

# 10-1918-cv(L), 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 FOR AMICUS CURIAE DOLE FOOD COMPANY, INC.  
IN SUPPORT OF AFFIRMANCE**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel states that Dole Food Company, Inc. is a publicly traded company (NYSE: DOLE) that has no parent. No publicly traded company owns 10% or more of its shares.

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## PRELIMINARY STATEMENT<sup>1</sup>

Joseph Berlinger and his supporting *amici* media companies invite this Court to raise the level of protection currently provided in this Circuit to non-confidential material in the possession of journalists, pressing for an expansive interpretation of this Court’s decision in *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999). Berlinger and the Media Amici<sup>2</sup> argue that the protection mandated by *Gonzales* is robust – so robust that it trumps the interests of attorneys Rodrigo Pérez Pallares and Ricardo Reis Veiga in obtaining footage that is likely relevant to their defense in criminal prosecutions, and the interests of Chevron in obtaining footage that is likely relevant to civil proceedings involving damage claims of over 27 billion dollars. Berlinger further asserts that the “abuse of discretion” standard normally applicable to appellate review of a district court’s order granting discovery under 28 U.S.C. § 1782, and federal litigation generally, should be discarded, instead inviting this Court to employ the *de novo* “independent appellate

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<sup>1</sup> Pursuant to Fed R. App. P. 29(a), this amicus brief is filed on the consent of all parties to this proceeding and without motion for leave of the Court. In addition, pursuant to Local Rule 29.1, Amicus Dole Food Company, Inc. confirms that no party or counsel to any party in these proceedings, or any other person aside from Amicus or its counsel, authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief.

<sup>2</sup> Amicus has seen only the Media Amici brief submitted in the proceedings for a stay.

review” standard of *Bose Corp. v. Consumers Union of United States., Inc.*, 466 U.S. 485 (1984).

The application of an evidentiary privilege in a discovery order does not implicate the content-based regulation of speech, which is the appropriate predicate for triggering *Bose* independent *de novo* review of final judgments. *Lee v. Dep’t of Justice*, 413 F.3d 53, 58-59 (D.C. Cir. 2005). More fundamentally, this Court has never held that the qualified protection that protects the identity of even *confidential* sources is grounded in the First Amendment, as opposed to federal common law, let alone that the *lower level* of protection for non-confidential sources emanates from the First Amendment. This Court should resist taking the step it has thus far steadfastly refused to take and should not expand *Gonzales* and the prior decisions upon which it relied to declare that the privilege doctrines applicable to newsgathering are rooted in the First Amendment.

Amicus also contests the obvious attempt by Berlinger and the Media Amici to recast the *Gonzales* standard. The interpretation of the *Gonzales* privilege advanced by Berlinger and the Media Amici for non-confidential information is indistinguishable from that applied in this Circuit to confidential sources, and is contrary to the guiding principles articulated by the Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972). *Gonzales* rejected a stringent test protecting non-

confidential information, instead adopting the “far less demanding” standard in which the applicant seeking disclosure must only demonstrate that the material bears “likely relevance” to a “significant issue” in a pending proceeding and is “not reasonably obtainable from other available sources.” 194 F.3d at 36. This standard has been clearly satisfied in this litigation. Notwithstanding the alarmist claims that the heavens will fall if Berlinger is forced to provide the outtakes to interviews of persons who voluntarily appeared on camera for his film – though he obtained releases permitting him to reveal any or all of that interview footage to the world – the incursion on the interests of Berlinger, or other documentary filmmakers, is minimal. Berlinger and the Media Amici are mistaken in their claim that the District Court failed to properly credit those interests. To the contrary, the strength or weakness of any privilege is captured in the standards that must be satisfied for its defeasance; the only obligation of the District Court was to apply that standard conscientiously, as Judge Kaplan did, quite meticulously. The balance here overwhelmingly favors disclosure. The material at issue, sought in aid of the truth-seeking function in two criminal prosecutions and two civil matters of enormous gravity, implicates interests that reside at the core of our commitment to the rule of law.

## INTEREST OF AMICUS

Dole Food Company, Inc. (“Dole”) is a Delaware corporation with its global headquarters in California. Dole is the world’s leading producer, marketer and distributor of fresh fruit and vegetables, offering over 200 products worldwide. Dole also markets a growing line of packaged and frozen fruits and is a produce industry leader in nutrition education and research. Dole does business throughout North and South America, Asia, and Europe and employs approximately 75,000 people worldwide.

