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SUPERIOR COURT, STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

MICHAEL JOE JACKSON,

Defendant.

Case No.: 1133603

BENCH BRIEF RE: LIMITING SCOPE OF DIRECT AND CROSS-EXAMINATION OF MARTIN BASHIR; DECLARATION OF THEODORE J. BOUTROUS, JR.

Department SM-8,
Judge Rodney S. Melville

[VIA FACSIMILE]

I. INTRODUCTION

In its January 28 ruling, this Court declined to rule that the District Attorney was barred from calling Mr. Bashir to testify, but it recognized that some areas of testimony were plainly off limits. The Court did not, however, indicate what areas of inquiry might be appropriate. Mr. Bashir thus respectfully submits this Bench Brief to assist the Court in determining the proper scope of any direct questioning of Mr. Bashir by the prosecution, and cross-examination by the defense, during Michael Jackson's criminal trial.[1]

[1] For all of the reasons stated in his January 18 motion for a protective order, Mr. Bashir objects to being called as a witness at all in this case, and any suggestions regarding possible areas of inquiry should not be interpreted as waiving that objection or any rights and privileges held by

[Footnote continued on next page]

In his opposition to Martin Bashir's motion for a protective order precluding Mr. Bashir from being required to testify, the District Attorney identified several proposed topics about which he sought to question Mr. Bashir. At the January 28, 2005 hearing, the District Attorney conceded, and the Court agreed, that some of the information identified by the District Attorney is "unpublished information" clearly within the scope of California's journalists' constitutional and statutory shield law. The Court expressed the view that there were some areas on which Mr. Bashir could be questioned and thus denied his request for a protective order, but it did not indicate what areas of inquiry might be appropriate. Mr. Bashir strongly believes that permitting the District Attorney to call him to the stand in this case is inconsistent with the California shield law and its purpose of protecting the "'autonomy of the press.'" *Miller v. Superior Court*, 21 Cal. 4th 883, 898 (1999). To mitigate the intrusion into newsgathering, and to avoid distractions and delay at trial, Mr. Bashir now respectfully requests that the Court limit and clearly define in advance the scope of potential questioning that the parties may pursue in the event Mr. Bashir is actually called to the stand.

The areas about which the District Attorney may even arguably question Mr. Bashir are, indisputably, exceedingly narrow. The California journalists' shield law, embodied in Article I, Section 2(b) of the California Constitution and California Evidence Code § 1070, provides ***absolute*** protection from contempt for any television reporter who, when subpoenaed in a criminal action by the prosecution, declines to disclose his sources or any "unpublished information" obtained during newsgathering. *Miller*, 21 Cal. 4th at 897. The term "'unpublished information' was defined in broad, nonrestrictive terms," *id.* (quotations omitted), and it includes "data of whatever sort not itself disseminated to the public through a medium of communication." Cal. Const. Art. I, § 2(b); Cal. Evid. Code § 1070(c).

Given the expansive scope of the shield law, plus the added protection of the First Amendment, the only areas about which the District Attorney seeks to inquire that even arguably could be pursued are Mr. Bashir's professional and educational background and information

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[Footnote continued from previous page]
Mr. Bashir under the California shield law and the First Amendment to the United States Constitution.

regarding the broadcast and distribution of the documentary, which already has been provided in a declaration submitted by an employee of Granada Television. All of the other information sought by the District Attorney, including the origination of the documentary and information perceived by Mr. Bashir during its filming, relates to "unpublished information" and the protected newsgathering and editorial processes.

As for cross-examination of Mr. Bashir by the defense, the limited realm of permissible, non-duplicative inquiry inherently limits the scope of any cross-examination. *See* Cal. Evid. Code § 773(a) (limiting cross-examination to "any matter within the scope of the direct examination"). The California shield law and First Amendment journalist's privilege also sharply restrict the realm of questioning permitted by the defense. *See infra* pp. 8-10.

Finally, if Mr. Bashir is compelled to testify at all, this Court should issue in advance clear limitations on the questions that may be asked by both the government and the defense in order to minimize intrusions into protected newsgathering and editorial areas and to preclude a lengthy, distracting, and irrelevant attack on Mr. Bashir and his journalistic work. During the January 28 hearing, Mr. Jackson's counsel made clear that he intends to launch such an attack if given leeway to do so. The California journalists' shield law, as well as the First Amendment, would prohibit the kind of questioning Mr. Jackson's lawyer suggested he might pursue and it would further complicate an already complex proceeding. Moreover, the District Attorney's primary objective – as he stated at the January 28 hearing – is to introduce the documentary as an operative fact showing motive for subsequent alleged behavior by Mr. Jackson, not for the truth of anything asserted therein.

Permitting these issues to be injected into the trial thus risks not only damaging the autonomy of the press to gather news, but also disrupting the trial and distracting the jury. In a complex trial justice will not be served by diversionary tactics designed not to test the guilt or innocence of the defendant but to shift the focus of attention as far away as possible from the essential purpose of these proceedings. Unless there are strict, and strictly enforced, rules on the questioning of Mr. Bashir, it is highly likely that Mr. Jackson's counsel will lead the jury through arbitrary and irrelevant matters as a deliberate tactic of diversion.

