

Case No. A23-1284

STATE OF MINNESOTA  
IN SUPREME COURT

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Energy Transfer LP  
(f.k.a. Energy Transfer Equity, L.P.), et al.,

*Appellants,*

v.

Greenpeace International  
(a.k.a. Stichting Greenpeace Council), et al.,

*Defendants,*

Unicorn Riot, et al.,

*Respondents.*

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**AMICI CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM  
OF THE PRESS, MINNESOTA NEWSPAPER ASSOCIATION, ST. PAUL  
PIONEER PRESS, SAHAN JOURNAL, SILHA CENTER FOR THE STUDY OF  
MEDIA ETHICS AND LAW, AND E.W. SCRIPPS CO.  
IN SUPPORT OF RESPONDENTS UNICORN RIOT AND NIKO GEORGIADES**

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DATED: October 28, 2024

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## **CORPORATE DISCLOSURE STATEMENTS**

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation or stock.

The Minnesota Newspaper Association (MNA) is a voluntary trade association acting on behalf of all general-interest newspapers and most of the special-interest newspapers in the state. It is the principal representative of the organized press in Minnesota, with approximately 300 newspaper members. MNA through its members represents a substantial percentage of Minnesota's professional news organizations and journalists.

St. Paul Pioneer Press is owned by MediaNews Group, Inc., d/b/a Northwest Publications, LLC.

Sahan Journal is a 501(c)3 organization with no parent corporation or private ownership.

The Silha Center for the Study of Media Ethics and Law is located within the Hubbard School of Journalism and Mass Communication at the University of Minnesota-Twin Cities. The Silha Center endowment is administered through the University of Minnesota Foundation, a 501(c)(3), and no other entity owns any part of the Center. The Silha Center does not own any stock.

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## INTEREST OF AMICI CURIAE

Compelled disclosure of journalist-source communications and other journalistic work product chills the flow of information to the press and thereby deprives the public of vital reporting. Lead amicus the Reporters Committee for Freedom of the Press (“Reporters Committee”) is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Other amici include news organizations and other organizations committed to defending the First Amendment and newsgathering rights of journalists in Minnesota. Amici have a strong interest in ensuring that statutory and constitutional protections against the compelled disclosure of journalist-source communications and journalistic work product are correctly interpreted and applied.<sup>1</sup>

This case concerns application of the Minnesota Free Flow of Information Act, Minn. Stat. §§ 595.021–025 to a media organization with a history of covering issues of public concern. Amici write to provide their perspective on the issues presented to aid the Court in resolving the dispute before it. In addition to the Reporters Committee, amici are:

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<sup>1</sup> No counsel for any party authored this brief in whole or in part. No person or entity, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

**The Minnesota Newspaper Association (MNA)** is a voluntary trade association acting on behalf of all general-interest newspapers and most of the special-interest newspapers in the state. It is the principal representative of the organized press in Minnesota, with approximately 300 newspaper members. MNA through its members represents a substantial percentage of Minnesota's professional news organizations and journalists.

**The Silha Center for the Study of Media Ethics and Law** was established in 1984 with an endowment from Otto and Helen Silha. Located within the Hubbard School of Journalism and Mass Communication at the University of Minnesota, the Silha Center is the vanguard of the School's interest in the ethical responsibilities and legal rights of the mass media in a democratic society.

**The St. Paul Pioneer Press** is an award-winning newspaper based in Saint Paul, Minnesota serving the Minneapolis–Saint Paul metropolitan area.

**Sahan Journal** provides free, fair and responsive journalism that shows everyone the way to a more equitable Minnesota. Founded by journalist Mukhtar M. Ibrahim in 2019, Sahan is the first Minnesota newsroom solely dedicated to covering immigrants and communities of color.

