No. 3-13-0696

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

BETHANY MCKEE,

Defendant-Appellee,

and

JOSEPH HOSEY,

Respondent-Appellant.

Appeal from the Circuit Court of Will County, Illinois
Twelfth Judicial Circuit, No. 13 CF 100
The Honorable Gerald R. Kinney, Judge Presiding.

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 38 OTHERS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT JOSEPH HOSEY

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STATEMENT OF INTEREST

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.

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 website WJLA.com. An affiliated company operates the ABC affiliate in Charleston, S.C.

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 ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from

300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

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., 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.

CBS Broadcasting Inc. produces and broadcasts news, public affairs and entertainment programming. Its CBS News Division produces morning, evening and weekend news programming, as well as news and public affairs newsmagazine shows, such as "60 Minutes" and "48 Hours." CBS Broadcasting Inc. also directly owns and operates television stations across the country, including WBBM-TV in Chicago.

The Chicago Headline Club is the second-largest chapter of the Society of Professional Journalists, an organization founded in 1909. Its more than 300 members include editors, reporters and other journalists working in print, broadcast and online.

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.

The Daily Beast was founded in 2008 as the vision of Tina Brown and IAC Chairman Barry Diller. Curated to avoid information overload, the site is dedicated to breaking news and sharp commentary. Tina Brown, former editor of Tatler, Vanity Fair, The New Yorker & Talk, author of the 2007 NY Times best-seller The Diana Chronicles and founder of the annual Women in the World summit, serves as editor-in-chief of the site which regularly attracts over 16 million unique online visitors a month and is the winner of two consecutive Webby awards for 'best news' site.

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.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

Fox News Network LLC ("Fox News") owns and operates the Fox News Channel, the top rated 24/7 all news national cable channel, and the Fox Business Network, as well as Foxnews.com, Foxbusiness.com, and the Fox News Radio Network.

Gannett Co., Inc. is an international news and information company that publishes hundreds of daily newspapers and non-daily publications in the United States, including USA TODAY. In broadcasting, the company operates dozens of television stations in the U.S. 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.

The Illinois Broadcasters Association ("IBA") is the leading advocate for the Illinois broadcast industry and is actively engaged in shaping public policy to create positive legal and regulatory environments for its radio and television station members.

For over 60 years, the IBA has been Illinois' sole trade association providing broadcast news, advertising and content to metropolitan areas and rural communities alike.

Founded in 1955, the Illinois News Broadcasters Association has fought to represent the interests of news broadcasters and other electronic journalists, journalism educators and broadcast journalism students, and has worked actively toward the goal of transparency and openness in government by shaping public policy.

The Illinois Press Association ("IPA") is the largest state press organization in the United States. Founded in 1865 near the end of the Civil War, the IPA's members include nearly all of the more than 600-plus newspapers in Illinois. Throughout its long history, the IPA has been dedicated to promoting and protecting the First Amendment interests of newspapers and citizens before the Illinois legislature and Illinois courts.

Investigative Reporters and Editors, Inc. is a grassroots nonprofit organization dedicated to improving the quality of investigative reporting. IRE was formed in 1975 to create a forum in which journalists throughout the world could help each other by sharing story ideas, newsgathering techniques and news sources.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

Journal Communications, Inc., headquartered in Milwaukee, Wisconsin, was founded in 1882. We are a diversified media company with operations in television and radio, publishing and interactive media. We publish the Milwaukee Journal Sentinel,

which serves as the only major daily newspaper for the Milwaukee metropolitan area, and several community publications in Wisconsin. Through Journal Broadcast Group, we own and operate 15 television stations and 35 radio stations in 12 states. Our interactive media assets build on our strong publishing and broadcasting brands.

The McClatchy Company, through its affiliates, is the third-largest newspaper publisher in the United States with 30 daily newspapers and related websites as well as numerous community newspapers and niche publications. McClatchy owns the Belleville News-Democrat, an Illinois newspaper.

MediaNews Group's more than 800 multi-platform products reach 61 million Americans each month across 18 states.

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 ("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. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

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 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."

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 Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

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 Record (Bergen County), the state's second-largest newspaper, and the Herald News (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County's premiere magazine. All of the newspapers contribute breaking news, features, columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

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 ("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.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper The Seattle Times, together with The Issaquah Press, Yakima Herald-Republic, Walla Walla Union-Bulletin, Sammamish Review and Newcastle-News, all in Washington state.

