Case No. A23-1284

STATE OF MINNESOTA
IN SUPREME COURT

Energy Transfer LP (formerly known as Energy Transfer Equity, L.P.), et al.,

Appellants

v.

Greenpeace International (also known as Stichting Greenpeace Council), et al.,

Defendants,

Unicorn Riot, et al.,

Respondents.

APPELLANTS' REPLY BRIEF

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ARGUMENT

In its response brief, Unicorn Riot does not meaningfully dispute that it wrongfully trespassed on Appellants' property when it joined activists vandalizing the Dakota Access Pipeline site in summer 2016. To the contrary, Unicorn Riot strenuously defends its supposed entitlement as a newsgatherer to bend the law and commit whatever torts it feels are necessary to get the stories it pursues. Unicorn Riot suggests that the MFFIA is in fact designed to protect such unlawful and tortious conduct, claiming that the MFFIA privilege applies to shield it from any subsequent civil discovery or third-party subpoena requests relating to that wrongful, tortious conduct. Indeed, Unicorn Riot asserts that the MFFIA is *so* absolute that the district court is prohibited from even asking Unicorn Riot to produce a privilege log—like every other individual and entity—justifying its invocation of the MFFIA privilege.

The Court should reject this overly broad and unreasonable interpretation of the MFFIA. The MFFIA explicitly states that it is intended to protect newsgathering consistent with the public interest—and there is no public interest in wrongful, tortious conduct by purported newsgatherers. The Court should also reject Unicorn Riot's attempt to exempt itself from basic discovery requirements imposed on every other individual and entity in Minnesota and instead confirm that the district court acted within its discretion by ordering Unicorn Riot to produce a privilege log justifying its MFFIA privilege claim in this case.

I. Unicorn Riot's overly broad interpretation of the MFFIA privilege is inconsistent with the statute's purpose and invites abuse of its substantial protections.

A. There is no public interest in protecting unlawful or tortious conduct by purported newsgatherers.

Unicorn Riot argues that because the MFFIA does not itself explicitly explain that its protections apply to lawful, nontortious newsgathering, the Court cannot infer that any such requirement exists. Not so. The Court will construe a statute to avoid absurd results and unjust consequences. *See Am. Fam. Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000); *see also Erickson v. Sunset Mem'l Park Ass'n*, 108 N.W.2d 434, 441 (Minn. 1961) ("The general terms of a statute are subject to implied exceptions founded on rules of public policy and maxims of natural justice so as to avoid absurd and unjust consequences."). The Court will also construe a statute in light of its surrounding, related sections and its overall purpose. *See Am. Fam. Ins. Grp.*, 616 N.W.2d at 278.

Here, the Legislature explained in the MFFIA's preamble that it established the MFFIA privilege to protect only the free flow of information and the confidential relationship between newsgatherers and their sources *consistent with*, and in protection of, the public interest. Minn. Stat. § 595.022. There is no public interest in protecting or encouraging unlawful or tortious activity by a newsgatherer (or its sources). Nothing in the MFFIA's preamble or its text suggests that the Legislature intended the MFFIA to give newsgatherers carte blanche to engage in whatever tortious or unlawful conduct they believe will help them get their story—without fear of a subsequent civil discovery request that could require them to disclose the extent of their (or their sources') wrongful acts. Yet

Unicorn Riot's (and the Court of Appeals') interpretation of the MFFIA would have exactly that effect: it would immunize purported newsgatherers and their sources from civil consequences for their own tortious conduct. The Legislature cannot have intended that absurd and deeply unjust result.

