

# 11-1591

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United States Court of Appeals  
*for the*  
Second Circuit

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**JANET BAKER AND JAMES BAKER,**  
*Plaintiffs-Appellants,*

v.

**GOLDMAN SACHS & CO., GOLDMAN SACHS GROUP, INC.  
AND GOLDMAN SACHS & CO., LLC,**  
*Defendants-Appellees,*

**JESSE EISINGER,**  
*Non-Party Movant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK  
THE HONORABLE BARBARA S. JONES

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**BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR  
FREEDOM OF THE PRESS AND 46 MEDIA ORGANIZATIONS IN SUPPORT  
OF NON-PARTY MOVANT-APPELLEE SUPPORTING AFFIRMANCE**

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(c)(5) and Local R. 29.1(b), *amici* state as follows: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person — other than the *amici curiae*, their members or their counsel — contributed money that was intended to fund preparing or submitting the brief.

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## IDENTITY AND INTEREST OF *AMICI CURIAE*

*Amici curiae* are national and local news organizations, nonprofit associations representing newsgatherers, and trade groups whose journalists and members regularly gather and disseminate news and information to the public through their newspapers, magazines, television and radio stations and via the Internet (collectively, the “*amici*” or “*amici curiae*”).<sup>2</sup> As described more fully in the accompanying motion for leave to file this brief, *amici*’s interest in this case is in preserving the media’s ability to pursue the constitutionally protected freedom to gather and report the news, free from intrusion by the government or private litigants. *Amici* request that this Court find that the reporter’s privilege applies to

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<sup>2</sup> *Amici* are The Reporters Committee for Freedom of the Press, ABC, Inc., Advance Publications, Inc., A. H. Belo Corporation, Allbritton Communications Company, ALM Media, LLC, American Society of News Editors, The Associated Press, Association of Alternative Newsweeklies, The Association of American Publishers, Inc., Association of Capitol Reporters and Editors, Atlantic Media, Inc., Bay Area News Group, Belo Corp., Bloomberg L.P., Cable News Network, Inc., CBS Broadcasting Inc., Citizen Media Law Project, Cox Media Group, Inc., Daily News, L.P., The E.W. Scripps Company, First Amendment Coalition, First Amendment Project, Gannett Co., Inc., Hearst Corporation, LIN Media, The McClatchy Company, Media General, Inc., National Press Photographers Association, NBCUniversal Media, LLC, The New York Times Company, Newspaper Association of America, The Newspaper Guild – CWA, The Newsweek/Daily Beast Company LLC, North Jersey Media Group Inc., NPR, Inc., Online News Association, POLITICO LLC, Radio Television Digital News Association, Reuters America LLC, The Seattle Times Company, Society of Professional Journalists, Stephens Media LLC, Time Inc., Tribune Company, The Washington Post and WNET. A description of each of the *amici* is set forth in the addendum to this brief.



Plaintiffs-Appellants’ subpoena because it impermissibly seeks unpublished information about the editorial process that is subject to a qualified privilege under the New York shield law. The Court should affirm the lower court’s order granting Non-Party Movant-Appellee Jesse Eisinger’s (“Eisinger”) motion to quash the subpoena.

### **SOURCE OF AUTHORITY TO FILE**

Counsel for Defendants-Appellees Goldman Sachs & Co. et al. (“Goldman Sachs”) and Counsel for Eisinger consented to the filing of this brief *amici curiae*. Noting that it does not view the issue on appeal as one that implicates freedom of the press, Counsel for Plaintiffs-Appellants did not consent.<sup>3</sup> Accordingly, *amici curiae*, pursuant to Fed. R. App. P. 29(a), respectfully request the Court’s permission to submit a brief *amici curiae* in this action in support of Eisinger. *Amici* submit their motion herewith.

### **INTRODUCTION**

This case presents an irony not at all lost on *amici*: The crux of Plaintiffs-Appellants’ claim against Goldman Sachs is that the company failed to use due diligence in researching, investigating and compiling information about Lernout & Hauspie’s finances. (Compl. ¶¶ 25, 52). Yet, Plaintiffs-Appellants themselves seek to skirt their similar obligation to use due diligence in gathering discovery by

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<sup>3</sup> Telephone Conversation by Attorney Kristen Rasmussen with Joan A. Yue, Partner, Reed Smith, in Phila., Pa. (June 17, 2011).

subpoenaing an independent reporter for the information. Fortunately, the New York shield law, which governs the matter, extends a reporter's privilege from compelled disclosure of newsgathering information beyond just the identity of confidential sources to include non-confidential unpublished material underlying a finished journalistic product. *See* N.Y. Civ. Rights Law § 79-h(c) (McKinney 2011).

The examples contained in this brief of the hardships that subpoenas for this type of information impose on the journalists who gather it provide compelling evidence of why the shield law is vital to the maintenance of a robust press and should thus be faithfully enforced. These anecdotes show that requiring reporters to even appear for deposition or trial testimony where any of the questions will or are likely to touch on unpublished information, as is the case here, is a significant burden on the press and unwarranted here and anywhere. As such, *amici* urge this Court to find that the reporter's privilege applies to the testimony Plaintiffs-Appellants seek from Eisinger because it requires him to divulge unpublished information about the editorial process. The Court should affirm the lower court's ruling that the litigants failed to meet the standard required to overcome the reporter's qualified privilege from compelled disclosure of non-confidential material.

