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' BRIEF

Lawrence Bender (MN #153862)
FREDRIKSON & BYRON, P.A.
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
lbender@fredlaw.com
Telephone: 701.221.8700

Richard D. Snyder (#0191292)
FREDRIKSON & BYRON, P.A.
60 South Sixth Street, Suite 1500
Minneapolis, MN 55402
rsnyder@fredlaw.com
Telephone: 612.492.7145

Attorneys for Appellants

Christopher Proczko (#0392419)
SAPIENTIA LAW GROUP, PLLC
120 South Sixth Street, Suite 100
Minneapolis, MN 55402
christopherp@sapientialaw.com
Telephone: 612-756-7100

Ryan R. Simatic (#0392462)
BIERSDORF & ASSOCIATES, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402
ryan@condemnation-law.com
Telephone: 612.339.7272

Attorneys for Respondents

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STATEMENT OF THE ISSUES

I. **Should the qualified privilege established by the Minnesota Free Flow of Information Act, Minn. Stat. §§ 595.021-.025 (MFFIA), apply when a purported newsgatherer engages in unlawful or tortious conduct?**

Rulings Below:

The district court concluded that the qualified privilege established by the MFFIA applies even when a purported newsgatherer engages in unlawful or tortious conduct and denied Appellants' motion to compel Respondents to comply with Appellants' subpoena.

The Court of Appeals affirmed the district court, holding that the protections of the MFFIA are not limited to newsgathering information obtained through lawful, nontortious conduct.

Apposite Authorities:

Minn. Stat. § 595.022; Minn. Stat. § 595.023; *United States v. Sanusi*, 813 F. Supp. 149 (E.D.N.Y. 1992); *Food Lion, Inc. v. Cap. Cities/ABC, Inc.*, 194 F. 3d 505 (4th Cir. 1999).

II. **When a party claims that relevant information in its possession is privileged under the MFFIA, does the district court have discretion to order the production of a privilege log so that the validity of the privilege claim can be assessed?**

Rulings Below:

The district court exercised its wide discretion in discovery matters to order Respondents to produce a privilege log for documents that Respondents are withholding from Appellants.

The Court of Appeals reversed the district court's order, holding that in a proceeding to enforce a third-party subpoena, a district court may not require the third party to produce a privilege log or submit information for in camera review that is privileged under the MFFIA and does not fall within a statutory exception.

Apposite Authorities:

Minn. R. Civ. P. 45.04(b); *Shetka v. Kueppers, Kueppers, Von Feldt and Salmen*, 454 N.W.2d 916, 921 (Minn. 1990).

STATEMENT OF THE CASE

This case asks whether the reporters' privilege established by the Minnesota Free Flow of Information Act, Minn. Stat. §§ 595.021-.025 (MFFIA), applies when the alleged newsgatherer engages in unlawful, tortious conduct—and whether the MFFIA prohibits a district court from requiring a party invoking its qualified protection to produce a privilege log establishing that the privilege, in fact, applies to any withheld documents.

Appellants Energy Transfer LP, Energy Transfer Operating, L.P., and Dakota Access LLC sued Greenpeace International, Greenpeace Inc., and Greenpeace Fund, Inc. in North Dakota for extensive damages caused by Greenpeace's commission and facilitation of trespass, violence, and other unlawful conduct intended to prevent the construction of the Dakota Access Pipeline. In 2016, Respondent Unicorn Riot, a far-left organization of "citizen journalists," inserted its members into these protests and then posted supportive interviews, photographs, and video footage online. Unicorn Riot members accompanied protestors as they trespassed onto pipeline construction sites, vandalized equipment, threatened workers and law enforcement officials, and unlawfully obstructed pipeline completion. Unicorn Riot members conducted interviews with protesters and recorded footage of the protestors' unlawful activities while trespassing on pipeline construction sites. Unicorn Riot also likely received communications from protestors concerning plans for the protests—including plans for unlawful activity—in order to coordinate its presence and facilitate its live coverage of those activities.

Because Appellants believed that Unicorn Riot likely possessed extensive information that is highly relevant to Appellants' claims against Greenpeace, Appellants

served Unicorn Riot and its principal, Niko Georgiades (collectively, "Unicorn Riot"), in Minnesota with subpoenas duces tecum aimed at discovering documents and information relevant to Appellants' claims. Despite its own participation in the tortious conduct at issue in the underlying suit, Unicorn Riot refused to produce a single document, instead claiming expansively that all of its information was privileged under the MFFIA.

Appellants brought a motion to enforce the subpoenas. The district court denied the motion, agreeing with Unicorn Riot that the MFFIA applied. The district court also determined, however, that not all responsive information in Unicorn Riot's possession was necessarily privileged under the MFFIA and ordered Unicorn Riot to produce a privilege log so that the court could review the validity of Unicorn Riot's privilege claims.

Both parties appealed the district court's order. The Court of Appeals affirmed the district court's order with respect to the scope of the MFFIA, holding that the MFFIA privilege applies even if the information was gathered in an illegal or tortious manner. The Court of Appeals reversed the district court's order that Unicorn Riot must produce a privilege log, holding instead that a district court cannot require a privilege log or order in camera review of information that "is privileged" under the MFFIA. In so holding, the Court of Appeals absolved Unicorn Riot of any obligation to justify its assertion that its withheld materials are, in fact, covered by the MFFIA privilege.

Appellants sought, and this Court granted, review of the Court of Appeals' decision on both issues. The Court should reverse the Court of Appeals' decision in its entirety. The MFFIA applies only to legitimate, lawful newsgathering activities. Courts have long recognized that evidentiary privileges should not extend to illegal or tortious conduct. The

Court of Appeals' holding to the contrary invites abuse of the reporters' privilege and flies in the face of the public-interest purpose of the MFFIA. The Court of Appeals further erred—and further invited abuse of the privilege—when it freed any party claiming MFFIA protection from its burden of demonstrating through a privilege log that the privilege actually applies to all withheld materials.