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

Sun-Times Media, LLC (the "Sun-Times") is the publisher of the Chicago Sun-Times daily newspaper as well as many other daily, weekly and semi-weekly newspapers and internet news sites in northern Illinois and Indiana, including The SouthtownStar, The Beacon News, The Courier News, The Lake County News Sun, the Naperville Sun, and the Post Tribune. The Chicago Sun-Times, formed in 1948 from the merger of the Chicago Sun and Chicago Daily Times, is one the largest daily newspapers in the United States and is circulated throughout the City of Chicago and suburbs. The newspaper has won eight Pulitzer Prizes and has a tradition of fostering in-depth investigative reporting

regarding issues of local and regional interest. Consequently, the freedom of speech and the press in Illinois is a core interest of the Sun-Times, and it seeks to participate as amicus curiae to defend important First Amendment free speech principles. The Sun-Times is particularly interested in this case because it intervened in the trial court proceedings to oppose the Circuit Court's wholesale sealing of the public court file, including indictments and its own orders, as well as the Circuit Court's order purporting to "gag" not only attorneys involved in the case but also law enforcement and coroner personnel from both Will County and surrounding counties. The orders that the Sun-Times intervened to oppose were entered in response to the same news report by Joseph Hosey that is at the center of this appeal. The Circuit Court partially lifted its sealing order in response to the Sun-Times' Motion but modified the gag order only to allow the gagged parties to release basic facts, such as the defendants' identities, the time of arrest, and the nature of the charges.

Time Inc. is the largest magazine publisher in the United States. It publishes over 90 titles, including *Time*, *Fortune*, *Sports Illustrated*, *People*, *Entertainment Weekly*, *InStyle* and *Real Simple*. Time Inc. publications reach over 100 million adults, and its websites, which attract more visitors each month than any other publisher, serve close to two billion page views each month.

Tribune is one of the country's leading multimedia companies, operating businesses in publishing, digital and broadcasting. In publishing, Tribune's leading daily newspapers include the Chicago Tribune, Los Angeles Times, The Baltimore Sun, Sun Sentinel (South Florida), Orlando Sentinel, Hartford Courant, The Morning Call and Daily Press. The company's broadcasting group operates 42 television stations, WGN

America on national cable and Chicago's WGN-AM. Popular news and information websites, including www.chicagotribune.com and www.latimes.com, complement Tribune's print and broadcast properties and extend the company's nationwide audience.

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, that is read by an average of more than 20 million unique visitors per month.

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ARGUMENT

I. Crime Reporting Is Vital to an Informed Citizenry, and This Important Public Interest Is Harmed by the Misapplication of the Illinois Reporter's Privilege.

A. Crime reporting serves an important public interest that requires access to reliable information from within the law enforcement community.

Crime reporting plays a distinct and vital role in public discourse. News coverage is the primary means through which members of the public are educated about the justice system, as the typical citizen rarely interacts with the system directly and has no direct means of oversight. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (noting the media serves as "surrogates for the public"). It serves to deter crime by showing readers that people who break the law can be caught and prosecuted. It ensures trials are not conducted in secret, especially where a person is wrongly accused and has the benefit of drawing upon public support. It educates readers about the contours of the laws and may inspire some readers to advocate for a change in the law through their legislatures. In discussing what inspires her to work as a crime reporter, *Charlotte (N.C.) Observer* reporter Melissa Manware said:

> I believe crime reporting is . . . the most important work a reporter can do. . . . It's showing what happens when young people react without thinking, when their parents forget to parent them, or when drugs or alcohol take control. . . . Every day you think, "Maybe this story will convince someone to reach out to a friend or co-worker in need. Maybe this will move a woman to leave a violent relationship, a drug addict to seek help, or a rape victim to come forward. Maybe it will lead someone to come forward with information about who committed this horrible crime."

Melissa Manware, *Overcoming TRAUMA*, Quill, May 2008, at 20.

To report on crime effectively, journalists often need access to law enforcement documents and inside sources. For example, the *Milwaukee Journal Sentinel* in 2012 reported that the police chief's proclamations for years that the crime in Milwaukee was steadily declining were, in fact, the result of misreporting serious crimes as minor ones. David J. Krajicek, *Crime Drop? How Data-Driven Reporting Fueled an Investigation of the Milwaukee Police Department's Flawed Data*, Criminal Justice Journalists, January 2012, *available at* http://bit.ly/1aG09Bz. The newspaper's publication spurred an internal police audit, which found that 5,300 aggravated assaults and 900 burglaries had been misreported as lesser crimes since 2006. *Id.* at 10. The *Journal Sentinel* was tipped off to the faulty data, in part, by "countless police officers and supervisors [who] had expressed skepticism about the veracity of the data." *Id.* at 4. In addition, after the story initially broke, data editor Ben Poston received calls from law enforcement officers and supervisors who gave him specific suggestions for where to look for other commonly misreported crimes. *Id.* at 10. Without the assistance of law enforcement officers and the data the newspaper was able to compile, this important story may never have been told.

