New York County Clerk's Index No. 30037/13

Court of Appeals

of the

State of New York

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.

BRIEF OF *AMICI CURIAE*
(for list of *Amici* see next page)

KATHERINE M. BOLGER
LEVINE SULLIVAN KOCH & SCHULZ, LLP
Attorneys for Amici Curiae
321 West 44th Street, Suite 1000
New York, New York 10036
Tel.: (212) 850-6100
Fax: (212) 850-6299

Date Completed: August 30, 2013

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ABC, INC.,
ADVANCE PUBLICATIONS, INC.,
ALLBRITTON COMMUNICATIONS COMPANY,
THE AMERICAN SOCIETY OF NEWS EDITORS
THE ASSOCIATED PRESS,
THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
ATLANTIC MEDIA, INC.,
BLOOMBERG L.P.,
COURTHOUSE NEWS SERVICE,
COX MEDIA GROUP, LLC,
DAILY BEAST COMPANY LLC,
DIGITAL MEDIA LAW PROJECT,
DOW JONES & COMPANY, INC.,
THE E.W. SCRIPPS COMPANY,
FORBES LLC,
GANNETT CO., INC.,
HEARST CORPORATION,
LIN MEDIA,
THE NATIONAL PRESS CLUB,
THE NATIONAL PRESS
PHOTOGRAPHERS ASSOCIATION,
NATIONAL PUBLIC RADIO, INC.,
NBCUNIVERSAL MEDIA, LLC,
NEW YORK MEDIA, LLC,
THE NEW YORK TIMES COMPANY,
THE NEW YORKER,
NEWSDAY LLC,
THE NEWSPAPER ASSOCIATION OF AMERICA,
NORTH JERSEY MEDIA GROUP INC.,
NYP HOLDINGS, INC.,
ONLINE NEWS ASSOCIATION,
POLITICO LLC,
RADIO TELEVISION DIGITAL NEWS ASSOCIATION,
REUTERS AMERICA LLC,
SOCIETY OF PROFESSIONAL JOURNALISTS
THE TRIBUNE COMPANY,
and THE WASHINGTON POST.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Preliminary Statement

This case is about whether New York courts should enforce a Colorado subpoena to Respondent-Appellant Jana Winter, a New York based journalist, which would require Ms. Winter to reveal the name of her confidential source or face prison. As the First Department majority held, "the question presented is whether the Supreme Court erred in its determination to enforce a subpoena under the Uniform Act to Secure Attendance of Witnesses from Without the State in Criminal Cases (CPL 640.10) when the witness's testimony potentially involves the assertion of privilege provided by Civil Rights Law § 79-h(b)." *In re Holmes v. Jana Winter,* --- N.Y.S.2d ----, 2013 WL 4414784, at *1 (1st Dep't Aug. 20, 2013). Despite recognizing that "New York's Shield Law (Civil Rights Law § 79h-[b]) continues to represent a strong public policy and the long history of vigilantly safeguarding freedom of the press," *id.* at *2 (citation omitted), the three member majority concluded that Ms. Winter's reliance on New York Civil Rights Law § 79-h (the "Shield Law") "is unavailing. The narrow issue before the Supreme Court was whether respondent should be compelled to testify, and privilege and admissibility are irrelevant for this determination (*see Matter of Codey [Capital Cities, Am. Broadcasting Corp.],* 82 N.Y.2d 521, 528–530, 605

N.Y.S.2d 661, 666-668 [1993]; *Matter of Magrino,* 226 A.D.2d 218, 640 N.Y.S.2d 545 [1st Dept 1996])." (citations in original)

With respect, the majority decision of the First Department was in error because it failed to apply this Court's directive 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 that otherwise met 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 dissenting opinion more properly applied the *Codey* standard, correctly concluding that "New York's public policy, as reflected in this state's Shield Law (Civil Rights Law § 79–h[b]), is violated when a court of this state directs a reporter to appear in another state, where the purpose of requiring her appearance is to obtain from her the identity of her confidential sources, and where there is a substantial possibility that the demanding court will issue such a directive." *Id.*, at *3. In addition, in his dissent, Judge Saxe also concluded that the Petitioner's

application for a subpoena should have been denied under the framework of the Uniform Act to Secure Attendance of Witnesses from Without the State because there would be 'undue hardship' to Ms. Winter were the Colorado subpoena to be enforced, remarking, "[t]he hardship to respondent if she is compelled to testify is far more than three days of travel, a hotel stay, and missing work; it is nothing short of undermining her career, the very means of her livelihood." *Id.* at *9.

The *amici*, whose employees and members regularly gather, publish, broadcast, produce and distribute news and information write to provide this Court with further information regarding the way in which the strong New York state policy embodied in the Shield Law is of critical importance to reporting the news in the American republic and to further discuss the undue hardship faced by reporters who are forced to choose between incarceration and the continuation of their careers.

ARGUMENT

POINT I

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

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

All of the Justices of the First Department below correctly concluded that the New York State Shield Law embodies a strong public policy of the State of

New York to safeguard the rights of free speech and free expression. *In re Holmes*, 2013 WL 4414784, at *1, *4.

Their conclusion is inescapable: 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, 361 (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, 4-5 (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 is the ingrained public policy of this State. The First Department was, therefore, correct in recognizing the importance of this policy in the decision below, *In re Holmes*, 2013 WL 4414784, at *1, *4.

B. The Court Should Take Into Account The Public Policy of New York In Deciding Whether To Enforce The Colorado Subpoena

The majority of the First Department, however, erred in failing to follow this Court's directive in *Codey* that "a strong public policy of this State, ... embodied in evidentiary privilege... justif[ies] the refusal of relief under CPL 640.10 even [though] the 'material and necessary' test set forth in the statute is satisfied." *Codey*, 82 N.Y.2d at 530, n. 3, 605 N.Y.S.2d, n. 3. This Court should correct that error.

