

**New York Supreme Court**  
**Appellate Division—First Department**

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In the Matter of the Application of JAMES HOLMES,

*Petitioner-Respondent,*

A Defendant in the State of Colorado for a Subpoena Directing Jana Winter to Appear as a Witness in Arapahoe County, Colorado, as a Material Witness to Give Testimony Concerning the Intentional Violation of Arapahoe County Judge Sylvester's Order Limiting Pretrial Publicity by Leaking Privileged and Confidential Information,

– against –

JANA WINTER,

*Respondent-Appellant.*

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**BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR  
FREEDOM OF THE PRESS PLUS 42 NEWS ORGANIZATIONS IN  
SUPPORT OF RESPONDENT-APPELLANT JANA WINTER**

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## **Interest of Amici**

*Amici* are all news organizations that publish information or represent the interests of those that do. The input of *amici* may be valuable to this Court because of their experience analyzing legal issues that touch on First Amendment rights, and because of their direct interests in protecting the freedom of the press. This case does not present a simple question of which state's law to apply, but instead requires this Court to consider how the public policy of the state, as seen in the actions taken over the years by the courts and Legislature, should inform its decision on whether to enforce a subpoena to one of its citizens.

Subpoenas, whether they seek journalists' confidential sources, non-confidential material or verification of published statements, threaten the neutrality and independence of the news media, casting them as agents of discovery in lawsuits that do not involve them. And when the subpoena does demand the identity of a confidential source, the specter of enforcing that subpoena causes a chill among all future sources who may have valuable information about matters of public concern, but need an assurance of confidentiality before sharing their information. If those sources never come forward, it is the public that suffers the loss.

The individual descriptions of each of the *amici* are as follows:

## **The Reporters Committee for Freedom of the Press**

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. As advocates for the rights of the news media and others who gather and disseminate information to the public, the Reporters Committee has a strong interest in ensuring that journalists' ability to credibly promise confidentiality to sources remains uninhibited.

## **ABC, Inc.**

ABC, Inc., alone and through its subsidiaries, owns and operates, inter alia, ABC News, abcnews.com and local broadcast television stations, including WABC-TV in New York City, which regularly gather and report news to the public. Programs produced and disseminated by ABC News include "World News with Diane Sawyer," "20/20," "Nightline," "Good Morning America" and "This Week."

## **Advance Publications, Inc.**

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, newspapers in over 20 cities and weekly

business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers.

### **Allbritton Communications Company**

Allbritton Communications Company is the parent company of entities operating ABC-affiliated television stations in the following markets: Washington, D.C.; Harrisburg, Pa.; Birmingham, Ala.; Little Rock, Ark.; Tulsa, Okla.; and Lynchburg, Va. In Washington, it operates broadcast station WJLA-TV, the 24-hour local news service, NewsChannel 8 and the news websites WJLA.com and TBD.com. An affiliated company operates the ABC affiliate in Charleston, S.C.

### **American Society of News Editors**

With some 500 members, American Society of News Editors (“ASNE”) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

## **The Associated Press**

The Associated Press (“AP”) is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. AP’s members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP reports news in print and electronic formats of every kind, reaching a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries.

## **The Association of American Publishers, Inc.**

The Association of American Publishers, Inc. (“AAP”) is the national trade association of the U.S. book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

## **Atlantic Media, Inc.**

Atlantic Media, Inc. is a privately held, integrated media company that publishes *The Atlantic*, *National Journal*, *Quartz* and *Government Executive*. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at federal, state and local levels. *The Atlantic* was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

## **Bloomberg L.P.**

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of more than 1,500 professionals in 145 bureaus around the world. Bloomberg News publishes more than 6,000 news stories each day, and The Bloomberg Professional Service maintains an archive of more than 15 million stories and multimedia reports and a photo library comprised of more than 290,000 images. Bloomberg News also operates as a wire service, syndicating news and data to over 450 newspapers worldwide with a combined circulation of 80 million people in more than 160 countries. Bloomberg News operates the following: cable and satellite television news channels broadcasting worldwide; WBBR, a 24-hour business news radio station that syndicates reports to more than 840 radio stations

worldwide; *Bloomberg Markets* and *Bloomberg Businessweek* magazines; and Bloomberg.com, which receives 3.5 million individual user visits each month.

### **Cable News Network, Inc.**

Cable News Network, Inc. (“CNN”), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and information. Its reach extends to the following: nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news websites in the United States; CNN Newsource, the world’s most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

### **Courthouse News Service**

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on court coverage throughout the nation, reporting on matters raised in trial courts and courts of appeal up to and including the U.S. Supreme Court.