When the *Chicago Tribune* began its series in 1999 that questioned the effectiveness of the death penalty in Illinois, reporters conducted an "exhaustive analysis of appellate opinions and briefs, trial transcripts and lawyer disciplinary records, as well as scores of interviews with witnesses, attorneys and defendants." Ken Armstrong & Steve Mills, *Part 1: Death Row Justice Derailed*, Chi. Trib., Nov. 14, 1999, *available at* www.chicagotribune.com/news/watchdog/chi-991114deathillinois1,0,4002543.story. Without that level of access, the newspaper could not have produced such comprehensive and eye-opening pieces, which contributed to Illinois's eventual abolition of the death

penalty. Steve Mills, *What Killed Illinois' Death Penalty*, Chi. Trib., Mar. 10, 2011, *available at* http://bit.ly/1a4ijML.

Countless other stories of criminal reporting all show the same thing: that their stories shape policy, educate the community, unveil problems, and hopefully inspire solutions. None of this could be possible without access to reliable information from inside judicial and law enforcement agencies. Reporters must be allowed to speak candidly with law enforcement officers so that they can bring the most accurate and reliable account possible to the people. Access to law enforcement records is particularly vital in fulfilling the "watchdog" function of the press in this case, where one of the defendants is the son of a police sergeant. Recently, the Seventh Circuit held that the public interest in the conduct of law enforcement is so compelling that the First Amendment could not tolerate a generally applicable eavesdropping statute prohibiting citizens from recording police officers. *Am. Civil Liberties Union of Illinois v. Alvarez ("ACLU")*, 679 F.3d 583, 597 (7th Cir. 2012), cert. denied, 133 S. Ct. 651 (2012).

B. The public has a legitimate interest in the information that Hosey obtained, which was from presumptively public records.

The circuit court's order does not contend that the identity of Hosey's source is material to the question of whether the defendants committed murder. Rather, Judge Kinney ordered divestiture to further his unrelated investigation into who provided a police report to Hosey. The order acknowledges that the court's "inquiries may seem to be off topic when it comes to focusing [sic] four (4) Defendants charged with Murder" but states that "this Court in no way believes that this inquiry is off the topic of determining whether or not there have been violations of Illinois law or Supreme Court Rules." R. at C0000270. A circuit court cannot expand the proceedings beyond the

triable issues before it in order to determine that a reporter's source is "relevan[t] to the proceedings." 735 ILCS 5/8-904.

Of course, if a trial judge can usurp the roles of the grand jury and Attorney Registration and Disciplinary Commission (ARDC) to launch his own investigation into whether a reporter's source acted wrongfully, and then order divestiture to advance this investigation, rather than advance the underlying trial, the privilege would be meaningless. Unless the source comes forward voluntarily, the reporter could always be forced to reveal his source's identity.

Even assuming that the circuit court was within its rights to hold a trial within a trial regarding Hosey's source, the order does not reveal any basis to believe the source did anything unlawful. The Will County Circuit Court listed a number of reasons why it believed divestiture of the reporter's privilege was warranted, in part, because of the various laws or rules that *could* have been violated. *See* R. at C0000267-68. But this conclusion is based on faulty and speculative assumptions that do not overcome the privilege.

First, Hosey began citing police reports in his news stories on February 26, before the judge sealed the court files and ordered the parties not to speak with the media on March 1 (and later amended the gag order to include "any law enforcement employee of any agency involved in this case, []or any persons subpoenaed or expected to testify in this matter"). *Compare* R. at C0000058, *with* R. at C0000068 and C0000194. There can be no suggestion that the source leaked sealed court documents or violated a gag order when there was no such order at the time that Hosey obtained the police report. Instead, the gag order led several agencies to *later* deny FOIA requests for other public records,

apparently believing that the gag order trumped FOIA. *See, e.g.*, Letter from David J. Silverman, Mahoney, Silverman & Cross, to Matthew C. Rogina, Assistant Att'y Gen., Office of Att'y Gen. (May 17, 2013) (citing the court's order as the reason for denying the request), *infra* at A-8; Letter from Mary Fran Niemann, FOIA Officer, Will Cnty. Adult Det. Facility, to Matthew C. Rogina, Assistant Att'y Gen., Office of Att'y Gen. (Apr. 16, 2013) (same), *infra* at A-5; Letter from Jeffrey S. Plyman, Corp. Counsel, City of Joliet, to Matthew C. Rogina, Assistant Att'y Gen., Office of Att'y Gen. (Apr. 12, 2013) (same), *infra* at A-3; Letter from Mary Fran Niemann, FOIA Officer, Will Cnty. Adult Det. Facility, to Janet Lundquist, Reporter, Herald-News (Mar. 18, 2013) (same), *infra* at A-1.

