

State of Minnesota
in Court of Appeals

Energy Transfer LP (f.k.a. Energy Transfer Equity, LP), et al.,
Appellants / Cross-Respondents,

vs.

Greenpeace International (a.k.a. Stichting Greenpeace Council), et al.,
Defendants,

Unicorn Riot, et al.,
Respondents / Cross-Appellants.

**BRIEF OF *AMICUS CURIAE* THE FORUM FOR CONSTITUTIONAL RIGHTS
SUPPORTING RESPONDENTS / CROSS-APPELLANTS UNICORN RIOT, ET AL.**

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Amicus Identity, Interest, & Authority to File¹

A. Identity of The Forum for Constitutional Rights (FCR)

The Forum for Constitutional Rights (or FCR) is a general public-benefit corporation that is organized and operated under Minnesota law. FCR provides public education about constitutional history and rights, including (but not limited to) rights enshrined by the First Amendment. FCR's public education efforts include filing *amicus curiae* briefs in cases involving First Amendment rights and other important constitutional protections. FCR's advocacy is non-partisan in nature.

B. FCR's Interest in *Energy Transfer LP*

FCR's interest in *Energy Transfer* is public. The Minnesota Free Flow of Information Act (MFFIA), Minn. Stat. §595.021 *et seq.*, exists to protect "the confidential relationship between the news media and its sources." *Id.* §595.022. FCR seeks to ensure this protection benefits all forms of news media equally, be they traditional entities (e.g., newspapers, television stations, etc.) or non-traditional entities – and regardless of a media entity's ideological or editorial perspective.

C. FCR's Authority to File in *Energy Transfer LP*

On September 21, 2023, the Court granted FCR leave to file this brief.

¹ Amicus FCR certifies under MRCAP 129.03 that: (1) no counsel for a party authored this brief either in whole or in part; and (2) no person or entity has contributed money to the preparation or submission of this brief other than FCR, its members, and its counsel.

Argument

The Minnesota Free Flow of Information Act (MFFIA), Minn. Stat. §595.021 *et seq.*, shields all news media that “publish information” without regard to conventionality or ideological orientation.

This case is about the proper application of the Minnesota Free Flow of Information Act (MFFIA) to “Unicorn Riot and its journalists, including Niko Georgiades.” Appellants’ Add.3. A “non-profit media organization” trying to “amplif[y] the stories of social and environmental struggles,” Unicorn Riot “embedded” its journalists among “protestors gathered in an effort to halt construction” of the Dakota Access Pipeline. *Id.* Energy Transfer designed and built the Pipeline; Dakota Access owns and operates the Pipeline. Appellants’ Br.3. Energy Transfer and Dakota Access (together, Energy Transfer) served subpoenas to compel Unicorn Riot to produce “documents and communications related to the protests and Unicorn Riots’s coverage.” Appellants’ Add.3.

On appeal, Energy Transfer challenges the district court’s holding that the MFFIA protects Unicorn Riot. Appellant’s Br.11-16; Appellant’s Add.4-6. Energy Transfer builds this challenge on repeated references to Unicorn Riot as a “far-left nonprofit organization” that “reports from a far-left political and ideological perspective.” Appellants’ Br.1, 5. Energy Transfer further maintains that Unicorn Riot was “not merely a neutral observer” to the pipeline protests. *See* Appellant’s Br.16. Through these arguments, Energy Transfer invites the Court to view Unicorn Riot and its members as “purported ‘newsgatherers’” to which “the MFFIA does not apply.” Appellant’s Br.17; *see also, e.g., id.* at 10-13, 18.

MFFIA protections, however, do not turn on a news media outlet's conventionality (i.e., how 'traditional' a news-gatherer is). Nor do MFFIA protections turn on a news media outlet's ideological orientation (or lack thereof). MFFIA protections apply to every "person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public." Minn. Stat. §595.023.

