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IN THE SUPREME COURT OF MISSOURI

SC 95175

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

Plaintiff/Appellant,

v.

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

Defendants/Respondents.

On Appeal from the Circuit Court of Dent County, Missouri
Southern District, Division Two
The Honorable Ronald D. White, Special Judge

BRIEF OF AMICI CURIAE

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STATEMENT REGARDING CONSENT

In accordance with Missouri Supreme Court Rule 84.05(f)(2), Counsel for Amici herein sought and obtained the consent of all parties to this cause for the filing of this Amicus Brief. In response to correspondence from Counsel for Amici, Plaintiff's counsel indicated consent by email dated January 14, 2016, and counsel for both Defendants indicated their consent by email on the same date.

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POINT RELIED ON

THE COURT DID NOT ERR IN DISMISSING PLAINTIFF'S PETITION BECAUSE THE HUMANE SOCIETY'S STATEMENTS IDENTIFYING PLAINTIFF'S KENNEL AS A "PUPPY MILL" AND AMONG THE "WORST" PUPPY MILLS IN THE STATE, IN THE CONTEXT OF A POLITICAL CAMPAIGN TO ADOPT A REFERENDUM REGULATING DOG BREEDERS, ARE CONSTITUTIONALLY PROTECTED OPINIONS BASED ON DISCLOSED, TRUTHFUL FACTS.

Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. banc 1993)

Henry v. Halliburton, 690 S.W.2d 775 (Mo. banc 1975)

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)

Diez v. Pearson, 834 S.W.2d 250 (Mo.App. E.D. 1992)

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ISSUE

The issue presented in this appeal is whether statements identifying a dog kennel as a "puppy mill" and one of the "worst puppy mills in Missouri" during a political campaign urging Missouri voters to approve a statewide public referendum on the "Puppy Mill Cruelty Prevention Act" are protected under the First Amendment as non-actionable statements of opinion where the publisher discloses as the basis for such statements the kennel owner's history of repeated United States Department of Agriculture violations—including, *inter alia*, citations for unsanitary conditions; dogs exposed to below-freezing temperatures and excessive heat with inadequate shelter from the weather; dogs in cages too small to move freely; pest and rodent infestations; injured and bleeding dogs; and dogs with loose, bloody stools—none of which are alleged to be false?

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THE INTERESTS OF AMICI

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

The St. Louis Post-Dispatch, LLC ("Post-Dispatch") is a news organization, which publishes a daily newspaper of general circulation in and around St. Louis and eastern Missouri and operates an internet site at www.stltoday.com. In its role of informing the news-reading public, the Post-Dispatch has written about the debate concerning the dog breeding industry in Missouri using the term "puppy mill." *See, e.g.,* http://www.stltoday.com/news/local/metro/where-did-missouri-s-puppy-mill-debate-go/article_4be18df6-955c-58fe-8360-846c5c11ca35.html

The *Kansas City Star* ("Star") is a news organization, which publishes a daily newspaper of general circulation in an around Kansas City and western Missouri and operates an internet site at www.kansascity.com. In its news reporting, the Star has written about the dog breeding industry using the term "puppy mill." *See, e.g.,* http://www.kansascity.com/news/article351019/Missouri-Kansas-dog-breeders-criticized-by-animal-welfare-group.html.

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The Council of Better Business Bureaus, Inc. ("CBBB") is a not-for-profit corporation. It licenses the Better Business Bureau name and trademarks to various Better Business Bureaus ("BBBs") located in various geographic locations throughout the United States, which agree to its mission and rules for promoting honest, humane, and ethical business practices. The CBBB's mission and that of its various local BBB's is to be leaders in advancing marketplace trust by setting standards for marketplace trust, encouraging and supporting best practices by engaging with and educating consumers and businesses, celebrating marketplace role models, calling out and addressing substandard marketplace behavior, and creating a community of trustworthy businesses and charities.

