IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: 2017-CR-9700
	)	
DAVID MARCH,	)	Judge Domenica A. Stephenson
	)	
Defendant.	)	
	)	
	)	

BRIEF OF *AMICI CURIAE*
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND 19 MEDIA ORGANIZATIONS IN SUPPORT OF
REPORTER JAMIE KALVEN'S MOTION TO QUASH SUBPOENA

INTRODUCTION

This case concerns whether journalist Jamie Kalven[1] should be compelled to disclose information about his newsgathering activity and sources from his 2015 reporting on the shooting of Laquan McDonald. The defendant, former Chicago police detective David March, is now facing charges for allegedly conspiring to obstruct justice in the investigation of a fellow officer, Jason Van Dyke, who shot and killed McDonald. March has subpoenaed Kalven's testimony. *See* Kalven Motion to Quash, filed Nov. 20, 2018. The Reporters Committee for Freedom of the Press and 19 additional media organizations[2] (collectively, "*amici*") submit this brief as *amici curiae* in support of Kalven's motion to quash the subpoena.

Kalven's article, "Sixteen Shots," revealed: an autopsy report that showed McDonald was shot 16 times throughout his body; an unnamed witness' account that McDonald had been "shying away" from police when they started shooting; and confirmation from an unnamed source that a police dashboard-camera video existed documenting the incident. Jamie Kalven, *Sixteen Shots*, Slate Magazine, Feb. 10, 2015, https://perma.cc/X5BN-KQQ6. Kalven's reporting contradicted the official narrative of the shooting—that McDonald had lunged at the police with a knife—and ultimately forced Chicago city officials to release the video, which showed McDonald being shot repeatedly as he walked away from the officers. Julie Bosman, *Journalist Who Told Laquan McDonald's Story Faces Fight Over Sources*, N.Y. Times, Nov.

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[1] Craig Futterman, a professor at the University of Chicago Law School, has also been subpoenaed. *See* Motion to Quash, filed Nov. 20, 2018. Given *amici*'s interest in supporting journalists and advocating for press freedoms, this brief will focus on Kalven's subpoena.

[2] These media organizations are the American Society of Journalists and Authors, American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, BuzzFeed, Chicago Tribune Company LLC, Dow Jones & Company, Inc., First Look Media Works, Inc., Gannett Co., Inc., Illinois Broadcasters Association, Illinois Press Association, News Media Alliance, Online News Association, Radio Television Digital News Association, The Slate Group, Society of Professional Journalists, Sun-Times Media, LLC and Univision Communications Inc. Some of these organizations and the Reporters Committee have also intervened in this case to gain access to sealed court filings and related relief.

26, 2017, https://www.nytimes.com/2017/11/26/us/chicago-police-shooting-journalist-laquan-mcdonald.html?_r=0.

During his criminal prosecution last year, Van Dyke also sought to compel Kalven's testimony, but the presiding judge in that case granted Kalven's motion to quash, pointing to, among other things, the Illinois Reporter's Privilege Act, 735 ILCS 5/8-901, *et seq.* (the "Act"). *See* Kalven Motion to Quash, Ex. A (Order at 4, filed Dec. 13, 2017) ("Kalven's source of information is protected by the Reporter's Privilege.").

Compelling Kalven's testimony would violate the Act, which was adopted to protect precisely the type of newsgathering activity and reporter-source communications at issue in this case—those that shed light on matters of critical public importance, such as how police shootings of civilians are investigated and resolved. Divesting a reporter of these protections is appropriate only under extraordinary circumstances, where "all other available sources of information have been exhausted" and "disclosure of the information sought is essential to the protection of the public interest involved." 735 ILCS 5/8-907(2). Although the specific reasons that March asserts for compelling Kalven's testimony remain unclear, he must satisfy a stringent standard for overcoming the privilege, which protects the vital flow of information to the public. For all the reasons set forth herein and in Kalven's motion to quash, this Court should grant Kalven's motion and quash the subpoena.[3]

[3] Although not addressed in this brief, Kalven's motion demonstrates that the special witness doctrine also protects him from compelled disclosure of the information sought.

ARGUMENT

I. The Illinois Reporter's Privilege Act broadly protects confidential and non-confidential sources and newsgathering activities, providing a vital safeguard to the free flow of information to the public.

Illinois has long recognized the need to provide strong protections for free speech and an unfettered press. This principle is reflected in the Illinois reporter's privilege, which "evolved from a common law recognition that the compelled disclosure of a reporter's sources could compromise the news media's first amendment right to freely gather and disseminate information." *In re Special Grand Jury Investigation*, 104 Ill. 2d 419, 424 (1984) (internal citations omitted). In 1971, Illinois codified this principle in the Act, which conferred "a *presumptive privilege* on the newsgathering functions of reporters and the media." Samuel Fifer & Gregory R. Naron, *Illinois*, *in* REPORTER'S PRIVILEGE COMPENDIUM, https://www.rcfp.org/illinois-privilege-compendium/i-introduction-history-background; *In re Arya*, 226 Ill. App. 3d 848, 852 (1992). In the subsequent decades, a national consensus on this issue has emerged, as nearly every other state has adopted some form of protection for reporters' communications with sources. *See, e.g.*, RCFP Reporters Privilege Map, https://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/shield-laws (showing that every state except Wyoming and Hawaii has either adopted a shield law or court-recognized privilege).