### **Cox Media Group, Inc.**

Cox Media Group, Inc. is an integrated broadcasting, publishing, direct marketing and digital media company. Its operations include 15 broadcast television stations, a local cable channel, a leading direct marketing company, 85

radio stations, eight daily newspapers and more than a dozen non-daily print publications and more than 100 digital services.

### **Daily News, LP**

Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is the sixth-largest paper in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 22 million unique visitors each month.

### **Digital Media Law Project**

Digital Media Law Project ("DMLP") provides legal assistance, education and resources for individuals and organizations involved in online and citizen media. DMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media.

### **Dow Jones & Company, Inc.**

Dow Jones & Company, Inc., a global provider of news and business information, is the publisher of The Wall Street Journal, Barron's, MarketWatch, Dow Jones Newswires, and other publications. Dow Jones maintains one of the world's largest newsgathering operations, with 2,000 journalists in more than fifty countries publishing news in several different languages. Dow Jones also provides

information services, including Dow Jones Factiva, Dow Jones Risk & Compliance, and Dow Jones VentureSource. Dow Jones is a News Corporation company.

### **The E.W. Scripps Company**

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information websites and licensing and syndication. The company's portfolio of locally focused media properties includes: 19 TV stations (ten ABC affiliates, three NBC affiliates, one independent and five Spanish-language stations); daily and community newspapers in 13 markets; and the Washington-based Scripps Media Center, home of the Scripps Howard News Service.

### **Forbes LLC**

Forbes LLC is the publisher of Forbes and other leading magazines, including Forbes Life and Forbes Asia, as well as an array of investment newsletters and the leading business website, Forbes.com. Forbes has been covering American and global business since 1917.

### **Gannett Co., Inc.**

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including *USA TODAY*, as well as hundreds of non-daily publications. In broadcasting, the company operates 23

television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

### **Hearst Corporation**

Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include the following: ownership of 15 daily and 38 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany (N.Y.) Times Union*; interests in an additional 43 daily and 74 non-daily newspapers owned by MediaNews Group, which include *The Denver Post* and *The Salt Lake Tribune*; nearly 200 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E and ESPN; business publishing, including a minority joint venture interest in Fitch Ratings; and Internet businesses, television production, newspaper features distribution and real estate.

### **Lee Enterprises, Inc.**

Lee Enterprises, Inc., based in Davenport, Iowa, is the publisher of 46 daily newspapers nationwide, with a joint interest in four others. Lee's markets include

St. Louis, MO; Lincoln, NE; Madison, WI; Davenport, IA; Billings, MT; Bloomington, IL; and Tucson, AZ.

### **LIN Media**

LIN Television Corporation d/b/a LIN Media, along with its subsidiaries, is a local multimedia company that owns, operates or services 43 network-affiliated broadcast television stations, interactive television stations and niche websites and mobile platforms in 23 U.S. markets, including properties in Portland, Ore., Buffalo, N.Y., and New Haven, Conn.

### **MPA – The Association of Magazine Media**

MPA – The Association of Magazine Media (“MPA”) is a national trade association for multi-platform magazine companies. Representing approximately 225 domestic magazine media companies with more than 1,000 titles, MPA members provide broad coverage of domestic and international news in weekly and biweekly publications and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of intellectual property and the First Amendment.

## **The National Press Club**

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

## **The National Press Photographers Association**

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

## **National Public Radio, Inc.**

National Public Radio, Inc. is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations that are independently operated, noncommercial public radio stations. In addition,

NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and 10 years of archived audio and information.

### **NBCUniversal Media, LLC**

NBCUniversal Media, LLC is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline NBC" and "Meet the Press."

### **New York Media, LLC**

New York Magazine covers, analyzes, comments on, and defines the news, politics, culture, entertainment, lifestyle, fashion, and personalities that drive New York City. New York Magazine, founded in April 1968, reaches 1.8 million readers each week and is published by New York Media, LLC.

## **The New York Times Company**

The New York Times Company is the publisher of *The New York Times*, *The Boston Globe*, and *International Herald Tribune* and operates such leading news websites as nytimes.com and bostonglobe.com.

## **The New Yorker**

The New Yorker is an award-winning magazine of general interest, published weekly in print, digital, and online. Its writers regularly use information provided by sources, confidential and non-confidential, to report on matters of state, national, and international importance.

