10-1918-cv(L),

10-1966-cv(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHEVRON CORPORATION, RODRIGO PEREZ PALLARES, and RICARDO REIS VEIGA,
Petitioners-Appellees,

v.

JOSEPH A. BERLINGER, CRUDE PRODUCTIONS, LLC, MICHAEL BONFIGLIO, THIRD EYE MOTION PICTURE CO., INC., @RADICAL.MEDIA, and LAGO AGRIO PLAINTIFFS,
Respondents-Appellants.

On Appeal From the United States District Court
For the Southern District of New York

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEES PALLARES AND VEIGA URGING AFFIRMANCE

Richard D. Willstatter
GREEN & WILLSTATTER
200 Mamaroneck Ave., Suite 605
White Plains, NY 10601
Telephone: (914) 948-5656

John D. Cline
K.C. Maxwell
115 Sansome Street, Suite 1204
San Francisco, CA 94104
Telephone: (415) 747-8287

Attorneys for Amicus Curiae National Association of Criminal Defense Lawyers

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INTEREST OF AMICUS CURIAE

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.[1]

NACDL was founded in 1958. It has a nationwide membership of more than 10,000 and an affiliate membership of more than 35,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in the Supreme Court and the courts of appeals, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] Counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

NACDL has decided to submit an amicus brief in this case to emphasize the interest of the individual appellees, who face criminal charges in Ecuador, in obtaining information helpful to their defense through 28 U.S.C. § 1782. Under circumstances such as these, in the view of the NACDL, the criminal defendants' concrete and urgent interest in presenting a full defense plainly outweighs the interest of a documentary filmmaker in withholding nonconfidential outtakes.[2]

SUMMARY OF THE ARGUMENT

It is a bedrock principle of due process that a person charged with a serious crime, and faced with loss of liberty, should have a full and fair opportunity to obtain information helpful to his defense. The courts of this country permit only a few well-established and narrowly drawn privileges to outweigh the accused's vital interest in defending himself. Not even the federal government's national security interest overcomes a criminal defendant's right to present a defense; when the government withholds information that is helpful to the defense on national security grounds, it must suffer an appropriate case-related sanction.

[2] Because NACDL's mission focuses on the rights of criminal defendants, we address the issues in this case solely with respect to appellees Veiga and Pallares, who have been charged in Ecuador with serious crimes.

The purported journalists' privilege that appellant Berlinger[3] asserts does not come close to overcoming the interest of appellees Veiga and Pallares in obtaining evidence with which to defend themselves in Ecuador against a politically driven prosecution orchestrated by the subjects of Berlinger's film. The asserted journalists' privilege has no First Amendment basis, as the Supreme Court made clear long ago in *Branzburg v. Hayes*, 408 U.S. 665 (1972). If it exists at all--a matter of considerable dispute among the federal courts--it does so as a matter of federal common law under Fed. R. Evid. 501.

The circumstances here present a particularly weak case for application of such a common law privilege. Berlinger seeks to protect *nonconfidential* outtakes of a film that counsel for the Lago Agrio plaintiffs solicited him to make about the Lago Agrio litigation. Those counsel and their celebrity followers play starring roles in the film. And the film documents (among other things) the efforts of plaintiffs' counsel to foment the prosecution of Veiga and Pallares as a boost to plaintiffs' civil litigation against Chevron.

It would demean press freedom to recognize the journalists' privilege here. The Court should assess the subpoena to Berlinger under the reasonableness standard applicable to subpoenas generally, without adding additional criteria

[3] We refer to the media-related appellants collectively as "Berlinger." We assume for purposes of this brief that Berlinger has a sufficient connection to newsgathering to assert whatever journalists' privilege may exist.

merely because of his status as a filmmaker. *See McKevitt v. Pallasch*, 339 F.3d 530, 533-34 (7th Cir. 2003). Because the subpoena to Berlinger is patently reasonable under the circumstances, the Court should affirm the district court's order.

