

10-1918-cv(1), 10-1966-cv(CON)

United States Court of Appeals
for the
Second Circuit

CHEVRON CORPORATION, RODRIGO PEREZ PALLARES,
RICARDO REIS VEIGA,

Petitioners-Appellees,

– v. –

JOSEPH A. BERLINGER, CRUDE PRODUCTIONS, LLC, MICHAEL
BONFIGLIO, THIRD EYE MOTION PICTURE COMPANY, INC.,
@RADICAL.MEDIA, LAGO AGRIO PLAINTIFFS,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**REPLY BRIEF FOR RESPONDENTS-APPELLANTS
JOSEPH A. BERLINGER, CRUDE PRODUCTIONS, LLC,
MICHAEL BONFIGLIO, THIRD EYE MOTION PICTURE
COMPANY, INC. AND @RADICAL.MEDIA**

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PRELIMINARY STATEMENT

Joe Berlinger is a documentary filmmaker. For the last twenty years he has devoted his life to investigating issues of public concern and bringing them to light. There is no doubt that his end product exists in the public arena, for the entire world to see. But to do his job, to get to that end result, Berlinger relies on well-established protections for activities that journalists engage in every day – tasks that range from locating and interviewing sources and gaining their trust, to shooting background footage and conducting tedious background research, to spending hours reviewing raw footage and making editorial decisions about what to include and what will end up on the cutting-room floor.

This case is not about who should prevail in the Lago Agrio Litigation. It is not about the Plaintiffs' colorful counsel, or litigation tactics, or waiver of the attorney-client privilege, or frankly anything other than whether Berlinger, and other journalists in his position, are entitled to any protection for the source materials they choose not to share with the world.

Below, the Chevron Parties came to court with an extraordinary position – based on a few snippets of footage they had identified from this full-length documentary (which was released over a year ago), they made an urgent request for access to every minute (all 600 plus hours) of Berlinger's unseen work. In a truly unprecedented decision, the District Court granted their request.

The resulting Order is so overreaching that even the Chevron Parties have retreated from parts of it. Tellingly, both Chevron and the Individual Applicants have provided this Court with a detailed roadmap for a revised and significantly-narrowed order. *See* C. Br. at 44-45 (footage relating to Plaintiffs and their counsel, the experts and government officials); PV Br. at 31.¹ These proposals seek materials that are well beyond the scope of relevance under this Court’s decision on *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999). However, the fact that they were made sends an unmistakable signal: the existing Order is overbroad, and only the limited subjects the Chevron Parties now identify are, in their opinion, “of likely relevance” to the foreign Proceedings.

The District Court’s Order must be reversed, or at least significantly narrowed, in order to account for and adequately protect the real interest Berlinger has in protecting both his confidential and non-confidential source materials.² This

¹ “C. Br.” refers to Chevron’s brief and “PV Br.” refers to the Individual Applicants’ Brief. “Dole” refers to the Chevron Parties’ amicus Dole Food Company, Inc. and “NACDL” refers to the Chevron Parties’ amicus National Association of Criminal Defense Lawyers. All other capitalized terms and abbreviations have the meaning ascribed to them in Berlinger’s opening brief.

² Berlinger recognizes that he must comply with a significantly-narrowed order compelling production only of specific materials that are “likely relevant” to a significant issue in the Proceedings and not “reasonably available” elsewhere, and limiting the use of that material to the Proceedings at issue. Berlinger also has always been willing to assist the Court in that inquiry and will participate in any creative but deliberative process to help narrow the Order.

Court should also enter a protective order to ensure that the Chevron Parties' use of any Footage that Berlinger is ultimately required to produce be limited to submissions in the Proceeding.

ARGUMENT

I

THE DISTRICT COURT IMPROPERLY DISCOUNTED THE SIGNIFICANT BURDEN, AND FIRST AMENDMENT INTRUSION, THAT COMPELLING THE TURNOVER OF ALL OF THE FOOTAGE WILL CAUSE

One of the gravest errors the District Court committed was its utter failure to consider the burden its broad Order imposes on Berlinger and other journalists. As this Court noted in one of its earliest cases recognizing the journalist's privilege, "freedom 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." *See Baker v. F&F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972).³

The burden at issue is not solely, as the Chevron Parties suggest, a monetary burden, or a burden related only to the time or inconvenience involved in turning over all of the Footage. *See, e.g.*, C. Br. at 49 n.8. Instead, it is the burden squarely placed on Berlinger's incentive, ability, and Constitutional right to access

³ Although Chevron is dismissive of this Court's pre-*Gonzales* decisions, describing them as "outdated," Chevron Br. at 31 n.3, in fact *Gonzales* was a reaffirmation of the principles articulated by those decisions – not a repudiation.

the participants in newsworthy events, learn their stories and create documentary films that provide the public with in-depth analysis of those events. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (recognizing that the First Amendment protects the process of newsgathering, cautioning that “without some protection for seeking out the news, freedom of the press could be eviscerated”).