STATEMENT OF THE FACTS

A. Protestors opposing the Dakota Access Pipeline trespass on and cause significant damage to the pipeline construction site.

The Dakota Access Pipeline is a 1,172 mile underground pipeline built to transport crude oil from North Dakota through South Dakota and Iowa to Illinois. (Doc. 7 at 58.[1]) Energy Transfer designed and constructed the pipeline. (*Id.* at 54-55.) Dakota Access owns and operates the pipeline. (*Id.* at 55.) In the underlying lawsuit against Greenpeace, Appellants allege that in July 2016, as the pipeline neared completion, Greenpeace perpetuated a campaign to obstruct Appellants' operations. (*Id.* at 60-61.) Greenpeace spread false statements about Appellants in order to raise funds supporting their pipeline protests and incited thousands of protestors to descend on Lake Oahe to halt construction. (*Id.* at 61-67.) Greenpeace then organized, funded, directed, and supported unlawful acts of trespass, property destruction, and violence by the protestors to prevent pipeline completion and operation. (*Id.* at 60-61, 67-72; Doc. 8 at 73-87.) Greenpeace knew and

[1] Citations to the record use the the Document Index Number, e.g., "Doc. 7 at 58" refers to Documents Index # 7 at page 58.

intended that the protestors would engage in tortious and criminal conduct in violation of North Dakota laws. (Doc. 7 at 60-61.)

As part of this campaign, Greenpeace sent "direct action trainers" to protest camps to lead daily direct-action trainings, which included instruction in unlawful activity, such as "hard lockdown blockades" and "technical blockades." (Doc. 7 at 67-68.) Greenpeace and other activist groups taught protestors to use U-locks, steel cables, chains, and metal pipes to attach themselves to construction equipment. (*Id.*)

Protestors then used those tactics—many of which were unlawful—at pipeline construction sites on an almost daily basis between August and November 2016, causing a total shutdown of pipeline construction. (*Id.*) Appellants allege in their underlying lawsuit that on August 10, 2016, approximately 100 protestors entered the pipeline property near Lake Oahe. (Doc. 8 at 76.) The protestors breached fences and threatened pipeline employees and law enforcement officers with knives. (*Id.*) Attacks continued for the next few days when hundreds of protestors entered pipeline property and threatened pipeline employees. (*Id.*) Appellants' employees had to be evacuated by police escort, halting construction and disrupting pipeline completion. (*Id.*)

The attacks continued in September. On September 3, 2016, hundreds of protestors attacked crews working on the pipeline. (*Id.* at 77.) They stampeded horses, loosed dogs, and drove vehicles onto federal and private land where construction was occurring. (*Id.*) Protestors attacked security personnel with knives, fence posts, and flagpoles, resulting in multiple hospitalizations. (*Id.*) They mounted another similar attack on September 6. (*Id.*) On September 9, protestors illegally entered a pipeline construction site and used steel

pipes to lock themselves to construction equipment. (*Id.*) On September 14, protestors again trespassed onto a pipeline construction site and attached themselves to an excavator. (*Id.*) The protestors' unlawful activity and ongoing disruption cost Appellants tens of millions of dollars in property damage, security expenses, and delay-related damages.

B. Unicorn Riot engages in unlawful activity at pipeline construction sites.

Unicorn Riot describes itself as a "decentralized," "non-profit media organization of journalists" that "engages and amplifies the stories of social and environmental struggles from the ground up." (Doc. 8 at 105.) Unicorn Riot reports from a far-left and antiestablishment political and ideological perspective.

During the 2016 pipeline protests, Unicorn Riot members, including Georgiades, "embedded" and participated with protestors while they blocked the entrances to pipeline construction sites and eventually trespassed on those sites to further obstruct the construction work. In September, two Unicorn Riot members, Georgiades and Chris Schiano, were arrested while trespassing at pipeline construction sites recording the protests. (Doc. 9 at 132.) Unicorn Riot live streamed the arrests. (*Id.* at 121-26.) Two more Unicorn Riot members were arrested protesting the pipeline in October. (*Id.* at 127-31.) In February 2017, Unicorn Riot posted an article that three members who had been charged with criminal trespass faced trial for their actions during the protests. (*Id.* at 132.) Although criminal charges against the Unicorn Riot members were eventually dropped because law enforcement purportedly did not provide the members with both notice that they were encroaching on private property and an opportunity to leave, video evidence recorded by Unicorn Riot shows that Unicorn Riot members were unlawfully present on

pipeline construction sites without permission while recording images and conducting interviews of protestors who were then trespassing at the sites. (Doc. 3 ¶¶ 2-6; Doc. 8 at 107-20.)

C. Appellants sue Greenpeace to recover damages caused by the unlawful conduct at the pipeline sites.

Appellants sued Greenpeace in 2019, seeking recovery of damages caused by the unlawful conduct and property destruction that occurred during the protests. (Doc. 7 at 50.) Appellants asserted claims for trespass, aiding and abetting trespass, conversion, aiding and abetting conversion, nuisance, aiding and abetting nuisance, defamation, tortious interference with business relations, and civil conspiracy. (Doc. 8 at 92-100.) Appellants allege in their underlying lawsuit that as a result of Greenpeace's wrongful acts, Appellants suffered substantial damage in North Dakota, including costs of delayed construction, costs of professional security services to protect workers and property against violent protestors, and costs associated with mitigating Greenpeace's misinformation campaign. (*Id.* at 91.)[2]

D. Unicorn Riot refuses to comply with Appellants' subpoenas.

In March 2021, to discover information relevant to Appellants' claims against Greenpeace, Appellants served a subpoena duces tecum on Unicorn Riot and Georgiades. (Doc. 7 at 8-49.) The subpoenas request production of the following materials:

> 1. Documents and communications sufficient to identify the organizational structure of Unicorn Riot during the Relevant Time Period . . . .