Put another way, MFFIA protections turn on particular *actions* ("gathering, procuring, compiling, editing or publishing") taken for a specific *purpose* ("transmission, dissemination, or publication to the public")—not specific *attributes* of news media outlets, such as being a "traditional" form of media or being "neutral" journalists. The result is a broad protective shield. As the MFFIA's legislative author explained to the Legislature, the MFFIA's "effect" is "to provide that no person engaged in gathering news for publication or dissemination shall be required to disclose his sources of information." *Heaslip v. Freeman*, 511 N.W.2d 21, 24 (Minn. App. 1994) (quoting Sen. Humphrey).

Unicorn Riot falls squarely within the MFFIA's broad protective shield. Unicorn Riot is a non-traditional, decentralized, Internet-based media outlet—but that does not alter Unicorn Riot's much noted record of news gathering, procuring, compiling, editing and publishing. Unicorn Riot has an ideological bent—but that does not alter Unicorn Riot's core dedication to news-gathering for the essential purpose of transmission, dissemination, or publication of information to the public.

A. Conventinality

Courts have generally upheld MFFIA protections in the context of “traditional” media outlets and their reporters—or have presumed that MFFIA protections apply to such entities in the first instance, even if later displaced by MFFIA exceptions allowing courts to order the disclosure of information. *See, e.g., State v. Turner*, 550 N.W.2d 622, 629–31 (Minn. 1996) (presuming MFFIA’s applicability to photojournalist); *Bauer v. Gannett Co., Inc.*, 557 N.W.2d 608, 610–13 (Minn. App. 1997) (presuming MFFIA’s applicability to a television station); *see also Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 336–37 (D.D.C. 1994) (upholding MFFIA protections against disclosure in favor of a Minnesota-situated newspaper).

But Minnesota courts have also recognized the MFFIA reaches well beyond traditional media outlets. As one Minnesota district court has put it, the MFFIA’s “wide-cast net” includes “not only reporters and journalists working in traditional news media, but also internet bloggers, unpaid news-gatherers, even public relations consultants as long as they were engaged in any of the enumerated activities.” *In re Application of Pet’r Mahtani*, No. 27-CV-17-11589, 2017 Minn. Dist. LEXIS 7, at *9 (Minn. Dist. Ct. Sept. 25, 2017) (order denying enforcement of subpoena that sought to compel disclosures from “ZambiaReports.com, a news website intended to disseminate information to the public”).

Consistent with this observation, the district court here correctly held that the MFFIA protects Unicorn Riot. *See Appellant’s Add.4–6*. Unicorn Riot is not a traditional media outlet like a newspaper, radio broadcaster, or TV station. Unicorn Riot “spans across multiple U.S.

cities, with no central location,” generating content mostly available only “through the Internet.”² “Unicorn Riot works on a consensus decision-making model, which gives them the ability to act quickly in the field.”³ Unicorn Riot members often “do not use bylines for their stories” and make their stories “available to other nonprofits via a Creative Commons license.”⁴ Unicorn Riot members “share equipment” while “[d]onations help pay for reporters’ travel expenses and a small per diem.”⁵

Through this unconventional structure, Unicorn Riot “directly engages” in “[news] gathering, procuring, compiling, editing, [and] publishing.” Minn. Stat. §595.023. Unicorn Riot “send[s] [its] journalists to cover events on the ground and use[s] remote support teams to assist their production.”⁶ Bearing video cameras and live-streaming equipment, Unicorn Riot members “gather[.]” news at events with political, social, or ecological implications – for example, protests against police brutality. Minn. Stat. §595.023. Unicorn Riot also “procures” information (*id.*) by “interviewing sources” and obtaining “FOIA documents.”⁷ The following Star Tribune photograph (and caption) captures this reality:

² FAQ – *Structure of Unicorn Riot*, UNICORN RIOT, <https://unicornriot.ninja/faq/> (last accessed November 6, 2023).

³ Baynard Woods, *How Unicorn Riot Covers the Alt-Right Without Giving Them a Platform*, COLUMBIA JOURNALISM REV., Nov. 1, 2017, <https://tinyurl.com/mwxjshud>.