Accordingly, this Court should strictly limit the questions posed to Mr. Bashir by both the prosecution and the defense to relevant matters within his personal knowledge that do not come within the broad protections of California's shield law and the First Amendment qualified reporter's privilege. This approach is commonly followed, *e.g.*, *NLRB v. Mortensen*, 701 F. Supp. 244, 247, 15 Med. L. Rep. 2309 (D.D.C. 1988), and needed to avoid unnecessary and unjustified intrusions into Mr. Bashir's protected newsgathering and editorial activities.

II.

ARGUMENT

A. The Scope of the District Attorney's Questioning of Mr. Bashir Must Be Strictly Limited Under the California Shield Law and the First Amendment Privilege.

The only areas listed in the District Attorney's opposition to Mr. Bashir's motion for a protective order which even arguably lie outside the scope of the broad and absolute immunity provided by the shield law are Mr. Bashir's professional and educational background (Opp'n to Mot. for Protective Order at 2.A) and questions regarding the broadcast and distribution of the documentary (*Id.* at 3.E), which now would be duplicative given the declaration and records submitted by a Granada Television employee.[2]

The California journalists' shield law protects a wide array of information related to the newsgathering and editorial processes. Specifically, the shield law provides that:

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[2] Even these areas of inquiry, of course, are subject to the general evidentiary requirements of relevance, materiality, and admissibility. *See* Cal. Evid. Code §§ 210, 350. With respect to his professional background and credentials, Mr. Bashir has already supplied information in his earlier declaration (Mot. for Protective Order, Decl. of Martin Bashir ¶¶ 2-9) and Mr. Jackson has not contested any of the specifics of Mr. Bashir's resume. With respect to information related to the specific countries in which the documentary was broadcast and other questions concerning its distribution, Mr. Bashir questions the relevance and materiality of such information to this case. Moreover, Mr. Bashir is not the appropriate person to ask. While he was the correspondent and narrator for the documentary, Mr. Bashir does not own the rights to it and did not himself distribute it. Because these questions lie outside the realm of his responsibilities and knowledge, it is unclear whether any answers he might be able to provide would even be admissible. *See generally* Mr. Bashir's Reply To Plaintiff's Response To Mot. For Protective Order at 5.

> [A] radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, . . . [may not be] adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose ***any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.***

Cal. Const. Art. I, § 2(b); Cal. Evid. Code § 1070(b) (emphasis added). The term "unpublished information" is "defined in broad, nonrestrictive terms," *Miller v. Superior Court*, 21 Cal. 4th 883, 897 (1999) (quotations omitted), and includes

> information not disseminated to the public by the person from whom disclosure is sought, ***whether or not related information has been disseminated*** and includes, but is not limited to, all notes, outtakes, photographs, tapes or ***other data of whatever sort*** not itself disseminated to the public through the medium of communication, ***whether or not published information based upon or related to such material has been disseminated.***

Cal. Const. Art. I, § 2(b); Cal. Evid. Code § 1070(c) (emphasis added); *see also Playboy Enters., Inc. v. Superior Court*, 154 Cal. App. 3d 14, 21 (1984) (noting that "unpublished information" includes "factual information that is within the newsperson's knowledge, whether contained in source material or memory"). Moreover, as to the District Attorney, Mr. Bashir's protection from disclosing this broad range of information is absolute. *Miller*, 21 Cal. 4th at 896-97.

This absolute bar totally prevents the prosecution from compelling Mr. Bashir's testimony about most of the information listed in the District Attorney's opposition to Mr. Bashir's motion for a protective order. Requests for information about the editorial process (including Mr. Bashir's judgments about content), information regarding the unpublished context and events surrounding the origination and making of the documentary (including who approached whom with the idea of making the film and any information Mr. Bashir perceived during its production), Mr. Bashir's relationship with sources (including Mr. Jackson and the alleged victim's family) and his opinions about Mr. Jackson based on his journalistic activities, ask for unpublished information, and would represent a direct and substantial intrusion into his protected newsgathering and editorial processes. *See generally* Martin Bashir's Reply to District Attorney's Opp'n to Mr. Bashir's Mot. for Protective Order at 3-5.

Even questions that seek to elicit testimony verifying or authenticating the documentary fall within the broad and absolute protection of the California shield law. This type of questioning seeks confirmation that the underlying newsgathering facts are consistent with what was presented in the broadcast. That in itself is necessarily an inquiry into unpublished information and material. *See Playboy Enterprises., Inc. v. Superior Court*, 154 Cal. App. 3d 14, 21-23 (1984) (holding that the shield law provided absolute protection to a magazine against providing materials authenticating that a person in fact stated the words attributed to him in quotations in the article).

