10-1918(L), 10-1966(con)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHEVRON CORPORATION, RODRIGO PEREZ PALLARES and RICARDO REIS VEIGA,

Petitioners-Appellees,

v.

JOSEPH BERLINGER, CRUDE PRODUCTIONS, LLC, MICHAEL BONFIGLIO, THIRD EYE MOTION PICTURE COMPANY, INC., and @RADICAL.MEDIA, INC.,

Respondents-Appellants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF *AMICI CURIAE* OF ABC, INC., THE ASSOCIATED PRESS, CBS BROADCASTING INC., DAILY NEWS, L.P., DOW JONES & COMPANY, INC., GANNETT CO., INC., HEARST CORPORATION, HOME BOX OFFICE, INC., THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, NBC UNIVERSAL, INC., THE NEW YORK TIMES COMPANY, PEN AMERICAN CENTER, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE SOCIETY OF ENVIRONMENTAL JOURNALISTS, AND THE WASHINGTON POST IN SUPPORT OF RESPONDENTS-APPELLANTS' EXPEDITED APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* ABC, Inc., The Associated Press, CBS Broadcasting Inc., Daily News, L.P., Dow Jones & Company, Inc., Gannett Co., Inc., Hearst Corporation, Home Box Office, Inc., the National Press Photographers Association, NBC Universal, Inc., The New York Times Company, PEN American Center, the Reporters Committee for Freedom of the Press, the Society of Environmental Journalists, and the Washington Post certify as follows:

ABC, Inc. has the following publicly held corporate parent: The Walt Disney Company.

The Associated Press has no parents, subsidiaries, or affiliates that have any outstanding securities in the hands of the public, has no publicly held stock, and no publicly held company owns 10% or more of its stock.

CBS Broadcasting Inc. is an indirect, wholly-owned subsidiary of CBS Corporation, which is a publicly-traded company.

Daily News, L.P., is a limited partnership, the general partner of which is New DN Company, a privately-held corporation. No publicly-held corporation holds an interest of 10% or more in Daily News, L.P.

News Corporation, a publicly held company, is the indirect parent corporation of *amicus* Dow Jones & Company, Inc. ("Dow Jones"), and Ruby Newco LLC, a subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. No publicly held company owns 10% or more Dow Jones stock.

Gannett Co., Inc. is a publicly traded corporation. It has no parents, subsidiaries or affiliates that are publicly traded. J.P. Morgan Chase and Co. owns more than 10% of Gannett Co., Inc. stock.

Hearst Corporation is a privately held company.

Time Warner Inc., a publicly-traded company, is the ultimate parent corporation of *amicus* Home Box Office, Inc. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

The National Press Photographers Association is a 501(c)(6) non-profit organization.

NBC Universal, Inc. is owned by General Electric Corporation, a publicly traded U.S. corporation, and Vivendi, S.A., a publicly traded French company.

The New York Times Company has no parent, and no publicly-held corporation holds an interest of 10% or more in the New York Times Company.

PEN American Center is a 501(c)(3) nonprofit organization.

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

The Society of Environmental Journalists is a 501(c)(3) nonprofit organization.

WP Company LLC d/b/a The Washington Post is a wholly-owned subsidiary of The Washington Post Company, a publicly held corporation. Berkshire Hathaway, Inc., a publicly held company, has a 10% or greater ownership interest in The Washington Post Company.