Second, the circuit court relied heavily on the possibility that an attorney in the case may have violated the discovery rules or someone may have violated the secrecy of the grand jury. *See* R. at C0000267-68. However, these assumptions are entirely speculative. There is no evidence to suggest that the source – who could be any one of at least 500 people – was an attorney in the case or that the source violated the secrecy of the grand jury, and the circuit court acknowledges that it "is not in a position to say definitively whether or not the secrecy of the Grand Jury has been violated in this case." R. at C0000268. Rather than stating any basis for its admitted speculation that the report came from an attorney, the order notes that the State's Attorney believed that the police report was released to Hosey by the Joliet Police Department. R. at C0000264. Police officers are not bound by rules governing attorneys or litigants and, in fact, are required by law to release information regarding arrests. 5 ILCS 160/4a. When dealing with a

public document like a police report, the court should not presume that someone somewhere must have violated some law in sharing it with the public.

While the order emphasizes that a copy of the police report was subject to discovery governed by Supreme Court Rule 415(c), the U.S. Supreme Court has made clear even the litigants themselves "may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's [discovery] processes." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984); *cf. Carbondale Convention Ctr., Inc. v. City of Carbondale*, 245 Ill. App. 3d 474, 478, 614 N.E.2d 539, 541 (5th Dist. 1993) (finding court orders cannot override FOIA); *Better Gov't Ass'n v. Blagojevich,* 386 Ill. App. 3d 808, 816, 899 N.E.2d 382, 390 (4th Dist. 2008) (holding that a federal rule of criminal procedure imposing secrecy of grand jury proceedings did not preempt FOIA).

Third, under the Illinois Freedom of Information Act (FOIA), arrest reports are largely a matter of public record. *See* 5 ILCS 140/2.15. The statute's purpose is clear: "Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." 5 ILCS 140/1. Not only are police not obligated to withhold arrest reports, they are required by statute to release information regarding arrests to the press, even without a FOIA request. 5 ILCS 160/4a. *See also Stern v. Wheaton-Warrenville Community Unit School Dist. 200*, 233 Ill.2d 396, 410-11, 910 N.E.2d 85, 94 (2009) (noting that government records "are presumed to be open and accessible"). Reporters, therefore, routinely obtain copies of arrest reports, and there is no basis to assume that the report at issue was somehow "leaked" to Hosey, let

alone that his source broke any law or Supreme Court Rule. In any event, if there were reason to believe that the source committed a crime or violated rules governing attorneys, it would be up to a grand jury to decide whether to indict the source or the ARDC to decide whether to discipline him or her. A circuit court judge's unsupported suspicions do not entitle him to issue orders purporting to override both FOIA and the reporter's privilege statute.

There are some exemptions to FOIA, under which "the public body *may elect to redact* the information that is exempt" but is not required to do so. *See* 5 ILCS 140/7 (emphasis added). Illinois's Attorney General has stated clearly that FOIA exemptions are discretionary, not mandatory: "The exemptions do not . . . prohibit the dissemination of information; rather, they merely authorize the withholding of information." Lisa Madigan, Attorney General, *A Guide to the Illinois Freedom of Information Act* (Sept. 2004), *available at* http://bit.ly/1ebrHPA (citing *Roehrborn v. Lambert*, 277 Ill. App. 3d 181, 186 (1st Dist. 1995)). If a public body elects to claim an exemption, it must prove by clear and convincing evidence that it is exempt. 5 ILCS 140/1.2. And where there is a question as to whether the information is exempt or not, it is "presumed to be open." *Id.*

Judge Kinney earlier in this case extended a gag order over area police departments because, as defendants' attorneys argued, the police should have been applying a FOIA exemption and were not. Tr. Hr'g, *infra* at A-22 to -26, Mar. 15, 2013. However, it is not a violation of the FOIA law to release police reports because one is not *prohibited* from releasing information, *see* Madigan, *supra*. If anything, Hosey's source upheld the spirit of openness that FOIA is founded upon by releasing the reports. If there

was a question as to whether the information should have been released, the source was obligated to presume the police reports were open and available to the public. *See* 5 ILCS 140/1.2. Rather than focus on how to restrict information to the public at large, a judge has other means of countering pretrial publicity, such as changing venue, striking jurors, and instructing jurors to disregard outside publicity.

There will be gray areas where police officers may be unsure whether they should share certain details with reporters. They must be given breathing space to make those decisions free of censure. That may mean that some information that is best kept secret will be exposed. That is the price a society pays in exchange for an open government. It is far better to have our eyes and ears open and know a little too much than to shutter our government behind closed doors for the sake of protecting a single document from slipping through the veil.

C. The court did not properly balance the free speech interests at stake in this case.

While the court purported to balance the First Amendment rights at issue, the only interests it discussed concerned speculative financial incentives of journalists:

> The Court cannot ignore the fact that there is the potential for financial gains that come from one reporter obtaining this information sooner than other reporters. The Court can envision instances where significant income can result from obtaining information and using that information to author articles, books, plays, screenplays in order to profit from exclusively obtained information.

