Case No. A23-1284

State of Minnesota

In Supreme Court

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

Appellants,

v.

Greenpeace International (a/k/a Stiching Greenpeace Council), et al.,

Defendants,

Unicorn Riot, et al.

Appellees.

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I. The Minnesota Free Flow of Information Act (MFFIA) protects any person engaged in newsgathering from being compelled to disclose "any unpublished information" in "any proceeding" by "any court." Does that protection include a newsgatherer who receives a third-party subpoena from a plaintiff in a civil case who later alleges that the newsgatherer trespassed on private property while newsgathering?

Rulings Below:

> Both the district court and the Court of Appeals concluded that the MFFIA fully applies to newsgatherers who are alleged to have trespassed on private property while newsgathering. Here, in connection with a lawsuit against organizations and individuals involved in protesting the construction of the Dakota Access Pipeline in North Dakota, appellant Energy Transfer issued third-party subpoenas to Unicorn Riot, a Minnesota-based media organization, and its affiliate journalist Niko Georgiades. In a motion to compel production of the subpoenaed material, Energy Transfer accused Unicorn Riot of trespass. The courts below concluded that the MFFIA does not have an unwritten exception for allegedly trespassing newsgatherers and that the MFFIA's protections therefore apply to Unicorn Riot.

Apposite Authorities:

> Minn. Stat. §§ 595.021 to 595.025.
> Minn. Stat. § 645.19.
> *State v. Caldwell*, 803 N.W.2d 373 (Minn. 2011).
> *Weinberger v. Maplewood Rev.*, 668 N.W.2d 667 (Minn. 2003).

II. If the MFFIA prohibits issuing an order compelling a journalist to disclose any unpublished information—because the journalist was engaged in protected newsgathering and because no statutory exception applies—does the MFFIA also prohibit issuing an order compelling the journalist to describe the unpublished information in a privilege log?

Rulings Below:

The district court ruled that Unicorn Riot must produce a privilege log of responsive documents and answers claimed as privileged. The Court of Appeals held that the district court's ruling was incorrect because a privilege log would disclose MFFIA-protected material.

Apposite Authorities:

Minn. Stat. §§ 595.021 to 595.025.
In re Hope Coal., 977 N.W.2d 651 (Minn. 2022).
Brown v. St. Paul City Ry. Co., 62 N.W.2d 688 (Minn. 1954).

III. Even if the MFFIA does not protect the newsgathering activities at issue here, are those activities protected by a constitutional reporter's privilege?

Rulings Below:

Neither the district court nor the Court of Appeals addressed the constitutional question.

Apposite Authorities:

U.S. Const., Amend. I.
Minn. Const., Art. I, Sec. 3.
State v. Turner, 550 N.W.2d 622 (Minn. 1996).
Gonzales v. Nat'l Broad. Co., 194 F.3d 29 (2d Cir. 1999).

INTRODUCTION

Reporters do not choose where news happens. Sometimes news breaks on public streets. Sometimes it breaks in government buildings. And sometimes it breaks on private property. Below, the Court of Appeals held that if Minnesota reporters allegedly follow protesters onto private property to deliver news to the public, they are entitled to the protections of Minnesota's reporter shield law. That decision is correct.

To encourage newsgathering and publication, the Minnesota Free Flow of Information Act (MFFIA) shields newsgatherers from being compelled to disclose "any unpublished information" in "any proceeding" by "any court." Minn. Stat. § 595.023. That broad privilege has only two exceptions. One is for certain criminal prosecutions: those alleging gross misdemeanors, those alleging felonies, or those alleging misdemeanors if the information sought from the newsgatherer would not tend to identify the source or how it was obtained. *Id.* § 595.024. The other is for defamation cases alleging actual malice. *Id.,* § 595.025. This case involves none of those things.

Instead, it arises from a civil suit by appellant Energy Transfer against individuals and entities that, in 2016, protested the construction of the Dakota Access Pipeline in North Dakota. Respondent Unicorn Riot is a Minnesota media organization whose member journalists published stories, videos, and images concerning the protests. Respondent Niko Georgiades is one of Unicorn

Riot's members. In connection with its North Dakota lawsuit, Energy Transfer issued third-party subpoenas to Unicorn Riot and Georgiades (collectively "Unicorn Riot"), seeking disclosures of unpublished material. Unicorn Riot declined to provide the material, and in 2022 Energy Transfer filed a motion to compel in Minnesota.

The Court of Appeals held that the MFFIA straightforwardly prohibits the compelled disclosure of the subpoenaed material. It also held that, contrary to a decision of the district court, the MFFIA prohibits compelling Unicorn Transfer to produce a privilege log describing those privileged materials. And for good reason. Energy Transfer does not dispute that: (1) it subpoenaed unpublished material from Unicorn Riot; (2) Unicorn Riot's coverage of the protests constituted newsgathering under the MFFIA; and (3) neither MFFIA exception applies here. That is enough to resolve this case.

Nevertheless, Energy Transfer argues that the MFFIA should be construed to contain an additional, unwritten exception that would deny MFFIA protection to unpublished material held by reporters who are alleged to have committed any legal violation while newsgathering (even if they are neither prosecuted nor sued). Energy Transfer asserts that this unwritten exception applies here because it alleges that Unicorn Riot trespassed while covering the protests. This argument, however, is fatally flawed.

First, Energy Transfer's attempt to conjure a new MFFIA exception contradicts the statute's text and purpose. Canons of statutory construction dictate that when a law has clear, written exceptions—as the MFFIA does—a court cannot construe it to have unclear, unwritten exceptions. Here, precisely because the MFFIA contains exceptions only for certain criminal proceedings under certain circumstances, and only for one type of tort (defamation), it cannot be construed to contain an implicit exception for literally any legal violation alleged in any proceeding. Nor should it. If reporters break the law, they can be sued or prosecuted. But the MFFIA's shield aims to promote newsgathering and publication, and that purpose would be severely undermined if the shield were to evaporate whenever, while newsgathering, a reporter allegedly trespasses, speeds, jaywalks, or double-parks.

Second, and relatedly, ordering Unicorn Riot to submit a privilege log summarizing the very information the MFFIA protects—including unpublished communications with sources—would itself violate the MFFIA. The MFFIA bars the compelled disclosure of "any" unpublished information or other reportorial data. Minn. Stat. § 595.023. Privilege logs necessarily reveal at least some of that information. And here, requiring Unicorn Riot to produce a privilege log would be especially burdensome and pointless because Energy Transfer's subpoenas request patently privileged material.

Third, even if the MFFIA did not apply here, the U.S. and Minnesota Constitutions would. In civil cases, a constitutional reporter's privilege applies to nonparty reporters from whom unpublished information is sought. And, at a minimum, the Court of Appeals' construction of the MFFIA should be affirmed so that this Court can avoid the difficult constitutional questions that would arise from Energy Transfer's proposed rule.

Therefore, as shown below, the Court of Appeals should be affirmed.

STATEMENT OF THE CASE AND FACTS

I. The Protests

Unicorn Riot is a Minnesota-based nonprofit media organization, and Niko Georgiades is one of its member journalists. Appellants' Add. 23; Index #27 at ¶ 1 ("Georgiades Decl."). In the summer of 2016, Unicorn Riot member journalists traveled to North Dakota to report on protests opposing the construction and operation of the new Dakota Access Pipeline (DAPL), which is owned by appellants Energy Transfer LP, et al. Appellants' Add. 3; Georgiades Decl. ¶ 2. The protests were conducted by Greenpeace and others, and they allegedly involved civil disobedience. Appellants' Add. 3-4. The district court found that Georgiades and other Unicorn Riot member journalists embedded with the protesters, in "much the same way that war correspondents embed themselves into military units." *Id.* at 23.