Moreover, even if the requested verification testimony were not protected by the shield law, it would still lie within the expansive protection of the First Amendment privilege recognized by California's state and federal courts. *See, e.g., Mitchell v. Superior Court*, 37 Cal. 3d 268, 283 (1984); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993) (First Amendment privilege "protects journalists against compelled disclosure in all judicial proceedings, civil and criminal alike").[3]

Under the First Amendment privilege, a party seeking compelled disclosure of unpublished information or material must demonstrate, inter alia, (1) that the information sought "is crucial to the maintenance of the [subpoenaing party's] legal claims," *Shoen*, 5 F.3d at 1296 (and cases cited therein); (2) that it is "relevant, material, and non-cumulative" of other available information or materials, *id.*, and (3) that the party seeking the information has exhausted alternative means of obtaining the information. *Id.*; *see also, e.g., Mitchell*, 37 Cal. 3d 268, 281-82 (under

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[3] In *Mitchell*, the California Supreme Court recognized a qualified privilege for journalists against compelled disclosure that is rooted in the "protections for freedom of the press enshrined in the United States Constitution and the correlative provision (art. I, § 2, subd. (a)) of the California Constitution." 37 Cal. 3d at 274-79. Although *Mitchell* itself did not arise from a criminal case, many other jurisdictions recognize that concerns for the independence of the press warrant a First Amendment or common-law qualified privilege from compelled disclosure in criminal cases. *See, e.g., Shoen*, 5 F.3d at 1292 (noting that in the Ninth Circuit a "'partial First Amendment shield' protects journalists against compelled disclosure in all judicial proceedings, civil and criminal alike"); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) ("[T]he interests of the press that form the foundation for the privilege are not diminished because the nature of the underlying proceedings out of which the request for the information arises is a criminal trial."); *see also United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (applying reporter's privilege in criminal case); *United States v. Corporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (same).

First Amendment privilege, party seeking information must demonstrate exhaustion of alternative sources and that the information "goes to the heart of the [party's] claim"; "mere relevance is insufficient" to overcome the privilege).[4]

Courts have held that requiring reporters to verify published information implicates this First Amendment privilege. *See, e.g., United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982) (under First Amendment privilege, quashing subpoena seeking testimony from reporter verifying that the defendant in fact made the statements attributed to him in the article); *Maurice v. NLRB*, 7 Media Law Reporter 2221 (S.D. W. Va. 1981), *vacated on other grounds*, 691 F.2d 182 (4th Cir. 1982) (under First Amendment privilege, enjoining NLRB from compelling reporter to verify quotations). *See also Nat'l Labor Relations Bd. v. Mortensen*, 701 F. Supp. 244, 247, 15 Media L. Rep. 2309, 2311 (D.D.C. 1988) ("The Board seeks confirmation that certain sources spoke to the reporters and gave statements... Their contention that this discovery is beyond First Amendment concern ... is a misconception of the scope of the free press interest.")

To the extent the District Attorney seeks authentication testimony, he has not begun to make the required showing of necessity or exhaustion. It does not appear that any of the statements made by Michael Jackson in the documentary are themselves in dispute, either as to whether he stated them or as to their content. Moreover, none of the statements contains an admission as to any of the alleged wrongful conduct charged in this case, all of which allegedly occurred *after* the broadcast. Before requiring verification testimony from Mr. Bashir, the District Attorney would need to exhaust other ways to authenticate that Mr. Jackson in fact spoke the words he is shown speaking in the documentary – including asking Mr. Jackson himself and any other person who was present at the

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[4] The order summoning Mr. Bashir to testify was issued by a New York court and served upon him in New York, and the New York shield law imposes essentially the same identical test as the First Amendment. Confidential information is absolutely privileged, N.Y. Civ. Rts. L. § 79-h(b), but a party seeking nonconfidential information must make a "clear and specific showing" that the information is (1) highly material and relevant; (2) critical or necessary to maintain the claim or defense asserted, and (3) not obtainable from any alternative source. N.Y. Civ. Rts. L. § 79-h(c); *see also* N.Y. Const. Art. I, § 8 ("Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.").

time the material was filmed. *See, e.g., Mortensen*, 15 Med. L. Rptr. at 248. Moreover, unlike a quotation in a newspaper article, these statements are presented in the voice and likeness of Michael Jackson himself; Mr. Jackson's well-known voice and image can be easily authenticated in other ways. *Cf.* 1 Jefferson, California Evidence Benchbook (Cont.Ed.Bar 3d ed. 2004), Authentication and Proof of Writings, section 30.28, pages 648-649 (a party may authenticate a recording "by means of a comparison, made by the trier of fact, of the disputed audiotape recording and a genuine exemplar of the speaker's voice").

B. Both Direct and Cross Examination Should Be Strictly Limited to Reduce the Intrusion into Protected Journalistic Activities and Unpublished Information And Streamline the Trial.

This Court should sharply control and restrict the questioning it allows both the District Attorney and the defense. In addition, at the conclusion of any direct questioning by the prosecution, the Court should reiterate that Mr. Jackson's cross-examination may not exceed the prosecution's areas of inquiry on direct. Such limitations are necessary to avoid unnecessary and unjustified intrusions into Mr. Bashir's protected newsgathering and editorial activities, and will streamline the process at trial.

