COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS	Superior Court Criminal Action No. 2282cr00117
COMMONWEALTH OF MASSACHUSETTS, v. KAREN READ,	

MOTION OF MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION, NEW ENGLAND FIRST AMENDMENT COALITION, NEW ENGLAND NEWSPAPER AND PRESS ASSOCIATION, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS FOR LEAVE TO FILE AMICUS MEMORANDUM

The Massachusetts Newspaper Publishers Association, New England First Amendment Coalition, New England Newspaper and Press Association, and Reporters Committee for Freedom of the Press ("Proposed Amici") respectfully move for leave to file the amicus memorandum attached hereto as **Exhibit A** with respect to the Motion for Reconsideration of Portion of December 5, 2024, Court Order Regarding Records Disclosure filed by non-party Gretchen Voss ("Voss").

The Proposed Amici seek to be heard as amici in order to explain why they believe that the compelled disclosure of a reporter's notes concerning confidential communications with a source that never have been published or made public poses a grave threat to the free flow of information. Statements of interest for each of the Proposed Amici are below.

1. The Massachusetts Newspaper Publishers Association ("MNPA") is a voluntary association of newspapers published through the Commonwealth of Massachusetts. It represents those newspapers in legal and legislative matters of common concern. In particular, the MNPA

focuses on preserving freedom of speech, freedom of the press, and the public's right to know. MNPA does not have a parent company, and no publicly held corporation owns 10% or more of its stock.

2. The New England First Amendment Coalition (NEFAC) is the region's leading advocate for First Amendment freedoms and the public's right to know about government. NEFAC is a non-partisan non-profit corporation organized and existing under the laws of the Commonwealth of Massachusetts. In collaboration with other like-minded advocacy organizations, NEFAC works to advance understanding of the First Amendment and right-to-know issues throughout New England and across the world.

3. New England Newspaper and Press Association, Inc. ("NENPA") is the regional association for newspapers in the six New England States (including Massachusetts). NENPA's corporate office is in Woburn, Massachusetts. Its purpose is to promote the common interests of newspapers published in New England. Consistent with its purposes, NENPA is committed to preserving and ensuring the open and free publication of news and events in an open society.

4. The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

For the foregoing reasons, the Proposed Amici respectfully request that the Court grant leave to file the amici memorandum attached hereto as **Exhibit A**.

By their attorneys,

/s/Jonathan M. Albano

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Dated: January 30, 2025

CERTIFICATE OF SERVICE

I, Jonathan M. Albano, hereby certify that this document was served on counsel of record for the Commonwealth, the Defendant, and Gretchen Voss on January 30, 2025.

/s/ Jonathan M. Albano
Jonathan M Albano, BBO # 013850

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS	Superior Court Criminal Action No. 2282cr00117
COMMONWEALTH OF MASSACHUSETTS, v. KAREN READ,	

AMICUS MEMORANDUM OF MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION, NEW ENGLAND FIRST AMENDMENT COALITION, NEW ENGLAND NEWSPAPER & PRESS ASSOCIATION, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

The Massachusetts Newspaper Publishers Association, New England First Amendment Coalition, New England Newspaper & Press Association, and Reporters Committee for Freedom of the Press ("Amici") respectfully submit this amicus memorandum concerning the Motion for Reconsideration of Portion of December 5, 2024, Court Order Regarding Records Disclosure filed by non-party Gretchen Voss ("Voss").

Amici understand that, as strangers to this prosecution, they are in no position to substitute their judgment for that of the Court. As journalistic organizations dedicated to protecting against threats—both old and new—to First Amendment interests, they seek only to explain why the compelled disclosure of a reporter's notes concerning confidential communications with a source that never were published (either in whole or in part) poses a grave threat to the free flow of information to the public.

The issue presented here is not whether the Commonwealth will obtain recordings of statements made by the defendant. Voss has not sought reconsideration of that portion of the Court's order. Rather, the issue is whether the Commonwealth also is entitled to obtain the

reporter's notes of a separate, confidential interview she conducted, based only upon the Commonwealth's speculation about the contents of those unpublished notes. Unlike the recordings of two other interviews of the defendant, the notes likely reflect Voss's internal impressions, reactions, and thoughts as the interview unfolded. Amici respectfully submit that, under these circumstances, the government's intrusion into entirely confidential communications between a reporter and source, including the thought processes and work product of a journalist, unjustifiably intrudes on First Amendment interests and, as precedent, would unnecessarily chill the newsgathering process.

A. Confidential, Off-the-Record Journalistic Work Product Is Protected by the First Amendment, Article 16, and the Common Law of Massachusetts.

In contrast to the recordings of the two interviews that the Court ordered Voss to produce, the notes at issue reflect communications made under a promise of confidentiality, of which no part ever has been made public. The confidential, unpublished nature of the communications trigger significant constitutional protections. As Justice Powell stated in his widely cited concurring opinion in *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (a concurrence necessary to create the majority of five which decided the case), "[t]he Court does not hold that [journalists], subpoenaed to testify … are without constitutional rights with respect to the gathering of news or in safeguarding their sources."

> Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

Id. at 710. *See also id.* at 700 ("newsgathering is not without its First Amendment protections) (White, J., opinion of the Court).

The essential role that confidential communications play in newsgathering has long been recognized. *See, e.g., United States v. LaRouche Campaign*, 841 F.2d 1176, 1181 (1st Cir. 1988) ("[C]ourts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights."). And the government itself also regularly protects the identities of its confidential informants. As Dean Wigmore explained:

> Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency, or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity to protect himself and his family from harm [and] to preclude adverse social reactions[.]