The Court of Appeals observed that Unicorn Riot members conducted "media coverage of the DAPL protests," including "written reports published on Unicorn Riot's website, and updates, interviews, and livestreams posted on Unicorn Riot's social-media accounts." *Id.* at 4. Although several members of Unicorn Riot were arrested during the protests, all charges were dropped. *Id.*

II. The Subpoenas

Energy Transfer sued Greenpeace and other entities and individuals in North Dakota state court in 2019, alleging a civil conspiracy to stop construction of the pipeline. *Id.* at 3. The lawsuit also alleged other tort claims, including trespass, conversion, nuisance, defamation, and tortious interference with business relations. *Id.* Energy Transfer did not name Unicorn Riot or any of its members as defendants.

In March 2021, Energy Transfer served Unicorn Riot and Georgiades with subpoenas duces tecum showing venue in Hennepin County District Court. *Id.* at 4. The subpoenas requested 16 categories of material, including information about Unicorn Riot's operations, its coverage of the protests, and its communications with the protesters. Index #7 at 26-28.

Unicorn Riot sent a letter objecting to the subpoenas and asserting that the requested materials were exempt from disclosure under, among other things, the MFFIA and the First Amendment to the U.S. Constitution. Index #2 at 7; Index #8 at 31-32. With respect to several requests, Unicorn Riot's

letter stated that it had no responsive documents because it did not engage in any "Direct Action" relating to the protests; did not receive any financial support from the defendants named in Energy Transfer's lawsuit; and had no joint plans or agreements with those defendants. Index #8 at 31-32. The letter also supplied website addresses and social media pages containing Unicorn Riot's published information on the protests. *Id.*; *see also* Appellants' Add. 6.

In June 2022, more than a year after Unicorn Riot's letter and nearly six years after the protests, Energy Transfer initiated litigation in Minnesota in which it moved to compel Unicorn Riot's compliance with its subpoenas. Index #1. Energy Transfer's motion papers alleged that Unicorn Riot members trespassed onto Energy Transfer property. Index #2 at 1-2. But Energy Transfer also acknowledged that this alleged trespass facilitated newsgathering: "At the time they participated in the trespasses onto DAPL sites, the Unicorn Riot member conducted interviews with protesters and recorded sound and video images of the activities of the protesters, including their unlawful activity." *Id.* at 1. Likewise, Energy Transfer speculated that Unicorn Riot members "most likely" communicated with protesters "to allow the Unicorn Riot members to plan and arrange to 'embed' with the protesters during the unlawful trespasses." *Id.* at 2; *see also* Appellants' Op. Br. 2, 6-7.

Energy Transfer did not claim that Unicorn Riot joined the civil conspiracy alleged in the North Dakota lawsuit. Nor did Energy Transfer claim

that Unicorn Riot destroyed property, engaged in violence, or participated in protester trainings. *See* Appellants' Op. Br. 4-5.

Unicorn Riot opposed the motion to compel and submitted a declaration from Mr. Georgiades in support of that motion. Georgiades Decl.. Georgiades explained that Unicorn Riot member journalists used their own resources to cover the protests, carried press passes, and conducted interviews. Georgiades Decl. ¶ 3. He further explained that Unicorn Riot members did not share resources with the protesters and did not participate in any planning of the protests. *Id.* ¶¶ 3, 5.

III. The District Court Decision

The district court denied Energy Transfer's motion to compel Unicorn Riot's compliance with its subpoena. The court ruled that the MFFIA applied to Unicorn Riot's coverage of the DAPL protests because Unicorn Riot is a media organization and none of the statutory exceptions applied. Appellants' Add. 25-27. But the district court also ordered Unicorn Riot to produce a privilege log "[b]ecause . . . Unicorn Riot [is] claiming that all documents requested by [Energy Transfer] are privileged." *Id.* at 28.

IV. The Court of Appeals Decision

The Court of Appeals affirmed the district court's determination that the MFFIA shields from disclosure all information gathered by Unicorn Riot during its coverage of the DAPL protests. *Id.* at 2. Consistent with that core

holding, the Court of Appeals also held that the district court had erred as a matter of law by ordering Unicorn Riot to prepare a privilege log, and to submit for in camera review, information shielded by the MFFIA. *Id.*

With respect to the MFFIA's reach, the Court of Appeals affirmed the district court's conclusion that Unicorn Riot engaged in newsgathering within the meaning of Minn. Stat. § 595.023. *Id.* at 9. The court next noted that the MFFIA contains only two exceptions—one for criminal proceedings, and another for defamation suits alleging actual malice—and Energy Transfer did not assert either one. *Id.* at 10-11. Instead, Energy Transfer asked the court to interpret the MFFIA to contain an additional exception for reportorial data obtained during allegedly unlawful conduct. *Id.* at 11. The Court of Appeals rejected that request because (1) the protections of § 595.023 do not contain a "lawful" requirement; (2) nothing in the MFFIA hinges on "the means used for newsgathering"; and (3) none of the cases on which Energy Transfer relied involved a reporter's assertion of any reporter shield law. *Id.* at 12-13.

Regarding the privilege log, the Court of Appeals held that the MFFIA prohibits compelling Unicorn Riot to produce such a log in this case because the MFFIA broadly states that "*no* person" engaged in newsgathering can be required by "*any* court" to make a disclosure in "*any* proceeding" that would reveal "any unpublished information." Appellants' Add. 16-17. Consequently, neither the district court nor Energy Transfer "ha[d] offered any conceivable

method of preparing a privilege log" without "disclos[ing] . . . privileged information." *Id.* at 17. The Court of Appeals also noted *In re Hope Coalition*, 977 N.W.2d 651 (Minn. 2022), where this Court held that a sexual assault counselor could not be compelled to produce records for in camera review in a criminal sexual-assault case, despite the defendant's constitutional rights to confront witnesses and present a complete defense. Appellants' Add. 17-18.

Finally, although the Court of Appeals held that Unicorn Riot could not be compelled to describe unpublished material in a privilege log, or produce material for in camera inspection, there was still some work for the district court to do. Specifically, the Court of Appeals ordered the case remanded so that the district court could determine (1) whether there is any discoverable information requested in the subpoenas with respect to which Unicorn Riot has not responded or asserted that the information is privileged and (2) whether the requests impose an undue burden or are otherwise objectionable under Minn. R. Civ. P. 45.03 or 45.04(a), thus entitling Unicorn Riot to its reasonable attorneys' fees and costs. Appellants' Add. 19.

ARGUMENT

I. The MFFIA protects Unicorn Riot.

The Court of Appeals correctly held that Unicorn Riot's coverage of the DAPL protests falls squarely within the MFFIA's protections. As this Court recently emphasized, "the purpose of statutory interpretation is to determine

the Legislature's intention by reading the statute as a whole." *Hope Coal.*, 977 N.W.2d at 657 (quoting *Christianson v. Henke*, 831 N.W.2d 532, 536-37 (Minn. 2013)). Here, the relevant interpretive rules show that the MFFIA protects Unicorn Riot. Energy Transfer's argument—that the MFFIA does not apply when someone allegedly trespasses while newsgathering—fails, at every turn, to grapple with the MFFIA's text, structure, and purpose.

