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March 14, 2024

Via Electronic Filing

Clerk of the Supreme Court
201 W. 14th Street
Austin, TX 78701

Re: *Netflix, Inc., NetFliz Worldwide Entertainment, LLC, Kyoko Miyake, Sarit G. Work, Samantha Knowles, Kate Gill, Jigsaw Productions, LLC, and Alex Gibney v. Tonya Barina*, No. 22-0914 pending in the Supreme Court of Texas

Dear Clerk of the Court:

The following entities/organizations wish to file this notice of joinder as additional amici curiae in support of Brief of Proposed Amici Curiae Documentarians, Authors, and Texas Lawyers in Support of Petition for Review.

Statements of Interest:

The amici who join are listed below.

The Freedom of Information Foundation of Texas, Center for Investigative Reporting, The Media Institute, Tully Center for Free Speech, Freedom of the Press Foundation, Motion Picture Association, Inc., The Authors Guild, National Coalition Against Censorship, The Association of American Publishers, Inc., The Association of American Publishers, Inc., National Press Photographers Association, The Freedom to Read Foundation, American Booksellers for Free Expression, News/Media Alliance, First Amendment Foundation, Inc. and The Media Coalition Foundation, Inc. respectfully join as additional Amici Curiae (collectively “Amici”) in support of the Amici Curiae Documentarians, Authors, and Texas Lawyers in Support of Petition for Review. Joining Amici are all organizations that have a heightened interest in and support for investigative reporting in the public interest, the free flow of information and open government and, accordingly, in the correct application of Texas law regarding substantial truth law and defamatory meaning and the rejection of “amorphous” defamation claims, reminiscent of false light, that threaten to chill reporting.

In accordance with Texas Rule of Appellate Procedure 11(c), Amici hereby disclose that no counsel for a party authored this notice of joinder or the underlying brief in whole or in part, and no person other than Amici, their members, or their counsel made a monetary contribution to its preparation or submission. This notice of joinder was commissioned by the following Amici:

The Freedom of Information Foundation of Texas (“FOIFT”) is a non-profit Texas based organization representing a broad spectrum of Texas citizens concerned about the free flow of information and dedicated to open government. Since its founding in 1978, FOIFT's mission has been to serve as a statewide clearinghouse of information on open government and First Amendment issues and to take action in the public interest on open government and First Amendment problems. FOIFT has not received nor will receive any fee for preparing this brief. Counsel for this entity is Joseph R. Larsen.

Center for Investigative Reporting: The Center for Investigative Reporting is the nation’s oldest nonprofit investigative newsroom in the country that runs the brands Mother Jones, Reveal, and CIR Studios. Mother Jones is a reader-supported news magazine and website known for groundbreaking investigative and in-depth journalism on issues of national and global significance. Reveal produces investigative journalism for the Reveal national public radio show and podcast, and CIR Studios produces feature length documentaries distributed on Netflix, Hulu and other streaming channels. Reveal often works in collaboration with other newsrooms across the country.

The Media Institute: The Media Institute is a nonprofit foundation specializing in communications policy issues. The Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. The Media Institute is one of the country’s leading organizations focusing on the First Amendment and speech-related issues.

Tully Center for Free Speech: The Tully Center for Free Speech began in Fall, 2006, at Syracuse University’s S.I. Newhouse School of Public Communications, one of the nation’s premier schools of mass communications.

Freedom of the Press Foundation (FPF): FPF is a non-profit organization that protects, defends, and empowers public-interest journalism. FPF regularly advocates against and participates in legal proceedings to oppose legislation, government policies and judicial orders that violate the First Amendment and undermine press freedoms.

Motion Picture Association, Inc. (“MPA”): MPA is a not-for-profit trade association founded in 1922. The MPA serves as the voice and advocate of the film and television industry, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and supporting the creative ecosystem that brings entertainment and inspiration to audiences worldwide.

The Authors Guild: The Author’s Guild was founded in 1912 and is a national non-profit association of more than 13,000 professional, published writers of all genres. The Guild counts historians, biographers, academicians, journalists, poets, translators, and other writers of non-fiction and fiction as members. The Guild works to promote the rights and professional interest of authors in various areas, including copyright, fighting censorship, and taxation. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business, and other areas; they are frequent contributors to the most influential and well-respected publications in every field. One of the Authors Guild’s primary areas of advocacy is to protect the free expression rights of authors.