Unicorn Riot does not appear to dispute that its interpretation of the MFFIA would have the effect of encouraging individuals to break the law and engage in harmful, tortious conduct in the pursuit of alleged "newsgathering." Indeed, Unicorn Riot urges this Court to *embrace* that outcome and affirm that purported newsgatherers are, in fact, entitled to bend the law and engage in tortious acts in the course of their work. Unicorn Riot repeatedly asserts its purported entitlement to follow the news wherever it happens and in whatever manner it believes is necessary, declaring that "[p]romoting the free flow of information may, at times, require reporters to cover news using means that may be technically tortious or unlawful." (R. Br. at 23; *see also* R. Br. at 3, 5 (noting that reporters "do not choose where news happens" and should therefore be allowed to trespass onto private property, or to speed or double park in order to "deliver news to the public").)[1]

While Unicorn Riot may feel that it should be entitled to those broad immunities, neither the text nor purpose of the MFFIA suggests that the Legislature intended to

[1] Unicorn Riot and amici use the media's presence at the police brutality protests in Minnesota in 2020 as an example of the need for the media to "risk legal exposure" in the course of their reporting. The curfews imposed during the demonstrations exempted the media. Journalists covering the demonstrations were not committing any wrongful or illegal acts, even if they remained out after curfew. *See Cole v. Lockman*, No. 21-CV-1282, 2024 WL 328976, at *2, 7 (D. Minn. Jan. 29, 2024) (noting that under Minnesota's emergency orders, "members of the media were exempt from the curfew").

encourage or protect such conduct. Indeed, courts around the country have squarely rejected the argument that the media requires any such special treatment in order to promote the free flow of information. *See, e.g.*, *Mgmt. Info. Techs., Inc. v. Alyeska Pipeline Serv. Co.*, 151 F.R.D. 471, 475 (D.D.C. 1993) ("It is axiomatic that the First Amendment does not give newspaper reporters a blanket right to break of law in the pursuit of news.")[2]; *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("The press may not with impunity break and enter an office or dwelling to gather news."); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."); *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1351 (7th Cir. 1995) ("[T]here is no journalists' privilege to trespass."); *United States v. Sanusi*, 813 F. Supp. 149, 155 (E.D.N.Y. 1992) (noting that the media may not "simply by raising the cry of 'newsgathering,' exempt itself from all ordinary legal constraints"). This Court too should decline to exempt Unicorn Riot (or any newsgatherer) from normal legal accountability for

[2] Unicorn Riot relies on *Management Information Technologies* to argue that the Legislature could not have meant to withhold MFFIA protection for newsgatherers who engage in unlawful behavior. Unicorn Riot misleadingly asserts that the *Management Information Technologies* court rejected an argument that a reporters' privilege does not apply when the reporter engages in tortious conversion. (R. Br. at 19.) The court did not reject that argument. To the contrary, it confirmed that that there is no reporter's privilege to commit torts or crimes. *Mgmt. Info. Tech.*, 151 F.R.D. at 475. It noted, however, that the party challenging the privilege had not made any showing that the reporter committed the alleged tort: the challenging party stated only that the reporter possessed a copy of documents allegedly stolen, without any evidence that the reporter was involved in the theft. *Id.* Here, however, there is ample evidence in the record showing Unicorn Riot's tortious trespass. The only reason there are no findings to that effect is because the district court drew a legal conclusion that such facts are irrelevant.

tortious or illegal conduct—particularly conduct that invades the rights of others—and instead confirm that the MFFIA privilege does not apply to purported newsgatherers who engage in such conduct.

Unicorn Riot asserts that the Court need not interpret the MFFIA with an eye toward deterring unlawful conduct because other criminal and civil laws "are perfectly capable of deterring and redressing wrongdoing by journalists." (R. Br. at 20.) In reality, however, Unicorn Riot's proposed interpretation of the MFFIA would make it nearly impossible for a private party to redress harm caused by a wrongdoing newsgatherer. While there is an exception in the MFFIA for information "relevant to a gross misdemeanor or felony," the Court has interpreted that exception as being applicable only "in criminal cases." *Weinberger v. Maplewood Rev.*, 668 N.W.2d 667, 672 (Minn. 2003).