**The E.W. Scripps Company** is the nation's fourth-largest local TV broadcaster, operating a portfolio of 61 stations in 41 markets. Scripps also owns Scripps Networks, which reaches nearly every American through the national news outlets Court TV and Newsy and popular entertainment brands ION, Bounce, Grit, Laff and Court TV Mystery.



Scripps outlets such as Court TV regularly report from Minnesota. The company is the longtime steward of the Scripps National Spelling Bee.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The press plays an essential role in ensuring the public is well informed. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). Compelling journalists to testify about information they obtained while newsgathering undermines that role and, by doing so, can deprive the public of journalism about matters of the utmost importance. Attempts by civil litigants to rifle through the notebooks of third-party journalists and news organizations can, among other things, lead to costly and time-consuming legal battles that divert journalists' attention and newsroom resources away from reporting and can foster distrust of the press among potential sources who may, as a result, be less willing to speak to journalists.

For these reasons, Minnesota, like most states, has enacted a law to shield members of the media from the compelled disclosure of their journalistic work product—an important addition to existing protections for newsgathering under the First Amendment. The Minnesota Free Flow of Information Act (the “MFFIA” or “Shield Law”) provides any person engaged in the acts of newsgathering and publishing an absolute privilege to withhold, *inter alia*, unpublished information sought in a civil case, except under certain delineated exceptions not implicated here. Minn. Stat. §§ 595.021–025. As the Court of Appeals correctly recognized, the Shield Law applies to both traditional and non-traditional newsgatherers alike.

Appellants—energy companies that are suing an advocacy organization and activists in North Dakota in connection with the 2016 Dakota Access Pipeline (“DAPL”) protests—appeal the Court of Appeals' well-reasoned decision affirming the trial court's

refusal to enforce Appellants’ wide-ranging subpoena to the non-party nonprofit media organization Unicorn Riot Collective LLC and its co-founder Niko Georgiades (“Georgiades”) (collectively, “Unicorn Riot” or “Respondents”). The Court of Appeals correctly held that Unicorn Riot falls within the protections of the MFFIA and that Appellants’ subpoena sought privileged documents protected from disclosure under the Shield Law. It also correctly held that requiring Unicorn Riot to produce a privilege log would undercut the protections of the statute.

This Court of Appeals’ decision properly interpreted and applied the MFFIA and, in so doing, ensured that all Minnesota news organizations are shielded from the kind of interference with newsgathering that the statute was enacted to protect against. The purpose of the Shield Law would be frustrated if third-party journalists were forced to participate in burdensome civil discovery in the manner Appellants seek here.

For the reasons herein, amici urge the Court to affirm.

## **ARGUMENT**

### **I. The Court of Appeals correctly applied the Shield Law.**

#### **A. The MFFIA was intended to provide broad protection for newsgathering and the reporting process.**

Nearly every state has passed legislation to protect journalists and news organizations from compelled disclosure of newsgathering materials and other journalistic work product. The Minnesota Shield Law was first enacted in 1973—following the U.S. Supreme Court decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972)—and it remains one of the strongest such laws in the country. *See Reporter’s*

*Privilege Compendium: Minnesota*, Reps. Comm. for Freedom of the Press (last visited Nov. 2, 2023), <https://www.rcfp.org/privilege-compendium/minnesota/>.

In 1998, the Minnesota legislature extensively amended the Shield Law, strengthening it “[i]n order to protect the public interest and the free flow of information.” Minn. Stat. § 595.022. As its statutory purpose explains: “[T]he news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information.” *Id.*<sup>2</sup> The Shield Law, in its current form, provides any “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” an unqualified privilege to withhold, *inter alia*, unpublished information—except under certain delineated exceptions that are not implicated here. Minn. Stat. §§ 595.023–025.