A. The MFFIA's plain text protects unpublished information possessed by newsgatherers, without regard to whether they are alleged, in third-party subpoenas, to have trespassed.

When interpreting a statute, this Court "look[s] first at the plain and ordinary meaning of the statute's language to determine whether it is ambiguous." *Hope Coal.*, 977 N.W.2d at 657. (internal quotation marks omitted). If "the statute is 'plain and unambiguous,' [the Court] will 'not engage in any further construction.'" *Mittelstaedt v. Henney*, 969 N.W.2d 634, 639 (Minn. 2022) (quoting *State v. Townsend*, 941 N.W.2d 108, 110 (Minn. 2020)). That is the situation here. The MFFIA unambiguously protects Unicorn Riot's newsgathering activities, whether they involved trespass or not.

Enacted in 1973 and amended in 1998, the MFFIA broadly prohibits the compelled disclosure of information obtained by journalists in the course of their work. 1973 Minn. Laws 2201; 1998 Minn. Laws 589. The statutory privilege broadly applies to 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. The MFFIA prohibits "any court" from compelling such a newsgatherer to disclose "any unpublished information" or "any of the person's notes . . . or other reportorial data" in "any proceeding." *Id.* The statute defines "reportorial data" to include not only notes, but also "memoranda, recording tapes, [or] film." *Id.* Since 1998, the MFFIA has specified that this privilege applies "whether or not" disclosure "would tend to identify" a source. *Id.*

The broad privilege defined in § 595.023 is limited by only "two exceptions," in §§ 595.024 and 595.025, which allow courts to compel newsgatherers to disclose information only "under certain limited circumstances." *Weinberger v. Maplewood Rev.*, 668 N.W.2d 667, 672 (Minn. 2003). The first exception is for material that is "clearly relevant to a gross misdemeanor or felony" or "clearly relevant to a misdemeanor so long as the information would not tend to identify the source of the information or the means through which it was obtained." Minn. Stat. § 595.024. To implement this exception, § 595.023 provides that its disclosure prohibitions govern "[e]xcept as provided in section 595.024." This Court has determined that this exception is "applicable in criminal cases." *Weinberger*, 668 N.W.2d at 672.

The second exception applies in certain civil defamation cases. Specifically, the "prohibition of disclosure provided in section 595.023 shall not

apply in any defamation action where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice." Minn. Stat. § 595.025. A person seeking to invoke this exception must demonstrate "probable cause to believe that the source has information clearly relevant to the issue of defamation," and that "the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights." *Id.*

B. The MFFIA privilege fully applies to Unicorn Riot.

The Court of Appeals correctly held that Unicorn Riot cannot be compelled to comply with Energy Transfer's subpoenas because Unicorn Riot's newsgathering qualifies for the protections of § 595.023, and neither statutory exception applies.

For starters, Unicorn Riot's coverage of the 2016 protests constituted "the gathering . . . of information for the purposes of transmission, dissemination or publication to the public," within the meaning of § 595.023. Indeed, despite its trespassing allegation, even Energy Transfer concedes that the alleged trespass occurred while Unicorn Riot was "recording images and conducting interviews." Appellants' Op. Br. 6-7.

Moreover, neither of the MFFIA's exceptions conceivably applies here. Energy Transfer's North Dakota lawsuit is not a criminal case alleging a gross misdemeanor or felony. *Contra* Minn. Stat. § 595.024. Nor is it a criminal case

alleging a misdemeanor in which Unicorn Riot could possibly supply the material sought by Energy Transfer without "tend[ing] to identify the source of the information or the means through which it was obtained." *Id.* In fact, it is not a criminal case at all. It is a civil case. And although Energy Transfer's North Dakota complaint contains a defamation count, it does not allege actual malice. *Compare* Index #8 at 97-98, *with* Minn. Stat. § 595.025.[1]

Because Unicorn Riot engaged in newsgathering within the meaning of § 595.023, and because neither statutory exception applies, the MFFIA bars courts from compelling Unicorn Riot to comply with Energy Transfer's subpoenas. The MMFIA protects "unpublished information procured by the [reporter] in the course of work." Minn. Stat. § 595.023. Yet that is what Energy Transfer's subpoenas seek. Appellants' Op. Br. 7-10. The MFFIA therefore bars any enforcement of those subpoenas.

C. The rules of statutory construction foreclose Energy Transfer's proposed carveout for any allegedly unlawful or tortious conduct.

Energy Transfer disputes almost nothing in the analysis above. It does not deny that Unicorn Riot's coverage of the protests qualifies as newsgathering under § 595.023. It does not argue that this case meets the

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[1] This is unsurprising, given that actual malice typically need not be proved in a defamation action unless the plaintiff is a public official. *Weinberger*, 668 N.W.2d at 673.

criteria for the exceptions listed in §§ 595.024 or 595.025. Instead, it argues that this Court should create a new exception that would deny MFFIA protection to newsgathering activities that are alleged to be tortious or unlawful. That argument lacks merit.

1. The MFFIA's plain text forecloses an exception for all allegedly unlawful or tortious newsgathering.

In at least three ways, the MFFIA's plain text forecloses Energy Transfer's argument.

First, as the Court of Appeals noted, Energy Transfer's argument would require "add[ing] the word 'lawful' into section 595.023 such that the privilege against disclosure of information would extend only to 'the [lawful] gathering, procuring, compiling, editing, or publishing of information.'" Appellants' Add. 12. But that provision nowhere uses the words "lawful" or "nontortious." Although Energy Transfer insists the MFFIA's preamble *implies* a lawfulness requirement, *see* Appellants' Op. Br. 15, that is not accurate. The preamble does not even hint that the lawfulness of a newsgatherer's actions determines the scope of the MFFIA's protections. *See* Minn. Stat. § 595.022. Courts "cannot

add words or meaning to a statute that were intentionally or inadvertently omitted." *Rohmiller v. Hart*, 811 N.W.2d 585, 590 (Minn. 2012).[2]

Second, construing the MFFIA to contain an implicit exception for any allegedly unlawful or tortious conduct would run headlong into the canon of *expressio unius est exclusio alterius*. That canon, which the Legislature has codified, provides that "[e]xceptions expressed in a law shall be construed to exclude all others." Minn. Stat. § 645.19; *see also State v. Caldwell*, 803 N.W.2d 373, 383 (Minn. 2011) (explaining that the canon "generally reflects an inference that any omissions in a statute are intentional"). Here, the Legislature wrote two—and only two—exceptions into the MFFIA. In writing those two exceptions, the Legislature carefully prescribed procedures, including burdens of proof, for assessing whether the exceptions apply to a given case.

Yet not only is Energy Transfer's proposed exception absent from the statute, so are instructions for adjudicating it. It is unclear what evidentiary

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[2] Energy Transfer's attempt to argue for a court-created exception to the MFFIA by analogizing to the crime-fraud exception to attorney-client privilege is similarly misguided. *See* Appellants' Op. Br. 17-18. Unlike the MFFIA, Minnesota's attorney-client privilege statute is expressly limited to communications "in the course of professional duty." Minn. Stat. § 595.02(b). Attorneys who facilitate criminal or fraudulent conduct are not acting "in the course of professional duty." *See* Minn. R. Prof. Conduct 1.6(b)(4) (allowing lawyers to reveal information "to prevent the commission of a fraud" that the lawyers' services have facilitated "or to prevent the commission of a crime").

standards would apply, what findings would have to be made by the court in whose name the subpoena is issued, and what preclusive effect (if any) those findings might have in other proceedings involving those reporters, including proceedings in which the reporters are named as defendants. Energy Transfer's proposed rule would appear to task trial courts with conducting mini criminal trials just to decide whether a subpoena is valid. That is a due process nightmare. "If the Legislature intended other exceptions to apply, the Legislature could have also listed them." *Hope Coal.*, 977 N.W.2d at 658. Because it did not do so, the MFFIA "shall be construed to exclude all other[]" exceptions. Minn. Stat. § 645.19.

