No. 01-04-00231-CV

IN THE COURT OF APPEALS

FOR THE FIRST DISTRICT OF TEXAS

AT HOUSTON

HARVEST HOUSE PUBLISHERS, JOHN ANKERBERG,
and JOHN WELDON

v.

THE LOCAL CHURCH, ET AL.

On appeal from the 8th Judicial District Court
Harris County, Texas

BRIEF OF AMICUS CURIAE, NATIONAL RELIGIOUS BROADCASTERS

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Oral Argument Requested

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Amicus Curiae is National Religious Broadcasters ("NRB"), a non-profit, private association, with its principal offices located at 9510 Technology Drive, Manassas, Virginia, 20110. It also maintains offices on Capitol Hill, at 119 C Street, S.E., Washington, D.C. 20003.

Further details on the mission of NRB and its particular interest in this litigation are set forth below. See: Interest of the Amicus Curiae.

Counsel for Amicus Curiae, NRB, is Craig L. Parshall, Esq. , Law Office of Craig L. Parshall, 32 Waterloo St., STE 109, Warrenton, VA 20186. Attorney Parshall is licensed to practice law in the State of Virginia, VSB # 38028. Attorney Parshall is also licensed to practice before the United States Supreme Court, and the United States Courts of Appeal for the Second, Third, Fourth, Fifth, Seventh, Tenth and District of Columbia Circuits, and *inter alia*, in the United States

District Court for the Northern District of Texas. Mr. Parshall has been granted *pro hac vice* admission by this Court to participate in this appeal.

All fees for the preparation and filing of this brief have been paid by Amicus Curiae, NRB.

INTEREST OF AMICUS CURIAE

NRB is an association for Christian media and Christian communicators. As an association, NRB has three primary functions: (1) to facilitate the spread of the Christian gospel; (2) to positively impact culture through the encouraging and enabling of sound biblical teaching; and (3) to preserve religious freedom by keeping the doors of Christian media, and particularly the electronic media, open for the spread of the Christian gospel.

NRB has one thousand five hundred and eighty four organizational members. Of those, seven hundred and fifty one (or forty seven percent) are comprised of radio stations and radio networks, and television stations and television networks. The remaining eight hundred thirty three organizational members (or fifty one percent) are made up of publishing companies, media arts groups, and a variety of ministries, including religious teaching and preaching entities and groups that emphasize the true biblical doctrines of the Christian faith and which defend them against unbiblical teachings and practices through a variety of communication media ("apologetics").

Appellants Harvest House Publishers and John Ankerberg are members of NRB.

One hundred and fifty three of NRB's organizational members have offices in, and operate from, the State of Texas.

Because of NRB's commitment to the preservation of the fullest possible freedom of religion and freedom of speech for broadcast and publishing organizations which seek to spread the Christian gospel, as well those which also seek to expose what they believe to be aberrant, heretical, or unorthodox religious teachings, the case at bar is of particular interest to Amicus Curiae, NRB.

Ill-advised, or over-expansive legal doctrines for defamation liability of media defendants, and especially those that arise from defamation actions for religious expression, carry a grave potential for constitutional damage, for restriction of First Amendment liberties, and for a constriction of the free-flow of information and ideas in the religious realm.

For these reasons, and for those more particularly set out in the foregoing Brief of Amicus Curiae, National Religious Broadcasters, NRB has a heightened interest in the outcome of this litigation.

SUMMARY OF THE ARGUMENT

Amicus Curiae, National Religious Broadcasters, contends that the *Encyclopedia* at issue merely addresses The Local Church regarding its theological doctrines, and never alleges any reprehensible conduct against them.

The publisher and its authors have sufficiently demonstrated that no language in the book actually defamed The Local Churches, nor attributes negative conduct against them. The Local Churches, in an attempt to raise a factual issue so as to preclude summary judgment, have relied on a process of blurring the lines between non-actionable religious opinion and defamatory assertions of fact; further, they employ a "burden shifting" tactic which fails to raise factual issues and, if adopted by the court, would violate the First Amendment.

The statements directed at The Local Churches are pure religious "opinion" devoid of verifiable factual assertions, which are not actionable as defamation; nor could they be, not only under traditional defamation law, but also under the "excessive entanglement" test of the Establishment Clause of the First Amendment.

The Local Churches argue that factual assertions have been made against them indirectly in the book, where the bad conduct of some "cults" is mentioned only generally in the Introduction of the *Encyclopedia*, yet it is argued that this is nevertheless sufficient to specifically taint The Local Churches as well. However, the definitions of "cult" included in the Introduction indicate that some groups are

deemed to be a "cult" because of a particular characteristic that is purely a matter of theology, while another group could be deemed to be a "cult" because of conduct-related criteria. Because The Local Church is treated in the *Encylopedia* only regarding its theological positions, and is never attributed with negative conduct of any kind, therefore the subject book fails to make a defamatory assertion of fact against The Local Churches.

Furthermore, The Local Churches' theory of liability which is asserted in an attempt to defeat summary judgment is fatally flawed in other ways. Their argument not only fails to present evidence of a factual dispute, but also: (a) shifts the burden of proof both as to the "of and concerning" element (by imposing an express disclaimer obligation on media publishers), and shifts the burden also as to the "factual assertion" element (using the "ambiguity" rule to blur the lines between fact and opinion), thus violating the First Amendment; (b) misconstrues Texas law on the rule of "ambiguity" at the summary judgment stage of a defamation action; (c) misconstrues Texas law regarding the "of and concerning" element; and (d) would create a chilling effect under the First Amendment on media communicators of all kinds.

