

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

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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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.*

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

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

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Respondents-Appellants Crude Productions, LLC (“Crude”), Third Eye Motion Picture Company, Inc. (“Third Eye”) and @radical.media (“Radical”) state as follows:

1. Crude Investments, Inc., a privately-held company, holds a majority interest in Crude. No publicly-owned corporation holds any interest in Crude;
2. Third Eye has no parent company and no publicly-owned corporation owns 10% or more of Third Eye’s stock; and
3. Radical has no parent company and no publicly-owned corporation owns 10% or more of Radical’s stock.

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## **PRELIMINARY STATEMENT**

On this appeal, this Court is called upon to protect a fundamental right of this free society – the journalist’s right to safeguard his editorial materials from compelled disclosure. Joe Berlinger, a documentary filmmaker, has made a critically-acclaimed documentary called *Crude*, which probes the issues surrounding one of the largest environmental lawsuits in history – a seventeen year legal battle between the indigenous people of the Lago Agrio region in Ecuador and the oil conglomerate Chevron.

In a truly unprecedented decision, the District Court has ordered Berlinger to turn over *all* of the previously unreleased footage from *Crude* – over 600 hours worth – to Chevron and two of its employees. The District Court has not in any way limited the scope of the footage these parties may obtain, nor has it placed any restrictions on their public or private use of that footage.

All of Berlinger’s footage is protected by the journalist’s privilege, based on this Court’s decision in *Gonzales v. National Broadcasting Co., Inc.*, 194 F.3d 29 (2d Cir. 1999), and cannot be turned over without severely chilling Berlinger’s ability to make such documentaries in the future, as well as the ability of other journalists and documentary filmmakers to cover important or controversial news stories.

In *Gonzales*, this Court recognized that requiring journalists like Berlinger to unwillingly disclose their resource materials – whether or not they are confidential – threatens their ability to engage in the newsgathering process by deterring potential sources from speaking to the press, burdening journalists with subpoena compliance, and conscripting them as the “investigative arm” of private litigants. The District Court brushed aside these concerns, expressly stating that it did “not credit any assertion that the discovery of the outtakes by the Chevron Parties would compromise the ability of Berlinger or, for that matter, any other film maker, to obtain material from individuals interested in confidential treatment.”

Memorandum Opinion, dated May 10, 2010 (the “Order”), at 18 (SPA-18). This pronouncement disregards decades of legal precedent acknowledging the high value the Constitution and the American public place on a free and active press, and eviscerates the journalist’s privilege designed to protect that freedom.

In addition to ignoring these burdens, the District Court misapplied the two-part test for overcoming the journalist’s privilege set forth in *Gonzales*. First, the District Court erred in granting the Chevron Parties full access to *all* 600 hours of the privileged footage based only on their identification of three isolated scenes in the released film that contain material supposedly relevant to the foreign proceedings. The District Court’s willingness to speculate about the content and relevance of hundreds of hours of footage without a proper foundation is

inconsistent with all prior case law on the subject. Second, rather than inquiring into whether there were alternative sources for the *information* contained in the footage, the District Court erroneously held that there was no alternative source for the *footage itself*. This interpretation of the standard virtually eviscerates the privilege, since, in almost every case, a journalist's original materials, as opposed to the evidence contained in them, will not be available elsewhere.

Finally, the District Court ignored the uncontroverted evidence that Berlinger had entered into confidentiality agreements with many subjects of the film. Disclosing this confidential footage would breach those agreements, making it more difficult for Berlinger – and other journalists – to gain the trust of their sources in the future.

For these and the other reasons discussed below, the Order should be vacated.

### **JURISDICTION**

This appeal is from the Order of the U.S. District Court, Southern District of New York (Kaplan, J.) entered May 10, 2010 granting the applications of Chevron Corporation (“Chevron”) and two Chevron employees, Rodrigo Pérez Pallares (“Pallares”) and Ricardo Reis Veiga (“Veiga”) (collectively, the “Chevron Parties”), pursuant to 28 U.S.C. § 1782 (the “Applications”). The Order permits the Chevron Parties to serve subpoenas (the “Subpoenas”) on Respondents-

Appellants Joseph A. Berlinger (“Berlinger”), Michael Bonfiglio, Third Eye Motion Picture Co., Inc., Crude Productions, LLC and @radical.media (collectively, the “Appellants”) compelling them to produce all of the unreleased raw footage (the “Footage”) from the documentary film entitled *Crude* and to submit to a deposition to authenticate that footage in aid of three separate foreign proceedings: the “Lago Agrio Litigation,” where Chevron is a defendant, an international arbitration relating to the Lago Agrio Litigation, and a criminal action in Ecuador against Pallares and Veiga (the “Proceedings”).<sup>1</sup>

The District Court had subject matter jurisdiction over the Applications pursuant to 28 U.S.C. § 1331 since they arose under 28 U.S.C. § 1782. This Court has jurisdiction over this appeal from a final decision of the District Court pursuant to 28 U.S.C. § 1291. *See In re Application of Silvia Gianoli Aldunate*, 3 F.3d 54, 57 (2d Cir. 1993) (order granting application for discovery under 28 U.S.C. § 1782 is immediately appealable under 28 U.S.C. § 1291); *In re Matter of Letters Rogatory Issued By the Director of Inspection of the Government of India*, 385 F.2d 1017, 1018 (2d Cir. 1967) (Section 1782 order constitutes final, appealable

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<sup>1</sup> Although the Applications, the Order, and the Subpoenas were directed at all of the Appellants, only Berlinger and the production company he formed to produce the documentary have control over the Footage. Therefore, for ease of reference and since he is the party most affected by the Order, these papers will refer to Berlinger when discussing the District Court’s incursion into the journalist’s privilege.

decision). The appeal was timely filed. The Order was entered on May 10, 2010 and the Notice of Appeal was filed on May 14, 2010.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Did the District Court err in compelling Berlinger to produce to the Chevron Parties all 600 hours of the unreleased Footage, where its holding that all of the material contained in that Footage is likely relevant was based solely on its finding that three scenes from the final documentary are relevant to the Proceedings?

Answer: Yes.

2. Did the District Court err in holding that all of the Footage must be turned over, without considering whether the information contained in the Footage is available elsewhere?

Answer: Yes.

