

# 10-1918(L), 10-1966(CON)

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In the United States Court of Appeals  
for the Second Circuit

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CHEVRON COPRORATION, RODRIGO PEREZ PALLARES and RICARDO  
REIS VEGA,

*Petitioners-Appellees,*

JOSEPH BERLINGER, CRUDE PRODUCTIONS, LLC, MICHAEL  
BONFIGLIO, THIRD EYE MOTION PICTURE COMPANY, INC. and  
@RADICAL.MEDIA, INC.,

*Respondents-Appellants.*

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On Appeal from the United States District Court  
for the Southern District of New York

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**BRIEF OF *AMICI CURIAE* INTERNATIONAL DOCUMENTARY ASSOCIATION,  
CENTER FOR ASIAN AMERICAN MEDIA, DIRECTORS GUILD OF AMERICA,  
INC., FILM INDEPENDENT, IFP, INC., LATINO PUBLIC BROADCASTING, NATIVE  
AMERICAN PUBLIC TELECOMMUNICATIONS, NATIONAL ASSOCIATION OF  
LATINO INDEPENDENT PRODUCERS, PACIFIC ISLANDERS IN  
COMMUNICATIONS, PRODUCERS GUILD OF AMERICA, TRIBECA FILM  
INSTITUTE, UNIVERSITY FILM AND VIDEO ASSOCIATION, WOMEN MAKE  
MOVIES, WRITERS GUILD OF AMERICA EAST, WRITERS GUILD OF AMERICA  
WEST AND INDIVIDUAL *AMICI*: PATRICIA AUFDERHEIDE, THEODORE BRAUN,  
KIRBY DICK, ALEX GIBNEY, ANDREW GOLDBERG, ROBERT KENNER, TIA  
LESSIN, EDDIE SCHMIDT AND RICKI STERN IN SUPPORT OF APPELLANTS**

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June 23, 2010

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* the International Documentary Association, Center for Asian American Media, Directors Guild of America, Inc., Film Independent, IFP, Inc., Latino Public Broadcasting, Native American Public Telecommunications, National Association of Latino Independent Producers, Pacific Islanders in Communications, Producers Guild of America, Tribeca Film Institute, University Film and Video Association, Women Make Movies, Writers Guild of America East, and Writers Guild of America West certify as follows:

The International Documentary Association, Film Independent, IFP, Inc., National Association of Latino Independent Producers, Producers Guild of America, Tribeca Film Institute, University Film and Video Association and Women Make Movies are nonprofit membership organizations.

The Center for Asian American Media, Latino Public Broadcasting, Pacific Islanders in Communications and Native American Public Telecommunications are nonprofit membership organizations funded by the Corporation for Public Broadcasting.

The Directors Guild of America, Inc. is a non-profit mutual benefit corporation and labor union.

The Writers Guild of America East and Writers Guild of America West are nonprofit labor unions.

*Amici* have no parent corporations, and no publicly held corporation owns ten percent or more of any *amici* organization's stock.

/s/ Michael C. Donaldson

Michael C. Donaldson

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## **INTRODUCTION AND INTEREST OF *AMICI CURIAE***

The International Documentary Association, Center for Asian American Media, Directors Guild of America, Inc., Film Independent, IFP, Inc., Latino Public Broadcasting, Native American Public Telecommunications, National Association of Latino Independent Producers, Pacific Islanders in Communications, Producers Guild of America, Tribeca Film Institute, University Film and Video Association, Women Make Movies, Writers Guild of America East, Writers Guild of America West and individual *amici* Patricia Aufderheide, Theodore Braun, Kirby Dick, Alex Gibney, Andrew Goldberg, Robert Kenner, Tia Lessin, Eddie Schmidt and Ricki Stern respectfully submit this memorandum of law, as *amici curiae*, supporting appellants and urging reversal of the District Court's order.<sup>1</sup> Pursuant to Rule 29(a), all parties have consented to the filing of this brief.

The International Documentary Association (IDA) was founded in 1982 as a nonprofit membership organization dedicated to supporting the efforts of nonfiction film and video makers throughout the United States and the world; promoting the documentary form; and expanding opportunities for the production,

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<sup>1</sup> This brief was prepared on a pro-bono basis. Pursuant to Local Rule 29.1(b), *amici* hereby confirm that no party's counsel authored any part of this brief. No party or any other person, other than the *amici curiae*, its members, personnel and/or counsel, contributed money that was intended to fund the preparation or submission of this brief.

distribution, and exhibition of documentary. Over the past twenty-eight years IDA has served as a forum and voice for documentarians around the world. IDA currently serves over 11,000 members and community users in over fifty countries.