## ARGUMENT

### **I. Judicially mandated production of newsgathering materials threatens important interests.**

Several overarching concerns underlie the reporter’s qualified privilege and support a non-party news organization’s motion to quash a subpoena. These concerns are well-stated by this Court in *Gonzales v. NBC, Inc.*, 194 F.3d 29, 35 (2d Cir. 1999). In *Gonzales*, the plaintiffs sued defendant for allegedly stopping their vehicle on a Louisiana interstate without any probable cause or reasonable suspicion, thereby violating their civil rights. About a year later, a segment on NBC’s *Dateline* newsmagazine reported abuses by law enforcement officers in Louisiana, including the defendant, who conducted unwarranted traffic stops of motorists. Both the plaintiffs and defendant subpoenaed the original, unedited camera footage of the defendant’s stop of a *Dateline* undercover employee that served, in part, as the basis of the aired report, and sought the testimony of NBC representatives about the recorded events. NBC objected to both subpoenas.

The court recognized “broader concerns undergirding the qualified privilege [for non-confidential information] for journalists — such as the pivotal function of reporters to collect information for public dissemination, and the paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters.” *Id.* (citations omitted) (internal quotation marks omitted). It therefore affirmed its

recognition of the existence of a journalist's privilege under the First Amendment to refuse to disclose non-confidential information and, for the first time, expounded its rationale for doing so:

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.

*Id.* (footnote omitted).

Many other federal and state courts have likewise noted the threat that compelled disclosure of non-confidential information poses to the free flow of information to the public. *See, e.g., Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (citation omitted) (internal quotation marks omitted) (“[T]he [qualified] privilege is a recognition that society’s interest in protecting the integrity of the newsgathering process . . . is an interest of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.”); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir.

1988) (“We discern a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled.”); *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115, 121 (D.D.C. 2002) (citations omitted) (“While I am not convinced that vitiating the privilege in a particular case would undermine the news gathering process, I am persuaded that the wholesale abrogation of the privilege for nonconfidential information would have a ripple effect felt far beyond any single lawsuit or newspaper article. There is little doubt that placing such a limitation on the privilege would undermine the free press that has flourished in and is cherished by this nation.”); *In re Woodhaven Lumber & Mill Work*, 589 A.2d 135, 140 (N.J. 1991) (expounding as rationale for protecting press freedoms under the state shield law the same policies identified by the *Gonzales* court).

It is thus clear that courts have identified at least four essential policy concerns that underpin the reporter’s qualified privilege:

- The recognition that compelling discovery from a news organization improperly burdens the press with the costs of compliance;
- The prospect of having to comply with future subpoenas may force changes in newsgathering and editorial procedures to the detriment of the public interest;
- The fear of being unnecessarily drawn into litigation deters potential sources from speaking with the press; and

- The pressing need to preserve the independence and objectivity of the press requires that it not be an investigative arm of the government, judicial system or private litigants rather than a check on governmental power.

The very policies that led this and numerous other courts to protect reporters from the compelled disclosure of unpublished information obtained during the newsgathering process are implicated in this case and justify Eisinger's motion to quash the subpoena.

**A. The press is burdened by the high costs of subpoena compliance.**

Cooperating with subpoenas is a significant strain on reporters. Simply put, a journalist cannot comply with a bevy of subpoenas and continue to report the news in a meaningful way. For most citizens, responding to a subpoena is an irksome yet unusual occurrence. But for the news media, which routinely report on controversies, disputes, disasters, crimes and other newsworthy matters that often give rise to litigation, they are far more likely than any third party to be subject to a constant torrent of subpoenas such that responding to them is an especially cumbersome burden. And this rule does not apply with any less force to subpoenas seeking non-confidential material.<sup>4</sup> In those cases, “the damage is perhaps less

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<sup>4</sup> Although subpoenas involving confidential sources ordinarily garner the boldest headlines and the most public attention, the overwhelming majority of subpoenas served on reporters do not involve confidential sources. According to a recent study, only 43 of 3,062 reported subpoenas from 2006, or just 1.4%, sought the names of confidential sources. *See RonNell Andersen Jones, Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 Minn. L. Rev. 585, 643 & n.254 (2008). Copies of published stories were the most

obvious, but no less real.” *Lonegan v. Hasty*, No. CV-04-2743(NG)(VVP), 2008 WL 41445, at \*2 (E.D.N.Y. Jan. 1, 2008). Indeed, responding to *any* subpoena — whether it seeks the identity of a confidential source, testimony about unpublished information or verification of published statements<sup>5</sup> — imposes costs in time and money that unnecessarily burden reporters and their employers. *See id.* The results of surveys aimed to assess the frequency and impact of media subpoenas issued to daily newspapers and network television affiliates nationwide<sup>6</sup> anecdotally illustrate these burdens.