ARGUMENT

I. A CRIMINAL DEFENDANT'S INTEREST IN OBTAINING EVIDENCE HELPFUL TO HIS DEFENSE IS ENTITLED TO GREAT WEIGHT.

The Supreme Court has made clear in the plainest possible terms the importance of full development of the facts in criminal cases. Rejecting a claim of executive privilege for confidential presidential communications--a claim of far greater weight than Berlinger's--the Court declared:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

United States v. Nixon, 418 U.S. 683, 709 (1974). *Nixon* addresses the importance of full disclosure to the American criminal justice system, but the principles on which it rests speak to fundamental notions of due process and basic fairness that

apply equally here, where Veiga and Pallares face criminal prosecution in another country.

Similarly, in *Branzburg*--in which the Supreme Court refused to recognize a First Amendment-based privilege for confidential newsgathering material, *see infra* Part II--the Court stressed the importance to the criminal justice system of a full development of the facts. The controversy in *Branzburg* arose in the context of a grand jury investigation into potential crimes. The Court found "particularly applicable to grand jury proceedings" the principle that "the public has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg*, 408 U.S. at 688 (internal quotation and ellipsis omitted).

Nixon and *Branzburg* focus on the importance of full factual development to the criminal justice system as a whole. The Supreme Court has recognized as well the importance to criminal defendants in particular of obtaining evidence helpful to their defense. The Court has, for example, vigorously enforced the prosecution's duty to produce exculpatory information to a criminal defendant, including impeachment information. *See, e.g., Kyles v. Whitley*, 514 U.S. 419 (1995); *Brady v. Maryland*, 373 U.S. 83 (1963). And the Court has refused to permit the government to bring a prosecution and then invoke government privileges to withhold relevant information from the defense. *See, e.g., Jencks v. United States*,

353 U.S. 657, 671 (1957); *United States v. Reynolds*, 345 U.S. 1, 12 (1953). As Judge Learned Hand explained for this Court:

> While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. . . . The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.

United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944). These decisions rest in part on the premise elaborated in *Nixon*--that the criminal justice system functions effectively only when the facts are fully developed--and in part on a criminal defendant's particular interest, rooted in due process, in obtaining evidence helpful to his defense.

Courts have likewise stressed the importance of a criminal defendant's interest in obtaining helpful evidence in the precise context at issue here: a defense request for nonconfidential newsgathering materials. In *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988), for example, the court upheld a subpoena for such materials based in part on the "very considerable" interests of a criminal defendant in a fair trial, compulsory process, and effective confrontation and cross-examination of adverse witnesses. *Id.* at 1182. Similarly, the New York Court of Appeals declared that "in a criminal case, a defendant's interest in nonconfidential material weighs heavy" and reversed a trial

court's refusal to require production of outtakes of videotape that Court TV had made of the defendant's arrest and questioning. *People v. Combest*, 4 N.Y.3d 341, 346, 828 N.E.2d 583, 586, 795 N.Y.S.2d 481, 484 (2005).

This Court as well has emphasized the importance of the interests at stake in criminal proceedings when weighing assertions of the journalists' privilege. In *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), a civil case, the Court upheld a privilege for a journalist's confidential source. It distinguished *Branzburg* as based on the Supreme Court's "concern with the integrity of the grand jury as an investigating arm of the criminal justice system." *Id*. at 784. In *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983)--the Court's first post-*Branzburg* criminal case involving an asserted journalists' privilege--the Court recognized that "a criminal defendant has more at stake than a civil litigant and the evidentiary needs of a criminal defendant may weigh more heavily in the balance" in assessing the privilege. *Id*. at 77. But, diverging from *Baker*, the Court concluded that the same standard for overcoming the journalists' privilege should apply in civil and criminal cases. *See id*.