⁴ *Id.*

⁵ *Id.*

⁶ FAQ – *Structure of Unicorn Riot*, *supra* note 2.

⁷ FAQ – *Ethics & Unicorn Riot*, UNICORN RIOT, <https://unicornriot.ninja/faq/> (last accessed November 6, 2023).



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Unicorn Riot's Niko Georgiades filmed his colleague Georgia Fort interviewing Merry Rosario, mother of Brian Quinones, at a rally on the first anniversary of Quinones' fatal shooting by police in Richfield.

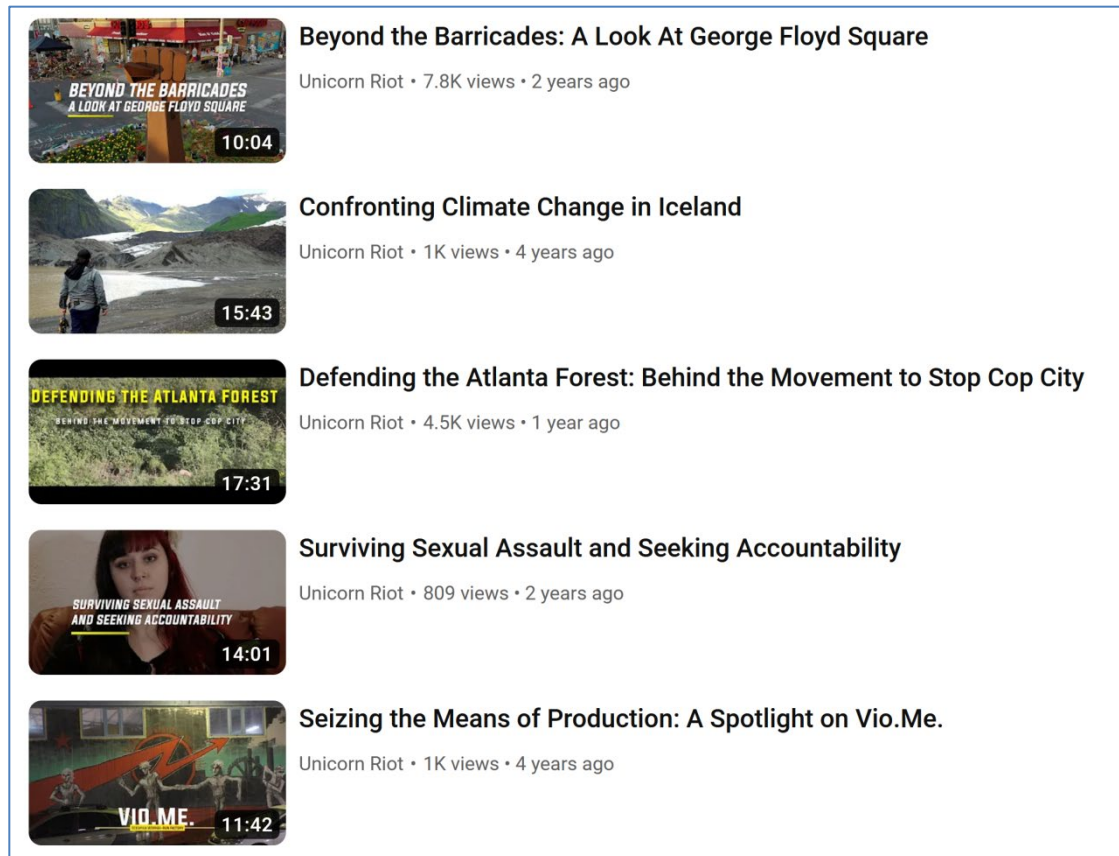
Star Tribune Photo of Unicorn Riot Engaged in News Gathering⁸

Unicorn Riot “publish[es]” its video coverage on “livestream.com” to enable real-time viewership.⁹ Minn. Stat. §595.023. Unicorn Riot also “compile[s]” gathered video into “edite[d]” documentaries that Unicorn Riot then “publish[es]” on YouTube for the world to see (*id.*):¹⁰

⁸ Rachel Hutton, *Unicorn Riot's Protest Coverage Brings Global Notice to the Alternative Media Group*, STAR TRIB., Oct. 3, 2020, <https://tinyurl.com/5fmy2bbz> (photo credit: Renee Jones Schneider).