Amicus Curiae National Religious Broadcasters exists to promote and protect the interests of hundreds of Christian broadcasting organizations. The theory of defamation liability advanced by The Local Churches would imperil the ability of broadcasters to address the controversial teachings and doctrines of different religions. This is so, because their theory is that the mere mention of the

word "cult" (even though limited to a purely theological context) necessarily implies, as a matter of law, that any religious group referred to in the same discussion has committed the worst of behaviors attributed to any other "cult." Thus, The Local Churches' theory would effectively censor the lexicon of words (like "cult") that can be used in religious discussions. Such a result offends the First Amendment.

ARGUMENT

Standard of Review

A party moving for summary judgment has the burden of showing no genuine issue of material fact exists and it is entitled to judgment as a matter of law. *Caplinger v. Allstate Insurance Company*, 140 S.W. 927, 929 (Tex. App. Dallas 2004, pet. denied). After the movant has established a right to summary judgment, the burden shifts to the nonmovant to present evidence creating a fact issue. *Id.* The nonmoving party must satisfy this burden by coming forward with competent and admissible evidence. *United Blood Services v. Longoria*, 938 S.W. 2d 29 (Tex. 1997).

As to the other applicable standards of review, Amicus Curiae adopts, in toto, the standards of review set forth in the Brief of Appellants, pages 17 – 18.

I. STATEMENTS REGARDING THE LOCAL CHURCH ARE NON-ACTIONABLE OPINION

A. In an Attempt to Raise a Factual issue, The Local Churches Treat Statements of Opinion as if they were Fact, and Ignore the Constitutional Distinction between the two.

The Local Churches cite *Milkovich v. Lorain Journal*, 497 U.S. 1, 10 (1990) for the proposition that statements of "opinion" can constitute actionable defamation. Br. Appellees, page 9. However, they also concede, under the reasoning of *Milkovich* (and as followed by the courts in Texas), that statements of opinion can be constitutionally defamatory *only* if they contain assertions of "objective fact ..." and those assertions are "provable as false." Br., page. 9, n. 6. Like The Local Churches, we also use the word "opinion" to represent those statements which cannot be proven or disproved on the basis of objective fact, and which are therefore constitutionally protected. Br., page 9, n. 6.

A key question in this action, therefore, is whether the publisher or its authors published any statement critical of The Local Churches which contained factually verifiable information. Or stated conversely, were the publisher's and authors' statements about The Local Church purely matters of opinion, to-wit, statements which addressed only the theological or doctrinal beliefs of The Local Churches?

The Local Churches's argument seems to assume, *a priori*, that factual assertions, including allegations of criminal conduct on the part of that group, can be found in the pages of the *Encyclopedia*. But they cannot. They state that

"[w]hether one has committed a crime is not a relative matter nor is it a matter of belief. It is one of fact." Br. Appellees, pages 10 - 11. Yet, they cannot point to any specific language in the book that ever specifically attributes criminal or immoral conduct to The Local Churches.

The Local Churches reject the notion that "the book's ostensibly 'theological' subject matter somehow renders its entire context subjective and thus insulates [the publisher and authors] from defamation liability." Br., page 11. This is a critical flaw in their theory of liability, as will be demonstrated in sections B and C below.

In recognizing the proper opinion/fact distinction, it is helpful to note the comment of Judge Possner, where, citing *Milkovich*, he summarized the law this way:

> [I]f it is plain that the speaker is expressing a subjective view, an interpretation, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statements are not actionable.

Haynes v. Alred A. Knopf, Inc., 8 F. 3d 1222, 1227 (7th Cir. 1993). Judge Possner's analaysis has been widely adopted in courts around the nation: *Levinsky's Inc. v. Wal-Mart Stores, Inc.,* 127 F.3d 122, 127 (1st Cir. 1997); *Partington v. Bugliosi*, 56 F.3d 1447, 1156 (9th Cir. 1995); *Quigley v. Rosenthal*, 43 F. Supp. 2d 1163, 1174 (D. Col. 1999); *Moore v. University of Note Dame*, 968 F. Supp. 1330, 1334 (N.D. Ind. 1997); *Boese v. Paramount Pictures Corp.*, 953 F. Supp. 550, 555 (N.D. Ill. 1996); *Washington v. Smith*, 893 F. Supp. 60, 62 (D.D.C. 1995).

Following in the wake of *Milkovich,* courts have continued to hold negative or critical statements to be constitutionally protected as opinion, even where they might appear to have some kinship to assertions of fact, where such statements were ultimately intended to contain non-factual value judgments. *Gilbrook v. City of Westminster*, 177 F. 3d 839 (9th Cir. 1999) (statements about a union official, referring to him as a "Jimmy Hoffa," were non-actionable opinion because they did not *contain a provably false factual connotation*); *Dilworth v. Dudley*, 75 F. 3d 307, 310-311 (7th Cir. 1996) (one mathematician's reference to another mathematician as a "crank" was opinion, and therefore was not defamation).

Over the wide spectrum of potential union conduct, that which is described to be like "Jimmy Hoffa" (an actual person) obviously may carry the negative factual connotation of general corruption. Calling a professional mathematician a "crank" may impugn his scholarly credibility and imply a lack of rigorous logic (and presumably the faulty use of mathematics or logic is verifiable). Likewise, referring to a particular religious group as a "cult" regarding its suspect doctrine or theology carries an undesirable connotation (and admittedly, in matters of religion, the faithful believe that whether one is unorthodox or not can be determined by resort to certain objective standards of biblical doctrine).