Dole has great respect for the freedom of the press embodied in the First Amendment, as well as for the important role of the press and other media in our society. Dole also values its reputation in the worldwide community as a reliable provider of safe, nutritious agricultural products. In recent years, Dole has been required to take steps to preserve that hard-earned reputation, not only by maintaining excellent relations with the media in the U.S. and worldwide, but, when necessary, through the courts.

Dole, like many other large U.S. companies, finds itself facing lawsuits brought in foreign countries or on behalf of foreign citizens by U.S.-based lawyers. *See Osorio v. Dole*, 665 F. Supp. 2d 1307 (S.D. Fl. 2009) (refusing to enforce \$97 million judgment against Dole, Dow Chemical and other companies on grounds that the Nicaraguan judiciary fails to meet international standards of due process

and lacks impartial tribunals). These lawsuits are a part of a growing global tort business in which U.S. lawyers partner with lawyers in foreign jurisdictions to recruit plaintiffs and manufacture evidence in support of fraudulent lawsuits aimed at U.S. companies. These lawsuits are often supported by elaborate and carefully staged public relations campaigns, typically involving press releases and documentaries which purport to detail the tortious conduct and resulting damages claimed by these attorneys.

This growing trend is the subject of a detailed study released in June 2010, by the U.S. Chamber Institute for Legal Reform entitled “Think Globally, Sue Locally.”<sup>3</sup> This study reports that “[o]ver the past 15 years, there has been a sharp rise in lawsuits brought against United States companies ... that are premised on alleged personal or environmental injuries that occur overseas.” (*Id.* at 4.) The attorneys engineering these lawsuits often employ “aggressive out-of-court tactics that approach, straddle, and sometimes cross ethical lines in seeking to gain litigation advantages.” (*Id.*) Many of these out-of-court tactics are media related, and include close cooperation with documentary filmmakers:

Of particular note, plaintiffs drum up substantial publicity with films, documentaries and minidocumentaries about their cases and causes. Like *Bananas!*\* in the DBCP context [discussed below] and *Crude* in

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<sup>3</sup> Available at: <http://www.instituteforlegalreform.com/images/stories/documents/pdf/international/thinkgloballysuelocally.pdf>

connection with Lago Agrio .... In some instances, it is unclear whether plaintiffs are directly involved in the funding or artistic direction made with the cooperation of the plaintiffs or their attorneys, as they play central roles in several of them and generally are featured to some extent. Regardless of their exact role in the films, plaintiffs and their advocates certainly seek to take full advantage of them, advertising the movies (and sometimes including clips from them on their websites and internet campaigns), and planning activism events around them. ... In this way, plaintiffs use the documentaries to generate more publicity for themselves, create more negative publicity for corporate defendants, and serve as a teaching tool about the underlying cause. (*Id.* at 64-5.)

Recently, Dole was the subject of a documentary film by Swedish filmmaker Fredrick Gertten, entitled *Bananas!\**, which purported to report on lawsuits filed in the U.S., which alleged that Nicaraguan workers were rendered sterile as a result of exposure to the then-commonly used nematocide DBCP in the 1970s, which Dole ceased using nearly three decades ago. The film, which was widely circulated, contained numerous factual and malicious falsehoods concerning Dole.

The film centered on Los Angeles-based personal injury lawyer Juan Dominguez and the trial in the matter of *Jose Adolfo Tellez et al. v. Dole Food Co., Inc., et al.*, Case No. BC312852 (Los Angeles Superior Court) ("*Tellez*"). The *Tellez* case was one of three companion cases brought in Los Angeles by Dominguez. The film not only centered on the *Tellez* trial but also relied heavily on Dominguez himself to present its story – a story that profoundly and falsely disparages Dole.

*Before* the filmmakers screened their film, however, they *knew* that in the two companion cases – *Rodolfo Mejia et al. v. Dole Food Co., Inc., et al.*, Case No. BC340049 (Los Angeles Superior Court) (“*Mejia*”); and *Hilario Rivera et al. v. Dole Food Co., Inc., et al.*, Case No. BC379820 (Los Angeles Superior Court) (“*Rivera*”) – the Honorable Victoria Chaney had *found* by clear and convincing evidence that the protagonist of their film, Dominguez, had prosecuted fraudulent claims against Dole in the *Tellez* case – “*a case that was built on somebody’s imagination, a case that was put together by smoke and mirrors.*” (*Mejia*, Transcript of Oral Ruling at 25:17-18 (April 23, 2009).)<sup>4</sup> The filmmakers *knew* that Judge Chaney had found that Dominguez’s fraudulent “misconduct . . . is so outrageous and pervasive and profound that it far exceeds anything described . . . in any of the reported cases.” (*Id.* at 12:5-7.) And they *knew* that Judge Chaney had found that this pervasive fraud had “contaminated each and every one of the [*Tellez*] plaintiffs,” (*Id.* at 25:8-9), and that she had imposed *terminating sanctions* for fraud on the court in the very cases *that the film mentions* were next to be litigated and that supposedly would “be even stronger than the first one.” (Declaration of Lincoln D. Bandlow, Ex. 10 at 302, *Dole v. Gertten, et al.* (No. BC417435) (Los Angeles Superior Court Sep. 10, 2009).) In fact, Judge Chaney