3. Did the District Court err in holding that none of the Footage contains confidential material for purposes of application of the journalist's privilege, despite evidence of explicit agreements between Berlinger and his subjects limiting the use of that Footage, and thus fail to apply the stricter standard that must be met before confidential materials are disclosed?

Answer: Yes.

4. Did the District Court abuse its discretion when it determined under

28 U.S.C. § 1782, which requires courts to examine whether a request for discovery in aid of a foreign proceeding is unduly intrusive or burdensome, that the compelled production of the Footage would not have a chilling effect on Berlinger's ability to make documentaries in the future?

Answer: Yes.

5. Did the District Court err when it failed to issue a protective order ensuring that Berlinger's undisclosed privileged Footage would only be used in aid of the Proceedings, as contemplated by Section 1782?

Answer: Yes.

### **STATEMENT OF THE CASE**

On or about April 9, 2010, Chevron, Pallares and Veiga filed the Applications seeking production of all 600 hours of Berlinger's raw Footage and depositions to authenticate that Footage. *See* Applications (A-15-20; A-147-50); Proposed Subpoenas (A-139-46; A-158-95). Berlinger opposed the Applications on the grounds that the Footage is protected by the journalist's privilege and that compliance with such subpoenas would be a burdensome intrusion into his editorial process. *See* Declaration of Joseph A. Berlinger, dated April 22, 2010 ("Berlinger Decl. I") ¶¶ 4, 26, 30 (A-576, 584-85). In addition, the Applications did not meet the statutory requirements or the discretionary factors of 28 U.S.C. §

1782. *See* Declaration of Maura J. Wogan, dated May 20, 2010 (“Wogan Decl. II”), ¶ 6 (A-1643).

On April 30, 2010, the District Court held a hearing on the Applications. *See* Transcript of Proceedings dated April 30, 2010 (“Tr.”), at 1537-86. At the hearing, Berlinger requested that, to the extent that the Court was inclined to grant the Applications, a protective order be issued to preserve the confidentiality of the Footage and to limit its use to the foreign Proceedings. *See id.* at 48 (A-1584). Berlinger argued that Chevron has engaged in an aggressive and well-funded public relations campaign surrounding the Lago Agrio Litigation in order to sway public opinion to its side, *see id.*, and, in the absence a protective order, would immediately disseminate any Footage it believed would give it an advantage in the court of public opinion.

On May 6, 2010, the District Court issued an order granting the Applications in their entirety, which was then corrected by the Order dated May 10, 2010. The Order permits the Chevron Parties to subpoena all 600 hours of Footage and does not limit the use of the Footage to submissions in the Proceedings or prohibit disclosure of the Footage to third parties or the public at large. *See* Order at 31 (SPA-31).

On May 13, 2010, pursuant to the Order, the Chevron Parties served the Subpoenas on the Appellants requiring each of them to produce the Footage and

appear for depositions on May 21, 2010. *See* Declaration of Maura J. Wogan, dated May 14, 2010 (“Wogan Decl. I”) ¶ 3 (A-1633) & Ex. A (A-1633.1-33.38). One day later, on May 14, 2010, Appellants filed a Notice of Appeal (A-1676) and a motion in the District Court to stay the Order pending appeal or, in the alternative, to stay the Order pending this Court’s determination of the stay motion. (A-1630). On May 19, 2010, the District Court held a hearing on the stay motion and, on May 20, 2010, issued an order which, with certain conditions (met by Appellants), postponed Berlinger’s compliance with the Subpoenas from May 21, 2010 until 10 a.m. on May 31, 2010. *See* Memorandum Opinion, dated May 20, 2010 (“Postponement Order”), at 20 (A-1640.20).

On May 20, 2010, Appellants filed a motion in this Court for (i) a stay of the Order pending this Court’s determination of this appeal, (ii) a temporary stay of the Order pending a hearing on the motion for a stay, and (iii) an expedited appeal. On May 21, 2010, this Court granted a temporary stay of the Order pending a resolution of Appellant’s motion for a stay. On June 8, 2010, this Court granted a stay of the Order “until otherwise ordered” and set an expedited briefing schedule for this appeal.

## STATEMENT OF FACTS

### Documentary Filmmaker Joe Berlinger and His Film *Crude*

Joe Berlinger is a 20-year veteran and well-regarded documentary filmmaker. *See* Berlinger Decl. I ¶¶ 5, 11, 23 (A-576, 578, 583). His work has been featured at the Sundance Film Festival and hundreds of other prestigious festivals and theaters around the world, as well as on most major television networks and cable stations. He has received numerous awards recognizing his commitment to excellence in journalism and filmmaking, including two Emmy Awards and the George Foster Peabody Award for excellence in broadcast journalism. Several of Berlinger's films explore the American justice system by covering ongoing criminal trials, such as *Brother's Keeper* (the Delbert Ward murder trial) and *Paradise Lost* (the Robin Hood Hills child murders). *Id.* ¶¶ 6-7 (A-576-77). In recognition of Berlinger's contribution to deepening the American public's understanding of the law and the legal system, he was awarded the American Bar Association's Silver Gavel Award for Media and the Arts.

Berlinger's film *Crude* documents the Lago Agrio Litigation, one of the world's largest and most controversial environmental lawsuits in history. *See* Declaration of Randy M. Mastro, dated April 9, 2010 ("Mastro Decl."), Ex. AA (A-463). Despite the global importance of the issues at stake, the Lago Agrio Litigation had not received wide media coverage in the U.S. until Berlinger made

his documentary. *Id.* (A-465).<sup>2</sup> The lawsuit alleges that oil drilling operations by Chevron's predecessor in Ecuador in the 1960's and 1970's, along with inadequate remediation, have caused massive environmental contamination that has severely damaged the health and habitat of the plaintiffs, who are members of the indigenous communities located in and around Chevron's drilling sites (the "Lago Agrio Plaintiffs"). Berlinger Decl. I ¶ 12 (A-578). Chevron denies any liability and contests the harm. *Id.*

### **Berlinger's Relationships with the Subjects of his Film**

Berlinger began production on *Crude* in November 2005. *Id.* ¶ 15 (A-579). For over three years, Berlinger and his crew travelled through the rainforests of Ecuador to investigate, film and document the people, places and events surrounding the Lago Agrio Litigation. *Id.*