Under Unicorn Riot's theory of the MFFIA, then, a private party's ability to seek and receive justice and restitution for any harm caused by a newsgatherer's wrongdoing depends entirely on whether the State decides to bring criminal charges. If a prosecutor does not file charges, a private party would be severely limited in its ability to pursue a remedy through a civil lawsuit, because it would have no ability to discover the information it would need to fully prove its claim and damages. For example, if a reporter broke into a person's office or home and took photographs of private documents (or accomplished the same intrusion via digital means by hacking into the person's computer or online accounts) in pursuit of a news story, the harmed individual could perhaps bring a claim for trespass, civil theft, or invasion of privacy—but it would then be prohibited from requiring the defendant reporter to disclose in discovery what documents it copied, any recorded tapes

or memoranda regarding the intrusion, or any other information regarding the "means from or through which" the journalist's information was obtained. In other words, although a harmed individual could file a complaint, Unicorn Riot's interpretation of the MFFIA would permit the journalist to subsequently withhold all evidence of its own wrongdoing.[3]

Although such hypotheticals may seem extreme, they are not implausible—particularly in the modern world of extreme polarization, spurred in part by the proliferation of alternative news sources that may not adhere to traditional media norms and ethics, where sophisticated digital spying and hacking tools are readily available, and where every person with a smartphone in their pocket is one Facebook livestream away from being "directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public" (and therefore a potentially protected newsgatherer under the MFFIA). Interpreting the MFFIA to apply to a purported newsgatherer even when that newsgatherer participates in tortious or illegal conduct invites abuse of the MFFIA's privilege—and sends a message to purported newsgatherers like Unicorn Riot that they have free rein to disregard civil and criminal laws in the course of their work. As explained above, there is no public interest in encouraging such lawlessness and malfeasance. The Court should accordingly reject

[3] Unicorn Riot appears to agree that a reporter's ability to evade discovery in a direct suit for his or her own torts is concerning, conceding in its brief that "this might have been a harder case if it involved a tort lawsuit against a reporter." (R. Br. at 44.) By its own terms, the MFFIA applies to defendant newsgatherers and nonparty newsgatherers alike, and the Court accordingly should not simply disregard the effect that its ruling will have in future cases involving claims asserted directly against a wrongdoing newsgatherer.

Unicorn Riot's and the Court of Appeals' overly broad interpretation of the MFFIA privilege and instead clarify that its substantial protection applies only to lawful newsgathering activities.

B. Construing the MFFIA privilege as applying only to lawful newsgathering does not render the MFFIA's explicit exceptions superfluous.

Unicorn Riot erroneously argues that interpreting the MFFIA privilege to apply only to lawful newsgathering would violate the canon of *expressio unius est exclusio alterius* and render the MFFIA's two explicit exceptions superfluous. To the contrary, interpreting the MFFIA as applying to lawful newsgathering activities is consistent with the structure of the statute as a whole and does not render any provision of the statute meaningless.

Under the MFFIA, when a law-abiding newsgatherer engages in legitimate, nontortious newsgathering activities, it is entitled to the substantial protections of the MFFIA. *See* Minn. Stat. §§ 595.022-.023. However, that substantial privilege can nevertheless be overcome in two circumstances: (1) in certain criminal cases, and (2) in a defamation action when the identity of a source will lead to evidence relevant to actual malice. Minn. Stat. §§ 595.024-.025; *see also Weinberger*, 668 N.W.2d at 672. In other words, the Legislature determined that even the substantial privilege protecting information obtained during *lawful* newsgathering must give way in two limited circumstances, and it provided statutory exceptions detailing those circumstances. There is nothing superfluous about the MFFIA's explicit exceptions under Appellants' interpretation of the statute: they simply provide a means of overcoming the privilege even when the newsgatherer has not engaged in any tortious or wrongful conduct.

C. The district court is capable of determining whether a purported newsgatherer engaged in tortious or illegal conduct and thus stepped outside of the MFFIA's protection.

