UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| IN RE: McCRAY, *et al.*, | : | No. 03 Civ. 9685 (DAB) (RLE) |

**MEMORANDUM OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE ASSOCIATED PRESS, DOW JONES & CO., INC., GANNETT CO., INC., AND THE NEW YORK TIMES IN SUPPORT OF FLORENTINE FILMS' MOTION TO QUASH NON-PARTY SUBPOENA SERVED BY DEFENDANTS**

Amici Curiae The Reporters Committee for Freedom of the Press, The Associated Press, Dow Jones & Co., Inc., Gannett Co., Inc., and The New York Times, by and through undersigned counsel, respectfully submit this memorandum in support of Florentine Films' motion to quash a non-party subpoena served by Defendant New York City (the "City") (Dkt. No. 186). This Court granted leave to file this amicus brief in a memo endorsement dated November 20, 2012 (Dkt. No. 191).

## INTEREST OF AMICI CURIAE

The Reporters Committee for Freedom of the Press (the "Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information rights of the news media. Amicus has provided representation, guidance, and research in First Amendment and freedom of information litigation since 1970 and seeks to weigh in on an issue in this case that has profound implications on the ability of reporters to inform the public about matters of great importance. As advocates for the rights of the news media and others who seek to provide information to the public on important issues that affect them, the Reporters Committee closely monitors developments in media law

nationwide that affect the ability to gather and disseminate news, including subpoena requests issued to journalists who are not parties to litigation.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. Its members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. The Associated Press has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. It publishes 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.

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.

Dow Jones & Company, Inc. is the publisher of The Wall Street Journal, a daily newspaper with a national circulation of over two million, WSJ.com, a news website with more than one million paid subscribers, Barron's, a weekly business and finance magazine and, through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires, as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

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.

The input of amici may be valuable to this Court because of their experience analyzing legal issues that touch on First Amendment rights, and because of their direct interests in protecting the freedom of the press. In this case, the City seeks to retrieve hours of unpublished interviews and other non-confidential outtakes filmed in preparation for Florentine Films' documentary film "The Central Park Five." The City contends that Florentine Films cannot avail itself of the reporter's privilege and thus shield itself from compelled disclosure of such information. 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 City's contention presents a problematic interpretation of both the state and federal shield law that, if heeded by this Court, could significantly chill the ability of journalists to obtain such information from sources in the future. In particular, under the City's interpretation of the "relevance" prong of the standard used to determine whether a reporter's privilege exists, potentially any reporter covering a civil or criminal trial could be subject to a subpoena simply for the fact that the subject matter at issue is the same. 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.

Amici offer unique and valuable perspectives on the legal questions before the Court in this case. Drawing on insight gained through careful observation of the law over a period of

time, the brief submitted by amici takes a broad view of the issue, thereby providing a larger context to the controversy.

## ARGUMENT

This Court should grant Florentine Films' motion to quash the subpoena issued by the City, which seeks non-confidential outtakes and unpublished video footage of interviews with a wide range of sources related to the documentary film "The Central Park Five." The City's subpoena seeks to downplay the well-established qualified reporter's privilege shielding both confidential and non-confidential information from compelled disclosure. The City justifies its subpoena request with the argument that the principals of Florentine Films cannot claim the status of independent journalists because Sarah Burns, one of the filmmakers, once worked for the law firm representing plaintiffs in the underlying civil action prior to beginning the research and interviewing the subjects that form the basis of the documentary. But that employment history is only meaningful if the newsgathering process started as part of that position, or if her previous employer financially contributed to or retained editorial control over the production; none of those conditions exist here.

Denying the motion to quash the City's subpoena would have an unsettling impact well beyond this particular discovery dispute. The City seeks to discredit the asserted independence of Florentine Films in the unfounded hope of discovering statements to use to impeach the testimony of the plaintiffs and others in the underlying civil suit before many of them have even been deposed. In doing so, the City disregards the important principle that journalists must be free to work independently of the judicial process, ignores the public interest in a reporter's right to keep information confidential, and dismisses the very real chilling effect that a decision like this will have on the public's receipt of information on important controversies.