But what all three examples have in common is that each of those statements, though negative, are not ultimately asserting some objective fact that can be demonstrated empirically; rather, such statements are vehicles for value-judgments of opinion. Such opinions are constitutionally protected not because

they are harmless; but rather, because opinions are too important to the market-place of ideas to be suppressed by the heavy hand of government sanction through damage verdicts. [1]

As the Supreme Court said in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 – 400 (1974):

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

The danger of expanding, by court decision, what is deemed to be factual so as to include statements which are purely opinion in nature has been noted by courts and commentators. The devastating risk is that by focusing only on whether statements are factually true (and disregarding whether they are statements of non-actionable opinion) will inevitably deter statement by would-be religious critics and commentators, who harbor doubts about their ability to prove in court that their statements were pure opinion rather than fact. This risk was recognized as unacceptable in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

Further, as one commentator noted, failure to adequately protect statements of opinion will stand as "open invitations to judges and juries to ask themselves whether they thought the opinions to be right or wrong, and to decide the cases before them accordingly … [judgments] transmorgrified, one might fear, into conclusions about whether the opinion of the outsider/publisher … is wrong or

[1] The Local Churches agree that "ideas which are incapable of proof" from a factual standpoint are non-

offensive" rather than whether it was a defamatory statement of fact which was false. Robert D. Sack, *Protection of Opinion under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy under the First Amendment,"* 100 Colum. L. Rev. 294, 327 – 328 (January 2000).

Under the rubric of Judge Possner, *supra*, we would submit that the publisher and its authors published statements regarding The Local Churches that were matters of "interpretation" of that group's religious beliefs, rather than postulates of "objectively verifiable facts." As such, because such statements constitute expressions of opinion, the First Amendment protects them.

B. The Statements Regarding The Local Church were Theological Opinion about their Religious Beliefs rather than Expressions of Fact concerning their Conduct

As we have pointed out, *infra*, pages 1 - 5, each statement made in the *Encyclopedia* which specifically mentions The Local Churches refers to their theological beliefs, and none refer to any negative, immoral, or criminal behavior on the part of the group, or any of its affiliated churches.

The Local Churches do not attempt to point to any specific statements in the *Encyclopedia* which attribute specific negative conduct against them. Rather, they argue that the book states that *some* cults commit unsavory acts, and that The Local Churches, by reason of its inclusion in a book about cults, is thereby defamed. The Local Churches point out that the Introduction mentions

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actionable opinion. Br. Appellees, page 10.

various immoral and criminal actions that some cults have committed in general. Br. Appellees, page 1.

The Local Churches further state that the Introduction asserts "all of the organizations engage in at least some of the acts …" and they contend that Appellants have conceded as much (Br. Appellees page 2), citing Br. Appellants page 24. However, Appellants did not make this concession.

Rather, the publisher and the authors have argued that the *Encyclopedia*, in the Introduction, states that "[s]ome groups could have as few as one characteristic …" Br. Appellants, page 24 (emphasis added). The reference to "characteristic" relates back to the list of the twelve characteristics of a hypothetical "perfect cult" (see: *infra* pages 2 - 3) and does not relate to any group in particular; moreover, some of those characteristics are defined in purely theological terms, and others are defined in terms of negative conduct. To say that all of the groups in the *Encyclopedia* have at least one characteristic of a "cult" does not answer the critical question: does the book assert that The Local Churches are a cult by virtue of its religious dogma, rather than by reason of its factually verifiable behavior?

The logical answer is to resort to the one chapter that actually deals with The Local Churches. Yet even The Local Churches do not contend that there is anything defamatory in that chapter.

The Local Churches apparently contend that The Local Church had been defamed, albeit indirectly, by being tainted with the label "cult;"[2] that because the *Encyclopedia* states that *some* cults may perform immoral or inappropriate acts, therefore the worst conduct of *some* cults must necessarily be inferred against The Local Churches.

In their brief, The Local Churches admit that the connection between the listed "bad acts" in the *Encyclopedia* and The Local Churches is merely "potentially applicable," and they further state that "[t]here is no language [in the book] that would enable a reader to determine whether a particular organization is guilty or innocent ..." including, presumably, The Local Churches themselves. Br. Appellees, page. 2.

Elsewhere in their brief The Local Churches repeat this concession of a failed connection between the alleged bad acts and The Local Churches: " ... the authors do not distinguish which 'cult' practices which vile acts ..." [any given group is alleged to have been involved with]. Br., page. 11- 12. " ... the authors clearly intend to convey that any of the cults described in the Book *could well participate in any of the characteristics of cults* ..." Br., page. 17 (emphasis added). " ... the authors intended the challenged statements be understood as *potentially applicable* to any of the groups in the Book." Br., page. 18 (emphasis

[2] However, The Local Churches admitted at oral argument before the trial court that "[t]here is nothing in our petition that says we are defamed because they called us a cult." 2 RR 38, at transcript lines 15 - 16. Yet, The Local Churches use the word "cult" no less than 101 times in their brief to this Court.

added). " ... the Book provides the reader with *no way of knowing* whether a particular group does or does not engage in a particular practice ..." Br. pg. 23.

The *Encyclopedia* never alleges any factual conduct of a negative type against The Local Churches, and criticizes only their religious doctrines. Accordingly, The Local Churches have resorted to shifting the burden of proof in this defamation action: they argue that, because the publisher and its authors *failed to affirmatively disclaim* any implication in the *Encyclopedia* that The Local Churches are guilty of the bad conduct generally asserted against some cults, as a result thereby the *Encyclopedia* should be inferred to have defamed The Local Churches. We address this argument in section II. below, and explain why this argument violates the constitutional protections set forth by the Supreme Court regarding media defendants who publish statements on a matter of a public concern.

C. Statements on Religious Doctrine Are Constitutionally Protected Expressions of Opinion

The necessary consequence of the theory of The Local Churches is that publications which are inherently theological in nature can be treated as fair game for defamation lawsuits. Accordingly, we believe it is critical to address the constitutional implications raised in their response to the brief of the publisher and the authors.

