IN THE SUPREME COURT

STATE OF ARIZONA

PHOENIX NEWSPAPERS, INC. and JOHN D'ANNA, Petitioners, v. THE HONORABLE PETER C. REINSTEIN, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa, Respondent Judge, STATE OF ARIZONA and GARY MICHAEL MORAN, Real Parties in Interest.	Supreme Court No. CR-16-0371-PR Court of Appeals, Division One, No. 1 CA-SA 16-0096 Maricopa County Superior Court No.: CR2014-128973-001

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press ("Reporters Committee"), respectfully submits this brief as *amicus curiae* in support of Petitioners. The Reporters Committee has read the briefs of the parties and can provide information and perspective that will assist the Court in this case.

As a non-profit organization dedicated to safeguarding journalists' ability to gather and report the news, the Reporters Committee has a unique understanding of the dangers of compelling journalists to disclose both unpublished nonconfidential and confidential information, including their mental impressions and personal notes about their interviews. The Reporters Committee has decades of experience addressing legal issues arising in the newsgathering context – including involvement in the drafting of several reporter's shield laws and the submission of *amicus* briefs in several dozen reporter subpoena cases over more than 40 years – and a direct interest in protecting freedom of the press under the First Amendment and the right to "freely speak, write, and publish on all subjects" under Arizona's Constitution.

A robust reporter's privilege is crucial to providing journalists the breathing space needed to establish working relationships with individuals possessing newsworthy information and to report on stories of corruption and wrongdoing that would not otherwise be covered. Thus, the Reporters Committee has a strong,

direct interest in this Court's resolution of this case, which involves a subpoena to a journalist for "any and all electronic communications, written notes, audio, visual, or otherwise memorialized documentary evidence related to Father Joseph Terra's interview[,]" and respectfully urges this Court to affirm the Court of Appeals' decision directing the trial court to quash that subpoena.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In this appeal, Phoenix Newspapers, Inc. ("PNI") and John D'Anna ("D'Anna"), a reporter for *The Arizona Republic*, ask this Court to affirm the Court of Appeals' decision directing the trial court to grant their motion to quash a criminal defendant's subpoena seeking unpublished notes, recordings, and any "otherwise memorialized documentary evidence" regarding two interviews D'Anna conducted with Father Joseph Terra ("Father Terra").

This case presents a significant issue that affects the free flow of information to the public about important newsworthy matters. Issuing subpoenas to journalists and subjecting them to a legal process to force the disclosure of their unpublished nonconfidential and confidential information obtained during the newsgathering process weakens journalists' ability to gather and disseminate news to the public. Because most subpoenas are issued under state law, the Reporters Committee writes to emphasize the importance of a reporter's privilege under Arizona law against the compelled disclosure of both nonconfidential and

confidential information, and to highlight the broader interests underlying Arizona's two news media statutes and the free speech provision in its constitution. *See How many reporters receive subpoenas each year?*, REPORTERS COMM. FOR FREEDOM OF THE PRESS ("RCFP"), http://bit.ly/2j8DAPC (last visited Jan. 30, 2017).

Both the Arizona Constitution and state statutes recognize the need for a free press to publish without limitation by the government or interference by private parties seeking unpublished information and journalistic work product as part of a fishing expedition for unknown evidence. *See* ARIZ. CONST. art. II § 6; A.R.S. §§ 12-2214, 12-2237; *see also Matera v. Super. Ct.*, 170 Ariz. 446, 448, 825 P.2d 971, 973 (Ct. App. 1992). It is not only the compelled disclosure of confidential information that harms the news media; compelled disclosure of nonconfidential information interferes with future source cooperation and undermines the values embodied in Article II of the Arizona Constitution, which states: "Every person may *freely* speak, write, and publish . . . ." ARIZ. CONST. art. II § 6 (emphasis added).

ARGUMENT

I. A reporter's privilege promotes open and trusted communication between reporters and sources who would otherwise remain silent.

