005). There, the court of appeals explained that "[e]xactly what constitutes a 'trash terrorist' is unclear. Indeed, given the imprecise nature of the phrase, it is uncertain how the truth or falsity of being a 'trash terrorist' could be determined." *Id*. at 155-56. The same is true here. Other than the dictionary definition—which is plainly not defamatory—"exactly what constitutes a ['puppy mill'] is unclear. Indeed, given the imprecise nature of the phrase, it is uncertain how the truth or falsity of being a ['puppy mill'] could be determined." *Id*.

Despite this fact, Smith argues—and the court of appeals found—that The Humane Society's use of the name "puppy mill" to refer to Smith's Kennel is not a protected statement of opinion because The Humane Society stated in the Dirty Dozen report that its researchers "ha[d] spent weeks poring over state and federal inspection reports, investigators' photographs, and enforcement records received via the Freedom of Information Act to compile a list of some of the worst puppy mills in Missouri, known as 'Missouri's Dirty Dozen.'" (LF36) (A15). According

to the court of appeals, this statement meant that The Humane Society's use of the term "puppy mill" "impl[ied] verifiable factual information, not statements of opinion." *Smith*, 2015 WL 3946781, at *8. But this ruling is in error because the result of The Humane Society's review and analysis, *i.e.*, that Smith runs a "puppy mill," is still an unverifiable opinion.

This conclusion is perhaps best shown by the following example. Let's say the author of a report wrote that he or she has looked at every photograph of the claimant ever taken and, based on that review, the author states the claimant is ugly. The author in this hypothetical—just like The Humane Society—expressly disclosed the information he or she relied on (*i.e.*, every photograph of the claimant ever taken), but the author's resulting conclusion is still an unverifiable statement of opinion: the claimant is ugly. *See Ness v. Albert*, 665 S.W.2d 1, 2 (Mo. App. 1983) ("Aesthetic considerations are fraught with subjectivity. … What is aesthetically pleasing to one may totally displease another—'beauty is in the eye of the beholder.'").

The same is true here. The Humane Society's conclusion, *i.e.*, that Smith operates a "puppy mill," is an unverifiable statement of opinion, given the imprecise nature of the term and the inability to objectively ascertain the truth or falsity of the claim Smith operates a "puppy mill." *See* pp. 18-19, *supra*. This remains

true whether or not The Humane Society discloses the fact its researchers reviewed inspection reports in arriving at its list of the "Dirty Dozen."[6]

Finally, the court of appeals ignored the fact the Dirty Dozen report does much more than recite that The Humane Society's researchers reviewed unspecified inspection reports—the report includes verbatim quotations from inspection report after inspection report, including numerous inspection reports showing repeat violations at Smith's Kennel over the last decade. (LF48) (A19).

b. The Humane Society's use of the name "puppy mill" was in the midst of a heated political campaign and, as such, was even more likely to be understood as expressing The Humane Society's opinion.

There is no dispute that the Humane Society's use of the term "puppy mill" in its Dirty Dozen report and related materials was in the midst of a heated

[6] The court of appeals' logic—if adopted—would create the incongruous rule that an ignorant speaker who calls someone a pejorative name is protected from liability, whereas an informed speaker who, after diligent research and public disclosure of his or her research, calls someone the identical name is not. Such a rule would be inconsistent with long-held belief that "the Constitution presupposes the existence of an **informed** citizenry prepared to participate in governmental affairs." *Bd. of Ed., Isl. Trees Union Sch. Dist. v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring) (emphasis added).

statewide political battle. As noted above, the original Dirty Dozen report—which was published just 28 days before a statewide referendum—stated right on page one that "[t]he purpose of the report to is to demonstrate current problems that could be addressed by the passage of Proposition B, which Missouri citizens will vote on in November." (LF36) (A15). And the updated report—which was published in the midst of the Legislature's attempt to repeal Proposition B—was a call to arms to supporters, urging citizens to "mak[e] brief, polite phone calls to their state senator, representative, and governor to ask them to respect the will of the voters – by voting 'NO' on any bill that seeks to weaken or overturn Prop B." (LF97) (A28).

As the Court explained in *Henry*, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." 690 S.W. 2d at 785 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). This is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Id*. Because The Humane Society was participating in a spirited debate on a matter that was to be decided by Missouri voters themselves, both its speech—and that of it opponents—is entitled to the highest level of First Amendment protection.

Additionally, because The Humane Society was engaged in a spirited public debate over Proposition B, its speech was more likely to be viewed as expressing its partisan views—rather than objective facts. As Judge Sack noted: "Potentially defamatory statements in the guise of statements of fact uttered during a bit-

ter political debate are particularly likely to be understood to be rhetorical opinion." 1 R. Sack, Sack on Defamation § 4:3.1, at 4-31 (4th ed. 2015). He goes on to write:

> Courts have therefore been particularly assiduous in using protections given opinion by common and constitutional law as tools to shelter strong, even outrageous, political speech. Courts have been willing to read political invective as part of the political process and therefore worthy of unusually strong protection. The result is also justified on the basis that the ordinary reader or listener will, in the context of political debate, assume that vituperation is some form of political opinion neither demonstrably true nor demonstrably false.

Id. at 4-43 to 4-44.

Here, even Smith acknowledges that The Humane Society cranked up what she refers to in her Brief as "the well funded publicity machine of HSUS" to lobby for passage of Proposition B. (App. Br. at 32). As such, there is simply no doubt that readers of the Dirty Dozen reports plainly understood the reports were the product of a proponent of Proposition B and, therefore, reflected The Humane Society's opinions.

c. The Humane Society's use of the name "puppy mill" is a classic case of name-calling, which makes The Humane Society's use of the term even more likely to be understood as expressing The Humane Society's opinion.

Moreover, the tone of the report—and the language used in the associated press releases—reflects what the *Henry* court referred to as "epithets, fiery rhetoric or hyperbole," all significant indicators to the intended audience that the author is expressing his or her opinion. *Henry*, 690 S.W.2d at 788-90. For example, the title of the report itself—"Missouri's Dirty Dozen"—is clearly rhetorical, particularly given the fact the report actually lists 20 puppy mills, eight more than a "dozen." (LF39). Similarly, the use of terms such as "shocking" (LF70, 82), "atrocious" (LF36), "unconscionable" (LF68), and "flagrant" (LF99), are still other indicators of the author's expression of his or her opinion, as opposed to statements of objective facts. *See id*. at 789-90 (defendant's references to plaintiff as a "fraud" and a "twister" protected statements of opinion).

As such, far from supporting Smith's claims, the use of such "pejorative or vituperative" terms makes her claim less likely to succeed. *See id*. As the Court would later explain in *Nazeri*, "neither 'imaginative expression' nor 'rhetorical hyperbole' is actionable as defamation," and "the more vituperative and abusive a statement is, the more likely it is to be protected as an expression of opinion." 860 S.W.2d at 314 & n.5.

Nor is this Court alone in viewing name-calling in this fashion. In his treatise, Judge Sack notes near uniformity of views on this topic. "Common-law tradition has combined with constitutional principles to clothe the use of epithets, insults, name-calling, and hyperbole with virtually impenetrable legal armor. 1. R. Sack, Sack on Defamation § 2:4.7, at 2.45 (4th ed. 2015) (collecting examples).