In order to make this documentary, Berlinger attempted to gain access to (or at least capture on film) all of the major participants in the Lago Agrio Litigation, including the attorneys for the plaintiffs and Chevron, the presiding Judge, and court-appointed experts. *Id.* Berlinger also met with community members, including the indigenous Cofán people, local medical professionals and community leaders. *Id.* He reached out to Chevron and negotiated for almost seven months to

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<sup>2</sup> The two publicly-released versions of *Crude* were submitted to the District Court and copies of the DVDs are available in the Appendix at A-589 & 590.

obtain interviews with two senior Chevron executives, Sara McMillen, Chevron's Chief Environmental Scientist, and Ricardo Reis Veiga, one of the appellees here and the Managing Counsel for Chevron Latin America. *Id.*; *see also* Declaration of Joseph A. Berlinger, dated May 27, 2010 ("Berlinger Decl. II"), ¶¶ 6-9 (A-1807-09).

To gain such access and to obtain permission to film his subjects, Berlinger entered into a variety of agreements limiting his use of the Footage. With some subjects, he agreed that he would not use any footage in which they appeared without first obtaining their express authorization. Berlinger Decl. I ¶ 19 (A-582); Berlinger Decl. II ¶ 13 (A-1810). Other times, he agreed that, if a subject requested him to turn off the camera, he would do so and the footage created prior to the request would not be included in the documentary. Berlinger Decl. I ¶ 19 (A-582). Berlinger offered these or other confidentiality arrangements both to representatives of the Lago Agrio Plaintiffs and to Chevron. *Id.* There also were agreements between Berlinger and his subjects that the materials left out of the finished product would remain confidential and not be turned over to third parties for any purpose other than the making of the film. *Id.* ¶ 21 (A-582-83).

Because Berlinger often seeks to film people involved in sensitive, painful or conflict-ridden situations, these types of confidentiality arrangements are his stock in trade. *Id.* ¶ 20 (A-582). Berlinger has testified that, without the ability to

assure his subjects that the footage he is capturing will be used only for the limited purpose of making a documentary, Berlinger and other similarly situated investigative journalists will not be able to undertake this type of long-form investigative film in the future. *Id.*

In addition, as a result of the time and effort Berlinger invested in his relationships with these subjects, they came to believe in his honesty and journalistic integrity, and trusted that he would take the hundreds of hours of raw Footage (from a multitude of sources) and craft it into an accurate portrayal of events by laboring intensively in the edit room. *Id.* ¶ 21 (A-582-83).

The documentary debuted in January 2009 at the Sundance Film Festival. *Id.* ¶ 18 (A-582). Thereafter, *Crude* was shown at over 80 film festivals, both in the United States and internationally, and was distributed in theaters beginning in September of 2009. Berlinger Decl. II ¶ 11 (A-1809-10).

### **Crude Has Received Numerous Awards and Critical Acclaim**

*Crude* has received numerous accolades, including being named one of the Top Five Documentaries of the Year by the National Board of Review, and receiving the award for Best International Green Film at Berlin's prestigious Cinema for Peace festival. Berlinger Decl. I ¶ 18 (A-582). It has garnered over twenty additional international awards from a variety of film, environmental and human rights organizations. *Id.*

The documentary explores the complexities of the Lago Agrio Litigation, and both sides of the issues are well represented. *See Id.* ¶¶ 15-17 (A-579-81); Berlinger Decl. II ¶¶ 5-9 (A-1807-09). For instance, the documentary contains several lengthy clips of an interview with Ms. McMillen discussing Chevron's assessment of the environmental impact of its operations in the region. Berlinger Decl. I ¶ 16 (A-580). It also contains an interview with Mr. Veiga discussing some of Chevron's defenses in the Lago Agrio Litigation, such as its remediation efforts, the validity of the release it obtained from the government of Ecuador, and its allegation that PetroEcuador, another party to the suit, was the actual polluter of the region. *Id. Crude* also includes footage from a video Chevron presented to its shareholders which highlights Chevron's defenses to the Lago Agrio Litigation. Berlinger Decl. II ¶ 9 (A-1809).

Critics who have reviewed the film have focused on its even-handed and balanced treatment of the subject matter. Berlinger Decl. I ¶ 17 (A-580-81). For example, A.O. Scott, a highly respected *New York Times* film critic, wrote:

While Mr. Berlinger's sympathies clearly lie with the oddly matched pair of lawyers – Steven Donziger, a big, outgoing American, and Pablo Fajardo, a wiry, diffident Ecuadorean – who are consumed by the now 16-year-old suit against Chevron, he is fair-minded enough to include rebuttals from the company's executives and in-house environmental scientists. And since this is, in part, a courtroom drama, both sides have a chance to be heard.

*Id.* (A-580).

### **Berlinger Has Always Protected His Raw Footage from Disclosure**

Berlinger has never released raw footage from any of his films to any third party (voluntarily or otherwise). *Id.* ¶ 23 (A-583). In the past, he has aggressively and successfully opposed subpoenas demanding the disclosure of his outtakes. *Id.* Prior to the release of *Paradise Lost*, which covered events surrounding a capital murder trial, the prosecutor and one of the defendants in the case subpoenaed Berlinger to obtain audio tapes of interviews conducted in connection with the film. *Id.* Berlinger opposed the subpoenas on the ground that the audio tapes were protected from discovery under the journalist's privilege, and both of the subpoenas were quashed. *Id.* ¶ 24 (A-583) & Ex. C (A-591-96).

### **The Chevron Parties' Subpoenas Seek All 600 Hours of Footage**

On May 13, 2010, pursuant to the Order, the Chevron Parties served the Subpoenas on Appellants requiring each of them to produce all 600 hours of the Footage and to appear for depositions on May 21, 2010. Wogan Decl. I ¶ 3 (A-1633) & Ex. A (A-1633.1-33.38). The Subpoenas in no way attempt to limit the scope of the Footage sought, or its disclosure to third parties. *See* Wogan Decl. I, Ex. A (A-1633.1-33.38).