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ABC, Inc., The Associated Press, CBS Broadcasting Inc., Daily News, L.P., Dow Jones & Company, Inc., Gannett Co., Inc., Hearst Corporation, Home Box Office, Inc., the National Press Photographers Association, NBC Universal, Inc., The New York Times Company, PEN American Center, the Reporters Committee for Freedom of the Press, the Society of Environmental Journalists, and the Washington Post respectfully submit this memorandum of law, as *amici curiae*, in support of the emergency appeal by Respondents-Appellants Joseph A. Berlinger, Crude Productions, LLC, Michael Bonfiglio, Third Eye Motion Picture Company, Inc., and @radical.media ("Filmmakers"), and the Lago Agrio Plaintiffs (collectively, "Respondents") of the May 10, 2010 order issued by the U.S. District Court for the Southern District of New York (Kaplan, J.) (the "District Court").[1]

The District Court's order granted an application by Petitioners-Appellees Chevron Corporation, Rodrigo Pérez Pallares, and Ricardo Reis Veiga (collectively, "Petitioners") to subpoena what appears to be the largest amount of film

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1 Pursuant to Local Rule 29.1(b), *amici* hereby confirm that no party to the instant appeal, or their counsel, has contributed money that was intended to fund the preparation or submission of *amici*'s proposed brief. In addition, no non-party other than the *amici*, or their members and counsel, has contributed such funds. Counsel for the parties to this appeal did not author the proposed brief in whole or in part.

outtakes in American history — approximately *six hundred hours* of documentary film outtakes created by the Filmmakers. While purporting to apply the journalist privilege standard articulated by this Court in *Gonzales* v. *National Broadcasting Company, Inc.*, 194 F.3d 29 (2d Cir. 1999), the District Court opinion is at odds with both the letter and spirit of that opinion. Because the District Court's analysis severely undermines the continued vitality of a journalist's privilege with respect to outtakes and unpublished newsgathering material in a manner which imperils not only the rights of the Filmmakers before this Court but those of all who engage in news reporting and filmmaking, and ultimately all who read and view their efforts, the undersigned urge this Court to reverse the District Court's order.[2]

INTERESTS OF THE *AMICI*

The *amici* and their employees and members distribute news and documentaries on television, produce, create and direct films, including documentaries, publish newspapers and magazines, and otherwise prepare for and offer to the public the widest array of information covering subjects of public interest. In doing so,

[2] All parties to the appeal have consented to the filing of this brief, thus it is submitted on consent pursuant to Federal Rule of Appellate Procedure 29, as well as this Court's scheduling order of June 8.

all the *amici* distribute, include in their films, or publish only a limited amount of the information gathered and initially considered for possible inclusion. The materials not included — outtakes and other unpublished newsgathering material — have long been held by this Circuit to be protected by a qualified privilege designed to assure that news reporters, filmmakers, writers, and their sources will not be chilled from participating in the gathering and dissemination of information of interest and importance to the public. A ruling such as that before this Court, which too easily and too sweepingly requires the production of such material, can well have just that effect.

Individually, the *amici* are as follows:

ABC, Inc. is a broad-based communications company with significant holdings in the United States and abroad. Alone or through its subsidiaries, it owns ABC News, abcnews.com, and local broadcast television stations that regularly gather and report news to the public. ABC News produces the television programs World News, 20/20, Primetime, Good Morning America and Nightline, among others.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet

content providers. AP distributes news worldwide through its global network of 243 bureaus and offices and, on any given day, AP's content can reach more than half of the world's population.

CBS Broadcasting Inc. ("CBS Broadcasting") 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 INVESTIGATES. CBS Broadcasting also directly owns and operates television stations across the country, including WCBS-TV in New York.

Daily News, L.P., publishes the New York *Daily News*, which is the sixth-largest circulation newspaper in the country, serving primarily the New York City metropolitan area. The *Daily News*' website, nydailynews.com, had 21.6 million unique visitors and 211 million page views in April 2010.

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 other Dow Jones products and services.

Gannett Co., Inc. is an international news and information company that publishes 81 daily newspapers in the United States, including USA TODAY, and a number of non-daily publications, including USA Weekend, a weekly newspaper magazine. Gannett also owns 23 television stations, and operates over 100 U.S. websites that are integrated with its publishing and broadcast 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; nearly 200 magazines around the world; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks; as well as business publishing, Internet businesses, television production, newspaper features distribution and real estate.