C. The Humane Society's ranking of Smith's Kennel as "one of the worst puppy mills" in Missouri is a protected statement of opinion.

In its opinion, the court of appeals found that The Humane Society's ranking of Smith's Kennel as "one of the worst puppy mills" in Missouri was a protected statement of opinion. *Smith*, 2015 WL 3946781, at *8 ("many of the statements made by Defendants are 'opinion,' such as whether Plaintiff's kennel was the 'worst' of the puppy mills"). Despite this finding, Smith continues to assert that The Humane Society defamed her when it referred to Smith's Kennel as "among the worst licensed kennels in the state." (App. Br. at 21-22). But Smith is wrong.

1. Ratings, rankings, lists and grades are inherently subjective.

Repeated appellate court decisions—in Missouri and elsewhere—hold that rankings, ratings, grades, etc., are inherently subjective, and are therefore protected statements of opinion. The most apposite—and recent—Missouri case is *Castle Rock Remodeling, LLC v. Better Bus. Bureau of Greater St. Louis, Inc.*, 354 S.W.3d 234 (Mo. App. 2011), where the court addressed "the specific issue of

whether a rating or grade can be the basis of a defamation claim." *Id*. at 240-41. There, the BBB gave the plaintiff, a remodeling company, a "C" grade (on an A through F scale), and the remodeler sued for defamation. The trial court granted the BBB's motion to dismiss, and Castle Rock appealed.

In affirming the dismissal, the court of appeals began by recognizing that the case was one of first impression in Missouri, but noted that "[o]ther courts have considered the issue of whether a rating or grade can be the basis of a defamation claim and found that claims for defamation based upon ratings or grades fail because a rating or grade cannot be objectively verified as true or false and thus, are opinion accorded absolute privilege." *Id*. at 241.

Among the cases the *Castle Rock* court relied on in reaching its conclusion was the Eighth Circuit Court of Appeals decision in *Aviation Charter, Inc. v. Aviation Research Group/US*, 416 F.3d 864 (8th Cir. 2005). There, an air charter company sued Aviation Research Group/US ("ARGUS") for defamation, after ARGUS gave the plaintiff a "Does Not Qualify" rating—the lowest of four possible safety ratings. In its suit, the charter company claimed that "ARGUS's rating system was fundamentally flawed" and that this flawed methodology led to an improper rating. *Id*. at 867.

In affirming the trial court's grant of summary judgment, the appellate court never got to the plaintiff's claim that ARGUS's rating system—which was derived from its review and analysis of, among other things, FAA and NTSB reports on the plaintiff—was flawed. Instead, the court held that "although AR-

GUS's comparison relies in part on objectively verifiable data, the interpretation of those data was ultimately a subjective assessment, not an objectively verifiable fact." *Id*. As a result, "ARGUS's interpretation of the public database information available on Aviation Charter is not 'sufficiently factual to be susceptible of being proved true or false.'" *Id*. And "because ARGUS's comparative rating is not a 'provably false statement of fact,'" the plaintiff's defamation claim failed as a matter of law. *Id*. at 871-72.

The *Castle Rock* court also cited to another federal court of appeals' decision, *Compuware Corp. v. Moody's Investors Servs., Inc*., 499 F.3d 520 (6th Cir. 2007), in which the plaintiff claimed it was defamed by Moody's when the credit agency gave the plaintiff's bonds a "junk" grade rating. In affirming the dismissal of the plaintiff's claim as to the credit rating, the court explained that a Moody's credit rating is "dependent on a subjective and discretionary weighing of complex factors. We find no basis upon which we could conclude that the credit rating itself communicates any provable false factual connotation. Even if we could draw any fact-based inferences from this rating, such inferences could not be proven false because of the inherently subjective nature of Moody's ratings calculation." *Id*. at 529; *see also Browne v. Avvo, Inc*., 525 F. Supp. 2d 1249, 1252 (W.D. Wa. 2007) (also discussed in *Castle Rock*) (dismissing defamation claim by lawyer over poor rating, noting that "the underlying data is weighted based on [the defendant's] subjective opinions regarding the relative importance of various attributes").

Relying on this precedent (as well as this Court's *Henry* and *Nazeri* decisions), the *Castle Rock* court had little trouble concluding that the BBB's "C" rating was a protected statement of opinion. As the court explained, the "BBB's rating system relies on objective and subjective components, and BBB's weighting of the objective data." 354 S.W.3d at 242. As a result, the court concluded: "BBB's 'C' rating of Castle Rock is not sufficiently factual to be susceptible of being proved true or false. Although one may disagree with BBB's evaluation of the underlying objective facts, the rating itself cannot be proved true or false. Therefore, the rating is protected as opinion under the First Amendment." *Id*. at 243.

Since the *Castle Rock* decision, another appellate court decision has reached the same conclusion on facts that are even more similar to those here. In that case, the court found that the popular website "TripAdvisor" was not liable for its listing of the Grand Resort Hotel and Convention Center in Pigeon Forge, Tennessee as number one on its list of "2011 Dirtiest Hotels." *Seaton v. TripAdvisor LLC*, 728 F.3d 592, 600 (6th Cir. 2013). As the court explained in affirming the trial court's grant of TripAdvisor's motion to dismiss, "'top ten' lists and the like appear with growing frequency on the web. It seems to us that a reasonable observer understands that placement on and ranking within the bulk of such lists constitutes opinion, not a provable fact." *Id.*[7]

[7] In still another "top ten" case, a court recently held that "[t]hese finite lists inherently require authors to exercise opinion and discretion as they

The court also addressed head-on the hotel's claim that TripAdvisor used a "flawed methodology" in compiling its list, writing that "even if [plaintiff] is correct that TripAdvisor employed a 'flawed methodology' in creating the list, [its] claim for defamation still fails because TripAdvisor's method of compiling its [list] is 'inherently subjective [in] nature.'" *Id*. at 601 (quoting *Compuware*, 499 F.3d at 529).

Finally, it is worth noting that the court also took into consideration the website's use of "rhetorical hyperbole" in labeling the hotels as the "dirtiest" in America, explaining: "'Dirtiest' is a loose, hyperbolic term because it is the superlative of an adjective that conveys an inherently subjective concept." *Id*. at 598. In this regard, of course, the *TripAdvisor* decision is in accord with this Court's holding in *Nazeri* that "neither 'imaginative expression' nor 'rhetorical hyperbole' is actionable as defamation." 860 S.W.2d at 314.

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choose and rank who or what to include." *Mirafuentes v. Estevez*, Case No. 1:15-cv-610, 2015 WL 8177935, *4 (E.D. Va. Nov. 30, 2015). The court went on to cite *Milkovich*'s comment that certain publications—including editorials, political cartoons, reviews, etc.—signal the reader that the comments are the views of the author, and added: "The Internet listicle, whose popularity post-dated *Milkovich* by at least a decade, might be a welcome addition to this group of articles that signal opinion to readers simply by their format." *Id*.

2. The Humane Society's ranking of Smith's Kennel as one of the twelve worst puppy mills in Missouri fits squarely within this precedent.

In order to arrive at its list of twelve (or 20, if you include the "dishonorable mentions" in the original report, or 26, if you include the additions made in the updated report), The Humane Society necessarily engaged in what the *Castle Rock* court described as a "subjective … weighting of the objective data." *Id*. at 242.