The Center for Asian American Media (CAAM) was founded in 1980 by filmmakers, media activists and educators to counter the scarcity of images of Asians and Asian Americans in film and television, correct often distorted portrayals of them in the mainstream media and create opportunities for the full participation of Asian American producers in public media. Today, CAAM is the leading Asian American media arts organization in the nation and a leading arts and culture organization in San Francisco. Annually, CAAM's national public broadcasts reach over 10 million viewers, its San Francisco International Asian American Film Festival attracts over 25,000 Bay Area audience members and its educational distribution program serves over 2,000 universities, K-12 schools and libraries around the nation. In addition, CAAM has awarded over \$3 million towards independent film and video productions by and about Asian Americans for public television broadcast with funding from the Corporation of Public Broadcasting. CAAM represents a membership of approximately 6,000.

The Directors Guild of America, Inc. (DGA) was founded in 1936 to protect the economic and creative rights of Directors. Over the years, its membership has expanded to include the entire directorial team, including Unit Production

Managers, Assistant Directors, Associate Directors, Stage Managers and Production Associates. DGA's over 14,500 members live and work throughout the United States and abroad and are vital contributors to the production of feature films, television programs, documentaries, news and sports programs, commercials and content made for the Internet and other new media. DGA seeks to protect the legal, economic and artistic rights of directorial teams and advocates for their creative freedom.

Film Independent (FIND) is a nonprofit organization dedicated to helping independent filmmakers make their films, building the audience for independent film, and increasing diversity in the film industry. Every year, FIND provides its member base of roughly 4,000 with over 250 hours of film education programming, more than a hundred free preview screenings of the latest independent films, substantial production rental discounts and fellowship and grant opportunities totaling over \$240,000.

Now in its thirtieth year of operation, the nonprofit Independent Filmmaker Project, Inc. (IFP) is the nation's oldest and largest organization of independent filmmakers and also a premier advocate for them. Since its start, IFP has supported the production of 7,000 films and provided resources to more than 20,000 filmmakers—voices that otherwise might not have been heard. Currently, IFP represents a network of 10,000 filmmakers in New York City and around the

world. IFP believes that independent films enrich the universal language of cinema, seeding the global culture with new ideas, kindling awareness, and fostering activism.

Latino Public Broadcasting (LPB) is a nonprofit organization created in 1998 and funded by the Corporation for Public Broadcasting. LPB's mission is to support the development, production, acquisition and distribution of non-commercial television that is representative of Latino people or addresses issues of interest to Latino Americans. LPB has provided over 100 hours of programming to PBS and has awarded over \$5 million to independent producers through its funding initiative. LPB has also organized over 100 workshops to support the professional development of Latino producers. LPB serves hundreds of Latino producers located all over the United States and its territories. In 2006, LPB launched VOCES, the first series showcasing the best of Latino culture on public television. Edward James Olmos is founder and Chairman of the LPB Board of Directors.

The National Association of Latino Independent Producers (NALIP) is an eleven-year-old media arts service organization dedicated to increasing the quality and quantity of images by and about Latinos. NALIP works to promote the advancement, development and funding of Latino/Latina film and media arts in all genres. NALIP is the only national organization committed to supporting both

grassroots and community-based producers and media makers along with publicly funded and industry-based content creators. NALIP has over 1,200 members in the United States, Canada, Puerto Rico and Dominican Republic and its constituency includes nearly 10,000 writers, producers and directors, executives, representatives, broadcasters and advocates who work in film, television, documentaries and new media.

The mission of Pacific Islanders in Communications (PIC) is to support, advance and develop Pacific Island media content and talent that results in a deeper understanding of Pacific Island history, culture and contemporary challenges. PIC receives funding from the Corporation for Public Broadcasting to create Pacific Islander content for PBS. PIC, which was founded in 1991, funds and serves independent filmmakers and supports 5,000 constituents.

The Producers Guild of America (PGA) is the nonprofit trade group that represents, protects and promotes the interests of all members of the producing team in film, television and new media. The producing team consists of those whose interdependency and mutual support are necessary for the creation of entertainment content and intellectual property. As a unit, the producing team is responsible for the art, craft and science of production in the entertainment industry. The PGA has over 4,300 members who work together to protect and improve their careers, industry and community by providing members health

benefits, enforcing workplace labor laws, establishing fair and impartial standards for the awarding of producing credits, as well as other education and advocacy efforts. The PGA hosts several important annual industry events, including its Producers Guild Awards and the Produced By Conference.