Historically, this Court has recognized the significant burden on the freedom and independence of the press created by a subpoena seeking newsgathering materials, holding that 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, 528 N.Y.S.2d at 3 (citation omitted). Following this Court's lead, other 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.").

Consequently, 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), *aff'd*, 175 F.R.D. 57 (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, 528 N.Y.S.2d at 3 (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").

The decision by the majority of the First Department in this case not to consider the public policy here is, therefore, inconsistent with this Court's precedent. And that error is likely to cause grave consequences to Ms. Winter. 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 Ms. 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.[1] As Judge Samour stated, should the Holmes notebook

---

[1] *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 July 20, 2012), available at http://www.courts.state.co.us/userfiles/file/Court_Probation/18th_Judicial_District/18th_Courts/12CR1522/002/2013_04_08%20Order%20Reagarding%20Jana%20Winters%20Second%20

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 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 Ms. 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.

Ms. Winter should not be involuntarily converted into an investigator for a defense team seeking the identities of individuals who may have disclosed

---

Ripeness%20Contention%20Raised%20in%20Support%20of%20her%20Motion%20to%20Quash%20Sub%20and%20for%20Protective%20Order%20C-26a.pdf.

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 First Department decision.

POINT II

CONFIDENTIAL SOURCES ARE ESSENTIAL TO NEW YORK JOURNALISTS' NEWSGATHERING BOTH WITHIN THE STATE AND BEYOND

In addition, the practical importance to New York-based journalists of being able to rely on the New York Shield law in the gathering and reporting of the news cannot be overstated. These 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.nytco.com/company/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 Emschwiller, *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.

POINT III
THE SUBPOENA PLACES AN "UNDUE BURDEN" ON RESPONDENT-APPELLANT

In addition, as Judge Saxe highlighted in the dissent, the burden on reporters called to testify about the identities of their confidential is extreme. Accordingly, even if the Court were to conclude that New York public policy did not apply here, it should deny the request to enforce the Colorado subpoena on the grounds that compliance therewith imposes an "undue hardship" on Ms. Winter and so fails to satisfy the Uniform Act to Secure the Attendance of Witnesses from Without the State. *See* CPL 640.10[2]

In her affidavit, submitted in this case, Ms Winter swore that

> [H]aving to testify will jeopardize my ability to perform my job during the time that I am away and, irrevocably, in my relationships with future sources. I am an Investigative Reporter, and one of the most fundamental truths of my profession is that most investigative reporting cannot be accomplished without confidential sources. If I am forced to reveal the identities of persons whom I have promised to shield from public exposure, simply put, I will be unable to function effectively in my profession. I rely on the trust of my sources every single day and my career will be over if I am forced to disclose the identities of my sources.

Affidavit of Jana Winter, sworn to the 4th day of March 2013. The "fundamental truth" discussed by Ms. Winter has also been sworn to by other reporters facing the choice of revealing their sources and losing their careers or losing their liberty. In the *Wen Ho Lee* matter, for example, Walter Pincus, a highly respected national

security journalist for *The Washington Post* who has won both the Polk Award and the Pulitzer Prize, submitted a declaration in which he swore that "I cannot identify my confidential sources for these articles without violating my commitments that I made to those individuals to maintain their anonymity. Those commitments were a condition of my interviews with these individuals. If I had not promised them anonymity, they would not have provided me the information I was able to report. If I were to breach my commitment to these sources, even under Court order, I could no longer function effectively and with accuracy in reporting on matters of intelligence and national security." Aff. of Walter Pincus ¶22, *Wen Ho Lee v. U.S. Dept. of Justice,* Case No. 99-3380 (TPJ) (D. D.C. 2004). In the same case, Scott Armstrong, a *Washington Post* journalist and a professor of journalism, submitted a declaration swearing that "most journalists operate on the assumption that they will not reveal sources even under the possibility of being held in contempt for refusing to comply with an order to reveal their sources." Aff. of Scott Armstrong, ¶19, *Wen Ho Lee v. U.S. Dept. of Justice,* Case No. 99-3380 (TPJ) (D. D.C. 2004).

In short, an order of the kind contemplated by the Colorado court places Ms. Winter at the fork of a very treacherous road . If the Colorado court compels her to testify, one path leads to imprisonment and the other to the end of her career. This is an undue hardship to be sure. For this reason, Judge Saxe was correct in

concluding that "the probable result of incarceration or the loss of her livelihood is far more of a "hardship" than those minor considerations." *In re Holmes*, 2013 WL 4414784 at *7.

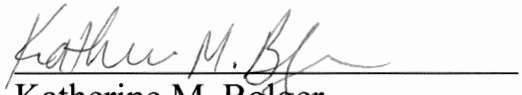
CONCLUSION

This Court, mindful of the importance of the free flow of information in this republic and the cardinal role of the residents of the State of New York in gathering and publishing the news, has long been a staunch defender of the rights of freedom of speech and of the press. Because the majority decision of the First Department in this case is inconsistent with that important precedent, *amici* respectfully request that this Court reverse the First Department's order.

Respectfully submitted,

Dated: August 30, 2013

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: 

Katherine M. Bolger
LEVINE SULLIVAN
KOCH & SCHULZ, LLP
321 West 44th Street, Ste 1000
New York, New York 10036
Tel.: (212) 850-6123
Fac.: (212) 850-6299
Email: kbolger@lskslaw.com