Home Box Office, Inc. is America's most successful premium television company, delivering two 24-hour pay television services — HBO and Cinemax — to over 40 million U.S. subscribers. HBO documentary films offers a full spectrum of non-fiction programming by acclaimed documentary filmmakers and has earned virtually every major programming award.

The National Press Photographers Association (NPPA) was founded in 1946 and is dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's membership includes television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry throughout the world. As staff photographers and freelance photojournalists, the NPAA's members produce content for traditional print publications; broadcast news, sports and documentaries; as well as for Internet entities and emerging media.

NBC Universal, Inc. 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, NBC Universal owns and operates NBC News, the NBC television network, the Spanish-language television network Telemundo, several news and entertainment networks including MSNBC, CNBC and Bravo, a television stations group consisting of 19 owned-and-operated television broadcast stations that produce substantial amounts of local news, sports and public affairs programming, and the Universal and Focus Features film studios.

The New York Times Company, a leading media company with 2009 revenues of $2.4 billion, publishes *The New York Times* with a circulation of close to

one million daily and 1.4 million Sundays, the *International Herald Tribune*, *The Boston Globe*, 15 other daily newspapers and operates more than 50 Web sites, including NYTimes.com, Boston.com and About.com.

PEN American Center is composed of over 3,000 writers and others in the literary community. It is dedicated to the protection of free expression and the advancement of literature, through an international literary fellowship. The PEN American Center is the largest center of over 140 around the world who are part of International PEN, and its members challenge rules that limit freedom of expression in this country.

The Reporters Committee for Freedom of the Press ("Reporters Committee") 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 litigation in state and federal courts since 1970.

The 1,500 members of the Society of Environmental Journalists ("SEJ") work to strengthen the quality, reach and viability of journalism across all media in advancing public understanding of widely diverse environmental issues. These include, for instance, the regulated extraction of mineral and energy resources, and

their environmental consequences. SEJ's First Amendment Task Force exists to respond to what its members describe as growing restrictions on their ability to report on and depict environmental issues.

WP Company LLC publishes, among other things, The Washington Post, a leading newspaper with daily and Sunday circulation primarily in the Washington, D.C. metropolitan area, and operates websites such as washingtonpost.com.

THE DISTRICT COURT'S MAY 10 ORDER SHOULD BE REVERSED

In this brief, *amici* deal only with one aspect of the instant appeal — the District Court's failure to correctly apply this Circuit's well-established requirements for the production of outtake material protected by a qualified journalist privilege. The standards governing this Court's review of the Filmmakers' privilege claim are not in dispute. All parties and the District Court agree that *Gonzales* v. *National Broadcasting Company, Inc.*, 194 F.3d 29 (2d Cir. 1999), provides a sufficient basis for deciding that claim. Where the parties differ with each other and where the *amici* differ with the District Court is as to nothing less than the meaning of *Gonzales*.

The *Gonzales* case was not some sort of judicial outlier, created out of whole cloth by this Court. It followed a number of rulings, after the Supreme Court's de-

cision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), holding that a qualified privilege protects confidential journalistic sources. *See Baker* v. *F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982); *von Bulow* v. *von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987).

In *Gonzales*, this Court resolved all doubt as to the applicability in this Circuit of a qualified privilege for non-confidential newsgathering materials, holding that a party seeking to compel production of such materials must make a somewhat less demanding showing than for confidential information – but a showing that is, nonetheless, still significantly more substantial than the burden on a litigant seeking ordinary garden-variety discovery. The Court summed up its ruling as follows:

> [W]e reaffirm that the qualified privilege for journalists applies to nonconfidential, as well as to confidential, information. . . . Where a civil litigant seeks nonconfidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists' privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.