Tribeca Film Institute (TFI) is a New York based 501(c)(3) public charity which creates innovative programs that draw on the unifying power of film to promote understanding, tolerance and global awareness. TFI's year-round programming includes youth education and support for filmmakers who are creating socially significant work in narrative film, documentary and new media. TFI's artist programs provide funding and guidance to independent filmmakers in the pursuit of their creative vision, while its educational work fosters the artistic and personal growth of young people from culturally diverse backgrounds and communities often bypassed by arts and media education initiatives. TFI's programs stress access and mentorship for filmmakers who are often excluded from traditional funding and distribution channels and are underrepresented in the film industry.

Founded in 1947 as the University Film Producers Association, the University Film and Video Association (UFVA) has developed into an organization of over 1,200 professionals and institutions involved in the production and study of film, video and other media arts. The UFVA is

a nonprofit international organization where media production and writing meets the history, theory and criticism of the media. The UFVA members are image-makers and artists, teachers and students, archivists and distributors, college departments, libraries and manufacturers.

The Writers Guild of America, East, AFL-CIO (WGAE) represents thousands of members who write for film, television, radio and digital media. WGAE members write and produce some of the most compelling, well-researched and widely-viewed news and public affairs programming in the country, including short- and long-form documentaries for public television, for commercial broadcast and cable television and for the screen. The WGAE represents these writers in collective bargaining and presents seminars, panel discussions, screenings, social gatherings and other opportunities for members and others to develop a deeper understanding of the critical issues faced by television, radio, Internet and screen writers.

The Writers Guild of America, West (WGAW) is a labor union representing writers of motion pictures, television, radio and Internet programming, including news and documentaries. Founded in 1933, the WGAW negotiates and administers contracts that protect the creative and economic rights of its members. It is involved in a wide range of programs that advance the interests of writers and is

active in public policy and legislative matters on the local, national and international levels.

Women Make Movies is a multicultural, multiracial, non-profit media arts organization which facilitates the production, promotion, distribution and exhibition of independent films and videotapes by and about women. WMM was established in 1972 to address the under representation and misrepresentation of women in the media industry and currently distributes films from over 500 women filmmakers.

Patricia Aufderheide is a Professor in the School of Communication at American University. She founded and currently runs the Center for Social Media in the School of Communication at American University. The Center focuses on social-issue media, particularly documentary film. She has published several books, including *Documentary Film: A Very Short Introduction* (Oxford University Press, 2007), now a standard text in higher-education curriculum. She has followed the field of documentary filmmaking since 1967.

Theodore Braun is a writer, director and an Associate Professor at the University of Southern California's School of Cinematic Arts. His critically acclaimed feature film, *Darfur Now*, won the NAACP Image Award for best documentary of 2007 and was named one of 2007's top five documentaries by the National Board of Review. The film tells the story of six people, three working

inside Darfur and three outside, who share a common drive to bring an end to the crisis in Darfur. His work in Sudan in 2007 making *Darfur Now* would simply have been impossible had he not been able to assure all the subjects—including the Prosecutor of the International Criminal Court, staff of the United Nations, victims of crimes in Darfur and members of rebel groups operating inside the borders of Sudan—that his unedited master tapes belonged to the production and would not be shared with anyone. Many of the people who spoke with Braun in Darfur were only willing to do so clandestinely, knowing their lives would be in danger if it was discovered that they were meeting with a filmmaker from the United States.

Kirby Dick is an Academy Award-nominated documentary director. Five of Dick's films have premiered at the Sundance Film Festival. His films have screened at the Venice, Berlin, Toronto, San Sebastian, Locarno, Edinburgh, Yamagata Film Festivals and many others. Dick's 2009 film *Outrage* is a searing indictment of the hypocrisy of closeted politicians who actively campaign against the LGBT community to which they covertly belong. In filming *Outrage* Dick interviewed several dozens of people that agreed to talk only off the record. Many of the subjects were afraid of professional harm and some even feared physical harm would occur if their identities were disclosed. If Dick's subjects felt that all their words would be made public, it would be impossible for him to make these kinds of films.

