

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE:

McCray, *et al.*

No. 03 Civ. 9685 (DAB) (RLE)

***AMICI CURIAE* BRIEF OF THE INTERNATIONAL DOCUMENTARY ASSOCIATION,
FILM INDEPENDENT, THE NATIONAL ALLIANCE OF MEDIA ARTS AND
CULTURE, INDEPENDENT FILMMAKER PROJECT – MINNESOTA,
KARTEMQUIN FILMS, MINNESOTA FILM AND TV, KATIE GALLOWAY, KELLY
DUANE DE LA VEGA, GEOFFREY SMITH, ROBERTO HERNANDEZ, KIRBY DICK,
ALEX GIBNEY, JOSH FOX, GORDON QUINN, MALIKA ZOUHALI-WORRALL,
KATHERINE FAIRFAX WRIGHT, AND SCOTT HAMILTON KENNEDY IN
SUPPORT OF FLORENTINE FILMS’ MOTION TO QUASH NONPARTY SUBPOENA**

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TABLE OF CONTENTS

	<u>PAGE NO(s)</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
INTRODUCTION AND INTEREST OF AMICI CURIAE	1
ARGUMENT	3
I. COMPELLING DISCLOSURE OF FLORENTINE FILMS’ VIDEO OUTTAKES WILL HAMPER THE FREE PRESS AND UNDERMINE THE VALUES UNDERGIRDING THE REPORTER’S PRIVILEGE	3
II. FLORENTINE FILMS PROPERLY ASSERTS THE REPORTER’S PRIVILEGE	5
A. The availability of the reporter’s privilege turns on the independence of the journalistic process	6
B. Journalistic independence is unrelated to viewpoint neutrality	6
C. Journalistic independence is unrelated to solicitation	8
D. Journalistic independence is unrelated to whether the journalist is engaged in advocacy	9
III. THE REPORTER’S PRIVILEGE PROTECTS FROM COMPELLED DISCLOSURE THE JOURNALISTIC MATERIAL THE CITY SEEKS	10
CONCLUSION	11

TABLE OF AUTHORITIES

PAGE NO(s):

Cases

<i>Baker v. F & F Inv.</i> , 470 F.2d 778 (2d Cir. 1972).....	4, 7, 8
<i>Chevron Corp. v. Berlinger</i> , 629 F.3d 297 (2d Cir. 2011).....	5, 6, 8
<i>Gonzales v. Nat’l Broad. Co., Inc.</i> , 194 F.3d 29 (2d Cir. 1999).....	<i>passim</i>
<i>In re Fitch</i> , 330 F.3d 104 (2d Cir. 2003).....	9
<i>In re Petroleum Prods. Antitrust Litig.</i> , 680 F.2d 5 (2d Cir. 1982)	3, 5
<i>Police Dep’t of Chi. v. Mosely</i> , 408 U.S. 92 (1972).....	7
<i>Schiller v. City of New York</i> , 245 F.R.D. 112 (S.D.N.Y. 2007)	9
<i>von Bulow v. von Bulow</i> , 811 F.2d 136 (2d Cir. 1987).....	9

PRELIMINARY STATEMENT

At stake in this case is the vitality of the documentary film industry. As today's investigative journalists, documentary filmmakers gather and publicly disseminate information about significant social, political, and ethical issues. Through their films, they delve into areas of civic importance, uncover new information, educate the public, impart lessons and stories, advocate action, and initiate public discourse and debate. In this way, film documentarians play a key role in serving the values our free-press guarantee was designed to protect.

However, documentary filmmakers are also uniquely vulnerable to being sucked into litigation. Because their investigations are conducted primarily on film, virtually all of their work faces the risk of discovery and is thus threatened by the weakening of the reporter's privilege. Without a robust privilege—one that protects the video outtakes sought in this case—we will see documentarians become less willing and less able to continue to disseminate information and stir debate. The quality of our public discourse will necessarily suffer.

INTRODUCTION AND INTEREST OF AMICI CURIAE

The International Documentary Association, Film Independent, the National Alliance of Media Arts and Culture, Independent Filmmaker Project – Minnesota, Kartemquin Films, Minnesota Film and TV, Katie Galloway, Kelly Duane de la Vega, Geoffrey Smith, Roberto Hernandez, Kirby Dick, Alex Gibney, Josh Fox, Gordon Quinn, Malika Zouhali-Worrall, Katherine Fairfax Wright, and Scott Hamilton Kennedy respectfully submit this memorandum of law, as *amici curiae*, in support of Florentine Films' motion to quash the nonparty subpoena filed by the City of New York ("City").