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frequently subpoenaed items reported by newspapers in 2006, followed by notes and testimony at trial. *See id.* at 659. Deposition testimony, unpublished photographs and copies of published photographs were the next most sought-after items. *See id.*

<sup>5</sup> *Amici* are puzzled by Plaintiffs-Appellants’ contention that the information they seek is published non-confidential information not subject to a qualified privilege under the New York shield law. (Br. 13–16). A description of the actions a journalist took to learn of and compile the material on which a published report was based — i.e., a description of “what Eisinger did to raise suspicion about and uncover discrepancies in L&H’s reported Asian revenues” (Br. 22 n.8) — plainly is unpublished information “obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news.” *See* N.Y. Civ. Rights Law § 79-h(c).

<sup>6</sup> *See* Jones, *supra* note 4. Professor Jones’ report compared the numbers of subpoenas received during 2006 to similar data collected before a spate of high-profile cases of media subpoenas in the early- to mid-2000s. *See id.* at 586. This earlier data were compiled by lead *amicus curiae* The Reporters Committee for Freedom of the Press through six biennial surveys it conducted, the results of which were published in reports in 1991, 1993, 1995, 1999 and 2001. *See* The Reporters Committee for Freedom of the Press, *Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 2001*, at 1 (2003), <http://www.rcfp.org/agents/agents.pdf>. This most recent Reporters Committee

**i. Subpoenas impose a burden on newsroom time.**

Regardless of the type of material they demand, media subpoenas impose heavy time commitments and distractions on editorial staff members. Notably, both challenges to and compliance with subpoenas consume enormous amounts of time of editors, news directors and reporters and divert attention from newsgathering to subpoena handling. *See* RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 Wash. L. Rev. 317, 356 (2009) [hereinafter Jones, *Media Subpoenas*].<sup>7</sup> According to many journalists who responded to Professor Jones' survey, the sheer bulk of subpoenas received results in costly distractions from the time-sensitive business of daily news, even when the media organization does not raise a legal challenge. *See id.* A television news director provided the following commentary as part of the qualitative interview-style portions of the survey: "I have six 'ordinary' subpoenas on my desk right now. We won't be fighting them, and we might not even be able to comply with them because we recycle our field tapes. But we can't ignore them. And that is time I won't be spending on the

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report, the one Professor Jones used for comparison purposes, compiled data about subpoenas received in 2001 and was published in 2003. *See* Jones, *supra*, at 621 & n.199.

<sup>7</sup> This article is also based on the data Professor Jones compiled from her survey of subpoenas received in 2006. *See* RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 Wash. L. Rev. 317, 320 (2009).



news.” *See id.* (internal quotation marks omitted). Another wrote, “[f]or one case, I can spend four or five hours waiting for calls, taking calls, missing daily editorial meetings so that I wouldn’t miss important calls from attorneys. It is increasingly frustrating.” *Id.* (internal quotation marks omitted).

Estimates as to the average time spent on a typical subpoena varied radically, from 10 to 15 minutes for dubs, or copies of recorded material, to 160 hours on the part of one staff member, in addition to the time expended by lawyers and editors. *See id.* at 356–57 & nn.167–68. A majority of the journalists who responded to a survey conducted by lead *amicus curiae* The Reporters Committee for Freedom of the Press about subpoenas received in 2001 said each subpoena took between one and four hours of their time. *See* The Reporters Committee for Freedom of the Press, *Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 2001*, at 13 (2003), <http://www.rcfp.org/agents/agents.pdf>. Meetings with attorneys preparing for their court appearances and briefing generally added an extra four to eight hours, according to one respondent. *See id.* at 14. Of course, that figure is largely dependent on the amount and nature of materials requested and increases sharply for more complicated subpoenas. *See* Jones, *Media Subpoenas*, *supra*, at 357. For example, one newspaper editor who responded to Professor Jones’ 2006 survey told of a subpoena seeking “all material” related to a particularly high-profile

crime wave, on which the news director worked every day for “several months.”  
*See id.* n.169 (internal quotation marks omitted).

For many small news organizations, complying with a subpoena goes beyond imposing on daily news operations to actually crippling them. For example, the editor of a newspaper with a daily circulation of just over 1,000 reported that “the paper’s lone reporter received a subpoena to testify in a local state court, leaving no one to cover the proceeding itself, which was ‘one of the biggest stories to hit town in a long while.’” *See id.* at 359–60. And often the burden is not alleviated simply because the reporter is privileged to refuse to testify, as this anecdote from another small-newspaper editor demonstrates:

“[O]ur reporter had to travel three hours to the courthouse, get on the stand and seek the privilege [under the state shield law], and then travel three hours back,” the editor reported. “We did this twice for two separate co-defendants in a criminal matter about which we had written just a little crime blurb of a story. We were without our police-and-courts reporter for all that time.”

*See id.* at 360.