R. at C0000270. There is no indication that the court contemplated the *public's* interest or the reporter's *actual* First Amendment free speech rights at stake here,[1] which is to

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[1] The Illinois Supreme Court has held that the free speech clause of the Illinois Constitution, Art. I, § 4, is broader and more far-reaching than the First Amendment. *See City of Blue Island v.*

"assure reporters access to information, thereby encouraging a free press and a well-informed citizenry." *See People v. Pawlaczyk*, 189 Ill. 2d 177, 187, 724 N.E.2d 901, 908 (2000).

The circuit court goes on to say that "[t]his Court is aware of its duty and obligation to protect the First Amendment Rights of the reporters, but cannot envision where those rights are superior to the fair trial rights of individuals charged by the State with the most serious criminal offenses." R. at C0000270.

Yet Illinois courts have long been balancing the fair trial rights of defendants in murder trials with the First Amendment rights of the public and journalists. *See People v. McCullough*, 40 Media L. Rep. 1316, *infra* at A-32 (Ill. Cir. Ct. Dekalb Cnty. 2011); *Illinois v. Fort*, 15 Media L. Rep. 2251, *infra* at A-37 (Ill. Cir. Ct. Cook Cnty. 1988). The court in *Fort* recognized that the constitutional arguments before a criminal court are:

> generally limited to those rights embodied in the Fourth, Fifth, Sixth and Fourteenth amendments. Though that may be the case, it's nonetheless true that the rights, privileges, and protections enumerated in the Bill of Rights have a broader reach indeed. To conclude that the rights afforded the criminally accused must necessarily be paramount to rights afforded other citizens under other provisions and amendments would be to misread the grand design of the founding fathers.

Fort, 15 Media L. Rep. at 2253, A-39. The court in *McCullough* likewise held that "the rights of the criminally accused do not necessarily trump the rights afforded to other protected individuals." *McCullough*, 40 Media L. Rep. at 1318, A-35. The defendants in both *Fort* and *McCullough* were on trial for murder, yet the courts still found that the

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Kozul, 379 Ill. 511, 379 Ill. 511 (1942); *People v. DiGuida*, 152 Ill. 2d 104, (1992). Thus, the expansive free speech guarantees of the Illinois Constitution, which are incorporated into the Act, also protect reporters from the compelled disclosure ordered here.

journalists were protected and refused to divest them of their privilege. *McCullough*, 40 Media L. Rep. at 1318-19, A-34 to -35; *Fort*, 15 Media L. Rep. at 2253-54, A-39 to -40.

The reporter's privilege must be applied with care in Illinois's circuit courts. If public officials can expect the kind of inquisition that occurred in this case – requiring affidavits from more than 500 individuals who may or may not have ever seen the police report and may or may not be testifying in the case – then surely they will fear disclosing police reports in the future. Certainly information that should be in the public discourse will be held back. The next time a reporter asks one of the public officials in this case for information on a crime, it is not hard to imagine the official redacting with a heavier hand and denying more requests – just in case. Just in case he or she is publicly revealed as a reporter's source and is faced with perjury charges, all for releasing information that was likely a matter of public record in the first place. For these reasons, the decision from the lower court cannot stand.

II. Anonymous Sources Are Essential to the Work of Journalists, and Unmasking Those Sources in Court Will Surely Lead to Less Speech on Matters of Public Importance.

Journalists depend on a network of sources to guide the direction of their reporting. That reality is at the heart of the Illinois Reporter's Privilege Act – and is precisely what the Act seeks to protect. Reporters have little but a blank page until they can pry facts, memories, and details out of people. Rarely can journalists witness an event and then spontaneously report on it. Rather, they must dig and question and interview until they slowly unearth a story. As Walter Cronkite stated in the early 1970s, "Without [confidential sources], I would be able to do little more than broadcast press releases and public statements." *Newsmen's Privilege: Hearings Before the Subcomm.*

on Constitutional Rights of the Comm. on the Judiciary, 93rd Cong. (1973) (citing an affidavit from Cronkite in *Caldwell v. United States* before the Ninth Circuit).

In 1973, Jack C. Landau and Jack Nelson, early members of the Reporters Committee for Freedom of the Press, asked Congress

> to consider what kind of nation we would be, for example, if the Pentagon Papers, the Bobby Baker affair, the Thalidomide horror, the My Lai Massacre, among others, and hundreds of scandals involving state and local government still lay locked in the mouths of citizens fearful that they would lose their livelihoods or perhaps even be prosecuted if their identities became known.