A similar course was followed in *Mortensen*, 701 F. Supp. 244, 15 Med. L. Rep. 2309 (D.D.C. 1988). After holding that the NLRB had demonstrated a compelling need and exhaustion of alternatives, the court ordered two reporters to verify that statements published in their newspaper stories had in fact been made by the persons to whom they were attributed. In doing so, however, the court emphasized that it was "sensitive to the Supreme Court's warning that intrusions into First Amendment activities must be narrowly limited" and therefore set out a list of prescribed questions, *id.* at 250, with the admonition that the journalists "are not required to answer any questions that go outside the narrow scope circumscribed by the Court." *Id.* at 15 Media Law Reporter 2314.[5]

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[5] The opinion as reported in the Media Law Reporter includes the *Mortensen* court's specific order regarding the permissible scope of the reporters' testimony and an appendix listing the specific questions the reporters could be asked on direct and cross-examination. 15 Media L. Rep. at 2314. For this court's convenience, a copy of the decision and order as published in the Media Law Reporter are attached hereto. *See* Boutrous Decl., ¶ 1, Exh. A.

The judge limited both direct and cross examination to extremely circumscribed questions which precluded any direct inquiry into, for example, the context of the quoted statements, any other statements made by the quoted persons, any observations made or other information received by the reporters in the course of their reporting, the reporters' views concerning or relationship with the quoted persons, or any other questions concerning their newsgathering or unpublished information or materials. *Id.*

This Court, if it orders any testimony from Mr. Bashir, should use a similar approach to minimize the intrusion into Mr. Bashir's protected journalistic activities and to avoid allowing a distracting side-issue to delay or disrupt trial proceedings. As the court recognized in *Mortensen*, such a limitation of Mr. Bashir's questioning must apply to Mr. Jackson's cross-examination as well as to the District Attorney's direct examination. Section 773(a) of the California Evidence Code expressly limits permissible cross-examination to "any matter ***within the scope of the direct examination***." Cal. Evid. Code § 773(a) (emphasis added). Moreover, cross-examination by Mr. Jackson would itself be limited by the protections accorded Mr. Bashir by the California shield law and the First Amendment privilege. *See, e.g., Delaney v. Superior Court*, 50 Cal. 3d 785, 797, 805 (1990); *People v. Sanchez*, 12 Cal. 4th 1, 56 (1995).[6] Mr. Jackson cannot meet the necessary standards established by these respective tests, particularly given the narrow scope of permissible

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[6] Mr. Jackson's veiled suggestion in his opposition to Mr. Bashir's motion for protective order that Mr. Bashir is not a journalist entitled to the protection of the California shield law and the First Amendment privilege is entirely without merit. As a journalist employed by Granada television for the production of news reports and documentaries and, currently, as a journalist employed for the same purposes by ABC News, *see generally* Mot. for Protective Order, Decl. of Martin Bashir, Mr. Bashir beyond doubt qualifies for the protections of both the California shield law and the First Amendment, which have been broadly applied to reporters, producers, writers, columnists, editors, and others involved in the preparation of reports, documentaries, and articles in a wide range of media, including television, radio, newspapers, and magazines. *See, e.g., People v. Von Villas*, 10 Cal. App. 4th 201, 231 (1992) (applying shield law to freelance writer); *Shoen v. Shoen*, 5 F.3d at 1293; *cf. People v. Sanchez*, 12 Cal. 4th 1, 56 (1995) (noting that reporter "met his foundational requirements" by filing a declaration stating he was a news reporter and that unpublished information was obtained or prepared in the gathering, receiving or processing of information for communication to the public).

direct, the extremely limited relevance of and need for Mr. Bashir's testimony, and the availability of alternative sources of information.[7]

Such strict limits on cross-examination are appropriate in the context of a criminal defendant. For example; in *Sklar v. Ryan*, 752 F. Supp 1252 (E.D. Pa. 1990), *aff'd without opinion*, 937 F.2d 599 (3d Cir. 1991), the trial court limited a journalist's testimony to confirming published statements attributed in his article to the defendant and did not permit the defense in cross-examination to inquire about unpublished sources and information. The court rejected the defense's contention that this limitation violated the defendant's rights under the Sixth Amendment Confrontation Clause. *Id.* at 1267-68..

If, contrary to *Sklar*, this Court were to conclude that it could not permit Mr. Bashir's testimony without allowing the defense a broader scope of cross-examination than is permitted under the protections accorded Mr. Bashir by the shield law and First Amendment, then – rather than violate those protections – this Court would have to hold that Mr. Bashir cannot be called to testify by the District Attorney on direct. Thus, in *EEOC v. McKellar Development*, 13 Media Law Reporter 1061 (N.D. Cal. 1986), the court quashed a subpoena to a reporter which sought authentication of a published article, because, *inter alia*, cross examination would have involved questions about unpublished "observations and judgments" barred by the shield law and First Amendment. *See also* 3 Witkin, Cal. Evid. 4th (2000), § 228, p. 295 ("In either a civil or criminal case, where a party is deprived of the benefits of cross-examination of a witness by refusal of the witness to answer, the trial court may strike out the direct examination."); *id.* at 296 ("This rule is also applied where the refusal to answer is based on a valid claim of privilege.").

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[7] Mr. Jackson has indicated that there is an alternative source for unpublished information – the outtakes made by his own videographer and the "Footage You Were Never Meant to See" program – which Mr. Jackson has asked this Court to enter into evidence. Mr. Jackson himself, the alleged victim in this case, and any other of the numerous persons who were present at the various times at which Mr. Bashir was in the company of Mr. Jackson, also provide alternative sources of information.

III.

CONCLUSION

For the foregoing reasons, the Court should establish strict limits on the scope of permissible direct and cross examination of Martin Bashir.