Unicorn Riot also asserts that limiting the MFFIA privilege to only lawful newsgathering would be unworkable, noting that the statute itself does not provide a standard for making that determination.

But courts are perfectly capable of developing and applying standards for determining whether asserted privileges apply. District courts regularly decide such issues when confronted with other types of privilege claims. For example, with respect to the crime-fraud exception to the attorney-client privilege, district courts require the privilege-challenging party to make a prima facie showing that a purportedly privileged communication was (1) made in furtherance of a crime or fraud and (2) was closely related to the fraud. *Levin v. C.O.M.B. Co.*, 469 N.W.2d 512, 515 (Minn. Ct. App. 1991). The prima facie showing requires more than "[m]ere allegations of wrongdoing" and "mere coincidences." *Id.* (citing *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987); *In re Grand Jury Subpoenas Duces Tecum*, 773 F.2d 204, 207 (8th Cir. 1985)). Courts have developed similar tests for determining when other privilege exceptions apply. *See, e.g.*, *United States v. White Owl*, 39 F.4th 527, 532 (8th Cir. 2022) (recognizing third-person/spousal-victim exception to the marital communications privilege and noting that a prima facie showing that the exception applies is sufficient).

There is no reason that courts could not develop and apply a similar standard when determining whether a newsgatherer stepped outside of the MFFIA's protection by engaging in tortious or illegal conduct.

D. The canon of constitutional avoidance does not apply in this case.

Unicorn Riot also argues that construing the MFFIA privilege to apply only to lawful newsgathering would "trigger a constitutional confrontation," and that Unicorn Riot's interpretation of the MFFIA privilege should be affirmed based on the "canon of constitutional avoidance." (R. Br. at 23-26.) Unicorn Riot misapplies the canon and misconstrues Appellants' position.

As an initial matter, the canon of constitutional avoidance is not implicated in this case. The canon is based on the separation-of-powers doctrine and the Court's respect for the Legislature. *See* Minn. Stat. § 645.17(3) (noting that courts ascertaining legislative intent may presume that "the legislature does not intend to violate the Constitution of the United States or of this state"); *Union Pac. R. Co. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 893 (8th Cir. 2013) (noting that courts adhere to the "principle of constitutional avoidance" out of respect for the legislature, "which we assume legislates in light of constitutional limitations"). The canon accordingly requires courts to interpret statutes to avoid meanings that violate constitutional principles. *See, e.g.*, *Hutchinson Tech., Inc. v. Comm'r of Revenue*, 698 N.W.2d 1, 18 (Minn. 2005). When a statute can be given two constructions, one constitutional and the other unconstitutional, the constitutional interpretation must be adopted, and the statute's constitutionality preserved. *Id.*

No party in this case has ever contended that the MFFIA is *unconstitutional*, or that it would be unconstitutional if it did not extend to cover tortious or criminal conduct committed in the course of newsgathering. Although Unicorn Riot has contended that the Court should recognize an *additional* constitutional privilege that would apply to protect

Unicorn Riot in this case, Unicorn Riot has never contended that a narrowly construed MFFIA would *violate* the Minnesota or United States constitutions. The canon of constitutional avoidance accordingly does not apply.

Unicorn Riot's related assertion that Appellants' interpretation raises "constitutional questions" because it construes the MFFIA to hinge on a reporter's viewpoint mischaracterizes Appellants' position in this case. (R. Br. at 24.) Appellants have never argued that application of the MFFIA hinges on a newsgatherer's ideological or political viewpoint.[4] Instead, it is the illegal or tortious nature of a purported newsgatherer's conduct that ultimately matters. Narrowly construing the MFFIA would accordingly not trigger a "constitutional confrontation" or raise "serious constitutional questions," as Unicorn Riot contends.