Specifically, as disclosed in the Dirty Dozen report, The Humane Society used objective data, *i.e*., "state and federal inspection reports, investigators' photographs, and enforcement records received via the Freedom of Information Act" (LF36) (A15), to engage in a subjective weighting of that data. The report made clear that The Humane Society did more than simply count the number of violations, or rank their severity, but instead engaged in an inherently subjective assessment of each kennel's condition.

Perhaps the best evidence of this is the inclusion on the list of Jesse and Sonja Miller, the owners of Walnut Creek Kennel. As expressly stated in the Dirty Dozen report, "the Millers do not have as many violations on file as some of the other dealers on this list." (LF54) (A20). Nevertheless, as the report went on to explain, The Humane Society included the Millers in its list of the "Dirty Dozen" because the Millers' "stated intention of clubbing unwanted dogs earned them a place in the dirty dozen." (LF54) (A20). As such, readers of the Dirty Dozen report knew, without any doubt, that the Humane Society did not simply engage in a

mechanical counting of violations, but instead engaged in a subjective evaluation of all the records its researchers reviewed in arriving at its ranking of kennels to determine the "Dirty Dozen."

Moreover, the report repeatedly disclosed that its list was not exhaustive, but was—as its subtitle pointedly stated—"A report on **some** of the worst puppy mills in Missouri." (LF36) (A15) (emphasis added). Still on the first page, the report noted that "Missouri's Dirty Dozen were selected as **examples** of **some** of the worst licensed kennels in the state." (LF36) (A15) (emphasis added).

The Humane Society's ranking of dog kennels in Missouri is no different than ARGUS's ranking of air charter companies, Moody's ranking of bond issuers, AVVO's ranking of lawyers, and the BBB's ranking of companies. Each of these rankings—and the correlative rating, grade, or position on a list—"relies on objective and subjective components, and [the defendant's] weighting of the objective data." *Castle Rock*, 354 S.W.3d at 242.

Finally, for much the same reasons, The Humane Society's ranking of Smith's Kennel among other Missouri kennels—and Smith's Kennel's resulting inclusion on the list of what The Humane Society believes is 12 (or 20 or 26) of "the worst puppy mills in Missouri" (LF36) (A15)—is not "capable of being objectively characterized as true or false." *Henry*, 690 S.W.2d at 788; *see Nazeri*, 860 S.W.2d at 314 (describing the relevant test as "whether the underlying statement about the plaintiff is **demonstrably** false") (emphasis added).

Instead, just like the BBB's ranking/rating of Castle Rock, it "is not sufficiently factual to be susceptible of being proved true or false. Although one may disagree with [the defendants'] evaluation of the underlying objective facts, the rating itself cannot be proved true or false. Therefore, the rating is protected as opinion under the First Amendment." *Castle Rock*, 354 S.W.3d at 243; *see also Aviation Charter*, 416 F.3d at 867 ("ARGUS's interpretation of the public database information available on Aviation Charter is not 'sufficiently factual to be susceptible of being proved true or false.'"); *Compuware*, 499 F.3d at 529 ("Even if we could draw any fact-based inferences from this rating, such inferences could not be proven false because of the inherently subjective nature of Moody's ratings calculation.").

In her Brief, Smith posits a test for determining whether one kennel is better than another by simply adding up the number of "severe violations" of a kennel and comparing it to the number of "severe violations" of another kennel. Smith even uses bold to make her point: "**either Plaintiff had more or more severe violations of those regulations, as stated in the report, or she did not. And she was either selected because of that, as claimed in the report, or she was not. These statements can be proven or disproven**." (App. Br. at 24) (emphasis in original).

To begin with, on its face, Smith's professed test necessarily injects the subjective element of what is a "severe violation"? Are citations for having dogs whose toenails are so long they are turning the dog's toes sideways—which

Smith's Kennel had[8]—"severe violations"? Are citations for having dogs with "bright red blood in the[ir] feces," "green matter in their eyes" and "hair loss"—which Smith's Kennel had—"severe violations"? How "severe" is the fact that "Smith's Kennel has a history of repeat USDA violations stretching back more than a decade," or that "[t]he owner has issues with this facility that remain consistent with each inspection and more issues have surfaced since the last inspection"? (LF48) (A19).

Smith and The Humane Society obviously have different answers to each of these questions. This fact alone proves beyond any doubt that these questions call for subjective answers.

Second, Smith's proffered test is refuted by inclusion of Walnut Creek Kennel, owned by Jesse and Sonja Miller, on the Dirty Dozen list. As noted above, the Dirty Dozen report expressly disclosed that "[w]hile the Millers do not have as many violations on file as some of the other dealers on this list, the stated intention of clubbing unwanted dogs earned them a place in the dirty dozen." (LF54) (A20). As such, Smith's suggested methodology—far from proving the existence of an objective test for inclusion in the Dirty Dozen—affirmatively disproves the existence of such a test.

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[8] Again, it should be noted that "Plaintiff does not allege in her fourth amended petition that any of the information specifically about Plaintiff in the [Dirty Dozen] report was false." *Smith*, 2015 WL 3946781 at *5.

D. Smith's suggestion that The Humane Society was required to reprint, verbatim, the hundreds of pages its researchers reviewed is unsupported by the law and absurd on its face.

Finally, in her Brief, Smith argues that The Humane Society cannot rely on the opinion privilege because The Humane Society merely summarized the hundreds of pages of inspection reports its researchers reviewed—and did not reprint them verbatim. (App. Br. at 21-22). In fact, Smith argues that not only should The Humane Society have reprinted verbatim all of the inspection reports it reviewed for Smith's Kennel and the other kennels named in the report, it should have done so for "the hundreds of other kennels in the State of Missouri to which the named kennels were supposedly compared." (App. Br. at 22). Given that the entire Dirty Dozen report is just 27 pages (*see* LF 36-LF62)—and one kennel on the list had, by itself, "more than 500 pages of Animal Welfare Act violations and enforcement records on file" (LF64)—Smith's suggestion is absurd on its face.

The absurdity of Smith's position is corroborated by thinking how such a requirement would apply to a book review, a movie review, or a concert review. Would a book reviewer be required to reprint the text of the book in full—before offering his or her opinion on the book? How would a print reviewer (*i.e.*, a reviewer whose review appeared in a printed publication such as a newspaper or magazine) set forth the entire content of a movie or a concert? Smith's position is simply untenable.

Instead, what The Humane Society did by including excerpts from the inspection reports from each of the kennels listed in the Dirty Dozen report is exactly what a book reviewer (in a newspaper review), movie reviewer (in a TV review) or concert reviewer (in a TV or radio review) would do. In each case, the reader or viewer can compare the excerpted materials with the reviewer's comments and reach their own decision about the reviewer's review.

In this regard it is important to point out—as the court of appeals noted in its decision—that "Plaintiff does not allege in her fourth amended petition that any of the information specifically about Plaintiff in the [Dirty Dozen] report was false." *Smith*, 2015 WL 3946781 at *5. Instead, Smith objects only to The Humane Society's characterization of that disclosed information.

But The Humane Society's characterization of disclosed information is not actionable. In *Diez v. Pearson*, 834 S.W.2d 250 (Mo. App. 1992), the court of appeals affirmed the dismissal of a defamation petition brought by a county commissioner against the county assessor over a series of letters to the editor in which the assessor accused the commissioner of having "broke[n] the law" and being part of a "story of lies and deceit." *Id*. at 251-52. The court of appeals found these statements to be protected statements of opinion that were based on the assessor's description of the events upon which he based his opinions. *Id*. at 253.