⁹ Chris Walker, *Guerilla Video Journalists Unicorn Riot Focus on Homelessness & Police*, WESTWORD, Feb. 10, 2016, <https://tinyurl.com/ytk98ytn>.

¹⁰ In this regard, Unicorn Riot resembles the video collectives of the 1970s like “Videofreex” that documented protests, interviewed activists,



Screenshot of Unicorn Riot’s Documentaries on YouTube¹¹

Unicorn Riot’s non-traditional – but MFFIA-protected – approach to news-gathering has redefined journalism, as illustrated by the Floyd protests and civil unrest. Unicorn Riot livestreamed “night after night of vigils and struggle and trouble” – coverage “impressive for its intimacy with the community and unrivaled in its ability to tell the story patiently, in hour upon hour of searching the streets for clarity.”¹²

and operated the nation’s first unlicensed television station. *See generally Videofreex Digital Archive 1966–2019*, <https://videofreex.com>.

¹¹ *See Documentaries – Unicorn Riot*, YOUTUBE, <https://tinyurl.com/2szsyt3w> (last accessed November 6, 2023).

¹² Troy Patterson, *The Tiny Media Collective That Is Delivering Some of the Most Vital Reporting from Minneapolis*, THE NEW YORKER, June 3, 2020, <https://tinyurl.com/353rbyyh>.

Such coverage has enabled Unicorn Riot to break new journalistic ground. A “five-and-a-half-hour [Unicorn Riot] live stream, shot with a single camera” marks a sharp break from the “familiar sort of processed journalistic narrative.”¹³ “[Y]ou get a constantly updating document that accommodates person-on-the-street interviews thriving with unaffected voices.”¹⁴ During the George Floyd protests, “a Unicorn Riot camera crew elicited a succinct commentary on the dynamics of property destruction from a local business owner.”¹⁵ “These are not connections or exchanges you can see on CNN or terrestrial local-news stations.”¹⁶

As a result, Unicorn Riot has “gained traction among people looking for alternative news sources” – alternatives dedicated to capturing “on-the-ground perspectives many mainstream outlets miss.”¹⁷ But this work is “not without dangers.”¹⁸ When Unicorn Riot journalist Chris Schiano filmed a pro-Christopher Columbus rally in southern Philadelphia, a group of men armed with baseball bats suddenly approached Schiano and tried to grab Schiano’s camera and bicycle.¹⁹ Schiano “was assaulted ‘multiple times’” throughout the pro-Columbus rally.²⁰

¹³ Patterson, *supra* note 12.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Woods, *supra* note 3.

¹⁸ Adam Gabbatt, *Unicorn Riot: Tiny Media Outlet on the Frontlines of US Protests*, THE GUARDIAN, July 1, 2020, <https://tinyurl.com/29annj9e>.

¹⁹ *Id.*

²⁰ *Id.*

The dangers that non-traditional media like Unicorn Riot endure in gathering and publishing information then only underscores why the MFFIA protects Unicorn Riot no differently than CBS News. Such protection also aligns with other state high courts in assessing the breadth of their respective states' journalistic privileges. In *Mortgage Specialists v. Implode-Explode Heavy Industries, Inc.*, 999 A.2d 184 (N.H. 2010), the New Hampshire Supreme Court held that the “news-gathering privilege” afforded by the New Hampshire state constitution applied to Implode—an Internet publisher responsible for a website ranking “various businesses in the mortgage industry.” *Id.* at 187.