Third, Energy Transfer's proposed exception, if endorsed by this Court, would render the MFFIA's other two exceptions superfluous. *See State v. Beganovic*, 991 N.W.2d 638, 646 (Minn. 2023) (explaining that the Court will not interpret statutes to render words superfluous). To interpret the MFFIA as Energy Transfer proposes, this Court would have to say that the Legislature drafted the MFFIA to contain a carefully drawn exception for certain criminal cases under certain circumstances, as well as an unwritten exception for cases alleging *literally any violation of law under any circumstance*. Likewise, this Court would have to say that the Legislature drafted the MFFIA to contain a carefully drawn exception for one specific tort—defamation—plus an

unwritten exception for cases alleging *literally any other tort*. *See Bol v. Cole*, 561 N.W.2d 143, 147 (Minn. 1997) (noting that defamation is a tort).

That cannot be right. The Legislature would not have needed to draft narrow exceptions for certain crimes and one specific tort if, as Energy Transfer claims, the MFFIA somehow exempts all crimes and all torts.

2. Energy Transfer's proposed exception would undermine the MFFIA's purposes.

When a statute's plain text is clear, there is no need to "resort[] to other principles of statutory interpretation." *Binkley v. Allina Health Sys.*, 877 N.W.2d 547, 550 (Minn. 2016); *see also* Minn. Stat. § 645.16. Because the MFFIA is unambiguous, there is no need to resort to other canons of statutory construction and determine whether Energy Transfer's proposed exception is consistent with the statute's overall purpose. But, to be clear, it is not.

Energy Transfer claims that the Legislature "implicit[ly]" meant to withhold MFFIA protection for any newsgatherer who engages in unlawful or tortious behavior. Appellants' Op. Br. 15. Putting aside the complete absence of textual support for this claim, its reasoning does not withstand scrutiny. *See Mgmt. Info. Tech., Inc. v. Alyeska Pipeline Serv. Co.*, 151 F.R.D. 471, 475 (D.D.C. 1993) (rejecting as "without merit" the argument "that no privilege can apply" when a journalist "engaged in tortious or otherwise criminal conversion"). The Legislature did not draft the MFFIA in a vacuum. It has also

enacted criminal and civil laws. And those laws are perfectly capable of deterring and redressing wrongdoing by journalists.

As its title suggests, the MFFIA's purpose is to "protect the public interest and promote the free flow of information," Minn. Stat. § 595.022. The basic idea is to promote newsgathering, and thus the free flow of information, by providing "the news media" with "a substantial privilege not to reveal sources or information or to disclose unpublished information." Minn. Stat. § 595.022. The MFFIA does not say that its purpose is to police journalists.

Although Energy Transfer posits that affirming the Court of Appeals would induce reporters to break into people's homes and copy documents, *see* Appellants' Op Br. at 18, a reporter would have to be foolish to do that in reliance on the MFFIA. For starters, the reporter would face criminal prosecution for gross misdemeanors or felonies. *See, e.g.*, Minn. Stat. §§ 609.582 (burglary), 609.52 (theft), 609.595 (damage to property), 609.89 (computer or electronic data theft), 609.891 (unauthorized computer access). In the ensuing criminal matter, the reporter would also lose MFFIA protection under § 595.024. That exception facilitates the enforcement of criminal laws in appropriate cases. But it does not empower civil litigation plaintiffs to obtain court orders allowing them to rifle through nonparty reporters' notebooks.

Thus, in enacting the MFFIA, the Legislature had no need to focus on deterring unlawful conduct by journalists. Other laws do that. In short, the

Legislature has carefully balanced the MFFIA's protections against the liabilities of criminal and tort law.

That balance makes sense because, contrary to Energy Transfer's supposition, "traditional newsgathering" has included trespass and other muckraking behavior. *See generally* Brooke Kroeger, *Undercover Reporting: The Truth About Deception* (2012). For example, in 1887, Nellie Bly "went undercover to detail the brutality and neglect toward patients" at an insane asylum. Laurent Sacharoff, *Trespass and Deception*, 2015 BYU Law Rev. 359, 370 (citing Nellie Bly, *Ten Days in a Mad-House* (Norman L. Munro ed., 1887)). In the early 1900s, Upton Sinclair posed as a worker to gain access to Chicago's meatpacking district. *Id.* (citing Upton Sinclair, *The Jungle* (1906)). Other examples abound. From illicitly sneaking into slave auctions to cover the horrors of slavery, to evading detection at a military hospital to document the mistreatment of Iraq War veterans, journalists have, on occasion, risked legal exposure to report important stories. Kroeger, *supra*, at 3-6, 15-30.

The same is true in Minnesota. In 2020 and 2021, journalists in Brooklyn Center and Minneapolis, including Unicorn Riot, continued covering police brutality protests even after crowds had been ordered to disperse.[3] It is difficult

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[3] *See, e.g.*, Tony Webster, *Federal Judge Orders Minnesota State Troopers to Not Arrest Journalists Covering Protests*, Minn. Reformer (Apr. 16, 2021),

to deny that the work of those journalists, like those who came before them, served the public interest and facilitated the flow of information. The state might or might not prosecute those acts, in and of themselves, as violations of the law. But the attendant legal violations do not void MFFIA protection for the unpublished materials collected during newsgathering.

Beyond ignoring the history of journalism, construing the MFFIA to contain an exception for any unlawful behavior would deter valuable newsgathering. Will journalists lose MFFIA protection if they follow a story beyond police barriers? What if they exceed the speed limit on their way to interview a witness? If they jaywalk? If they double-park? And when will journalists face these charges? In Minnesota, criminal trespass is normally

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https://minnesotareformer.com/2021/04/16/federal-judge-orders-minnesota-state-troopers-to-not-arrest-journalists-covering-protests/ (discussing a judicial order to refrain from arresting journalists covering protests); Dennis Wagner, *Minneapolis Police Injured Protesters with Rubber Bullets. The City Has Taken Little Action.*, MinnPost (May 28, 2021), https://www.minnpost.com/other-nonprofit-media/2021/05/minneapolis-police-injured-protesters-with-rubber-bullets-the-city-has-taken-little-action/ (discussing police orders for protesters to disperse); Angelique Jackson, Audrey Cleo Yap & Elaine Low, *Reporting While Black: The Complexity of Covering Racial Inequality as a Black Journalist*, Variety (June 3, 2020), https://variety.com/2020/tv/features/black-journalists-racial-inequality-protests-george-floyd-1234623820/ (discussing the arrest of journalists in Minneapolis); Niko Georgiades, *Police Break Equipment, Shoot, Beat, and Detain Press*, Unicorn Riot (Apr. 21, 2021), https://unicornriot.ninja/2021/police-break-equipment-shoot-beat-and-detain-press/ (noting that Mr. Georgiades was shot in the leg by a 40mm marker round).

subject to a three-year statute of limitations, *see* Minn Stat. § 628.26(k), yet Energy Transfer's motion to compel, alleging trespass by Unicorn Riot, came nearly six years after the protests. Now it has been roughly eight years.