Protecting journalists from being subjected to subpoenas not only encourages open communication between them and their sources but also supports

the public's interest in accountability, and prevents journalists from being treated as investigators for litigants, government entities, and defendants. *See Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting) (finding that not recognizing a reporter's privilege invites authorities "to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government"). States have long provided safeguards for journalists. *See The Reporter's Privilege Compendium: An Introduction*, RCFP, http://bit.ly/1bg7g4l (last visited Jan. 30, 2017). The first shield law was enacted in Maryland in 1896. *See id.* By the time *Branzburg*, was decided by the United States Supreme Court, 17 states had enacted shield laws. *Branzburg*, 408 U.S. at 689 n.27. Yet, despite these protections, the government and private litigants have continued to routinely turn to the news media when seeking evidence. *See* RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317, 340 (2009). Indeed, in response to a surge in subpoenas directed at the news media, a group of journalists founded the Reporters Committee for Freedom of the Press in 1970, with the mission of providing legal aid to journalists whose First Amendment rights are threatened. *See History*, RCFP, http://bit.ly/2je6QEu (last visited January 30, 2017).

To do their jobs, journalists must maintain open and trusted lines of communication, so their sources feel comfortable disclosing newsworthy information without the fear of reprisal. A reporter's privilege protects a source just as much as a reporter and serves the public by encouraging the free flow of information. "The inevitable size and complexity of modern government" requires "well-organized, well-financed, professional critics to serve as a counterforce to government – critics capable of acquiring enough information to pass judgment on the actions of government, and also capable of disseminating their information and judgments to the general public." Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 541 (1977). In order to perform this function, journalists must remain independent and free from the threat of subpoenas that directly compromise that independence.

Without a privilege, open communication between reporters and sources would suffer. Although it is clear why journalists seek to protect *confidential* information, compelled disclosure of *nonconfidential* information also threatens the ability of journalists to gather and report the news, resulting in a "chilling effect." In this case, a criminal defendant is seeking information beyond what Father Terra said. For example, the defendant is demanding the mental impressions of a reporter by requesting the reporter's unpublished notes, which are part of a journalist's work product. Even requiring D'Anna to produce

nonconfidential information would be detrimental to the public and the practice of journalism. *See* Jones, *supra*, at 354-74.

Reporters strategically choose which information to publish. They ask particular questions and engage in certain conversations to gain the trust of their sources and, in some cases, enter into agreements with sources that are based on trust. If unpublished information were to routinely become public, reporters would lose the trust of their sources, and their ability to write well-researched stories based on the input of knowledgeable sources would be jeopardized. Those sources who previously confided in the journalists and others who may have otherwise been willing to would be dissuaded from coming forward, fearing that any agreement with their confidantes could later be rendered meaningless. *See id.* at 368-69. Others may still speak to the press but would be more wary of the consequences and thus less candid.

Alternatively, some journalists may be forced to balance the newsworthiness of a story against the likelihood of a subpoena and opt not to publish a story because of the time and money required to litigate a subpoena action. Especially in criminal matters where the news media is more susceptible to subpoenas, responding to them is not only exhaustive but resource-intensive. *See id.* at 356-67 & nn.167-68, 177. Reporters and editors must locate responsive materials, make copies, prepare testimony, appear in court, and consult with legal counsel. *See id.*

at 357 n.168 ("The average subpoena takes two days to compile. Searching archives, viewing tapes, conversations with legal department, tape dubbing and administrative paperwork are the norm. The process can involve three or more people."). More importantly, requiring reporters from smaller news organizations to respond to subpoenas could "crippl[e]" the organizations, depriving them of the manpower to cover important stories – a detriment to the public. *See id.* at 359-60.

In response to subpoena threats, news organizations have also altered their policies, even destroying raw film and notes and informing potential sources that they may break promises of confidentiality if subpoenaed, demonstrating an interference with journalists' First Amendment rights. *Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 2001*, RCFP 4 (2003), http://bit.ly/2jqvVKW.

Leonard Downie Jr., who has been a journalist for over 50 years, was a long-time reporter and editor at *The Washington Post* and currently serves as the Weil Family Professor of Journalism at Arizona State University's Walter Cronkite School of Journalism. In the attached declaration he explains the significance of source agreements in determining what gets published:

> In one of the multitude of instances in which I found this to be vital to *Washington Post* reporting of all kinds, Pulitzer Prize-winner Dana Priest reported the existence of the CIA's extra-legal foreign-based "black site" prisons for the detention and interrogation of terrorism suspects after the 9/11 attacks through painstaking interviews with many sources on her intelligence services beat. Those interviews

> were dependent on agreements with sources to protect the confidentiality of their identities and any off-the-record portions of their conversations. Maintaining that confidentiality was also important in my decision-making about what to publish from Priest's reporting and what to keep confidential because of potential harm to national security.