The International Documentary Association ("IDA") was founded in 1982 as a nonprofit membership organization dedicated to supporting the efforts of nonfiction film and video makers throughout the United States and the world; promoting the documentary form; and expanding

opportunities for the production, distribution, and exhibition of documentary. Over the past thirty years, IDA has served as a forum and voice for documentarians around the world. IDA currently serves over 11,000 members and community users in over fifty countries.

Film Independent (“FIND”) is a nonprofit organization dedicated to helping independent filmmakers make their films; building the audience for independent film; and increasing diversity in the film industry. Every year, FIND provides its member base of roughly 4,000 with over 250 hours of film education programming, more than a hundred free preview screenings of the latest independent films, substantial production rental discounts, and hundreds of thousands of dollars in fellowship and grant opportunities.

The National Alliance for Media Arts and Culture (“NAMAC”) is a nonprofit organization dedicated to fostering and fortifying the culture and business of the independent media arts. NAMAC consists of 225 organizations that serve over 400,000 artists and media professionals nationwide. Its members include community-based media production centers and facilities, university-based programs, museums, media presenters and exhibitors, film festivals, distributors, film archives, youth media programs, community access television, and digital arts and online groups.

Independent Filmmaker Project – Minnesota (“IFP MN”) is dedicated to advancing a vibrant and diverse community of independent film and media artists through networking, education, funding, and showcasing opportunities. IFP MN represents a network of 500 filmmakers and photographers in Minnesota, the Upper Midwest, and around the country.

Kartemquin Films makes documentaries that examine and critique society through the stories of real people. Its documentaries, including *The Interrupters*, *Hoop Dreams*, and *The New Americans*, are among the most acclaimed of all time and have left a lasting impact on

millions of viewers. For over 45 years, Kartemquin Films has been home to independent media makers who seek to create social change through film.

Minnesota Film and TV is a nonprofit professional service organization dedicated to creating jobs and economic growth by promoting and supporting Minnesota's film and television production industry.

Katie Galloway (*Better This World*, 2011; *The Case for Innocence*, 2000), Kelly Duane de la Vega (*Better This World*, 2011), Geoffrey Smith (*The English Surgeon*, 2007; *Presumed Guilty*, 2008), Roberto Hernandez (*Presunto Culpable*, 2008), Kirby Dick (*The Invisible War*, 2012; *This Film Is Not Yet Rated*, 2006), Alex Gibney (*Park Avenue: Money, Power, and the American Dream*, 2012; *Taxi to the Dark Side*, 2007), Josh Fox (*Gasland*, 2010), Gordon Quinn (*The New Americans*, 2004), Malika Zouhali-Worrall (*Call Me Kuchu*, 2012), Katherine Fairfax Wright (*Call Me Kuchu*, 2012), and Scott Hamilton Kennedy (*The Garden*, 2008) are acclaimed documentary filmmakers whose accolades include Emmy and Academy Awards, among others.

ARGUMENT

I. COMPELLING DISCLOSURE OF FLORENTINE FILMS' VIDEO OUTTAKES WILL HAMPER THE FREE PRESS AND UNDERMINE THE VALUES UNDERGIRDING THE REPORTER'S PRIVILEGE

As traditional print and television outlets cut back on investigative reporting, the role of documentary filmmakers in conducting investigations and disseminating controversial stories to the public is more important than ever. Compelling Florentine Films to produce its interview outtakes from *The Central Park Five* will discourage rather than encourage documentarians' valuable contributions. The result: the impoverishment of our public debate and the erosion of the values the reporter's privilege was created to protect.

The qualified privilege for journalists exists for two primary purposes: to safeguard the "pivotal function of reporters to collect information for public dissemination," *Gonzales v. Nat'l*

Broad. Co., Inc., 194 F.3d 29, 35 (2d Cir. 1999) (quoting *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 8 (2d Cir. 1982)) (internal quotation marks omitted), and to promote 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.* (quoting *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972)) (internal quotation marks omitted). As the Second Circuit has explained:

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.