The Act broadly forbids courts from compelling "any person to disclose the source of any information"—confidential or not[4]—"obtained by a reporter," except where no other law prevents the disclosure, "all other available sources of information have been exhausted," and (in

[4] *Salamone v. Hollinger Int'l, Inc.*, 347 Ill. App. 3d 837, 842 (1st Dist. 2004) (citing *People v. Slover*, 323 Ill. App. 3d 620, 623 (4th Dist. 2001)).

non-libel cases like this) such disclosure is "essential" to protect the public interest. 735 ILCS 5/8-901, 907. The statute defines "source" as "the person or *means* from or through which the news or information was obtained." *Id.* at 5/8-902(c) (emphasis added). By adopting an expansive definition of "source," the Illinois legislature sought "[t]o further the public interest in a free press," protecting "not only *identities* of sources," but also the *means* by which journalists gather the news. *Kelley v. Lempesis*, No. 13-cv-4922, 2015 WL 4910952, at *2 (N.D. Ill. Aug. 17, 2015) (quoting 735 ILCS 5/8-902(c)); *Slover*, 323 Ill. App. 3d at 624 (noting that the legislature could have—*but did not*—"limit the scope of section 8–901 of the Code by inserting either 'the name of' or 'the identity of' before 'the source of any information'"). "Means" is defined as "something useful or helpful to a desired end." *Slover*, 323 Ill. App. 3d at 624 (quoting Merriam Webster's Collegiate Dictionary 720 (10th ed.1998)). The Act thus shields journalists from being compelled to reveal the means used "to collect newsworthy information." *Id.* (finding unpublished photographs to be "source" of information protected under Act); *see also Simon v. Northwestern Univ.*, 321 F.R.D. 328, 332, 45 Media L. Rep. 1961 (N.D. Ill. 2017) ("audio and visual data, notes, drafts, and transcribed interviews gathered by" filmmakers in creation of documentary were "the source from which [documentary] was created" and covered by Act); *Smith v. Advocate Health Care Network*, 33 Med. L. Rptr. 1752, 1753 (Cir. Ct. Cook Cty. Sept. 10, 2004) (emphasizing that "[t]he reporter's privilege applies not only to the identity of a news source, but to the physical means by which the news is preserved"); *Redmond v. Illinois*, 19 Med. L. Rptr. 1446, 1447 (Cir. Ct. Cook Cty. Sept. 5, 1991) (noting that "the case law really expands the definition of source to cover items beyond just the name . . . to include the information and any other research materials of the reporter or the media entity"). (Copies of cases from Media Law Reporter are attached as Ex. 1.)

Relatedly, Illinois courts have long recognized that the Act protects all sources, whether they are confidential or not. *See supra* n.4. "[T]he definition of 'source' makes no distinction between confidential and nonconfidential 'person or means from or through which the news or information was obtained.'" *See People v. Silverstein*, 89 Ill. App. 3d 1039, 1043 (Ill. App. Ct. 1st Dist. 1980), *rev'd on other grounds*, 87 Ill. 2d 167 (1981) ("The compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants.") (quoting *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197, 1204 (N.D. Ill. 1978)); *Kelley*, 2015 WL 4910952 (same; quashing subpoena for broadcaster's video outtakes); *Slover*, 323 Ill. App. 3d at 624 (subpoenaed photographs were privileged because Act "protects even nonconfidential sources").

The subpoenaing party has the burden of satisfying the rigorous test set forth above. *In re Arya*, 226 Ill. App. at 862. By placing this burden on the subpoenaing party, the legislature ensured that compelled disclosure would occur only as a "last resort" and under extraordinary circumstances. *Id.* at 862. The legislature adopted this high standard to protect the "'paramount public interest'" in maintaining "'a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment.'" *Silverstein*, 89 Ill. App. 3d at 1043 (quoting *Baker v. F&F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972)). The Act aims to "preserve the autonomy of the press by allowing reporters to assure their sources of confidentiality, thereby permitting the public to receive complete, unfettered information." *In re Arya*, 226 Ill. App. at 852 (citing *Zerilli v. Smith*, 656 F.2d 705, 710–11 (D.C. Cir. 1981)).