**ii. Subpoenas impose a financial burden.**

A corollary to the issue of time expenditures by press organizations is that of monetary expenditures — a particularly critical inquiry as media companies continue to cope with the declining profits, shrinking staffs and significant

bankruptcies stemming from the recent recession.<sup>8</sup> Despite these severe financial woes, however, the qualitative reports from Professor Jones’ survey on this issue indicate that media organizations bear significant legal defense costs, even for single subpoena episodes — “considerable legal expense,” “large attorney bills,” “significant legal costs,” “immeasurable financial resources.” *See id.* at 361 (internal quotations marks omitted). An *Orlando Sentinel* representative similarly reported in response to the Reporters Committee survey about subpoenas received in 2001 that the newspaper’s legal expenses were “significant”: “roughly more than \$30,000 for a subpoena.” *See* Reporters Committee, *supra*, at 14 (internal quotations marks omitted). Newsroom leaders at smaller media companies reported spending more than \$10,000 to have a journalist removed from a witness list and \$1,000 to file a motion to quash under a state shield law. *See* Jones, *Media Subpoenas*, *supra*, at 361 & n.180.

For many small news organizations, the dollars-and-cents cost of fighting subpoenas translates to a more fundamental cost in loss of neutrality. *See id.* at

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<sup>8</sup> *See* Pew Project for Excellence in Journalism, *The State of the News Media: An Annual Report on American Journalism Overview; Newspapers — Summary Essay*, 2010, available at <http://stateofthemediamedia.org/2010/overview-3/>, <http://stateofthemediamedia.org/2010/newspapers-summary-essay/> (reporting that newspapers and local television saw ad revenue fall 26% and 24% respectively in 2009; about 13,500 jobs for full-time newsroom professionals disappeared from 2006 to 2009; and more than a half dozen newspaper companies declared bankruptcy in 2009, most notably Tribune Company, owner of the *Los Angeles Times* and *Chicago Tribune*, which was staggering under a \$13 billion debt).

362. Unable to afford legal challenges, these smaller companies generally comply with subpoenas, prompting the editor of a mid-sized paper, summarizing the view of a number of respondents, to observe that ““when we do that, we really lose our independence and become the agents of government.”” *See id.* Thus, for many media organizations, the financial burden of subpoenas exacerbates the problem, as discussed further in Part D, of the press’ use as an investigative arm of the government or private litigants.

Moreover, some newsroom leaders noted that the perceived increase in the frequency of media subpoenas is directly attributable to these high legal costs. *See id.* at 363. Conscious of the fact that many media organizations, particularly smaller ones, are cash-strapped and unable to mount legal defenses, prosecutors and private litigants are increasingly subpoenaing journalists for material they need rather than putting forth the time and effort to discover the information themselves,<sup>9</sup> these journalists said. *See id.* And some unscrupulous litigants or prosecutors even tactically or vindictively use these high costs as punishment for publishing unflattering information about them, some respondents to Professor Jones’ 2006 survey reported. *See id.* One editor, for example, told of a local businessman who “dragged out the subpoena process and deliberately ran up our

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<sup>9</sup> *See infra* Part D.

costs” after the paper reported corruption in some of his dealings. *Id.* (internal quotation marks omitted).

Much like the burden imposed on a reporter’s time, the financial weight associated with receipt of a subpoena is not mitigated by the fact that the requested information is ultimately shielded from compelled disclosure. To the contrary, each and every subpoena requires a response, and journalists subject to subpoenas seeking protected material must still incur court costs and attorney’s fees to ensure their compliance with legal procedures required to challenge a subpoena. Likewise, the recipient of a subpoena seeking copies of published information or other unprotected material would seemingly want to consult a lawyer, if only to verify his or her awareness and understanding of the rights and duties implicated by issuance of the subpoena. However, as one editor reported, “[j]ust the process of replying and the back and forth between attorneys cost us thousands of dollars in legal fees.” *See id.* at 361 n.180 (internal quotation marks omitted.)

**B. The use or threat of subpoenas affects journalistic practice in a manner detrimental to the public.**

The prospect of future demands for material journalists obtained in gathering and disseminating important information often affects newsroom procedures in a variety of ways detrimental to the public.

**i. The prospect of future subpoenas prompts destruction of materials.**

News outlets that might otherwise archive reporters' notes, copies of recorded conversations, e-mail messages, outtakes and other newsgathering materials now routinely destroy them so as not to have them on hand in the case of a future subpoena. *See id.* at 364. And the time period for retention of materials at these newspapers and television stations is generally quite short, in some cases no longer than moments after story publication. *See id.* at 365. These aggressive policies often prevent journalists from using their source material to build helpful archives for future research, report follow-up stories about ongoing issues, generate new leads and identify significant patterns or trends.

**ii. The issuance of subpoenas prompts removal of the most knowledgeable reporter from trial coverage.**

The use or threat of subpoenas also has a negative impact on the coverage of news events. Indeed, small news organizations are not the only ones to face significant difficulties when a reporter is subpoenaed to testify in a case he or she covered.<sup>10</sup> In increasing numbers, news organizations opt to remove these reporters from coverage of the ongoing story, which is often part of that journalist's regular beat, to avoid the conflict of interest created when the subpoena made the reporter

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<sup>10</sup> For further discussion of this burden on small media organizations' daily newsgathering operations, see *supra* Part I.A.i., p. 11.

a part of the story itself. *See id.* at 366–67. In other instances, subpoenaed reporters are removed from a story as a result of a judge’s separation order forbidding a reporter-witness to be in the courtroom. *See id.* at 366. The net result is often the assignment of less-experienced reporters who lack the relevant background knowledge and relationships with sources that beat reporters who usually cover the issue possess. In worst-case scenarios, no reporters are assigned, and the community is deprived of important information of public concern.