### **STANDARD OF REVIEW**

As a general rule, an appeal from an order pursuant to Section 1782 is reviewed for abuse of discretion. Although judicial discretion is "necessarily broad," it "is not absolute." *Malev Hung. Airlines v. United Tech. Int'l, Inc.*, 964

F.2d 97, 101 (2d Cir. 1992) (holding that district court abused its discretion under Section 1782 where it failed to consider proper factors).

However, because of the unique First Amendment freedoms at stake in this case, specifically the freedom of the press, this Court should “‘make an independent examination of the whole record’ in order to make sure ‘that the judgment [of the district court] does not constitute a forbidden intrusion on the field of free expression.’” *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)); *see also Green Party v. New York State Bd. of Elections*, 389 F.3d 411, 418 (2d Cir. 2004) (where case involves “rights protected by the First Amendment” appellate court is “obliged to make an independent examination of the record as a whole, to ensure that the district court’s judgment has not improperly intruded into the field of free expression”).

Finally, where, as here, a party seeks to subpoena editorial materials from a journalist, this Court has held that the appellate court must conduct a “case by case evaluation” that balances the “legitimate competing interests” of a party seeking disclosure of a journalist’s materials against that journalist’s claim to First Amendment protection. *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (applying the balancing test to conclude that reporter’s First Amendment interests outweighed evidentiary needs of criminal defendant).

## SUMMARY OF ARGUMENT

As shown in **Point I** below, requiring Berlinger to produce all 600 hours of Footage from *Crude* violates his First Amendment right as a journalist to engage freely in the newsgathering process without the fear that his materials may be seized at any time by private litigants to further their personal litigation objectives. This right – embodied in the well-established “journalist’s privilege” – ensures that members of the press will be not conscripted to serve as unwilling arms of the legal system and protects them from burdensome and intrusive disclosure requirements that will inhibit their ability to perform their critical social function – to investigate and report on significant, newsworthy events.

In holding that the Chevron Parties had met their burden to overcome the journalist’s privilege, the District Court erred in at least four ways. First, the Court failed to recognize or consider the substantial burden that such disclosure would impose on Berlinger, as well as other members of the journalist community. This Court has long recognized that forcing journalists to produce their editorial materials will substantially impinge on their ability to conduct critical newsgathering and investigative activities. The District Court expressly refused to “credit” the existence of such a burden in connection with the disclosure of nonconfidential materials, even though *Gonzales* explicitly recognizes such a burden for both confidential and nonconfidential materials.

Second, the District Court erroneously held that all 600 hours of Footage were of likely relevance to the Proceedings, based solely on the purported relevance of three scenes in the film. In fact, the District Court expressly absolved the Chevron Parties of their burden to prove the relevance of the Footage, holding that the Chevron Parties “cannot reasonably expect to identify with particularity the outtakes” relevant to their claims, because the “knowledge of their content lies exclusively with Berlinger.” Order at 27 (SPA-27). Thus, the District Court disregarded one of the essential requirements for overcoming the journalist’s privilege articulated by this Court in *Gonzales*.

Third, the District Court erroneously held that, to overcome the privilege, the Chevron Parties need only prove that the *Footage* itself was not available elsewhere, rather than requiring them to establish that the *information* contained in the Footage could not reasonably be obtained from other sources. Thus, the District Court ordered production of the Footage without requiring the Chevron Parties to demonstrate that they had made reasonable efforts to seek the information from other sources.

Finally, the District Court erroneously held that all of the Footage was nonconfidential (and thus subject to less rigorous protections than confidential material), ignoring uncontroverted evidence that Berlinger had entered into confidentiality agreements with many of his documentary subjects.

**Point II** establishes that the District Court erroneously applied at least one of the discretionary factors under Section 1782 by failing to give sufficient weight to the substantial burden that production of the Footage would place on Berlinger's First Amendment rights, and the chilling effect such a broad order would have on other journalists and documentary filmmakers.

Finally, **Point III** establishes that, even if some Footage is subject to disclosure, the District Court abused its discretion by denying Berlinger's request for an order limiting the use of the Footage to the foreign Proceedings, as contemplated by Section 1782, and keeping it confidential within those Proceedings.

For these reasons, the Order compelling Berlinger to produce all of the Footage should be reversed.

## **ARGUMENT**

### **I**

#### **THE DISTRICT COURT ERRED IN COMPELLING PRODUCTION OF ALL OF THE UNDISCLOSED FOOTAGE FROM CRUDE WITHOUT REGARD FOR THE JOURNALIST'S PRIVILEGE**

The District Court committed reversible error by ordering disclosure of all 600 hours of the Footage. This unprecedented decision failed to give due consideration to the journalist's privilege, ignored the interests underlying that

privilege, and incorrectly applied the legal standards designed to protect those interests. The Order must be vacated.

**A. The District Court Erred in Holding that the Non-Confidential Portions of the Footage Should Be Turned Over to the Chevron Parties**

There is no doubt that this Court recognizes “a qualified privilege for journalistic information.” *Gonzales*, 194 F.3d at 32. The leading case in this area, *Gonzales*, sets forth the roadmap that a court must follow in determining whether a journalist’s undisclosed materials should be turned over in response to a subpoena. Analysis of that case also clearly shows where this District Court went off course.

In *Gonzales*, the parties to a civil litigation sought undisclosed footage from a Dateline NBC program about unlawful police stops. *Id.* at 31. In ultimately holding that the parties were entitled to a limited portion of the footage (only the footage regarding one particular police stop, not *all* of NBC’s undisclosed footage for the entire program), this Court described at length how unrestricted third-party discovery into a journalist’s resource materials would impose an impermissible burden on journalists and create a chilling effect on news coverage. *Id.* at 32-36. In recognition of that substantial burden, this Court held that both confidential and non-confidential materials are protected by the journalist’s privilege, *id.* at 35, and that to gain access to non-confidential materials, a third party must show, not only that the materials are likely to be relevant to a significant issue in the underlying

proceedings, but also that the information contained in those materials is not reasonably obtainable from any other source. *See id.* at 36.

The District Court first erred here by completely refusing to credit the burden on Berlinger that the unrestricted production of all of the Footage to the Chevron Parties will cause, and then compounded that error by applying the *Gonzales* two-prong test in a manner that rendered it meaningless.