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<sup>4</sup> Available at: [http://www.dole.com/servedocument.aspx?fp=documents/dole/04-23-09\\_Chaney\\_Oral\\_Ruling.pdf](http://www.dole.com/servedocument.aspx?fp=documents/dole/04-23-09_Chaney_Oral_Ruling.pdf)

found that the evidence demonstrated that the fraud was not limited to the specific plaintiffs before her: “An entire industry has developed around DBCP litigation in Nicaragua for the purpose of bringing fraudulent claims.” (*Mejia, Rivera, Findings of Fact and Conclusions of Law Supporting Order Terminating Mejia and Rivera Cases for Fraud on the Court* ¶ 75 (June 17, 2009).)<sup>5</sup>

Before the film’s screening, the filmmakers were fully aware that reasonable viewers of their film would interpret it in a manner that communicates false facts about Dole. Before screening the movie, the Los Angeles Film Festival (“LAFF”) provided audience members with written statements describing Judge Chaney’s fraud findings and explaining that “[t]he judge specifically mentions in her ruling that the witnesses you will see in the film tonight (from the *Tellez* trial) lied under oath, presented false employment records, and presented fraudulent evidence of sterility.” (Declaration of Scott A. Edelman, Ex. 52., *Dole v. Gertten, et al.* (No. BC417435) (Los Angeles Superior Court Oct. 6, 2009).) LAFF further stated “*there seems to be little question that the version of reality that the film portrays does not match the reality that emerged in the courtroom.*” (*Id.*, emphasis added.)

Despite their knowledge of these facts, the filmmakers have repeatedly screened their film. Accordingly, on July 8, 2009, Dole filed a defamation action

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<sup>5</sup> Available at: <http://www.dole.com/servedocument.aspx?fp=documents/dole/chaney-findings-web.pdf>

against the makers of *Bananas!\**.<sup>6</sup> Dole later voluntarily dismissed the case without prejudice, because although it strongly believed in the merits of its lawsuit, it was in the midst of an Initial Public Offering, and the defendant filmmaker had organized a boycott in Sweden which was creating an undesirable distraction. In connection with that dismissal, Dole declared, “While the filmmakers continue to show a film that is fundamentally flawed and contains many false statements we look forward to an open discussion with the filmmakers regarding the content of the film.” (Dole News Release, Oct. 14, 2009.)<sup>7</sup> Nonetheless, the filmmakers have continued to tout the known falsehoods depicted in their film as truth and to screen the film worldwide.

The events and circumstances involved in the creation of *Bananas!\** have a striking similarity to those alleged to have been involved in the production of *Crude*, the subject of the proceedings herein. Both *Bananas!\** and *Crude* are part of the growing trend of plaintiffs’ lawyers using a supposedly factual documentary film in a public campaign seeking to discredit the targeted defendants. Indeed, Dole is in the midst of proceedings seeking dismissal of the remaining fraudulent

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<sup>6</sup> Dole’s Complaint is available at: <http://www.dole.com/servedocument.aspx?fp=documents/dole/conformed-complaint-for-defamation.pdf>

<sup>7</sup> Available at: [http://www.dole.com/PDFs/dbcp/BananaMoviePressReleaseWithdraw\\_FINAL101409.pdf](http://www.dole.com/PDFs/dbcp/BananaMoviePressReleaseWithdraw_FINAL101409.pdf)

claims emanating from Nicaragua and originating with Mr. Dominguez. During these proceedings, Dole has introduced clips of the *Bananas\*!* film as evidence of attorney wrongdoing and fraud justifying dismissal. While Dole did not have occasion to invoke Section 1782 because the filmmakers of *Bananas\*!* are based in Sweden, Dole has experienced first hand how intimate collaboration between a plaintiff's lawyer and a filmmaker can generate important evidence demonstrating attorney wrongdoing that is unavailable from other sources.