This Court has interpreted *Branzburg* as holding that “the First Amendment affords a privilege ‘if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation.’” *New York Times v. Gonzales*, 459 F.3d 160, 179 n.8 (2d Cir. 2006) (quoting *Branzburg*, 408 U.S. at 710). The District Court’s Order compelling Berlinger to produce all 600 plus hours of his raw Footage without proof that the material has a relationship to a significant issue in the Proceeding, unquestionably violates that stricture and is “overbroad under the First Amendment.” *Id.*

Both the District Court and the Chevron Parties disregard the chilling effect this will have by erroneously conflating the “burden” associated with the journalist’s privilege with the “burden” associated with the disclosure of confidential sources. *See SPA-18* (concluding that disclosure is not burdensome because it would not “compromise” the ability of a journalist to get information from a source “interested in *confidential* treatment”) (emphasis added). Chevron contends that any concern about the “future filmmakers’ ability to obtain

confidential information is misplaced,” because in this case there “is no secret identity to protect.” C. Br. at 37. But this Court has made clear that the disclosure of both confidential *and* non-confidential materials can have a significant chilling effect. *See Gonzales*, 194 F.3d at 34-35. (“The resulting wholesale exposure of press files to litigant scrutiny would . . . impair its ability to perform its duties, particularly if potential sources were deterred from speaking to the press.”)

Furthermore, both the District Court and the Chevron Parties apply the wrong analysis to reach the predetermined conclusion that disclosure of the Footage would cause no burden. They focus almost exclusively on whether disclosure would have a chilling effect on the subjects of *Crude*, arguing that because Plaintiffs’ counsel allegedly recruited Berlinger to promote their cause and appear in the film voluntarily, they or others like them will not be deterred from participating in future news stories. *See e.g.* C. Br. at 51. *Crude*, however, covers many subjects other than Plaintiffs’ counsel. Moreover, the relevant question is not only whether sources will be discouraged from speaking to the press, but whether this far-reaching Order will have a chilling effect on the incentive and ability of *Berlinger* and other filmmakers to make similar investigative documentaries in the future, the answer to which is a resounding “Yes.” *See* Briefs of Media Amici.

II

THE DISTRICT COURT’S FINDING THAT ALL THE FOOTAGE WAS “LIKELY RELEVANT” TO A SIGNIFICANT ISSUE IN THE FOREIGN PROCEEDINGS IS UNPRECEDENTED AND CANNOT STAND

The Chevron Parties and their amici repeatedly argue that Berlinger is seeking to have *Gonzales* overturned or impermissibly expanded to protect the disclosure of his Footage. *See* C. Br. at 30-31; PV Br. at 1; Dole Br. at 22. But that is not the case. Instead, Berlinger merely asks this Court to hold the District Court to the clear standard *Gonzales* established: that with respect to non-confidential material, the Chevron Parties must show that the material is likely relevant to a significant issue in the foreign Proceedings, and that the information contained in the Footage is not reasonably obtainable from other sources.

Gonzales, 194 F.3d at 36. Nothing more, nothing less.

A. The District Court Impermissibly Twisted Berlinger’s “Unprecedented Access” to the Lago Agrio Litigation Proceedings into a Justification for Turning Over All of His Footage

Both the District Court and the Chevron Parties rely heavily on Berlinger’s “unprecedented access” to “behind the scenes” events to support their conclusion that the Footage is of “likely relevance” to the foreign Proceedings.⁴ *See* SPA-26.

⁴ In any event, Berlinger’s comment that he was given “unprecedented access,” which is repeated as a mantra throughout the Appellees’ briefs, refers not to Berlinger’s access to the Plaintiffs or their counsel, but to the access he received to the judicial system in Ecuador – the very same access that Chevron and its cameras were given as well. A-137; A-587. Yet, both the District Court and the Chevron

According to the District Court, because Berlinger had “unprecedented access . . . there is considerable reason to believe that the outtakes are relevant to significant issues in the Proceedings.”⁵ *Id.*

Yet, “access” to information – even extraordinary, unprecedented access – is the hard-earned reward of the relationship that a journalist builds with his sources, which is critical to the newsgathering process. *See U.S. v. Marcos*, No. SSSS 87 598 CR. 598 (JFK), 1990 WL 74521, at *2 (S.D.N.Y. June 1, 1990) (“[E]ffective gathering of newsworthy information in great measure relies upon the reporter’s ability to secure the trust of new sources.”) As *Gonzales* makes clear, that relationship of trust is one of the principles that the journalist’s privilege is designed to protect, regardless of whether the source is confidential or non-confidential. *See Gonzales*, 194 F.3d at 35. Indeed, it is the strength of that relationship that often determines whether a source decides to remain anonymous, as this Court observed in *Gonzales*. *Id.* By hinging its decision on Berlinger’s “unprecedented access,” the District Court and the Chevron Parties have turned those protected relationships into weapons against the journalist’s privilege.