**1. The District Court Erred by Failing to Consider the Burden its Order Places on Berlinger and Other Journalists**

In ordering that the Chevron Parties were entitled to all of the Footage, the District Court ignored completely the evidence Berlinger presented of the chilling effect that compliance with the Subpoenas will have on his future work. It held that:

[T]he Court does not credit any assertion that the discovery of the outtakes by petitioners would compromise the ability of Berlinger or, for that matter, any other film maker, to obtain material from individuals interested in confidential treatment. These subpoenas would impose no undue burden on respondents.

Order at 18 (SPA-18). In refusing even to consider, much less recognize, the burden imposed on Berlinger (and other journalists) by requiring production of non-confidential material, the District Court committed reversible error.

In *Gonzales*, this Court explained the heavy burden that would be imposed on journalists absent a privilege for non-confidential material:

If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise *impair its ability to perform its duties-particularly if potential sources were deterred from speaking to the press*, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation. Incentives would also arise for press entities to clean out files containing potentially valuable information lest they incur substantial costs in the event of future subpoenas. And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the *symbolic harm of making journalists appear to be an investigative arm of the judicial system*, the government, or private parties.

*Gonzales*, 194 F.3d at 35 (emphasis added).

As detailed in Berlinger’s submissions to the District Court, the concerns articulated in *Gonzales* are particularly relevant to Berlinger’s work as an investigative documentary filmmaker.<sup>3</sup> See Berlinger Decl. I ¶¶ 4, 19-30 (A-576, 582-85); Berlinger Decl. II ¶ 14 (A-1810) & Exs. F-M (A-1826-37).

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<sup>3</sup> The District Court correctly determined that Berlinger was entitled to claim the journalist’s privilege because he “investigated ‘the events and people surrounding’ the Lago Agrio Litigation, a newsworthy event, and disseminated his film to the public.” Order at 20 (SPA-20); see also *Gonzales*, 194 F.3d. at 35 (holding that journalist’s privilege attached to NBC’s Dateline footage); *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987) (“[A]n individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press.”).

The subjects of Berlinger's films, like those of most documentaries, are only willing to grant him access into their lives and communities because they trust that he is a neutral outsider and not an advocate for either side of the controversy. *See* Berlinger Decl. I ¶¶ 19-22 (A-582-83); *see also United States v. Marcos*, No. 87 Cr. 598, 1990 WL 74521, at \*2 (S.D.N.Y. June 1, 1990) (recognizing that “effective gathering of newsworthy information in great measure relies upon the reporter’s ability to secure the trust of news sources”). There is no doubt that the trust so fundamental to Berlinger’s ability to make documentary films would be undermined if his subjects think that their statements, stories, and comments can be seized at any time, taken out of context, edited, and used to further the personal agendas and interests of private litigants. *See* Berlinger Decl. I ¶ 30 (A-585).

The same is true for other journalists and documentary filmmakers, as shown by the passionate outpouring from members of the press and media in response to Judge Kaplan’s overreaching Order. *See* Wogan Decl. I, Exs. C & D (A-1636-40); Berlinger Decl. II ¶¶ 14-15 (A-1810-11) & Exs. G-M (A-1828-34). The reaction from these professional journalists reinforces what one court has wisely observed: “Many doors will be closed to reporters who are viewed as investigative resources of litigants. The hindrance to the free flow of information which accompanies this perception is inimical to the First Amendment.” *Marcos*, 1990 WL 74521, at \*2; *see also Gonzales*, 194 F.3d at 35 (noting the “symbolic

harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties”).

More generally, as this Court has recognized, without the ability to protect their resource materials, journalists covering controversial topics that either are – or are likely to be – the subject of litigation, will be bombarded with subpoenas, an untenable situation that will discourage them from covering contentious issues, distract them from newsgathering, and encourage them to destroy their work product as a precautionary measure.<sup>4</sup> *See Gonzales*, 194 F.3d at 35.

By ignoring this important consideration, and the ramifications of its decision on both Berlinger and the journalist community at large, the District Court committed a fundamental error and the Order must be vacated. *See Wogan Decl. I, Exs. C & D (A-1636-40); Berlinger Decl. II, Exs. G-M (A-1828-34).*

## **2. The District Court Erred in Holding That *All* of the Footage Was Relevant to the Proceedings**

The District Court’s determination that all 600 hours of Footage are of likely relevance to the Chevron Parties’ claims, based solely on the purported likely relevance of three scenes in the released film, constituted an unwarranted leap in

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<sup>4</sup> The District Court’s observation that “the burden of resisting the subpoenas undoubtedly already has imposed a greater burden on Berlinger than compliance” misses the point. Order at 18 (SPA-18). The same could be said for anyone who elects to assert any legal right they possess. Moreover, the burden here is not simply administrative or financial, but one that impacts Berlinger’s ability to continue making documentaries that delve into complex and controversial issues.

logic that runs contrary to well-established law. None of the prior decisions in this Circuit ordering the production of undisclosed footage have gone nearly so far. Instead, they have limited production to only a small portion of the undisclosed footage surrounding the relevant segment appearing in the released work. *See, e.g., Gonzales*, 194 F.3d at 32 (litigants who established relevance of five video clips of a questionable police stop aired on episode of *NBC Dateline* were only entitled to outtakes of that same police stop, not undisclosed footage from the entire program); *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993) (news stations that broadcast snippets of criminal defense attorney's public statements about criminal trial were compelled to produce outtakes of only those statements); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1177 (1st Cir. 1988) (ordering NBC to produce outtakes only of interview with a prospective key witness, where portion of interview was broadcast); *Saperstein v. Palestinian Authority*, No. 09-mc-00619, 2010 WL 1371384, at \*3 (E.D.N.Y. Apr. 9, 2010) (granting a "narrow" request to produce unedited interviews of two individuals from BBC documentary).

In each of these cases, where portions of a scene (a police stop or an interview) had been broadcast, and the reviewing court found that the scene was relevant to issues in the lawsuit, it required the journalist to produce not the entire corpus of the undisclosed footage, but instead only the outtakes from that relevant

scene. The link between the relevance of the broadcast material and the relevance of the outtakes was inexorable. The orders requiring the production of the outtakes were narrowly tailored and did not permit the requesting party to sift through *all* of the journalists' footage based on unsupported speculation about what that footage might contain.