Alex Gibney is an Oscar, Emmy and Grammy Award-winning producer and founder of Jigsaw Productions. He produced one of the top grossing documentaries of all time, *Enron: The Smartest Guys in the Room*. Gibney is a regular contributor to the Huffington Post and has written for Newsweek, the Los Angeles Times, Newsday, New Republic, The Wilson Quarterly, LA Reader, Chicago Reader and San Francisco Chronicle. He is on the Executive Committee of the Academy of Motion Picture Arts and Sciences' Documentary branch. Gibney has worked with many reluctant sources who have trusted him to only use information that is absolutely necessary to tell the story at hand. These sources would take a different view and would be unwilling to provide information if they thought that office transcripts or the cutting room floor were public property.

Andrew Goldberg has produced and directed news and documentaries for some fifteen years, working with such networks as PBS, ABC News and CBS News, along with numerous networks internationally. His work tends to focus on public affairs, history, and current events. Often Goldberg's projects have focused on issues that have not traditionally found voices in the media, such as the Armenian genocide, anti-Semitism, and bigotry. *The Armenian Genocide* could not have been made without the input of sources that trusted Goldberg to control the use of the footage.

Robert Kenner is an Academy Award-nominated and Emmy-winning producer, director and writer. Kenner's recent documentary film, *Food, Inc.*, was nominated for an Academy Award in 2010. *Food, Inc.* lifts the veil on our nation's food industry, exposing the highly mechanized underbelly that has been hidden from the American consumer with the consent of the government regulatory agencies, the USDA and the FDA.

Tia Lessin is an Academy Award nominee and two-time Emmy Award-nominated producer and director. Lessin produced Michael Moore's *Fahrenheit 9/11*, winner of the Palme d'Or at the Cannes Film Festival, and the Academy Award-winning *Bowling for Columbine*. In 2001, Lessin produced and directed *Behind the Labels*, a documentary which exposed the labor trafficking of garment workers in the U.S. commonwealth of Saipan. The on-camera interviews Lessin conducted, featuring government whistleblowers, current and former garment workers, and lawyers waging a class action lawsuit against the manufacturers and retailers, would have been impossible if those subjects believed that Lessin would be forced to turn over her raw footage to the very industry they were speaking out against.

Eddie Schmidt is an Oscar-nominated filmmaker, as well as the Board President of the International Documentary Association (IDA), a nonprofit community for nonfiction storytellers. He has served on the Board of Directors of

the IDA since 2006. In 2004 Schmidt produced the documentary *Twist of Faith*, a feature length film that took a closer look into one of the stories to come out of the Catholic Church scandals of 2002. It was nominated for an Academy Award in 2005 for Best Documentary Feature. *Twist of Faith* follows the powerful and intimate psychological journey of Tony Comes, a firefighter from Toledo, Ohio, who survived years of sexual abuse at the hands of a Catholic priest. *Twist of Faith* could not have been made without the involvement and cooperation of sources that trusted Schmidt to control the use of the footage. In 2006 Schmidt produced the documentary *This Film is Not Yet Rated*, a feature length film that investigated the Motion Picture Association of America's (MPAA) rating system and its effect on American culture. The film would not have been able to fully expose these clandestine operations without the assurance that material from sources could be used without the fear that the material would be used other than for the film.

Ricki Stern is a director, producer and writer whose films have been shown on HBO and PBS. She recently co-directed and co-produced with Annie Sundberg the award-winning documentary *The Trials of Darryl Hunt*, a production of Break Thru Films, which tells the story of a man who spent 20 years in prison for a brutal rape/murder he did not commit. *The Trials of Darryl Hunt*, which appeared at the Sundance Film Festival in 2006, was a 2007 Independent Spirit Award nominee for Best Documentary and has won more than twenty festival awards to date.

Sundberg and Stern have been recognized with the Best Female Filmmakers Award at the San Diego Film Festival as well as the Adrienne Shelly Excellence in Filmmaking Award and Lena Sharpe/Women in Cinema Persistence of Vision Award at the Seattle International Film Festival. *The Trials of Darryl Hunt* could not have been made without the journalistic protections that allowed the attorneys to speak with Stern regarding the case and their concerns with the criminal justice system. Ultimately there was a change in law that might not have happened if not for the attention her filming created.