## **Newsday LLC**

Newsday LLC (“Newsday”) is the publisher of the daily newspaper, Newsday, and related news websites. Newsday is one of the nation’s largest daily newspapers, serving Long Island through its portfolio of print and digital products. Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

## **Newspaper Association of America**

Newspaper Association of America (“NAA”) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association

focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

### **The Newsweek/Daily Beast Company LLC**

The Newsweek/Daily Beast Company LLC publishes Newsweek magazine and operates the website TheDailyBeast.com. The 80-year-old Newsweek magazine became an industry leader by going all-digital in 2013. It is now one of the largest tablet magazines in the world. Available weekly across digital platforms, Newsweek is written with a global perspective for a global audience. The Daily Beast, founded by Newsweek/Daily Beast Editor in Chief Tina Brown in 2008, offers award-winning journalism spanning every major news vertical, from politics and world news to fashion, film, and art. Winner of the 2012 Webby Award for Best News Website, The Daily Beast attracts over 16 million unique visitors per month and is among the fastest-growing news destinations on the web.

### **North Jersey Media Group Inc.**

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: *The (Bergen County) Record*, the state's second-largest newspaper, and *The (Passaic County) Herald News*. NJMG also publishes more than 40 community newspapers serving towns across five counties, including

some of the best weeklies in the state. Its magazine group produces high-quality glossy magazines, including *(201) Best of Bergen*, nearly a dozen community-focused titles and special-interest periodicals, such as *The Parent Paper*. The company's Internet division operates many news and advertising websites and online services associated with the print publications.

### **NYP Holdings, Inc.**

NYP Holdings, Inc., a News Corporation company, is the publisher of the New York Post, the oldest continuously published daily newspaper in the United States.

### **Online News Association**

Online News Association (“ONA”) is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

## **POLITICO LLC**

POLITICO LLC is a nonpartisan, Washington-based political journalism organization that produces a series of websites, video programming and a newspaper covering politics and public policy.

## **Radio Television Digital News Association**

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

## **Reuters America LLC**

Reuters, the world’s largest international news agency, is a leading provider of real-time multi-media news and information services to newspapers, television and cable networks, radio stations and websites around the world. Through Reuters.com, affiliated websites and multiple online and mobile platforms, more than a billion professionals, news organizations and consumers rely on Reuters every day. Its text newswires provide newsrooms with source material and ready-to-publish news stories in twenty languages and, through Reuters Pictures and Video, global video content and up to 1,600 photographs a day covering

international news, sports, entertainment, and business. In addition, Reuters publishes authoritative and unbiased market data and intelligence to business and finance consumers, including investment banking and private equity professionals.

### **Society of Professional Journalists**

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

### **Stephens Media LLC**

Stephens Media LLC is a nationwide newspaper publisher with operations from North Carolina to Hawaii. Its largest newspaper is the *Las Vegas Review-Journal*.

### **Tribune Company**

Tribune Company operates broadcasting, publishing and interactive businesses, engaging in the coverage and dissemination of news and entertainment programming. On the broadcasting side, it owns 23 television stations, a radio station, a 24-hour regional cable news network and “Superstation” WGN America.

On the publishing side, Tribune publishes eight daily newspapers — *Chicago Tribune*, *Hartford (Conn.) Courant*, *Los Angeles Times*, *Orlando Sentinel* (Central Florida), *The (Baltimore) Sun*, *The (Allentown, Pa.) Morning Call*, (Hampton Roads, Va.) *Daily Press* and *Sun-Sentinel* (South Florida).

### **The Washington Post**

WP Company LLC (d/b/a The Washington Post) publishes one of the nation's most prominent daily newspapers, as well as a website, [www.washingtonpost.com](http://www.washingtonpost.com), that is read by an average of more than 20 million unique visitors per month.

### **WNET**

WNET is the parent company of THIRTEEN, WLIW21, Interactive Engagement Group and Creative News Group and the producer of approximately one-third of all primetime programming seen on PBS nationwide. Locally, WNET serves the entire New York City metropolitan area with unique on-air and online productions and innovative educational and cultural projects. Approximately five million viewers tune in to THIRTEEN and WLIW21 each month.

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## **Statement of Facts**

Amici adopt the summary of the Nature of the Case of Respondent-Appellant Jana Winter.

## Argument

### POINT I

#### **THIS COURT SHOULD UPHOLD THE PUBLIC POLICY INTERESTS IN PROTECTING JOURNALISTS FROM COMPELLED DISCLOSURE OF CONFIDENTIAL SOURCES**

The IAS Court erred in failing to adequately consider New York’s strong public policy protecting journalists and their confidential sources when it applied CPL § 640.10 – this state’s version of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Cases – to grant a subpoena request from the District Court of Arapahoe County, Colorado. The subpoena sought to compel Respondent-Appellant Jana Winter, a Fox News investigative reporter, to testify about confidential sources used in her reporting on the James Holmes theater-shooting case.