On one hand, The Local Churches concede that they cannot seek defamation liability against the publisher or its authors by reason of statements in the *Encyclopedia* on matters of theology or doctrine. The Local Churches state that "the defamatory statements [in this action] do not involve religious doctrine. They consist of false accusations of crime and abhorrent behavior." Br. Appellees page. 31, n. 23. Elsewhere, in the heading of a section of their brief, they state, "The Challenged Statements Are Not Theological ..." Br., page. 9.

Accordingly, The Local Churches attempt to convert a theological discussion of their group into actionable defamation by an argument that yields a tortured reading of the *Encyclopedia*. This Court, in effect, is urged to ignore what was actually said about The Local Churches in the book (a discussion of pure theology) and to focus *on what was not said about them* (attributions of occasional wrongful conduct to some cults in general, with no reference to The Local Churches) in order to create liability.

Expressions about religious belief or doctrine, which are at the core of the *Encyclopedia's* treatment of The Local Churches, must be protected as non-actionable opinion to be consistent with other First Amendment jurisprudence.

Under the "excessive entanglement" test of the Establishment Clause of the First Amendment, courts are prohibiting from deciding theological matters, or interpreting religious doctrine, or making matters of religious belief the subject of tort liability. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1975) (courts should not interfere with church disputes over religious matters);

Tran v. Fiorenza, 934 S.W.2d 740 (Tex. App. Houston, 1st District, 1996) (no defamation action permitted where court would have to determine whether plaintiff was actually "excommunicated" as the alleged defamatory publication asserted); *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85 (Tex. App. Ft. Worth, 1998) (no tort liability where the wrongful action was asserted to be incorrect use of demon exorcism – court prohibited under the First Amendment from performing the kind of "searching inquiry" into religious beliefs that was required by the lawsuit).

Because the statements which are clearly attributable to The Local Churches in the *Encyclopedia* are all of a theological and doctrinal nature, liability for defamation is precluded by the First Amendment.

II. THE LOCAL CHURCHES SEEK TO UNCONSTITUTIONALLY SHIFT THE BURDEN OF PROOF ON A CRITICAL ELEMENT OF THEIR DEFAMATION SUIT

A. The Constitutional Constraints on Shifting the Burden of Proof in Defamation Cases where Media Defendants Publish on Matters of Public Concern

We submit that the publisher and its authors have clearly satisfied their duty of "showing no genuine issue of material fact exists and [they are] entitled to judgment as a matter of law." *Caplinger v. Allstate Insurance Company*, 140 S.W. 927, 929 (Tex. App. Dallas 2004, pet. denied).

Assuming *arguendo* that the publisher/authors have satisfied their summary judgment burden, then "the burden shifts to the nonmovant [The Local Churches] to present evidence creating a *fact issue*." *Id.* (emphasis added)

Nevertheless, rather than raise *factual issues* from the evidentiary record, The Local Churches have essentially made their stand by using a series of burden-shifting arguments, as we illustrate below.

We believe that *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) is a relevant standard by which to measure the constitutionality of The Local Churches' rebuttal arguments in this regard.

In *Hepps* the Supreme Court ruled that "the common law presumption that defamatory speech is false cannot stand where a plaintiff seeks damages against a media defendant for speech of a public concern." *Id.* at 767. See also: *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990). In *Hepps* the Court reasoned that "placement by state law of the burden of proving truth upon media defendants [as opposed to placing the burden of proving falsity on the plaintiff] who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result." *Id.* at 777 – 778. The Court went on to specifically note that "... the burden of proof is the deciding factor only when the evidence is ambiguous ... In a case presenting a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech." *Id.* at 777.

As the Court noted in *Milkovich*, the *Hepps* decision "fashioned 'a constitutional requirement that the plaintiff bear the burden of showing *falsity*, as well as *fault* ...'" (quoting from *Hepps*). *Milkovich*, *supra* (emphasis added).

The same logic should apply to requiring the plaintiff to also bear the burden of proving that the statement alleged to be defamatory is "of and concerning" the plaintiff. That element, after all, is just as basic to the framework of a defamation action as either the falsity or the fault elements – and perhaps even more so. If the subject statements are not proven to be "of and concerning" the plaintiff, then all other issues (including falsity or fault) are rendered moot.

It appears that The Local Churches assume the burden of proving, under both Supreme Court and Texas law, that the allegedly defamatory *conduct* listed in the *Encyclopedia* that is applicable *to some cults* is also applicable to them. Br. Appellees, page 14. & ff. The "of and concerning" element is a cardinal requirement for defamation actions. *Newspapers, Inc. v. Matthews*, 161 Tex. 284, 289-290, 339 S. W. 2d 890, 893-894 (1960).

Accordingly, under *Hepps*, if the burden of *disproving* the "of and concerning" element is placed on the defendant (rather than requiring the plaintiff to *prove* that element) the same constitutional infirmity results in a case, such as this, where the media defendants are addressing a "matter of public concern."[3]

[3] Matters of public concern are those matters involving "interchange of ideas for the bringing about of ... social change ..." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985), quoting from *Connick v. Myers*, 461 U.S. 138, 145 (1983). They can be contrasted with purely "private matters." Robert D. Sack, Sack on Defamation: Libel Slander, and Related Problems (3d ed. 1999) at section 6.6, pages 22 – 23. Hence, it seems clear that a book dealing with the nature and beliefs of religious cults is

Relieving plaintiffs of the burden of proving the "of and concerning" element thus carries the same risk of "deter[ing] such speech [by media defendants on matters of public concern] because of the fear that liability will unjustifiably result," under the reasoning of *Hepps*.