Parties misleadingly equate “unprecedented access” with “exclusive access,” which is something quite different.

⁵ The District Court also uses Berlinger’s “unprecedented access” as a justification for its holding that his Footage “unobtainable from other sources.” *Id.* at 29 (SPA-29); *Chevron Br.* at 2, 36, 45-46 (referring repeatedly to Berlinger’s “unprecedented access” as basis for the Order).

B. The District Court Improperly Based its Conclusion that All of the Footage was Likely Relevant on the Unwarranted Finding that Berlinger Was Solicited by the Plaintiffs to Tell Only Their Side of the Story

Similarly, the District Court based its finding of “likely relevance” on its erroneous conclusion that Berlinger was “solicited” by Plaintiffs’ counsel to make the Documentary, a charge repeated *ad nauseum* by the Chevron Parties and their amici. *See* SPA-26; *see also* SPA-23 (“[T]here is ample reason to believe that the *Crude* outtakes would be relevant . . . given that Berlinger was solicited by plaintiffs’ counsel.”). Not only is this accusation belied by Berlinger’s own sworn testimony that he retained full editorial control (a statement the Court later holds against him to establish that none of his material is confidential), it is irrelevant to the issue of whether the Chevron Parties have established the likely relevance of the material they seek.

There is nothing in the record to support that Berlinger was solicited or commissioned by the Plaintiffs. In fact, as Berlinger explained to the District Court, he made it clear to Donziger that he was not going to create a one-sided activist film.⁶ A-579 ¶ 14. Instead, *Crude* was independently financed and

⁶ Although the Individual Applicants quote from an article published months before the Chevron Parties filed the Applications, in which Berlinger describes the events that led to his decision to produce *Crude*, (*see* PV Br. at 12) they only include the part where Donziger tries to persuade Berlinger “to tell his clients’ story.” *Id.* In fact, a review of the entire article shows that Berlinger rejected Donziger’s offer as follows:

Berlinger retained complete editorial control over the film at all times.⁷ *Id.* That Donziger initially informed Berlinger about the events in Ecuador in no way suggests that Berlinger produced *Crude* as a means of promoting Donziger’s cause or, as Chevron puts it, “to support their litigation efforts.” C. Br. at 32.⁸

Dole attempts to bolster the Chevron Parties’ argument that the journalist’s privilege should not “encompass a documentary film like this one, which was solicited by Plaintiffs’ counsel to support their litigation efforts” (C. Br. at 31 n.4) by drawing parallels between the Documentary and an unrelated film made about the suit brought against Dole by Nicaraguan farm workers. However, there is nothing in the record to support any connection between the two films, other than

I explained to him that I believe the best way to serve the truth is to explore a situation from all sides without overtly revealing the filmmaker’s viewpoint, allowing each audience member to come up with his or her own conclusion about the events they are witnessing onscreen.

A-120.

⁷ The Documentary actually goes to great lengths to explain Chevron’s position, including its arguments concerning the company’s remediation efforts, the validity of the release, the evidence disputing the claims of contamination, the role of the Ecuadorian government in exploiting the region beginning in the 1960’s, the true financial motives of the Amazon Defense Fund and the Plaintiffs’ attorneys, and the allegation that state-owned oil company, PetroEcuador, not Chevron, bears legal responsibility for the pollution. A-1807 ¶ 8. There is simply no merit to the notion that the Documentary is a propaganda film commissioned by the Plaintiffs.

⁸ There is nothing nefarious about someone approaching a journalist with a story idea. In fact, both *60 Minutes* and *Vanity Fair* also covered the Lago Agrio Litigation after being approached by Donziger. A-1806.

the fact that they both involve claims against corporations alleging large-scale environmental contamination. In support of its extraordinary accusation that Berlinger is nothing more than a propagandist, Dole cites to and relies upon a report issued, *just two days before* Dole submitted its brief, by the U.S. Chamber Institute for Legal Reform (the “ILR Report”). That document, which purports to be an inside look into the “playbook” of unscrupulous plaintiffs’ attorneys, also takes unfair aim at journalists, documentarians and others exercising their First Amendment rights.⁹