**iii. The issuance of subpoenas prompts an avoidance of investigative reporting.**

Perhaps most concerning, the time- and resources-consuming nature of media subpoenas has led many journalists to cease their pursuit of meaningful but controversial stories. Aware that subpoena battles are more likely to arise out of investigative journalism than out of other forms of reporting, many newsroom leaders have made the calculated decision to forgo in-depth, public service reporting in order to avoid costly, protracted litigation. *See id.* at 360, 397. One of the journalists who responded to Professor Jones’ survey expressed this sentiment as follows:

“News organizations now are worried about being nibbled to death in depositions and spending all of their time dealing with subpoenas rather than with the work of newsgathering. So they have now just decided to go for the low-hanging fruit rather than continue with good, investigative journalism. I hear people in the business say all the time now that they just can’t do it anymore, because they can’t afford to have that kind of time spent on subpoenas.”

*Id.* at 360–61.

Taking these various actions for legal, rather than editorial, reasons undermines journalists’ First Amendment right to gather and disseminate the news. Even those news organizations that effectively avoid the subpoena threat by routinely destroying unpublished notes or other newsgathering materials and refusing to engage in investigative journalism do not defeat the subpoena threat — they merely trade editorial freedom for a safe harbor from compelled disclosure and its attendant costs.

**C. Compelled disclosure interferes with reporters’ relationships with potential sources.**

Journalists often have difficulty convincing reluctant sources to come forward and speak freely and openly, particularly about controversial issues. The task is even more challenging, if not impossible, if the sources sense that reporters may, at any time, be compelled to serve as witnesses against those they interview. One Pulitzer Prize winning investigative journalist subpoenaed to testify in a criminal trial about non-confidential unpublished information he obtained while newsgathering recently stated that his ““ability to obtain interviews and elicit information is dependent upon the assurance that I will not be compelled to testify in court any time I research or prepare articles on a topic that pertains in any way to a civil or criminal matter.”” Brief for Dow Jones & Co. as Amicus Curiae at 19, *United States v. Treacy*, 639 F.3d 32 (2d Cir. 2011) (No. 09-3939-cr).



As this reporter indicates, the negative impact of compelled disclosure on sources' willingness, or lack thereof, to volunteer information to journalists is not lessened where, as here, testimony regarding a confidential source is not at issue. To the contrary, the free flow of information from the press to the public is still encumbered by mandated production of non-confidential information and sources. *See In re Schuman*, 552 A.2d 602, 610 n.11 (N.J. 1989) (construing the state shield law to apply to non-confidential materials as well as confidential information). That is, media subpoenas, regardless of the type of information they seek, arouse a fear in sources that speaking with reporters will expose them to unwilling and unnecessary involvement in pending litigation. "The perception created through the use of a newsperson as a . . . witness causes some reporters and their sources to become apprehensive, regardless of whether the information sought is confidential." *Id.* at 611.

The strong public interest in journalists' cultivation of relationships with potential sources underlies the reporter's qualified privilege from compelled disclosure of non-confidential newsgathering material and is well-identified by a documentary filmmaker recently subpoenaed for such:

If the subjects of my films believed that the raw footage, as opposed to a release of footage as part of the overall story told by me, would be handed over to third-parties and potentially taken out of context (especially by their adversaries in the lawsuit), they would be far less inclined to trust me and allow me to film them. Without the protections of the journalists' privilege and the confidence that I can

honor my commitment to maintain control over my footage, I cannot make documentary films . . . .”

Brief for ABC, Inc. et al. as Amici Curiae Supporting Respondents-

Appellants at 11, *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011)

(No. 10-1918-cv).<sup>11</sup>

**D. Compelled disclosure robs journalists of their status as outside observers and transforms them into participants, thereby undermining their credibility and independence.**

Underlying the news media’s resistance to subpoenas is a fear that complying with them, especially when those subpoenas come from government sources, interferes with the media’s ability to function as independent newsgatherers. Absent a protection from compelled disclosure, the press is reduced to an investigative arm of prosecutors, police, criminal defendants and civil litigants, resulting in a compromise of the media’s neutral status and a severe chilling of the flow of information to the public.