## ARGUMENT

### I. THE DISTRICT COURT'S ORDER, IF ALLOWED TO STAND, WILL HAVE A SUBSTANTIAL CHILLING EFFECT ON THE CREATION OF DOCUMENTARY FILMS

Based on their significant firsthand experience as described in the Statement of Interest, *amici* fear that the District Court's order will have a substantial chilling effect on the creation of investigative documentary films. At the heart of documentary filmmaking is the relationship that exists between filmmakers and their subjects, who entrust filmmakers to accurately tell their stories. Subjects who agree to be interviewed for films that investigate controversial subjects often put themselves at great risk. If subjects fear that their outtakes may be taken out of context and used against them by their adversaries in litigation, they will be less willing to participate. In this way, the District Court's order will significantly impair the creation of documentary films that investigate controversial issues.

#### A. It will be nearly impossible for filmmakers who report on controversial issues to obtain candid interviews

The firsthand experiences of *amici* provide concrete examples of the type of socially important filmmaking that the District Court's order would jeopardize. To make *Darfur Now*, an award-winning documentary on the ongoing atrocities in Sudan, filmmaker Theodore Braun interviewed innocent victims in refugee camps, members of the principal rebel groups, as well as sources from the U.S.

Government, the Sudan Government and the International Criminal Court. Some sources agreed to appear on camera, even though their lives could be in jeopardy for speaking out, under the understanding that the source could request that parts of the interview be excluded from the final film. Braun states that:

For many of my sources inside Darfur—Sudanese as well as international staff of UN organizations and non-governmental aid organizations (NGOs)—what I included was a matter of life or death. Without the sources' trust, and their confidence that I would have complete control over the material and honor their requests, *Darfur Now* would not have been possible to make.

If Braun's sources feared the outtakes might be subpoenaed they would never have shared their stories and the film would have been impossible to make.

Tia Lessin's film *Behind the Labels* exposed the squalid living and working conditions of trafficked garment workers in the U.S. Commonwealth of Saipan. Lessin conducted on-camera interviews with government whistleblowers, current and former garment workers, and lawyers waging a class action lawsuit against the manufacturers and retailers. Lessin states that “[m]any of the workers who allowed me to film them were Chinese nationals working for Chinese-owned garment factories that feared for their safety and the safety of their families back home.” If these interviewees had feared the outtakes would be exposed, Lessin would not have been able to make the film.

Ultimately, the District Court's decision, if not reversed, will have a chilling effect on the creation of socially important documentary films such as these.

**B. The District Court's Order threatens the foundations of investigative filmmaking**

The documentary film community's immediate reaction of shock and outrage to the District Court's order illustrates how it threatens the very foundations of investigative filmmaking. After the May 10, 2010 Order, the filmmaking community responded with an open letter in support of Berlinger. To date, the letter has been signed by more than 300 individuals from the documentary film community, including such luminaries as Errol Morris, D.A. Pennebaker, Bill Moyers, Alex Gibney, Davis Guggenheim, and Michael Moore. In the words of Eddie Schmidt, IDA President and Oscar nominee for the 2005 documentary *Twist of Faith*:

[A]llowing an entity—any entity—to have access to all the raw materials that comprise a film—any film—effectively muzzles the future of free speech as it applies to our profession. It matters not that one's final product stands on its own merits. . . The scope of this order—all 600 hours of shot footage for a 105 minute film—is so vast, it threatens to swallow an entire profession along with it.

As president of the DGA, Taylor Hackford describes how the chilling effect of Order will ultimately harm the public's right to information:

[F]uture filmmakers will be constantly aware that their materials may be seized as evidence, and those who once

might have been willing to share their point of view become wary that a documentarian cannot protect them, even if their participation is anonymous. Safeguarding the right of documentary filmmakers to protect their sources is ultimately about protecting the public's right to know and preserving the role of investigative filmmaking in exposing the issues, educating the viewers and informing the public. (May 18, 2010 DGA statement)

In sum, the District Court's order will seriously threaten the ability of documentary filmmakers to investigate and report on socially important issues, and if allowed to stand, it will ultimately harm the public's access to information.

## **II. DOCUMENTARY FILMMAKERS SHOULD GENERALLY BE PROTECTED BY THE JOURNALISTS' EVIDENTIARY PRIVILEGE**

The District Court correctly held that the journalists' privilege applied to Berlinger's outtakes. We urge this Court to affirm this part of the District Court's opinion and hold that documentary filmmakers who engage in traditional newsgathering activities are protected by the journalists' privilege, without regard for the viewpoint expressed or the style of filmmaking. Berlinger's *Crude* has drawn praise for its fair and even-handed treatment of its subject matter. Berlinger Decl. I at ¶ 17. However, even if the film was a work of pure point-of-view journalism, it would not lose protection for that reason.