The court acknowledged its previous news-gathering-privilege cases involved “traditional news media.” *Id.* at 189. The court then “reject[ed]” the idea that these cases meant the privilege could not apply to Implode because Implode was “neither an established media entity nor engaged in investigative reporting.” *Id.* at 189. The court instead found the privilege applied because “Implode’s website serves an informative function and contributes to the flow of information to the public.” *Id.*

Unicorn Riot is no different, and the MFFIA’s text affords no basis to treat Unicorn Riot any differently. Unicorn Riot “puts out live stream coverage and then cuts digestible videos and publishes written articles.”²¹ The MFFIA protects such news “gathering, procuring, compiling, editing, [and] publishing.” Minn. Stat. §595.023. The MFFIA also protects this work regardless of Unicorn Riot’s ideological orientation.

²¹ Gabbatt, *supra* note 18.

B. Ideological orientation

MFFIA protections apply to news media outlets – traditional or not – when the outlet’s purpose is the “transmission, dissemination, or publication to the public” of gathered information. Minn. Stat. §595.023. Nothing in this statutory text allows the denial of MFFIA protections based on a media outlet’s political or ideological orientation. So, to the extent that Unicorn Riot has an ideological bent, such a bent does not alter the MFFIA’s protection of Unicorn Riot’s reporting.

In fact, Unicorn Riot's ideological leanings mean that the group is able to identify news events that are not always covered in equal depth by more traditional (or purportedly “objective”) media. Unicorn Riot “considers the citizens most immersed in a situation as those closest to its truth.”²² That’s why “you might see a Unicorn Riot reporter . . . hug or high-five . . . a source after an interview – something many mainstream news organizations would not construe as impartial.”²³ It is also why “Unicorn Riot was one of the few media outlets” to show up when the Standing Rock Sioux tribe began protesting the Dakota Access Pipeline.²⁴ Unicorn Riot saw an important story many others missed.

Unicorn Riot’s coverage of the pipeline protest ultimately proved “essential to understanding the events in North Dakota.”²⁵ “More

²² Hutton, *supra* note 8.

²³ *Id.*

²⁴ Alleen Brown, *Arrests of Journalists at Standing Rock Test the Boundaries of the First Amendment*, THE INTERCEPT, Nov. 27, 2016, <https://tinyurl.com/mstfep4y>.

²⁵ *Id.*

immersive than mainstream media and more polished than the work of most activist documentarians,” Unicorn Riot communicated “distinct information about public life and the use of force to control a dissenting citizenry.”²⁶ Unicorn Riot video of tear gas canisters and water cannons “sprayed directly into crowds of protesters . . . when temperatures stood well below freezing, countered [local] police claims that the water was being used primarily to protect people from fire.”²⁷

The public value of such journalism exemplifies why various courts nationwide have ruled state journalist-shield laws protect media outlets regardless of how ideologically oriented the media outlet may happen to be. New Jersey blogger Tina Renna used her public website to report the improper use of generators by several public employees in the wake of Hurricane Sandy. *See In re Jan. 11, 2013 Subpoena*, 75 A.3d 1260, 1262–63 (N.J. Super. Ct. 2013). County prosecutors served a subpoena on Renna to force Renna to disclose the names of the offending public employees. *See id.* Renna refused to comply, invoking New Jersey’s journalist-shield law. *Id.* The County argued Renna “should not be considered a journalist.” *Id.* at 1269. The County’s basis for this argument included (*inter alia*) Renna’s use of profanity and ad hominem; Renna’s participation in conservative politics; and Renna’s self-identification as a “citizen activist.” *Id.*

A New Jersey trial court held the journalist-shield law protected Renna. *See id.* at 1270–74. The court found it “clear” that Renna authored

²⁶ Brown, *supra* note 24.