The Better Business Bureau of Eastern Missouri and Southern Illinois ("StL BBB") is a not-for-profit corporation which informs consumers about questionable business and charity practices. It provides business reviews to consumers rating businesses and charities based on consumer-provided reviews and routinely issues news releases cautioning consumers about particular businesses and charities. In 2010, in conjunction with Better Business Bureaus in Kansas City and southwestern Missouri, the StL BBB issued a report detailing allegations of improper conduct and inhumane treatment in the dog breeding industry in Missouri, entitled "The Puppy Industry in Missouri—A Study of the Buyers,

Sellers, Breeders and Enforcement of the Laws." *See* www.bbb.org/Storage/142/Documents/Puppy%20Mills%20study.pdf.

Other amici are news organizations, publishers, and other public-interest groups having interests and concerns similar to those identified above and are identified in a separate Appendix submitted herewith.

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SUMMARY OF THE POSITION ADVANCED BY AMICI

This appeal presents an important question for anyone who chooses to speak out on public issues: where to draw the line between protected opinion and actionable fact in defamation and privacy law. Amici ask this Court to preserve the broad protection now afforded opinions and subjective expression, in order to allow the "breathing space" required for speech to flourish and support the guarantee that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-272 (1964). In this case, Defendants' statements—which were based on disclosed, truthful facts about a political issue—fall squarely on the opinion side of the fact-opinion dichotomy.

If the barrier between protected opinion and actionable fact is blurred, the freedom of speech enshrined in the First Amendment to the United States Constitution and Article I, Section 8 of the Missouri Constitution will be chilled. Speakers would be deterred from injecting themselves into public debate for fear of tort liability and the marketplace of ideas would be diminished, forcing people to examine matters of public concern without the benefit of diverse viewpoints. Courts should encourage—not suppress—a vast array of opinions because "the ultimate good desired is better reached by free trade in ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (J. Holmes, dissenting).

The Court of Appeals' decision that Defendants' statements were not protected opinion is inconsistent with Missouri and United States Supreme Court jurisprudence and infringes on fundamental constitutional freedoms. This decision must be corrected in order to ensure speakers can express opinions without fear of liability, a core guarantee of the United States and Missouri Constitutions.

For the reasons set forth, amici urge this Court to find that Defendants' statements are constitutionally protected opinion and affirm the trial court's dismissal of this case.

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STATEMENT OF FACTS

In October 2010, the Humane Society of the United States published a Report titled "Missouri's Dirty Dozen" urging voters to support Proposition B, the Puppy Mill Cruelty Prevention Act. "The purpose of the report [was] to demonstrate current problems that could be addressed by the passage of Proposition B, which Missouri citizens [would] vote on [that] November." (LF 36). In the Report, the Humane Society listed what it believed were the twelve worst Missouri "puppy mills." The Report included Plaintiff Mary Smith's kennel on the "Dirty Dozen" list based on the Humane Society's analysis of the number and severity of state and federal animal welfare violations. (LF 36-62). The Humane Society also published a Summary Report, Press Release, and an Updated Report containing similar information about the listed kennels. (LF 63-66; 72-97).

Smith sued for defamation and false light invasion of privacy because the Report labeled her kennel as a "puppy mill." (LF 21-35). The trial court dismissed Smith's claims (LF 141), but the Court of Appeals reversed and remanded, finding that "the contention that Plaintiff's kennel was a puppy mill with the definitions given as to what constitutes a puppy mill was, under the totality of the circumstances in this case, a factual contention." (Opinion at 16). This Court accepted transfer on October 27, 2015, upon the request of Defendants. This Court has jurisdiction based on Article V, Section 10 of the Missouri Constitution.

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ARGUMENT

I. THE COURT DID NOT ERR IN DISMISSING PLAINTIFF'S PETITION BECAUSE THE HUMANE SOCIETY'S STATEMENTS IDENTIFYING PLAINTIFF'S KENNEL AS A "PUPPY MILL" AND AMONG THE "WORST" PUPPY MILLS IN THE STATE, IN THE CONTEXT OF A POLITICAL CAMPAIGN TO ADOPT A REFERENDUM REGULATING DOG BREEDERS, ARE CONSTITUTIONALLY PROTECTED OPINIONS BASED ON DISCLOSED, TRUTHFUL FACTS.

> The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no counter-belief, no relevant information, may be kept from them.