Compelling disclosure of the materials at issue in this case will threaten investigative journalism—and the information-gathering and debate-creating functions of documentarians—in the precise ways feared by the Court of Appeals. If documentarians are unable to shield their subjects from the overreaching arms of litigants, many would-be subjects will be deterred from participating in the filming process, crippling documentarians in their investigatory function. Those subjects who do agree to be filmed may speak less candidly, thereby decreasing the accuracy and completeness of the documentarian’s ultimate product, while some subjects will simply refuse to appear at all.

Worse yet, faced with the threat of being drawn into litigation, documentarians may choose to shy away from controversial topics, or documentary filmmaking altogether, so as to reduce their exposure to the courts' subpoena power. We can expect fewer documentaries on important yet divisive topics, and a concomitant reduction in the quality and vigor of our public discourse, if the privilege is not vigorously protected.

The reporter's privilege was borne of the judicial recognition that these unhappy results would likely flow from unfettered judicial access to information gathered by our press. By upholding the reporter's privilege in this case, the Court will allow the privilege to continue to stand as a strong bulwark against such threats to our free press.

II. FLORENTINE FILMS PROPERLY ASSERTS THE REPORTER'S PRIVILEGE

Information gathered in a journalistic investigation is protected by a qualified evidentiary privilege. *Chevron Corp. v. Berlinger*, 629 F.3d 297, 306 (2d Cir. 2011); *Gonzales*, 194 F.3d at 32. Pursuant to that privilege, an independent journalist may not be compelled to disclose such nonconfidential¹ information unless: (1) the information is of likely relevance to a significant issue in the case; and (2) the information is not reasonably obtainable from other sources. *Gonzales*, 194 F.3d at 36. The subpoena in this case—for outtakes from the documentary *The Central Park Five*—should be quashed because the material sought to be compelled was gathered in an independent journalistic investigation and is neither highly relevant to a significant issue in the case nor unobtainable from other sources.

¹ Confidential information gathered in a journalistic investigation is protected by an even stronger evidentiary privilege. See *Petroleum Prods.*, 680 F.2d at 7.

A. The availability of the reporter’s privilege turns on the independence of the journalistic process

The centerpiece of a free press, and of the reporter’s privilege, is journalistic independence. The reporter’s privilege is properly invoked to protect nonconfidential information from disclosure only when such information was gathered by an *independent* documentarian. *Berlinger*, 629 F.3d at 308. An independent documentarian is someone who retains control of the “journalistic process.” *Id.* at 309. Thus a documentarian who maintains financial autonomy and editorial control of his product is independent. *Id.* In contrast, one who “gather[s] and publish[es] information because [he has] been commissioned to publish in order to *serve the objectives of others* who have a stake in the subject of the reporting are not acting as an independent press.” *Id.* at 308 (emphasis added).

The hallmark of journalistic independence is the independence of the journalist’s *process*: his judgment with respect to the subject of his reporting, the information he chooses to include and exclude, the topics or perspectives he chooses to emphasize and deemphasize. To retain independence, a documentarian must exercise his judgment during the newsgathering and publishing process free of control by a stakeholder in the material to be published. In short, when a documentarian’s work is the product of his own judgments, he acts independently, but when his work is borne of his subservience to the direction and objectives of others with a stake in what is to be published, he does not.

B. Journalistic independence is unrelated to viewpoint neutrality

Irrelevant to a journalist’s independence is whether his work expresses a viewpoint. If independence meant that a documentary must express perfect objectivity or viewpoint neutrality, independent documentarians would be a null set. Every choice made in creating a documentary—including whom to feature, the length and depth of the treatment of an issue, and

even the general topic—reflects the decisionmaker’s point of view. Each choice reveals the creator’s judgment about the relative importance and newsworthiness of different topics and ideas. Documentarians have opinions, beliefs, sympathies, and their own senses of right and wrong, and the vitality of our free press draws its strength from the diversity among them. Reflecting this reality, courts demand independence in the journalistic *process*, not the *content* of the product. *See Baker*, 470 F.2d 778 (upholding reporter’s privilege with respect to information gathered by journalist in connection with written exposé of discriminatory practices by real estate agents, where journalist was “highly sympathetic” to litigants challenging those practices); *cf. Police Dep’t of Chi. v. Mosely*, 408 U.S. 92, 95 (1972) (holding that the First Amendment prevents the government from restricting expression because of its message).