National Coalition Against Censorship (“NCAC”) is an alliance of 60 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. NCAC works to protect the First Amendment rights of artists, authors, students, readers, and the general public. Since its founding, it has had a special interest in supporting artistic expression that is threatened with suppression because of its sexual content. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

The Association of American Publishers (“AAP”):

AAP is a not-for-profit organization that represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. AAP’s member includes approximately 130 individual members, who range from major commercial book and journal publishers to small, non-profit, university, and scholarly presses, as well as leading publishers of educational materials and digital learning platforms. AAP’s members publish a substantial portion of the general, educational, and religious books produced in the United States in print and digital formats, including critically acclaimed, award-winning literature for adults, young adults, and children. AAP represents an industry that not only depends upon the free exercise of rights guaranteed by the First Amendment, but also exists in service to our Constitutional democracy, including the unequivocal freedoms to publish, read, and inform oneself.

National Press Photographers Association (“NPPA”): NPPA is a 501(c)(6) not-for-profit organization dedicated to the advancement of visual journalism in its creation, editing, and distribution. NPPA’s members include video and still photographers, editors, students, and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the Voice of Visual Journalists, vigorously promoting the constitutional and intellectual property rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

The Freedom to Read Foundation (“FTRF”): FTRF is an organization established to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

American Booksellers for Free Expression (“ABFE”): American Booksellers for Free Expression is the free speech initiative of the American Booksellers Association (“ABA”). ABA was founded in 1900 and is a national not-for-profit trade organization that works to help independently owned bookstores grow and succeed. ABA represents 2,474 bookstore companies operating in 2,881 locations. ABA’s core members are key participants in their communities’ local economy and culture. To assist them, ABA provides education, information dissemination, business products, and services; creates relevant programs; and engages in public policy, industry, and local first advocacy.

News/Media Alliance: News Media Alliance represents the newspaper, magazine, and digital media industries, including nearly 2,200 diverse news and magazine publishers in the United States and internationally. It is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

First Amendment Foundation, Inc. is a 501(c)(3) tax-exempt, non-profit organization created to ensure government openness and transparency by providing education and training, monitoring open records and meetings laws, and assisting citizens and journalists in obtaining access to government information and proceedings. Amicus has a strong interest in this proceeding because it, and the citizens and journalists it supports, all routinely exercise their First Amendment rights by promoting and engaging in speech on matters of public concern that must be free from the chilling fear of prosecution.

The Media Coalition Foundation, Inc.: Media Coalition Foundation, Inc. monitors potential threats to free expression, and engages in litigation and education to protect free speech rights, as guaranteed by the First Amendment.

Amici have no personal or financial interest in the subject matter of the case. All fees for preparation of this amicus curiae notice of joinder letter have been paid for by amici. All text has been prepared by amici.

The Amicus Curiae brief filed previously by Documentarians, Authors, and Texas Lawyers thoroughly presents the legal issues and policy concerns that amici have in this case. Because that brief is so comprehensive and well stated, the above amici hereby join the arguments in that brief and adopt them as their own.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 14, 2024, this Letter of Joinder of Amici was served on counsel of record by electronic service:

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No. 22-0914

IN THE SUPREME COURT OF TEXAS

NETFLIX, INC., *et al.*,
Petitioners,

v.

TONYA BARINA,
Respondent.

On Motion for Rehearing of Denial of Petition for Review
From Case No. 04-21-00327-CV, in the Court of Appeals
for the Fourth District of Texas at San Antonio

**BRIEF OF PROPOSED AMICI CURIAE DOCUMENTARIANS,
AUTHORS, AND TEXAS LAWYERS
IN SUPPORT OF MOTION FOR REHEARING OF
DENIAL OF PETITION FOR REVIEW**

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Identities of Amici	1
Statement of the Case.....	5
Statement of Jurisdiction.....	5
Issues Presented	5
Introduction and Interest of Amici.....	6
Argument.....	9
I. The “gist” analysis in the Court of Appeals’ opinion, finding potential liability when a documentary included no false statements, creates untenable uncertainty for documentarians and others exercising their First Amendment rights and improperly infringes on protected editorial judgment	9
II. There is no “endorsement” exception to Texas’ third-party allegation statute.....	15
Conclusion and Prayer	18
Certificate of Compliance	19
Certificate of Service	20

TABLE OF AUTHORITIES

<i>Cases</i>	<u>Page</u>
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964).....	15
<i>Bentley v. Bunton</i> , 94 S.W.3d 561 (Tex. 2002).....	11
<i>Cain v. Hearst Corp.</i> , 878 S.W.2d 577 (Tex. 1994).....	14-15
<i>Dallas Morning News, Inc. v. Hall</i> , 579 S.W.3d 370 (Tex. 2019).....	16
<i>Dallas Morning News, Inc. v. Tatum</i> , 7554 S.W.3d 614 (Tex. 2018).....	12
<i>Greenbelt Cooperative Publishing Assn., Inc. v. Bresler</i> , 398 U.S. 6 (1970).....	11
<i>Hailey v. KTBS, Inc.</i> , 935 S.W.2d 857 (Tex. App. – Texarkana 1996, no pet.).....	11
<i>Hollywood Unlocked, Inc. v. Lifetime Entm't Servs., LLC</i> , No. 220-CV-11273-MCSRAO, 2021 WL 3265037 (C.D. Cal. Mar. 17, 2021)...	7
<i>In re Lipsky</i> , 460 S.W.3d 579 (Tex. 2015).....	9
<i>Lilith Fund for Reproductive Equity v. Dickson</i> , 662 S.W.3d 355 (Tex. 2023).....	10-11
<i>Mattel, Inc. v. MCA Records, Inc.</i> , 296 F.3d 894 (9th Cir. 2002).....	11
<i>Miami Herald Pub. Co. v. Tornillo</i> , 418 U.S. 241 (1974).....	13