DATED: February 25, 2005

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutrous, Jr.
Michael H. Dore

By: _____
Theodore J. Boutrous, Jr.

Attorneys for MARTIN BASHIR

DECLARATION OF THEODORE J. BOUTROUS, JR.

I, THEODORE J. BOUTROUS, JR., hereby declare and state that:

I am a lawyer admitted to practice in the State of California, a partner in the law firm of Gibson, Dunn & Crutcher LLP, and counsel for Martin Bashir. I have personal knowledge of all facts herein stated. If called as a witness, I could testify competently to the following:

1. Attached hereto as Exhibit "A" is a true and correct copy of *National Labor Relations Board v. Mortensen* as reported in The Media Law Reporter at 15 Media L. Rep. 2309 (D.D.C. 1988).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 25th day of February, 2005, at Los Angeles, California.

Theodore J. Boutrous, Jr.

EXHIBIT A

proposed programs fall within the section 315(a)(4) exemption as analyzed pursuant to the *Aspen* criteria. Of course, this panel does not urge the FCC to exercise its discretion under the second prong of *Chevron/NLRB* in any particular way. It must merely fill the gap left by the statute and do so in a way that reasonably addresses any retreat from precedent.[1]

So ordered.

NLRB v. MORTENSEN

U.S. District Court
District of Columbia

NATIONAL LABOR RELATIONS BOARD v. CHRIS MORTENSEN; NATIONAL LABOR RELATIONS BOARD v. CHRISTINE BRENNAN and MICHAEL WILBON, Nos. 88-311 and 88-320, November 23, 1988

NEWSGATHERING

Forced disclosure of information—Common-law privilege (§60.20)

National Labor Relations Board's showing, in seeking to subpoena during unfair labor practices proceeding newspapers reporters who wrote stories quoting management personnel who have denied or refused to confirm such quotations, that information sought is clearly relevant and that all alternative sources for such information have been exhausted warrants federal district court order requiring reporters to testify, although questions will be limited by court to achieve purpose of verifying quotations and to ensure against unnecessary intrusion upon First Amendment activities.

Action by National Labor Relations Board seeking to enforce subpoenas issued to reporters.

Reporters ordered to testify, with specifically limited questions.

Nelson Levine and Harvey Holzman for NLRB.

Terrence B. Adamson, R. Bruce Beckner, and Michael P. Fisher, of Dow, Lohnes & Albertson, Atlanta, Ga., for Mortensen.

Kevin Baine and Mark Seere, of Williams & Connolly, Washington, D.C., for Brennan and Wilbon.

Full Text of Opinion

Parker J.:

The General Counsel of the National Labor Relations Board ("NLRB" or "Board") seeks enforcement orders from this Court requiring three newspaper reporters to comply with certain regularly issued subpoenas *ad testificandum*. The subpoenas were duly served on the reporter-respondents, Chris Mortensen of *The Atlanta Journal-Constitution*, and Christine Brennan and Michael Wilbon of *The Washington Post*. Their counsel challenge the General Counsel's application and contend that entry of enforcement orders covering the subpoenas would violate a reporter's privilege under the First Amendment.

The matter presents a serious constitutional question of whether enforcing the subpoenas would infringe upon the respondents' qualified privilege and chill their ability to gather news. In deciding the issue, the Court must strike a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony.

The background facts, the applicable law and the arguments of counsel have been fully considered. For the reasons

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[1] We recognize that the FCC may not be able to reconsider this case before the completion of the current presidential election. This has not deterred us in our consideration of this appeal, however, because there will still be a live controversy even if the election occurs before this case is resolved. The FCC's construction of the equal time requirement will remain in effect after the November election, so there will still be a concrete dispute regarding the correctness of the agency's interpretation of the statute, and the agency's enforcement of the statutory rule will continue to have a direct impact on King Broadcasting. *See, e.g., Payne Enterprises v. United States*, 837 F.2d 486, 490–91 (D.C. Cir. 1988); *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 90–92 (D.C. Cir. 1986). Even if this case could be viewed as moot, the "capable of repetition, yet evading review" exception to the mootness doctrine would apply. *See Roe v. Wade*, 410 U.S. 113, 124–25 (1973); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). If King is forced to wait until the next presidential election to contest the agency's construction of the equal time requirement, it will once again face the problem of the challenged action being too short in duration to be fully litigated before the occurrence of the election.

stated below the Court determines that under the circumstances presented, the challenge of the respondents should be rejected. The Court will enter an appropriate enforcement order and attach narrowly tailored questions that may be asked of the respondents.

I.

BACKGROUND

The underlying events before the National Labor Relations Board giving rise to this subpoena enforcement action involve the National Football League Players Association, AFL-CIO ("Players Association") and the National Football League Management Council ("Management Council"). Included within the latter as constituent members, are the 28 football teams within the League.

On the eve of the 1987 National Football League season, the Players Association called a strike. That labor action was short-lived and, according to the Players Association, was seriously undermined by the "anti-union" activities of the Management Council. On basis of charges made by the Players Association, the Management Council and its constituent members were charged with interference, deprivation of players' guaranteed rights, and unfair labor practices — alleged violations of Sections 7 and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§151 *et.seq.* (1975).