Promoting the free flow of information may, at times, require reporters to cover news using means that may be technically tortious or unlawful. And there may be situations in which reporters must answer for that conduct. Nevertheless, *the public* has an interest in what the reporter uncovers. That, and not enforcing every law and tort on the books, is the MFFIA's purpose. For all these reasons, it is easy to understand why the Legislature did not draft the MFFIA to include Energy Transfer's proposed exception.

3. The canon of constitutional avoidance also confirms that the MFFIA protects Unicorn Riot's newsgathering.

Finally, as the Court of Appeals observed, the cases cited by Energy Transfer do not support its interpretation of the MFFIA because they do not concern the MFFIA at all. In arguing about the MFFIA, Energy Transfer has primarily relied on cases interpreting the First Amendment reporter's privilege. Appellants' Op. Br. 1, 18-21. But interpreting a statute to be no broader than a relevant constitutional provision would contradict a basic canon of construction. Generally speaking, "'if [this Court] can construe a statute to avoid a constitutional confrontation, [it is] to do so.'" *State v. Irby*, 848 N.W.2d 515, 521 (Minn. 2014) (quoting *In re Civil Commitment of Giem*, 742 N.W.2d

422, 429 (Minn. 2007)). Here, even if the MFFIA were ambiguous—though it is not—construing it to protect Unicorn Riot would permit the Court to avoid a constitutional confrontation in two ways.

First, as explained below in Part III, this case raises serious questions about the scope of a constitutional privilege protecting nonparty reporters. If the Court were to hold that the MFFIA applies to Unicorn Riot's newsgathering—and that Unicorn Riot need not provide a privilege log—the Court could avoid deciding those constitutional questions. That is what the Court of Appeals did. In contrast, narrowly construing the MFFIA would trigger a constitutional confrontation.

Second, serious constitutional questions arise from Energy Transfer's emphasis on what it calls Unicorn Riot's "political and ideological perspective" and "sympathy with the protesters." Appellants' Op. Br. 6; Index #31 at 9. Construing the MIFFIA to hinge in any respect on a reporter's viewpoint would cast serious doubt on the MFFIA's constitutionality because viewpoint-based laws are presumptively unconstitutional. *See, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298-99 (2019). Indeed, it is hard to imagine how, if demonstrators encroach on a pipeline, or march on a police department, or storm the U.S. Capitol, a law could permissibly confer its strongest protections only on journalists who disagree with the demonstrators.

Rather than acknowledge the canon of constitutional avoidance, Energy Transfer urges what would be, in effect, a canon of constitutional confrontation. It asks this Court to construe the MFFIA and the First Amendment's reporter's privilege identically, and to apply constitutional case law to the MFFIA. Appellants' Op. Br. 1, 18-21 & n.4. Adopting that approach—that is, construing the MFFIA to be no broader than the constitution—would require Minnesota courts to interpret the constitution every time they resolve an ambiguity in the MFFIA. That is the exact opposite of what the canon of constitutional avoidance instructs.

Energy Transfer's argument also cannot be squared with the MFFIA's history, which demonstrates that the MFFIA sweeps more broadly than the U.S. Constitution. The Minnesota Legislature enacted the MFFIA in 1973, immediately after the U.S. Supreme Court decided *Branzburg v. Hayes*, 408 U.S. 665 (1972). While *Branzburg* held that the First Amendment did not shield a reporter from being compelled to provide grand jury testimony about the identity of his sources, the U.S. Supreme Court expressly "le[ft] state legislatures free . . . to fashion their own standards" for shielding reporters. 408 U.S. at 706. In enacting the MFFIA, the Legislature took the Court up on its offer.

The MFFIA provided that "the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose

unpublished information." 1973 Minn. Laws 2201. As this Court has observed, "it is clear that the Act was a reaction to the *Branzburg* decision, and was intended to provide *additional* protection to reporters and their employers against subpoenas from litigating parties." *State v. Turner*, 550 N.W.2d 622, 631 (Minn. 1996) (emphasis added). In 1998, the legislature went further; it clarified that the MFFIA's protections apply "whether or not" the identity of a confidential source was at stake. 1998 Minn. Laws 589.

In consequence, Energy Transfer's suggestion that the MFFIA simply codifies the First Amendment's reporter's privilege contradicts both the canon of constitutional avoidance and the actual history and text of the MFFIA. The MFFIA is a broad shield against the compelled disclosure of a newsgatherer's unpublished materials, and it fully applies here.

II. The MFFIA exempts Unicorn Riot from having to create a privilege log describing unpublished information.

Given that the MFFIA applies to Unicorn Riot, the Court of Appeals correctly held that the district court erred as a matter of law by ordering Unicorn Riot to produce a privilege log. Appellants' Add. 16. When a discovery order involves questions of statutory interpretation, appellate courts review those questions de novo. *1300 Nicollet, LLC v. County of Hennepin*, 990 N.W.2d 422, 431 (Minn. 2023). Here, the MFFIA's text, supported by its purpose,

prohibits courts from ordering reporters to produce privilege logs detailing unpublished information.[4]

A. The MFFIA prohibits ordering reporters to produce privilege logs disclosing unpublished information.

The privilege log issue arises from a single paragraph in Energy Transfer's memorandum in support of its motion to compel, which requested "a privilege log detailing the responsive material [Unicorn Riot] is withholding." Index #2 at 17. Energy Transfer was right to acknowledge that such a log would require "detailing" information sought by the subpoenas. Privilege logs "describe the nature of the documents, communications, or things not produced or disclosed in a manner that . . . will enable other parties to assess the applicability of the privilege or protection." Minn. R. Civ. P. 26.02(f). This often includes dates, the identities of the relevant parties, and the types of communications used. But these details are precisely what the MFFIA prohibits disclosing.

As the Court of Appeals explained, when the MFFIA's privilege applies, its protection is "broad and comprehensive." Appellants' Add. 17. The MFFIA

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[4] Energy Transfer concedes that, in cases not involving the MFFIA, the Rules of Civil Procedure at most permit, but never require, district courts to order nonparties to produce privilege logs. Appellants' Op. Br. 23. Thus, if the MFFIA prohibits ordering Unicorn Riot to produce a privilege log, as the Court of Appeals held, the Rules of Civil Procedure could not have supplied the district court with an alternative basis for issuing such an order.

prohibits courts from requiring reporters "directly engaged in [news]gathering" 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." Minn. Stat. § 595.023 (emphasis added). Thus, it is a privilege not just against disclosing the substance of certain materials, but against disclosing "*any*" unpublished information or reportorial data. *Id.* (emphasis added). A privilege log detailing material related to a reporter's newsgathering activity necessarily includes "unpublished information" and "reportorial data." Therefore, a court may not order a reporter to produce such a privilege log.

In arguing otherwise, Energy Transfer ignores the MFFIA's text. *See* Appellants' Op. Br. 22-28. For example, it argues that submitting a privilege log would "merely" require Unicorn Riot to disclose "lists [of] withheld materials," provide a "general description of the withheld material," and "state[] the basis" for withholding the material. *Id.* at 24. But that log would necessarily include "information," "data," and sources the statute protects. As the Court of Appeals put it, "neither the district court nor Energy Transfer have offered any conceivable method of preparing a privilege log that would not result in the disclosure of privileged information." Appellants' Add. 17.