As Winter’s brief details, *see* Brief of Respondent-Appellant at 3, 23, the trial court ignored the directive from the New York Court of Appeals that lower courts can consider whether there is a strong public policy – “even one embodied in an evidentiary privilege” – that would justify withholding a subpoena despite otherwise meeting the statutory requirements of § 640.10. *Codey v. Capital Cities, American Broadcasting Corp.*, 82 N.Y.2d 521, 530 n.3, 605 N.Y.S.2d 661, 667 n.3 (1993). In *Codey*, this Court upheld a New Jersey subpoena for a broadcast reporter’s outtakes because New Jersey’s strong Shield Law was not inconsistent

with New York law. Footnote three, in which the Court left open the consideration of public policy interests, was meant for situations precisely like this one, where Colorado provides a much lesser degree of protection than New York. The IAS Court erred in failing to follow this directive.

The ability of investigative reporters like Jana Winter to report on sensitive and newsworthy issues would be severely diminished should trial courts grant out-of-state subpoenas without any consideration of New York's strong policy interests in protecting sources. This state's Shield Law aims to encourage people with newsworthy information about public affairs to come forward without the fear that a reporter will later be forced to choose between taking contempt and failing to honor a promise of confidentiality.

**A. New York Has A Long Tradition of Recognizing the Public Interest in Protecting Reporters' Sources.**

The tradition of freedom of expression and of the press in New York dates back at least to 1735, when a New York jury acquitted newspaper publisher John Peter Zenger of the crime of seditious libel for publishing opinions critical of the colonial governor. Zenger was prosecuted after refusing to reveal the author of the articles, and the case, which established truth as a defense to libel, is widely considered the cornerstone of American press freedom. *See, e.g., McIntyre v. Ohio Elections Com'n*, 514 U.S. 334 (1995) ("Although the [Zenger] case set the Colonies afire for its example of a jury refusing to convict a defendant of seditious

libel against Crown authorities, it also signified at an early moment the extent to which anonymity and the freedom of the press were intertwined in the early American mind.”)

Courts in New York have repeatedly recognized that the speech and press freedoms guaranteed in the New York Constitution have for almost two centuries been treated as broader than in the U.S. Constitution:

This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas . . . . That tradition is embodied in the free speech guarantee of the New York State Constitution, beginning with the ringing declaration that ‘[e]very citizen may freely speak, write and publish ... sentiments on all subjects.’ Those words, unchanged since the adoption of the constitutional provision in 1821, reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms . . . . Thus, whether by the application of ‘interpretive’ (e.g., text, history) or ‘noninterpretive’ (e.g., tradition, policy) factors, the ‘protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by’ the Federal Constitution.

*Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 249, 566 N.Y.S.2d 906, 913 (1991) (internal citations omitted).

The Court of Appeals has made clear that this distinction is significant and imposes a duty of vigilance on courts:

The expansive language of our State constitutional guarantee, its formulation and adoption prior to the Supreme Court’s application of the First Amendment to the States, the recognition in very early New York history of a constitutionally guaranteed liberty of the press, and the consistent tradition

in this State of providing the broadest possible protection to the sensitive role of gathering and disseminating news of public events all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference.

*O'Neill v. Oakgrove Const., Inc.*, 71 N.Y.2d 521, 528-9, 528 N.Y.S.2d 1, 5 (1988)

(internal citations omitted).

Nowhere is a commitment to freedom of the press more evident than in the state's Shield Law, which, after several amendments, now provides for absolute protection when confidential sources and information are implicated. *See* New York Civil Rights Law § 79-h. In enacting the shield statute in 1970, the New York State Legislature expressed its support for the notion that confidential sources are essential to a thriving press. The Shield Law's bill jacket includes an article explaining the interests in protecting confidential sources:

The reason a reporter keeps his sources confidential – and should be assisted in doing so – is well known inside the communications media but, alas, it is not generally known outside our profession. The reason is four-fold: First, it is a basic tradition of journalism dating back to ... Zenger and the victory that he won so sensationally.... Second, confidentiality is the newspaperman's proper trade secret, which insures that his reservoir of news sources will not dry up; indeed, that the rivulets of information will keep flowing. Third, the protection of news sources is in the best interest of the informant and also, of course, of the general public, not to mention its vital importance to the medium. Fourth, confidentiality is not merely a matter of reporter convenience but something vital in the practice of a free press.