The Humane Society did the same thing here: it provided its description of what it viewed were relevant inspection reports—and in many cases even included verbatim quotes from many of the inspection reports. And like Pearson, it then

went on to provide its opinion as to what those inspection reports meant to it. This was all The Humane Society was required to do—it was not required to reprint verbatim hundreds upon hundreds of pages of inspection reports before it would be allowed to give its opinion as to the significance of those reports.

E. Smith's reliance on snippets from press releases and other documents which do not identify Smith is insufficient to establish a defamation claim because defamation requires identification of the plaintiff.

Throughout Smith's Brief, she excerpts statements from press releases and other documents which never contain Smith's name, or the name of her kennel. For example, Smith complains about a statement in a press release to the effect that the kennels selected for inclusion in the Dirty Dozen report "depriv[ed] dogs of the basics of humane car [sic], such as food, shelter from the heat and cold, and/or basic veterinary care."(App. Br. at 22) (citing LF67).

But that press release—along with the other press releases attached to Smith's Petition—never mention Smith or her kennel. (*See, e.g.*, LF 67-LF69) (press release); (LF70-LF71) (press release); (LF98-LF100) (press release). This fact makes these press releases nonactionable, for "[i]n order to be defamatory, a statement must be clear as to the person addressed." *Castle Rock*, 354 S.W.3d at 240.

In an analogous situation, this Court ruled in *Hylsky v. Globe Democrat Pub. Co.*, 152 S.W.2d 119 (Mo. 1941), that where a false and misleading headline

did not identify the plaintiff it did not defame the plaintiff, where the text of the newspaper report got the facts correct. There, the headline contained the statement "Officer Working Alone Solves Case, Trapping Own Friend." *Id*. at 120. The officer referred to in the headline sued, claiming the headline falsely accused him of wrongdoing, *i.e.*, "trapping" someone into confessing to a crime. This Court affirmed the dismissal of the officer's lawsuit, explaining that "plaintiff's name does not appear in the headline, but far down in the body of the article," and that by the time the reader got far enough into the article to see the plaintiff's name, they would understand that the officer did nothing wrong. *Id*. at 122-23.

Numerous decisions from other jurisdictions are in accord. *See, e.g.*, *McCabe v. Rattiner*, 814 F.2d 839, 843 n.3 (1st Cir. 1987) ("The jumpline, taken alone, made no reference to anyone. The only way to find out that it referred to McCabe and Island Manor resorts was to read the article. Having read the article, the reader would take the headline in context with the facts as spelled out in the body of the article."); *Crall v. Gannett Satellite Info. Network, Inc.*, No. C-2-92-233, 1992 WL 400713, *4 (S.D. Ohio Nov. 6, 1992) ("[T]he article must be read to discern that Crall was the individual who, according to the headline, was jailed on drug charges. Thus, the headline is not, standing alone, a 'defamatory comment' on Crall."); *Ledger-Enquirer Co. v. Brown*, 105 S.E.2d 229, 230 (Ga. 1958) ("Where the plaintiff's name was not contained in the headline, the article and the headline must be construed together as one document to determine whether the newspaper article was libelous to the plaintiff.").

Under this well-accepted line of cases, the press releases by themselves are not actionable, but must be read **with** the Dirty Dozen reports themselves for Smith to even be identified. *See Nazeri*, 860 S.W.2d at 311 ("hold[ing] that the alleged defamatory words must be considered in context"). And when a reader does that, he or she will plainly see that the reports contain The Humane Society's opinions, as set forth above.

For all these reasons, the trial court did not err in dismissing Counts I and II of Smith's Fourth Amended Petition.

II. Smith cannot maintain a false light invasion of privacy claim for allegedly false statements which she claims injured her reputation. (Responding to Appellant's Point II).

In her second point, Smith argues that the very same Dirty Dozen reports and press releases which she alleges support her failed defamation claim also support her alternative theory of recovery for false light invasion of privacy. But Smith—like the plaintiffs in *Sullivan*, *Nazeri* and *Farrow* before her—misapprehends the nature and elements of a claim for false light invasion of privacy. False light is not defamation 'lite.' It is not a gap filler designed to provide an alternative forum for defamation plaintiffs who are unable to make out a valid claim for defamation. Instead, if it is recognized at all in this State—which remains an open question—it is a separate tort with defined elements which Smith cannot satisfy.

A. Over the last 30 years, this Court has repeatedly refused to recognize a claim for false light invasion of privacy for allegedly false statements which injured the plaintiff's reputation.

This Court first addressed the issue of whether to recognize a claim for false light invasion of privacy some thirty years ago in *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475 (Mo. banc 1986). There, the Court explained that while Missouri had recognized a cause of action for something called "invasion of privacy" since the early Twentieth century, it had never recognized the "false light" variant of invasion of privacy, which was first proffered by Prof. Prosser in 1960 and adopted by ALI in the Restatement (Second) of Torts in 1976. *Id*. at 477. According to the Restatement, false light invasion of privacy is defined as follows.

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E.

In its opinion in *Sullivan*, the Court noted that "the 'false light' theory under § 652E resembles a defamation suit because each action requires the publica-

tion of false information." 709 S.W.2d at 478. In fact, the Court noted, the "[t]he only apparent difference between 'false light' and defamation is that the latter protects one's *interest* in his or her reputation, while the former protects one's *interest* in the 'right to be left alone.'" *Id*. at 479 (emphasis in original).The Court questioned the need for duplicative remedies in such cases and acknowledged that "jurisdictions … have split over whether or not" a claim for false light invasion of privacy should be recognized separate and apart from defamation. *Id*. at 479.

The Court then analyzed the question of whether to adopt a false light invasion of privacy claim based on the facts before it. Sullivan—an employee of the City of St. Louis—alleged that a television station falsely reported that he "was unlawfully and improperly building a home with materials stolen from the City of St. Louis, ... and … had improperly arranged for an architect employed by the City of St. Louis to prepare the official plans for his home." *Id*.

In affirming the dismissal of Sullivan's false light invasion of privacy claim, the Court wrote: "The case at bar is nothing more than the classic defamation action where one party alleges that the other published a false accusation concerning a statement of fact—in this case, a charge of criminal conduct or wrongdoing." *Id*. at 481. In so doing, the Court rejected Sullivan's facile effort to disguise his defamation claim as a false light claim, remarking that "[i]n his petition, appellant has merely substituted the word 'false' for the phrase 'false impression'; and rather than alleging an injury to reputation, appellant alleges an injury to his repu-

tation and an injury to his right to let alone." *Id.* "We find these factors insufficient to justify treating his claim as anything other than a defamation action …." *Id.*

This Court reaffirmed the *Sullivan* holding seven years later, when it held in *Nazeri v. Missouri Valley College*, that "[r]ecovery for untrue statements that cause injury to reputation should be in defamation." In *Nazeri*, the Court noted its rejection of the false light theory of recovery in *Sullivan*, and held that Nazeri "presents no facts that would merit a reconsideration of this ruling." 860 S.W.2d at 317.