Protection of reporters' newsgathering activity and reporter-source communications serves the health of our democracy by ensuring that citizens have access to information needed

"to make informed political, social, and economic choices." *Zerilli*, 656 F.2d at 711. The ability to foster and maintain relationships with sources is crucial to effective reporting, since reporters often rely on sources to publish news stories that inform the public of sensitive and important issues. As former Illinois Governor Richard Ogilvie explained upon signing the Act into law, the reporter's privilege promotes 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. at 852 (internal citations omitted).

The dangers of compelled disclosure of a reporter's source information loom especially large in criminal cases. Such compelled disclosure could result in a party using the news media as an investigative tool in a criminal case, undermining the media's autonomy and contravening legislative intent. *See id.* at 861. The news media's reports on criminal activities are an important source of information for the public about crime and government response to crime. Sources who believe that reporters are working as an investigative arm of the government or a defendant in a criminal case will be less likely to come forward with truthful information about government misconduct, leading to a loss of public knowledge about these critical issues. Thus, the presumption against compelled disclosure of source information is heightened in criminal cases, like this, where the "important social interests" underlying the privilege are "particularly compelling," and journalists should be "encouraged to investigate and expose evidence of criminal wrongdoing." *United States v. Lopez*, No. 86 CR 513, 1987 WL 26051, at *1 (N.D. Ill. Nov. 30, 1987) (citing *United States v. Burke*, 700 F.2d 70, 77 (3d Cir. 1983)).

II. The strict requirements of the Act are not overcome by speculative arguments.

Defendant March has apparently "refused repeated attempts" by Kalven to discuss the substance of what relevant, non-privileged testimony he seeks. *See* Motion to Quash at 1.

Further, since March has not yet filed an opposition to Kalven's motion, *amici* have little insight, beyond informal communications with March's attorney, into why March may believe that the reporter's privilege does not apply or has been overcome in this case.

Regardless of March's specific arguments, he must meet his burden of showing that the stringent standards of the Act have been satisfied before the reporter's privilege may be overcome. Mere speculation does not establish exhaustion or need or justify the extreme, "last resort" remedy of compelling the disclosure of a journalist's sources. *See People v. Childers*, 94 Ill. App. 3d 104, 112 (3d Dist. 1981) (affirming denial of application to divest reporter of source protections where "other sources not only were available to defendant but it is difficult to perceive what public interest might be involved"); *see also* Fifer & Naron, *supra* (collecting cases showing that Illinois courts have "consistently upheld" the powerful interests embodied in the Act and rejected frivolous attempts to compel disclosure of sources).

III. The public policy of the Act weighs decisively in favor of quashing March's subpoena.

In addition, the public interest in protecting a journalist's sources is particularly compelling in this case. Kalven's reporting exposed misconduct by the Chicago Police Department and an official cover-up that led to a public accounting and an investigation by the U.S. Department of Justice. He has won numerous awards for this article and others. *See, e.g.*, *About Jamie Kalven*, Invisible Institute, https://invisible.institute/jamie-kalven/; Michael Miner, *Jamie Kalven wins Polk Award for his coverage of Laquan McDonald*, Chicago Reader, Feb. 15, 2016, https://www.chicagoreader.com/Bleader/archives/2016/02/15/jamie-kalven-wins-polk-award-for-his-coverage-of-laquan-mcdonald. As *The New York Times* reported, "[i]f not for the reporting of Jamie Kalven, an independent journalist in Chicago, the world might never have known the name Laquan McDonald, a black teenager who was shot 16 times by a police officer

as he walked down a street holding a folding knife." Bosman, *supra*. Kalven's article "forced the case out of obscurity in the Police Department and at City Hall and into public view." Bosman, *supra*. The subsequent investigation into McDonald's death "upended Chicago," resulting in nightly demonstrations in the city, the firing of the police superintendent and the head of the Independent Police Review Authority, the state's attorney's loss of her re-election bid, calls for the mayor to resign, and a U.S. Department of Justice investigation into possible civil rights abuses. Bosman, *supra*.

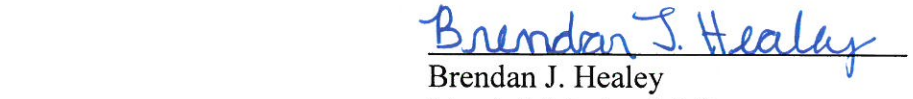
This story illustrates precisely why source protections are necessary. Without them, the public may have never known how McDonald died, depriving it of the opportunity to hold the government and law enforcement accountable. Upholding Kalven's privilege to protect his sources and newsgathering activity serves the vital goals of the Act and will encourage people to continue to reveal government misconduct to reporters. Without this privilege, Kalven faces potential contempt of court or other sanctions, including incarceration. Raising the specter of such harsh penalties for reporters in Illinois, simply for engaging in constitutionally protected newsgathering activity, would set a dangerous precedent. The Court should not countenance such a result.

CONCLUSION

For these reasons, the Court should grant Kalven's motion to quash the subpoena.

Dated: November 26, 2018

Respectfully submitted,



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