[2] The underlying case against Greenpeace is ongoing and is currently scheduled for trial in 2025.

2. Documents and communications, including video and audio recordings, concerning actual or planned Direct Action relating to [Appellants], and/or DAPL . . . .

3. Documents and communications, including video and audio recordings, between July 2016 and April 2017 concerning the use of, or trespass onto, any [Appellants'] land or DAPL construction site for any actual or planned Direct Action . . . .

4. Communications, including video and audio recordings, concerning [Appellants] or DAPL, including concerning any actual or possible Direct Action, between or involving you and: (i) Greenpeace; (ii) Krystal Two Bulls; (iii) Cody Hall; (iv) Red Warrior Camp or any of its supporters, participants, agents, members, volunteers, affiliates, or any others purporting to act on its behalf; (v) the SRST tribal government or Tribal Council, including its chairman, vice chairman, secretary, councilmen-at-large, district representatives, or any of its staff; (vi) any federal, state, local, or tribal governmental agency or official or law enforcement agency or official; (vii) any investors in [Appellants] or DAPL, including any shareholders; (viii) any lenders to, or creditors of, [Appellants] or DAPL; (ix) the Freshet Collective; (x) the NoVo Foundation; (xi) Earth First!; (xii) Chase Iron Eyes; (xiii) IP3; (xiv) LaDonna Tamakawastewin Allard; (xv) Joseph Haythorn; (xvi) Ruckus Society; and (xvii) any members of the press.

5. Documents and communications, including video and audio recordings, concerning any action by you or any other person, group, or entity to halt, impede, obstruct, block, delay, or interfere with DAPL construction and/or to damage or attempt to damage DAPL construction equipment.

6. Documents and communications, including video and audio recordings, concerning Unicorn Riot's processes, policies, procedures, protocols, guidelines, standards, manuals, slideshows, or instructions for Direct Action, including with respect to techniques, methods, or activities to halt, impede, obstruct, blockade, delay, or interfere with the activities of [Appellants] and/or DAPL.

7. With respect to any monies or other financial support, supplies, items, equipment, food, lodging, transportation, weapons, implements, things, or other tangible support provided to you, Greenpeace, or any other person, group, or entity in connection with any opposition to, or actual or potential direct action against, [Appellants] and/or DAPL: (a) Documents and communications concerning any such support; (b) Documents or

communications requesting any such support; (c) Documents or communications identifying individuals and entities that provided such support; and (d) Documents or communications concerning or identifying how such support was expended, deployed, or utilized.

8. Documents and communications concerning any monies or other financial support, supplies, items, food, lodging, transportation, weapons, implements, things, or other tangible support provided by Greenpeace to you, including monies or other financial support, supplies, items, food, weapons, implements, things, or other tangible support . . . .

9. Documents and communications concerning the possible or actual payment of attorney's fees, court costs, fines, bail, or other legal fees or penalties related to any opposition to, or actual or potential Direct Action against [Appellants] or DAPL, including all documents concerning or identifying the sources of funds used for such payments.

10. Documents concerning or identifying funds allocated to, or expended on, any planned or actual Direct Actions, campaigns, protests, or activities relating to [Appellants] and/or DAPL, including all documents concerning or identifying the sources of such funds.

11. Documents and communications, including video and audio recordings, concerning any training provided to actual or potential participants in connection with any Direct Action, protests, demonstrations, or other means of opposition to [Appellants] or DAPL, including but not limited to any training materials, manuals, presentations, recordings, videos, emails, texts, blog or other internet or Social Media posts, or handouts.

12. Documents and communications between you, Krystal Two Bulls, Cody Hall, and/or any Direct Action trainer concerning Red Warrior Camp, [Appellants] or DAPL.

13. Documents and communications, including video and audio recordings, sufficient to identify any Social Media accounts you used in connection with any opposition to DAPL during the Relevant Time Period.

14. All communications, including video and audio recordings, by you concerning [Appellants] and/or DAPL distributed via Social Media or e-mail.

15. All videos, audio recordings, images, reports, articles, letters, emails, press releases, statements, internet postings or content, or other materials prepared

> by Unicorn Riot concerning [Appellants] or DAPL, including any drafts, edits, or revisions, and all documents and communications concerning the funding, development, research, drafting, editing, review, revision, approval, publishing, or dissemination of such materials.
>
> 16. Documents and communications concerning any understandings, joint plans, or agreements between you . . . and Greenpeace, BankTrack, and/or Earth First! . . . concerning [Appellants] and/or DAPL.

(*Id.* at 26-28; 47-49.)

Unicorn Riot objected to the subpoenas. (Doc. 8 at 103-04.) Counsel for Appellants and Unicorn Riot held a series of conference calls in April and May 2021 regarding Unicorn Riot's objections. (Doc. 7 at 1-2.) Appellants' counsel proposed modifications to the subpoena in an attempt to mitigate Unicorn Riot's concerns, but Unicorn Riot refused to negotiate regarding any possible narrowing of the requests and instead asserted a blanket objection to all requests based on freedom of the press. (*Id.* at 2.) Unicorn Riot refused to produce a single document. (*Id.*)

E. The district court denies Appellants' motion to compel after concluding that the withheld documents are likely privileged under the MFFIA but orders Unicorn Riot to produce a privilege log.