The reporter-respondents were served with subpoenas *ad testificandum*, in order to authenticate certain statements made by and/or attributed to John Jones, Bobby Beathard and Jim Conway, all serving as members of the Management Council. Jones and Conway were Public Relations Director and General Counsel, respectively; Beathard was General Manager of the Washington Redskins. The statements attributed to the three were made in separate press interviews with the reporter-respondents during the 1987 strike and, if true, are relevant to the charges — deprivation of players' guaranteed rights and unfair labor practice.

The respondents' news articles quoted or paraphrased statements attributed to three Management Council personnel. Specifically, respondent Chris Mortensen wrote an article published on October 9, 1987, in *The Atlanta Journal-Constitution* entitled "Players Union Accused of 'Outright Lying' to Its Strikers." Two consecutive paragraphs of the article for which authentication is sought read:

> Jones also sent a message to striking players: Through the 1 p.m. deadline to play in Sunday's games has passed, they can still report and expect their paychecks.
>
> The games are going to be played, but it's almost impossible that they would be played by the guys on strike," said Jones. 'Unless we had a 'dead agreement on all the issues, there's no way those players could expect to play. And I can assure you we are not close on an agreement.'

Respondents Christine Brennan and Michael Wilbon wrote articles that appeared on October 15, 1987, in *The Washington Post*. The Brennan article included a quote from Bobby Beathard of the Washington Redskins. The Wilbon article paraphrased a statement attributed to the chief attorney for the Management Council.

Ms. Brennan's article read in part:

> 'I was told that if [Management Council executive director Jack Donlan and Upshaw] had reached an agreement [Wednesday], the deadline would be extended. But if the players came in and there was no agreement, there was no possibility they could play,' Beathard said.

Mr. Wilbon's article included, *inter alia*, the following paragraph:

> In New York, Jim Conway, general counsel of the Management Council, said his office expected 'a couple other teams' to return as full groups today and that as many as seven other teams may do so. None will be eligible to play this week unless the strike is over, he said.

Jones, Beathard, and Conway appeared as witnesses at the NLRB hearings which began on May 9, 1988. When confronted with the newspaper articles, none admitted the statements attributed to them. Jones denied making the statement quoted by Mortensen, Beathard would neither confirm nor deny the statement attributed to him by Brennan, and Conway denied the statement ascribed to him by Wilbon.

Faced with the answers of the three members of the Management Council, the Administrative Law Judge ("ALJ") conducting the hearing, caused subpoenas to be issued against the reporters. The subpoenas required the journalists to appear and verify the fact that they had conducted and reported correctly the three interviews. The respondents' several challenges to the subpoenas were denied at the

Board level. Faced with this problem, the General Counsel for the Board applied for judicial relief—an order from this Court directing Mortensen, Brennan, and Wilbon, to appear before the ALJ and give testimony as to the accuracy of the statements attributed to the three Management Council personnel.

On November 7, 1987, counsel for the respondents appeared before the Court and offered argument on behalf of their clients. Counsel for the Players Association and the Management Council also appeared. They presented argument on their recently filed motions to intervene which were taken under advisement. An order denying the motions to intervene was entered on November 22, 1988.

II.
ANALYSIS

Respondents contend that this Court should deny the application for orders enforcing the subpoenas *ad testificandum*, because such orders would clearly violate First Amendment guarantees of freedom of the press. They also contend that as journalists they are constitutionally protected from compelled disclosure of their news-gathering activities by virtue of the "reporter's privilege." In responding, the Board counters that the constitutional issues should not be addressed since it is only seeking verification of quotations which would not result in an intrusion upon the reporters' First Amendment privileges. In the alternative, the Board argues that under the reporters' privilege balancing test, the weight of the considerations favors requiring the reporters to testify.

A.

The Supreme Court explicitly acknowledged the existence of First Amendment protection for news gathering in *Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972). The Court held, however, that a journalist does not have an absolute privilege under the First Amendment to refuse to disclose confidential sources to a grand jury conducting a criminal investigation, despite the potential interference with news gathering. Justice Powell, who cast the deciding vote, wrote a concurring opinion in which he stated that courts can determine whether a privilege applies by using a balancing test:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 710.

This Circuit has stated that a qualified reporter's privilege under the First Amendment should be readily available in civil cases. *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1982) (citing *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974)). Other circuits considering the question have agreed that a balancing approach should be applied to civil as well criminal cases. *See Riley v. City of Chester*, 612 F.2d 708, 715-16 (3rd Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-38 (10th Cir. 1978); *Baker v. F & F Investment*, 470 F.2d 778, 783 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

As a preliminary matter, the Court rejects the notion that the subpoenas do not implicate cognizable First Amendment interests. The Board seeks confirmation that certain sources spoke to the reporters and gave statements regarding the strikers' deadline. Their contention that this discovery is beyond First Amendment concern because it does not seek to identify confidential sources is a misconception of the scope of the free press interest. Regardless of whether they seek confidential or nonconfidential sources, or whether they seek disclosure or verification of statements, the Board is attempting to examine the reportorial and editorial processes. The fact that their purpose is to support, rather than undermine, the bona fides of the statements as expressed by the reporters makes no difference. Such discovery necessarily implicates the First Amendment interests of the journalists. *See Consumers Union of United States Inc. v. Wilk*, 495 F. Supp. 582, 586 (S.D.N.Y. 1980). Under the circumstances presented, therefore, the Court is required to apply the *Branzburg* balancing test and consider the conflicting interests at issue in this case.