<i>Netflix, Inc. v. Barina</i> , 2022 WL 3908540 (Tex. App. – San Antonio Aug. 31, 2023, pet. filed).....	9, 13, 16
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	8
<i>New Times, Inc. v. Isaacks</i> , 146 S.W.3d 144 (Tex. 2004).....	10
<i>Pittsburgh Press Co. v. Human Relations Comm’n</i> , 413 U.S. 376 (1973).....	13
<i>Rosenblatt v. Baer</i> , 383 U.S. 755 (1966).....	11
<i>Sarver v. Chartier</i> , 813 F.3d 891 (9th Cir. 2016).....	7
<i>Stolatis v. Hernandez</i> , 161 A.D.3d 1207 77 N.Y.S.3d 473 (2018).....	10
 Statutes	
TEX. CIV. PRAC. & REM. CODE § 7.005(b)	16
 Other Authorities	
Paige Gold, <i>Fair Use and the First Amendment: Corporate Control of Copyright Is Stifling Documentary-Making and Thwarting the Aims of the First Amendment</i> , 15 U. BALT. INTELL. PROP. L.J. 1 (2006)	8
Paul Jenkins, “Why Are Documentaries Popular? Exploring the Rise of Non- Fiction Filmmaking,” BRILLIANTIO.COM, June 1, 2023 (available at https://brilliantio.com/why-are-documentaries-popular-exploring-the-rise-of- non-fiction-filmmaking/).....	8

Devin Monk, “Texas Film, Video Game Industries in the Spotlight,” *Fiscal Notes*, August 2023, available at <https://comptroller.texas.gov/economy/fiscal-notes/archive/2023/aug/film.php> 7

IDENTITIES OF AMICI

Lawrence Wright is an author and journalist. He won the Pulitzer Prize for General Non-Fiction for his book, *The Looming Tower: Al-Qaeda and the Road to 9/11*. Wright's book *Going Clear: Scientology, Hollywood, and the Prison of Belief*, was adapted into a documentary that won three Primetime Emmy Awards. His book *God Save Texas* is the basis for a three-part documentary series that premiered in January 2024. Wright is a longtime Austin resident.

Rick Linklater is a Texas film screenwriter, director, and producer. Linklater wrote, directed, and produced the iconic Texas film *Dazed and Confused* and has directed numerous feature films, including *Boyhood*, for which he won a Golden Globe Award for directing. He is also a documentarian who directed an episode of *God Save Texas*.

Alex Stapleton is a documentary film and television director, producer, and showrunner. She directed an episode of *God Save Texas* focusing on her family in Houston. Stapleton received an Emmy Award for her work on the PBS documentary series, *SoCal Connected*.

Iliana Sosa is a Texas documentary and narrative-fiction filmmaker. She directed *What We Leave Behind*, a documentary about her grandfather building a home in Mexico for his family that lives on both sides of the Rio Grande. The documentary provides a glimpse of a familial connection common among many Texans living along the United States-Mexico border. She also directed an episode of *God Save Texas* exploring her Mexican heritage and her hometown of El Paso.

Peter Elkind is a Texas investigative journalist who has served as associate editor at *Texas Monthly* and editor at the *Dallas Observer*. Elkind co-authored *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron*, which was adapted into an Academy Awarded nominated documentary.

Frank Marshall is a film director and producer. He has directed and produced several documentaries, including co-directing the Grammy Award winning documentary *Jazz Fest: A New Orleans Story*. Marshall has produced film franchises such as *Indiana Jones*, *Back to the Future*, and *Jurassic World*. He has received an Emmy Award, Grammy Award, Academy Award, and Tony Award.

Morgan Neville is a film writer, director, and producer. Neville won the Academy Award for Best Documentary Feature for his film *20 Feet from Stardom*. Neville's

film *Won't You Be My Neighbor?*, a documentary about Fred Rogers, received wide critical and popular acclaim.