While Dole certainly hopes that its experience with *Bananas!\*!* will not be repeated, the reality is that Dole, like many U.S. companies, is a defendant in lawsuits of various kinds in foreign jurisdictions. As need arises in its defense of these cases now and in the future, Dole expects it will have occasion to avail itself of discovery in aid of these foreign proceedings under 28 U.S.C. § 1782. Accordingly, Dole has an interest, as a potential litigant seeking discovery under § 1782, in having the legal rules applicable to privilege claims, whether asserted by parties or non-parties such as filmmakers who have teamed up with plaintiffs' lawyers, applied in a fair and balanced way. This is particularly true in a case where, as here, the test for ordering the production of non-confidential journalism materials has been clearly articulated by the Circuit Court (here, in *Gonzales*) and applied in a well-reasoned decision by the District Court.

## ARGUMENT

### I. ABUSE OF DISCRETION IS THE PROPER STANDARD OF REVIEW

#### A. Only Constitutional Claims Qualify for *Bose* Independent Appellate Review

Berlinger asserts that “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’” Brief for Respondents-Appellants Joseph A. Berlinger, *et al.* (“Berlinger Br.”) at 15, *citing Bose v. Consumers Union of United States*, 466 U.S. at 499. Amicus vigorously contests this assertion.

The established law of this Circuit is that review of a district court’s decision under 28 U.S.C. § 1782 is for “abuse of discretion.” *Euromepa, S.A. v. Esmerian, Inc.*, 154 F.3d 24, 27 (2d Cir. 1998). While the review of a district court’s decision over whether the statutory standards are met is *de novo*, once it is determined that § 1782 applies, review of the district court’s decision as to whether or not to grant discovery is limited to review for abuse of discretion. *Id.*, *citing Esses v. Hanania*, 101 F.3d 873, 875 (2d Cir. 1996). The standard for which Berlinger argues – the exceptional doctrine of *de novo* “independent appellate review” articulated in *Bose Corp. v. Consumers Union of United States, Inc.* – grew out of the Supreme

Court's adoption of the "actual malice" standard for review of money judgments in public official libel cases involving speech on matters of public concern. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). The *Bose* doctrine recognizes the important role appellate courts play in ensuring that money judgments for defamation do "not constitute a forbidden intrusion on the field of free expression." *Bose*, 466 U.S. at 499 (quoting *Sullivan*, 376 U.S. at 284-86). That standard has no place in review of a discovery ruling.

Other courts agree. For example, the Court of Appeals for the District of Columbia refused to apply the *Bose* doctrine in its review of discovery and contempt orders involving the refusal of journalists to answer questions *involving confidential sources*. *See Lee v. Dep't of Justice*, 413 F.3d 53, 58-59 (D.C. Cir. 2005). In *Lee*, the court rejected the argument, now advanced here by Berlinger, that the "field of free expression" is threatened by an order compelling disclosure of journalists' sources:

[T]his case does not involve a claim of forbidden intrusion on the field of free expression. There is no suggestion that the court or any branch of government in any fashion attempted to interfere with or now attempts to interfere with the Appellant journalists' right to print or communicate anything they choose. Both *New York Times* and *Bose* were libel cases in which a judgment of the court stood to "punish" or at least adversely affect the litigants based upon the exercise of their free expression. No such threat exists here.

*Id.* at 58. (citations and quotations omitted). The court in *Lee*, further relied on and quoted the Supreme Court’s decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) – decided one month after *Bose* – for the proposition that no heightened First Amendment scrutiny applies to discovery orders. *Id.* at 59. Amicus urges this Court to adopt this persuasive holding.

**B. This Court Has Refused to Hold that Newsgathering Privileges Are Rooted in the First Amendment**

This Court has on several occasions emphasized that it has never yet decided whether the qualified newsgathering privileges it has created for confidential and non-confidential information are rooted in the First Amendment, or merely in federal common law.

In *Gonzales*, the case that is the central focus of the parties in this Appeal, this Court noted that it had never resolved this issue, and explicitly reserved any ultimate resolution of the question. 194 F.3d at 35, n. 6 (“Previous decisions of our court have expressed differing views on whether the journalists’ privilege is constitutionally required, or rooted in federal common law. . . . Until Congress legislates to modify the privilege or do away with it, however, we need not decide whether the privilege is founded in the Constitution”). Since *Gonzales*, this Court has visited the newsgathering privilege only once, and in doing so held clearly that, in the circumstances there presented, the privilege was *not* rooted in the First

Amendment. *See New York Times Co. v. Gonzales*, 459 F.3d 160, 169-174 (2d Cir. 2006). In *New York Times Co. v. Gonzales*, this Court noted the uncertainties over the meaning of this Circuit's precedents in the reporter's privilege area, citing its prior decision in *Gonzales v. National Broadcasting Co.* among others, and then indicated that in the circumstances there presented under the Supreme Court's decision in *Branzburg v. Hayes*, the privilege is not grounded in the First Amendment. Quoting with approval the decision of the District of Columbia Circuit in the important Judith Miller / Valerie Plame / Scooter Libby confidential source dispute, this Court declared that the meaning of *Branzburg* is that no First Amendment privilege exists in cases falling within its purview:

Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter.