Governor's Bill Jacket, L 1970, ch. 615, at 15.

In explaining the well-recognized principles upon which the statute was enacted, Gov. Nelson A. Rockefeller stated that “[f]reedom of the press is one of the foundations upon which our form of government is based. A representative democracy, such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news.” Memorandum of Gov. Nelson A. Rockefeller, Governor’s Bill Jacket, L 1970, ch. 615, pp. 91-92. Rockefeller also emphasized the unique strength of the statute: “This ‘Freedom of Information Bill for Newsmen’ will make New York State – the Nation’s principal center of news gathering and dissemination – the only state that clearly protects the public’s right to know and the First Amendment rights of all legitimate newspapermen, reporters and television and radio broadcasters.” *Id.*

Notwithstanding the clear and unequivocal support for the protection of confidential sources embodied in the Shield Law, courts in New York began to limit the statute’s reach contrary to the intent of the legislature soon after it was enacted. *See Beach v. Shanley*, 62 N.Y.2d 241, 250, 476 N.Y.S.2d 765, 769 (1984) (describing holdings by a number of courts that the state reporter shield law provided less than an absolute privilege). In response, the legislature first revised the statute in 1975 to explicitly prevent grand juries from seeking contempt charges against journalists who refuse to identify their confidential sources. *Id.* Renewed efforts to undermine the purpose of the shield statute led the legislature

to once again amend the law in 1981. *Id.* The sponsor of the bill, Assemblyman Steven Sanders, explained that its primary purpose was to “correct loopholes and fill gaps in the existing statute,” which was necessary because “[c]ase history makes it abundantly clear that the courts have been all too often disinclined to follow the letter or even the spirit of the existing law. This bill reinforces the original provisions and expands on them definitively.” Memorandum of Assemblyman Steven Sanders, Governor’s Bill Jacket, L 1981, ch. 468, p. 1.

The Legislature significantly strengthened the statute again in 1990 to state that there is absolute protection for confidential sources and information:

*Exemption of professional journalists and newscasters from contempt: Absolute protection for confidential news.* Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist ... shall be adjudged in contempt by any court in connection with any civil or criminal proceeding ... for refusing or failing to disclose any news obtained or received in confidence, or the identity of the source of any such news coming into such person’s possession in the course of gathering or obtaining news ... .

N.Y. Civ. R. Law § 79-h(b); *see also* L. 1990, ch. 33, § 1.

This history of robust protection of the news media from colonial times through the legislature’s repeated efforts to strengthen the New York Shield Law show that New York’s commitment to protection of confidential sources must be carefully considered when evaluating the enforcement of out-of-state subpoenas.

**B. Public Policy Considerations Weigh  
Against Enforcing the Colorado Subpoena.**

Privilege protections are extended to journalists because the “autonomy of the press would be jeopardized if resort to its resource materials, by litigants seeking to utilize the newsgathering efforts of journalists for their private purposes, were routinely permitted.” *O’Neill*, 71 N.Y.2d at 526. Beyond the protection of confidential sources or materials, courts in this state have acknowledged that, without the New York Shield Law, journalists would be unduly burdened by requests from the government or other litigants and diverted from the important tasks of gathering and reporting the news. *Id.* at 526-27; *In re Brown & Williamson Tobacco Corp.*, 24 Med. L. Rep. 1720, 1996 WL 350827, at \*3 (Sup. Ct. N.Y. Cnty. Feb. 28, 1996) (“Attempts to obtain evidence from [journalists] as nonparties would, if unrestrained, subject news organizations to enormous depletions of time and resources as well as seriously impede their ability to obtain materials from confidential sources.”).

State and federal courts in New York have long recognized that allowing litigants free rein to compel discovery from reporters – even where no confidential source is implicated – diminishes the flow of information to the public in a number of ways, for instance, by

- deterring sources who might otherwise be willing to speak to the press.

*See, e.g., Gonzales v. National Broadcasting Co., Inc.*, 194 F.3d 29, 35 (2d Cir.

1999) (recognizing that exposing newsroom files to litigant scrutiny increases the risk that “potential sources [will be] deterred from speaking to the press, or insist[ ] on remaining anonymous”);

- burdening the press with unacceptable costs of subpoena compliance. *See, e.g., O’Neill*, 71 N.Y.2d at 526-27 (noting that “because journalists typically gather information about accidents, crimes, and other matters of special interest that often give rise to litigation, attempts to obtain evidence [from the press] would be widespread if not restricted on a routine basis”); and

- discouraging journalists from reporting on matters that are likely to be the subject of litigation. *See, e.g., In re Consumer Union of U.S., Inc.*, 495 F. Supp. 582, 586 (S.D.N.Y. 1980) (finding that compelled disclosure of a magazine's unpublished information would inhibit its “coverage of provocative issues important to the public”).