**A. Documentary films that express a viewpoint do not lose the protection of the journalists' privilege**

The journalists' privilege applies to documentary films regardless of whether they express a viewpoint about their subject matter. Under the First Amendment, regulation of speech based upon viewpoint is the most egregious form of content-discrimination and draws the highest degree of strict scrutiny. *See Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 95 (1972) (“above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”). Accordingly, any distinction between documentary films that express a viewpoint (as the majority of investigative journalists' work does, in any medium) and those that neutrally report facts would be impermissibly content-based, and would draw the highest degree of strict scrutiny.

**B. Second Circuit case law supports the conclusion that the journalists' privilege covers documentary filmmakers generally**

The Second Circuit stated in *von Bulow v. von Bulow* that “an individual successfully may assert the journalists' privilege if he is involved in activities traditionally associated with the gathering and dissemination of news,” even if he is not a member of the institutional press. In that case, the Court stated that the “critical question” in determining whether a person is protected is “whether the

person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained[.]” 811 F.2d 136, 142 (2d Cir. 1987).

In *Gonzales v. Nat’l Broad. Co.*, the Second Circuit held that the journalists’ privilege applied to raw videotape footage from a NBC Dateline television segment reporting on abuses by law enforcement officers in Louisiana (although ultimately the privilege was overcome). 194 F.3d 29, 36 (2d Cir. 1999). The Dateline segment included hidden camera footage of a traffic stop of a reporter, which NBC used to demonstrate that no traffic laws had been violated and that the deputy stopped the car without probable cause. *Id.* at 31.

Documentary filmmakers begin their productions with the “intent to disseminate to the public” the information that they discover. The district court in *Psenicska v. Twentieth Century Fox Film Corp.* quoted the New Oxford American Dictionary to define the word “documentary:”

‘[D]ocumentary,’ as an adjective, means ‘(of a movie, a television or radio program, or photography) using pictures or interviews with people involved in real events to provide a factual record or report...;’ as a noun... means ‘a movie or a television or radio program that provides a factual record or report.’ 2008 U.S. Dist LEXIS 69214 at \*17 (S.D.N.Y. 2008).

Under the court’s definition, documentary films will qualify for the journalists’ privilege under *von Bulow*.

Like the Dateline television reporters in *Gonzales*, documentary filmmakers engage in investigations of factual events in the public's interest. The 2010 Sundance Film Festival alone included sixteen journalistic documentary films from the United States, including *Waiting for Superman* (reporting on the state of American schools), *GASLAND* (reporting on the natural gas industry), *Freedom Riders* (featuring interviews of activists and firsthand observers of the 1960s civil rights movement), *Bhutto* (chronicling the life of Benazir Bhutto), *Countdown to Zero* (on nuclear proliferation), *Lucky* (about lottery winners) and *12th and Delaware* (reporting on abortion clinic protests). The creators of documentary films such as these engage in traditional newsgathering activities and should generally be covered by the journalists' privilege, just as the NBC Dateline television reporters were in *Gonzales*.

### **C. The First Amendment rationale for the journalists' privilege applies equally to documentary filmmakers**

The process of newsgathering is protected under the First Amendment. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). The journalists' privilege is grounded in the First Amendment interest in "the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters." *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972). Nearly every Second Circuit case on the journalists' privilege from the last

forty years has emphasized the deterrent effect that compelled disclosure of unpublished press materials would have on investigative journalism and that such disclosures threaten public access to information. *See, e.g., Baker*, 470 F.2d at 782; *Gonzales*, 194 F.3d at 33; *Lonegan v. Hasty*, 2008 U.S. Dist. LEXIS 158 (E.D.N.Y. 2008) at \*9.

Documentary films by *amici* have brought greater awareness to stories such as the Catholic Church abuse scandal (*Twist of Faith* by Kirby Dick and Eddie Schmidt), the trafficking of garment workers in the U.S. Commonwealth of Saipan (*Behind the Labels* by Tia Lessin), and the environmental effects of corporate agribusiness in the United States (*Food, Inc.* by Robert Kenner), just to name a few examples. Films such as these have been vital to publicizing important stories that have not received such in-depth attention from traditional news media sources.