II. The MFFIA does not exempt Unicorn Riot from having to prepare a privilege log like any other individual or entity.

Unicorn Riot urges this Court to strip the district court of all discretion to require a party to justify its MFFIA privilege claim by providing a privilege log—the standard tool for asserting any other privilege. Unicorn Riot argues that (1) the MFFIA's language exempts any purported newsgatherer from providing literally any information about responsive materials it may be withholding and that (2) subjecting Unicorn Riot to normal

[4] Amicus The Reporters Committee for Freedom of the Press also devotes much of its briefing to arguing that Unicorn Riot is "news media" and defending the MFFIA's application to "non-traditional media." For the purpose of this appeal, Appellants do not contend that Unicorn Riot is not "news media" entitled, when engaged in lawful newsgathering activities, to the MFFIA privilege.

subpoena-response requirements would effectively "extinguish" the MFFIA's protections. The Court should reject both arguments.

A. The MFFIA does not exempt purported newsgatherers from providing a privilege log.

First, neither the language nor purpose of the MFFIA exempts purported newsgatherers from establishing that the MFFIA privilege applies to responsive, withheld documents. The MFFIA prohibits compelled *disclosure* of the following: (1) the identity of a person providing information (i.e., a confidential source) or the means through which the information was obtained; (2) unpublished information procured by the newsgatherer in the course of work; or (3) the newsgatherer's notes, memoranda, recording tapes, film, or other reportorial data. Minn. Stat. § 595.023. Unicorn Riot asserts that a privilege log would "necessarily" include the information and data the MFFIA protects. Not so. The form and content of a privilege log can be modified to ensure that MFFIA-protected information remains undisclosed. A privilege log for an MFFIA privilege claim may, for example, require only a date and very high-level description of the document being withheld. *See, e.g.*, *Thurman v. Knezovich*, 522 P.3d 1000, 1008 (Wash. Ct. App. 2023) (holding in a case involving a reporter's privilege that the date of a newsgatherer's discussion or document is not privileged information).

Unicorn Riot objects to even that minimal requirement, asserting instead that *any* form of privilege log "could" compromise sources and thus violate the MFFIA. (R. Br. at 32.) Unicorn Riot's objection is undermined by the fact that federal courts regularly order privilege logs—even in the face of reporters' privileges that protect the identity of a source.

Thus, as federal courts regularly confirm, privilege logs can be modified to prevent disclosure of source identities. (*See* R. Br. at 30 (conceding that the court in *Gibbons v. GlaxoSmithKline, LLC*, 239 N.E.3d 10, 21 (Ill. App. Ct. 2023), considered a reporter's shield law that protected sources and held that the district court still had discretion to order a privilege log because the identity of the source could be omitted).)

Moreover, although Unicorn Riot asserts that federal courts' history of ordering privilege logs is not relevant here because "the First Amendment reporter's privilege is narrower than the MFFIA" (R. Br. at 30), some jurisdictions have, in fact, recognized a very broad reporters' privilege equivalent to the MFFIA—and have still permitted district courts to order privilege logs when appropriate. *See, e.g.*, *In re Application of Chevron Corp.*, 736 F. Supp. 2d 773, 778 (S.D.N.Y. 2010) (requiring privilege log relating to the reporters' privilege recognized in the Second Circuit after noting that the privilege does not excuse journalists "from demonstrating, in an appropriate manner, that the privilege applies to particular documents or information in question"); *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 30 (2d Cir. 1999) (acknowledging that the Second Circuit recognizes a broad reporters' privilege that covers both confidential sources *and* nonconfidential materials obtained or created by the reporter—as the MFFIA does).