Dole and the ILR Report attempt to twist the fact that thirteen international class action suits were the subjects of documentaries into evidence of unscrupulous plaintiffs’ tactics. But, isn’t it more likely that those documentaries were made because allegations of environmental contamination are issues of public concern? It is clear that Chevron and Dole want the Order affirmed to quiet their critics and so that they, and other corporations accused of such wrongdoing, will have another weapon in their arsenal – unfettered access to the unseen materials of journalists covering the proceedings against them. *See* Dole Br. at 10 (“Dole expects it will

⁹ For example, it claims that the Lago Agrio Plaintiffs have “unveiled a striking series of out-of-court tactics to pressure Chevron” that includes such First Amendment-protected activity as “calls for boycotts and city resolutions, news items, photos, videos . . . authoring opinion editorials in newspapers and magazines . . . contacting regulatory authorities; and engaging [sic] a variety of political efforts in the U.S.” ILR Report at 7.

have occasion to avail itself of discovery in aid of these foreign proceedings under 28 U.S.C. § 1782”). That is exactly the “standard operating procedure” that *Gonzales* warned against.

Moreover, even if the Documentary were the opinionated, one-sided presentation the Chevron Parties and Dole accuse it of being (which it clearly is not), that would be irrelevant to the analysis of whether Berlinger is entitled to a journalist’s privilege for his unseen source material. The “touchstone” of the journalist’s privilege is not whether the reporter is “unbiased” because, “by that standard, few, if any, [journalists] could assert the privilege.” *Schiller v. City of New York*, 245 F.R.D. 112, 119 (S.D.N.Y. 2007). The First Amendment does not require “journalists to refrain from drawing conclusions or holding opinions about the subjects on which they are reporting as a prerequisite to protection from compelled disclosure.” *Wright v. Fred Hutchinson Cancer Research Ctr.*, 206 F.R.D. 679, 681 (W.D. Wash. 2002). To the contrary – one of the primary interests “recognized in the journalist’s privilege is the press’ independence in its ‘selection and choice of material for publication.’” *Marcos*, 1990 WL 74521, at *2 (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 124 (1973)). As one district court observed in the context of upholding the journalist’s privilege:

The First Amendment does not favor “objective” reporting, nor is it limited to statements which contain only proven facts. The

opinionated, one-sided, and issue-oriented writings found in the Federalist Papers, abolitionist newspapers, and communist dailies are all entitled to First Amendment protections, regardless of the bias of the authors.

Wright, 206 F.R.D. at 681 n.2.

Similarly, the District Court points to Berlinger’s decision to cut the Cofán meeting scene from one version of the Documentary as support for its relevance holding. SPA-24 to -26. But premising the journalist’s privilege on Berlinger’s choice of scenes or viewpoint would clearly violate his First Amendment rights. “The choice of material to go into a newspaper [or documentary film], and the decisions made as to limitations on the size and content of the paper [or film], and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment.” *Tornillo*, 418 U.S. at 258; *see also Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 391 (1973) (reaffirming “unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial”).

In sum, accepting the District Court’s conclusion that the Footage should not be protected by the journalist’s privilege because of Berlinger’s alleged collaboration with and bias for the Lago Agrio Plaintiffs (a claim which Berlinger vehemently denies) presents the risk of “penalties” being “exacted on the content of speech.” (Dole Br. at 17-18). This is a result the First Amendment does not

tolerate, and even the possibility of such a result illustrates why an “independent examination of the whole record” is warranted. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).

C. Under the District Court’s Application of the *Gonzales* Relevance Standard, All Outtakes from Any News Story about a Lawsuit Would Be Discoverable

In apparent recognition that the handful of scenes they identified to the District Court does not entitle them to all of the Footage, the Chevron Parties now try a new tack. They argue that because the Documentary “is *all about* the conduct of the Lago Agrio Litigation,” the District Court “correctly held that *all* of the outtakes are of likely relevance to the foreign proceedings.” C. Br. at 40; *Id.* at 21, 34, 40, 42. But that is not the *Gonzales* standard. The Chevron Parties must establish that all of the outtakes “are of likely relevance to *a significant issue*” in the Proceedings, not just that they are “about” the Proceedings in general. 194 F.3d at 36 (emphasis added).

In the same vein, the Chevron Parties contend that the mere presence of Plaintiffs’ counsel on the screen entitles them to all of the Footage claiming that, since they “dominate” the film, they “likely dominate the outtakes as well.”¹⁰ However, neither the District Court nor the Chevron Parties successfully explain, nor can they, why that demonstrates likely relevance to a significant issue in the

¹⁰ See, e.g., C. Br. at 1, 4, 7, 9, 21, 36, 39, 40.