In June 2022, Appellants filed in Minnesota state court a motion to compel Unicorn Riot to comply with the subpoenas. (Docs. 1, 2.) Appellants also requested that, to the extent Unicorn Riot claimed any documents were privileged, Unicorn Riot be required to produce a privilege log listing the responsive material it was withholding and the basis for the claimed privilege so that the validity of the privilege claim could be evaluated. (Doc. 2 at 17.) Unicorn Riot opposed the motion, arguing that all of the requested information was privileged under the MFFIA and the First Amendment to the United States

Constitution. (Doc. 25 at 5-12.) It also argued that Appellants' requests were overly broad and unduly burdensome. (*Id.* at 12-14.) Appellants responded by contending that no journalistic privilege under the MFFIA or the First Amendment applied, because Unicorn Riot's conduct went beyond legitimate, lawful newsgathering when its members engaged in tortious conduct by trespassing on the pipeline sites and effectively participating in the protests and disruption. (Doc. 2 at 17-21; Doc. 28 at 5-9.)

In a short, six-page order, the district court denied Appellants' motion to compel. The district court found that the documents Appellants sought were likely privileged under the MFFIA and that Appellants had not established that a statutory exception to the privilege applied. (Add. 24-27.) In a single sentence, the district court summarily rejected Appellants' argument that the MFFIA does not apply when a purported newsgatherer engages in unlawful, tortious conduct, stating that this argument "appears to have no basis in either statute or case law." (Add. 27.) Because the district court concluded that the documents at issue were likely privileged under the MFFIA, it declined to consider Unicorn Riot's objections under the First Amendment or its argument that the document requests were overly broad and unduly burdensome. (Add. 27-28.)

The district court did, however, acknowledge that Unicorn Riot's blanket claim of privilege may have shielded responsive, unprivileged documents. (Add. 27.) It noted that, without a privilege log, "Plaintiffs have no notice of whether any [responsive] documents exist, much less the specific nature of the privilege claimed for each one." (*Id.*) It ordered Unicorn Riot to produce a privilege log of all responsive materials it claims are privileged.

(Add. 21.) The district court also noted that it would consider requests for in camera review of particular documents once the privilege logs were produced. (Add. 21-22.)

F. The Court of Appeals holds that the MFFIA privilege applies to information obtained by unlawful conduct and bars a district court from ordering the production of a privilege log.

Both parties appealed the district court's order. Appellants argued that the district court erred when it denied Appellants' motion to compel because the MFFIA does not apply to protect information acquired during or related to a purported newsgatherers' unlawful, tortious conduct and thus could not apply to materials Unicorn Riot obtained during the course of, and in furtherance of, its trespass on Appellants' construction sites. (*See* Add. 9-11.) Respondents argued that the district court's privilege log order was an abuse of discretion, asserting that the MFFIA's protection is so absolute that a district court cannot require a party claiming the MFFIA privilege to produce a privilege log. (*See* Add. 16.)

In a precedential opinion, the Court of Appeals held that the protections of the MFFIA are not limited to newsgathering information obtained by means of lawful conduct. (Add. 9-16.) It accordingly affirmed the district court's determination that the MFFIA privilege applies to Unicorn Riot's newsgathering information relating to the DAPL protests. (Add. 16.)

The Court of Appeals took an even broader view of the reporters' privilege than the district court, however, and reversed the court's order requiring Unicorn Riot to produce a privilege log. (Add. 16-18.) The Court of Appeals instead held that under the language of the MFFIA, a district court has no authority to order a privilege log for materials protected

from disclosure under the MFFIA unless one of the statutory exceptions in the MFFIA applies. (*Id.*)

Despite this broad holding, the Court of Appeals acknowledged that "it is possible that not *all* the information requested by [Appellants] is privileged." (Add. 18.) It clarified that the MFFIA privilege "extends not to Unicorn Riot as an entity, but only to the disclosure of unpublished newsgathering information and information that may disclose the source and means of newsgathering." (Add. 19.) It remanded the case to the district court to determine (1) whether there is any discoverable information requested in the subpoenas to which Unicorn Riot has not responded or asserted a privilege, and (2) whether Appellants' requests impose an undue burden or are otherwise "objectionable under Minn. R. Civ. P. 43.03 or 45.04(a)." (*Id.*)[3]

G. Appellants' petition for review is granted.

Appellants petitioned for review of the Court of Appeals' decision. Appellants requested review of the following issues: (1) whether the privilege established by the MFFIA applies when a purported newsgatherer engages in unlawful or tortious conduct, and (2) whether a party claiming that information in its possession is privileged under the MFFIA may be required to produce a privilege log so that the validity of its privilege claim can be contested. On August 6, 2024, this Court granted Appellants' petition.

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[3] The Court of Appeals also addressed Unicorn Riot's claim that the district court erred by failing to award it attorney fees relating to the motion to compel. (Add. 20.) The Court of Appeals declined to address the issue and instructed the district court to address the attorney-fee request on remand. (*Id.*) The attorney fee decision was not included in Appellants' petition for review and is accordingly not at issue on appeal to this Court.

STANDARD OF REVIEW

This case asks the Court to determine the scope of the reporters' privilege established by the MFFIA. The interpretation of a statute presents a legal question, which the Court reviews de novo. *Mittelstaedt v. Henney*, 969 N.W.2d 634, 638 (Minn. 2022). Application of a statutory privilege to undisputed facts also presents a question of law subject to de novo review. *Energy Pol'y Advocs. v. Ellison*, 980 N.W.2d 146, 151-52 (Minn. 2022). A district court's discovery order requiring a party to provide a privilege log is reviewed for an abuse of discretion. *Shetka v. Kueppers, Kueppers, Von Feldt and Salmen*, 454 N.W.2d 916, 921 (Minn. 1990).