In stark contrast to those decisions, the District Court's Order draws an unreasonable inference that, because essentially three scenes in *Crude*, amounting to less than ten minutes of screen time, contain allegedly relevant material, *all* of the undisclosed Footage filmed by Berlinger must be of likely relevance to the foreign Proceedings and therefore discoverable.<sup>5</sup> *See* Order at 26 (SPA-26) (the existence of those three scenes "*amply supports* an inference that the outtakes contain additional relevant material") (emphasis added). Even assuming that the

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<sup>5</sup> Those three purportedly relevant scenes depict: (i) an interaction between plaintiffs' counsel and an individual who was subsequently made a court-appointed expert; (ii) an interaction between plaintiffs' counsel and an Ecuadorian judge; and (iii) and an interaction between plaintiffs' counsel and a member of the Ecuadorian government. *See* Order at 25 ("Any interaction between plaintiffs' counsel and a supposedly neutral expert in the Lago Agrio litigation. . . . [p]laintiffs' counsel's interactions with the Ecuadorian judiciary and government officials . . . would be relevant"); 26 (outtakes likely relevant to "whether plaintiffs' counsel improperly influenced expert witnesses and the GOE"); 27 (outtakes likely relevant to "whether the prosecutions were motivated by a desire to put pressure on Chevron in the Lago Agrio Litigation and the role, if any, plaintiffs' counsel and the GOE played in the those proceedings"); and 29 ("raw footage" relevant to "evidence of any misconduct on the part of plaintiffs' counsel, expert witnesses, or the GOE"). (SPA-25-27, 29).

ten minutes or less of Footage are of likely relevance to the Proceedings, that does not “amply” – or even remotely – support an inference that all 600 hours (36,000 minutes) of “the outtakes” contain additional relevant material. *Id.*<sup>6</sup>

The District Court’s reasoning is circular, effectively reversing the burden of proof on the journalist’s privilege. Rather than requiring the Chevron Parties to establish the likely relevance of the Footage, as required by *Gonzales*, the District Court assumed that *all* the Footage was of likely relevance, because the Chevron Parties could not “reasonably be expected to identify with particularity the outtakes that they seek where knowledge of their content lies exclusively with Berlinger.” Order at 27 (SPA-27). Furthermore, the District Court put the onus on Berlinger, criticizing him for “refus[ing] to provide any information whatsoever as to the content of the outtakes.” *Id.*<sup>7</sup> Finally, during the course of the hearing, the District

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<sup>6</sup> In its Postponement Order, the District Court asserted that its finding that all of the Footage was of likely relevance, relied not only on the likely relevance of the three segments discussed above, but also on its finding that Steve Donziger, counsel for the Lago Agrio Plaintiffs, appears in numerous scenes throughout the released film. *See* Postponement Order at 9-10 (A-1640.9-40.10). However, while Donziger does appear in many scenes, the vast majority of the footage used in *Crude* (and, presumably, the unreleased Footage) does not include him. Moreover, Donziger’s mere presence in the film cannot possibly suffice to establish the likely relevance of all the remaining Footage. Not everything Donziger does or says can be relevant to the underlying Proceedings.

<sup>7</sup> In fact, the film itself contains sufficient evidence for the Chevron Parties to identify with particularity the outtakes they were seeking. Each and every scene in *Crude* contains evidence of the content of the unreleased Footage. The Chevron Parties could satisfy the relevancy test by identifying scenes in *Crude* that are

Court declared that, if Berlinger had disclosed the content of the Footage to the Chevron Parties, he would have waived his right to assert the journalist's privilege. Tr. at 43-47 (A-1579-83). Thus, the Court not only improperly shifted the burden of proof, but then made it impossible for Berlinger to meet that burden without waiving his privilege.

This Court has consistently rejected such sweeping demands for outtakes as inappropriate fishing expeditions. *See Krase v. Graco Children Prods. (In re NBC, Inc.)*, 79 F.3d 346, 352 (2d Cir. 1996) (baby crib manufacturer seeking *Dateline NBC* outtakes failed to demonstrate specific need for unaired footage merely because broadcast portions were relevant); *see also United States v. Karen Bags, Inc.*, 600 F. Supp. 667, 669-71 (S.D.N.Y. 1985) (Motion seeking raw footage from *60 Minutes* episode was “at most based on a hypothesis or ‘hunch,’ lacking a logical basis, that because there are ‘outtakes’ which show [the witness] speaking, he must have said something which reflects adversely on his own credibility or demonstrates the innocence of [movant].”).

The Order gives the Chevron Parties *carte blanche* to “sift through” the Footage “in search of information supporting their claims,” precisely the type of

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relevant to the foreign Proceedings, and an appropriately-tailored order would require Berlinger to produce only the outtakes from *those particular scenes*, just as the Court directed in *Gonzales*. *See* 194 F.3d at 36 (ordering NBC to produce only the outtakes from a particular scene shown on *Dateline*).

fishing expedition this Court warned would become “standard operating procedure” in the absence of the journalist’s privilege. *Gonzales*, 194 F.3d at 35; *see also Karen Bags*, 600 F. Supp. at 669 (“[S]uch a request to compel disclosure of media files for this sort of fishing expedition should not be lightly granted.”). Accordingly, the District Court’s Order should be vacated.

**3. The District Court Applied the Wrong Standard When Considering Whether the Information was Available from Other Sources**

The District Court also erred in holding that the Chevron Parties had met the second part of the *Gonzales* test by demonstrating that the Footage – as opposed to the *information* contained in the Footage – was not reasonably obtainable from other sources. *See Gonzales*, 194 F.3d at 31, 36; Order at 29 (SPA-29).

The Court erred in holding that the relevant inquiry was “not whether the *evidence* petitioners seek would shed light on issues such as the existence and source of any pollution in the Ecuadorian Amazonian forests,” but “whether there is sufficient ground to believe that the *footage* petitioners seek would not reasonably be obtainable elsewhere.” Order at 28 (SPA-28) (emphasis added). The flaw in that logic is that a journalist’s private source materials – as opposed to the information contained in those materials – are almost never obtainable from a source other than the journalist. By framing the availability analysis as a tautology – a journalist’s privileged materials (which are generally only available to the

journalist) are unavailable from other sources and, therefore, discoverable – the District Court essentially eviscerated the second prong of the test, a result that flies in the face of the holding in *Gonzales*. See 194 F.3d at 36 (holding that “the outtakes *contain information* that is not reasonably obtainable from other available sources”) (emphasis added).