The government’s use of reporters in its investigations is not the only threat to journalistic independence, however. Indeed, the media’s ability to pursue their

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<sup>11</sup> In *Berlinger*, this Court noted that it “has long recognized a qualified evidentiary privilege for information gathered in a journalistic investigation.” *Chevron Corp. v. Berlinger*, 629 F.3d 297, 306 (2d Cir. 2011). Yet, it upheld the lower court’s ruling that the filmmaker was not entitled to invoke the protection to shield him from the mandated disclosure of 600 hours of raw footage because he could not prove he collected the material for the purpose of independent reporting and commentary. *See id.* at 300.

constitutionally protected freedom to gather and report the news free from intrusion is also severely undermined when, as here, civil litigants seek to enlist the court's aid in appropriating the newsgathering work of journalists to their cause. Litigants often would prefer to limit or avoid the time and expense necessary to develop the facts required to make their case, especially when an experienced journalist has already done the legwork. And, as noted in the introduction to this brief, the litigants in this case are no exception. Fortunately, most courts have prevented litigants from taking this discovery shortcut by refusing to enforce subpoenas for newsgathering materials. *See Shoen*, 5 F.3d at 1292 n.5 (noting that the majority of the federal courts of appeals have recognized that newsgathering materials are protected by a qualified First Amendment privilege).

### **CONCLUSION**

The compelled disclosure of unpublished non-confidential material obtained while gathering and disseminating news of public interest is as much an intrusive interference with the operation of a robust press as is the mandated production of confidential information. Subpoenas, whether they seek journalists' confidential sources, non-confidential material or verification of published statements, threaten the neutrality and independence of the news media, casting them as agents of discovery in lawsuits that do not involve them. And fighting the subpoenas in order to maintain journalistic independence drains significant resources that should be

spent collecting and disseminating news. Even when media organizations comply with a subpoena, the cost often includes countless employee hours and thousands of dollars. Moreover, non-monetary costs are measured by reporters' difficulties cultivating relationships with potential sources, and changes in newsroom procedure that affect news coverage in a manner detrimental to the public.

Moreover, the excessive entanglement between journalists and the government or journalists and private litigants created by compelled disclosure threatens reporters' ability to do their job in the vigorous, innovative and truly autonomous way befitting an open and democratic society. At their very best, journalists are objective reporters of the news. They are not tools of the prosecution or investigative arms of civil litigants, and it is important to honor this distinction. By compelling reporters to testify whenever litigants deem them to be informational resources who can provide useful discovery shortcuts, courts rob journalists of the freedom to fulfill their constitutionally protected role as unattached conduits of information. This loss of independence compromises journalistic integrity and endangers freedom of the press, thereby chilling the free flow of information to the public.

The impositions that accompany receipt of a subpoena are not exclusive to the news media. Litigants, witnesses and business entities that face subpoenas undoubtedly are also burdened by expenditures of time, money and other

resources. Yet, journalists necessarily inject themselves into public controversies, and subpoena data demonstrate that they are indeed differently situated from other subpoena recipients, namely because these media recipients can be used as agents of discovery in ways ordinary citizens cannot. Moreover, the evidence indicates that the practice of subpoenaing reporters has a significant detrimental effect on the quality of newsgathering and dissemination.

In conclusion, this Court's consistent recognition of the existence of a journalist's qualified privilege from compelled disclosure of non-confidential material affirms the special role of the media in a democratic society and the strong public interest in ensuring they remain impartial and disinterested both in perception and reality. In accordance with this jurisprudence, *amici curiae* respectfully request that the Court uphold the lower court's ruling granting Non-Party Movant-Appellee's motion to quash the subpoena.

Dated: July 1, 2011  
Arlington, VA

Respectfully submitted,

By: /s/Lucy A. Dalglish

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing brief *amici curiae* complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,160 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated:        July 1, 2011  
                  Arlington, VA

/s/Lucy A. Dalglish

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## CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2011, I

- Caused to be served for filing with the United States Court of Appeals for the Second Circuit the foregoing brief *amici curiae* via the CM/ECF case filing system;
- Caused to be served for filing with the Court one original and five true and correct copies of the foregoing brief *amici curiae* via first-class mail, postage prepaid; and
- Caused to be served the foregoing brief *amici curiae* on counsel of record in this case via the CM/ECF case filing system. All counsel of record, listed below, are registered CM/ECF users:

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## ADDENDUM

Descriptions of *amici curiae*:

**The Reporters Committee for Freedom of the Press** is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

**ABC, Inc.** alone and through its subsidiaries owns and operates, inter alia, ABC News, abcnews.com, the ABC Television Network and local broadcast television stations including WABC-TV in New York City that regularly gather and report news to the public. Programs produced and disseminated by ABC News include World News Tonight with Diane Sawyer, 20/20, Nightline, Good Morning America and This Week with Christiane Amanpour.

**Advance Publications, Inc.**, directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, daily newspapers in over 20 cities and weekly business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers.

**A. H. Belo Corporation** and its subsidiaries publish several daily newspapers, including *The Dallas Morning News*, Texas' leading newspaper and

winner of nine Pulitzer Prizes since 1986. A. H. Belo also operates a diversified group of web sites.

**Allbritton Communications Company** is the parent company of entities operating ABC-affiliated television stations in the following markets: Washington, D.C.; Harrisburg, Pa.; Birmingham, Ala.; Little Rock, Ark., Tulsa, Okla.; and Lynchburg, Va. In Washington, it operates broadcast station WJLA-TV, the 24-hour local news service, NewsChannel 8 and the news web sites, WJLA.com and TBD.com. An affiliated company operates the ABC affiliate in Charleston, S.C.