Henry v. Halliburton, 690 S.W.2d 775, 785 (Mo. banc 1975) (quoting A. Meikklejohn, FREE SPEECH: AND ITS RELATIONSHIP TO SELF-GOVERNMENT 88-89 (1948)).

This Court has held that expressions of opinion are absolutely privileged under the First Amendment. *See Nazeri v. Missouri Valley* College, 860 S.W.2d 303, 314 (Mo. banc 1993). In order to determine if a statement is a protected opinion or an actionable statement of fact, this Court instructed lower courts to

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"look to the totality of the circumstances" to determine if "an ordinary reader would have treated the statement as an opinion." *Henry*, 690 S.W.2d at 788. The totality of circumstances includes the broader context of the speech and the type of speech in question. *See id.* at 788-79. "The highest protection is accorded pure speech touching on matters of public importance." *Id*. at 784. The court must determine in the first instance whether a statement is protected opinion. *Id.* at 787.

The United States Supreme Court recognized protected opinion in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). While rejecting the idea of a distinct "opinion defense," the Court described two categories of opinion shielded by the First Amendment: statements that are not "provable as false" and statements that "cannot reasonably be interpreted as stating actual facts." *Id.* at 18-20. Some statements in and of themselves are so subjective and unverifiable that they must be deemed opinion. *See id*. at 20-21. Other statements can be perceived as factual or opinion statements. In such cases, if the facts supporting the statement are either truthfully disclosed or clear from the context in which the opinion is expressed, they are protected. *See* RESTATEMENT (SECOND) OF TORTS §566 cmts. b, c (1977); *see also id*. at Illus. 4-5; *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 13-15 (1970) (the term "blackmail" describing perceived heavy-handed tactics of a developer protected as opinion).

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Extrapolating from these two parameters set out in *Milkovich*, courts have continuously protected statements of subjective belief based on disclosed true facts. *See, e.g., Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1439-40 (9th Cir. 1995); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 731 n.13 (1st Cir. 1992); *Diez v. Pearson*, 834 S.W.2d 250, 251-53 (Mo.App. E.D. 1992).

In the instant case, the Court of Appeals found that the Humane Society's assertion that Plaintiff's kennel was a "puppy mill" was a factual contention under the totality of the circumstances. The Court reasoned that, because the Humane Society identified the facts supporting its conclusion that Plaintiffs' kennel was a "puppy mill," the conclusion itself was also a "factual contention." This determination, however, is contrary to settled case law. Rather than losing protection when the facts underlying a conclusion are set forth—as the appellate court determined—conclusions gain protection by revealing their truthful underpinnings. Because the facts that formed the basis of the Humane Society's conclusion that Plaintiff's kennel was a "puppy mill" and among the "worst" were not false, as even the Plaintiff does not dispute, these statements were protected opinion. The Court of Appeals also failed to take account of the fact that the Humane Society's statements were inherently political in nature. These are crucial errors in the appellate court's holding, which this Court must correct.

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A. Statements by the Humane Society regarding Plaintiff are not actionable because they are based on disclosed, truthful facts.

In its decision, the Court of Appeals misapplied a fundamental principle of the First Amendment recognized by courts across the country—conclusions based upon disclosed, true facts are not actionable. *See, e.g., Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997) (Where "a statement of opinion either discloses the facts on which it is based or does not imply the existence of undisclosed facts, the opinion is not actionable."). This principle is rooted in the theory that "statements clearly recognizable as pure opinion because their factual premises are revealed" are protected because they cannot be understood as stating "actual facts." *Phantom Touring*, 953 F.2d at 731 n.13.

Although this principle was not explicitly addressed in *Milkovich*, the U.S. Supreme Court provided an example of the reasoning behind protecting statements based on disclosed, true facts. The Court explained that the statement, "In my opinion Mayor Jones is a liar," could be actionable, but the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teaching of Marx and Lenin," would not be actionable. *Milkovich*, 497 U.S. at 20. The second statement, in which the speaker presents reasons for the belief, receives constitutional protection because it does not imply a provable false fact. *See id*. As the United States Court of Appeals for the First Circuit described this principle,

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when opinions are based on disclosed facts, "all sides of the issue, as well as the rationale for [defendant's] view, [are] exposed, [and] the assertion . . . reasonably could be understood only as [defendant's] personal conclusion about the information presented, not as a statement of fact." *Phantom Touring*, 953 F.2d at 730.