As the U.S. Supreme Court has recognized, the press plays a vital role in keeping the public informed. *See Minneapolis Star & Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (explaining that “an informed public is the essence of working democracy”). Shield laws are intended to safeguard that role. Protecting journalists against the compelled disclosure of source-communications and unpublished work product enable journalists to build trust with sources, as well as the public that relies on

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<sup>2</sup> The law was amended in response to a decision of the Minnesota Court of Appeals that read the prior version of the law only to protect unpublished information if it identified a confidential source. *Heaslip v. Freeman*, 511 N.W.2d 21, 23 (Minn. Ct. App. 1994). The Shield Law, as amended, expressly makes the privilege applicable “whether or not” unpublished information or reportorial data would “tend to identify the person or means through which the information was obtained.” Minn. Stat. § 595.023.

the independence of their reporting. Moreover, wide-ranging subpoenas, like the one at issue here, that demand “[a]ll videos, audio recordings, images, reports, articles, letters, emails, press releases, statements, internet postings or content,” are particularly burdensome. Responding to such subpoenas or fighting protracted and costly legal battles to protect their work product takes non-party journalists’ time and resources away from newsgathering and reporting—at a cost to the public they serve. *See United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (recognizing that “frequency of subpoenas would not only preempt the otherwise productive time of journalists and other employees but measurably increase expenditures for legal fees”).

**B. The Shield Law applies to non-traditional media.**

As both the trial court and Court of Appeals correctly held, the MFFIA is applicable here. Appellants’ Add. 20, 21. The Shield Law, by its express terms, protects any “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.” Minn. Stat. § 595.023.<sup>3</sup> Unicorn Riot, a self-described

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<sup>3</sup> Although this Court has not squarely applied the qualified First Amendment reporter’s privilege to protect unpublished journalistic materials in civil cases, as amici argued below, that privilege is applicable here. *See* Amicus Br. of Reps. Comm. For Freedom of the Press et al., at 15 (Nov. 3, 2023); *Keefe v. City of Minneapolis*, No. 09-CV-2941, 2012 WL 7766299, at \*3 (D. Minn. May 25, 2012) (“[M]ost federal courts grant a qualified privilege for journalists . . . . Where a court finds the First Amendment rights of the reporter outweigh the requesting party’s need for the information and grants the privilege, it typically extends to a reporter’s underlying work product . . . .”); *J.J.C. v. Fridell*, 165 F.R.D. 513, 516 (D. Minn. 1995) (“In granting the privilege, most federal courts have assumed the privilege protects a reporter’s underlying work product as well as an informant’s identity.”); *Bauer v. Gannett Co.*, 557 N.W.2d 608, 612 (Minn. Ct.

“decentralized, educational non-profit media organization” that “reports underrepresented stories and sheds light on alternative perspectives and systems” is entitled to invoke the MFFIA’s protections. Unicorn Riot, Home Page (last visited Sept. 30, 2024), <https://unicornriot.ninja/> (“We aim to provide an accessible platform for diverse stories, communities and media makers through free, nonprofit news.”); Appellants’ Add. 4 (describing Unicorn Riot as a “non-profit media organization of journalists’ that ‘engages and amplifies the stories of social and environmental struggles from the ground up’”).

Courts have recognized that the Shield Law applies not only to traditional news organizations but also to non-traditional and alternative news media. In *In re Mahtani, Ph.D.*, a decision that is persuasive in its reasoning, a Minnesota district court applied the MFFIA to the founder and publisher of ZambiaReports.com, a website that published stories about Zambian current events and political issues. The district court determined that ZambiaReports.com was a news website because it was intended as a vehicle to share information with the public. No. 27-CV-17-11589, 2017 WL 5571221, at \*5 (Minn. Dist. Ct. Sept. 25, 2017). In rejecting the petitioner’s claim that application of the Shield Law is limited to traditional news outlets, the district court observed that the writer

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App. 1997), *overruled on other grounds to the extent inconsistent with Weinberger v. Maplewood Rev.*, 668 N.W.2d 667 (Minn. 2003) (same); *see also In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 817 (Minn. 2006) (the court “[a]ssuming, without deciding, that a First Amendment journalist’s privilege exists”). However, because the MFFIA applies, and provides an absolute rather than a qualified privilege, the Court of Appeals did not address application of the privilege here. Appellants’ Add. 14.