**ALM Media, LLC** publishes over 30 national and regional magazines and newspapers, including The American Lawyer, the New York Law Journal, Corporate Counsel and the National Law Journal, as well as the web site Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's The Recorder, for example, has been published in Northern California since 1877; the New York Law Journal was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media.

With some 500 members, the **American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American

Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

**The Associated Press** (“AP”) is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP’s members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP news reports in print and electronic formats of every kind, reaching a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries.

**Association of Alternative Newsweeklies** (“AAN”) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their web sites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

**The Association of American Publishers, Inc.** (“AAP”) is the national trade association of the U.S. book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

**Association of Capitol Reporters and Editors** was founded in 1999 and has approximately 200 members. It is the only national journalism organization for those who write about state government and politics.

**Atlantic Media, Inc.** is a privately held integrated media company that publishes *The Atlantic*, *National Journal* and *Government Executive*. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at federal, state and local levels. *The Atlantic* was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

**Bay Area News Group** is operated by MediaNews Group, one of the largest newspaper companies in the United States with newspapers throughout California

and the nation. The Bay Area News Group includes the San Jose Mercury News, Oakland Tribune, Contra Costa Times, Marin Independent Journal, West County Times, Valley Times, East County Times, Tri-Valley Herald, The Daily Review, The Argus, Santa Cruz Sentinel, San Mateo County Times, Vallejo Times Herald and Vacaville Reporter. These newspapers rely on constitutional, statutory and common law protections for journalists' confidential sources and unpublished information in order to obtain and provide vital information to the public about government and corporate activities that affect their lives.

**Belo Corp.** owns or operates 20 television stations reaching 14% of U.S. television households, two regional cable news channels reaching more than three million households, four local cable news channels and more than 30 associated web sites.

**Bloomberg L.P.**, based in New York City, operates Bloomberg News, which is comprised of more than 1,500 professionals in 145 bureaus around the world. Bloomberg News publishes more than 6,000 news stories each day, and The Bloomberg Professional Service maintains an archive of more than 15 million stories and multimedia reports and a photo library comprised of more than 290,000 images. Bloomberg News also operates as a wire service, syndicating news and data to over 450 newspapers worldwide with a combined circulation of 80 million people, in more than 160 countries. Bloomberg News operates cable and satellite

television news channels broadcasting worldwide; WBBR, a 24-hour business news radio station which syndicates reports to more than 840 radio stations worldwide; Bloomberg Markets and Bloomberg BusinessWeek Magazines; and Bloomberg.com, which receives 3.5 million individual user visits each month.

**Cable News Network, Inc.** (“CNN”), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news web sites in the United States; CNN Newsource, the world’s most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

**CBS Broadcasting Inc.** produces and broadcasts news, public affairs and entertainment programming. Its CBS News Division produces morning, evening and weekend news programming, as well as news and public affairs newsmagazine shows, such as *60 Minutes* and *48 Hours*. CBS Broadcasting Inc. also directly owns and operates television stations across the country, including WCBS-TV in New York.

**Citizen Media Law Project** (“CMLP”) provides legal assistance, education and resources for individuals and organizations involved in online and citizen media. CMLP is jointly affiliated with Harvard University’s Berkman Center for

Internet & Society, a research center founded to explore cyberspace, share in its study and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media.

**Cox Media Group, Inc.** is an integrated broadcasting, publishing, direct marketing and digital media company. Its operations include 15 broadcast television stations, a local cable channel, a leading direct marketing company, 85 radio stations, eight daily newspapers and more than a dozen non-daily print publications, and more than 100 digital services.

**Daily News, L.P.** publishes the New York Daily News, a daily newspaper that serves primarily the New York metropolitan area and is the sixth-largest paper in the country by circulation. The Daily News' web site, [nydailynews.com](http://nydailynews.com), receives approximately 22 million unique visitors each month.

**The E.W. Scripps Company** is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information web sites, and licensing and syndication. The company's portfolio of locally focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service.



**First Amendment Coalition** is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

**First Amendment Project** ("FAP") is a nonprofit organization based in Oakland, Calif., dedicated to protecting and promoting freedom of information, expression and petition. FAP provides advice, educational materials and legal representation to its core constituency of activists, journalists and artists in service of these fundamental liberties.

**Gannett Co., Inc.** is an international news and information company that publishes 82 daily newspapers in the United States, including *USA TODAY*, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

**Hearst Corporation** is one of the nation's largest diversified media companies. Its major interests include ownership of 15 daily and 38 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany Times*; interests in an additional 43 daily and 74 non-daily newspapers owned by MediaNews Group, which include the *Denver Post* and *Salt Lake Tribune*; nearly 200 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E and ESPN; business publishing, including a minority joint venture interest in Fitch Ratings; and Internet businesses, television production, newspaper features distribution and real estate.