*New York Times Co. v. Gonzales*, 459 F. 3d at 173 n.6, quoting *In re Grand Jury Proceeding, Judith Miller*, 387 F.3d 964, 970 (D.C. Cir. 2005).

This view, that *Branzburg* rejected a constitutional privilege and that this is simply "the end of the matter," has gained momentum over the last two decades, turning the tide on an earlier generation of decisions that relied on Justice Powell's

brief concurring opinion in *Branzburg* to justify recognition of a journalists' privilege in civil matters. This Court's prior decisions adopting a qualified privilege for confidential sources were part of that early generation of cases. See *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir. 1982); *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983). While *Branzburg*, involving a criminal grand jury investigation, may not be literally controlling in the context of this action, it should inform the judgment of this Court on the issues here, and caution against elevating the privilege doctrine at issue here to constitutional stature.

**C. This Court Should Not Elevate *Gonzales* to Constitutional Status**

Berlinger's assertion that this Court should now apply *Bose de novo* review would require this Court to make new law, treading where it has thus far refused to venture, elevating the privileges for confidential and non-confidential information to constitutional stature. This is contrary to the existing pronouncements of this Circuit, and runs decidedly against the grain of the Supreme Court's own subsequent treatment of *Branzburg*. In *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the Supreme Court rejected a claim for an "academic freedom" privilege not unlike the claim for a reporter's privilege sought in *Branzburg*. In *University of Pennsylvania* the Supreme Court stated without equivocation that: "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.”

*Id.* at 201. Acceptance of Berlinger's argument would thus place this Circuit in open tension, if not outright conflict, with the Supreme Court's considered position. Judge Richard Posner in *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) summarized the field as follows:

A large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope. . . . A few cases refuse to recognize the privilege, at least in cases, which *Branzburg* was but this case is not, that involve grand jury inquiries. . . . Our court has not taken sides. Some of the cases that recognize the privilege . . . essentially ignore *Branzburg* . . . some treat the “majority” opinion in *Branzburg* as actually just a plurality opinion . . . some audaciously declare that *Branzburg* actually created a reporter's privilege. . . . The approaches that these decisions take to the issue of privilege can certainly be questioned. Some cases that recognize a reporter's privilege suggest that it can sometimes shield information in a reporter's possession that comes from a nonconfidential source . . . Others disagree. . . . The cases that extend the privilege to nonconfidential sources express concern with harassment, burden, using the press as an investigative arm of government, and so forth. . . . Since these considerations were rejected by *Branzburg* even in the context of a confidential source, these courts may be skating on thin ice.

*Id.* at 532-33 (internal citations omitted); *see also United States v. Smith*, 135 F.3d 963, 970 (5th Cir. 1998) (“Despite the newsreporters' strong First Amendment arguments, however, the *Branzburg* Court rejected their call for a privilege. Here,

on the other hand, the danger that sources will dry up is less substantial. WDSU-TV seeks to protect only nonconfidential information obtained from a person who wanted it aired when he gave it . . .”); *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987); (“Because we conclude that acceptance of the position urged upon us by Stone would be tantamount to our substituting, as the holding of *Branzburg*, the dissent written by Justice Stewart (joined by Justices Brennan and Marshall) for the majority opinion, we must reject that position”).

Berlinger and the Media Amici are urging this Court to recognize a privilege for non-confidential materials rooted in the First Amendment, as most of the same Amici did in the rehearing that led to the *Gonzales* decision.<sup>8</sup> The panel did not do so there, and this Court should not do so here.