authored and edited articles, which brought him under the umbrella of the MFFIA, regardless of whether he expressed a particular point of view in his publications. *Id.* at \*4 (observing that “[t]he wide-cast net of the [MFFIA] would appear to catch not only reporters and journalists working in traditional news media, but also internet bloggers, unpaid news-gatherers, even public relations consultants,” so long as they were engaged in the newsgathering activities enumerated in the statute).<sup>4</sup>

Unicorn Riot is a news website that provides original reporting and coverage about a variety of topics, focusing on what it describes as “underrepresented stories.” Unicorn Riot publishes reporting from cities across the United States, including Minneapolis, on political, social, economic, and criminal justice topics such as climate change, prison reform, poverty, and indigenous communities, among others. *See* Unicorn Riot,

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<sup>4</sup> To determine whether a non-traditional journalist or media organization should receive protection under the qualified First Amendment privilege, courts have likewise looked to whether that journalist intended to disseminate information to the public. *See In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W. 2d at 816 (whether individual was “entitled to assert a First Amendment journalist’s privilege” depended on whether they “contemplated public dissemination of the information conveyed by his sources at the time he received it”); *accord Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436 (10th Cir. 1977) (documentary filmmaker who conducted extensive research on suspicious death of whistleblower was a journalist because “[h]is mission in this case was to carry out investigative reporting for use in the preparation of a documentary film”); *see also Police-Media Interactions During Mass Demonstrations: Practical, Actionable Recommendations*, Office of Community Oriented Policing Services (COPS), U.S. Dep’t of Justice (October, 4, 2024), <https://cops.usdoj.gov/pressrelease/DOJ-Releases-Report-on-Police-Media-Interactions-During-Mass-Demonstrations> (DOJ report recommending that police at protests, when attempting to determine who is a member of the press, “err on the side of inclusiveness, defining as ‘media’ both credentialed press from established media outlets and noncredentialed individuals who are acting as reporters in their function and behavior. In no circumstances can police distinguish among the media based on their expressed or anticipated viewpoints . . .”).

*supra*. Unicorn Riot employs staff who research, write, and edit stories—journalistic work that, as the district court explained in *In re Mahtani*, brings it within the scope of the Shield Law. *Cf. In re Mahtani*, 2017 WL 5571221, at \*5. In addition to writing articles published on the Unicorn Riot website, some Unicorn Riot journalists, including Georgiades, disseminate their work via Unicorn Riot’s social media accounts and livestreams. Doc. 37 at 3; *see also id.* at Ex. B (hereinafter “Georgiades Affidavit”).

It was this kind of “gathering, procuring, compiling, editing, [and] publishing,” that—the record before this Court makes clear—Georgiades and other Unicorn Riot journalists were engaged in during the 2016 DAPL protests. *See* Appellants’ Br. at 2; *see also* Georgiades Affidavit ¶¶ 2–3. Unicorn Riot’s coverage of those protests included interviews with protestors, live videos broadcast on the Unicorn Riot website, and reports filed from the field. *Id.* These journalistic activities—newsgathering and reporting—fall squarely within the scope of the MFFIA.

**C. The Shield Law affords an absolute privilege under the circumstances here that Unicorn Riot did not waive or surrender.**

Having correctly found the MFFIA applicable, the Court of Appeals correctly affirmed the district court’s denial of Appellants’ motion to compel because the Shield Law provides an absolute privilege to withhold, *inter alia*, unpublished information except under certain exceptions not implicated here. Minn. Stat. §§ 595.023–025.<sup>5</sup>

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<sup>5</sup> Specifically, the MFFIA provides exceptions only for when newsgathering information is sought in certain criminal proceedings and in defamation cases when the news organization is a defendant; neither exception applies here. *Id.* § 595.024; *see also Reporter’s Privilege Compendium: Minnesota, supra* (statutory privilege is qualified in civil defamation actions and absolute in other civil actions).