**LIN Television Corporation** d/b/a LIN Media, along with its subsidiaries, is a local multimedia company that owns, operates or services 32 network-affiliated broadcast television stations, interactive television stations and niche web sites, and mobile platforms in 17 U.S. markets, including properties in Buffalo, New York and New Haven, Conn.

**The McClatchy Company** publishes 31 daily newspapers and 46 non-daily newspapers throughout the country, including the *Sacramento Bee*, the *Miami Herald*, the *Kansas City Star* and the *Charlotte Observer*. The newspapers have a

combined average circulation of approximately 2.5 million daily and 3.1 million Sunday.

**Media General, Inc.** is a leading provider of news, information and entertainment across multiple media platforms, serving consumers and advertisers in strong local markets, primarily in the Southeastern United States. The company's operations include 18 network-affiliated television stations and associated web sites, 21 daily newspapers and associated web sites, more than 200 specialty publications that include weekly newspapers and niche publications targeted to various demographic, geographic and topical communities of interest.

**National Press Photographers Association** ("NPPA") is a nonprofit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 8,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

**NBCUniversal Media, LLC** is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and

entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the “Today” show, “NBC Nightly News with Brian Williams,” “Dateline NBC” and “Meet the Press.”

**The New York Times Company** is the publisher of The New York Times, the International Herald Tribune, The Boston Globe and 15 other daily newspapers. It also owns and operates more than 50 web sites, including nytimes.com, Boston.com and About.com.

**Newspaper Association of America** (“NAA”) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today’s newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

**The Newspaper Guild – CWA** is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising,

business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

**The Newsweek/Daily Beast Company LLC** publishes *Newsweek* magazine and operates the web site TheDailyBeast.com. Through nine print editions, *Newsweek* magazine appears weekly in more than 170 countries and is read by 19 million people. The Daily Beast was launched in 2008 by Tina Brown and Barry Diller of IAC. It is a multi-platform brand consisting of a news and current affairs web site that attracts an average of 6 million unique visitors per month from around the world, as well as a conference division and a book publishing imprint.

**North Jersey Media Group Inc.** ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: The Record (Bergen County), the state's second-largest newspaper, and The Herald News (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties, including some of the best weeklies in the state. Its magazine group produces high-quality glossy magazines including "(201) Best of Bergen," nearly a dozen community-focused titles and special-interest periodicals such as The Parent Paper.

The company's Internet division operates many news and advertising web sites and online services associated with the print publications.

**NPR, Inc.** is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and 10 years of archived audio and information.

**Online News Association** ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public, generally, by encouraging editorial integrity, editorial independence, journalistic excellence, freedom of expression and freedom of access.

**POLITICO LLC** is a nonpartisan, Washington-based political journalism organization that produces a newspaper and web site covering politics and public policy.

**Radio Television Digital News Association** (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

**Reuters America LLC** serves the financial markets and news media with real-time, high-impact multimedia news and information services and is part of Reuters, the world’s largest international news agency. Through Reuters.com and affiliated web sites around the world and via multiple platforms including online, mobile, video and outdoor electronic displays, Reuters provides trusted, unbiased, professional-grade business news, financial information, market data and national and international news directly to an audience of business professionals around the world. In addition, Reuters publishes a portfolio of market-leading titles and online services, providing authoritative and unbiased market intelligence to investment banking and private equity professionals.

**The Seattle Times Company**, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with the *Yakima Herald-Republic*, the *Walla Walla Union Bulletin*, *The Issaquah Press*, *Sammamish Review* and *Newcastle News*, all in Washington state.

**Society of Professional Journalists** (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

**Stephens Media LLC** is a nationwide newspaper publisher with operations from North Carolina to Hawaii. Its largest newspaper is the Las Vegas, Nev., *Review-Journal*.

**Time Inc.** is the largest magazine publisher in the United States. It publishes over 90 titles, including *Time*, *Fortune*, *Sports Illustrated*, *People*, *Entertainment Weekly*, *InStyle* and *Real Simple*. Time Inc. publications reach over 100 million adults and its web sites, which attract more visitors each month than any other publisher, serve close to two billion page views each month.



**Tribune Company** operates broadcasting, publishing and interactive businesses, engaging in the coverage and dissemination of news and entertainment programming. On the broadcasting side, it owns 23 television stations, a radio station, a 24-hour regional cable news network and “Superstation” WGN America. On the publishing side, Tribune publishes eight daily newspapers — Chicago Tribune, Hartford Courant, Los Angeles Times, Orlando Sentinel (Central Florida), The (Baltimore) Sun, The Daily Press (Hampton Roads, Va.), The Morning Call (Allentown, Pa.) and South Florida Sun-Sentinel.

**The Washington Post** is a leading newspaper with nationwide daily circulation of over 623,000 and a Sunday circulation of over 845,000.

**WNET** is the parent company of THIRTEEN, WLIW21, Interactive Engagement Group and Creative News Group and the producer of approximately one-third of all prime time programming seen on PBS nationwide. Locally, WNET serves the entire New York City metro area with unique on-air and online productions and innovative educational and cultural projects. Approximately five million viewers tune in to THIRTEEN and WLIW21 each month.