Judd Apatow is an award-winning film screenwriter, director and producer. Apatow has produced many critically acclaimed television series and films, including the films *Superbad*, *Bridesmaids*, and *The Big Sick*. Apatow has also directed several documentaries, including *Doc and Darryl* and *The Zen Diaries of Garry Shandling*.

Fisher Stevens is a film actor, writer, director, and producer. In addition to his multiple feature film, stage, and television credits as an actor, he won an Academy Award for Best Documentary Feature for *The Cove*, a documentary he produced about dolphin-hunting practices in Japan, and also directed the documentaries *Crazy Love* and *Before the Flood*.

Davis Guggenheim is a film screenwriter, director, and producer. Guggenheim directed and produced the documentary *An Inconvenient Truth*, which won the Academy Award for Best Documentary Feature. He has received awards and nominations for other documentaries, including *Waiting for "Superman"*, *He Named Me Malala*, and *Still: A Michael J. Fox Movie*.

Ezra Edelman is a documentary film director and producer. He won the Academy Award for Best Documentary Feature and the Primetime Emmy Award for Outstanding Directing for Nonfiction Programing for directing *O.J.: Made in America*.

Robert Kenner is a film and television writer, director, and producer. Kenner wrote, directed, and produced *Food, Inc.*, a documentary film that examined the industrialization of the American food system. *Food, Inc.* won two News & Documentary Emmy Awards and was nominated for the Academy Award for Best Documentary Feature.

Raoul Peck is a feature and documentary film writer, director, and producer. Peck's documentary, *I Am Not Your Negro*, which follows the life of James Baldwin, received an Emmy Award for Outstanding Arts and Culture Documentary and an Academy Award nomination for Best Documentary Feature.

Steve James is a documentary film director and producer. James has created numerous documentaries, including *Abacus: Small Enough to Jail*, which earned him an Academy Award nomination for Best Documentary Feature.

Amy Berg is a documentary filmmaker. Berg directed *Janis: Little Girl Blue*, a documentary about Texas legend Janis Joplin. Berg's other work includes *Deliver Us From Evil*, a documentary that was nominated for the Academy Award for Best Documentary Feature.

Sheila Nevins is a television producer and current head of the MTV Documentary Films division of MTV Studios. Nevins previously was the President of HBO Documentary Films. Nevins has won more than thirty Primetime Emmy Awards.

Matthew Heineman is a documentary film director and producer. Heineman's documentary, *Cartel Land*, which documents vigilante groups fighting drug cartels along both sides of the United States-Mexico border, earned Heineman three Primetime Emmy Awards among numerous other awards and nominations.

Marina Zenovich is a documentary filmmaker who specializes in biographical documentaries. Her film *Roman Polanski: Wanted and Desired* won the Primetime Emmy Awards for Outstanding Directing for Nonfiction Programming and Outstanding Writing for Nonfiction Programming.

Alexis Bloom is a documentary film director and producer. Bloom has produced episodes of the PBS series *Frontline*, and her directorial credits include the documentary *Bright Lights: Starring Carrie Fisher and Debbie Reynolds*.

Rory Kennedy is a documentary film director and producer. She directed and co-produced *Ghosts of Abu Ghraib*, which won the Primetime Emmy Award for Best Documentary. Kennedy has directed and produced multiple documentaries including *The Fence*, *Last Days in Vietnam*, and *Downfall: The Case Against Boeing*.

Stephen Harrigan is a Texas journalist, novelist, and screenwriter. Harrigan authored the bestseller *The Gates of the Alamo*, and his novel *Remember Ben Clayton* received multiple awards including the Jesse H. Jones Award from the Texas Institute of Letters. A longtime Austin resident, Harrigan has also written extensively for *Texas Monthly* magazine.

Evan Smith has served as editor of *Texas Monthly* and is the co-founder and senior adviser at *The Texas Tribune*. He hosts the interview program *Overheard with Evan Smith*, produced in Austin by KLRU and airing nationally on PBS stations.

Gregory Curtis is an author and editor who served as editor-in-chief of *Texas Monthly* magazine for nineteen years. His books include *Disarmed: The Story of Venus DeMilo* and *The Cave Painters*.

Patrick Radden Keefe is an award-winning writer and investigative journalist. He is a staff writer at *The New Yorker* magazine and has authored several books, including *New York Times* bestsellers *Rogues: True Stories of Grifters, Killers, Rebels, and Crooks* and *Empire of Pain: The Secret History of the Sackler Dynasty*.

Jane Mayer is a staff writer for *The New Yorker*. Her books include *The Dark Side* and *Dark Money*. Her writing has garnered multiple awards, including the John Chancellor Award for Excellence in Journalism and the George Polk Award for Magazine Reporting.

Joshua J. Bennett and **E. Leon Carter**, and the lawyers at Carter Arnett PLLC, represent both plaintiffs and defendants in defamation actions and First Amendment litigation, and have litigated Texas' Anti-SLAPP statute across the State.