Gonzales, 194 F.3d at 35-36 (holding that the privilege applied to non-confidential

outtakes subpoenaed from a television network).[3] The Court explained its reasons for extending a qualified privilege to all non-public journalist materials:

> These broader concerns, [such as the "pivotal function of reporters to collect information for public dissemination,"] we believe, are relevant regardless whether the information sought from the press is confidential. 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 . . . . [P]ermitting 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 privilege articulated in *Gonzales* protects journalists' credibility with sources while promoting, at the same time, an editorial process free from undue, outside intrusion. As Judge Keenan explained twenty years ago:

> The second interest recognized in the journalist's privilege is the press' independence in its "selection and choice of material for publication." Ready obtainment by litigants of court orders compelling disclosure of outtakes and unpublished information could prompt re-

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3 *Amici* note that the Filmmakers have consistently asserted the confidentiality of certain outtake footage throughout the proceedings below and challenge the District Court's finding of non-confidentiality in this appeal.

> porters or editors to purge from publication any information they fear would excite the interest of current or prospective litigants.

United States v. *Marcos*, No. SSSS 87 CR 598, 1990 WL 74521, at *2 (S.D.N.Y. June 1, 1990) (quashing subpoena that sought outtakes from *60 Minutes* interview with Imelda Marcos) (citations omitted). *See also 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."); *United States* v. *Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) ("Like the compelled disclosure of confidential sources, [the compelled production of a reporter's resource materials] may substantially undercut the public policy favoring the free flow of information to the public that is the foundation of the privilege."). But the District Court in this case recognized none of these interests, and certainly none such as were well-identified by Mr. Berlinger in his declaration:

> 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 like *Crude*.

Decl. of Joseph A. Berlinger, dated Apr. 22, 2010 ("Berlinger Decl."), at ¶ 11.

The vast distance between the District Court's reading of *Gonzales* and its text and spirit is illustrated by the Court's emphasis in both its May 10 and May 20 orders on the proposition that, because the individual subjects captured in the out-take footage voluntarily chose to expose themselves to public scrutiny through the inevitable screening of a completed film, it would "not credit any assertion that the discovery of the outtakes by [P]etitioners would compromise the ability of Berlinger or, for that matter, any other film maker, to obtain material from individuals interested in confidential treatment." May 10 Order, at 7. *See also* May 20 Order, at 8-9. This analysis completely ignores the relationship between a documentary filmmaker and the individuals that he or she accompanies or interviews; it assumes, wrongly, that the participants in such a project would see no difference between the public circulation of a final film painstakingly prepared and edited by the filmmaker who solicited their contribution and whom they entrusted with telling a story and the potentially unlimited display of their every word in a widely-publicized multi-billion dollar international litigation.[4]

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[4] The District Court also noted in its May 20 opinion that "this case has little or nothing in

Footnote continued on next page.

The District Court correctly recited the governing standards, set forth in *Gonzales*, for the consideration of a qualified journalists' privilege in its May 10 order.[5] But the Court's application of those standards to the instant dispute is at war with — and threatens to consume — the standards themselves. Most obviously, there was no basis in the record for the sweeping assumption that all 600 hours of tape — nearly 350 times the footage that appeared in the final film itself — contained material "of likely relevance to a significant issue in the case." Applying the *Gonzales* standard in name only, the Court focused on three scenes in the publicly-released film to support its conclusion that *all* the footage sought, none of which was even reviewed by the District Court, would be of likely relevance to Petitioners' claims.

Confronted with the limits of its review in Respondents' request for a stay, the District Court described its findings as resting on a "far broader base than Ber-

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common with the archetypal situations in which journalist privilege is claimed[.]" May 20 Order, at 8. But the facts of this case cut especially strongly against the disclosure ordered. Petitioners' subpoena for 600 hours of outtake footage far surpasses in scope *any* requests previously addressed by this or, we believe, any Court. Never before, to *amici*'s knowledge, has a court confronted with the journalist's privilege approved production of a body of work approaching the elephantine amount of material at issue here.