Consistent with *Milkovich*, federal courts protect opinion based on disclosed, true facts. *See, e.g., Riley v. Harr*, 292 F.3d 282, 294 (1st Cir. 2002) (statement that witness was "lying" was protected opinion because the speaker disclosed the facts supporting the opinion); *Yagman*, 55 F.3d at 1439 (by divulging facts underlying a conclusion, "readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts"); *Potomac Value & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1290 (4th Cir. 1987) (statements about a business protected opinion because the "premises are explicit, and the reader is by no means required to share [the author's] conclusion"); *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 972 (3d Cir. 1985) (dismissal of defamation claim appropriate because "the factual bases for all stated opinions were adequately disclosed and therefore the[] statements were not actionable"); *Lauderback v. Am. Broad. Cos., Inc.*, 741 F.2d 193, 195 (8th Cir. 1984)

(statements that agent was "rotten," "unethical," "sometimes illegal," a "crook," and a "liar" were protected opinions based on disclosed true facts).

Missouri courts also have protected statements based on disclosed, true facts. *See, e.g., Diez*, 834 S.W.2d at 251-53 (discussed below); *Matyska v. Stewart*, 801 S.W.2d 697, 701 (Mo.App. E.D. 1991) (defendant's letter accusing Plaintiffs of criminal conduct and professional incompetence was not actionable because defendant "disclosed in detail the facts which underlie his opinions"); *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 499 (Mo.App. E.D. 1980) (the statements "this sleazy sleight-of-hand has been the work of Don Anton" and "[residents in Affton] are telling Walker, Anton and their bunch they want no part of these sleazy dealings" were constitutionally privileged because defendants set forth the facts upon which the opinions were based).

In *Diez v. Pearson*, Diez, a member of the Franklin County Commission sued Pearson, the Franklin County Assessor, for defamation. Diez claimed Pearson harmed his reputation in letters written to Franklin County newspapers alleging the County Commission broke the law by changing employee time sheets, resulting in shortchanging employee wages. *See Diez*, 834 S.W.2d at 251-52. Pearson also wrote that electing Diez was a "sad turn for Franklin Country." *Id*. at 252. In the letters, Pearson included the following facts: a budget was signed, time sheets were altered, employees were not originally paid the budgeted amount, and

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the commission gave the employees back pay. *See id*. at 251-52. The court found Pearson's statements to be protected opinion because he "set forth the facts upon which he based his opinion" and "opinions, even if false and insincerely held, are constitutional privileged if the facts supporting them are set forth." *Id.* at 253.

Disclosing the facts upon which an opinion is based also prevents the reader from inferring undisclosed defamatory facts. The RESTATEMENT (SECOND) OF TORTS §566 states that a statement of opinion can be actionable "only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." RESTATEMENT (SECOND) OF TORTS §566 (1977). Thus, an opinion is protected if the "maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character." *Id.* at cmt. b. When a speaker reveals the facts upon which a conclusion is based, readers can make determinations for themselves.

In this case, the Humane Society based its subjective conclusion that Plaintiff's kennel is a "puppy mill" on facts from state and federal inspection reports, photographs, and enforcement records. The Humane Society began its Report by explaining the basis for including the selected kennels in the "Dirty Dozen": "Researchers at The Humane Society of the United States (HSUS) have spent weeks poring over state and federal inspection reports, investigators' photographs, and enforcement records received via the Freedom of Information

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Act to compile a list of some of the worst puppy mills in Missouri, known as 'Missouri's Dirty Dozen.'" (LF 36). Throughout the Report, the Humane Society reiterated to its readers that the conclusion of the Report—that the listed kennels are among the worst "puppy mills" in the state—was based upon these official records. (LF 36-62).

When specifically discussing Plaintiff's kennel, the Humane Society laid out the specific factual basis for describing Plaintiff's kennel as a "puppy mill." The section of the Report devoted to Plaintiff's kennel begins, "Smith's Kennel has a history of repeat USDA violations stretching back more than a decade." (LF 48). The Report then detailed specific quotations from federal inspection reports:

- "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 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).