Energy Transfer also incorrectly writes off this Court's decision in *Hope Coalition*. *See* Appellants' Op. Br. 26-28. There, this Court interpreted a

statute stating that "[s]exual assault counselors *may not* be allowed to disclose any opinion or information received from or about the victim without the consent of the victim." Minn. Stat. § 595.02, subd. 1(k) (emphasis added). Noting the statute's "broad grant of protection," this Court held that the phrase "may not" was "prohibitive," and that the district court therefore lacked authority to order the disclosure of any records—including for in camera inspection. 977 N.W.2d at 658-59.

The Court of Appeals correctly concluded that *Hope Coalition*'s reasoning is "equally applicable here," Appellants' Add. 18, and stands for the proposition that Minnesota Courts apply statutory privileges by their terms. It does not matter that this case, unlike *Hope Coalition*, deals with a privilege log rather than in camera inspection. What matters is that, both in *Hope Coalition* and here, a statute's plain text prohibits any compelled disclosure. That prohibition includes a privilege log.

In this way, the MFFIA's protections are different from the sorts of privileges that are compatible with privilege logs. The attorney-client privilege does not protect all information and data relating to the relationship between lawyer and client; it protects only confidential communications made to obtain or deliver legal advice. Minn. Stat. § 595.02(1)(b); *Brown v. St. Paul City Ry. Co.*, 62 N.W.2d 688, 700 (Minn. 1954); *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 444 (Minn. 1998). So when attorney-client privilege logs state what type

of communication existed, between who, and about what subject, they do not violate the privilege. *E.g., In re Application of Chevron Corp.,* 736 F. Supp. 2d 773, 783-84 (S.D.N.Y. 2010). The same is not true when the relevant privilege protects "any" information related to that communication, including the parties, date, time, and method. That is the case under the MFFIA.

Energy Transfer equally overlooks that this is a case about statutory interpretation when it argues that "courts in jurisdictions that recognize a reporter's privilege have regularly ordered the production of privilege logs." Appellants' Op. Br. 27. Again, Energy Transfer's invocation of the First Amendment reporter's privilege is unpersuasive because that privilege is narrower than the MFFIA. *See supra* Part I.C.3. And the only case Energy Transfer cites concerning a state reporter's shield law—*Gibbons v. GlaxoSmithKline, LLC*, 239 N.E.3d 10, 21 (Ill. App. Ct. 2023)—comes from Illinois, whose statute protects only "sources," not information or data. 735 Ill. Comp. Stat. 5/8-901.

In *Gibbons*, the Illinois Appellate Court held that the district court had discretion to order a privilege log because (1) the reporter could omit the identity of the source and (2) the reporter had claimed three different privileges that the court had to sort through. *Gibbons*, 239 N.E.3d at 21. Neither of those justifications applies here. In fact, Energy Transfer fails to identify a single case in a jurisdiction with an MFFIA-like statute in which a trial court ordered

a reporter to produce a privilege log detailing unpublished information over a reporter's objection. This Court, on the other hand, has long rejected overly broad requests for information from journalists. *See Thompson v. State*, 170 N.W.2d 101, 103-04 (Minn. 1969).

Energy Transfer also claims that under the Court of Appeals' holding, "a party claiming MFFIA privilege automatically makes itself immune from any challenge to that claim." Appellants' Op. Br. 25. That statement is incorrect.

First, the MFFIA protects only those "directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public" and applies only to their "unpublished information . . . or any of the person's notes, memoranda, recording tapes, film or other reportorial data." Minn. Stat. § 595.023. If either of these conditions are not satisfied, the MFFIA privilege does not apply.

Second, the Court of Appeals' decision does not undermine a trial court's ability to verify that the claim of privilege is proper. After a court determines whether the subpoenaed party is a reporter, the analysis shifts to the subpoena itself. If the subpoena requests *unpublished* data, then no further inquiry is required to determine if the privilege, in fact, applies. Moreover, courts have recognized other means of verifying a claim of privilege when a privilege log is not available. The most common method is a declaration, which is what Unicorn Riot provided here. Georgiades Decl.; *cf. Jardaneh v. Garland*, No.

8:18-cv-02415-PX, 2021 WL 4169600 at *6 (D. Md. Sept. 14, 2021); *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 29 F. Supp. 3d 142, 150-51 (E.D.N.Y. 2014). But the MFFIA removes courts' discretion to order the production of a privilege log. It is simply impossible to craft one that keeps privileged what the statute protects.

B. Compelling newsgatherers to produce privilege logs describing unpublished information would contradict the MFFIA's purposes.

In addition to running afoul of the MFFIA's text, compelling newsgatherers to produce privilege logs "detailing" or "listing" their unpublished information would undermine the MFFIA's purposes. As noted above, *supra* Part I.C.2, the MFFIA facilitates "the free flow of information" and safeguards "the confidential relationship between the news media and its sources." Minn. Stat. § 595.022. Forcing reporters to produce privilege logs would undermine this policy in two ways.

First, as discussed above, *supra* Part II.A, privilege logs necessarily reveal information that could compromise sources. The purpose of some privileges, like the attorney-client privilege, is to facilitate open communication, not to shield from public view the existence, timing, means, and frequency of those communications. *Nat'l Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn. 1979). But the MFFIA is designed to provide a broader shield and thus protects *any* unpublished material. Minn. Stat. § 595.023.

Second, compelling reporters to produce privilege logs hinders "the free flow of information" by imposing crushing burdens on reporters that, in effect, would extinguish the MFFIA's protections. Producing a privilege log involves document-by-document review that is time-consuming and costly—burdens that fall harder on nonprofit media organizations like Unicorn Riot. If civil plaintiffs can impose those burdens simply by issuing subpoenas that expressly target MFFIA-protected material, they will have at their disposal a powerful tool for harassing and retaliating against journalists. *See United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (arguing that the act of "routine[ly] and casually . . . compel[ing]" the disclosure of even nonconfidential information is a "lurking and subtle threat to journalists and their employers"); *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1999) ("If the parties to any lawsuit were free to subpoena the press at will . . . [t]he resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties . . . ."). Reversing the Court of Appeals decision would supply that tool and, in so doing, turn the MFFIA's purpose on its head.

C. Compelling Unicorn Riot to produce a privilege log would violate the MFFIA.

Given the principles above, the Court of Appeals correctly held that Unicorn Riot cannot be compelled "to produce a privilege log for all information

for which [it] is claiming the MFFIA privilege." Appellants' Add. 20. Because the MFFIA's protections apply to Unicorn Riot, and because the MFFIA prohibits disclosure of "*any* unpublished information," "reportorial data," or sources related to newsgathering, Minn. Stat. § 595.023 (emphasis added), Unicorn Riot cannot be compelled to create a document that would divulge such information. Yet that is what Energy Transfer's privilege-log demand entails.

As a threshold matter, Energy Transfer incorrectly asserts that Unicorn Riot bears the burden of proving that the MFFIA privilege applies to each aspect of Energy Transfer's subpoenas, and that failing to compel the creation of a privilege log would therefore "put the cart before the horse." Appellants' Op. Br. 23, 25. That argument misapprehends the law. If a party subpoenas material that is patently privileged, the burden never shifts to the subpoenaed entity to prove a claim of privilege through a privilege log. As this Court has explained, "When . . . a party litigant claims privilege, the burden rests on him to present facts establishing the privilege *unless it appears from the face of the document itself that it is privileged*." *Brown*, 62 N.W.2d at 701 (emphasis added) (citing *Robertson v. Commonwealth*, 25 S.E.2d 352, 360 (Va. 1943)).