5 *See* May 10 Order, at 9 (quoting *Gonzales*); May 20 Order, at 6.

linger acknowledges," but it did not clarify how any review of the published film could establish the likely relevance of all 600 hours not included in that public version.[6] Assuming, *arguendo*, that the outtake footage does contain the particular *categories* of footage that Petitioners and the District Court predict, the Court did not find — because it could not — that *all* the outtakes bore a likelihood of relevance to Petitioners' foreign claims. Indeed, the May 10 Order authorized Petitioners to subpoena an enormous quantity of outtake footage without *any* specification of particular topics or time periods that are supposedly relevant to their claims: absent reversal or remand by this Court, Petitioners would obtain 600 hours' worth of privately-created footage based solely on a self-serving extrapolation from the Filmmakers' published material. *See, e.g.*, Transcript of Apr. 30, 2010 Oral Ar-

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6 *See, e.g.*, May 20 Order, at 5 ("The fact that *Crude* contains only excerpts of footage depicting such interactions amply supports an inference that the outtakes contain additional relevant material. . . . Further . . . . [p]laintiffs' counsel indeed are on the screen throughout most of *Crude*, which contains less than one percent of the total footage Berlinger shot in connection with the litigation. Berlinger concededly removed at least one scene from the final version of Crude at their direction. In these circumstances, there is considerable reason to believe that the outtakes are relevant to significant issues in the Lago Agrio Litigation and the Arbitration, including whether plaintiffs' counsel improperly influenced expert witnesses and the [Government of Ecuador].") (quoting May 10 Order). At most, such an analysis — even if deemed a fair summary of the film — suggests only that some outtakes might be ordered disclosed. Nothing in the Court's opinion even begins to demonstrate that *all* the outtakes should have been ordered disclosed.

gument before Hon. Lewis A. Kaplan ("Apr. 30 Tr."), at 5:20. This is fishing with the largest possible net.

The District Court attempted to minimize the breadth of its order by maintaining that any insistence on greater specificity or a more targeted application would be unfair to Petitioners, because Petitioners cannot "reasonably be expected to identify with particularity the outtakes that they seek where knowledge of their content lies exclusively with Berlinger." May 20 Order, at 5 (quoting May 10 Order). This argument ignores the reality that outtake cases routinely involve parties seeking production of previously unseen material. The Court effectively shifted the burden of alleged unfairness onto the Filmmakers, rendering this Circuit's requirement of a relevance showing meaningless.

The contention of the individual Petitioners that it would not be "reasonable to expect the district court to review all 600 hours of footage *in camera* to surgically identify those scenes that are relevant," Br. for Petitioners-Appellees Pérez Pallares and Reis Veiga, dated June 21, 2010, at 32, similarly misses the point that a legally-recognized First Amendment-rooted privilege surely cannot disappear because the amount of material at issue is so enormous. Our point is not, as the individual Petitioners put it, that *Gonzales* invariably "require[s] an *in camera* review." *Id.* It is that *Gonzales* requires some sort of meaningful effort to distin-

guish between material that is truly "likely" to be relevant and material that is not. While resolution of this issue in this case undoubtedly required creativity, the use of a magistrate judge, a special master, an agreed-upon third party or some other mechanism could have been ordered rather than simply sweeping aside the privilege at issue in wholesale fashion.

Finally, the District Court acknowledged that, under *Gonzales*, Petitioners must demonstrate that the evidence they seek is "not reasonably obtainable from other sources." May 10 Order, at 9. Review of the Court's order, however, reveals only a cursory and misguided application of the considerations behind *Gonzales*'s test.