In 2005, in *State ex rel. BP Products North America, Inc., v. Ross*, 163 S.W.3d 922 (Mo. banc 2005), this Court reiterated that in *Sullivan*, "[t]he Court declined to recognize [a] cause of action [for false light] and noted instead that plaintiff actually was asserting 'nothing more than the classic defamation action where one party alleges that the other published a false accusation concerning a statement of fact … and, rather than alleging an injury to reputation, [the plaintiff] allege[d] an injury to his reputation and an injury to his right to be left alone.'" *Id.* at 926 (quoting *Sullivan*, 709 S.W.2d at 481).

B. The court of appeals decision in *Meyerkord* is consistent with this Court's prior precedent refusing to recognize a claim for false light invasion of privacy for allegedly false and defamatory statements which injured the plaintiff's reputation.

In its ruling in *Sullivan* rejecting a false light claim for allegedly false and defamatory statements, this Court left the door open for a possible false light claim

for **non-defamatory** statements. For example, the Court noted Missouri might recognize a false light claim where a defendant claimed that "the plaintiff wrote a poem, article or book which plaintiff did not in fact write." 709 S.W.2d at 480. The Court also cited a West Virginia case where a publication used the plaintiff's photo to illustrate a story about problems faced by women coal miners, although the plaintiff did not experience any such problems. *Id*. In such a case, the Court explained, the woman was put in a "false light" in that she was wrongfully portrayed as a "victim" of hazing. *See Crump v. Beckly Newspapers, Inc*., 320 S.E.2d 70 (W. Va. 1984). The *Sullivan* Court referred to each of these cases in which the offending statement was not defamatory—but nevertheless false—as the "classic case" of false light invasion of privacy. 709 S.W.2d at 480.

In *Meyerkord v. Zipatoni Co*., 276 S.W.3d 319, 323 (Mo. App. 2008), the Eastern District Court of Appeals had before it the "classic case" of false light invasion of privacy. There, Meyerkord had registered a website as part of his duties for Zipatoni, his employer. *Id*. at 321. After Meyerkord left his employment with Zipatoni, the company used the website which Meyerkord had registered for a marketing campaign for a handheld video game. Meyerkord alleged that when gamers, bloggers, and others learned of his registration of the website they wrongfully assumed he had something to do with the content of the website, and Meyerkord brought a claim for false light invasion of privacy. *Id*. at 321-22.

In ruling that Meyerkord stated a cause of action for false light, the court of appeals noted that while registering a website—like "wr[i]t[ing] a poem, article or

book," *see Sullivan*, 708 S.W.2d at 480—is not defamatory,[9] the unique juxtaposition of Meyerkord's registration of the website with the website's later content put him in a "false light." *Id*. at 325. In its opinion, the court of appeals was clear to distinguish Meyerkord's false light claim from a defamation claim, noting that "[a]n action for false light invasion of privacy does not require one to also be defamed." *Id*. at 323. In fact, the court of appeals even went so far as to expressly state that its recognition of a claim for false light invasion of privacy was limited situations where "the matter attributed to the plaintiff is not defamatory." *Id*.

C. This Court reaffirms the *Sullivan-Nazeri* line of cases post-*Meyerkord*, ruling once again that Missouri does not recognize a claim for false light invasion of privacy for allegedly false statements which injured the plaintiff's reputation.

Five years later, this Court—while acknowledging *Meyerkord*—reaffirmed that Missouri does not recognize a claim for false light invasion of privacy where the plaintiff alleges a false and defamatory statement. In *Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579 (Mo. banc 2013), the Court began by noting it had "flatly reject[ed] the cause of action" in *Sullivan*, and had reaffirmed that holding

[9] "'A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Henry v. Haliburton*, 690 S.W.2d at 779 (quoting Restatement (Second) of Torts § 559).

in *Nazeri* and restated it in *BP Products*. *Id*. at 600-01. The Court then went on to acknowledge the court of appeals decision in *Meyerkord*, noting, however, that the facts in *Meyerkord* did not fit "a classic defamation cause of action," because the plaintiff's affected interest in *Meyerkord* was simply the "right to be let alone," whereas in defamation law "the interest sought to be protected is the objective one of reputation, either economic, political or personal, in the outside world." *Id*. (quoting *Meyerkord*, 276 S.W.3d at 324-26).

The Court then looked at the allegations in Farrow's petition, which the Court described as follows: "The crux of Farrow's allegations is that Doctor made several false statements about her job performance that resulted in her termination from Hospital." *Id*. at 602. Given these allegations, this Court had little trouble finding that "[a]s such, her allegation is more akin to a classic defamation claim rather than a false light invasion of privacy claim," and affirmed the dismissal of Farrow's false light claim. *Id*.

D. Because Smith is seeking recovery for allegedly false and defamatory statements—that is, false statements which she claims injured her reputation—she cannot maintain a claim for false light invasion of privacy.

Under this Court's thirty years of precedent, Smith cannot maintain a false light invasion of privacy claim if her claim is grounded on allegedly false and defamatory statements which she claims injured her reputation. Because Smith is plainly seeking recovery in her false light count (Count III) for the identical state-

ments which she alleges in her defamation counts (Counts I and II) are false and defamatory and injured her reputation, the trial court correctly dismissed Smith's claim for false light invasion of privacy.

1. Smith is seeking recovery for allegedly false statements she describes as defamatory.

In Paragraphs 5-8 of her Petition, Smith includes numerous specific quotes from both the original Dirty Dozen report and the updated report, along with other statements from the related press conferences and press releases. (LF21-LF25) (A1-A5). Then, in Counts I and II—her defamation counts—Smith alleges that "[t]he statements set forth in paragraphs 5-8 of the General Allegations were false, scandalous, and defamatory, and as a result of the publication thereof Plaintiff's reputation has been damaged." (LF25 & LF27) (A5 & A7).

In Count III—her false light count—Smith merely repeats this same claim, alleging in Paragraph 24 that "[t]he reports and statements set forth above in paragraphs 5 and 6 … misrepresented Plaintiff's activities, conditions at her kennel, and inspection reports" (LF28) (A8) and in Paragraph 29 that "[t]he reports and statements set forth above in paragraphs 7 and 8 … misrepresented Plaintiff's activities, conditions at her kennel, and inspection reports." (LF30-LF31) (A10-A11).

Given these comparisons, it is patently obvious that just like the plaintiffs in *Sullivan*, *Nazeri* and, most recently, *Farrow*, "[t]he crux of [Smith]'s allegations is that [The Humane Society] made several false statements about her … perfor-

mance" as a dog kennel owner. *Farrow*, 407 S.W.3d at 602. Accordingly, just like Farrow's allegations, Smith's allegations are "more akin to a classic defamation claim rather than a false light invasion of privacy claim." *Id.*

In a transparent attempt to recast her defamation claims as a false light claim, Smith has sprinkled in allegations that The Humane Society "implied" this or "implied" that. For example, Smith claims The Humane Society "falsely implied that Plaintiff was a 'puppy mill.'" (LF28) (A8). In fact, The Humane Society did not "imply" that Smith's Kennel was a "puppy mill," it stated it outright—the title of The Humane Society report that is the basis of Smith's claim is "Missouri's Dirty Dozen: A report on some of the worst **puppy mills** in Missouri." (LF36) (A15) (emphasis added).