## I. The Existence of the Reporter's Privilege Does Not Depend on How an Individual Learned of the Underlying Events, as long as the Information Subsequently was Gathered for the Purpose of Disseminating It to the Public

The City makes clear in its correspondence with counsel for Florentine Films that it "contests the true independence of Florentine Films, at least in the context of this film." Dkt. No. 187, Siegel Decl., Ex. D, at 2. The City relies on last year's Second Circuit decision in *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011), in which the court held that the privilege does not apply to a journalist who has lost his "independence" by allowing the subject of the work to have editorial control or by accepting financial contributions to the project by the subject. *Berlinger* also involves a subpoena issued to a documentary filmmaker, but the unique facts of *Berlinger* which led to the Second Circuit's controversial decision do not exist here.

As Florentine Films makes clear in its memorandum in support of its motion to quash this subpoena, Dkt. No. 190, Memorandum of Law at 12, the court's holding in *Berlinger* in fact supports applying the privilege to the producers of "The Central Park Five." 629 F.3d at 309 ("[A] journalist who has been solicited to investigate an issue … can establish entitlement to the privilege by establishing the independence of her journalistic process, for example, through evidence of editorial and financial independence.")

In examining who should be covered by the reporter's privilege, the Second Circuit in *Berlinger* essentially reaffirmed its own prior precedent in *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987). The *von Bulow* court held that with respect to both confidential and non-confidential information, "an individual claiming the journalist's privilege must demonstrate, through competent evidence, the intent to use material sought to disseminate information to the public and that such intent existed at the inception of the newsgathering process." *Id.* at 147. In supporting this factual inquiry into a journalist's intent at the start of the newsgathering process, both the *Berlinger* and *von Bulow* courts made clear the public policy rationales influencing their

decision that the journalist's privilege should apply only to those engaged in journalistic – rather than private – pursuits. *Berlinger*, 629 F.3d at 308 ("The privilege is designed to support the press in its valuable public service of seeking out and revealing truthful information. An undertaking to publish matter in order to promote the interests of another, regardless of justification, does not serve the same public interest."); *von Bulow*, 811 F.2d at 142 ("This qualified right … emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public.").

It is this distinction that determines whether an individual was acting as a journalist, and the further distinctions in *Berlinger* only establish certain conditions – allowing editorial control or accepting payment – that will negate the privilege. The declarations of the filmmakers involved in the project state that none of the subjects involved in "The Central Park Five" had influence in the editorial process. *See, e.g.*, Dkt. No. 189, Sara Burns Decl., at 3-4. And the City itself accepts the filmmakers' contention that there was never any financial arrangement between Florentine Films and the subjects of its documentary. *Id.*

The facts in *von Bulow* demonstrate a distinct difference between the type of information-gatherers that do not warrant the protection of a reporter's privilege and those, like the documentary film makers in this case, who do. *Von Bulow* involved a claim by Andrea Reynolds, who was writing a book on the criminal trial of Claus von Bulow for the attempted murder of his wife. Reynolds was an "intimate friend" of von Bulow and his "steady companion" during his trial. 811 F.2d at 139. She also said she had worked as a paralegal for his defense team, *id.* at 140, and claimed that therefore the information she gathered at the time was protected by the attorney-client privilege, *id.* at 138. At a deposition, Reynolds "stated that she wished to claim the journalist's privilege along with 'any other privilege that exists under the

sun.'" *Id.* at 139. The fact that she simultaneously pressed an attorney-client privilege claim makes clear that Reynolds herself did not truly believe that she was acting with any independence when she began gathering information. Instead, she was actively serving the private interest of promoting a friend's defense.