Proceedings. Just because Donziger and Fajardo represent the Plaintiffs in the Lago Agrio Litigation, there is no basis to conclude that everything they say or do is “of likely relevance” to a “significant issue” in the Proceedings.¹¹ For example, what is the relevance to the foreign Proceedings of footage showing Fajardo telling his inspiring story of becoming an attorney (A-590 at 00:21:22), giving a tour of his mother’s house in Shushufindi (00:53:46), advising his *pro bono* clients on unrelated human rights matters (00:47:00-00:47:45), or describing the brutal murder of his brother (00:47:45-00:49:02)? How are these scenes or the related outtakes of likely relevance to any issue in the foreign Proceedings, let alone a significant one?

Similarly, Chevron seeks access to footage of the interactions between Plaintiffs’ counsel and their clients, claiming that the attorney-client privilege has been waived. C. Br. at 23-24, 39. But again, Chevron has not established that such undisclosed communications are of likely relevance to a significant issue in the foreign Proceedings. Chevron might argue that materials showing Plaintiffs’ litigation strategy would be advantageous to its defense in the Lago Agrio

¹¹ Moreover, the majority of the Documentary (and, presumably, the unreleased Footage as well) is not about the attorneys. The Chevron Parties certainly have not established the likely relevance of the hundreds of hours of footage showing other subjects, such as indigenous families, Chevron’s representatives, Trudie Styler, a rock concert, public rallies, public site inspections, and shots of earth, plants and animals.

Litigation, but it cannot link those materials to any substantive legal issue in that lawsuit. The journalist's privilege belongs to Berlinger and it is not impacted by any waiver of the attorney-client privilege.

In sum, neither the Chevron Parties nor the District Court can draw the nexus *Gonzales* requires between all of the Footage and a "significant issue" in the Proceedings. Merely relying on the overbroad and illogical pronouncement that "the district court ordered that all of the outtakes from *Crude* be produced because the entirety of *Crude* is about events surrounding the *Lago Agrio* litigation and is thus of 'likely relevance' to the Individual Applicants' defense" is not enough.¹² The unfortunate result of affirming this Order, or failing to significantly limit it, will be a precedent that allows the turnover in the future of all unseen footage from any documentary "about" any lawsuit, as surely that same argument can be made in any case.¹³

¹² Similarly, that the District Court reviewed the DVD and Netflix versions of *Crude* does not support its finding that all 600 hours of outtakes are of likely relevance to a "significant issue" in the foreign Proceedings. C. Br. at 39. Neither the District Court nor Chevron identifies any particular issue as to which the *entire film* would likely be relevant.

¹³ The likelihood of this outcome is demonstrated by the Chevron Parties' amici, who argue strenuously in favor of obtaining protected materials from journalists. See Dole Br. at 10; NACDL Br. at 13-14.

D. The District Court Impermissibly Shifted the Burden to Berlinger to Establish the Non-Relevancy of the Undisclosed Footage

The District Court impermissibly shifted the burden from the Chevron Parties to prove all of the outtakes were likely relevant, to Berlinger to prove they were not, by crediting the Chevron Parties' argument (made again on this appeal) that they do not have access to the unreleased Footage and therefore cannot be expected to identify the particular segments of the Footage they need.

The burden should have remained at all times on the Chevron Parties to show likely relevance; Berlinger was not obligated to provide information about the content of his materials. *See Gonzales*, 194 F.3d at 36. Indeed, the filmmaker's log contains confidential information that cannot be produced without risking waiver of the journalist's privilege. Tr. at 43-47 (A-1579 to -83).

Moreover, it is not Berlinger's fault that the Chevron Parties sought every scrap of Footage he shot, rather than limiting their request to the outtakes surrounding the scenes contained in the Documentary itself. Just as the litigants in *Gonzales* established the relevance of outtakes by pointing to a particular scene on *Dateline*, the Chevron Parties point to particular scenes in *Crude* they contend are relevant. But instead of asking just for the outtakes from those scenes, they requested, and received, permission to obtain *all* of the Footage Berlinger shot. *See Gonzales*, 194 F.3d at 30. The District Court went too far in granting that request.

III

THE INDIVIDUAL APPLICANTS HAVE FAILED TO ESTABLISH THE LIKELY RELEVANCE OF THE FOOTAGE TO THE CRIMINAL PROCEEDINGS

The Individual Applicants argue that they need Berlinger’s Footage because they believe it will show that the criminal proceedings against them are the result of improper collusion between Plaintiffs’ counsel and the Government of Ecuador. But that belief is pure speculation, contradicted by the documentary itself and all of the evidence in the record regarding the actual contents of the Footage. The Individual Applicants also argue that their need is “particularly powerful here” because they seek discovery for a criminal case, but that argument does not justify the District Court’s Order compelling production of *all* of the Footage. An urgent need for information for a criminal defense must still be limited to material that is “likely relevant” to that criminal proceeding (and not to the civil proceeding or the arbitration, or the Individual Applicants’ defense in general) and not reasonably obtainable elsewhere.