Appellants offer no legal support for their argument that non-party journalists served with a subpoena forfeit the protections of the Shield Law through allegedly unlawful newsgathering, nor does the plain language of the MFFIA support such an argument. Appellants' Add. 18.

Appellants concede that the privilege is absolute and its statutory exceptions do not apply here. They nevertheless argue that even if Unicorn Riot would ordinarily be covered by the Shield Law, it surrendered the MFFIA's protections by "participating" in the DAPL protests and being arrested in the course of newsgathering. Appellants Br. at 6–7. According to Appellants, the MFFIA does not apply to information gathered during a journalist's allegedly unlawful conduct. The Court of Appeals roundly, and correctly, rejected that argument. Even assuming *arguendo* there was any unlawful conduct here, acceptance of Appellants' argument would require grafting the word "lawful" into the text of section 595.034 where it does not exist, thereby adding an entirely new exception to the statute. Appellants' Add. 11–12.<sup>6</sup> The Court of Appeals correctly declined Appellants' invitation to rewrite the MFFIA, observing that "[t]he legislature included two and only two exceptions to the privilege against disclosure accorded under the MFFIA," neither of which is applicable here. *Id.*

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<sup>6</sup> While several Unicorn Riot journalists were arrested during the DAPL protests for allegedly trespassing, no charges were pressed against those journalists. And, even if they had been charged, as the Court of Appeals correctly observed, Appellants made no attempt to argue that the MFFIA's statutory exception for newsgathering information relevant to a gross misdemeanor or felony would apply to a nonparty journalist or news organization subpoenaed in connection with a civil lawsuit. Appellants' Add. 11.

Moreover, Appellants’ other arguments that the MFFIA is overcome also do not withstand scrutiny. They invoke the crime-fraud exception to the attorney-client privilege to argue that “privileges should not, and do not, extend to illegal or tortious conduct.” Appellants’ Br. at 17. But that analogy is inapposite. Unlike the common-law attorney-client privilege, the absolute privilege afforded by the Shield Law is a creature of statute with express exceptions that do not apply here. Further, and in any event, a party invoking the crime-fraud exception to the attorney-client privilege must make a prima facie showing that an otherwise privileged communication was “made in furtherance of a crime or fraud” and that the attorney and client were working in concert to commit a crime. *State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 691 (Minn. Ct. App. 2000). Appellants have made no such showing here with respect to Unicorn Riot’s newsgathering and reporting.

The Court of Appeals’ decision below implicitly recognized that journalists serve as a proxy for the public, including when covering protests and other demonstrations. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975) (explaining that because “each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations”); *see also Police-Media Interactions During Mass Demonstrations: Practical, Actionable Recommendations*, *supra* note 4 (noting that journalist “is a public service” and the role of the press “is to keep the public accurately informed—and the people’s awareness of events in their community is as necessary to their safety as their protection by law enforcement when those events

become dangerous.”); cf. Gabe Rottman, *DOJ Releases Long-Awaited 2022 Annual Report on News Media Guidelines*, Reps. Comm. For Freedom of the Press (Sept. 16, 2024), <https://www.rcfp.org/doj-releases-2022-media-guidelines-report/> (describing DOJ’s new internal guidelines creating “a bright-line rule that, so long as journalists are acting within the ‘scope of newsgathering,’ the department may not issue compulsory process for their records or testimony,” as a recognition of the important role the press plays).<sup>7</sup> Yet it is an unfortunate reality that journalists are too often improperly detained or arrested while covering such events—a fact that has been acknowledged by the nation’s top law enforcement agency. Police Executive Research Forum, *Police-Media Interactions during Mass Demonstrations: Practical, Actionable Recommendations*, Office of Community Oriented Policing Services, at 4–5 (October, 4, 2024), <https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-r1167-pub.pdf> (DOJ report acknowledging the problem of journalist arrests while covering demonstrations and providing guidance to law enforcement to avoid violating the First Amendment).