Moreover, in its *Sullivan* decision, this Court squarely rejected this very attempt to somehow 'plead around' the restrictions on false light claims, when the Court noted that in his false light count Sullivan, just like Smith, "merely substituted the word 'false' for the phrase 'false impression.'" 709 S.W.2d at 481. Finding this sleight of hand legally ineffectual, the Court found Sullivan's effort "insufficient to justify treating this claim as anything other than a defamation action." *Id.*

2. Smith is seeking recovery for damage to her reputation.

In both of her defamation counts, Smith alleges identical claims of damage to her reputation, reciting that as a result of the publication of the statements in Paragraphs 5-8 of her Petition, "Plaintiff's dog kennel business has been deprived

of valuable business associations in the dog raising and selling business." (LF26-LF27) (A6-A7). Smith then goes on to make the identical damage claim **in her false light claim**, *i.e.*, that as a result of the statements in Paragraphs 5-8 of her Petition, "Plaintiff's dog kennel business has been deprived of valuable business associations in the dog raising and selling business." (LF32) (A12).

Given these express allegations, there is no question that—just like in *Farrow*, where Farrow alleged that false and defamatory statements about her caused her to lose her job—"[Smith] is seeking to protect her reputation in the outside world." *Farrow*, 407 S.W.3d at 602. Accordingly, her claim is one for defamation, and not false light invasion of privacy.

This is true notwithstanding Smith's transparent attempt to recast her defamation claim as a false light claim by her addition of a purported second element of damages in her false light claim; namely, that "Plaintiff's privacy has been invaded [and] her right to be left alone has been compromised and degraded." (LF33) (A13). Again, this trick was tried—and rejected—in both *Sullivan* and *Farrow*.

In *Sullivan*, the Court found unpersuasive the fact that in his false light count Sullivan, "rather than alleging an injury to reputation, … alleges an injury to his reputation and an injury to his right to be let alone." 709 S.W.2d at 481. And in *Farrow*, the Court wrote: "Farrow's attempt to frame this cause of action as one where she merely wanted to be left alone is insufficient to differentiate it from her defamation claim. Here, Farrow is seeking to protect her reputation in the outside

world, specifically with Hospital and the medical community where she resides." 407 S.W.3d at 602. As such, concluded the Court, "her allegation is more akin to a classic defamation claim rather than a false light invasion of privacy claim." *Id*.

Here, Smith's invocation of her 'right to be left alone' rings even more hollow than in *Sullivan*, for Smith's claim of injury to her 'right to be left alone' appears only after she alleges—within her false light claim—the loss of "valuable business associations in the dog raising and selling business." (LF32) (A12). Instead of listing her interest in being left alone **instead** of her reputational interest, she lists it **after** (and in addition to) her reputational interests. As such, there is no doubt that Smith's allegations are more akin to a classic defamation case, and her claim of invasion of privacy is—both literally and figuratively—an afterthought.

E. Smith offers no legitimate reasons for this Court to overturn thirty years of precedent holding that a plaintiff cannot maintain a false light invasion of privacy claim for allegedly false statements which they claim injured their reputation.

For thirty years, this Court has consistently refused to recognize a claim for false light invasion of privacy where the claim is based on allegedly false statements which injure the plaintiff's reputation. This Court has repeatedly explained that "[t]he doctrine of *stare decisis*—to adhere to decided cases—promotes stability in the law by encouraging courts to adhere to precedents." *State v. Honeycutt*, 421 S.W.3d 410, 422 (Mo. banc 2013) (quoting *Med. Shoppe Int'l, Inc. v. Dir. of Revenue*, 156 S.W.3d 333, 334–35 (Mo. banc 2005)).

In her Brief, Smith suggests this precedent is not entitled to deference because it is old. (App. Br. at 30) (noting that *Sullivan* was decided in 1986). But in so arguing, Smith ignores *Nazeri*, as well as *Farrow*—which was decided in 2013. As such, far from providing a reason to question the applicability of *stare decisis*, this Court's repeated reaffirmation of the rule first set forth thirty years ago in *Sullivan* virtually compels its application today. "Under the doctrine of *stare decisis*, decisions of this Court should not be lightly overruled, especially when "'the opinion has remained unchanged for many years.'" *Id.* (quoting *Sw. Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 391 (Mo. banc 2002)).

More fundamentally, this Court's rationale for refusing to recognize false light invasion of privacy for allegedly false and defamatory statements is just as solid today as it was in 1986 (when *Sullivan* was decided), 1993 (when *Nazeri* was decided), and 2013 (when *Farrow* was decided).

To begin with, it is important to understand that "[d]efamation and false light, though frequently compared, have different elements and protect different interests." Ray, *Let There Be False Light: Resisting the Growing Trend Against an Important Tort*, 84 Minn. L. Rev. 713, 734 (2000).[10] Among those differences are that "[f]alse light … does not require a defamatory statement" and "requires no damage to reputation." *Id*. at 734-35. As a result, "a plaintiff can be cast in a false

[10] Smith herself cites this law review article in her Brief, praising its "excellent and thorough discussion." (App. Br. at 29 n.5).

light that reflects positively or even improves reputation." *Id*. at 735. "For example, a veteran might be depicted as a 'war hero' and given praise or recognition for deeds he did not perform. Such a misrepresentation might be just as offensive as one that disparages, but false light is the only tort that provides a remedy." *Id*.

Other, more noted, commentators agree. Prof. Smolla, for example, in his treatise writes: "The single most important distinguishing characteristic of the false light tort is that the publication need not be defamatory. A false light claim may actually say something *good* about the plaintiff, statements that enhance the plaintiff's reputation, yet are nonetheless 'false.'" 2 R. Smolla, Law of Defamation, § 10:11, at 10-70.1 to 10-70.2 (2d ed. 2015) (emphasis in original). Prof. Smolla goes on to note that defamation and false light are often confused, but should not be. "The confusion may be eliminated by reflecting on the fact that sometimes even a positive lie is offensive—the lie alone causes injury, even if the lie is a laudatory one." *Id*. at 10-72 to 10-73. Prof. Smolla then went on to use the very same 'false war hero' example, noting how such "exaggerated acts of courage might well enhance the veteran's reputation, but he would still have a valid action for false light invasion of privacy," because "the veteran would have seen real valor and real death, and would be profoundly disturbed and embarrassed at being made out as something he is not." *Id*. at 10-73.

The distinction these commentators make between defamation and false light is exactly the distinction this Court made in *Sullivan* when it referred to the "classic case" of false light as, for example, the use of a woman's photo to illus-

trate a story about female coal miners who were hazed, when the woman had not been hazed. 709 S.W.2d at 480. Of course, being a 'victim' is not defamatory, but it was nevertheless offensive and embarrassing to the plaintiff to be falsely portrayed as a victim.

The same is true for *Sullivan*'s other example, *i.e.*, "attributing to the plaintiff some opinion or utterance, whether harmful or not, that is false, such as claiming that the plaintiff wrote a poem, article or book which plaintiff did not in fact write." *Id*. Again, it is not defamatory to accuse some of being a poet or an author—no reputational harm is done by such a misattribution. Nevertheless, one could be put in a false light by being falsely associated with a book the plaintiff cannot actually take credit for writing.