As the traditional press cuts back on investigative reporting, the value of documentary filmmakers' efforts to disseminate controversial stories to the public is more important than ever. Newspaper staff layoffs and cutbacks in coverage have resulted in a pronounced drop in investigative projects. Even before the recession, a 2005 Arizona State University study found that 61% of daily newspapers surveyed had no investigative or projects team and 37% did not have even a single full-time investigative reporter on staff. Chelsea Ide & Kanupriya Vashisht, *Today's Investigative Reporters Lack Resources*, Arizona Republic, May

28, 2006.<sup>2</sup> The cutbacks have continued through the recession because investigative journalism is more expensive to create than other categories of journalism. See James T. Hamilton, *Subsidizing the Watchdog: What would it Cost to Support Investigative Journalism at a Large Metropolitan Daily Newspaper?*, Duke Conference on Nonprofit Media, May 4-5, 2009.

Moreover, documentary films fulfill a need by offering unique viewpoints on controversial topics. According to Professor Pat Aufderheide, they are often made “by individuals on the edges of mainstream media” and aim to “speak[] not only to audiences but to other members of a public that needs to know in order to act.” *Documentary Film: A Very Short Introduction* 6 (2007). As the traditional press becomes more consolidated and devotes fewer resources to investigative point-of-view journalism, documentary films become an even more vital source of in-depth news information for the public.

For the above reasons, the Court should hold that all documentary filmmakers qualify for the journalists’ privilege, regardless of whether their films express a viewpoint or whether they are employees of a traditional press institution.

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<sup>2</sup> The survey was sent to the 100 largest U.S. newspapers and drew 86 responses.

### **III. THE CHEVRON PARTIES DID NOT MEET THE STRINGENT REQUIREMENTS TO OVERCOME THE JOURNALISTS' PRIVILEGE**

#### **A. Berlinger's outtakes should be protected under the higher standard for confidential materials**

The District Court erred in finding that Berlinger's outtakes were not subject to the stronger privilege for confidential press materials because it did not fully consider the implicit understanding of confidentiality that existed between Berlinger and his interview subjects. Where the material sought is confidential, movants must make "a clear and specific showing" that the information sought "is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." *In re Petroleum Products Antitrust Litigation*, 680 F.2d at 7. Documentary filmmakers develop close personal relationships with their subjects over a period of months or even years; for instance, Michael Apter's *Up* series has followed the lives of fourteen subjects since 1964, when they were seven years old, and continues to follow their lives today. As a result of this relationship of trust, subjects often have an implicit expectation that the filmmaker will *only* use the footage to tell their story and will not disclose the footage for other purposes. The subjects agreed to participate with the understanding that Berlinger would only use the footage for that purpose. Berlinger Decl. I at ¶ 21.

This understanding is common within the documentary filmmaking industry. As Academy Award-nominated filmmaker Kirby Dick describes, even when a subject signs a release, “[t]here is a presumption between documentary filmmakers and their subjects that certain parts of a subject’s interview will not be disseminated publicly.” Filmmakers often allow subjects the right to request that certain parts of their interviews not be included in the final film.

**B. Berlinger’s outtakes are protected as unpublished source materials under *Gonzales*, even if they are not confidential**

Alternatively, even if Berlinger’s outtakes are not found to be confidential, they are still privileged under the test set out in *Gonzales*. 194 F.3d at 35 (2d Cir. 1999). *Gonzales* held that the journalists’ privilege covers non-confidential unpublished source materials in order to protect the “paramount public interest” in maintaining an independent free press. *Id.* When non-confidential materials are sought, the privilege can only be overcome if the movant shows the materials are of “likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.” *Id.*

Berlinger’s outtakes, which do not appear in the final film, are unquestionably unpublished source materials. The rationale for protecting unpublished source materials is the same as for protecting confidential sources: “Like the compelled disclosure of confidential sources, [the compelled production

of a reporters resource materials] may substantially undercut the public policy favoring the free flow of information to the public that is the foundation of the privilege.” *von Bulow*, 811 F.2d at 143. *Gonzales* identified five major concerns that are “relevant regardless [of] whether the information sought from the press is confidential or not.” 194 F.3d at 35. First, the court feared that subpoenas to the press would become standard operating procedure for litigants in cases that had been the subject of press attention if the privilege were not fully enforced; second, the press would be burdened by responding to routine subpoenas; third, potential sources would be deterred from speaking to the press or insist on anonymity; fourth, journalists would be incentivized to destroy their press materials in order to avoid future subpoenas; and fifth, permitting litigants broad access to unpublished press materials “would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties.” *Id.* For these reasons, the burden on movants who seek to obtain unpublished press material is still a substantial one, even if the materials are not confidential.