Amici have no direct financial interest in the outcome of this litigation. Counsel for Amici are to be paid by Amicus Carter Arnett PLLC for the preparation of this brief.

STATEMENT OF THE CASE

Amici agree with and adopt the Statement of the Case set forth in Petitioners' Brief on the Merits at page ix.

STATEMENT OF JURISDICTION

Amici agree with and adopt the Statement of Jurisdiction set forth in Petitioners' Brief on the Merits at page x.

ISSUES PRESENTED

Amici agree with and adopt the Statement of Issues Presented set forth in Petitioners' Brief on the Merits at page xi. Amici believe that every issue presented in this case is important to the State's jurisprudence, and herein address two issues of particular importance to them as documentary filmmakers and nonfiction authors.

First, the notion that a viable defamation claim can be made against a documentary that includes no false statements – built on a subjective, nebulous assessment of a film's "gist" based on exercise of editorial judgments like choice of background music and camera angles – is likely to result in a substantial chill on First Amendment-protect activity addressing important public issues.

Second, the importation of an "endorsement" exception to Texas' statutory protection conferred upon accurate reporting of third-party allegations undermines the statute's purpose by introducing unpredictability as to whether the protection applies, again leading to a chilling effect on constitutionally protected speech.

INTRODUCTION AND INTEREST OF AMICI

Amici include more than two dozen acclaimed filmmakers and authors, among them multiple Oscar and Emmy winners and nominees for producing and directing documentary films. Many are Texans and are responsible for documentaries focused on this State. Lawyers with a Texas law firm that represents both plaintiffs and defendants in defamation and other First Amendment cases also join as amici.

Amici are gravely concerned that if the Court of Appeals' decision is allowed to stand, documentarians and nonfiction authors may be subject to substantially increased risk of lawsuits – and that even suits without ultimate merit will survive dismissal motions under Texas' anti-SLAPP statute, forcing incurrence of substantial legal fees to defend core First Amendment rights. Amici also worry that the specter of costly and time-consuming litigation may result in fewer documentaries produced in the State, depriving the public of in-depth examination of important issues, or that documentarians may hesitate to incorporate controversial content or strong points of view. Even the most intrepid documentarian – and they are a courageous bunch – will have to consider the risks involved, particularly with films that focus on or feature Texas and Texans, even when every statement in a film is accurate.

Documentaries play an important role in Texas’ film industry. According to the Texas Comptroller’s Office, “more than 210 feature film, commercial and television production companies claim Texas as their home.”¹ The economic impact of participants in the Texas Moving Image Industry Incentive Program “have generated \$1.95 billion in economic impact with a 504 percent return on investment from 2007 to 2022, according to the Texas Film Commission.”² But if the Court of Appeals’ opinion, as it stands, makes Texas less hospitable to documentarians and other filmmakers.

Documentarians are among “the storytellers and artists who take the raw materials of life – including the stories of real individuals, ordinary or extraordinary – and transform them into art, be it articles, books, movies, or plays,” and whose work “[t]he First Amendment safeguards.”³ “While film technology may have been unknown to the Framers of the Constitution, the messages communicated by documentary films are part of the robust public dialogue that the First Amendment was designed to protect. Whether objective or subjective, aiming at illumination or persuasion, the messages that documentaries impart are all in keeping with our

¹ Devin Monk, “Texas Film, Video Game Industries in the Spotlight,” *Fiscal Notes*, August 2023, available at <https://comptroller.texas.gov/economy/fiscal-notes/archive/2023/aug/film.php>.

² *Id.*

³ *Hollywood Unlocked, Inc. v. Lifetime Entm’t Servs., LLC*, No. 220-CV-11273-MCSRAO, 2021 WL 3265037, at *3 (C.D. Cal. Mar. 17, 2021) (quoting *Sarver v. Chartier*, 813 F.3d 891, 901 (9th Cir. 2016)) (internal quotations omitted).

system’s ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’”⁴ “[D]ocumentaries provide a unique perspective on real-life events and issues, allowing us to learn about the world beyond our own experiences.”⁵

The Court of Appeals’ opinion, in accepting Plaintiff’s claims as viable, undermines documentaries’ constitutional protection and value to society. The impressive list of documentarians and nonfiction authors joining this Brief demonstrates the serious nature of this case among their community. Amici urge the Court to reconsider its denial of Petitioners’ petition for review, grant the petition, and reverse the Court of Appeals’ judgment.