B.

Several courts have set forth precise guidelines to determine how the balance

should be struck in a particular case. In *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), the Third Circuit stated that a reporter's privilege can be overcome by satisfying the following three-part balancing test:

> First, the movant [seeking to override the privilege] must demonstrate that he has made an effort to obtain the information from other sources. Second, he must demonstrate that the only access to the information sought is through the journalist and her source. Finally, the movant must persuade the court that the information sought is crucial to the claim.

Id. at 358-59.

A court must be sensitive to the availability of alternative means by which a litigant might acquire the same information without intruding upon a journalist's protected activities. If it is clear that there are alternative means of obtaining the information the movant seeks, the subpoenaed reporter will not be compelled to testify or produce materials. *Maughan v. NL Industries*, 524 F. Supp. 93, 95 (D.D.C. 1981). The importance of protecting journalists' sources certainly points towards compelled disclosure from the newsperson as normally the end, and not the beginning, of the inquiry. *Carey*, 492 F.2d at 638. Our Circuit has recently declared that "reporters should be compelled to disclose their sources only after the litigant has shown that he has exhausted every reasonable alternative source of information." *Zerilli*, 656 F.2d at 713. But where the journalist appears to be the only one with access to information relevant to the case, courts are willing to compel disclosure. *Carey*, 492 F.2d at 639 (litigants must not be "made to carry wide-ranging and onerous discovery burdens where the path is [] ill-lighted . . .")

Movants must also show that the reporters are the only keepers of the information the movant seeks. *Riley*, 612 F.2d at 717. The party seeking the information must show "that his only practical access to crucial information necessary for the development of the case is through the newsman's sources." *Gilbert v. Allied Chemical Corp.*, 411 F. Supp. 505, 510 (E.D. Va. 1976) Journalists are often the only ones able to testify that certain statements were ever made, and the speaker's motivation in disclosing certain information to a reporter may be very important in a case. Courts have recognized that in some cases, a journalist's recollection of remarks within the context of the conversation is valuable information that the movant could not acquire from any other source. *Criden*, 633 F.2d at 359. When movants clearly have no other source from which they can gain this insight, the journalist may be compelled to testify.

The third factor that must be considered is whether the information is of central importance and goes to the "heart" of the matter. *Carey*, 492 F.2d at 636. In *Carey*, a newspaper reporter was charged with libel based on his column reporting that plaintiff had removed documents and later complained to police that the documents had been stolen. This Circuit upheld the district court which directed the journalist to reveal the names of eyewitnesses to the alleged removal. Because the record did not disclose a thorough investigative effort by the reporter, the court stated that the sources's identities and their reliability were "critical" to plaintiff's claim that the reporter had acted recklessly. *Id.* at 637. *See also, Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (because the only source for allegedly libelous comments was the informant, disclosure of the informant's identity was compelled).

Before requiring a journalist to testify, courts have examined whether the litigant seeks discovery of a confidential or nonconfidential source. Many conclude that a lesser showing of need and materiality is required for discovery of nonconfidential material than for the identity of confidential sources. *See Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980) ("the court must assess the extent to which there is a need for confidentiality. Not all information is equally deserving of confidentiality."); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) ("Of course, the lack of a confidential source may be an important element in balancing the defendant's need for the material sought against the interest of the journalist in preventing production in a particular case."); *Continental Cablevision Inc. v. Storer Broadcasting Co.*, 583 F. Supp. 427, 434 (1984) (discovery of nonconfidential materials may not be entitled to the same protection as discovery of the identity of confidential informants).

As the Supreme Court instructed in *Branzburg*, 408 U.S. at 710, the balance of interest depends on the facts of each case. Because the privilege is qualified, confi-

tervailing interests may prevail in a particular case. *Riley*, 612 F.2d at 715.

C.

Applying the guidelines to the facts of this case, the Court is convinced that the reporters' qualified privilege must yield to the NLRB's need to verify the statements. The Board has met its burden under the test for compelling journalists' testimony. It has attempted to obtain relevant information elsewhere. The General Counsel subpoenaed Jones, Beathard, and Conway as witnesses and asked about the statements attributed to them. Having called the three management individuals, and having noted the unresolved questions regarding their testimony, the Board must turn to the keepers of the information themselves, the reporters who actually wrote the statements and conducted the interviews. The reporters are the direct and the most logical source of information about the statements of the three men because they were the other participants in the conversations from which the statements were taken. As the NLRB held in *Valley Camp Coal Co.*, 265 NLRB 1683 (1982) when the identity of the source was openly acknowledged and the evidence was clearly relevant, "counsel for the General Counsel is entitled to elicit from Petitioner [journalist] testimony with respect to [speaker's] statements explaining his decision" at issue in the unfair labor action proceeding. *Id.* at 1684.