Ten years later, in *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993), the Court discarded the suggestion in *Burke* that civil and criminal cases should be decided under the same standard. It declared that "*Burke's* articulation of a general test applicable to all phases of a criminal trial was not necessary to the

resolution of that case; *Burke* should accordingly be considered as limited to its facts." *Id*. at 73. As the Court later explained in *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1998): "The limitation [of *Burke* by *Cutler*] was meant to lower the bar of the showing required of [a criminal defendant] to obtain disclosure of reporters' materials; it resulted from our view in *Cutler* that *Burke* undervalued the needs of criminal defendants in putting on a defense." *Id*. at 34 n.3; *see Combest*, 4 N.Y.3d at 347 n.3, 828 N.E.2d at 587 n.3, 795 N.Y.S.2d at 485 n.3 (noting that, under *Gonzales*, "even less of a showing" is required in a criminal case to obtain nonconfidential materials than in a civil case).

Thus, criminal cases--and particularly criminal defendants' efforts to obtain information helpful to their defense--present the strongest possible case for overcoming any assertion of the journalists' privilege.

II. THE PRIVILEGE THAT BERLINGER ASSERTS, IF IT EXISTS AT ALL, SHOULD YIELD TO APPELLEES' NEED FOR INFORMATION WITH WHICH TO DEFEND THEMSELVES.

Gonzales requires a two-part showing before a party to a *civil* case may obtain nonconfidential news materials: "Where a civil litigant seeks nonconfidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists' privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources." 194

F.3d at 36. Although the district court correctly held that Veiga and Pallares met this standard, an even less stringent standard--the standard applicable to subpoenas generally--should control their applications, given the importance of their interests as criminal defendants and the relative weakness of Berlinger's asserted interest.

Before turning to the interests that Berlinger advances in support of the privilege, we note the threats to press freedom that this case does *not* implicate. As *Branzburg* observes:

> [This case] involve[s] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

408 U.S. at 681-82. This case does not even implicate the interest deemed insufficient to create a privilege in *Branzburg*--the protection of confidential sources. Berlinger had the burden of establishing each element of his asserted privilege, including the confidential nature of the outtakes. *See, e.g., von Bulow v. von Bulow*, 811 F.2d 136, 144, 146 (2d Cir. 1987). He did not meet that burden. Despite Berlinger's vague assertion that he had unspecified "understandings" about the use of his footage with some of his subjects, the district court correctly found

that the objective evidence--including his standard release agreement--refutes any claim of confidentiality.

Nor does Berlinger assert a privilege of constitutional dimension. The Supreme Court squarely rejected a First Amendment journalists' privilege in *Branzburg*, at least in the criminal context absent bad faith by the government. *Id*. at 708; *see, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("Nor does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source." (citing *Branzburg*)); *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201 (1990) ("In *Branzburg*, the Court rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary."). Following *Branzburg*, this and other Courts have similarly found no First Amendment journalists' privilege in the criminal context. *See New York Times v. Gonzales*, 459 F.3d 160,172-74 (2d Cir. 2006); *In re: Grand Jury Subpoena (Judith Miller)*, 397 F.3d 964, 968-71 (D.C. Cir. 2005); *McKevitt*, 339 F.3d at 533-34.

Congress--unlike many states--has not seen fit to enact a statutory journalists' privilege. That leaves federal common law as the sole basis for

Berlinger's asserted privilege.[4] When a witness asserts a common law privilege to deny a criminal defendant evidence he needs in his defense, the Supreme Court's admonition in *Nixon* has particular force: as "exceptions to the demand for every man's evidence," privileges "are not lightly created nor expansively construed, for they are in derogation of the search for the truth." *Nixon*, 418 U.S. at 710; *see Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

As *Nixon* makes clear, in criminal cases--and particularly when the criminal defendant seeks evidence for his defense--only the strongest of societal interests justifies foregoing "every man's evidence" and thus distorting the truth-seeking process. The interests underlying Berlinger's asserted privilege for nonconfidential materials do not meet the *Nixon* standard, given the concrete and urgent countervailing interest of Veiga and Pallares in obtaining evidence with which to defend themselves against serious criminal charges.[5]

Gonzales lists several interests supporting recognition in the civil context of a journalists' privilege for nonconfidential materials. First, the Court observed that if such materials could be subpoenaed at will, it would become "standard operating

[4] Some federal courts have refused to recognize a federal common law privilege in the criminal context even for confidential news materials. *See, e.g., In re: Grand Jury Subpoena (Judith Miller)*, 397 F.3d 964, 976-81 (D.C. Cir. 2005) (Sentelle, J., concurring); *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 402-03 (9th Cir. 1993). This Court has thus far declined to decide the question. *See New York Times*, 459 F.3d at 168-71.