Unlike New York law, which would have protected Winter from a subpoena with an absolute privilege, Colorado law, if applicable, is not nearly so clear. Journalists are only given a qualified privilege under that state’s shield law, and the privilege can be overcome if the person seeking information can prove by a preponderance of the evidence: “(a) That the news information is directly relevant to a substantial issue involved in the proceedings; (b) That the news information cannot be obtained by any other reasonable means; and (c) That a strong interest of

the party seeking to subpoena the news person outweighs the interests under the First Amendment to the United States Constitution of such news person in not responding to a subpoena and of the general public in receiving news information.” Colo. Rev. Stat. § 13-90-119 (3). While the balancing of the competing interests *should weigh* in Winter’s favor, the subjective nature of each of the elements of this test means that journalists cannot reliably promise confidentiality. Compared to the clear, unambiguous absolute privilege in New York’s law, the Colorado law falls well short of protecting the interests New York has long recognized.

Furthermore, the Colorado trial court has made it clear that in this case sustaining the privilege is far from certain. On April 8, 2013, Arapahoe County, Colorado Judge Carlos A. Samour Jr. decided to reserve, on ripeness grounds, ruling on whether to order Winter to testify until after deciding the privileged status of the notebook.<sup>1</sup> As Judge Samour stated, should the Holmes notebook become admissible, “it may well prove to be a critical piece of evidence in this case. ... Of course, the more significant any admissible contents of the notebook are, the more significant the credibility of one or more of the [detectives who

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<sup>1</sup> See Order Regarding Jana Winter’s Second Ripeness Contention Raised in Support of Her Motion to Quash Subpoena and for Protective Order (C-26(a)), signed on April 8, 2013, *People v. James E. Holmes*, Case No. 12CR1522 (Colo. Dist. Ct. Arap. Cnty filed 2012), available at [http://www.courts.state.co.us/userfiles/file/Court\\_Probation/18th\\_Judicial\\_District/18th\\_Courts/12CR1522/002/2013\\_04\\_08%20Order%20Regarding%20Jana%20Winters%20Second%20Ripeness%20Contention%20Raised%20in%20Support%20of%20her%20Motion%20to%20Quash%20Sub%20and%20for%20Protective%20Order%20C-26a.pdf](http://www.courts.state.co.us/userfiles/file/Court_Probation/18th_Judicial_District/18th_Courts/12CR1522/002/2013_04_08%20Order%20Regarding%20Jana%20Winters%20Second%20Ripeness%20Contention%20Raised%20in%20Support%20of%20her%20Motion%20to%20Quash%20Sub%20and%20for%20Protective%20Order%20C-26a.pdf).

denied releasing the notebook] is likely to be at trial.” *Id.* Thus, the need for the subpoena will turn on the defendant’s interest in questioning the credibility of an investigator, which itself is dependent on how he pleads. Under these circumstances, Colorado’s qualified privilege law (if applicable) provides little, if any, certainty as to whether Winter will be protected from compelled disclosure.

The strong interest in ensuring that journalists can credibly promise confidentiality to sources is not one of mere convenience. The ability to foster and maintain confidential relationships with sources is crucial to effective reporting. Often, as is the case here, the information at issue includes matters of profound public importance, and this state’s legislative commandment to respect the confidentiality of journalists’ communications with their sources has been vital to ensuring that the news media can effectively perform its constitutionally protected role of gathering information and disseminating it to the public.

Jana Winter should not be involuntarily converted into an investigator for a defense team seeking the identities of individuals who may have disclosed information related to the Holmes trial. *See, e.g., O’Neill*, 71 N.Y.2d at 526, 528 N.Y.S.2d at 3 (“The autonomy of the press would be jeopardized if resort to its resource materials by litigants seeking to utilize the newsgathering efforts of journalists for their private purposes, were routinely permitted.”). In the absence of even a cursory consideration of the public policy protecting such journalist-

source relationships embodied in New York’s Shield Law, journalists would constantly be at risk of being subpoenaed. The strong public policy in averting that outcome should have been considered and warrants this Court’s reversal of the lower court decision.