We would also submit that in the same way, the reasoning of *Hepps* should not permit defamation plaintiffs to shirk their burden of proving that the subject assertions are factual ones, and therefore actionable, rather than constitutionally protected opinions, and also that such statements were 'of and concerning' them. Again, the same fundamental threat of deterring speech by media defendants would be present whenever the plaintiff is alleviated from having to shoulder the burden of proving a critical element of a defamation case.

The defamation elements of both "of and concerning," and the "objectively verifiable assertion of fact (rather than non-actionable opinion)" are inherently *encompassed* within the framework of every defamation case. They are also encompassed within the elements of falsity and malice (fault).

For instance, *ideas* (as opposed to assertions of fact) have been declared, at least for constitutional purposes, to rest beyond any "true or false" analysis. *Gertz v. Robert Welch*, Inc., *supra*. Thus, ideas (i.e. non-actionable opinion) are naturally out of sync with the notion of factual falsity. Assertions of fact are the

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expounding on a subject of public concern. Appellants argued as such. Br. Appellants page 44 – 45. See also: Id., pages 3 – 4. We find nothing in the brief of The Local Churches that refutes this.

only kind of statements where it makes constitutional sense to discuss their truth or falsity. [4]

Similarly, in a case where the plaintiff is unable to shoulder the burden of proving that the offending statement was made "of and concerning" the plaintiff, it makes no sense to then talk about the falsity of the statement as regards that plaintiff if the statement cannot be proven to have targeted him. Further, it would also be an exercise in futility (as well as mootness) to ask in such a case whether the publisher/authors harbored malice in making statements that were *not really about the plaintiff in the first place*.

One of the reasons that the Supreme Court, in *Philadelphia Newspapers, Inc. v. Hepps*, *supra*, decided to place on the plaintiff the constitutional burden of proving *both fault* (malice) and *falsity* in actions against media defendants in public concern cases was that there was an inherent and logical connection between the two, and therefore only a minimal extra burden on the rights of plaintiffs. In *Hepps* the Court noted that "evidence offered by plaintiffs on the publisher's fault ... will generally encompass evidence of the falsity of the matters asserted." 475 U.S. 767 at 779.

For the same reasons this Court should, in this action, also determine that the "of and concerning" and "factual assertion" elements are a part of the constitutionally required burden of the plaintiff in defamation actions like the case

[4] Again, "truth" here is discussed in a legal, and not a metaphysical or theological sense. We have no doubt that authors Ankerberg and Weldon believed that their analysis of the theology of The Local Churches was

at bar, because those elements are logically "encompass[ed]" within the same evidence as the elements of fault and falsity.

Admittedly, *Hepps* was decided following a trial on the merits where the burden of proof had been unconstitutionally shifted. This case, on the other hand, is in the posture of a denial of summary judgment.

However, there is a parity between the way in which the burden of proof was improperly shifted in *Hepps*, and the manner by which The Local Churches here are attempting to satisfy their burden to factually rebut the summary judgment motion by attempting to shift its burden back to the publisher and its authors.

B. The Attempt to Shift the Burden of Proof Regarding Fact versus Opinion:Misapplying the Ambiguity Rule

The Local Churches have argued that they are relieved of proving that the defamatory statements against them were in fact assertions of fact rather than non-actionable opinion if the statements were ambiguous; that is to say, equally susceptible of being interpreted as factual or opinion. They state that "if the statements are ambiguous – if they can reasonably be understood to be statements of opinion *or* statements of fact – the question of defamatory meaning goes to the trier of fact," thus precluding the granting of summary judgment. Br. Appellees, page 13. However, The Local Churches have confused the rule on ambiguity in summary judgment cases. The ambiguity rule does not apply to fact/opinion

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"truthful" in the sense that the authors' conclusions reflected a true and orthodox understanding of

distinctions, but rather to ambiguities regarding whether the allegedly defamatory statements are susceptible of a defamatory meaning. Under Texas law, "[i]f the statement is ambiguous, that is *if the statement may have a defamatory meaning but it is not necessarily defamatory,* the issue must be submitted to the jury." *Sellards v. Express News Corp.*,702 S.W.2d 677, 679 (Tex. App. – San Antonio 1985, writ ref'd n.r.e) (cited at Br. Appellees, page 13)(emphasis added).

The Local Churches do not identify any "statement [that] is ambiguous …" as to its potential defamatory meaning. In fact, general assertions in the book about occasional wrongful acts by some cults including "fraud or deception," "drug smuggling," "murder," and "rape," which are cited by The Local Churches (Br. Appellees, page 8) are absolutely non-ambiguous. If such statements were false, and if they were aimed at The Local Churches, they would constitute actionable defamation because their meaning could be proven to be true or false by resort to objective evidence. Thus, the real issue is not the ambiguity of the statements which The Local Churches claim are allegedly defamatory.

The underlying problem is that The Local Churches have used sleight-of-hand in their misapplication of *Sellards*. That case did not deal with a scenario as here, where the only ambiguity asserted by the plaintiffs rests *on whether the plaintiffs were a target* of the defamatory statements about negative conduct, or whether the assertions against the plaintiffs were non-actionable theological

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Christianity and Scripture.

opinions.[5] Further, the *Sellards* case, by contrast, dealt with an ambiguity over whether or not the statements at issue were capable of being interpreted as having a *defamatory meaning*. However, as we have contended above (*infra* pages 18 – 19) The publisher and its authors have satisfied their burden in showing that there is no factual dispute over the *defamatory meaning* of the language in the *Encyclopedia* as concerns The Local Churches. Clearly, the publisher and the authors have shown that there is no ambiguity here – there is no reasonable way that the relevant portions of the book can be interpreted as having a defamatory meaning regarding The Local Churches.