Newsmen's Privilege: Hearings on H.R. 717 Before Subcomm. No. 3 of the Comm. on the Judiciary, 93rd Cong. 61 (1973) (statement of Jack C. Landau and Jack Nelson, Members of the Executive Committee of the Reporters Committee for Freedom of the Press). Thirty years later, Pulitzer Prize winner Jack Nelson, who covered the civil rights movement and six different presidential administrations, offered more examples of stories that would have gone untold without confidential sources, including aspects of the Watergate break-in and aftermath, cover-up attempts in the Iran-Contra affair, and details of the Monica Lewinsky scandal. Aff. of Jack Nelson ¶ 6, *Wen Ho Lee v. U.S. Dept. of Justice*, Case No. 99-3380 (TPJ) (D. D.C. 2004).

When journalists cannot promise confidentiality to those they interview, sources stop talking, and stories of public importance go untold. This is not a hypothetical concern, as Fox News reporter Jana Winter can attest. After a Colorado court issued a subpoena requesting that Winter divulge her source for a story she wrote on the July 2012 Aurora theater shooting, "dozens of individuals across the country . . . were suddenly unwilling to return my calls." *Statement of Jana Winter to the Colorado Senate Judiciary Committee*, Jan. 14, 2014, *available at* http://fxn.ws/1iqT4Hc. Some of her sources

specifically responded with "subpoena" or "no, sorry. Colorado" as their reason for not talking. Lauren Kirchner, *Jana Winter's Victory: And What She Lost Along the Way*, Colum. Journalism Rev., Dec. 11, 2013, *available at* http://www.cjr.org/behind_the_news/jana_winter.php. As a result, stories about "national security, terrorism, and government corruption never saw the light of day . . . ." *Statement of Jana Winter*, *supra.*

Likewise, after it was revealed that the government had subpoenaed Associated Press phone records and searched Fox News reporter James Rosen's email, reporters noticed a sea change in sources' willingness to talk. *See* Dylan Byers, *Reporters Say There's a Chill in the Air*, Politico, June 8, 2013, http://politi.co/1c7Xkrv. The New York Times and Associated Press said their reporters found that sources were suddenly fearful to return phone calls. *Id.*

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 L. 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 Res. J. 44-50 (1985).

The importance of keeping confidential sources confidential cannot be understated. It is a fundamental underpinning of the Illinois Reporter's Privilege Act. The repercussions from a single subpoena affect not just the work of the journalist who is subpoenaed but all other journalists in the State of Illinois (and beyond) whose sources will hesitate and hold back information. There is little doubt that many of the 500 individuals who were subpoenaed in this case – and even those who heard about it – will be fearful to speak to reporters in the future. The order divesting Joseph Hosey of his

reporter's privilege must be reversed, so that these sources can be assured that the Illinois reporter's privilege will protect sources in the manner it was meant to.

III. The Illinois Reporter's Privilege Will Be Rendered Meaningless if the Circuit Court's Finding That Hosey's Source Is Relevant to Defendant's Murder Trial Is Not Reversed.

The Illinois reporter's privilege was enacted in 1971, at a time when subpoenas of journalists suddenly bourgeoned after years of relative disuse. *See* Jose Kennon, *When Rights Collide: An Examination of the Reporter's Privilege, Grand Jury Leaks, and the Sixth Amendment Rights of the Criminal Defendant*, 17 S. Cal. Interdisc. L.J. 543 (2007-2008); Mark Neubauer, *The Newsman's Privilege after Branzburg: The Case for a Federal Shield Law*, 24 UCLA L. Rev. 160, 161 (1976-1977). The epicenter of the sudden influx can in some ways be traced to Chicago, starting with the 1968 Democratic National Convention. Neubauer, *supra*, at 162. In the case against the "Chicago Seven" – anti-war protesters charged with inciting a riot at the convention – the government subpoenaed all four major Chicago daily newspapers, three major television networks, and other publications. *Id.* Then in 1970, journalists again were subpoenaed in a case against protesters who participated in the "Days of Rage" demonstration in Chicago. *Id.* at 163.

It was against this backdrop that the Illinois legislature enacted its reporter's privilege. When signing the bill into law, then Governor Richard Ogilvie said, "['This] Act is more than a declaration of fair play for newsmen. It also assures a better informed public, for it allows reporters to seek the truth wherever it is to be found, without fear that their sources of information will be cut off by unnecessary disclosures.[']" *In re Arya*,

226 Ill. App. 3d 848, 852, 589 N.E.2d 832, 835 (4th Dist. 1992) (internal citations omitted).

Illinois offers a qualified privilege that protects journalists from having to testify or disclose materials that would reveal a source. 735 ILCS 5/8-901 to -909. To divest a reporter of this privilege, a party must show that the information sought is "relevan[t] to the proceedings," "that all other available sources of information have been exhausted," and that disclosure "is essential to the protection of the public interest involved." 735 ILCS 5/8-904, -907; *People v. Pawlaczyk*, 189 Ill. 2d 177, 187, 724 N.E.2d 901, 908 (2000).