## **POINT II**

### **CONFIDENTIAL SOURCES ARE ESSENTIAL TO NEW YORK JOURNALISTS’ NEWSGATHERING BOTH WITHIN THE STATE AND BEYOND**

New York-based journalists frequently report on matters of national importance occurring outside the state. In many cases, they rely on confidential sources in order to publish such stories. The interests of the public in receiving an uninhibited flow of information and this state’s historic commitment to protecting confidential source relationships would be seriously undermined if CPL § 640.10 can be used to compel a New York journalist to appear in another state to answer questions about her newsgathering activities without any consideration of how such requests square with protection for confidential source relationships.

The late Pulitzer Prize-winning reporter Jack Nelson covered the civil rights movement and the affairs of six different presidential administrations, and “utilized and protected confidential sources throughout a career of more than 50 years” for the *Los Angeles Times*. Providing testimony by affidavit in the Wen Ho Lee matter, Nelson stated that “[w]ithout these sources, the *Los Angeles Times* would

have been unable to report numerous such stories involving corruption or governmental abuses.” Aff. of Jack Nelson ¶6, *Wen Ho Lee v. U.S. Dept. of Justice*, Case No. 99-3380 (TPJ) (D. D.C. 2004). The examples cited by Nelson include stories disclosing aspects of the Watergate break-in and its aftermath during the Nixon administration, the cover-up attempts in the Iran-Contra affair during the Reagan administration, and details of the Monica Lewinsky scandal in the Clinton White House. *Id.* Nelson maintained that government interference with confidential relationships “undoubtedly would have a ripple effect, silencing whistleblowers and other government employees who might otherwise cooperate with the press in exposing government wrongdoing.” *Id.* ¶7.

Similarly, award-winning ABC News reporter Pierre Thomas, who has covered such national news stories as the 1993 World Trade Center bombing and the campaign finance probes during the Clinton administration, explained in the same proceeding the harm that occurs when journalists’ confidential communications with their sources are threatened:

Based on my years as a journalist, I believe that compelling reporters to testify about conversations with confidential sources or to reveal any potentially identifying information about those sources, such as where they work, would seriously jeopardize the ability of reporters to obtain information on a confidential basis. Sources would “dry up” and refrain from risking the possibility that, if they furnish information to a journalist, the journalist may later be compelled to unwillingly assist others in identifying them. ... Moreover, even if the source’s identity comes to be known because of a legal compulsion, any reporter revealing the information about the source immediately

would be perceived as dishonorable, biased and potentially, an ally of the party compelling the disclosure.

Aff. of Pierre Thomas, ¶12, ¶14, *Wen Ho Lee v. U.S. Dept. of Justice*, Case No. 99-3380 (TPJ) (D. D.C. 2002).

Reporters and their advocates have repeatedly written and testified about the importance of confidential sources to journalism, arguing that the full scope of news stories hinging on information gleaned from confidential sources is underestimated. *See, e.g.*, RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 594-625 (2008) (chronicling legislative efforts from 1929 to 2008 to enact a federal reporter's privilege and the news media's testimony in support of those efforts); Steven D. Zansberg, *The Empirical Case: Proving The Need for the Privilege*, 2 Media Law Resource Center Bull. 145 (2004) ("Taken together, this evidence points to the conclusion that without constitutional protection afforded to reporters and other newsgatherers against compelled disclosure of their sources and other unreported information, the American people would inevitably be deprived of the information necessary to be self-governing citizens."). Several empirical studies have supported these claims. A landmark 1971 study by then University of Michigan Law School professor Vincent Blasi, for instance, found that more than one quarter of reports on government affairs depended on the use of

confidential sources. Vincent Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971).

A decade later, a survey of Pulitzer Prize nominees found that more than half of respondents to the study from journalists nominated for the coveted prize in 1982 stated that they used confidential information “routinely” or “frequently.” John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence after a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 79 (1985). Significantly, every single reporter who responded to Osborn's survey had used confidential sources or information in the prior ten years. *Id.* at 72. A similar study of Florida journalists found that in 1974, 100% of respondents relied on confidential sources – a figure that remained largely unchanged one decade later, with 97% of respondents in 1984 reporting that they relied on confidential sources. Byron St. Dizier, *Reporters' Use of Confidential Sources, 1974 and 1984: A Comparative Study*, NEWSPAPER RESEARCH JOURNAL 44-50 (1985).