The public news report at issue in *Gonzales* asserted, in part, that non-public program outtakes retained by NBC could confirm that NBC's undercover reporter had not violated any traffic laws prior to being stopped by the same police officer who was the defendant in the underlying civil rights action. Specifically, the outtakes at issue purportedly contained factual information about the reporter's driving speed and vehicle operation prior to the stop, as well as details of the reporter's one-on-one interaction with the defendant, that could not reasonably be obtained through deposition testimony. *Gonzales*, 194 F.3d at 36. The district court's conclusion in *Gonzales* that no alternative source for such evidence existed was not

based on NBC's exclusive possession of a particular videotape, but on the specific factual contents of the footage at issue. This Court approved the district court's finding that such outtake tapes "contain[ed] *information* that [was] not reasonably obtainable from other available sources, because they [could] provide unimpeachably objective evidence of [defendant's] conduct." *Id.* (emphasis added). No such distinction between form and function was drawn or even attempted in this case. *Compare* Mem. of Law by Chevron Corporation in Support of Petition and Application for an Order Pursuant to 28 U.S.C. § 1782, at 18 ("[T]he 600 hours of footage shot by Mr. Berlinger and his colleagues are likely to be in their sole possession, and thus *the footage itself* is not known to be available from any other source.") (emphasis added) *and* May 10 Order, at 11 ("The issue . . . here is . . . . whether there is sufficient ground to believe that the *footage* [P]etitioners seek would not reasonably be obtainable elsewhere.") (emphasis added).

It is generally true that the footage itself is unobtainable elsewhere, but the correct test is whether the *information* contained in that footage is so obtainable. This Court used just this analysis three years before *Gonzales* in *In re Application to Quash Subpoena to National Broadcasting Company, Inc.*, 79 F.3d 346 (2d Cir. 1996) ("*Graco*"), reversing denial of a motion to quash where defendants failed to demonstrate unavailability. The *Graco* court explained as follows:

> The district court concluded that, because the material contained in the out-takes sought by Graco is solely in the hands of NBC, it is 'therefore, unavailable from any other source.' However, it cannot be said that pertinent material is not obtainable elsewhere just because it is included in some out-takes. . . . Graco has made no showing that it attempted to obtain the information from other sources, such as the medical examiner. Graco simply failed to exhaust all other available sources of information.

Id. at 353.

The alleged offenses depicted in *Crude* for which Petitioners seek additional evidence, involving an alleged Ecuadorian expert, counsel, and a judge in Quito, can be probed directly in Ecuador. Mr. Berlinger has also testified that: "Chevron's attorneys, often accompanied by their own cameras and film crew, were present at every public event and hearing concerning the judicial inspections at which the *Crude* cameras were rolling. . . . Thus, my raw footage is not the only source of the information sought by Chevron." Berlinger Decl. at ¶ 34. In their brief to the District Court, the Lago Agrio Plaintiffs also emphasized that Petitioners had not sought discovery of *any* evidence probative of the judicial corruption that they allege through Ecuadorian channels. *See* Mem. of Law by the Lago Agrio Plaintiffs in Opposition to Application for an Order Pursuant to 28 U.S.C. § 1782, at 18 ("Chevron . . . did not even *try* to get discovery concerning the Court expert from the foreign jurisdiction."). The District Court offered only a passing response to

these submissions, concluding that the presence of Chevron's attorneys, "often accompanied by their own cameras," did not match Berlinger's "unprecedented access." May 10 Order, at 11-12. But the question is not who had better or more access; it is whether the access Chevron concededly had or other information it could obtain was inadequate for it to make its case without the addition of Berlinger's outtakes. Having Berlinger's material as well as its own might (or might not) prove a useful addition to Chevron — but that is not the standard. Here, as was the case throughout the District Court's opinion, the District Court made it far too easy for Chevron to obtain far too much, precisely what *Gonzales* forbids.

CONCLUSION

For all of the foregoing reasons, *amici* respectfully request that the Court reverse the May 10 Order.

Dated: New York, New York
June 23, 2010

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

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 4,235 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

Dated: New York, New York
June 23, 2010

s/ Floyd Abrams
Floyd Abrams