In 2020 there were at least 146 incidents involving the arrest of journalists covering the widespread protests and demonstrations following the murder of George Floyd in Minneapolis, Minnesota, political rallies, and pandemic-related unrest. *Incident Database*, U.S. Press Freedom Tracker (last visited Sept. 30, 2024),

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<sup>7</sup> While journalists do not have a general immunity from criminal or tort liability for conduct undertaken in the course of newsgathering, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991), it does not follow that an arrest or even a conviction for trespass would invalidate applicable protections for journalistic work product, including the statutory protections of the MFFIA.

[https://pressfreedomtracker.us/all-incidents/?categories=4&date\\_lower=2020-01-01&date\\_upper=2020-12-31](https://pressfreedomtracker.us/all-incidents/?categories=4&date_lower=2020-01-01&date_upper=2020-12-31); see also Elisha Fieldstadt & Maia Davis, *CNN Reporting Crew Arrested Live on TV by Minnesota State Police*, NBC News (May 29, 2020), <https://www.nbcnews.com/news/us-news/cnn-reporting-crew-arrested-camera-police-minneapolis-n1217651> (reporting on the arrest of a CNN reporter and crew members, despite visible press credentials, covering Black Lives Matter protest and their subsequent release). On-the-job arrests only serve to underscore the importance of strong legal safeguards for reporters covering protests. Such encounters with law enforcement do not render journalists or their news organizations ineligible to invoke legal protections for their newsgathering materials.

Here, Unicorn Riot maintains that its journalists were independent of the protestors, did not assist in planning the demonstrations, and identified themselves as members of the news media throughout the events in question. Georgiades Affidavit ¶ 3. And the fact that Unicorn Riot reporters embedded themselves with protestors to build trust with sources and gather more accurate information should not alter the analysis. See Georgiades Affidavit ¶¶ 2–3; Resp. Br. at 6. Application of the Shield Law does not turn on the particular techniques a journalist or media organization uses to gather information, including efforts to develop and cultivate relationships with sources. Ride-alongs, embedding, and other means of getting “behind the lines” are common journalistic practices that enable journalists to obtain a clearer view and deeper perspective on issues and events they are covering. *Embedded Reporters*, Pew Rsch. Ctr. (Apr. 3, 2003), <https://www.pewresearch.org/journalism/>

[2003/04/03/embedded-reporters/](#). Journalists have been embedded in military units, protest organizations, extremist cells, and other groups in order to gain greater access to information. See *Journalists in Iraq – A Survey of Reporters on the Front Lines*, Pew Rsch. Ctr. (Nov. 28, 2007), <https://www.pewresearch.org/journalism/2007/11/28/embedding/>; Olivia Monahan, *I Was Deeply Embedded in the Pro-Trump Rallies. Journalists Like Me Saw This Coming.*, Courier (Jan. 13, 2021), <https://archive.couriernewsroom.com/2021/01/13/journalist-embedded-trump-rallies/>; Dave Davies, *A Journalist Ventures Inside One of the World’s Most Notorious Terrorist Groups*, NPR (Feb. 2, 2023), <https://www.npr.org/2023/02/02/1153773701/a-journalist-ventures-inside-one-of-the-worlds-most-notorious-terrorist-groups>. And, as the Court of Appeals noted, the MFFIA does not distinguish between these different methods of newsgathering and others. On the contrary, as the Court of Appeals explained, the Shield Law protects a journalist from being required to disclose the “means from or through which information was obtained,” and nothing in the text of the MFFIA suggests that an otherwise-covered journalist or media organization loses that protection by engaging in certain conduct in the course of newsgathering. Appellants’ Add. 12.