Finally, by asserting that ambiguity on the fact/opinion issue precludes summary judgment and requires resolution by a jury, The Local Churches have run afoul of the burden- of-proof reasoning in the *Hepps* decision. The constraints of the First Amendment regarding the free speech rights of media defendants would be violated if defamation plaintiffs were permitted to unburden themselves of having to prove that the subject assertions are essentially factual ones and therefore actionable. Likewise, the First Amendment is violated under *Hepps* if The Local Churches were permitted to satisfy their burden of rebutting a summary judgment motion by simply arguing that factual assertions against their group can be implied soley because other religious groups called "cults" are described as guilty of reprehensible conduct even if their group is not.

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[5] Amicus Curiae does not believe, however, that the *Encyclopedia* is actually ambiguous on this point. We believe the book is clearly asserting only theological errors against The Local Church, while it asserts bad conduct against other, mostly unidentified groups.

Among broadcasters, minute-by-minute decisions have to be made about what words can or should be used in programming which instantly reaches thousands, and sometimes millions of citizens. The Local Churches' theory increases (rather than resolves) ambiguity in distinguishing between non-actionable opinion about the theology of "cults" and actionable assertions of fact which allege wrongful "cult" conduct. Where legal ambiguity abounds, deadly, constrictive self-censorship by broadcasters will even more abound.

This is a danger explicitly recognized and deemed "intolerable" by the Supreme Court:

> Fear of guessing wrong must inevitably cause self-censorship and thus create the danger that the legitimate utterance will be deterred …
>
> In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulet the defendant for an innocent misstatement … but the possibility of such error … would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate.

Rosenbloom v. Metromedia, 403 U.S. 29, 50 (1971)(interior citations omitted).

Such a chilling effect shows the significant constitutional defect in The Local Churches' arguments.

C. The Attempt to Shift the Burden of Proof Regarding the "Of and Concerning" Element: Arguing for a Mandatory Disclaimer

As stated above, The Local Churches do not point to any particular defamatory statement in the *Encyclopedia* that expressly attributes to The Local Churches, by name, any immoral, illegal, or negative conduct. Instead, they argue

that the "cult" category in the book implies that every group named in the book is chargeable with the worst of the conduct that is attributable to any other cult group.

The Local Churches arrive at this position by arguing that the media publisher and its authors have failed to satisfy the burden of showing that they *expressly disclaimed and exempted* The Local Churches from the lists of "bad conduct" that are generally attributable in the book to other cults. Presumably the purpose of such an express disclaimer would be to remove any possibility that The Local Churches might be *tainted* by references to the bad acts of other "cults." Because the publisher and its authors have failed to prove such an express *disclaimer or exemption* for The Local Churches in the text of the book, The Local Churches reason, the worst of the "bad conduct" practices of some cults must therefore be presumed to apply, as well, to The Local Churches in the mind of the average, reasonable reader.

Examples of this line or argument are as follows:

- "This definition [of cult] is presented under the sub-heading 'Characteristics of Cults.' *Neither this subsection or any other section in the book contains any language that exempts any particular organization* from this definition." Br. Appellees, page. 17 (emphasis added);
- The media publisher/authors have allegedly failed to provide a "*caveat that the behavior is unique to that group and is not practiced by others*." Br., page. 17 (emphasis added);

- " … the Book provides the reader with *no means of determining* whether a given group engages in a particular abhorrent behavior …" Br., page. 21 (emphasis added);
- "… the Book provides the reader with no way of knowing whether a particular group does or does not engage in a particular practice *and thus begs the inference* that any group is suspect of any of the listed crimes and offenses." Br., page 23 (emphasis added).

However, the effect of The Local Churches' argument is to shift the burden of an essential element of defamation – the "of and concerning" element that connects the defamatory assertion to the plaintiff – over to media defendants on a matter of public concern. As we have argued above (see: section II. A.), under *Philadelphia Newspapers, Inc. v. Hepps*, *supra*, forcing such media defendants as a threshold matter to *disprove* that the defamatory language was "of and concerning" the plaintiff (whether through the requirement of a disclaimer or otherwise) would violate the First Amendment.

Further, if disclaimers or express exemptions are imposed on media defendants under the circumstances of this action, the result would be devastating. Such a rule would be particularly pernicious for broadcasters. By its very nature, radio and television broadcasting is more time-constrained and more immediate than magazine or book publishing. If broadcasters fear that using the word "cult" in a program dealing with a variety of religious sects might taint even those groups that deserve the label only because of their doctrine and not their conduct, a

content-based form of self-censorship will inevitably result. The word "cult" will be effectively removed from all broadcasting programs because The Local Churches' disclaimer requirement will be found to be an unworkable and onerous obligation; yet at the same time the contemplated use of that word will cause the specter of multi-million dollar defamation awards to hang over their ministries.

Thus, the net consequence will be less religious expression, not more; less exposition about religious teachings and doctrine, not more. To National Religious Broadcasters, and its hundreds of affiliated members (more than a hundred of whom operate in Texas), that would understandably represent a serious attack against the fundamental premise of their mission:

> [T]o positively impact culture through the encouraging and enabling of sound biblical teaching; and ... to preserve religious freedom by keeping the doors of Christian media, and particularly the electronic media, open for the spread of the Christian gospel.

See: Interest of the Amici, pages vi – vii.

Lastly, while the presence (or absence) of disclaimers in published statements that are alleged to be defamatory can be relevant in other contexts, they are not dispositive; also, those cases where disclaimers are described as potentially helpful are factually distinguishable from this case. Eg. *New Times v. Isaacks*, 47 Tex. Sup. Ct. J. 1140 (Sept. 3, 2004)(disclaimer can be helpful in aiding a reader to understand that published statements were *satire* and not factual assertions, however, absence of disclaimer did not render statements defamatory).