²⁷ *Id.*

“posts about alleged occurrences and issues related to Union County governance and politics not covered by other media sources.” *Id.* The court next observed the absence of any precedent “requir[ing] that a news entity be unbiased” for the shield law to apply. *Id.* at 1272–73. The court finally noted “many national publications such as *The Weekly Standard* (conservative) and *The New Republic* (liberal) have a point of view, yet are considered mainstream publications employing journalists to report on newsworthy events despite their ideological bent.” *Id.*

Ideological leanings have been a part of the press since before America’s founding. “In Tudor England, officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent, both Catholic and Puritan.” *Stanford v. Texas*, 379 U.S. 476, 482 (1965). In America, press partisanship peaked in the early 1900s, with newspapers across the nation adopting expressly political positions and even political party nomenclature.²⁸ Of this era, historian William Grienapp notes that newspaper editors “unabashedly shaped the news” in an effort “to convert the doubters, recover the wavering, and hold the committed.”²⁹

Some of the nation’s most important press-freedom cases have grown out of partisan media outlets, including truly fringe discourse.

²⁸ Some of these partisan names persist to this day, even after such papers have dropped their party connections – for example, *Red Wing, Minnesota’s Republican Eagle* (<https://www.republicaneagle.com>).

²⁹ William E. Gienapp, *Politics Seem to Enter into Everything: Political Culture in the North, 1840-1860*, in *ESSAYS ON ANTEBELLUM POLITICS, 1840-1860*, at 41 (eds. William E. Gienapp, et al. 1982).

Consider *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), in which the Supreme Court adopted the press-protective “prior restraint” doctrine. *Id.* at 713–23. At the heart of *Near* was “The Saturday Press” – a “scandal sheet” published in Minneapolis that trafficked in sensational accounts of gangsters and government misconduct, all laced with anti-Semitism and anti-Catholicism. *Id.* at 703–04. A Minnesota statute at the time allowed permanent injunctions against publishers “in the business of regularly and customarily producing, publishing” any “malicious, scandalous, and defamatory newspaper, magazine, or other periodical.” *Id.* at 706.

The Supreme Court struck down the Minnesota statute. *See id.* at 713–23. The Court stressed: “[t]he fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct.” *Id.* at 720. In recent years, Minnesota courts have continued to cite press freedoms as these courts have weighed cases involving expressly ideological (and often unconventional) publishers, including in the case of Minnesota blogger John Hoff. *See Moore v. Hoff*, 821 N.W.2d 591, 599 (Minn. App. 2012) (“[T]here is too great a risk of infringing on Hoff’s constitutional right to publish . . . if [Hoff] is held liable for Moore’s subsequent employment termination.”).

Unicorn Riot’s ideological leanings thus afford no basis to conclude the MFFIA does not protect Unicorn Riot in the same way the statute protects Fox News and MSNBC. “You could refer to what Unicorn Riot does as ‘activist reporting,’ just as you might call a bystander capturing

footage of N.Y.P.D. officers tossing people to the asphalt or plowing cruisers through crowds ‘citizen journalism.’” But such “quibbling about objective journalism” loses sight of the essential value that the MFFIA is meant to safeguard: “the power of people’s voices.”³⁰

Conclusion

Journalism is undergoing a “revolution of historic proportions” with “vast potential to alter how we think, express ourselves, and define who we want to be.” *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017). Unicorn Riot and its non-traditional, solidarity-driven protest reporting are part of this transformation, protected by the Minnesota Free Flow of Information Act without regard to the conventionality or the ideological orientation of Unicorn Riot’s news coverage. The Court should thus reject Energy Transfer’s less-than-subtle efforts to suggest otherwise.

Respectfully submitted,

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³⁰ Patterson, *supra* note 12.

Certification of Brief Length

The undersigned counsel certifies that this amicus brief satisfies MRCAP 132.01. This brief: (1) is printed using 13-point, proportionally-spaced fonts; and (2) complies with the relevant word-limit, containing 2,978 words (including headings, footnotes, and quotations) according to the Word Count feature of the word-processing software that counsel used to prepare this brief (Microsoft Word 2010).

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