⁴ Paige Gold, *Fair Use and the First Amendment: Corporate Control of Copyright Is Stifling Documentary-Making and Thwarting the Aims of the First Amendment*, 15 U. Balt. Intell. Prop. L.J. 1, 36 (2006) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

⁵ Paul Jenkins, “Why Are Documentaries Popular? Exploring the Rise of Non-Fiction Filmmaking,” Brilliantio.com, June 1, 2023 (available at <https://brilliantio.com/why-are-documentaries-popular-exploring-the-rise-of-non-fiction-filmmaking/>).

ARGUMENT

I. The “gist” analysis in the Court of Appeals’ opinion, finding potential liability when a documentary included no false statements, creates untenable uncertainty for documentarians and others exercising their First Amendment rights and improperly infringes on protected editorial judgment.

The starting point in evaluating a defamation claim is identification of the speaker’s allegedly false statements.⁶ But Barina here does not claim that the *Guardians, Inc.* documentary included *any* false statements of facts. Her claim is instead based on the allegation that the film “juxtaposed certain facts and omitted other to ‘paint a picture’ accusing Tonya” of “multiple crimes ... without explicitly saying so.”⁷ In accepting this characterization, the Court of Appeals’ opinion misconstrued and unduly broadened this Court’s precedent on defamation by implied “gist.”

Both Plaintiff and the opinion below misinterpret the film’s gist. The Court of Appeals writes that “falsely accusing someone of committing a crime (e.g., exploitation) is defamatory per se,” and that the documentary “clearly states its thesis: ‘Guardianship exploitation is the crime of the twenty-first century.’”⁸ Barina alleges that a “reasonable person also could perceive the episode as accusing Tonya

⁶ See, e.g., *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (“publication of a false statement of fact to a third party” is an essential element of a defamation claim).

⁷ Respondent’s Brief on the Merits at 25.

⁸ *Netflix, Inc. v. Barina*, 2022 WL 3908540 at *4 (Tex. App. – San Antonio Aug. 31, 2023, pet. filed).

of criminal conduct,” citing among other things one interviewee’s statement that “I believe it was a crime” and another’s query as to why “our society” doesn’t “recognize” that exploitation in the context of adult guardianships “is theft – and theft is a crime?”⁹

But the reasonable reader (or viewer, in this case)¹⁰ would not infer that the film accuses Barina of actual criminal conduct. The gist of the documentary is that *fully legal* conduct can still exploit the ward – morally if not legally – in ways enumerated by Petitioners, including the receipt of substantial compensation from the ward’s estate for serving as guardian and being paid commissions for liquidation of the ward’s assets. The courts’ approval of Barina’s actions as guardian is not evidence of defamation, but rather is consistent with the filmmakers’ thesis. In this context, the reasonable reader or viewer would not interpret the word “crime” as an accusation of literal prosecutable criminal misconduct, but rather as figurative rhetorical hyperbole. This Court recently recognized that calling a group a “criminal

⁹ Respondent’s Brief on the Merits at 22, 24. Respondent’s Brief uses the words “crime” and “crimes” no fewer than 33 times, often repeating twice the same quotations including the word.

¹⁰ Here, like this Court noted in *New Times, Inc. v. Isaacks*, “[t]he court of appeals has underestimated the ‘reasonable reader.’” 146 S.W.3d 144, 157 (Tex. 2004). “[T]he hypothetical reasonable person ... is no dullard. He or she does not represent the lowest common denominator, but reasonable intelligence and learning. ... The person of ‘ordinary intelligence’ ... is a prototype of a person who exercises care and prudence, but not omniscience, when evaluating allegedly defamatory communications. The appropriate inquiry is objective, not subjective. Thus, the question is not whether some actual readers” inferred false and defamatory statements of fact from the challenged speech, “but whether the hypothetical reasonable reader” would. *Id.* (internal quotations and citations omitted).

organization” was not a literal accusation of a crime, rejecting a defamation claim based on that characterization. *Lilith Fund for Reproductive Equity v. Dickson*, 662 S.W.3d 355 (Tex. 2023). *See also, e.g., Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 908 (9th Cir. 2002) (terms “bank robber,” “heist,” “crime” and “theft” are nonactionable “rhetorical hyperbole”); *Stolatis v. Hernandez*, 161 A.D.3d 1207, 1208–09, 77 N.Y.S.3d 473, 475–76 (2018) (referring to the plaintiff’s actions in demolishing a building as a “crime” was opinion or rhetorical hyperbole and thus could not form the basis of a libel suit, citing *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 14 (1970)).