And rightly so. As modern-day analogs to long-form investigative print journalists, film documentarians often explore complex social and political issues. They investigate problems, educate the public about them, and, when successful, spark the kind of public discourse that our free press was constitutionally enshrined to nourish. The documentarian’s role is to pique the interest of the public, to draw the public’s eye to the issue he is investigating. It is the nature of a documentarian’s work that often sets him in the middle of a controversy, and the public draws immense benefits from that work.

Indeed, documentarians have played a crucial role in uncovering and relaying important issues and stories to the public. For example, Errol Morris’s *The Thin Blue Line* told the public about an innocent man convicted for the murder of a police officer; Frederick Wiseman’s *Titicut Follies* exposed the horrors of a prison for the criminally insane; Al Gore’s *An Inconvenient Truth* brought public attention to the issue of global climate change; Michael Moore’s *Fahrenheit 911* publicly criticized President Bush’s policy positions in advance of the 2004 presidential election; and Dinesh D’Souza’s *2016: Obama’s America* did the same with respect

to President Obama’s policies in advance of the 2012 election. Each of these documentaries explored a controversial topic, and each documentarian undoubtedly expressed a viewpoint through his work. In so doing, these documentarians and their films enriched our public discourse in precisely the way our free press was intended to. *See Gonzales*, 194 F.3d at 35 (reporter’s privilege protects the “paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters” (quoting *Baker*, 470 F.2d at 782) (internal quotation marks omitted)).

C. Journalistic independence is unrelated to solicitation

In addition, whether a journalist is initially drawn to a topic at the solicitation of others or instead happens upon the topic himself is immaterial. Documentarians, like all journalists, are regularly “pitched” topics for films. In other words, interested parties reach out to documentarians—just like they reach out to journalists at *The New York Times* and *60 Minutes*—and try to persuade them to investigate particular issues. Sometimes, such persons derive their interest from a political or social agenda—opposition to the death penalty or abortion, for example. Other times, they hold a more direct stake in the material they want publicized—for example, as litigants in a lawsuit.

That a documentarian chooses a topic that was introduced to him by someone else—regardless of the subjective reasons motivating that other person—does not strip him of journalistic independence. Rather, what matters is *why* a journalist ultimately decides what topic to investigate. Certainly, if a documentarian chooses his topic because he is “bought and paid for”—*i.e.*, editorially or financially subservient to the demands of a non-journalist stakeholder who has demanded he choose the topic—this weighs against a finding of journalistic independence. *See Berlinger*, 629 F.3d at 308. However, if a documentarian exercises his own independent judgment about a topic’s newsworthiness, he acts independently for purposes of the

reporter's privilege—regardless of how he learned of that topic. *See In re Fitch*, 330 F.3d 104, 110 (2d Cir. 2003) (“[P]art of a journalist's job is exercising judgment about which events are newsworthy and which are not.”).

D. Journalistic independence is unrelated to whether the journalist is engaged in advocacy

Similarly, a journalist is not stripped of the reporter's privilege because he engages in advocacy—either prior to, during, through, or subsequent to his news-gathering and dissemination process. As discussed above, any documentary film—simply through its topic, focus, and narrative—necessarily expresses the viewpoint and voice of its creator. And any documentary might thus be described as advocating its creator's viewpoint. Indeed, many documentarians create works with the express and conscious purpose of advocating a particular viewpoint.

Not only is such advocacy-by-art-form permissible, it is a core value protected by the reporter's privilege. Regardless of whether the journalist developed his viewpoint during his investigation, or whether he began his investigation in order to publicly advocate his viewpoint, advocacy does not negate journalistic independence.² As the Court explained in *Schiller v. City of New York*, 245 F.R.D. 112 (S.D.N.Y. 2007), “the touchstone is not . . . whether the journalistic enterprise was ‘unbiased’; by that standard, few, if any, daily newspapers could assert the privilege.” *Id.* at 119. Rather, a documentarian maintains independence as long as his process, *i.e.*, his editorial decisionmaking, is dictated by his own judgment rather than by non-journalist

² In order to claim the reporter's privilege with respect to information, a journalist must have gathered it in the course of a journalistic endeavor. In other words, he must have gathered the information with the intention of disseminating it to the public. *See von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987). Thus, if a reporter gathered information solely to advocate in a *private* forum, such as in court during a litigation, he would be unable to assert the reporter's privilege regardless of his independence or lack thereof. *See id.* In contrast, when a reporter gathers information to disseminate it in *public* forum, that he does so through “advocacy” is immaterial to his ability to assert to the reporter's privilege.

stakeholders. In other words, if a documentarian's work voices his own advocacy, rather than the message of some third-party to whom his is subservient, he remains independent. *A fortiori*, that a documentarian may engage in additional activities apart from the editorial process, including advocacy, is irrelevant to whether he makes content-based decisions regarding his documentary free from the control of such third-parties. An otherwise independent documentarian's activities, advocacy-related or otherwise, do not taint his independence.