Finally, the court of appeals recognized this distinction in *Meyerkord*, writing: "An action for false light invasion of privacy does not require one to also be defamed." 276 S.W.3d at 323. In *Meyerkord*, the act attributed to the plaintiff was registering a website—something which occurs tens of thousands of times a day and is clearly not defamatory.[11] Yet, because of the juxtaposition of the registra-

[11] More than 20 million new websites were registered in 2006, the year Meyerkord registered his website. *See* http://www.internetlivestats.com/total-number-of-websites/#trend. That amounts to an average of 56,000 new registrations every day.

tion data with the subsequent website content, that content was falsely attributed to Meyerkord, thus giving rise to the "classic case" of false light invasion of privacy.

Importantly, however, the court of appeals expressly limited its holding to cases where the matter attributed to the plaintiff is not defamatory. "When … the matter attributed to the plaintiff is not defamatory, the rule here affords a different remedy not available in an action for defamation." *Id*. In so doing, the court carefully kept its holding in line with *Sullivan* and *Nazeri*, which held only that Missouri does not recognize a claim for false light invasion of privacy for false and defamatory statements. And, of course, when this Court decided *Farrow* some five years after *Meyerkord*, this Court maintained the distinction between defamatory and non-defamatory statements, reaffirming that Missouri would not recognize false light invasion of privacy for false statements which injure a plaintiff's reputation, while not overruling *Meyerkord*.

F. Smith's description of false light invasion of privacy as defamation 'lite' reflects a fundamental understanding of the fact the two torts have distinct elements and that the failure of one does not give rise to the other.

Because Smith misapprehends the tort of false light invasion of privacy, she never addresses the distinction this Court has repeatedly drawn between claims that are based on false and defamatory and non-defamatory—yet still false—portrayals. Instead, Smith portrays false light as defamation 'lite'—complaining

that "**Defendants are trying to have it both ways regarding defamation and false light**." (App. Br. at 37) (emphasis in original).

But false light is not a substitute for a failed defamation claim; rather, as Smith's own well-reasoned authority states: "False light is a distinct cause of action." Ray, 84 Minn. L. Rev. at 734. And if false light is recognized at all in Missouri, it is only recognized where a non-defamatory statement puts the plaintiff in a false light. Here, Smith has affirmatively pled that the statements she complains of in her false light claim are false and defamatory and injured her reputation. As such, she has affirmatively pled herself out of a false light claim.[12]

In her brief, Smith—again using bold—argues that it is somehow unfair that Defendants can defeat her defamation claim by reason of the opinion privilege, yet still assert that her false light invasion of privacy claim is not actionable.

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[12] In this regard, Smith is no different than a plaintiff in a prima facie tort case who affirmatively pleads that the defendant's actions were unlawful. Having done so, the plaintiff cannot make those allegations magically disappear by asserting a prima facie tort claim. *See Bradley v. Ray*, 904 S.W.2d 302, 315 (Mo. App. 1995) ("[W]hile prima facie tort requires an intentional *lawful* act, plaintiff stated facts which show defendant committed an *unlawful* act. … Plaintiff cannot plead facts which constitute an unlawful statutory violation, then merely assert that such conduct was lawful in an attempt to state a claim for prima facie tort.") (emphasis in original).

According to Smith: "**Both arguments cannot prevail. They are absolutely inconsistent**." (App. Br. at 37) (emphasis in original). But Smith is wrong—Defendants arguments are not inconsistent.

Because defamation and false light are separate causes of action—with different elements—the failure of one does not give rise to the other. This Court addressed an analogous argument in *Nazeri*, when it explained that prima facie tort "is not a duplicative remedy for claims that can be sounded in other traditionally recognized tort theories, or a catchall remedy of last resort for claims that are not otherwise salvageable under traditional causes of action. Instead, it is a particular and limited theory of recovery with specific elements, as any other tort." 860 S.W.2d at 315.

The Court went on to explain that the failure of one claim does not give rise to a claim for prima facie tort. "[P]rima facie tort is not a duplicative cause of action established either by the failure to prove a recognized tort claim, or by the failure of such a claim on account of a particular defense." *Id*. The same is true here. False light invasion of privacy is not established either by Smith's failure to establish her defamation claim, or "by the failure of such a claim on account of a particular defense," *i.e*., the opinion privilege. *Id*.

Finally, it should be noted that if this Court were to adopt Smith's description of false light—as a claim which springs into life by the failure of a defamation claim—the protections built into defamation law would be emasculated. This Court has repeatedly refused to do that, *see, e.g., Sullivan*, 709 S.W.2d at 477-81

(rejecting plaintiff's attempt to use false light to circumvent the shorter defamation statute of limitations) and *Farrow*, 407 S.W.3d at 600-01 (same), and should not be bullied[13] into doing so now.

This point was perhaps best made by Judge Blackmar in his concurring opinion in *Sullivan*. "The law of libel … is carefully confined, because it impacts freedom of expression. The two year statute of limitations is a relatively short one. The legislature apparently thought that libel claimants should be required to make their claims quickly. This purpose would be utterly frustrated if a litigant could extend the statute simply by giving the action another name." 706 S.W.2d at 481-82 (Blackmar, J., concurring).

III. Smith cannot maintain a false light claim for statements that are on a matter of legitimate public interest. (Responding to Appellant's Point II).

"'[F]alse light' … protects one's interest in the 'right to be let alone.'" *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d at 479. One does not have a right to be let alone, however, if he or she is involved in matters of public interest. Thus, even if

[13] Smith's reference in her Brief to the stopbullying.gov website is misplaced for a host of reasons, including the fact Missouri has its own anti-bullying statute. *See* http://www.stopbullying.gov/laws/missouri.html. As a result, it is not necessary to adopt the false light invasion of privacy claim to stop bullying.

Smith's Fourth Amended Petition otherwise stated a cause of action for false light invasion of privacy—which it does not—it was nevertheless properly dismissed because the right of privacy is expressly "subject to a common law privilege permitting the publication of matters of public interest." *Id.* at 478.

Again, Judge Blackmar said it best in his opinion in *Sullivan*, when he wrote: "The right of privacy inures to persons who are not proper subjects for public scrutiny." *Id*. at 481. He then went on to discuss several invasion of privacy cases—including a false light case involving a family following the accidental death of the father—and noted that "[t]he dominant feature of each of these cases is that private people were inappropriately exposed to public view." *Id*.

Given these underlying interests, the court of appeals has held that "an action cannot lie for a false light invasion of privacy where the matter involved was one of legitimate public interest." *Hagler v. Democrat-News, Inc*., 699 S.W.2d 96, 99 (Mo. App. 1985).

A. The Humane Society's statements were on a matter of legitimate public interest: Proposition B.

As stated on page one, the very purpose of the Dirty Dozen report was to persuade voters to support Proposition B, a statewide referendum on the November 2010 ballot:

> The purpose of the report is to demonstrate current problems that could be addressed by the passage of Proposition B, which Missouri citizens will vote on in November. Under Proposition B, the Puppy

> Mill Cruelty Prevention Act, many of these dealers' horrific violations would be backed by stronger enforcement opportunities.

(LF36) (A15).

It is difficult to imagine a matter of more legitimate public concern than an election on a statewide initiative. As this Court has said: "Nothing in our constitution so closely models participatory democracy in its pure form. Through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the public. The people, from whom all constitutional authority is derived, have reserved the 'power to propose and enact or reject laws and amendments to the Constitution." *Missourians to Protect Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990) (quoting MO. CONST. art III § 49). As such, there can be no question that the Dirty Dozen report is on a matter of legitimate public interest.