Guardians, Inc. posits that a guardian’s conduct can be held legitimate by courts and simultaneously be exploitive. Such critique of the government-operated adult guardianship system is political speech at the core of First Amendment protection. *See, e.g., Bentley v. Bunton*, 94 S.W.3d 561, 608 (Tex. 2002) (“[I]t is as much” the duty of the “citizen-critic ... to criticize as it is the [government] official’s duty to administer”) (Phillips, J. concurring and dissenting in part); *Hailey v. KTBS, Inc.*, 935 S.W.2d 857, 859 (Tex. App. – Texarkana 1996, no pet.) (“Criticism of government is at the very center of the constitutionally protected area of free discussion.” (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966))). And the examination of Barina’s conduct serves as an illustration of the overarching issue, as is often done in documentaries; Barina errs by arguing that every allegation of

irregularity in the adult guardianship system – even those that involve other cases or are general observations – contributes to the alleged defamation against her. *See, e.g., Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 636-37 (Tex. 2018) (gist of article was society’s attitudes toward suicide, not the plaintiffs’ actions, which were an illustration of the larger issue).

Barina argues, and the courts below accepted, that the filmmakers’ decision to omit facts about people other than Barina somehow resulted in defamatory implications about Barina. She maintains that the documentary should have, but did not, include details about court findings against her adversaries in the guardianship litigation. This premise suffers from at least two fatal flaws. First, as a matter of logic, omission of material critical of other people cannot convert truthful statements about Barina’s actions as guardian into false implications. Second, Barina’s argument amounts to an assertion that the documentary was obligated to focus on the dispute between her and her opposing parties and to affirm that she prevailed (and that her opponents committed misconduct). But the filmmakers were free to make a documentary with a broader focus, in which the alleged litigation wrongdoing of the parties opposing Barina is simply not relevant. If Barina had her way, libel plaintiffs and courts – not documentarians – could effectively exercise editorial control over the content of nonfiction films, which would result in plain-vanilla stenographic-like accounts without specific viewpoints and that dare not

question the decisions of government officials. But control of editorial decisions must rest with the speakers (here, the filmmakers); undue intrusion into the editorial process raises serious First Amendment implications. *See, e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (“[W]e reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views,” quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 391 (1973)); *id.* at 258 (“It has yet to be demonstrated how governmental regulation of this crucial [editorial] process can be exercised consistent with First Amendment guarantees”).

At least equally troubling is Barina’s and the Court of Appeals’ reliance on aesthetic editorial choices made by the filmmakers (none of which involved a false statement) in supporting the “false gist” narrative. The Court of Appeals’ opinion bases its conclusion in part on camera angles: “When Barina speaks, the camera zooms in on her hands and feet to show fidgeting but does not give the same visual treatment to” Barina’s litigation opponents.¹¹ Again, how the filmmakers did or did not choose to include content regarding persons *other than Barina* cannot constitute a false implication *about Barina*. More fundamentally, an editorial choice to include a true and accurate depiction is constitutionally protected. The Court of Appeals’ opinion can be read to impose some requirement – the contours of which are unclear

¹¹ *Netflix v. Barina* at *5.

– that certain camera angles cannot be used, or that the same type of camera angle must be used when portraying opposing parties, if a filmmaker wants to avoid a plaintiff claiming (and a court endorsing) that the depiction creates a “false gist” that can support a defamation claim.

Plaintiff herself goes even further, claiming that the use of “foreboding music” playing while a “photo of her scowling” is displayed is “disparate editing treatment” contributing to the alleged false and defamatory gist.¹² Again, nothing false here – if images of Barina “scowling” were used, it is because she was in fact scowling at the time the image was captured.

This Court should not endorse the policing by litigants, courts, and ultimately juries of whether a camera angle is sufficiently flattering or whether a music choice is too “foreboding.” The Court of Appeals’ vague and unworkable “gist” analysis misapplies this Court’s precedent that employs such an inquiry in only limited circumstances. As both Petitioners and previous amici pointed out, the opinion below departs from the doctrinally solid inquiry employed to analyze defamation claims and drifts dangerously close to the territory of the discredited “false light” tort, rejected by this Court thirty years ago. The Court in *Cain v. Hearst Corp.* declined to recognize false light in part because its elements “fail[] to draw reasonably clear lines between lawful and unlawful conduct ‘A law forbidding

¹² Respondent’s Brief on the Merits at

or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process.’
.... Thus, the uncertainty of not knowing what speech may subject the speaker or writer to liability would have an unacceptable chilling effect on freedom of speech.”¹³ So too here: there can be no guidelines as to when an accurate depiction of a person “fidgiting” can be transformed into a false actionable implication that the person engaged in wrongdoing.

The Court of Appeals’ opinion should not stand. Amici urge that this Court reconsider the denial of the petition for review, grant the petition, reverse the Court of Appeals, and render judgment in favor of Petitioners.

II. There is no “endorsement” exception to Texas’ third-party allegation statute.

The Court of Appeals’ opinion legally errs by creating an exception to Texas’ statutory protection afforded to accurate reports of third-party allegations on matters of public concern. The opinion purports to rely on this Court’s precedent, but the cited authority decidedly does not recognize any such extra-statutory exception. This Court should correct the lower court’s error before that court’s anti-textual exception is more broadly adopted.