ARGUMENT

I. The MFFIA's evidentiary privilege does not, and should not, extend to protect illegal or tortious newsgathering activities.

Although the MFFIA grants a broad and substantial privilege to lawful newsgatherers, it does not—and should not—extend to protect purported newsgatherers engaged in tortious, unlawful conduct. The Court of Appeals and district court erred when they concluded otherwise, and this Court should reverse.

A. The MFFIA protects lawful newsgathering.

The MFFIA protects information gathered in the course of lawful, legitimate newsgathering activities. Although this Court has not yet addressed whether the protection afforded by the MFFIA extends beyond lawful newsgathering activity to include information created or obtained during the commission of—and in furtherance of—unlawful, tortious, and/or criminal conduct, the history, language, and purpose of the MFFIA confirm that it does not.

The MFFIA provides:

> [N]o person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public shall be required by any court, grand jury, agency, department or branch of the state, or any of its political subdivisions or other public body, or by either house of the legislature or any committee, officer, member, or employee thereof, to disclose in any proceeding the person or means from or through which information was obtained, or to disclose any unpublished information procured by the person in the course of work or any of the person's notes, memoranda, recording tapes, film or other reportorial data whether or not it would tend to identify the person or means through which the information was obtained.

Minn. Stat. § 595.023. The MFFIA was enacted in 1973, at a time when news reporting was conducted by traditional media outlets using traditional newsgathering techniques. It is implicit in the statute that the activities protected are lawful, nontortious newsgathering activities. It is the protection of those *lawful* activities that the statute's preamble states is "consistent with the public interest":

> In order *to protect the public interest* and the free flow of information, the news media should have the benefit of a *substantial* privilege not to reveal sources of information or to disclose unpublished information. To this end, the freedom of press requires protection of the confidential relationship between the news gatherer and the source of information. The purpose of sections 595.021 to 595.025 is to insure and perpetuate, *consistent with the public interest*, the confidential relationship between the news media and its sources.

Minn. Stat. § 595.022 (emphases added). The MFFIA, which exists to protect the public interest and ensure the flow of information consistent with that public interest, is not intended to be a safe harbor for those who engage in illegal and tortious conduct. It is not

"consistent with the public interest" to protect purported "newsgatherers" who participate in illegal and tortious conduct. There is also no public interest in protecting from disclosure otherwise-discoverable information regarding unlawful, tortious, or criminal conduct that was obtained or created by a person participating in and facilitating that conduct.

Instead, a person who commits such unlawful conduct steps outside of the privilege—which is expressly intended to be "substantial," not *absolute*. The Court of Appeals' contrary holding undermines the purpose of the MFFIA and harms the public interest by immunizing from disclosure any information obtained during tortious, wrongful, and potentially criminal conduct by purported newsgatherers—thereby encouraging such conduct. The legislature could not have intended that perverse result. *See, e.g.*, *Grushus v. Minnesota Min. & Mfg. Co.*, 100 N.W.2d 516, 519 (Minn. 1960) (noting that the Court is "required in the interpretation of statutes to attempt to discover and effectuate the legislative intent, to consider the objects which the legislature seeks to accomplish by the statute and the mischief to be remedied; and to avoid a result which would be absurd or do violence to the language of the statute"); *Van Asperen v. Darling Olds, Inc.*, 93 N.W.2d 690, 698 (Minn. 1958) (stating that the object of statutory interpretation is "to ascertain and effectuate the intent of the legislature"); *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 the maxims of natural justice so as to avoid absurd and unjust consequences.").

B. It is well-established that privileges should not extend to illegal or tortious conduct.

An interpretation of the MFFIA that limits its protections to lawful newsgathering activities is also consistent with the long-established principle that privileges should not, and do not, extend to illegal or tortious conduct.

The quintessential example of this principle is the longstanding recognition of the crime-fraud exception to the attorney-client privilege. Courts have recognized the attorney-client privilege as the "most sacred of all legally recognized privileges." *United States v. Bauer*, 132 F. 3d 504, 510 (9th Cir. 1997); *see also United States v. Ivers*, 967 F.3d 709, 716 (8th Cir. 2020) (noting that the attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law"); *Paxton v. City of Dallas*, 509 S.W.3d 247, 259 (Tex. 2017) ("The attorney-client privilege holds a special place among privileges: it is the oldest and most venerated of the common-law privileges of confidential communications." (internal quotation marks omitted)). The Court has nevertheless recognized that the attorney-client privilege cannot apply to communications that facilitate criminal or fraudulent conduct. *See Kahl v. Minn. Wood Specialty, Inc.*, 277 N.W.2d 395, 399 (Minn. 1979) ("[T]he privilege is not permitted to prevent disclosure of communications relating to the commission of future crime or fraud."); *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 440 (Minn. 1998) ("[C]ourts have held that the privilege may not be used to shield communications regarding a future crime or fraud."); *see also Clark v. United States*, 289 U.S. 1, 15 (1933) ("The [attorney-client] privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the

commission of a fraud will have no help from the law. He must let the truth be told."). The crime-fraud exception to the attorney-client privilege exists even though the attorney-client privilege in Minnesota, like the MFFIA privilege, is protected by statute. *See* Minn. Stat. § 595.02(b).

Just as an attorney and client step outside of the attorney-client privilege when they engage in unlawful conduct, so too does a reporter step outside of the MFFIA's protections when he or she participates in tortious or criminal activity. Indeed, holding otherwise would lead to absurd and unjust results: under the Court of Appeals' and Respondents' interpretation of the statute, a reporter could break into a lawyer's, executive's, or government official's office or home in the middle of the night, copy newsworthy documents, and then assert a blanket privilege under the MFFIA to thwart any discovery into what documents were copied and how they were obtained. As explained above, the legislature surely never intended such an absurd result, nor should this Court condone that unreasonable interpretation.