**D. Testimonial Privileges Are Not Content-Based Regulation of Expression**

Even if this Court were to take what Amicus here asserts is the ill-advised step of declaring that the newsgathering privileges recognized in this Circuit are rooted in the First Amendment, it would not follow that *Bose* review ought to supplant the normal abuse of discretion standard applicable in § 1782 cases. For unlike review of actual malice findings in a libel case – review that protects against

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<sup>8</sup> Brief for Amici Curiae at 2-3, 6, *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999) (No. 97-9545).

penalties exacted on *the content of speech* – a decision ordering the production of material pursuant to a subpoena meeting the otherwise applicable standards established by Congress under § 1782 merely imposes an incidental burden on a journalist of the sort that does not repress or penalize expressive content. The default rule that the press is bound by neutral laws of general applicability in the same manner as any other member of society has been applied by the Supreme Court to the relationship between journalists and sources. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1981) (describing, in a case involving a claim brought by a source against a newspaper for alleged breach of a confidentiality agreement, the “well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news”); *United States v. Sanders*, 211 F.3d 711, 720-21 (2d Cir. 2000) (“However, the First Amendment erects no absolute bar against government attempts to coerce disclosure of a confidential news source . . . nor does it invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability”), *citing Branzburg v. Hayes*, 408 U.S. at 682. Under that precedent, disclosure of non-confidential material is not a content-based regulation of speech and the abuse of discretion standard should therefore apply.

## II. THE *GONZALES* STANDARD SHOULD NOT BE EXPANDED

### A. *Gonzales* Rejected a Stringent Test Protecting Non-Confidential Information

Berlinger and the Media Amici portray the standard announced by this Court in *Gonzales v. National Broadcasting Company* as if it were a ringing victory for the media's protection of non-confidential materials. They are wrong. In fact, *Gonzales* was a *loss* for NBC and the position it advocated. In *Gonzales*, NBC was required to produce the outtakes it sought to keep confidential because this Court refused to adopt the position advanced by NBC and its amici that the protection afforded non-confidential materials should be equivalent to that extended to confidential sources.

*Gonzales* unfolded in unorthodox fashion. The original panel to hear the appeal held that there was no protection whatsoever for non-confidential materials, reasoning that the prior opinions of this Circuit recognizing a privilege had been entirely focused on the interests germane to the protection of confidential sources. NBC thus lost, and was ordered to produce the outtakes. *See Gonzales v. National Broadcasting Co.*, 155 F.3d 618, 623-28 (2d Cir. 1998). NBC moved for rehearing. Once again NBC *lost*. *Gonzales v. National Broadcasting Co.*, 194 F.3d 29, 36 (2d Cir. 1999).

The second *Gonzales* panel issued a superseding opinion that adopted an intermediate position, holding that a privilege did extend to non-confidential materials, but that privilege was, in the words of the Court, “narrower,” “more easily overcome” and “less demanding.” *Gonzales*, 194 F.3d at 36. While the three-pronged Second Circuit test applied to *confidential* sources was, in the description of this Court in *Gonzales*, “stringent,” the test established for non-confidential sources was now described as “less demanding,” with *every prong* of the test for confidential sources significantly relaxed. *Id.* at 35-6. “[H]ighly material and relevant” became “of likely relevance.” *Id.* “[N]ecessary or critical to the maintenance of the claim” became “of likely relevance to a significant issue.” *Id.* at 33, 36. The significantly reduced test of *Gonzales* thus no longer forces a showing that the lack of the sought information would be a claim-killer. “[N]ot obtainable from other available sources” became “not reasonably obtainable from other available sources.” Finally, with regard to the test as a whole, *Gonzales* discarded the global requirement that the three factors it identified be supported by a “clear and specific showing,” instead jettisoning any mention of such heightened proof. *Id.*

**B. The District Court Properly Applied *Gonzales* and This Court Should Resist the Effort to Recast *Gonzales* as More Powerful Than it is**

Berlinger and the Media Amici attack the District Court's ruling, arguing that Judge Kaplan somehow missed the whole point of *Gonzales* and failed to properly credit the media's interests in protecting journalists' credibility with sources. Berlinger Br. at 20. With escalating rhetorical flourish, Judge Kaplan is criticized for "refusing even to consider, much less recognize, the burden imposed on Berlinger (and other journalists) by requiring production of non-confidential material ...." *Id.* These attacks on Judge Kaplan's ruling are utterly unfounded.

Berlinger and the Media Amici ignore that the interests of the media are *already accounted for* in *Gonzales*' adoption of the limited privilege in the first place and, in essence, ask that they be counted twice. The concern that mere "at will" access to press files may act as a deterrent to the willingness of sources to speak to the press, for example, was one of the reasons *Gonzales* adopted a limited privilege for non-confidential materials. *Gonzales*, 194 F.3d at 35. A district court is under no obligation to recite magic words paying homage to the rationales supporting the existence of a privilege. A district court is obliged only to apply conscientiously the *standards* that govern a privilege's defeasance in making its findings.