Those kind of generic disclaimers are a far cry from the type of disclaimer that The Local Churches argue that the publisher and its authors should have used here. The only kind of disclaimer that apparently would have satisfied The Local Churches would have been one specifically tailored to its religious organization, and with sufficient detail to eradicate any implication – no matter how far-fetched – that might possibly link it's group to statements describing examples of reprehensible conduct of any *other* group.

To impose an obligation for that kind of expansive disclaimer on broadcasters, let alone publishers, would unduly burden the free speech rights of public communicators who address controversial religious topics.

III. FAILURE TO SATISFY THE TEXAS RULE REGARDING THE "OF AND CONCERNING" ELEMENT

The Local Churches rightly cite their burden of proving that the allegedly defamatory statements were about The Local Churches and not others. Br. Appellees, page 14, citing *Newspapers Inc. v. Matthews*, 161 Tex. 284, 288, 339 S.W. 2d 890 (Tex. 1960).

The Local Churches also cite the principals that (1) the statements at issue must be read in context, and (2) the reference can be an indirect one, e.g. where the plaintiff is not specifically named, but where the context makes it clear that the statement refers to plaintiff. Br. pages 15 – 16. The Local Churches apparently rely on point (2) because the book nowhere makes the assertion that The Local Churches have committed <u>any</u> reprehensible acts that should result in liability for

defamation. The result is The Local Churches' argument that, because their group is deemed a "cult," therefore the worst "characteristics" of any other cult must, by implication, be deemed to "indirectly" apply also to them. Br. Appellees, pg. 16.

The Local Churches' argument, in that respect, creates a significant and unconstitutional burden on media defendants such as the publisher here and its authors. See: section II. above. But beyond that, it does not comport with Texas law.

The seminal case cited by The Local Churches for point (2) above, *Poe v. San Antonio Express-News Corp.*, 590 S.W. 2d 537 (Tex. App. 1979)(Br. Appellees, page 15), is distinguishable on its facts. The publication in question was a local newspaper article that described an incident where a public school girl was fondled and molested by a "middle aged male teacher" at "one of our local high schools." *Id.* at 538. It was clear from the evidence that the reporter had investigated only one such incident before writing his article, and that the incident involved those events that had led to a grand jury indictment against the plaintiff, a local high school teacher. The teacher was later acquitted by a jury of the criminal charges. *Id.* While the teacher was never named in the publication, it was clear to the court – indeed to the entire community – who the article was referring to. *Id.*, at 542.

Secondly, that case did not involve constitutionally protected speech on matters of religious doctrine and belief, as this case does. Rather, it involved allegations of a commission of a crime by an unnamed teacher under

circumstances where the plaintiff was the only obvious candidate to qualify as the suspected culprit.

A different Texas case more closely represents the facts here. In *Newspapers, Inc. v. Matthews*, 339 S.W. 2d 890 (Tex. 1960) the court determined that the plaintiff had failed to satisfy the "of and concerning" test for defamation, where **the plaintiff was never named in the article** but his auto body shop was expressly named as one of the shops which had been illegally fronting for a car-wrecking insurance scam; the article also named the two prior owners of the shop as the perpetrators. *Id.* at 290. The plaintiff argued that, as the new owner of the auto body shop, the article "implied" his guilt, and that he was tainted by the wrongful conduct described in the article by "implication." The court rejected those arguments stating:

> Such claimed implication is not consistent with the plain language of the articles ... The settled law requires that the false statement point to the plaintiff and *no one else*.

Id. (emphasis added). The last phrase strongly suggests that in cases where the plaintiff cannot prove that the subject statements actually referred to the plaintiff, as opposed to applying only to others, then the plaintiff has failed to make a prima facie case.

The Local Churches here cannot show that any of the negative statements of fact in the book about what some cults might do ("fraud or deception," "drug smuggling," "murder," "rape,") have anything to do with The Local Churches, or

that any reasonable reader of the book would conclude that. We would encourage this Court to reject The Local Churches' argument of *defamation by mere implied association* as fully as the Texas Supreme Court rejected a similar argument in *Newspapers, Inc. v. Matthews*.

IV. DEFAMATION LIABILITY IN THIS ACTION WOULD HAVE A CHILLING EFFECT ON FREE SPEECH

The theory of The Local Churches in this appeal urges a result that will have a chilling effect on the Free Speech rights of media publishers, broadcasters, and public communicators. This is so for two reasons. First, as we have argued, through their radical reformulation of the traditional defamation law they have blurred the distinctions between non-actionable opinion and actionable assertions of fact, and they have shifted the burden of proof over to media defendants by imposing a de facto *disclaimer* requirement. They have similarly shifted the burden of proof on the "of and concerning" element.

But second, they have expanded the universe of potentially defamatory, prohibited words to include, in all things religious, the term "cult," which has virtually achieved in The Local Churches' arguments the status of *defamation per se*.

On that issue, the decision in *Church of Scientology of California v. Siegelman et al,* 475 F. Supp. 950 (S.D. N.Y. 1979) is particularly instructive. In that case the authors, and their publisher J.B. Lippincott Co., were sued for defamation by the plaintiff religious group for assertions in a book that dealt, in

part, with the practices of "cult" organizations and their detrimental effect on human personality. Among the statements made against the Church of Scientology in the book, were these:

> It may also be one of the most powerful religious cults in operation today. … the reports we have seen and heard in the course of our research … are replete with allegations of psychological devastation, economic exploitation, and personal and legal harassment of former members and journalists who speak out against the cult.

Id. at 955, n. 14.