[Appendix (Declaration of Leonard Downie Jr. ("Downie Decl.")) at APP004, ¶ 8]

Downie held a wide variety of positions while at *The Washington Post* – executive editor, managing editor, national news editor, London correspondent, metropolitan news editor, and investigative reporter – and, applying his broad expertise, highlights how critical a reporter's independence is to informing "the public accurately and fairly[.]" [*Id.* at APP005, ¶ 10]

Similarly, author Vanessa Leggett, who was jailed for 168 days for refusing to turn over unpublished notes and records about a murder that was the subject of her book has explained the value of not succumbing to legal pressure and defending freedom of the press. Ross E. Milloy, *Writer Who Was Jailed In Notes Dispute Is Freed*, N.Y. TIMES (Jan. 5, 2002), http://nyti.ms/2kypHuj. Leggett had obtained hundreds of interviews with the prime suspect in the murder and others close to the case. *See id.* But when asked to produce her journalistic work product and serve as a government investigator for a fee, she refused. *See id.* Her narrative was of significant interest to the public, and if she had not maintained her agreement with her sources and instead had produced her notes, she would have lost the trust that remains at the heart of all informative and ethical source-based

reporting. *See id.* *New York Times* journalist Judith Miller, who was imprisoned for four months for refusing to comply with a court order requiring her to reveal the identity of a source, said, "If journalists cannot be trusted to guarantee confidentiality, then journalists cannot function, and there cannot be a free press." Gary Younge, *New York Times journalist jailed*, THE GUARDIAN (July 7, 2005), http://bit.ly/2kkculi.

II. Arizona's two statutes protecting reporters from third-party discovery demonstrate the state's commitment to shielding the press from subpoenas.

Arizona's two media-related statutes – the Arizona Shield Law and Media Subpoena Law – demonstrate a strong recognition of the importance of protecting reporters' notes. *See* A.R.S. §§ 12-2214, and 12-2237. In describing the Arizona Shield Law, both divisions of the Court of Appeals have stated that the state's reporter's privilege is premised on the "disclosure of confidential information" that "would seriously undermine the news gathering and editorial process." *See* A.R.S. § 12-2237; *Matera*, 170 Ariz. at 450, 825 P.2d at 975 (citing *Bartlett v. Super. Ct.*, 150 Ariz. 178, 182, 722 P.2d 346, 350 (Ct. App. 1986)).

The Media Subpoena Law requires those seeking to compel discovery from a member of the news media to file an affidavit attesting that a series of requirements were met before a subpoena was sought. *See* A.R.S. § 12-2214. The purpose of the law is to protect "persons engaged in the gathering and dissemination of news to the public on a regular basis . . . from burdensome

subpoenas and broad discovery 'fishing expeditions' that would interfere with the ongoing business of gathering and reporting news to the public." *Matera*, 170 Ariz. at 448, 825 P.2d at 973. More specifically, the law "was designed to aid a specific class of persons – members of the media – in performing their jobs *free from the inconvenience of being used as surrogate investigators for private litigants*." *Id.* (emphasis added) (citing *Bartlett*, 150 Ariz. at 183, 722 P.2d at 351).

The news media's ability to effectively report on criminal matters, like the murder at issue here, is assisted by a robust interpretation of these statutes, which promote the independence of the press and the public's right to know and encourage open and wide-ranging discussions between reporters and their sources.

III. The Arizona Constitution's affirmative grant to each citizen to "freely speak, write, and publish on all subjects" necessarily implies a freedom of the press to gather information without interference.

The Arizona Constitution provides greater protections for free speech and a free press than those afforded by the First Amendment. Unlike the First Amendment, article II, section 6, of the Arizona Constitution expressly grants "[e]very person" an affirmative right to "freely speak, write, and publish on all subjects" and does not merely restrict the government from infringing upon a free press. *Compare* ARIZ. CONST. art. II § 6 *with* U.S. CONST. AMEND. I.

In interpreting the scope of both article II, section 6 and the First Amendment, this Court has cited the "broader free speech right" guaranteed by the

former. *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 355, 773 P.2d 455, 460 (1989).

> The Arizona Constitution does not speak of major or minor impediments but guarantees the right to 'freely speak.' Although we may need to balance competing constitutional rights, such as the right to a fair trial and the right of free speech, *we avoid, where possible, attempts to erode constitutional rights by balancing them against regulations serving governmental interests*.