The relevant inquiry is not whether the “footage” can be obtained elsewhere, but whether there is an “adequate substitute for the *information* that may be obtained by the videotapes.” *Gonzales*, 194 F.3d at 36; see also *Blum v. Schlegel*, 150 F.R.D. 42, 45-46 (W.D.N.Y. 1993) (denying motion to compel production of law student’s taped interview with law school dean on the ground that plaintiff failed to seek the information first through other means, including deposing the dean).<sup>8</sup>

Here, as Berlinger testified, information contained in the undisclosed Footage is available from other sources. For example, the Chevron Parties allege that they need the undisclosed Footage because it contains evidence of harm allegedly caused by the oil company’s activities. See Applications (A-148). Berlinger does not deny that *Crude* contains footage showing environmental

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<sup>8</sup> As the court noted in *Blum*, “[t]he cases clearly establish that ‘all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press.’” *Id.* at 46 (quoting *Branzburg*, 408 U.S. at 707 n.41).

contamination of this region, and it may be reasonable to infer that the unreleased Footage contains additional material in this regard. However, that evidence is certainly available from other sources, including decades-worth of scientific reports and analyses performed by Chevron and the Lago Agrio Plaintiffs in connection with the Lago Agrio Litigation.

Similarly, much of the Footage was filmed at public meetings or events, involving numerous participants – all of whom could be interviewed or deposed about those events. Berlinger Decl. I ¶ 34 (A-587) Representatives of Chevron were often present when Berlinger’s cameras were rolling and, in some cases, the events were recorded by other media outlets and by Chevron itself. *Id.* Yet, the District Court imposed no requirement on the Chevron Parties to demonstrate that they had taken any steps to obtain the information in Berlinger’s Footage from any other sources, including interviewing or deposing witnesses, obtaining copies of other publicly-aired footage, or even getting the information from their own employees who attended – and often filmed – the events themselves.

Accordingly, the District Court erred in holding that the second prong of the *Gonzales* test was met without considering whether the information the Chevron Parties seek is available from other sources.

**B. The District Court Erred in Holding that None of the Undisclosed Footage is Confidential**

The District Court committed reversible error in finding that Berlinger's assertions concerning the confidential nature of his material were "conclusory" and that he had "not sustained his burden of demonstrating confidentiality for purposes of the journalist privilege." Order at 23 (SPA-23).

The District Court failed to consider Berlinger's uncontroverted sworn testimony in which he described the nature of his confidential relationships with his sources in as much detail as possible, without revealing confidential or privileged information. *See* Berlinger Decl. I ¶¶ 19-22 (A-582-83). Berlinger described his express agreements with certain sources that he would not release any footage in which they appeared without first obtaining their express authorization. *Id.* ¶ 19 (A-582). He also testified about his express agreements with certain sources that he would not use any footage he filmed right before a subject asked him to turn off the camera. *Id.* Finally, Berlinger described in detail the agreements he had with his sources that he would not use the Footage for any purpose other than to create a documentary film that conveys a comprehensive story – a story that those sources trusted Berlinger to tell. *Id.* ¶¶ 19-21 (A-582).

Berlinger also offered to submit to the District Court, for its *in camera* review, additional details concerning the identity of these confidential sources and the particular footage covered by those confidentiality agreements. Tr. at 29 (A-

1565). The District Court rejected that request, suggesting that Berlinger should have made an application to file under seal any “sensitive” materials. *Id.* However, Berlinger could not have disclosed the identity of his confidential sources under seal without, at the same time, disclosing that confidential information to the Chevron Parties.

The District Court also erred when it found that Berlinger’s claim of confidentiality was contradicted by “the standard form of release he obtained from his subjects, which granted him *carte blanche* to use all of the footage in his production.” Order at 21 (SPA-21) (citing Declaration of Kristen L. Hendricks, dated April 29, 2010, Ex. PP (A-1108) (“Release Form”). The District Court concluded that, although “Berlinger no doubt won the confidence of many of his subjects,” the “standard release that his subjects signed, however, expressly disclaims any expectation of confidentiality.” *Id.* at 22 (SPA-22). Yet, there is no evidence in the record that the single unsigned Release Form submitted by Chevron was signed by any of the subjects of the documentary. Instead, Berlinger’s uncontradicted testimony establishes that the “vast majority of subjects in *Crude* were either not asked to, or declined to execute, a release form.” Berlinger Decl. II ¶ 12.

Moreover, the language of the unsigned Release Form is not as broad as the District Court describes. Indeed, the Release Form expressly permitted Berlinger

to use the Footage only in connection with a publicly-released “nonfiction production,” and, conversely, restricted Berlinger from using the unreleased footage for any other purpose.<sup>9</sup> Accordingly, the Release Form is entirely consistent with the nature of the confidentiality agreements described by Berlinger, and entirely inconsistent with wholesale production of all of the Footage to the Chevron Parties.

The District Court should have held that the Footage contains confidential material; applied the stricter standard for overcoming the journalist’s privilege in connection with such confidential material; and determined whether the Chevron Parties had made “a clear and specific showing” that the information in the Footage is (1) “highly material and relevant,” (2) “necessary or critical to the maintenance of the claim,” and (3) not obtainable from other available sources – a standard the Chevron Parties could never have met. *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir. 1982).

<sup>9</sup> The Release Form reads, in relevant part, as follows:

I hereby confirm that I willingly participated in a documentary film production about the Ecuadorian class action lawsuit against Chevron-Texaco (my “Contribution”). I understand and acknowledge that *the filmmakers may use my Contribution in connection with the creation of a nonfiction production* (the “Production”) which may be released or licensed theatrically, non-theatrically, on television, on home video or similar viewing devices, on the Internet and/or in any other media now known or hereafter invented.

Release Form (A-1108) (emphasis added).

## II

**THE DISTRICT COURT ABUSED ITS DISCRETION WHEN, APPLYING THE *INTEL* FACTORS, IT HELD THAT THE COMPELLED PRODUCTION OF ALL THE FOOTAGE FROM *CRUDE* WOULD NOT BE “INTRUSIVE OR BURDENSOME” TO BERLINGER**

The District Court abused its discretion under 28 U.S.C. § 1782 by compelling the Filmmakers to produce the raw Footage to the Chevron Parties for use in the foreign Proceedings.