The statute at issue is straightforward and unqualified:

¹³ *Cain v. Hearst Corp.*, 878 S.W.2d 577, 584 (Tex. 1994), quoting *Baggett v. Bullitt*, 377 U.S. 360 (1964).

In an action brought against a newspaper or other periodical or broadcaster, the defense described by Subsection (a) applies to an accurate reporting of allegations made by a third party regarding a matter of public concern.

Tex. Civ. Prac. & Rem. Code § 7.005(b). The Court of Appeals engrafted an exception to the statute in holding that it did not protect Petitioners:

However, the third-party allegation rule requires that the media outlet not take the additional step of adopting or endorsing the allegations. ... [The alleged] adoption of the allegations disqualifies the Media Appellants from relying on the third party allegation rule as a defense.

Netflix v. Barina at *6 (citation omitted). The sole citation provided by the court for this supposed “disqualification” is this Court’s opinion in *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 380 (Tex. 2019). But the *Hall* opinion says nothing of the sort; it does not even use the words “adopt,” “endorse,” “disqualify,” or any derivative of those words in discussing the statute. The Court of Appeals wove this alleged exception to an unambiguous statute out of whole cloth.

What’s more, the Court of Appeals’ opinion reached its erroneous conclusion that Petitioners were “disqualified” through its subjective, nebulous “gist” analysis. The film does not contain any statement that actually endorses or adopts the allegations of any party portrayed in it. Rather, because the Court of Appeals determined through its vague analysis that the “gist” of the documentary was false and defamatory because it accused Barina of a crime, the Petitioners forfeited the protection of the third-party allegation statute.

To call this result troubling is an understatement. The Legislature determined that reporting of allegations regarding matters of public concern is valuable to Texas citizens and adopted a statutory privilege for such reporting, without qualification. Under the Court of Appeals’ analysis, documentarians, authors, reporters, and anyone else creating speech about matters of public concern cannot report newsworthy allegations made by third parties without the danger that a court may determine, through a “gist” analysis, that the speech somehow “adopts” or “endorses” the allegations, thus forfeiting the statutory protection. This Court’s precedent applying a gist analysis is properly limited to the speech of the *defendant*, not alleged adoption of accurately reported third-party allegations. The Court of Appeals’ acceptance of a non-statutory exception would seriously undermine the Legislature’s intent, as evidenced by the statute’s plain language, to protect the exact type of speech featured in *Guardians, Inc.*¹⁴

Even Barina appears to recognize that the Court of Appeals’ analysis is flawed. Despite the opinion’s clear statement that Petitioners had been “disqualified” from relying on the third-party allegation statute as a defense because

¹⁴ This Court has before it another case in which the petitioner asks the Court to recognize the same exception to the statutory third-party allegation rule created by the Court of Appeals in this case. The petitioner in *Bennett v. Monacelli*, No. 22-1013, characterized the issue presented there as whether Section 73.005(b)’s protection applies when the speaker “goes beyond merely restating a third party’s allegations and instead adopts a gist that the substance of the allegations is true.” Petition for Review, No. 22-1013, at page vii. The Court denied the petition for review on January 26, 2024, and the petitioner has received an extension for the filing of a motion for rehearing until March 13, 2024.

they had allegedly adopted or endorsed the allegations, Barina’s Brief on the Merits attempts to defend the opinion by asserting that the court “simply noted that Netflix failed to report the accusations as third-party allegations and thus does not fall under the statute’s protection.”¹⁵ She argues that the film did not adequately attribute the allegations to third parties. But the Court of Appeals’ opinion does not say this, and the argument is meritless: the third parties made their allegations *while on camera*. Surely there can be no clearer attribution of an allegation than to show a third party actually making it.

The Court of Appeals erred in adopting an exception untethered to the statutory text. Correction is important to the state’s jurisprudence. The Court should take this opportunity to bring clarity before the opinion below sows unnecessary confusion.

CONCLUSION AND PRAYER

Amici urge this Court to grant Petitioner’s motion for rehearing, grant review, reverse the Court of Appeals’ decision, and render judgment for Petitioners.

¹⁵ Respondent’s Brief on the Merits at 32.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4(i)(3), I certify that the foregoing document complies with the word count limitations set out in TEX. R. APP. P. 9.4(i). It contains 3,068 words, excluding any parts exempted by TEX. R. APP. P. 9.4(i)(1). In making this Certificate of Compliance, I am relying on the word count provided by the software used to prepare the document. This is a computer-generated document created in Microsoft Word, using 14-point Times New Roman typeface for body text and 12-point Times New Roman typeface for footnotes.

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Status as of 2/26/2024 3:40 PM CST

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