**C. The subpoenas for all 600 hours of Berlinger’s outtakes go far beyond material likely to be relevant to significant issues in the Lago Agrio Litigation, criminal proceedings or arbitration**

The unprecedented breadth of the District Court’s order to produce all 600 hours of outtakes is at odds with established case law. The Second Circuit condemns the use of subpoenas by litigants “to sift through press files in search of

information supporting their claims.” *Lonegan*, 2008 U.S. Dist. LEXIS 158 at \*11; *Gonzales*, 194 F.3d at 35. In *Lonegan*, the plaintiffs were attorneys who represented individuals detained in the aftermath of the September 11 attacks who alleged that their privileged conversations with their clients had been secretly videotaped by the detention facility. 2008 U.S. Dist. LEXIS 158 at \*3. After the New York Times published two articles on the case, one of which mentioned the video surveillance in passing, the defendants sought to subpoena all of the reporter’s documents conceivably related to the two articles. *Id.* at \*4.

Applying the *Gonzales* test for non-confidential materials, the *Lonegan* court held that the defendants’ request was too broad. *Id.* at \*12. Because the defendants only identified one specific phrase in the two articles that related to a significant issue in the trial—whether or not one of the plaintiffs knew that she was being surveilled—the defendants were only entitled to obtain documents between the reporter and that plaintiff that related *to that single issue*. *Id.* The court granted a protective order for all other materials beyond that limited area. *Id.*

Likewise, in this case appellees’ requests should be denied because they have not shown that all 600 hours of the outtakes sought are of likely relevance to significant issues in the Ecuadorian litigation. Just as the *Lonegan* defendants could only identify a single phrase that related to the issue of surveillance, in this case appellees identify just three specific scenes out of the whole 105 minute film

that *might* be relevant to the Lago Agrio litigation. *See* May 10 Order at \*31-32.

Accordingly, appellees' attempt to obtain the entirety of the outtakes is analogous to sifting through entire press files in search of any information that supports their claims, precisely the sort of fishing expedition that *Lonegan* and *Gonzales* condemn as an impermissible intrusion on the newsgathering process.

**D. The information that the Chevron parties seek is reasonably obtainable from other sources**

The District Court applied the wrong standard for when press material is reasonably obtainable from other sources. The correct standard is whether the “outtakes contain *information* that is not reasonably obtainable from other available sources,” not whether the outtakes themselves are available. *Gonzales*, 194 F.3d at 36 (emphasis added). The issue here is not whether Berlinger's outtakes themselves are reasonably available elsewhere, as the District Court misinterpreted *Gonzales*, but whether the information contained within the outtakes is reasonably available elsewhere. May 10 Order at \*37 (“[The issue] is whether there is sufficient ground to believe that the footage petitioners seek would not reasonably be obtainable elsewhere”).

Here, the purportedly relevant information contained in Berlinger's outtakes is reasonably obtainable from other sources, including appellees' own film footage of the same scenes. In contrast to *Gonzales*, in which the court determined that *in*

*that instance* a deposition was not an adequate substitute for hidden camera video footage of traffic stops, here, appellees themselves had access to the events at issue and even have their own footage available. 194 F.3d at 36, 31; Berlinger Decl. I. at ¶ 34. Appellees have failed to show how their own footage is not an adequate substitute for Berlinger's outtakes of the same events.

In sum, appellees have failed to prove that all 600 hours of outtakes are of likely relevance to significant issues in the litigation. Even with respect to the three allegedly relevant scenes identified, appellees have failed to show that the information contained in the outtakes is not reasonably obtainable from other sources. Accordingly, they have not met their burden to overcome Berlinger's journalists' privilege, even if the outtakes are considered non-confidential unpublished source material.

**CONCLUSION**

For the foregoing reasons, the Court should reverse the District Court's May 10, 2010 Order.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a fourteen-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word 2003), the brief contains 6,064 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Michael C. Donaldson  
Michael C. Donaldson

## CERTIFICATE OF SERVICE

I certify that on June 23, 2010, I caused the original and ten copies of this brief to be sent by first-class mail to the Clerk of the Court. I also served by email and caused two copies to be sent by first-class mail to the following:

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