The brief for appellant Joseph Hosey surely will analyze why the defendant has failed to show the relevancy, exhaustion, and public interest prongs of the statute. It is not the aim of this brief to belabor those arguments. However, it is in the particular interest of amici to stress that allowing the lower court's decision to stand – especially the finding on relevancy – would unravel the state's reporter's privilege.

It is worth noting at the outset that the "relevancy" of impeaching potential witnesses and rooting out perjury must be viewed warily when it is wholly manufactured in the circuit court proceedings, as it was here. The claims of perjury and the resulting interest in impeaching potential witnesses arose out of the affidavit process below. If the court's determination on relevancy is allowed to stand, the reporter's privilege will be rendered useless. In the future, a party who seeks privileged information from a reporter will merely have to obtain affidavits from anyone who could possibly be the source, then declare that someone must have lied and, therefore, insist that unmasking the source is necessary to root out perjury, impeach potential witnesses, and restore faith in the

criminal justice system. This is a complete misuse of the statute. The provision requiring the party to exhaust all other available resources was meant as a safeguard against disclosure, not the means though which disclosure is achieved.

Moreover, the circuit court looked at relevancy too broadly. "[A] fact is 'relevant' if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Pawlaczyk*, 189 Ill. 2d at 193. In *Pawlaczyk*, a special grand jury that was investigating perjury charges against city officials subpoenaed reporters to reveal their sources. *Id.* at 178-79. The question was whether the officials perjured themselves in a civil suit when they swore they did not disclose information pertaining to a criminal investigation to reporters. *Id.* The court determined that, "if the privileged information will make any one of the elements of perjury more or less probable, then it is relevant 'to the proceedings.'" *Id.* at 194. Ultimately, the court found that the source's identity was "relevant to an element of the perjury charge." *Id.*

Here, relevancy must be determined in relation to the underlying murder charge and not ancillary issues, which, while important, are not relevant to the guilt or innocence of the defendant. In *Pawlaczyk*, the court determined that revealing the reporter's source was relevant to the proceedings because the underlying charge was perjury and identifying the source would help determine the guilt or innocence of the person charged. *Id*. at 178 Here, the underlying charge is murder. Identifying Hosey's source will not make any element of the defendant's murder charge more or less probable; therefore, it is not relevant. *See id.* at 193.

Even assuming Hosey's source is among the more than 500 affiants who swore they were not the source, and assuming that person is called as a witness, cross-examination in itself is not a valid basis for finding relevancy. *See People v. McCullough*, 40 Media L. Rep. 1316, *infra* at A-32 (Ill. Cir. Ct. Dekalb Cnty. 2011); *Illinois v. Fort*, 15 Media L. Rep. 2251, *infra* at A-37 (Ill. Cir. Ct. Cook Cnty. 1988).

In *Illinois v. Fort*, the defendants sought from an NBC News reporter all the police reports and other law enforcement documents in her possession pertaining to the underlying murder trial. *Fort*, 15 Media L. Rep. at 2252, A-38. The defense wanted the documents to cross-examine potential witnesses. *Id.* at 2253, A-39. The court found that the defense did not meet a single prong of the Illinois shield statute. *Id.* The court followed the Virginia Supreme Court, which found that information sought to prove a witness's prior inconsistent statement was "collateral to rather than material to the question of guilt and, therefore, the newsman's privilege of confidentiality prevailed." *Id.* (citing *Brown v. Commonwealth*, 204 S.E.2d 429 (Va. 1974)). The Illinois Supreme Court has also acknowledged its support for the holding in *Brown v. Commonwealth*. *See Pawlaczyk*, 189 Ill. 2d at 195 (holding that, under the Illinois Act, information sought from a reporter must be "relevant to a fact of consequence" and citing support from other jurisdictions, including, *inter alia*, *Brown v. Commonwealth*).

In a 2011 case, the prosecution sought the notes of reporters who interviewed a murder defendant in jail. *People v. McCullough*, 40 Media L. Rep. at 1317-18, A-33. While the state wanted the notes, in part, to see if they indicated where the defendant was at the time of the murder, the state also wanted to use the defendant's statements in the notes for possible impeachment purposes. *Id.* at 1318, A-34. The court held that, "when

the information sought relates to collateral issues or used solely for impeachment, divestiture is not warranted." *Id.* The court found that the reporters' notes were not "relevant to the ultimate issue in this case." *Id.* at 1319, A-35.