A. The Documentary Contains No Evidence of Collusion Between Plaintiffs’ Counsel and the Ecuadorean Government

In their effort to obtain the Footage, the Individual Applicants mischaracterize *Crude* as “document[ing] the successful effort of the plaintiffs’ attorneys to secure the assistance of President Correa, who proceeded to demand the criminal prosecutions that are so advantageous to the *Lago Agrio* plaintiffs.”

PV Br. 13. The Individual Applicants argue that the unreleased Footage is likely relevant to the criminal proceedings in Ecuador because *Crude* “documents the thoughts, plans, and activities of those who devised the criminal charges as their scheme unfolded.” PV Br. 29.

However, not one scene in the Documentary even remotely suggests “collusion” or other inappropriate interactions between Plaintiffs’ counsel and the Government of Ecuador. At most, the documentary shows Plaintiffs’ efforts to foster a fair judicial environment and to develop a relationship with and to persuade the President to take notice of the contamination of the rainforests. *See, e.g.,* A-590 at 00:49:52-00:50:05 (Donziger: “What we need is . . . a political environment in Ecuador where the independence of the judiciary is respected and judges feel like they won’t get thrown out of office if they rule against a multinational company.”). The film then documents efforts by Donziger and others to persuade the President to visit the affected sites in the Amazon. *Id.* at 0:52:50-0:52:53. Donziger expresses his excitement about the President’s eventual visit:

This is historic. I mean we’ve never had a president in Ecuador in all the years of this case ever give a damn about the contamination. This is exactly what we’ve been waiting for, for a long time.

Id. at 1:04:07-1:04:20.¹⁴

The only reference in the documentary to the criminal Proceedings is a two-sentence “text card” at the end explaining that fraud charges were brought against Veiga after his interview was conducted. A-590 at 1:38:00. While Donziger is shown reacting to a public announcement by President Correa concerning the prosecution of officials *in the Ecuadorian government*, there is no basis to infer from this clip that any (much less all) of the outtakes are “of likely relevance” to the alleged collusion between the Lago Agrio Plaintiffs and the Government of Ecuador to bring false criminal charges against the Individual Applicants. *Id.* at 1:05:32-1:05:44.

B. The Unreleased Footage Contains No Material Concerning Any Criminal Proceeding, Much Less Evidence of Improper Collusion

In contrast to the Chevron Parties’ speculative arguments concerning the content of the Footage, Berlinger submitted uncontradicted testimony to the District Court that, beyond what is already contained in the Documentary, the unpublished Footage contains no material regarding the prosecutions against the Individual Applicants or any other criminal prosecution in Ecuador. *See* A-587 ¶ 35. While the Individual Applicants argue that “Judge Kaplan was not required to give any credence to Berlinger’s testimony concerning the content of the Footage,”

¹⁴ Chevron itself admits that it has been aggressively lobbying the Ecuadorian government for decades. *See* A-762; Lago Agrio Plaintiffs Br. at 20-22.

there is absolutely no evidence in the record that rebuts that testimony, and the Footage in the film provides no basis to infer otherwise. Moreover, Berlinger offered the Individual Applicants an opportunity to test Berlinger's testimony by granting them access to all footage showing interactions between Plaintiffs' counsel and President Correa or any prosecutor or official from the executive branch of the Ecuadorian government (which comprises less than 1% of the total Footage). *See* A-1839 to 40. The Individual Applicants' rejection of that offer significantly undermines their purported urgent need for the Footage and suggests that they are on a "fishing expedition" of their own.

C. The *Gonzales* Test, Not a Lower Standard, Applies

The NACDL suggests that this Court should analyze the Individual Applicants' requests under a "reasonableness standard" and not the two-part test enunciated in *Gonzales*. NACDL Br. at 3, 13. They argue that the journalist's privilege simply has no application to a criminal case. But that is not the law in this Circuit.¹⁵ In *U.S. v. Cutler*, 6 F.3d 67 (2d Cir. 1993), this Court found that the journalist's privilege could apply to non-confidential materials in a criminal case,

¹⁵ Other Circuits have also recognized the journalist's privilege in the criminal context. *See, e.g., In re Grand Jury Subpoena of Williams*, 963 F.2d 567 (3d Cir. 1992); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980). Numerous district courts in this and other Circuits have also applied the journalist's privilege in criminal cases. *See, e.g., United States v. Orsini*, 424 F. Supp. 229 (E.D.N.Y. 1976) (quashing subpoenas issued by defendant in criminal trial); *aff'd*, 559 F.2d 1206 (2d Cir. 1977).

but held that the privilege had been overcome in that particular instance because the video outtakes in that case actually captured a crime in progress.¹⁶ *Id.* at 73. Subsequently, in *Gonzales*, this Court made clear that its decision in *Cutler* did not “challenge[] the very existence of a journalists’ privilege for non-confidential materials,” but merely lowered the bar for overcoming that privilege when a criminal defendant is seeking the materials. *Gonzales*, 194 F.3d at 34 n.3.