III. THE REPORTER'S PRIVILEGE PROTECTS FROM COMPELLED DISCLOSURE THE JOURNALISTIC MATERIAL THE CITY SEEKS

In this case, the City contends that the qualified reporter's privilege cannot shield the video outtakes it seeks because they are likely relevant to significant issues in the case and are not reasonably obtainable from other sources. Siegel Decl. Ex. D at 2. The City suggests that the material in the video outtakes is not reasonably obtainable from other sources because deposing the individuals interviewed in the outtakes would be somehow insufficient. *Id.*

To adopt the City's argument would be to eviscerate the reporter's privilege for documentarians. Documentarians, by definition, engage in their investigations through the medium of film and video. While print reporters can synthesize information during their investigatory work and transcribe only what they deem relevant, documentarians capture almost every step of their investigation on film. Only after filming is complete do documentarians begin the process of determining whether what they have filmed will be used for dissemination. This means that virtually every aspect of a documentarian's investigation is captured and therefore available for discovery, and that his exposure to discovery demands is greater than that of any other kind of journalist. If the reporter's privilege is not robust, documentarians and their subjects, more than in the context of any other journalistic medium, are at risk of deciding that their vast exposure to the litigation system is not worth the candle.

The City implicitly suggests that film is more accurate than other forms of testimony (*i.e.*, that there is never equivalent evidence that is reasonably obtainable), and thus courts should be especially willing to permit the discovery of film and video outtakes. The Court should reject this untenable position. First, there is no reason to think that film is universally more accurate than other forms of evidence. Indeed, a filmed recording of an interview is arguably less accurate than, for example, a deposition of the same interviewee—where the interviewee is subject to examination on the particular issues at stake in the litigation by the parties to the litigation.

Second, because documentarians work principally through film and video, the City’s argument would effectively mean that documentarians’ investigatory material is always subject to discovery as long as it is relevant to a case. Although videotaped material may certainly be unobtainable through deposition testimony or other evidentiary sources *in unique cases*,³ it should not be categorically classified as such, as the City would have it. This would render the reporter’s privilege for documentarians qualitatively different, and substantially weaker, than for other journalists—an outcome at odds with the important values of the reporter’s privilege, which protects *all* independent news-gatherers in order to promote the dissemination of information and the instigation of public debate.

CONCLUSION

The City invites the Court to eviscerate the reporter’s privilege as applied to documentary filmmaking. The Court should reject that invitation. Documentarians must be free to express

³ For example, in *Gonzales*, the plaintiffs sought video outtake evidence that, according to the journalist’s own representations, depicted the defendant engaging in pretextual traffic stops, and the plaintiffs were suing the defendant for identical behavior. 194 F.3d at 31. Because, under these unique circumstances, the outtakes “provide[d] unimpeachably objective evidence of [the defendant’s] conduct,” the Second Circuit concluded that deposition testimony was not an adequate substitute for the information on the video outtakes. *Id.* at 36. Clearly, documentary outtakes in the vast majority of cases (*e.g.*, of interviews) would not constitute such “unimpeachably objective evidence.”

their points of view through their work, to choose film topics irrespective of the source of their inspiration, and to engage in advocacy, all free from the omnipresent specter of onerous subpoenas and satellite litigation. In addition, courts must not fetishize film above other forms of evidence, such that whenever relevant film evidence exists, it is subject to discovery, regardless of the alternative forms of evidence that might be available. Otherwise, the chilling effects on the documentary film industry will be significant and far-reaching. Documentarians nationwide will face outsized costs and challenges, and the public will suffer the consequences: reduced awareness of controversial issues and an impoverished social discourse.

The Court should quash the subpoena of Florentine Films' video outtakes.

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