Id. at 357, 773 P.2d at 462 (emphasis added). Thus, this Court has found unequivocally that the free speech provision means exactly what it suggests: unfettered protection of speech, whereby the press is free to gather information and publish it without government intervention. *See id.*

As Downie discusses in his declaration, the right to "freely speak" is intertwined with the right to "freely . . . publish." When he was a metropolitan news editor at *The Washington Post*, one *Post* journalist reported that Vice President Spiro Agnew was being investigated for taking bribes from government contractors when he was the governor of Maryland. Downie, describing that incident, demonstrates why reporters must not be compelled to produce unpublished nonconfidential and confidential information:

> In response to a court-approved subpoena of the reporter's notes of his interviews, *The Post*'s owner and publisher, Katharine Graham, took possession of the notes so she would have to be jailed for non-compliance with the subpoena, if necessary to maintain the newspaper's promises of confidentiality. Agnew soon made the subpoena moot by pleading no contest to tax evasion and resigning.

[Appendix (Downie Decl.) at APP004-05, ¶ 9]

This Court has also interpreted Arizona's free speech clause to mean that the "right of every person to freely speak, write[,] and publish *may not be limited.*" *Mountain States Tel.*, 160 Ariz. at 355, 773 P.2d at 460 (emphasis added) (citing *Phoenix Newspapers, Inc. v. Super. Ct.*, 101 Ariz. 257, 259, 418 P.2d 594, 596 (1966) ("*Phoenix Newspapers I*")). Permitting a private litigant to obtain "any and all electronic communications, written notes, audio, visual, or otherwise memorialized documentary evidence related to Father Joseph Terra's interview," *Phoenix Newspapers, Inc. v. Reinstein*, 240 Ariz. 443, 445 ¶ 4, 381 P.3d 236, 238 (Ct. App. 2016), would result in exactly what this Court has found to be impermissible: the "ero[sion of] constitutional rights by balancing them against regulations serving governmental interests." *See Mountain States Tel.*, 160 Ariz. at 357, 773 P.2d at 462. As this Court has emphasized, "[t]he framers of our constitution did not give our judges authority to censor speech or decide how much speech the constitution allows." *Id*. (citing *Phoenix Newspapers I*, 101 Ariz. at 259, 418 P.2d at 596). This Court has consistently "uph[eld] and enforce[d]" the "right to 'freely speak, write[,] and publish.'" *Id.* It should likewise do so here.

The compelled production of third-party journalists' unpublished notes threatens the very core of journalism: to seek the truth and report it. If the press is to serve as the public's surrogate and encourage individuals with newsworthy

information to come forward, then their its and independence is essential. *See* Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

CONCLUSION

For the foregoing reasons, the Reporters Committee as *amicus curiae* respectfully urges this Court to affirm the decision of the Court of Appeals directing the trial court to quash the subpoena to PNI and D'Anna.

Respectfully submitted this 30th day of January 2017.

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APPENDIX

DECLARATION OF LEONARD DOWNIE JR.

I, Leonard Downie Jr., declare:

1. I am the former executive editor of *The Washington Post*, now the Weil Family Professor of Journalism at Arizona State University's Walter Cronkite School of Journalism in Phoenix. I have been a journalist for more than a half century. I worked for *The Washington Post* for 44 years as an investigative reporter, metropolitan news editor, London correspondent, national news editor, managing editor under Benjamin Bradlee from 1984 to 1991. I served as executive editor from 1991 until my retirement in 2008, during which time *The Washington Post* won 25 Pulitzer Prizes, more than any other newspaper during a single editor's tenure. My investigative reporting in the mid-1960s led to the replacement of the old District of Columbia Court of General Sessions by the current District of Columbia Superior Court and was a Pulitzer finalist. As a metropolitan news editor, I helped supervise the investigation of Watergate by *Washington Post* reporters Bob Woodward and Carl Bernstein.

2. As managing editor and executive editor, I encouraged and oversaw wide-ranging investigative reporting by the newspaper. I frequently made decisions about granting confidentiality to sources, protecting off-the-record information, and fighting subpoenas seeking reporters' notes, accounts of off-the-

record portions of conversations with sources, and the identities of confidential sources.