Relatedly, although Unicorn Riot asserts that the MFFIA privilege is "different from other sorts of privileges that are compatible with privilege logs" (R. Br. at 29), other courts have required privilege logs even in the face of extremely broad statutory privileges. For example, the Alabama Supreme Court recently considered a defendant hospital's argument that Alabama's broad quality-assurance statute, which categorically prohibits clinical

accreditation or quality-assurance materials from any discovery or disclosure, precluded the district court from ordering a privilege log relating to materials withheld under the statute. *Ex parte Affinity Hosp., LLC*, No. SC-2024-0542, 2024 WL 4312757 (Ala. 2024). The Alabama Supreme Court rejected that argument and held that a statutory privilege exempting materials from discovery did not exempt a party from establishing the applicability of the privilege through a privilege log:

> In light of the policy behind the quality-assurance statutes, it is clear that the legislature intended that quality-assurance materials be exempt from Rule 26(b)(1)'s broad scope of discovery. However, [defendant's] argument that the legislature, by enacting the quality-assurance statutes, completely carved out and totally exempted quality-assurance materials from Rule 26's field of operation is without merit. [Defendant] makes the blanket assertion that a statutory privilege applies without any judicial oversight, intervention, or review. But that is not the case. . . .
>
> [T]he legislature has not diminished the judiciary's role in the discovery process when a party asserts that information is subject to a statutory privilege. Rather, when a health-care provider . . . asserts a statutory privilege, it must establish its applicability in the same manner as a party asserting any other privilege.

Id. at *2-3.

The same reasoning applies in this case. The MFFIA does not prohibit the district court from requiring a properly tailored privilege log in the face of a party's invocation of the MFFIA privilege. The Court of Appeals erred when it held otherwise.

B. Requiring Unicorn Riot to comply with the normal rules of discovery does not "extinguish" the MFFIA's protections.

Unicorn Riot declares that allowing district courts to order purported newsgatherers to provide a privilege log in appropriate cases would impose a "crushing burden" on reporters that would "extinguish" the MFFIA's protections. (R. Br. at 33.) Unicorn Riot appears to suggest that all reporters should be exempted from the normal demands of civil discovery imposed on every other individual and entity because those demands can be timely and costly. Unicorn Riot declares that reporters' time is simply too precious to spend on subpoena compliance. Unicorn Riot's histrionics on the burdens of subpoena compliance are exaggerated and unsupported by the actual text and purpose of the MFFIA, which is clearly concerned with protecting the confidentiality of the press's sources and work product—not with categorically exempting all newsgatherers from having to occasionally respond to valid discovery requests. *See* Minn. Stat. § 595.022.

Moreover, while Unicorn Riot states that normal civil discovery is a "crushing burden," it does not explain why reporters are uniquely entitled to a special, total exemption from that burden. News media provide a valuable public service—but so too do hospitals, schools, and other nonprofit public service organizations. None of those essential (and often cash- and labor-strapped) entities have a special blanket exemption from the obligation to respond to a valid subpoena. Neither should newsgatherers.

Finally, while Unicorn Riot raises the specter of harassing or retaliatory subpoenas, district courts are perfectly capable of preventing and punishing subpoena abuse. Minnesota's discovery rules provide significant protection to *all* nonparty subpoena

recipients, and district courts have broad discretion to enforce those protections. Subpoenaing parties are obligated under Rule 45 to avoid imposing undue burden or expense on a subpoenaed nonparty. Minn. R. Civ. P. 45.03(a). The district court must enforce that duty and can impose appropriate sanctions if the duty is violated. *Id.* Courts are likewise required to quash subpoenas that require disclosure of privileged information. Minn. R. Civ. P. 45.03(c)(1)(C). Then, if documents or other materials are ordered to be produced, a nonparty must be protected from significant expense resulting from the order. Minn. R. Civ. P. 45.03(b)(2). Unicorn Riot's dramatic warning that permitting a court to order a privilege log would provide a "powerful tool" for harassing journalists ignores the substantial protections that the discovery rules already provide to nonparty journalists.