Here, the Individual Applicants do not allege that Berlinger witnessed the alleged crime or that the outtakes contain directly relevant information such as footage documenting the execution of, or circumstances leading to, the releases that are at the center of the prosecutions against them. Rather, as shown above, the information they seek from Berlinger bears “only a remote and tenuous relationship to the subject” of the criminal proceedings, and requiring Berlinger to disclose all of the outtakes based on the Individual Applicants’ flimsy claim of relevance would violate Berlinger’s First Amendment rights. *See New York Times*,

¹⁶ In all of the cases cited by the NACDL, where the courts held that the privilege had been overcome, as in *Cutler*, the reporter either witnessed the crime or possessed evidence uncontrovertibly relevant to the issue in the criminal prosecution. *See, e.g., New York Times*, 459 F.3d at 160 (reporter knew source of leak that was target of grand jury investigation); *In re: Grand Jury Subpoena (Judith Miller)*, 397 F.3d 964 (D.C. Cir. 2005) (same); *People v. Combest*, 828 N.E.2d 583, 584 (N.Y. 2004) (footage of “defendant’s arrest and subsequent interrogation” by police prior to confession linking him to crime); *U.S. v. LaRouche Campaign*, 841 F.2d 1176, 1177 (1st Cir. 1988) (outtakes included “interview with a prospective key witness”); *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) (same).

459 F.3d at 174 (“The threatened subpoena thus may be overbroad under the First Amendment because it will surely yield some information that bears ‘only a remote and tenuous relationship’ to the investigation.”) (quoting *Branzburg*, 408 U.S. at 710).

IV

UNDER THE DISTRICT COURT’S MISAPPLICATION OF *GONZALES*, INFORMATION CONTAINED IN DOCUMENTARY OUTTAKES COULD NEVER REASONABLY BE OBTAINED FROM OTHER SOURCES

The District Court erred when it held that the inquiry on the second prong of the *Gonzales* test is “whether there is sufficient ground to believe that the *footage* petitioners seek would not reasonably be obtainable elsewhere,” rather than the *information* contained in that footage. SPA-28 (emphasis added); *Gonzales*, 194 F.3d at 36. Similarly, throughout the proceedings below, the Chevron Parties repeatedly asserted that they were entitled to all of the outtakes because the Footage itself was in Berlinger’s sole possession. Obviously, the raw footage itself will always be unobtainable from other sources, and thus will always be subject to disclosure if the District Court’s reasoning is accepted. Belatedly realizing this clear error, the Chevron Parties have now retreated from their previous position and attempt to rewrite the Court’s original Order in an unsuccessful attempt to salvage it. Thus, the Chevron Parties now contend that Judge Kaplan “expressly confirmed that he considered whether the *information* contained in those outtakes

was reasonably available from other elsewhere.” C. Br. at 45 (emphasis added). Yet, in support of this contention, they cite, not to the District Court’s original Order (which clearly contradicts this position), but to the subsequent Postponement Order, in which Judge Kaplan himself apparently tries to recast the basis for his decision. *See* A-1640.12-13 (describing the basis for the District Court’s conclusion as “there is no alternative source for information contained in the Outtakes”).

But the reality is unavoidable. The Order makes clear that the District Court only considered whether the Footage itself was available elsewhere. *See* SPA-28 to -29. Nor could there be any other explanation for the District Court’s overreaching order. Had the court truly considered whether the “information” in the Footage was available elsewhere, the conclusion would have been inescapable: the majority of the information is indeed available from other sources.

Contrary to what the Chevron Parties and the District Court erroneously claim, the majority of the Footage was not the result of any “unprecedented access” given to Berlinger, but is available in a variety of forms from other sources. Much of the Footage was obtained at public events and meetings, which in many cases were recorded by others, including Chevron itself.¹⁷ Indeed,

¹⁷ For example, one of the scenes cited by the District Court to justify its sweeping Order shows Mr. Donziger purportedly using “pressure tactics” by entering the judge’s chambers without Chevron. *See* SPA-24. Yet, this interaction was also

Chevron’s attorneys, often accompanied by their own cameras and film crew, were present at every public hearing and judicial inspection that Berlinger recorded. *See* A-587.

In addition, in order to support its argument that all of the outtakes are of “likely relevance,” Chevron points to “footage depicting the physical appearance of the area and its inhabitants.” C. Br. at 24 n.24. Conveniently, Chevron omits any reference to this Footage in its subsequent argument that the information is “not reasonably obtainable elsewhere.” *Id.* at 45-47. The reason is obvious: Chevron knows that this Footage, on which it relied to establish “likely relevance,” and which comprises a substantial portion of the outtakes, is reasonably obtainable from numerous sources, including Chevron’s own archives.