The same is true for the updated Dirty Dozen report, which came out after "nearly one million Missouri citizens voted to pass Prop B, the Puppy Mill Cruelty Prevention Act." (LF99). Despite this fact, in March of 2011, the Missouri Legislature was considering numerous bills that would repeal, or effectively limit, many of the provisions of Proposition B. (LF98). In response, The Humane Society released an updated Dirty Dozen report, which showed continuing animal welfare violations by many of the kennels in the original Dirty Dozen report. (LF72-LF97). In the section of the updated report titled "What Citizens Can Do," the updated report stated: "Missouri citizens can help by making brief, polite phone calls

to their state senator, representative, and governor to ask them to respect the will of the voters—by voting "NO" on any bill that seeks to weaken or overturn Prop B." (LF97) (A28).

B. The Humane Society's statements were on a matter of legitimate public interest: Government reports of animal welfare violations.

The privilege to comment on matters of public interest, however, extends well beyond matters related to public participation in the democratic process. Instead, as Missouri courts have explained, "[w]here the operation of laws and the activities of the police or other public bodies are involved, the matter is within the public interest." *Hagler*, 699 S.W.2d at 99. Importantly, "[t]he privilege of giving publicity to matters of general public interest applies even though the individual publicized may have been drawn out of his seclusion and become involved in a noteworthy event involuntarily and against his will and over his protest." *Williams v. KCMO Broad.*, 472 S.W.2d 1, 4 (Mo. App. 1971).

Thus, in *Williams*, the plaintiff—who was filmed being arrested, searched and placed into a police car—failed to make out a claim for invasion of privacy, for the activities of the police in arresting him were clearly a matter of legitimate public interest. As the court explained, "[i]n the case at bar, plaintiff was involved in a noteworthy event about which the public had a right to be informed and which the defendant had a right to publicize. This is true even though his involvement therein was purely involuntary and against his will." *Id*. at 5.

The court in *Hagler* relied on *Williams* in finding that a newspaper's identification of a suspected target of a police drug raid could not be the basis of a claim for false light invasion of privacy "[d]espite total innocence of involvement in the drug ring on the Haglers' behalf." *Hagler*, 699 S.W.2d at 100.

The Dirty Dozen report is a classic example of a report on government efforts to enforce the law. As expressly noted in the report, "Missouri's Dirty Dozen were selected as examples of some of the worst licensed kennels in the state, based upon the number and severity of state and/or federal animal welfare violations." (LF36) (A15). The Humane Society noted in preparing the report that "[r]esearchers at The Humane Society of the United States (HSUS) have spent weeks poring over state and federal inspections reports, investigators' photographs, and enforcement records received via the Freedom of Information Act to compile a list of some of the worst puppy mills in Missouri, known as 'Missouri's Dirty Dozen.'" (LF36) (A15).

The section of the report regarding Smith's Kennel expressly notes that "Smith's Kennel has a history of repeat USDA violations stretching back more than a decade," quotes from a half dozen "federal inspection reports" which document repeated violations, and even quotes from an inspection report that: "'The owner has issues with this facility that remain consistent with each inspection and more issues have surfaced since the last inspection.'" (LF48) (A19). As such, the Dirty Dozen report—which is based on more than ten years of federal and state animal welfare enforcement records—clearly qualifies as involving "the operation

of laws and the activities of … public bodies." *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 499 (Mo. App. 1990).

The same is true for the updated Dirty Dozen report which, in referring to Smith's Kennel, noted that "[t]he kennel's most recent USDA inspection was in June 2010, when the owner was cited for a repeat violation for two dogs that had untreated veterinary problems, a repeat violation for housing in disrepair, and sanitation problems." (LF79) (A25). The report also noted that "Smith's Kennel remains both USDA licensed and MDA licensed through 2011 despite ongoing repeat violations." (LF78) (A24).

Moreover, the updated report noted the fact that "Mary Ann Smith's son, now Republican Majority Whip Representative Jason Smith, was once listed in state records as a co-owner of her kennel and has been an outspoken opponent of Proposition B, the Puppy Mill Cruelty Prevention Act." (LF79) (A25). This reference neatly ties both elements of the public interest privilege together, *i.e.*, the public interest in the government's enforcement actions, as well as the public interest in the political effort to oppose Proposition B. Again, therefore, it is clear that the updated report—like the original report—is on a matter of legitimate public concern and therefore cannot be the basis of a false light invasion of privacy claim.

C. Smith's reliance on the court of appeals decision in *Meyerkord* in misplaced in that *Meyerkord* did not involve a matter of legitimate public interest.

In her Brief, Smith acknowledges that the court in *Hagler* held that "an action cannot lie for a false light invasion of privacy where the matter involved was one of legitimate public interest." 699 S.W.2d at 99. (*See* App. Br. at 38). She claims, however, that this Court should not follow that holding in light of the court of appeal's decision in *Meyerkord*. (App. Br. at 39).

But *Meyerkord* is inapposite for the simple reason that the statement at issue there did not deal with a matter of public interest. In *Meyerkord*, the plaintiff's claim for false light was premised on what the plaintiff claimed was the false attribution to him of being the registrar of a website related to a handheld computer game. 276 S.W.3d at 321. Such private commercial activity, however, in no way relates to a matter of "legitimate public interest." The registration of a website for a handheld computer game does not rise to the level of legitimate public interest.

Equally inapposite is Smith's attempt to distinguish a claim for publication of private facts from a false light claim. As the Restatement plainly states, both publication of private facts and false light are variants of a claim for invasion of the privacy which, according to the Restatement, are bound together by a common feature. "As it has developed in the courts, the invasion of the right of privacy has been a complex of four distinct wrongs, whose only relation to one another is that each involves interference with the interest of the individual in leading, to some

reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others." Restatement (Second) of Torts § 652A, cmt. b.

Here, contrary to Smith's contention that she was "yanked … out of her rural Missouri home into the limelight" (*see* App. Br. at 36), Smith was a proper subject of electioneering materials on Proposition B. As the Restatement notes, "[t]he right of privacy has been defined as the right to be let alone." Restatement (Second) of Torts § 652A, cmt. a. Smith gave up that right with respect to her dog kennel business when she voluntarily obtained federal and state licenses to breed and sell dogs for profit—and when she repeatedly violated both federal and state animal welfare regulations.[14]

For all these reasons, the trial court did not err in dismissing Count III of Smith's Fourth Amended Petition.

CONCLUSION

The trial court's Judgment dismissing Smith's Fourth Amended Petition should be affirmed.

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[14] In addition, the updated Dirty Dozen Report discloses that Smith's son Jason Smith was, at the time, not only the Majority Whip in the Missouri House of Representatives, but was also, at some time, a co-owner of the kennel with his mother. (LF79) (A25). Given this fact, Smith is simply not candid with this Court when she writes in her Brief: "How is someone like Mrs. Smith supposed to take on the well funded publicity machine of HSUS?" (App. Br. at 32).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Rule 55.03;

2. The brief complies with the limitations contained in Rule 84.06(b); and

3. According to the word count function of counsel's word processing software (Microsoft Word) and excluding those portions of the brief as permitted by Rule 84.06(b) the brief contains 15,712 words.

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CERTIFICATE OF SERVICE

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