C. The district court acted within its discretion by ordering a privilege log in this case.

Unicorn Riot wrongly asserts that it had no burden of showing that the MFFIA privilege applied because all of the documents Appellants requested were "facially privileged." (R. Br. at 34.) However, assuming the MFFIA applies to Unicorn Riot in this case (as explained above, it does not), many of the materials requested in Appellants' subpoenas are not covered by that privilege. For example, Unicorn Riot notes that Appellants requested information about Unicorn Riot's organizational structure, its funding, and its legal fees with respect to its participation in the Dakota Access Pipeline protests. These categories of documents and information are not, as Unicorn Riot bafflingly suggests (*see* R. Br. at 36), privileged under the MFFIA: they do not seek information about Unicorn Riot's sources and do not seek disclosure of its reportorial work

product. As the district court explained, even under Unicorn Riot's overly broad interpretation of the MFFIA, "it is possible that [Unicorn Riot's] blanket claim of privilege has shielded responsive documents and answers that are not protected by the privilege. As it stands, [Appellants] have no notice of whether any documents exist, much less the specific nature of the privilege claimed for each one." (Add. 27.)

The Court of Appeals erred when it prohibited the district court from ordering a privilege log that will give Appellants the notice they are entitled to under Rule 45. *See* Minn. R. Civ. P. 45.04(b) ("When information subject to a subpoena is withheld on a claim that it is privileged . . . the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim."). This Court should reverse.

III. The United States and Minnesota constitutions do not relieve Unicorn Riot of its obligation to comply with Appellants' subpoena.

Finally, Unicorn Riot offers an alternative argument that—even if the MFFIA does not apply here—the Minnesota and United States constitutions relieve it of any duty to comply with Appellants' subpoena. This constitutional claim was not addressed by the Court of Appeals or raised in the petition for review and is therefore outside the scope of this appeal. It also fails on its merits: this Court has never recognized a reporters' privilege under the Minnesota or United States constitution and should not do so now.

A. The existence and application of a constitutional reporters' privilege is outside the scope of this appeal.

As an initial matter, the Court should decline to decide whether there is a constitutional privilege shielding Unicorn Riot from compliance with Appellants' subpoena because that question is not properly before this Court.

This Court generally does not address issues that were not specifically raised in a petition for review. *See, e.g.*, *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 515 (Minn. 2012); *Garcia-Mendoza v. 2003 Chevy Tahoe*, 852 N.W.2d 659, 668 (Minn. 2014). As Unicorn Riot notes, neither the district court nor the Court of Appeals addressed whether a constitutional reporters' privilege applies. (R. Br. at 2.) While Appellants' petition for review briefly noted that this case has some constitutional implications (because the MFFIA is modeled on a qualified First-Amendment privilege that other jurisdictions have adopted), the specific issues Appellants presented for review were limited to the interpretation and application of the MFFIA. Unicorn Riot did not petition for review of any additional constitutional issues. The constitutional-privilege argument that Unicorn Riot presents is outside the scope of this appeal.

B. This Court has never recognized a constitutional reporters' privilege and Unicorn Riot provides no justification for doing so in this case.

Unicorn Riot's alternative constitutional argument also fails on its merits. Neither this Court nor the United States Supreme Court nor the Eighth Circuit has ever explicitly recognized a reporters' privilege under the First Amendment. *See, e.g.*, *Weinberger*, 668 N.W.2d at 671 n.5; *In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 817 (Minn. 2006) ("We have not before recognized a First Amendment

journalist's privilege[.]"); *Bredemus v. Int'l Paper Co.*, No. CV 06-1274, 2008 WL 11348492, at *4 (D. Minn. Aug. 22, 2008) ("[N]either the Minnesota Supreme Court, nor our Court of Appeals, has yet recognized a qualified reporters' privilege[.]").