Any footage of the environmental contamination and its effects would be cumulative or duplicative of the decades-worth of scientific reports and analyses performed by Chevron and the Plaintiffs. Chevron’s own Chief Environmental Scientist admits in the Documentary that Chevron conducted extensive research on the environmental impact of its operations as part of its defense to the litigation. *See, e.g.,* A-590 at 0:32:03-0:32:40 (Chevron engaged internal and external epidemiologists and teams of health assessors to assess link to cancer), 0:38:50-

captured by the Ecuadorian news media, and was included in a video produced by Chevron for its shareholders. A-590 at 0:39:17-0:43:49, 1:01:15.

0:39:14 (“We’ve sampled every stream at every inspection . . .”), 0:46:19 (discussing issue of skin rashes and water contamination). Given the extensive resources Chevron has poured into defending the Lago Agrio Litigation, it simply is not credible for it to suggest that it needs to obtain Berlinger’s random video shots of contamination sites to support its defenses.¹⁸ See, e.g., *U.S. v. Burke*, 700 F.2d 70, 78 (2d Cir. 1983) (given availability of extensive impeachment evidence, any information to be “gleaned” from work papers prepared in connection with *Sports Illustrated* article “would be merely cumulative and thus would not defeat” the journalist’s privilege).

V

UNDER THE DISTRICT COURT’S MISAPPLICATION OF *GONZALES*, NO OUTTAKES WOULD EVER BE CONFIDENTIAL IN THE ABSENCE OF A FORMAL CONFIDENTIALITY AGREEMENT

The Chevron Parties and their amicus Dole argue repeatedly that none of the material at issue here is confidential. In fact, they use that one assessment as the underpinning for much of their analysis as to why all of Berlinger’s Footage must be disclosed.

¹⁸ The court’s justification for this decision is that the Footage ostensibly contains “unimpeachably objective” evidence. See SPA-29. Yet, videotaped footage will, arguably, always contain “unimpeachably objective” evidence, thus swallowing up the rule entirely.

But they do not justify, because they cannot, the District Court’s refusal to accept Berlinger’s evidence regarding his confidential arrangements with his sources. Although Chevron claims that “in a complete failure of proof,” Berlinger failed “to substantiate” his claims of confidentiality “in any way,” the record tells a far different story. Chevron Br. at 33. First, Berlinger submitted his own declaration, which explained at length the confidentiality agreements he reached with his subjects, including Chevron. A-582 to -83. Second, although Chevron claims that “at the April 30 hearing, Berlinger’s counsel chose not to make any showing as to confidentiality,” that is simply untrue. Chevron Br. at 33. In fact, Berlinger’s counsel offered to make more detail regarding Berlinger’s agreements with his subjects available to the Court *in camera* (in order to protect the confidentiality of that information), but the Court refused. A-1565.¹⁹

Chevron and Dole also argue that Berlinger obtained releases from his subjects, and retained editorial control over the Film, and that therefore his subjects had no reasonable expectation of confidentiality. *See, e.g.*, Chevron Br. at 34. But once again, these arguments lack the support of the record, and the force of logic, and should not have been accepted by the District Court. There is no evidence in

¹⁹ Counsel could not have followed the District Court’s suggestion to submit the confidentiality agreements under seal, as while that would have possibly prevented the general public from accessing the information, it would have given Chevron free access.

the record that the single unsigned Release Form submitted by Chevron was signed by any of the subjects of the Film, and the vast majority of Berlinger's subjects either were not asked to, or declined to, execute a release. A-1810. And once again, the fact that Berlinger maintained editorial control over the Film underscores his integrity as a filmmaker and the value of his work, not his failure to preserve confidentiality as the Chevron Parties have suggested.

In sum, the District Court erred in finding that all of the Footage was non-confidential.

CONCLUSION

For the foregoing reasons, Respondents-Appellants respectfully request that this Court vacate the Order of the District Court.

Dated: New York, New York
June 25, 2010

FRANKFURT KURNIT KLEIN & SELZ, P.C.

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ss.:

**AFFIDAVIT OF
CM/ECF SERVICE**

I, Cristina E. Stout, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On June 25, 2010

deponent served the within: **Reply Brief for Respondents-Appellants Joseph A. Berlinger, Crude Productions, LLC, Michael Bonfiglio, Third Eye Motion Picture Company, Inc. and @radical.media**

upon:

See Attached Service List

via the CM/ECF Case Filing System. All counsel of record in this case are registered CM/ECF users. Filing and service were performed by direction of counsel.

Sworn to before me on June 25, 2010

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