In sum, the MFFIA’s purpose is to safeguard newsgathering and the reporting process, and the legislature chose to do so by affording an absolute privilege for unpublished newsgathering material in the circumstances presented here. To deny Unicorn Riot its ability to invoke the privilege would be inconsistent with the statutory language and undermine the purpose of the MFFIA, which is to provide broad and robust protection for unpublished information.

**II. The Court of Appeals correctly held that an order requiring Unicorn Riot to produce a privilege log would violate the Shield Law.**

The Court of Appeals correctly vacated the portion of the trial court's order requiring Unicorn Riot to produce a log of its privileged newsgathering materials. Non-parties are not required to produce privilege logs unless ordered to do so by the court. Appellants' Add. 28. And, while the Court of Appeals agreed that it is generally within the discretion of a trial judge to order a privilege log, it held that ordering production of a log of materials protected from disclosure under the MFFIA would run afoul of the statute. Appellants' Add.16. The Court of Appeals is correct. An order requiring Unicorn Riot to produce a privilege log describing the very information it is statutorily entitled to withhold would undermine the protection for unpublished information afforded by the Shield Law.

First, to require a non-party journalist or news organization to create a privilege log listing its communications, research, and other work product forces it to disclose the very unpublished newsgathering materials protected by the privilege.<sup>8</sup> Because the district court's initial order required Unicorn Riot to set forth its communications and information it obtained or created in the course of newsgathering, *see* Appellants' Add. 21–22, it effectively compelled Respondents to produce journalistic work product. Such

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<sup>8</sup> In this case, Appellants' subpoena sought disclosure of a wide swath of materials from Unicorn Riot's coverage of the DAPL protests, including "[d]ocuments and communications, including video and audio recordings, concerning actual or planned Direct Action relating to Energy Transfer, Dakota Access, and/or DAPL," and "[a]ll videos, audio recordings, images, reports, articles, letters, emails, press releases, statements, internet postings or content, or other materials prepared by Unicorn Riot concerning Energy Transfer, Dakota Access, or DAPL." Doc. 7 at 26, 28.

a decision would harm newsgathering efforts both by deterring reporters from tackling stories that might catch them in a dragnet of litigation and by deterring potential sources from speaking with reporters.

Second, the MFFIA safeguards journalism, in part, by shielding non-party journalists and news organizations from the burden of complying with subpoenas, which redirect time and resources away from newsgathering and reporting. Just as the burden of compliance with discovery, in general, can be significant, the creation of a privilege log can be equally so, especially here, where the subpoena sought a detailed inventory of all the documents connected to Unicorn Riot's reporting on the DAPL protests. A non-party should not be required to undertake the time-consuming, costly work of combing through months and even years of potentially responsive documents. *See Perry v. Schwarzenegger*, 268 F.R.D. 344, 353 (N.D. Cal. 2010) (affirming magistrate judge's order declining to order non-party journalist to create privilege log). As a practical matter, the creation of a privilege log requires time and resources, additional to and distinct from challenging a subpoena for those materials. *See, e.g., Xcentric Ventures, L.L.C. v. Borodkin*, 934 F. Supp. 2d 1125, 1147 (D. Ariz. 2013) (finding that requiring an extensive privilege log of information that was mostly protected by attorney-client privilege, just so "[plaintiff] can obtain the small slice of information that may be relevant and non-privileged," is unduly burdensome and should not be imposed).

Because requiring the creation of a privilege log would strip Unicorn Riot of the very protection that the Shield Law is intended to provide and because it would be

unnecessarily burdensome, the Court of Appeals was correct to vacate the district court's order requiring Respondents to create a privilege log.

### **CONCLUSION**

For the foregoing reasons, amici urge the Court to affirm the Court of Appeals decision.

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### **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this brief complies with the typeface and word count requirements of Minn. R. Civ. App. P. 132.01, subd. 3. This brief contains 4,442 words, and was prepared using Microsoft Word 365 in 13-point, Times New Roman font.

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