C. Courts have consistently recognized that the reporter's privilege does not immunize newsgatherers from the consequences of improper conduct.

While Minnesota courts have not previously addressed whether the MFFIA privilege extends to information obtained during and as a result of tortious conduct, other courts have repeatedly held that a reporter has no right to commit, and no immunity from the legal consequences for, unlawful or tortious conduct.

The reasoning in *Food Lion, Inc. v. Cap Cities/ABC, Inc.*, 194 F. 3d 505 (4th Cir. 1999), and *United States v. Sanusi*, 813 F. Supp. 149 (E.D.N.Y. 1992), is particularly instructive.

In *Food Lion*, two television reporters used fake resumes to get jobs at a grocery store and secretly videotaped food handling practices. The footage was then used in a broadcast criticizing the grocery store. *Id.* at 510-11. The store sued the television station and reporters involved in the scheme for fraud and trespass. *Id.* at 511. The defendants raised a First Amendment defense to the claims, arguing that First Amendment scrutiny was appropriate because the reporters were engaged in newsgathering. *Id.* at 520.[4] The court rejected that argument and held instead that First Amendment press protections did not protect the reporters from liability for the commission of unlawful conduct in furtherance of their reporting. *Id.* at 521. The court acknowledged the distinct line between protected legitimate newsgathering activities and unprotected unlawful conduct, stating

[4] Although some jurisdictions have recognized a reporter's privilege under the First Amendment, Minnesota courts have never recognized any such constitutional privilege, in part because the MFFIA exists and is itself modeled on a First Amendment privilege that other jurisdictions have adopted. *See Weinberger v. Maplewood Rev.*, 668 N.W.2d 667 (Minn. 2003); *State v. Turner*, 550 N.W.2d 622 (Minn. 1996). Cases addressing the scope of a First Amendment reporter's privilege are thus instructive. The Court of Appeals disagreed that First-Amendment-related caselaw is persuasive on the grounds that "the statutory protections offered under the MFFIA are broader than those afforded by the First Amendment." (Add. 14.) While that is obviously true in Minnesota (due to the simple fact that Minnesota has not recognized *any* First Amendment reporter's privilege), it misses the point. Other jurisdictions *have* recognized the privilege on constitutional grounds, and decisions as to the proper scope of that privilege are accordingly relevant in this case.

that "[w]e are convinced that the media can do its important job effectively without resort to the commission of run-of-the-mill torts." *Id.*

Similarly, in *United States v. Sanusi*, 813 F. Supp. 149 (E.D.N.Y. 1992), a federal court considered a motion to quash a subpoena seeking a videotape created by CBS while it, without permission, accompanied Secret Service agents in a search of an individual's apartment. The court refused to quash the subpoena and ordered CBS to produce the tape to the individual. The court's decision relied in significant part on the fact that CBS obtained the videotape as a result of its trespass. It stated that CBS's trespass in the individual's home "bears upon the court's evaluation of CBS's newsgathering privilege. . . . Even a reporter must accept limits on how far upon another person's privacy he or she may intrude." *Id.* at 160. Given the trespass, the court concluded that "the privilege operates weakly, if at all, in this case." *Id.*

In so holding, the court confirmed the axiomatic principle that that, although "the press in certain circumstances may be able to resist the demands of a subpoena," that "does not mean the press may, simply by raising the cry of 'newsgathering,' exempt itself from all ordinary legal constraints." *Id.* at 155; *see also Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1351 (7th Cir. 1995) ("To enter upon another's land without consent is a trespass. . . [T]here is no journalists' privilege to trespass."); *Prahl v. Brosamle*, 295 N.W.2d 768, 781 (Wis. Ct. App. 1980) ("[T]he claimed constitutional privilege to trespass does not exist."); *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 518 (Cal. Ct. App. 1986) ("[T]he privilege to publish newsworthy information does not immunize media defendants from liability for torts committed in gathering the information . . . . instead, the Supreme

Court has emphasized that 'the publisher of a newspaper has no special immunity from the general application of general laws. He has no special privilege to invade the rights and liberties of others.'" (quoting *Assoc. Press v. Nat. Lab. Rel. Bd.*, 301 U.S. 103, 132-33 (1937)); *Gaella v. Onassis*, 487 F.2d 986, 995-96 (2d Cir. 1973) ("Crimes and torts committed in news gathering are not protected. There is no threat to a free press in requiring its agents to act within the law.").

Unicorn Riot contends, and the Court of Appeals agreed, that these cases (other than *Sanusi*) are inapposite because they involve direct claims against a newsgatherer for its tortious or unlawful conduct. But the underlying principle at issue is equally applicable here: reporters do not have a protected right or special privilege to break the law or invade the rights of other citizens in the course of their purported newsgathering, and their decision to do so anyway subjects them to the same legal consequences faced by any other citizen. That consequence may be a direct claim against the newsgatherer, or it may be a subpoena request for responsive materials relating to the unlawful conduct. But the result in either circumstance should be the same: purported newsgatherers should not be allowed to claim a reporter's privilege to protect their own unlawful newsgathering activities.

D. Unicorn Riot stepped outside of the protections of the MFFIA when it engaged in unlawful trespass onto Appellants' construction sites.