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

(LF 48).

From these records and more referred to in the Report (*see* LF 48), the Humane Society concluded Plaintiff's kennel was a "puppy mill." Significantly, as the appellate court recognized (but then apparently disregarded), "Plaintiff does not allege in her fourth amended petition that any of the information specifically about Plaintiff's kennel in the Report was false." (Opinion at 10). Because the Humane Society fully disclosed the facts from which it reached its conclusion, an ordinary reader would understand the "puppy mill" label by the Humane Society as its subjective opinion.

Therein lies an important distinction between opinions which *might* be actionable, and those which are not. Had Plaintiff disputed the truth of the statements regarding her violations, those false statements *might* make the statement that she operated a "puppy mill" actionable because the "puppy mill" accusation would not be truthfully supported. Instead, Plaintiff carefully skirts the issue stating in conclusory terms that these facts were "taken out of context" (LF 31; P. Subst. Br. at 12), never once identifying any factual support showing how

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they were taken out of context, or how any context would have changed their gist or sting, or altered the subjective conclusion that Plaintiff operated a "puppy mill."

Likewise, had the Humane Society failed to identify any factual basis whatsoever for calling Plaintiff's dog kennel a "puppy mill" and were her dog kennel a model of cleanliness and humane animal treatment, a claim *might* lie. (Of course, that is not the case here). But even that is questionable given that the term "puppy mill" is not a legal one, nor does it have a common definition. For some, a puppy mill may be any kennel where dogs are raised for profit. For others, it may be a kennel where the dogs experience abusive conditions.

Because the term "puppy mill" does not have an agreed-upon meaning, it is dubious that the term alone could ever be deemed actionable. But when used in conjunction with the truthful facts on which the conclusion is based, the statement simply cannot be actionable because the audience is free to agree or disagree with the conclusion based on their own analysis of the facts.

In this case, readers could certainly form their own opinions. After reading the 27 pages of the Report and analyzing the myriad of disclosed facts, readers could agree or disagree with the Humane Society's opinion that Plaintiff's kennel is a "puppy mill." And because the Humane Society disclosed the facts on which it based its decision to include Plaintiff's kennel in its list of "puppy mills, it did not leave readers believing its judgment was based on other, undisclosed facts.

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Therefore, under well-established jurisprudence from Missouri and federal courts, the Humane Society's statements must be constitutionally protected.

The Report's rating of Plaintiffs' kennel as one of the "worst" puppy mills in the state does not change the equation. Even the appellate court recognized that rating a business as one of the worst is protected opinion. (Opinion at 16). *See also Castle Rock Remodeling, LLC v. Better Business Bureau of Greater St. Louis, Inc.*, 354 S.W.3d 234, 241 (Mo.App. E.D. 2011) ("claims for defamation based upon ratings or grades fail because a rating or a grade cannot be objectively verified as true or false and thus, are opinion accorded absolute privilege"); *Seaton v. TripAdvisor LLC*, 728 F.3d 592, 602 (6th Cir. 2013) (hotel's placement on website's "Dirtiest Hotels" list held protected opinion); *Aviation Charter, Inc. v. Aviation Research Group/US*, 416 F.3d 864, 870-71 (8th Cir. 2005) (negative comparative safety rating for charter airline held protected opinion); *Brown v. Avvo, Inc.*, 525 F.Supp.2d 1249, 1251-53 (W.D. Wash. 2007) (lawyer ratings held protected opinion).

Rather than protecting conclusions based on truthfully disclosed facts, as the case law directs, the Court of Appeals did the exact opposite—it used the disclosed, true facts to determine that the conclusion drawn from those facts was not protected opinion. The appellate court's misapplication of settled case law must be corrected.

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B. Statements by the Humane Society regarding Plaintiff deserve protection as core political speech.

The Humane Society's Report merits protection under the United States and Missouri Constitutions for a second reason: as a publication urging citizens to take action on proposed legislation, it was an exercise of core political speech. Echoing the prescriptions of the United States Supreme Court, this Court has held that political speech must be broadly construed and merits the "highest protection" under the First Amendment. *Henry*, 690 S.W.2d at 784; *see also Ribaudo v. Bauer*, 982 S.W.2d 701, 705 (Mo.App. E.D. 1998).