3. As a journalism professor since 2009, I have taught investigative reporting and supervised the annual Cronkite School-based News21 national student investigative reporting project, whose content has been published by dozens of news media throughout the United States. My teaching and News21 leadership includes instructing students on reporting ground rules and values, source relationships, and protection of the identities of confidential sources, and off-the-record conversations with them.

4. I have written and co-authored six books, including one about investigative reporting and two others about the news media. I researched and wrote a Committee to Protect Journalists special report on *The Obama Administration and The Press* and co-authored a major report published by Columbia University on *The Reconstruction of American Journalism: Leaks Investigations and Surveillance in Post-9/11 America*. I also have written opinion articles about the news media for *The Washington Post* and *The New York Times*, among other publications, and have been frequently interviewed about the news media on radio and television. I have been a member of the "News Media Dialogue Group" of journalists and lawyers that met with Attorneys General Eric Holder and Loretta Lynch on newsgathering issues, including the guidelines

governing subpoenas from federal prosecutors to reporters seeking their confidential sources, notes, and communications with sources.

5. I am familiar with the facts of this case, the issue of the confidentiality of the off-the-record portions of the reporter's interviews with the surviving victim, and the potential impact on newsgathering of compelling the reporter to turn over notes and testify about impressions from those interviews.

6. Throughout my long career, I have found that protection of reporters' relationships with sources – including agreements about source confidentiality and off-the-record conversations and information – is vital to newsgathering and informing the public under the First Amendment. Any abrogation of the agreements that reporters routinely make with sources daily endangers the ability of all reporters to establish necessary working relationships with their sources. It would be the essence of a "chilling effect" on First Amendment freedom of the press.

7. For example, in every instance in which a *Washington Post* reporter seeks to obtain information from a source who needs to keep his or her identity confidential or to conduct some of their conversations off the record, *The Post* journalist can point to the 40-plus years during which Bob Woodward and Carl Bernstein have kept their promises in the Watergate investigation to maintain confidentiality of the identities of their sources and the notes of their conversations

with sources as long as those sources were alive, unless a source took the initiative to release the reporters from the confidentiality agreement.

8. In one of the multitude of instances in which I found this to be vital to *Washington Post* reporting of all kinds, Pulitzer Prize-winner Dana Priest reported the existence of the CIA's extra-legal foreign-based "black site" prisons for the detention and interrogation of terrorism suspects after the 9/11 attacks through painstaking interviews with many sources on her intelligence services beat. Those interviews were dependent on agreements with sources to protect the confidentiality of their identities and any off-the-record portions of their conversations. Maintaining that confidentiality was also important in my decision-making about what to publish from Priest's reporting and what to keep confidential because of potential harm to national security.

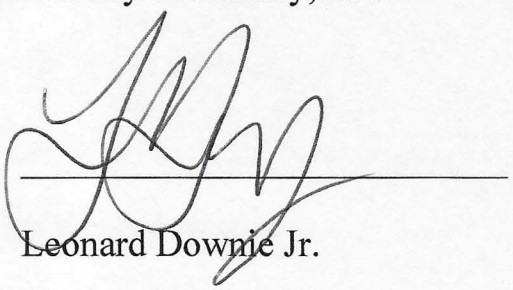
9. Protecting the confidentiality of sources and a reporter's notes played an important role when I was a metropolitan news editor when a *Washington Post* reporter first reported the federal investigation of and plea bargaining with Vice President Spiro Agnew for taking bribes in his dealings with government contractors when he was governor of Maryland. In response to a court-approved subpoena of the reporter's notes of his interviews, *The Post*'s owner and publisher, Katharine Graham, took possession of the notes so she would have to be jailed for non-compliance with the subpoena, if necessary to maintain the newspaper's

promises of confidentiality. Agnew soon made the subpoena moot by pleading no contest to tax evasion and resigning.

10. Those may have been extraordinary examples, but I want to emphasize that protecting the confidentiality of source agreements, off-the-record conversations and information, unpublished notes, and reporter's mental impressions are essential in my long experience to producing everyday journalism that informs the public accurately and fairly, including journalism that holds everyone in our society accountable to everyone else. It is embedded in what court decisions have characterized as a reporter's "qualified privilege" under the First Amendment and what Arizona's constitution states about every citizen's right to "freely speak, write, and publish on all subjects . . ." without government intervention.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Phoenix, Arizona on this 27th day of January, 2017.

By: 

Leonard Downie Jr.