Under these cases, the relevant inquiry is the journalist's intent at the time the information is gathered. In claiming that Florentine Films was acting not as an independent member of the press but as an advocate for the plaintiffs, the City relies heavily on the prior employment status of Sarah Burns, who worked as a paralegal for Moore & Goodman, P.A., counsel for three of the plaintiffs featured in the documentary, and her subsequent public statements about the underlying case. Dkt. No. 187, Siegel Dec., Ex. D, at 2-3. Yet the City reveals no sound reason to believe that the start of the newsgathering process occurred while Sarah Burns was employed by Moore & Goodman, P.A., and the filmmakers have stated that information was not gathered for their film while Burns worked at the firm. *See* Dkt. No. 189, Sarah Burns Decl. at 3.

To conclude, under these circumstances, that Florentine Films did not have the requisite independence to avail itself of the reporter's privilege undermines the policy rationale for the privilege, namely the service of the "paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters." *von Bulow*, 811 F.2d at 144.

## II. The City's Broad Definition of "Relevance" would Prevent Potentially Any Journalist from Being Able to Assert the Second Circuit's Qualified Privilege

In its letter to the filmmakers' counsel, the City merely states as its justification for meeting the relevance prong of *Gonzalez* that "the subject matter of the film is virtually identical to the subject matter of the instant public litigation." Dkt. No. 187, Siegel Decl., Ex. D, at 4.

Moreover, the City categorically states that the subjects of the documentary "are not 'sources,' and cannot be said to have conveyed information to Florentine Films about the events of April 19, 1989, and their aftermath 'in confidence.'" *Id.*

The test of relevance simply cannot be this broad. The standard set forth in *Gonzalez* governs when the reporter's privilege can be used to shield non-confidential information from compelled disclosure through court-ordered discovery. 194 F.3d 29. In *Gonzalez*, both plaintiffs and defendants in a civil rights lawsuit subpoenaed non-party NBC for video outtakes of allegedly improper traffic stops conducted by the defendant, a Louisiana deputy sheriff. *Id.* at 31. The court held that non-confidential press material received a qualified privilege similar, but narrower, to the privilege for confidential materials. *Id.* at 35-36. The subpoenaing party must demonstrate that the non-confidential material is "of likely relevance to a significant issue in the case, and [is] not reasonably obtainable from other available sources." *Id.* at 36. The Second Circuit engaged in a detailed review of the nature of the privilege:

> 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.* at 35.

The Court in *Gonzalez* concluded that the video outtakes NBC possessed of the deputy sheriff were relevant to a significant issue in the case, namely whether the deputy sheriff engaged in a pattern of stopping vehicles without probable cause. In other words, the videotape was known to be a direct depiction of the action of the officer. In contrast, the material sought by the City cannot meet the test of relevance, because the City does not know what is in the interview outtakes, and instead seeks possession of interviews with a wide range of individuals to comb through them in the hopes of finding something of relevance to as-yet-unknown testimony. This purely *speculative* relevance is not sufficient. In fact, the City's subpoena amounts to nothing more than a fishing expedition to find statements used to potentially impeach the plaintiffs.

Similarly, in claiming that the information in the raw footage owned by Florentine Films cannot be reasonably obtained from other sources, the City states that "the depositions are unlikely to adequately substitute for this footage." *Id.* This excuse does not meet the standard set out in *Gonzalez* and is at odds with the Court's rationale for recognizing a privilege for non-confidential information.

Without a more precise showing of the two prongs of the *Gonzalez* test, it would become impossible for journalists to maintain the independence from the judicial process they need so they can gather information and report news to the public without being compromised by litigants with a claim to pursue.

This Court should be mindful of the "chilling effect" subpoenas such as the one issued by the City have on reporters and the sources of their information. 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 be compelled to serve as witnesses against those they interview.

## CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the Court grant Florentine Films' motion to quash the City's subpoena.

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Respectfully submitted,

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