Although the decision to grant discovery under Section 1782 is discretionary, the Supreme Court and other courts have enumerated factors intended to guide that discretion, including whether the subpoena is “unduly intrusive or burdensome.” *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004). Here, the District Court not only ignored that the Footage *was* protected by a legally applicable privilege<sup>10</sup> – the journalist’s privilege – but it also erred in failing to give sufficient weight to the substantial burden that compliance with the Subpoenas will place not only on Berlinger’s First Amendment rights.

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<sup>10</sup> Section 1782 expressly precludes the production of privileged testimony or documents. 28 U.S.C. § 1782 (“A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.”); *see also Intel*, 542 U.S. at 260 (“We note at the outset, and count it significant, that § 1782(a) expressly shields privileged material.”).

As discussed above, the Subpoenas are unduly intrusive and burdensome, because requiring Berlinger to produce all 600 hours of Footage will have a chilling effect on his ability – and the ability of other journalists – to develop relationships with sources and to make documentaries reporting on important and newsworthy topics. *See supra* Point I.A.1. Nevertheless, the District Court expressly refused to “credit any assertion that the discovery of the outtakes by petitioners would compromise the ability of Berlinger or, for that matter, any other filmmaker, to obtain material from individuals interested in confidential treatment.” Order at 18 (SPA-18).

The District Court was also dismissive of the significant public interest at stake in this matter and gave short shrift to one of the most fundamental elements of a free society – a free press. The substantial public interest in this case was reflected in the immediate response, indeed, tremendous outcry, from many of this country’s most talented and important journalists and documentary filmmakers – each concerned about the impact of the Order on his or her ability to pursue investigative journalism without interference by the courts or private litigants in their editorial process. *See* Wogan Decl. I, Exs. C & D (A-1636-40); Berlinger Decl. II, Exs. G-M (A-1828-34).

For these reasons, the District Court abused its discretion in determining that the Chevron Parties’ interests in bolstering their defenses in the foreign

Proceedings outweighed the substantial burden on this U.S. journalist's constitutional rights, as well as the public's interest in preserving the freedom of the press. The Order should be vacated.

### III

#### **THE DISTRICT COURT ERRED WHEN IT HELD THAT BERLINGER WAS NOT ENTITLED TO A PROTECTIVE ORDER LIMITING CHEVRON'S USE OF THE FOOTAGE**

The District Court erred when it rejected Berlinger's request for a protective order ensuring that Berlinger's undisclosed, privileged and confidential Footage would only be used in aid of the Proceedings, as contemplated by Section 1782 and would be kept confidential in the context of the Proceedings.

First, the District Court does not limit the Chevron Parties' use of the Footage to the Proceedings specified in the Applications: the Lago Agrio Litigation, where Chevron is a defendant, the international arbitration relating to the Lago Agrio Litigation, and the criminal action in Ecuador against Pallares and Veiga. The Order imposes no restrictions on use of the Footage, effectively giving the Chevron Parties *carte blanche* to use, copy, edit, and distribute the Footage in any manner, for any purpose they choose.

Moreover, it is likely that Chevron will use the Footage outside the scope of the Proceedings. Chevron's website at [www.chevron.com/ecuador](http://www.chevron.com/ecuador) is only part of its massive public relations campaign related to the Proceedings. The website

includes regular litigation updates and press releases, as well as extensive documentation and information obtained by the Chevron Parties from third parties pursuant to other Section 1782 applications.<sup>11</sup>

Because a court is only authorized under Section 1782 to allow discovery where that discovery will be used in a proceeding before a foreign tribunal, the District Court erred here by failing to limit the Chevron Parties' use of the Footage to the Proceedings. *See* 28 U.S.C. § 1782; *Intel*, 542 U.S. at 247; *In re Gemeinschaftspraxis Dr. Med. Schottdorf*, No. Civ. M19-88, 2006 WL 3844464, at \*4 (S.D.N.Y. Dec. 29, 2006).

If it was inclined to allow production of any of the Footage, let alone *all* of it, the District Court also should have required the Chevron Parties to keep the Footage confidential within the context of the Proceedings. *See, e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (noting that “the trial court’s order allowing discovery was extremely broad,” raising the very “concerns that justifiably may prompt a court to issue a protective order”); *In re Malev Hung. Airlines*, 964 F.2d at 99 (noting that district court has authority under section 1782 and Fed. R. Civ. P. 26 to impose reasonable limitations and conditions upon

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<sup>11</sup> Indeed, a press release issued by Chevron during the lower court proceedings makes clear that Chevron is using the Section 1782 proceedings for publicity purposes. *See* “Proceedings Reveal New Evidence of Fraud and Plaintiffs’ Undisclosed Links to Ecuadorian Court Expert Richard Cabrera,” at <http://www.chevron.com/news/press/release/?id=2010-05-24>.

discovery); *In re Imanagement Servs. Ltd.*, No. Misc. 05-89, 2005 WL 1959702, at \*6 (S.D.N.Y. Aug. 16, 2005) (finding that “there may be confidentiality concerns that should be addressed before discovery [pursuant to 28 U.S.C. § 1782] is permitted” and referring to magistrate judge to address any limitations on scope “or restrictions to maintain the confidentiality of documents and testimony”); *Minatec Fin. S.A.R.L. v. SI Group, Inc.*, No. 08 Civ. 269, 2008 WL 3884374, at \*8 (N.D.N.Y. Aug. 18, 2008) (“[T]he beauty of § 1782 is that it permits [a] Court to impose a protective order that would extinguish any concern that privileged, confidential, or proprietary information would be indecorously revealed.”).


For the reasons set forth above, before ordering the production of any of the Footage, the District Court should have issued a protective order prohibiting the Chevron Parties from using the Footage for any purpose other than the Proceedings and requiring that the Footage be kept confidential within the context of the Proceedings.

**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 14, 2010

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**CERTIFICATE OF COMPLIANCE**

As counsel of record to the Respondents-Appellants, I hereby certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. I am relying upon the word count of the word-processing system (Microsoft Word) used to prepare the brief, which indicates that 8,956 words appear in the brief.

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