The media understandably wish that the law of the Second Circuit as articulated in *Gonzales* gave them stronger protection than it does. Yet precisely because the arguments supporting protection for non-confidential information are less powerful than the arguments supporting confidential information, the privilege itself is less powerful. All Judge Kaplan was required to do was what he, in fact, meticulously did: examine in a painstaking and careful manner the three *Gonzales* factors, explaining in detail the reasons for his judgment that the unknown content of the outtakes were indeed likely relevant to significant issues and not reasonably available from other sources.

The effort by Appellants and Amici to persuade this Court to recast *Gonzales* as a standard more powerful than it is – indeed, as if it were a standard indistinguishable from the standard for confidential sources – should be resisted. This Court cannot overrule the District Court’s decision without changing the balance it struck in *Gonzales*. To reverse the decision below would be to expand *Gonzales*.

**III. BERLINGER’S DEFINITION OF CONFIDENTIALITY RUNS COUNTER TO HOW THAT TERM IS USED IN THIS CIRCUIT’S JOURNALIST-PRIVILEGE JURISPRUDENCE**

Berlinger asks this Court to treat the outtakes sought here as “confidential,” Berlinger Br. at 11-12, 33, because he claims he entered into written and oral

confidentiality agreements with the interviewees of his film. In some instances, these “agreements” supposedly provided that “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.” Berlinger Br. at 11 (describing the claimed agreements). Significantly, Berlinger failed to provide the District Court with examples of these purported confidentiality agreements, redacted or otherwise, or with a privilege log identifying which portions of the outtakes were subject to the claimed privilege.<sup>9</sup> But the most powerful evidence against the existence of these supposed agreements is that fact that Berlinger’s subjects also signed releases granting him authority to use any of the footage as he sees fit in the final cut of his film.<sup>10</sup> *In re Application of Chevron Corp.*, \_\_ F. Supp. 2d \_\_, 2010 WL 1801526, \*9, \*20 (S.D.N.Y. 2010).

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<sup>9</sup> In this regard, Judge Kaplan was correct to find that Berlinger failed to meet his burden of demonstrating the confidentiality of the outtakes. *See Lipinski v. Skinner*, 781 F.Supp. 131, 136 (N.D.N.Y. 1991) (“general statements” in affidavit asserting confidentiality insufficient to supply convincing evidence of confidentiality); *Shoen v. Shoen*, 5 F.3d 1289 n.10 (9th Cir. 1993) (general claims of an expectation of confidentiality insufficient).

<sup>10</sup> Berlinger also testified that he “retained complete editorial control” over the final cut of his film. Declaration of Joseph H. Berlinger, April 22, 2010 ¶ 33.

In any event, even if taken at his word, Berlinger's understanding of "confidentiality" runs contrary to how that term is used in this Circuit's journalist-privilege jurisprudence. This Circuit has divided the law of journalist's privilege into two tracks, one dealing with confidential information, the other with non-confidential information. In all prior cases dealing with journalistic privileges, "confidential" has referred to either the identity of the source or the substance of the information revealed by a source. *PPM America, Inc. v. Marriott Corp.*, 152 F.R.D. 32, 35 (S.D.N.Y. 1993); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir. 1982). Thus a "confidential source" defines a relationship which comes into being when a reporter and a person have agreed that the person's identity will not be disclosed and the person's identity is not, in fact, disclosed. *Baker v. F. & F. Inv.*, 339 F.Supp. 942, 943 (S.D.N.Y. 1972), *aff'd* 470 F.2d 778 (2d Cir. 1972). In some instances, a source may insist that the journalist not reveal the content of what the source disclosed, but instead find other sources who will confirm that content – as in the famous "Deep Throat" source in the Watergate scandal.

Berlinger is using the term "confidential" in a manner completely inconsistent with these definitions. He claims that when a person he films is promised that the information supplied will only be used for the purpose

determined by him as a documentary filmmaker, that makes the information “confidential.” This makes no sense. When such person agrees that his or her name and identity need not be kept secret, and when the person agrees that what he or she says in a filmed interview may be shown to the public in the complete discretion of the film’s creator, the source is not insisting on confidentiality as commonly understood in caselaw, and the “agreement” between the source and the journalist, whether explicit or implicit, written or oral, is not a confidentiality agreement. *See Blum v. Schlegel*, 150 F.R.D. 42, 45 (W.D.N.Y. 1993) (claims of assurances by journalist “that certain information would not be publicized and would remain confidential” does not convincingly demonstrate confidentiality when “the overall purpose of the interview was to gather information for an article” which was in fact “published based on information given during the interview”).