[5] If found guilty, Veiga and Pallares could receive sentences of nine to twelve years in a state penitentiary. PAA 243.

procedure" for parties litigating cases in the news to subpoena the press. That, in turn, would "burden the press with the heavy costs of subpoena compliance." *Gonzales*, 194 F.3d at 35. In an appropriate case, the burden of complying with a subpoena might be a basis for judicial intervention--but this is not such a case. The appellees have announced their willingness to pay the costs of production; Berlinger need do nothing more than hand over the footage to an appropriate vendor and receive it back once the copies are made.[6]

Gonzales also notes the possibility that "wholesale exposure of press files to litigant scrutiny" might "impair [the press'] 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." *Id*. Whatever weight this interest might have in a different case, involving publicity-shy, litigation-averse sources, it has none here; Berlinger's subjects (principally plaintiffs' counsel in the Lago Agrio litigation)

[6] In a similar vein, *Gonzales* raises the specter of journalists "clean[ing] out files containing valuable information lest they incur substantial costs in the event of future subpoenas." 194 F.3d at 35. Because Berlinger will incur minimal costs here, and because district courts can exercise their discretion to shift the cost of complying with future subpoenas to the party seeking the materials, this case is unlikely to cause journalists to purge their files.

sought him out and solicited his filmmaking services specifically to further their goals in litigation that they initiated.[7]

Finally, *Gonzales* observes that "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." *Id*. It is doubtful that the mere "risk" of "symbolic harm" would *ever* justify denying a criminal defendant information relevant to his defense. But here that risk is nonexistent. In an unusual twist, it is the subjects of the film--the Lago Agrio plaintiffs' counsel--who have made Berlinger, if not their "investigative arm," at least their public relations ally. Given Berlinger's symbiotic (and very public) relationship with plaintiffs' counsel, no one will mistake him for an "investigative arm" of Veiga, Pallares, Chevron, or the court.

Under these circumstances, the concrete and urgent need of Veiga and Pallares for evidence with which to defend themselves far outweighs Berlinger's desire to withhold the nonconfidential outtakes at issue. As in *McKevitt*, the Court should assess the subpoena to Berlinger under the reasonableness standard

[7] Berlinger's purported concern that future film subjects will not cooperate with him if the current subpoena is enforced lacks empirical support. When the reporters in *Branzburg* expressed similar concerns, the Supreme Court found their forecasts of harm "widely divergent" and "to a great extent speculative." 408 U.S. at 693-94. Thirty-eight years later, press predictions of doom if reporters and filmmakers must provide evidence like ordinary citizens remain as speculative as ever.

applicable to subpoenas generally, without adding "special criteria merely because the possessor of the [outtakes] sought is a journalist." 339 F.3d at 533.

CONCLUSION

For the foregoing reasons, amicus NACDL urges the Court to affirm the district court's ruling.

Respectfully submitted,

By: /s/
John D. Cline

John D. Cline
K.C. Maxwell
115 Sansome Street, Suite 1204
San Francisco, CA 94104
Telephone: (415) 747-8287

Richard D. Willstatter
GREEN & WILLSTATTER
200 Mamaroneck Ave., Suite 605
White Plains, NY 10601
Telephone: (914) 948-5656

Attorneys for Amicus Curiae National Association of Criminal Defense Lawyers

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

Case Nos. 10-1918-cv(L), 10-1966-cv(CON)

I certify that pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(C), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 3223 words.

/s/ John D. Cline
John D. Cline
Attorney for Amicus Curiae
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

CERTIFICATE OF SERVICE

When All Case Participants Are Registered For The Appellate CM/ECF System

U.S. Court of Appeals Docket Number: 10-1918-cv-(L)

I hereby certify that on the 23d of June, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Second Circuit by using the appellate CM/ECF system.

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/s/ John D. Cline
John D. Cline