VIII Wigmore on Evidence, § 2374 (Rev. ed. 1961). *See generally Commonwealth v. Bonnett*, 472 Mass. 827, 846 (2015) ("The government's privilege not to disclose the identity of an informant has long been recognized in this Commonwealth") (internal quotations and citation omitted). As with confidential news sources, the inquiry "calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro v. United States*, 353 U.S. 53, 62 (1957). *See also Commonwealth v. Bonnett*, 472 Mass. 827, 848 (2015) (the court's "obligation is to balanc[e] ... the public interest in protecting the flow of information against the individual's right to prepare his [or her] defense, taking into account the crime charged, the possible defenses, the possible significance of the [privileged] testimony, and other relevant factors.") (internal quotations and citations omitted).

The First Amendment protections for confidential communications with news sources are based on the same principles. As Professor Alexander Bickel wrote in *The Morality of Consent* (1975):

> Forcing reporters to divulge such confidences would dam the flow to the press, and through it to the people, of the most valuable sort of information[.] ... [T]he forcing disclosure of reporters' confidences is ... a form of indirect, and perhaps random, but highly effective censorship; a prior restraint, not used in the sense in which those words are used as a phrase of art, but in a literal and constitutionally also relevant sense.

Id. at 84.

The government's request for the notes at issue stands in stark contrast to its request for the recordings of the defendant's two other interviews. The notes have been kept and remain entirely confidential, unlike certain statements in the recordings that were made public. The Commonwealth therefore is left to speculate about whether the statements in the confidential notes are relevant or in any way inculpatory. That is why it cannot cite any statements reflected in the notes or potentially intriguing redactions as it did to support its argument for the disclosure of previously unpublished portions of the recorded interviews. Reporters' notes, by their nature, are not a transcript of an interview. Instead, they would reflect Voss's own interpretations, as well as her likely impressions and thoughts about the interview and overall story, and should be protected. Compelling the production of these types of confidential journalistic materials would impose significant and unnecessary burdens on First Amendment interests.

It is not hard to envision the dangerous implications of such a rule of law. Journalists are expected (and duty bound) to interview persons involved in matters of public concern and interest. Their sources often include criminal defendants, current and former prosecutors, immigrants, and medical providers. Publishing a newsworthy article based on any such interview should not authorize government officials to forage into all other unpublished and confidential communications with those news sources, as well as the mental impressions, thoughts, and reactions of journalists, particularly when the government's request rests on speculative assertions that there may be inculpatory (or exculpatory) information in documents it has not seen or read

about. Any such result would constitute a serious infringement of First Amendment interests without serving any compelling governmental interest. In the words of the First Circuit:

> We discern a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled. To the extent that compelled disclosure becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding disclosure requests or compliance therewith rather than to the basic function of providing news and comment. In addition, frequency of subpoenas would not only preempt the otherwise productive time of journalists and other employees but measurably increase expenditures for legal fees. Finally, observing Justice Powell's essential concurring opinion in Branzburg, "certainly, we do not hold ... that state and federal authorities are free to annex the news media as an investigative arm of government."

LaRouche Campaign, 841 F. 2d at 1182 (citation omitted).

The same result is warranted as a matter of state constitutional law under Article 16 of the Declaration of Rights of the Massachusetts Constitution. The Supreme Judicial Court has long stated that "no inference should be drawn that the Declaration of Rights of the Constitution of the Commonwealth is less capable of protecting the essentials of freedom of speech, of the press, and of assembly than is the Federal Constitution." *Commonwealth v. Gilfedder*, 321 Mass. 335, 343 (1947). The press clause of Article 16 has remained unchanged since 1780, and thus predates the enactment of the First Amendment. Its construction, therefore, is not necessarily limited by constructions of its federal analogue. *Cf. Attorney General v. "Naked Lunch"*, 351 Mass. 298, 301 (1966) (Reardon, J., dissenting).

For that matter, the provisions of Article 16 have been held to extend protections even greater than those of the First Amendment. *See Commonwealth v. Sees*, 374 Mass. 532 (1978); *Cabaret Enterprises v. Alcoholic Beverages Control Commission*, 393 Mass. 13, 16-17 (1984). *See also* H. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 Suffolk L. Rev. 887, 889-90 (1980). *See*

generally Lyons v. Globe Newspaper Co., 415 Mass. 258, 268-69 (1993) ("the independent protections of freedom of speech which are found in our common law and in art. 16 would lead us to reach the same result even if there existed no Federal constitutional support for the principles which we applied").

In sum, a reporter should not have to conduct an interview with the knowledge that the government may commandeer her as an agent for the prosecution. The result would be self-censorship (by both the press and news sources). Besides warranting caution and prudence by courts, the government should be required to make a substantial showing that the information at issue will reveal material evidence for a critical element of the case. Accordingly, Amici respectfully submit that the government's request for Voss's notes of an entirely unpublished and confidential interview with the defendant would unjustifiably impose significant and unwarranted burdens on interests protected by the common law of Massachusetts, the First Amendment, and Article 16.

CONCLUSION

For the foregoing reasons, Amici support non-party Gretchen Voss's Motion for Reconsideration of Portion of December 5, 2024, Court Order Regarding Records Disclosure.

By their attorneys,

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