If Berlinger’s version of “confidentiality” were accepted, then this Court’s dividing line between the stringent test applicable to confidential materials and the less demanding test applicable to non-confidential materials would disappear. For it is always the case that when a reporter interviews a subject for an article, broadcast program, or documentary film, the understanding, explicit or implicit, is that the interview is being conducted for the article, broadcast, or film project on

which the journalist is working. That agreement, which goes to the *purpose* of the interview, must not be conflated with whether the identity of the source or the content of the interview is “confidential,” i.e., never to be revealed.

Berlinger is not claiming that any of his sources required him to blur their faces on camera, or disguise their voices. Nor is an outtake magically rendered “confidential” merely because Berlinger did not include it in his film. Once again, it is always the case that when a source is interviewed, openly and without reservation as to identity or content, that what the public sees in the first instance is only what the director decided to include in the final cut. But this does not mean that what was not revealed in the journalist’s story is now transformed in law to “confidential” material. There is no such alchemy. If this were the law, then *Gonzales* would make no sense, and the whole body of law treating “outtakes” as non-confidential would be incoherent. An “outtake” is, by definition, material not used.

#### **IV. DISCLOSURE HERE WILL ADVANCE THE INTEREST IN TRUTH SEEKING PROCESSES CENTRAL TO THE RULE OF LAW**

The District Court’s opinion evidenced a very careful and nuanced assessment of the three *Gonzales* factors, as well as a *real-politick* understanding of the many political, cultural, and litigation atmospherics surrounding this

protracted dispute, which has been spread for decades across many civil and criminal proceedings in Ecuador and the United States.

Protection of the free flow of information is not the only societal interest at stake here. Also at stake is the rule of law, and the truth-seeking function of the various tribunals, civil, criminal, and arbitral, in which the evidence at issue here will be germane. It is especially important that criminal proceedings, and the liberty of the two defense attorneys, Rodrigo Pérez Pallares and Ricardo Reis Veiga, are part of the mix. *Branzburg* instructs that the public interest in news cannot take precedence over the truth-finding function of society's criminal tribunals. *Branzburg*, at 408 U.S. at 695. In that central judgment expressing the core values of our constitutional system, *Branzburg* was right. Whether or not the ruling in *Branzburg* technically controls the precise doctrines to be applied in this Appeal, its central defining values ought to guide this Court in the application of those doctrines.

As water cannot rise higher than its source, the protection afforded a journalist's non-confidential materials cannot rise higher than the protection afforded a journalist's confidential source. If this were a grand jury proceeding, *Branzburg* clearly dictates that Berlinger would enjoy no privilege protecting him from divulging the identity of his sources, let alone any privilege against

production of non-confidential film outtakes. And if summoned to testify at an actual trial or to produce materials in his possession for either the prosecution or defense, Berlinger would enjoy no protection against disclosure. Appellees Pérez and Reis Veiga are seeking evidence likely relevant to their defense of criminal charges. In *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993) an attorney for a defendant in a criminal case was charged with contempt of court for extra-judicial statements, broadcast on television, about a pending case, in putative violation of a trial court's gag order. To assist in his defense, the attorney subpoenaed a television station's outtakes. This Court ruled that the defense attorney's need for the film footage in aid of his defense to the contempt charge trumped the journalist's privilege. *Id.* at 75.

In the present case, as in *Cutler*, and as in *Gonzales*, there is no substitute for the actual footage, and its content is not available anywhere else. The actual tapes are not vulnerable to the vicissitudes of depositions, in which the answers of witnesses may be colored by faulty memory or self-interest. The footage is what the footage is, and the camera does not lie. *See Gonzales*, 194 F.3d at 36 (“We agree with the district court that in this instance a deposition is not an adequate substitute for the information that may be obtained from the videotapes.”).

Evidentiary privileges “are not lightly created nor expansively construed, for they are in derogation of the search for truth.” *United States v. Nixon*, 418 U.S. 683, 710 (1974). In the words of Justice Frankfurter: “Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.” *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

Even a confidentiality privilege as important to society as the Executive Privilege granted to the President of the United States, a privilege grounded in the core structure of the United States Constitution, may be forced to give way to the imperatives of the truth-seeking function in a society dedicated to the rule of law.

As the Supreme Court instructed in *United States v. Nixon*:

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that “the twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer”.... 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



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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed R. App. P. 32(a)(7)(B)(i) because it contains 6,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: New York, New York  
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/s/ John J. Walsh



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