Unicorn Riot, as the party objecting to a valid subpoena, has the burden of proving that the MFFIA privilege applies to shield responsive documents and communications from disclosure. *See Brown v. St. Paul City Ry. Co.*, 62 N.W.2d 688, 701 (Minn. 1954) (stating that a party claiming privilege bears the burden of establishing that the privilege

applies). It cannot meet that burden in this case because its conduct went beyond legitimate newsgathering when it engaged in deliberate, unlawful trespass onto Appellants' private construction sites. Because the MFFIA does not protect the purported newsgatherer who engages in unlawful conduct from valid discovery requests, it cannot protect Unicorn Riot here. The Court of Appeals and district court erred when they failed to recognize this fundamental limitation on the MFFIA. This Court should reverse.

II. The MFFIA does not bar a district court from ordering a party claiming the MFFIA privilege to produce a privilege log.

The Court of Appeals also erred when it stretched the MFFIA's protections even further and held that a district court cannot order a party claiming the MFFIA privilege to produce a privilege log to justify that claim. In so holding, the Court of Appeals exempted reporters from fundamental discovery obligations imposed on every other litigant in Minnesota. Here, too, the Court should reverse.

A. A party claiming the protection of the MFFIA has the burden of showing that the MFFIA privilege applies to its withheld materials, and a privilege log is the method by which a party makes that showing.

A party objecting to a valid subpoena on privilege grounds has the burden of proving that the asserted privilege applies. *Brown*, 62 N.W.2d at 701; *In re Paul W. Abbott Co.*, 767 N.W.2d 14, 18 (Minn. 2009). Under Rule 45 of the Minnesota Rules of Civil Procedure,

> [w]hen 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.*

Minn. R. Civ. P. 45.04(b)(1) (emphases added).

Privilege logs are the standard method by which the privilege-description requirement is satisfied and are generally favored because they encourage the resolution of privilege disputes and discourage baseless assertions of privilege. *See* Advisory Comm. Cmt. on the 2000 Amendment to Minn. R. Civ. P. 26. Indeed, privilege logs are *always* required when a *party* asserts that discoverable information is privileged. Minn. R. Civ. P. 26.02(f)(1). Although *non*parties are not always required to produce a privilege log in every case, Minnesota courts may order the production of a privilege log by a nonparty in appropriate cases. *See* Advisory Comm. Cmt. on the 2000 Amendment to Minn. R. Civ. P. 26 ("Fed. R. Civ. P. 45(d)(2) expressly requires production of a privilege log by a non-party seeking to assert a privilege in response to a subpoena. Although the Committee does not recommend adoption of [that rule] . . . the difference in rules should not prevent a court from ordering production of a privilege log by a non-party in appropriate cases."). A court has wide discretion to issue discovery orders. *Shetka v. Kueppers, Kueppers, Von Feldt and Salmen*, 454 N.W.2d 916, 921 (Minn. 1990). Discovery orders are reversed only for a clear abuse that discretion. *Id.*

The Court of Appeals far exceeded its proper role when it reversed the district court's order requiring Unicorn Riot to produce a privilege log. The Court of Appeals acknowledged that district courts are accorded broad discretion in discovery matters. It nevertheless removed the district court's ability to exercise any such discretion when faced with an MFFIA privilege claim, holding instead that the language of the MFFIA bars a court from ordering the production of a privilege log "for materials protected from

disclosure under the MFFIA in absence of a statutory exception." (Add. 16.) The Court reasoned that, because the MFFIA states that no person engaged in newsgathering "shall be required by any court . . . to disclose in any proceeding the person or means from or through which information was obtained, or to disclose any unpublished information procured by the person in the course of work," a district court "may not order a privilege log or require the production for in camera review of information that is privileged under the MFFIA." (Add. 16, 18.)

The Court of Appeals' analysis of the privilege-log issue puts the cart before the horse and misunderstands the nature of a privilege log.

First, a privilege log need not—and in this case, should not—disclose the identity of a confidential source or unpublished information. A privilege log merely lists withheld materials, sets forth a general description of the withheld material, and then states the basis for withholding the material by specifically identifying the privilege that applies to the item. The point of a privilege log is to give enough information to the requesting party and the court that the privilege claim can be validated or potentially contested, without actually disclosing the underlying, ostensibly-privileged information or document. In other words, the limited information typically included in a privilege log is the same information that *must* be provided under Rule 45.04(b)—a privilege log is merely the method of satisfying the Rule's requirements. *See* Minn. R. Civ. P. 45.04(b)(1) (stating that a privilege claim in response to a subpoena must 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"). The Court of Appeals failed to address this requirement when

determining whether the district court could order a privilege log in this case—tellingly, Rule 45.04(b) is not cited at all in its opinion. Instead, it appeared to assume that information included on a privilege log constitutes "disclosure" of the information protected under MFFIA. It does not.

The Court of Appeals' reasoning on this issue also puts the cart before the horse. The Court of Appeals held that the district court "may not require the third party to produce a privilege log or submit information for in camera inspection that is privileged under the MFFIA and does not fall within a statutory exception." (Add. 2.) The Court of Appeals' decision *assumes* that the MFFIA privilege applies and is violated by the minimal disclosure requirements of a privilege log—but the whole purpose of a privilege log is to assess the threshold question of whether the asserted privilege does, in fact, apply to the withheld document or material. Similarly, in camera review of a document listed on a privilege log typically occurs when the privilege log indicates that the withheld document is *not* actually subject to the claimed privilege and is being improperly withheld. Under the Court of Appeals' holding, however, a party claiming MFFIA privilege automatically makes itself immune from any challenge to that claim, because it can simply assert that everything it possesses is covered by MFFIA, and neither the requesting party nor the court has any way to assess or challenge that assertion. It sets a dangerous precedent to permit a subpoenaed party to completely evade legitimate discovery by raising a blanket claim of privilege, with no attendant obligation to demonstrate that the privilege claim is justified.