The reliance on confidential sources as a basis for providing the public with newsworthy information on the affairs of government is so fundamental that several leading news organizations have formalized ethical codes and procedures to be employed in situations where a reporter is both negotiating and honoring pledges of confidentiality. *See, e.g.*, Radio Television Digital News Association, Code of Ethics, *available at*

<http://www.rtdna.org/uploads/files/code%20of%20ethics.pdf> (stating that “[c]onfidential sources should be used only when it is clearly in the public interest to gather or convey important information or when a person providing information might be harmed. Journalists should keep all commitments to protect a confidential source.”); American Society of Newspaper Editors, Statement of Principles, art. VI, *available at* <http://asne.org/content.asp?pl=24&sl=171&contentid=171> (“Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly. Unless there is clear and pressing need to maintain confidences, sources of information should be identified.”); Society of Professional Journalists, SPJ Code of Ethics, *available at* <http://www.spj.org/ethicscode.asp> (“Always question sources’ motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.”); *see also* The New York Times Company, Confidential News Sources Policy, *available at* [http://www.nytcocompany/business\\_units/sources.html](http://www.nytcocompany/business_units/sources.html).

Countless news stories on matters of profound local and national importance are often produced by journalists working for media outlets in New York. Everything from exposés on hazardous workplaces and unsafe products to exclusive reports on corporate wrongdoing and criminal activity have been brought

to the public's attention, in many cases, thanks to information gathered by New York journalists from confidential sources. Consider the following examples:

- Two reporters working for the *Wall Street Journal* relied on several unnamed sources dubbed "Our Mutual Friend" and "Jim" to reveal how one of this country's largest corporate accounting frauds was perpetrated at the Houston-based energy, commodities, and services company Enron. See Rebecca Smith and John Emschwiler, *24 Days: How Two Wall Street Journal Reporters Uncovered the Lies that Destroyed Faith in Corporate America* (2003).

- Relying on confidential sources, *The New York Times* revealed that the National Security Agency had been monitoring phone calls and email messages into and out of the United States involving suspected al-Qaida operatives without seeking approval from federal courts. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

- Based in part on information from confidential sources, *The New York Times* and other news organizations reported on the use of harsh interrogation tactics against terrorism suspects in U.S. custody. See, e.g., Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1. Such news coverage precipitated a wide-ranging public debate that prompted Congress to prohibit certain interrogation tactics entirely and led to the promulgation of an executive order repudiating many of

them. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–06, 119 Stat. 2680 (2005); Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

- Using graphic photographs in the possession of U.S. Army officials and a classified report that was “not meant for public release,” CBS News and *New Yorker* magazine contributing writer Seymour Hersh documented accounts of abuse of detainees at Abu Ghraib prison in Iraq. *See* Seymour M. Hersh, *Torture at Abu Ghraib*, *The New Yorker*, May 10, 2004, at 42, 43. After these incidents became public, other military sources who had witnessed abusive behavior came forward but often only “on the condition that they not be identified because of concern that their military careers would be ruined.” *See, e.g.*, Todd Richissin, *Soldiers’ Warnings Ignored*, *BALT. SUN*, May 9, 2004, at A1 (interviewing anonymous soldiers who witnessed abuse at Abu Ghraib); *see also* Miles Moffeit, *Brutal Interrogation in Iraq*, *DENVER POST*, May 19, 2004, at A1 (relying on confidential “Pentagon documents” and an interview with a “Pentagon source with knowledge of internal investigations into prisoner abuses”).

- The Pentagon’s secret history of America’s involvement in Vietnam, which famously became known as the “Pentagon Papers,” was provided to the news media by a confidential source. *See N.Y. Times Co. v. United States*, 403 U.S. 713 (1971). In refusing to enjoin publication of the information, several U.S. Supreme Court Justices suggested that the newspapers’ sources may well have

broken the law by turning over the materials. *Id.* at 754 (Harlan, J., dissenting). Nonetheless, “[i]n revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.” *Id.* at 717 (Black, J., concurring).

These examples represent just a fraction of the stories published every day that are dependent on the relationships built between reporters and their confidential sources. To select any subset of examples for this Court’s consideration necessarily excludes hundreds of others which also help shape a compelling picture of how vital the role of confidential sources – and the protection of such relationships through vehicles such as the New York Shield Law – is to the work of journalists in keeping the public informed of important events and controversies.

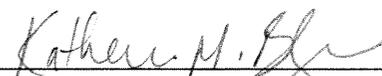
**CONCLUSION**

For the foregoing reasons, *amici* respectfully request that this Court reverse the trial court's order.

Respectfully submitted,

Dated: May 16, 2013

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## **PRINTING SPECIFICATION STATEMENT**

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Name of typeface: Time New Roman

Point Size: 14

Line Spacing: Double

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is 8,300.