There is no need to recognize any such constitutional privilege now. The MFFIA squarely covers the issues raised in this case. The Legislature enacted the MFFIA in response to the Supreme Court's decision *not* to recognize a reporters' privilege, and it designed the statute to provide reporters with all the protection it believed was necessary to preserve the freedom of the press. (*See* R. Br. at 26.) The MFFIA is (as Unicorn Riot repeatedly asserts) as broad, or broader, than the constitutional reporters' privileges that have been recognized in other jurisdictions. (*See* R. Br. at 25-26, 30.) Unicorn Riot does not explain how, if the constitutional reporters' privilege is *narrower* than the MFFIA's protections and provides *less* protection to reporters (R. Br. at 26), it would nevertheless apply here to protect information and documents not *already* covered by the MFFIA. Indeed, any such constitutional protection would *not* provide an additional layer of protection: if the MFFIA privilege does not apply to tortious or unlawful conduct, neither should a narrower, less-protective constitutional reporters' privilege. In short, there is simply no reason to decide the existence of a separate constitutional reporters' privilege in this case. *See Limmer v. Swanson*, 806 N.W.2d 838, 839 (Minn. 2011) ("We generally do not decide important constitutional questions unless it is necessary to do so[.]" (internal quotation marks omitted)).

Unicorn Riot also fails to clearly define the scope of the constitutional privilege it asks the Court to recognize. As Unicorn Riot concedes, "[c]ourts recognizing the

[constitutional reporters'] privilege have not settled on a single test . . . and the standard for overcoming the privilege varies significantly from court to court." *In re Charges of Unprofessional Conduct*, 720 N.W.2d at 816. Unicorn Riot recites some of the various standards, and proposes questions that courts "might" ask, but fails to clearly articulate the particular standard it believes the Court should adopt. (R. Br. at 40.)[5] The Court should decline Unicorn Riot's invitation to affirm the Court of Appeals' decision based on a constitutional privilege that this Court has never before recognized, does not need to now recognize, and for which Unicorn Riot itself provides no clear guidance or support.[6] *See In re Charges of Unprofessional Conduct*, 720 N.W.2d at 818 ("We are reluctant to articulate a new principle of constitutional law without the benefit of thorough briefing by the parties, particularly where the principle has not been firmly established by the Supreme Court, and federal courts of appeals differ as to the appropriate standard.").

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[5] Unicorn Riot does assert that "this case warrants the application of rigorous tests" because Appellants seek "confidential information." (R. Br. at 44.) However, *unpublished* information covered by Appellants' subpoena does not necessarily include *confidential* information. "Confidential" implies agreed-upon anonymity or secrecy—e.g., the name of a whistleblower which a reporter agrees not to reveal. By contrast, unpublished photographs of a public event, or unpublished parts of an interview with an on-the-record source that a reporter edited before publication, are not "confidential" just because they were not published. Many of Appellants' requests seek these sorts of unpublished but nonconfidential communications, videos, and photographs, because the protests at issue in this case were conducted by activists who wanted attention, not anonymity.

[6] Even if the Court were to adopt some new standard for applying and overcoming a constitutional reporters' privilege, it would be inappropriate to accept Unicorn Riot's assertion that Appellants have not met that standard. (*See* R. Br. at 45.) The proper course of action would instead be to remand to the district court to give Appellants an opportunity to address the new standard and its application to the information they seek.

CONCLUSION

The MFFIA does not apply to protect from disclosure information and materials held by purported "newsgatherers" engaged in unlawful, tortious conduct. When Unicorn Riot decided to repeatedly trespass on Appellants' construction sites—and thereby join the protestors in their equally tortious, unlawful conduct—it stepped outside the bounds of the privilege. The Court of Appeals erred when it held otherwise. The Court of Appeals also erred when it went a step further and held that the MFFIA strips district courts of their discretion to require privilege logs in discovery disputes and totally exempts purported newsgatherers from their obligation to demonstrate that the MFFIA privilege applies to withheld documents. Appellants respectfully ask that this Court reverse the Court of Appeals' decision in its entirety and remand to the district court for further consideration of Appellants' motion to compel.

Respectfully Submitted,

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