B. The Court of Appeals' reliance on *Hope Coalition* is misplaced.

The Court of Appeals based its privilege-log ruling in large part on this Court's decision in *In re Hope Coalition*, 977 N.W.2d 651 (Minn. 2022). *Hope Coalition* is legally and factually inapposite.

First and foremost, *Hope Coalition* does not involve a privilege log. Instead, it addresses whether a district court can order a sexual assault counselor to turn over records for in camera review upon a criminal defendant's *Paradee* motion. *See Hope Coalition*, 977 N.W.2d at 654.

Second, no party in *Hope Coalition* contended that the records to be reviewed were potentially *not* privileged—instead, the issue in *Hope Coalition* was whether the sexual-assault-counselor privilege under Minn. Stat. § 595.02(k) must give way to a criminal defendant's right to a fair trial. The Court held that there is no constitutional right to access privileged documents held by a non-government organization. *Id.* at 661, 663. ("[A[t] no point have we or the Supreme Court ever held that a criminal defendant has *any* constitutional right to access privileged documents. . . . Because the sexual-assault-counselor privilege under section 595.02, subdivision 1(k), cannot be pierced in criminal proceedings, it was clearly unreasonable for Hope Coalition to comply with the subpoena to produce records that it was expressly forbidden by statute from disclosing."). At its core, *Hope Coalition* was thus about piercing a recognized, undisputedly-applicable privilege—not about verifying that the privilege applied in the first place to the requested documents. *Hope Coalition* is accordingly not relevant here.

In addition to relying on inapplicable Minnesota caselaw, the Court of Appeals failed to recognize that courts in jurisdictions that recognize a reporter's privilege *have* regularly ordered the production of privilege logs. Indeed, under the federal rules, nonparties claiming the reporter's privilege may be found to have waived the privilege if they fail to produce a log. *See Mosley v. City of Chicago*, 252 F.R.D. 445, 448-49 (N.D. Ill. 2008) (holding that reporter waived the claimed reporter's privilege by not providing privilege logs as required under the federal rules); *Las Vegas Sun, Inc. v. Adelson*, No. 3:21-MC-17, 2021 WL 6621290, at *1 (D. Conn. Sept. 2, 2021) (holding that a journalist's privilege claim was waived because he failed to provide a privilege log); *In re Application of Chevron Corp.*, 736 F. Supp. 2d 773 (S.D.N.Y. 2010) (holding that a reporter's blanket privilege claim did not exempt the reporter from producing a privilege log); *see also Gibbons v. GlaxoSmithKline, LLC*, No. 1-22-1666, 2023 WL 7102030, at *6 (Ill. App. Ct. Oct. 27, 2023) (rejecting a publisher's argument that it was improper for the court to order it to produce a privilege log in response to its claim that the documents at issue were protected under the Illinois reporter's privilege statutes and a common-law peer-review privilege).

Courts have concluded that privilege logs are especially appropriate when the party possessing the requested documents asserts a blanket privilege claim—as Unicorn Riot does in this case. In *Chevron Corp.*, the district court rejected a reporter's argument that, based on his blanket claim of a qualified journalist's privilege, he should not be required to produce a privilege log. 763 F. Supp. 2d at 781. The court noted that although the Second Circuit had "long recognized" a qualified reporter's privilege, the privilege "does

not foreclose the issuance of compulsory process to journalists or excuse them from demonstrating, in an appropriate manner, that the privilege applies to particular documents or information in question." *Id.* The court reiterated that neither the court nor the subpoenaing party was required to simply accept a broad, generalized blanket privilege claim and that more was required from the reporter in the face of a valid subpoena:

> The fundamental point is that without knowing more about the particulars of the individual documents and events as to which [the reporter] claims privilege, it is impossible to make an informed determination as to whether in fact the elements of the privilege have been made out, let alone to permit [the subpoenaing party] to seek to overcome any such privilege, as is its right. In other words, the effect of accepting [the reporter's] blanket claim that every responsive document he has and everything he saw and heard while working on this documentary is privileged and that a subpoena therefore should not issue would transform [the reporter's privilege] into an absolute privilege for any and all information [the reporter] may possess.

Id. at 782. The court then noted that producing a privilege log (in the same manner as any other litigant) was an appropriate method for investigating the invocation of the privilege and would enable the court to rule on the privilege claims for the documents at issue. *Id.*

In sum, it was certainly not an abuse of discretion for the district court to order Unicorn Riot to produce a privilege log in this case. It was, in fact, an appropriate method by which to ensure Unicorn Riot complied with its obligation under Rule 45.04(b) to describe the materials it was not producing in a manner "sufficient to enable" Appellants to contest its claim. The Court of Appeals' decision to the contrary was erroneous and should be reversed.

CONCLUSION

The Court of Appeals' decision in this case stretches the protections of the qualified MFFIA privilege far beyond their established and rational bounds, expanding it into an unassailable, absolute privilege. The MFFIA does not protect from disclosure information and materials that a newsgatherer obtained as a result of, or in furtherance of, unlawful conduct. It likewise does not exempt purported newsgatherers from their obligation to demonstrate that any asserted privilege in fact applies to all withheld materials. Appellants therefore respectfully request that the 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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/s/ Richard D. Snyder

Richard D. Snyder (#0191292)
FREDRIKSON & BYRON, P.A.
60 South Sixth Street, Suite 1500
Minneapolis, MN 55402
rsnyder@fredlaw.com
Telephone: 612.492.7145

Lawrence Bender (MN #153862)
FREDRIKSON & BYRON, P.A.
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
lbender@fredlaw.com
Telephone: 701.221.8700

Attorneys for Appellants