In this case, the Humane Society published its Report to inform the electorate ahead of a vote on Proposition B, also known as the Puppy Mill Cruelty Prevention Act. This is clearly political speech. *See McIntyre v. Ohio Elecs. Comm'n*, 514 U.S. 334, 347 (1995) (the same stringent protections that apply to political campaigns "extend equally to issue-based elections"). Instead of rendering the "highest" protection and "broad" construction, however, the Court of Appeals narrowly construed the Humane Society's political speech and denied it any protection from liability.

This Court treats political speech with great reverence, writing that political speech demands the "highest rung of the hierarchy of First Amendment values" because giving wide-range protection to political speech ensures self-government

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and an effective democracy. *Henry*, 690 S.W.2d 785 (quoting *Connick v. Meyers*, 461 U.S. 138, 145 (1983)). The First Amendment protects voters' rights to understand the issues and to ascertain the truth—"no idea, no opinion, no doubt, no counterbelief, no relevant information, may be kept from them." *Henry*, 690 S.W.2d 785 (quoting Alexander Mieklejohn, FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT 88-89 (1948)). Indeed, the "freedom to discuss public affairs and public officials is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion." *Sullivan*, 376 U.S. at 296-297 (J., Black, concurring). Since *Sullivan*, the U.S. Supreme Court has consistently reiterated that "[i]f the First Amendment has any force, it prohibits Congress from fining . . . citizens, or associations of citizens, for simply engaging in political speech." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 313 (2010).

These principles are particularly important where, as here, citizens engage in political advocacy to encourage participation in an upcoming public vote. *See, e.g., Mills v. Alabama*, 384 U.S. 214, 218-20 (1966) (holding that the state cannot prohibit the publication of an editorial on election day urging people to vote a particular way and explaining that "there is practically universal agreement that a major purpose of that [First] Amendment was to protect the free discussion of governmental affairs").

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Like the newspaper editor in *Mills*, the Humane Society expressed political speech before a public vote. The Humane Society entered the marketplace of ideas by publishing its Report, subsequent Press Release, Article, and Updated Report for one reason—to create a more informed electorate. With Missourians set to decide whether to enact a new law in a matter of days, the Humane Society empowered voters with knowledge valuable in making an educated choice at the polling booth. The political objective behind publishing "Missouri's Dirty Dozen" is abundantly clear to readers. The second paragraph of the Report states: "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." (LF 36). Because the statements in the Report are political speech subject to the "highest protection" under the First Amendment, this Court should protect the Humane Society's statements as opinion.

C. Broadly protecting statements of opinion encourages robust speech, spurs societal change, and infuses valuable information into the public sphere.

Protecting opinion is essential in ensuring a flourishing marketplace of ideas. If courts find publishers liable for opinions, the "robust debate among people with different viewpoints that is a vital part of our democracy would surely be hampered." *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995). Stringent

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safeguards for opinion give speakers the security needed to add to public discourse without fear of liability.

Publishers of all types, including amici herein, rely on these broad protections to provide illuminating information to the public. Without expansive safeguards for opinions, "authors of every sort would be forced to provide only dry, colorless descriptions of facts, bereft of analysis or insight." *Id*. at 1154. The ability to freely quote sources, observe and describe events, and disseminate information using opinions is a critical journalistic tool. Reporting on the facts—the who, what, when, and where—is often only the starting point for journalists. Adding creative and illustrative features to the message being disseminated makes journalism compelling to readers and captures aspects of the story that would be absent without opinions.

The preservation of opinion-based speech is important. Often the information provided to the public via opinions is valuable to society because of the specialized knowledge of the speaker. For example, groups like the Humane Society bring special expertise when they opine about the treatment of animals. A columnist for a local newspaper, often with many connections and specific knowledge of the local community, shares critical information with the public when the columnist publishes pieces based on his specialized network. Publications that review and recommend products and services or rate businesses,

such as the Better Business Bureau, rely on tests, research, or consumer evaluations before reaching their opinions, making the conclusions disseminated beneficial to the public. Documentarians and political commentators rely on selective facts to advance ideas and philosophies and inform the populace. In shielding opinions from liability, courts are defending the public's right to receive information from these and many others sources.