That situation—where requested documents are facially privileged—will necessarily arise when someone flat-out requests privileged documents. For example, if a nonparty were to receive a subpoena for "all communication made by the client to the attorney or the attorney's advice given thereon in the course

of professional duty," *see* Minn. Stat. § 595.02(1)(b), they would rightly complain that any responsive document would be, by definition, privileged. Compelling the nonparty to carry the burden of proving that privilege would be a pointless exercise, as would ordering a privilege log. Indeed, requiring the log would undermine Minnesota's goal of "prevent[ing] misuse of subpoenas." Advisory Committee Comment on the 2010 Amendment to Minn. R. Civ. P. 45. It would also ignore the requirement that the civil rules are to be "construed and administered to secure the just, *speedy*, and *inexpensive* determination of every action." Minn. R. Civ. P. 1 (emphasis added). Requiring a nonparty to produce a privilege log for facially privileged documents is neither speedy nor inexpensive.

Energy Transfer's subpoenas trigger those concerns. It has requested unpublished newsgathering material that obviously falls within the MFFIA's privilege. It argues, incorrectly, that Unicorn Riot cannot claim the privilege. *See supra* Part I. But having drafted subpoenas based on a misapprehension that the MFFIA does not protect Unicorn Riot at all, Energy Transfer cannot dispute that it has requested unpublished newsgathering information. There is thus no need to put Unicorn Riot through the time and expense of creating a log just to confirm that, to comply with subpoenas demanding privileged information, Unicorn Riot would have to disclose privileged information.

Energy Transfer subpoenaed 16 categories of documents. Index #7 at 26-28. For four categories—categories 6, 7, 8, and 16—Unicorn Riot has carried any burden that it might have to establish that it has no responsive documents. Through a declaration, it has explained that it "did not share resources with the protesters, and [it] did not participate in any planning of protests, demonstrations, or any other actions made in protest of the construction and operation of the Dakota Access Pipeline." *Compare* Index #7 at 26-28, *with* Add. 18-19 & n.4, Georgiades Decl. at ¶¶ 3, 5, *and* Index #8 at 32 (Letter from Unicorn Riot's counsel). For two categories—categories 13 and 14—Unicorn Riot has fulfilled the request by identifying its social media accounts and posts. Index #8 at 32.

That leaves 10 categories. Those categories relate to Unicorn Riot's (a) organizational structure (category 1), (b) coverage of the protests and communications with sources (categories 2, 3, 4, 5, 11, 12, and 15), and (c) funding and legal fees (categories 9 and 10). Index #7 at 26-28.

But those categories seek information that is definitionally privileged under the MFFIA. Disclosing Unicorn Riot's structure (category 1) and funding (categories 9 and 10) would arguably reveal, among other things, the "means from or through which information was obtained." Minn. Stat. § 595.023. Regardless, it is entirely irrelevant to Energy Transfer's civil lawsuit in North Dakota. More glaringly, unpublished material about Unicorn Riot's coverage

of the protests (categories 2, 3, 4, 5, 11, 12, and 15) is exactly what is protected by § 595.023, including where Unicorn Riot's member journalists were, how they communicated, with whom they communicated, and what was happening at the protest. For example, Energy Transfer has requested items related to "planned Direct Action" (category 2) and Unicorn Riot's communications with alleged protesters (category 11). Index #7 at 26-27.

For purposes of the MFFIA, this is no different than subpoenaing attorneys for all the confidential legal advice they gave their clients. Requiring Unicorn Riot to log this information, just to confirm that it is privileged, would be pointless.

It would also necessarily reveal privileged information. *See supra* Part II.A. The Court of Appeals correctly observed that "neither the district court nor Energy Transfer have offered any conceivable method of preparing a privilege log that would not result in the disclosure of privileged information." Appellants' Add. 17. That remains true. Energy Transfer insists that a privilege log would "merely" contain things like "lists [of] withheld materials" and "a general description of the withheld material." Appellants' Op. Br. 24. But that is what the MFFIA prohibits extracting from newsgatherers. Unicorn Riot has met any applicable burden to claim the privilege by providing a declaration explaining its newsgathering role in the protests related to which Energy Transfer has subpoenaed information. Georgiades Decl. ¶ 2-3; Index

#2 at 11 & n.4 (Energy Transfer's acknowledgment that its motion to compel does not contest Unicorn Riot's "represent[ation] that there are no responsive documents for certain Requests"); *cf. Jardaneh*, 2021 WL 4169600 at *6; *Koumoulis*, 29 F. Supp. 3d at 150-51. The district court can order no more without violating the MFFIA.

To the extent Energy Transfer has legitimate concerns about newsgatherers claiming blanket privileges, the Court of Appeals' remand order should allay them. On remand, the district court can still consider "(1) whether there is any discoverable information requested in the subpoenas with respect to which Unicorn Riot has not responded or asserted that the information is privileged, and (2) whether the requests impose an undue burden or are otherwise objectionable under Minn. R. Civ. P. 45.03 or 45.04(a)." Appellants' Add. 19. But the district court should take note: Much of what Energy Transfer requests is covered by the MFFIA, much of what is not covered has been provided by Unicorn Riot, and what arguably remains (legal fees, Unicorn Riot's organizational structure) is entirely irrelevant to Energy Transfer's pending lawsuit. *See* Minn. R. Civ. P. 45.03(a).

III. The U.S. and Minnesota Constitutions also shield Unicorn Riot from having to disclose the subpoenaed materials.

In addition to the MFFIA, Unicorn Riot is also covered by reporter's privileges under the First Amendment to the U.S. Constitution and Article I,

Section 3, of the Minnesota Constitution. These privileges warrant especially strong protection in this case because Energy Transfer is seeking confidential information from a nonparty media organization in connection with a civil case where the rights of a criminal defendant are not at issue.

A. **The reporter's privilege applies to nonparty reporters** subpoenaed in civil cases.

As the U.S. Court of Appeals for the Eighth Circuit has observed, many courts have held that, when reporters are nonparties in civil litigation, they have a qualified privilege under the First Amendment to withhold certain materials from discovery. *Doe v. Young*, 664 F.3d 727, 735 n.3 (8th Cir. 2011) (collecting cases). "[T]he privilege recognizes society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public." *In re Madden*, 151 F.3d 125, 128 (3d Cir. 1998). At a minimum, it covers confidential sources and information, and most federal appellate courts to have addressed the issue have held that the privilege also reaches nonconfidential materials. *See, e.g.*, *Gonzales*, 194 F.3d at 32; *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993) ("*Shoen I*"); *LaRouche Campaign*, 841 F.2d at 1182; *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *J.J.C. v. Fridell*, 165 F.R.D. 513, 516 (D. Minn. 1995) (citing *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995) ("*Shoen II*")).

Courts use different tests to determine whether the reporter's privilege protects nonparty reporters in a particular case. If the contested materials are confidential, courts might ask: "(1) [I]s the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?" *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980). If the materials are not confidential, courts apply different tests. In the Second Circuit, "the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists' privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources." *Gonzales*, 194 F.3d at 36. In the Ninth Circuit, if the "information sought is not confidential," a civil litigant may overcome the reporter's privilege "only upon a showing that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." *Shoen II*, 48 F.3d at 416.