Based on the 500 affidavits that were submitted to the court, Hosey's source could be any number of people. The likelihood that the source will be among the likely few law enforcement officials who will be called as witnesses in the defendant's trial is arguably quite low. But even if the source were certain to be called as a witness, impeachment is a collateral issue and not relevant to the underlying murder charge. *See McCullough*, 40 Media L. Rep. at 1318-19, A-34 to -35; *Fort*, 15 Media L. Rep. at 2253, A-39; *People v. Marahan*, 81 Misc. 2d 637, 643-44, 368 N.Y.S.2d 685, 692 (Sup. Ct. 1975) ("The attempt to use the reporter's testimony for impeachment purposes on a collateral issue will entitle the reporter to First Amendment protection."). The interest in impeaching this witness is diminished further by the fact that the catalyst for impeachment was manufactured out of the very process used to reveal that witness's identity.

In addition, the circuit court seemed to base its decision primarily on the need to determine whether "there have been violations of Illinois law or Supreme Court Rules." R. at C0000270. The circuit court speculates that "[i]n the event that these charges lead to a conviction, identifying the source of this information will become an issue on appeal or in a post-conviction petition," *id.*, but it is certainly not the circuit court's role to assist defense counsel in bolstering hypothetical grounds for appeal. Such a statement by the judge in fact confirms that the information sought is not yet relevant, as he speculates that

the information may one day become relevant in an appeal that does not yet exist – and may never exist, especially if there is no conviction.

Judge Kinney presumably foresaw an appeal based on prejudicial pretrial publicity, but even then, the question for the court would be whether jurors were able to "disregard [pretrial publicity] and base their verdict upon the evidence presented in court." *Gentile v. Bar of Nevada*, 501 U.S. 1030, 1054-55 (1991); *see also Irwin v. Dowd*, 366 U.S. 717, 722-23 (1961). The identity of the person who disclosed information that led to the pretrial publicity is not at all relevant in such a decision.

Indeed, it is difficult to imagine why the identity of Hosey's source – as opposed to whether the jury pool was irreparably tainted – would be relevant to any such hypothetical appeal. And, in any event, there is an extraordinarily high bar to demonstrate that pretrial publicity rebuts the presumption of a prospective juror's impartiality. *See Gentile*, 501 U.S. at 1054-55 ("Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court."); *Irwin*, 366 U.S. at 722-23; *see also People v. LaGrone,* 361 Ill. App. 3d 532, 537, 838 N.E.2d 142, 147 (4th Dist. 2005) (finding in a highly publicized triple murder case that, even after change of venue, an order restricting access to prevent publicity must specify "why another change of venue could not occur or why the information at issue was so prejudicial that impartial jurors could not be chosen through voir dire").

It is important to note that the circuit court's divesture order was far from its only attempt to inhibit the media from reporting on this case. In response to Hosey's story and the purported "leak" of the police report, the circuit court, without providing notice to the

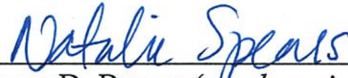
press or public, entered a series of overbroad orders both sealing the public court file in its entirety (including indictments and the court's own orders) and "gagging" not only attorneys involved in the case but a number of police departments and government agencies both in Will County and elsewhere. Sun-Times Media, LLC intervened to oppose these orders and to inform the circuit court of the constitutional standards and procedures required by the U.S. and Illinois Supreme Courts to seal public records or gag non-parties. *See* 705 ILCS 105/16(6); *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise I*"), 464 U.S. 501, 509-510 (1984); *Press-Enterprise Co. v. Superior Court* ("*Press Enterprise II*"), 478 U.S. 1, 12-13 (1986); *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 230-31, 730 N.E.2d 4, 15-16 (2000); *LaGrone*, 361 Ill. App. 3d at 537, 838 N.E.2d at 146. After extensive briefing, the circuit court partially lifted its sealing order but modified the gag order only to allow the gagged (non)parties to release basic facts, such as the defendants' identities, the time of arrest, and the nature of the charges. Viewed in context, it is clear that the divesture order reflects not only a misapplication of the Illinois reporter's privilege but a fundamental misunderstanding of the First Amendment and the role of public access in ensuring, not impeding, fair trials.

The reporter's privilege, meant to offer qualified protection to journalists from having to reveal their sources, cannot instead be used as a weapon against those very journalists. A defendant cannot spring a trap by requiring all potential sources to sign affidavits, under the guise of exhausting all available resources, and then assume that one of them lied and proclaim that discovering the identity of that person is relevant to the proceedings. To preserve the intent and purpose of the statute, the lower court's decision must be reversed.

CONCLUSION

For the foregoing reasons, the circuit court's decision to divest Joseph Hosey of his reporter's privilege should be reversed.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 21 pages.

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CERTIFICATE OF SERVICE

Kristen C. Rodriguez, an attorney, certifies that she caused three copies of the foregoing **BRIEF OF *AMICUS CURIAE* IN SUPPORT OF APPELLANT JOSEPH HOSEY** to be served upon:

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