Robust protection for opinion also encourages journalists and these other organizations to maintain their role as watchdogs, challenging the status quo and pushing for changes in society. *See Roth v. United States*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."). After all, it was an opinion column by Eileen McNamara that caused then-*Boston Globe* editor Marty Barron to designate resources to thoroughly investigate allegations of sexual abuse by priests in the Catholic Church. *See* Eileen McNamara, *A Familiar Pattern*, THE BOSTON GLOBE (July 22, 2001). The investigation revealed a history of covering up sexual abuses by Church officials, resulting in *The Boston Globe* receiving a Pulitzer Prize in 2003 and inspiring the Oscar-nominated movie *Spotlight*. Strong legal protections for investigative journalism are necessary to encourage publications to commit the

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resources to fund these projects and continue to shine a light on matters of public concern.

Imposing liability on the Humane Society for its Report discussing a pending ballot proposition—which certainly is core political speech—"muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills*, 384 U.S. at 219. A vibrant press is necessary to maintain an educated electorate. Voters rely on the press to be a watchdog over the government, call out corruption, and protect minority voices. *See New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) ("In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governor.") (J., Black, concurring). Decreasing the amount of advocacy and opinion journalism would threaten the amount of information the public can rely on in fulfilling its civic duty in the voting booth. Absent broad protections for the press and organizations like the Humane Society and Better Business Bureaus, the public would be rendered powerless in intelligently advocating for change. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("Without the information provided by the press, most of us and many of our representatives would be unable to vote intelligently.").

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D. Plaintiff's claims are not salvaged by asserting a claim for false light invasion of privacy.

Dismissal of Plaintiff's Petition alleging false light was appropriate for the same reasons that dismissal of her defamation claim was appropriate. Statements of opinion do not lose their constitutional protection simply because a tort is called by a different name. *Seaton*, 728 F.3d at 601 n.9 ("[W]e agree with the district court that Seaton cannot prove falsity, an element of false-light invasion of privacy, because Grand Resort's placement on TripAdvisor's list [of "Dirtiest Hotels"] constitutes protected opinion.").

Moreover, this Court has never seen fit to recognize the false light tort, and this case does not present a viable basis for doing so. *See, e.g., Farrow v. Saint Francis Medical Center*, 407 S.W.3d 579, 600 (Mo. banc 2013) ("This Court has not recognized a cause of action for false light invasion of privacy."); *Nazieri*, 860 S.W.2d at 317 ("declin[ing] to recognize a cause of action for invasion of privacy when recovery is sought for untrue statements"); *Sullivan v. Pulitzer Broadcasting Co*., 709 S.W.2d 475, 481 (Mo. banc 1986) (declining to recognize false-light claim). Certainly, where, as here, a false light claim is "nothing more than the classic defamation action where one party alleges that the other published a false accusation," there is no grounds to even consider recognition of the tort. *Sullivan*, 708 S.W. 2d at 481; *see also Farrow*, 407 S.W.3d at 602 (plaintiff's claim, which

was "seeking to protect her reputation in the outside world," was "more akin to a classic defamation claim rather than a false light invasion of privacy claim" and could only be brought as such.). Because Plaintiff's defamation claim was properly dismissed, so was her false light claim.

CONCLUSION

For the above reasons, *amici curiae* respectfully urge this Court to affirm the trial court's dismissal of this case.

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CERTIFICATE PURSUANT TO RULES 84.06(c) and 84.06(g)

The undersigned counsel for *amici curiae* states:

1) The foregoing brief includes the information required by Rule 55.03, and the attorney signing verifies that he signed and has retained the original signed copy;

2) The foregoing brief complies with the limitations set forth in Mo. R. Civ. P. 84.06(a); and contains 5,941 words according to the word count of the word processing system used to prepare the brief, which is within the applicable limitations in length set forth in Rule 84.06(b).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of February, 2016, a true and accurate copy of the foregoing document was served via the court's electronic filing system, and that a copy was electronically served via email, on:

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