This Court's cases are consistent with those decisions. Although Energy Transfer argues that this Court has "never recognized" a reporter's privilege, Appellants' Op. Br. 19 n.4, that is not quite right. This Court has indeed held that reporters lack a wholesale privilege against providing compelled testimony in criminal cases. *Turner*, 550 N.W.2d at 628-29. But, at the same time, the Court held that when a litigant seeks to compel "nontestimonial,

unpublished information," a district court "should perform an in camera review . . . and release only those [unpublished materials] which would be relevant to [the criminal defendant's] defense theory." *Id.* at 629. This procedure, the Court explained, "balance[s] the [criminal] defendant's need for evidence to support his or her claims against the public's interest in a free and independent press." *Id.* This Court has characterized the procedure outlined in *Turner* as an "order." *State v. Burrell*, 697 N.W.2d 579, 604 n.18 (Minn. 2005)

Thus, even in cases implicating the constitutional rights of criminal defendants, this Court requires in camera review to prevent the compelled disclosure of irrelevant material possessed by a reporter. That approach is perfectly consistent with the federal appellate decisions applying a more robust reporter's privilege when reporters are nonparties in civil cases that do not implicate the rights of criminal defendants.

B. **A civil plaintiff's trespass allegation against a nonparty reporter does not extinguish the reporter's privilege.**

Energy Transfer argues that the reporter's privilege ceases to protect any reporter—even a nonparty subpoenaed in a civil case—who engaged in unlawful or tortious conduct while newsgathering. The case law does not support that argument.

Far from settling this issue in Energy Transfer's favor, the U.S. Supreme Court has said that "the enforcement of a generally applicable law may or may

not be subject to heightened scrutiny under the First Amendment." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 640 (1994) (comparing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991), with *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566-67 (1991)). In *Cowles*, the Court held that a Minnesota reporter could be sued, on a claim of promissory estoppel, for allegedly breaking a promise to keep a source's identity confidential. The Court reasoned that the press "has no special immunity from the application of general laws." *Cowles*, 501 U.S. at 670; *see also id.* at 669 ("[t]he press may not with impunity break and enter an office or dwelling to gather news"); *see also Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937). Yet in *Glen Theatre*, decided three days before *Cowles*, the Court applied heightened scrutiny to a law of general applicability—a restriction on public nudity—as applied to nude dancing. Although the Court deemed nude dancing to fall at "the outer perimeters of the First Amendment," and although it deemed the nudity ban to have only "incidental limitations" on expression, the Court still applied a four-part test to assess whether the law could survive First Amendment scrutiny. *Glen Theatre*, 501 U.S. at 566-68.

The U.S. Court of Appeals for the Fourth Circuit later considered the "arguable tension between" *Cowles* and *Glen Theatre* in a case involving a tort lawsuit against reporters who went undercover to investigate a grocery store. *Food Lion, Inc. v. Cap. Cities/ABC, Inc.*, 194 F.3d 505, 521-22 (4th Cir. 1999).

The court concluded that *Cowles* and *Glen Theatre* could be reconciled by "view[ing] *the challenged conduct* in *Cowles* to be the breach of promise and not some form of expression." *Id.* at 522 (emphasis added). On that basis, the court held that journalists can be sued in tort. The court reasoned that, "as in *Cowles*, heightened scrutiny does not apply because the tort laws (breach of duty of loyalty and trespass) do not single out the press or have more than an incidental effect upon its work." *Id.*

The Court of Appeals correctly held that *Food Lion* does not support Energy Transfer's argument in this case. Appellants' Add. 12-13. Even assuming that the result in *Food Lion* is correct—which Unicorn Riot does not concede—its core rationale is that alleged media tortfeasors lack First Amendment protection only from legal actions that *actually challenge* their allegedly tortious conduct. *Food Lion*, 194 F.3d at 522. But a third-party subpoena does no such thing. To be sure, Energy Transfer *argues* that Unicorn Riot engaged in trespass. But it has not sued Unicorn Riot. It does not seek money damages from Unicorn Riot. Instead, it seeks unpublished information from Unicorn Riot—information that Unicorn Riot obtained while newsgathering. Far from being "incidental" to the subpoenas, the "challenged conduct" in this case is Unicorn Riot's exercise of its constitutional right to freedom of the press. *Id.*

This might have been a harder case if it involved a tort lawsuit against a reporter, *contra Cowles*, 501 U.S. at 670, or a subpoena implicating a criminal defendant's constitutional rights, *contra United States. v. Sanusi*, 813 F. Supp. 149, 159-60 (E.D.N.Y. 1992) (holding that reporter's First Amendment privilege was overcome where reporter engaged in trespass and subpoena sought "potentially exculpatory evidence" that was "not obtainable from any other source"). But this case is neither of those things. The constitutional reporter's privilege fully applies to Unicorn Riot.

C. **Energy Transfer has** not overcome the reporter's privilege.

Energy Transfer has not made, and cannot make, the showing necessary to overcome the reporter's privilege here.

To begin, this case warrants the application of rigorous tests governing the compelled production of confidential information from reporters, because each request in Energy Transfer's subpoenas seeks confidential information. *See, e.g.*, *Miller*, 621 F.2d at 726. For example, 15 of the 16 requests expressly seek "communications," a term that Energy Transfer defines capaciously to encompass any conceivable "transmittal of information"—whether among reporters or between reporters and their sources. *See* Index #7 at 13, 26-28 (requests 1-9 and 11-16). These requests are a far cry from situations in which reporters have been asked to disclose materials they did not receive confidentially, like information from the author of an article published in *Time*

magazine, or recorded outtakes from public statements made to television cameras. *Gonzales*, 194 F.3d at 33. The sixteenth request seeks funding information, which is decidedly nonpublic. Index #7 at 26-28 (category 10).

Because its subpoenas seek confidential information, Energy Transfer must demonstrate a compelling need for that information. *See Miller*, 621 F.2d at 726. Even if it had sought only nonconfidential materials, Energy Transfer would have to demonstrate that the information was not reasonably available through other means. *See Shoen II*, 48 F.3d at 416; *Gonzales*, 194 F.3d at 36.

But Energy Transfer has not made those showings. In both this Court and the Court of Appeals, Energy Transfer has failed to explain why it needs the subpoenaed materials to pursue its lawsuit in North Dakota. That lawsuit has involved extensive discovery and motions practice, and it is set for trial in February 2025. *Energy Transfer Equity, L.P. v. Greenpeace Int'l*, No. 30-2019-CV-00180 (N.D. Dist. Ct., Morton Cnty., filed Feb. 21, 2019). Particularly given the abundant publicly available reporting by Unicorn Riot and other members of the media, and particularly given the information that Unicorn Riot has voluntarily provided to Energy Transfer, it is unclear why any material still at issue here would be both relevant to and noncumulative in the North Dakota case.

Accordingly, on this record, even if this Court were to disagree with the Court of Appeals' interpretation of the MFFIA, its decision should be affirmed

on the alternative ground that compelling the disclosure of the subpoenaed material would violate Unicorn Riot's constitutional rights.

CONCLUSION

The decision of the Court of Appeals should be affirmed, and this case should be remanded with instructions for the district court to consider Unicorn Riot's request for an award of attorneys' fees.

Respectfully Submitted,

Dated: October 21, 2024

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CERTIFICATE OF COMPLIANCE, RULE 132.01

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