Yet in that case the U.S. District Court held that "[n]one of these statements go beyond what one would expect to find in a frank discussion of a controversial religious movement, which is a public figure, and thus none of these statements may be the basis for an action in defamation." *Id.*, at 956.

It is axiomatic that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion my seem, we depend for its correction not on the conscience of judges and juries but on the competition of ideas." *Gertz v. Welch, supra*, at 339 – 340.

This lawsuit, by attempting the remove "cult" from publishers' lexicons, by blurring the lines between "ideas" (non-actionable opinion) and factual assertions, and by shifting the burden of proof for central defamation elements, poses an unacceptable risk of stultifying the publishing of certain religious "ideas" among radio and television broadcasters even more radically than it does among publishers. The time-sensitive nature of the more "immediate" and deadline-

driven mission of broadcasters would dictate, if The Local Churches' theory holds, that broadcasters would begin sacrificing certain words (like "cult") out of fear of expensive, entangling litigation.

Similarly, it cannot be forgotten that this dispute is essentially a debate over religious expression, and the freedom to print or communicate a strong dissent on the theology of a specific group. Ironically, The Local Churches reserves its most aggressive and vituperative attack, not against the *Encyclopedia* which lies at the heart of this case, but against the publisher and its authors, who criticize the doctrine of The Local Churches. We would submit that The Local Churches' epithets against these media defendants are several times more harsh than any of the actual language used in the *Encyclopedia* in the few, sparse sections where The Local Churches was actually mentioned.

According to The Local Churches, the publisher and its authors are overly "narrow" in their promotion of "true Christianity," and publish "writings intended to provoke intolerance, fear and hatred toward other faiths ..." Br. Appellees page 36. According to them, one of the authors was involved in "anti-cult vigalante groups," and the publisher disseminates "alarmist books," which "disparage" other religious groups. Id., page 37-38. Though not expressly stated, there is an impression that The Local Churches are suggesting that the publisher and its authors are outside the religious mainstream in their insistence on scriptural accuracy and doctrinal purity and their devotion to spreading their vision of "true Christianity."

Religious differences, which sometimes provoke heated debate, must be able to be aired in open and robust fora. Radio and television, including so-called live "talk" formats with call-in listeners and controversial topics, have replaced the village commons of the eighteenth century. Nevertheless, they should be entitled, along with publishers and communicators of all kinds, to the same freedom from fear of sanction that under-girded the founders' design of the First Amendment.

Moreover, it does not solve the problem here to simply suggest that religious ministries that speak out about "cults," or religious radio broadcasters who air their programs, are free to relocate to more free-speech-friendly territory if they do not like the result in this appeal.[6] As the Supreme Court noted in *Wisconsin v. Yoder*, 406 U.S. 205, 218, n. 9 (1972):

> However, the danger to the continued existence of an ancient religious faith cannot be ignored simply because of the assumption that its adherents will continue to be able, at considerable sacrifice, to relocate in some more tolerant State or country or work out accommodations under threat … Forced migration of religious minorities was an evil that lay at the heart of the Religion Clauses.

Media discussion about controversial theological beliefs, or the religious groups that hold them, must be given "breathing space" so that the freedom of speech and freedom of the press guarantees of the First Amendment will not be rendered a mirage. *Rosenbloom v. Metromedia*, 403 U.S. 29, 50 (1971). As the Supreme Court noted in *Hustler Magazine v. Falwell*, 485 U.S. 46, 50-51 (1988):

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he freedom to speak one's mind is not only an aspect of individual liberty - and thus a good unto itself - but also is essential to the *common quest for truth* and the vitality of society as a whole." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503 -504 (1984). We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974). As Justice Holmes wrote, "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion).(Emphasis added).

Those media organizations and communicators like this publisher and its authors, which seek to pursue within the realm of religion that "common quest for truth," *Hustler Magazine v. Falwell*, *supra*, and which have not expressly and directly defamed The Local Churches by charging them with conduct that is readily identifiable, and clearly reprehensible, should be protected in that pursuit, not punished.

Such a result, we would submit, is in accord with the original design of our Founding Fathers.

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[6] One hundred and fifty three members of NRB are located in, or operate from, Texas. See: Interest of the Amicus Curiae, page vii.

Thomas Jefferson said it well, when he advised against using the sanctions of the law to punish those whose religious views were found to be offensive. In his Bill for Establishing Religious Freedom, he wrote:

> Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion.

Cited in: Charles B. Sandford, The Religious Life of Thomas Jefferson (1992) page 23.

In 1774 James Madison witnessed first hand the jailing of a Baptist preacher in Virginia whose preaching was found to be disagreeable. Irate at the incident, he wrote a letter to William Bradford complaining:

> This vexes me most of any thing whatever. There are at this [time] in the adjacent County not less than 5 or 6 well meaning men in close Gaol for publishing their religious sentiments which in the main are very orthodox.

John W. Whitehead, The Right to Picket and the Freedom of Public Discourse, (1984) page 31. Madison concluded his letter by asking the recipient to "pray for Liberty of Conscience ..." Id. More than a decade latter, the Virginia lawyer would have the chance to secure that liberty as the chief architect of the First Amendment.

Admittedly, this case is not about Harvest House and its authors being faced with imprisonment "in close Gaol." Nevertheless, the potential intimidation, expense, and interference of a complex case which seeks large amounts of money in damages is certainly a punishing sanction. Permitting The Local Churches to continue this case to trial, and the placing of a judicial imprimatur of approval on The Local Churches' troubling theory of defamation, would elevate that punishment to a level that offends justice, and violates the First Amendment.

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to reverse the decision and order of the trial court, and dismiss this action.

Respectfully submitted,

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