The NLRB has fulfilled its obligation to exhaust possible alternative sources of information. The declaration filed by Harvey A. Holzman, counsel in the underlying unfair labor practice proceeding, identified the numerous individuals that have appeared before the ALJ. (Declaration of Harvey A. Holzman, NLRB co-counsel, at 3 (November 8, 1988)). The top officials of the Management Council denied that the strikers deadline rule could be waived, which is inconsistent with the statements attributed to Jones, Beathard, and Conway by the reporters in their October 1987 stories. Conway and Jones denied that they told reporters that the deadline could be waived. According to Holzman, one of Jones' duties was to get information to the news media. Yet, neither Conway, nor Jones could specifically recall being interviewed by Wilbon or Mortensen, respectively. As a result, the NLRB's General Counsel was unable to ascertain whether anyone else was present during the interviews. *Id.* Since the management individuals are now denying that they ever made such contrary and conflicting statements to the journalists, the reporters testimony is very important.

The General Counsel has also tried alternative methods of demonstrating that management's reporting deadline rule was discriminatory by requesting that the Management Council produce all documents pertaining to the deadline rule, including the waiver or changing of that rule. *Id.* at 3-4. But the Management Council and the 28 member clubs have asserted that they have provided all documents covered by the General Counsel's subpoenas *duces tecum*. According to Holzman's declaration, all the subpoenaed documents have been reviewed and nothing has been found that deals with the possibility of waiving the deadline for returning strikers. *Id.* at 4. Clearly, the General Counsel has exhausted all possible sources and the reporters remain the only individuals with the knowledge of whether these management officials made statements about the waiver of the reporting deadline.

The final criterion to be applied is the relevance and importance of the matter to the particular proceeding. The statements attributed to three Management Council members are central to the Board's allegation that the deadline was just a pretext and that the Management Council discriminated against striking players. Without the authentication of the statements the Board will not have a fair opportunity to prove that the Management Council engaged in unfair labor activities.

The fact that the three important management personnel have denied or refused to confirm their quoted statements, distinguishes this case from *Maughan v. NL Industries*, 524 F. Supp. 93 (D.D.C. 1981). There the court held the need for the reporter's testimony was not compelling and alternative sources existed. In *Maughan*, the plaintiffs did not deny making the statements that appeared in the article and therefore the movant could attempt to obtain the information it needed by way of stipulation or requests for admissions. *Id.* at 95. Here, Jones, Beathard, and Conway testified before the ALJ, yet no one confirmed the remarks quoted by respondents. The reporters' interests in refusing to testify for the sole purpose of verifying the statements, not disclosing sources, is rather attenuated and must yield to the need for confirmation as presented here.

In applying the balancing test to the specific facts of this case and weighing the conflicting interests, the Court has little if any doubt in ruling that the respondents must testify regarding the statements they quoted or paraphrased in their October 1987 articles.

CONCLUSION

In balancing the NLRB's right to compel discovery against the assertions that discovery will intrude upon protected First Amendment rights of journalists, the Court concludes that the Board's need for discovery outweighs any possible intrusion on the news gathering process. The public interest in requiring citizens to give relevant testimony in civil proceedings takes precedence over the interests of the reporters asserted in this case. In requiring the reporters to testify at the ongoing hearings pending before the NLRB, the Court is sensitive to the Supreme Court's warning that intrusions upon First Amendment activities must be narrowly limited. Therefore, the Court will limit the questions posed to the reporters.

An appropriate order follows.

ORDER

In accordance with the Memorandum Opinion filed herein on this date, it is this 23rd day of November, 1988,

ORDERED

That applicant's motions for order requiring obedience to subpoenas ad *testificandum* is granted.

Respondents Chris Mortensen, Christine Brennan, and Michael Wilson shall comply with the subpoenas issued by the General Counsel of the NLRB. They shall appear as witnesses in the underlying Board Cases 5-CA-19170 and 5-CA-19508. The Board's direct examination of respondents is limited to the questions set forth in Appendix A attached to this Order. The defendants in the underlying proceedings are limited in their cross examination of respondents by the second set of questions laid out in Appendix A. Respondents are not required to answer any questions that go outside the narrow scope circumscribed by the Court.

APPENDIX A

Direct Examination

1. Please state your name and address for the record.

2. Are you appearing here today pursuant to a subpoena that the General Counsel had served upon you?

3. Directing your attention to the date of [date of the article in question], were you employed by the [newspaper in question]?

4. In what capacity were you employed by that newspaper on that date?

5. Directing your attention to what has been marked for identification as General Counsel Exhibit No. [the article in question] were you an author of that article?

6. Directing your attention to the following and I quote as follows: [the part of the article in question] was that based upon an interview with [the alleged speaker]?

7. Does that part of the article relating to the quotation by [the speaker] that I read accurately reflect word-for-word what was said to you by [the speaker]

OR

Does that part of the article relating to the paraphrase of [the speaker] that I read accurately reflect what was said to you by [the speaker]?

8. At this time, Counsel for the General Counsel moves for the admission of General Counsel Exhibit No. [the newspaper article in question] into evidence.

Cross Examination

1. When did the interview take place in relation to the publication of the article?

2. When did your writing of the article commence in relation to the interview?

3. When did you finish writing the article in relation to the interview?

4. Was anyone else present when the interview occurred?

5. How long have your been a reporter at this newspaper or any prior newspaper?

6. How long have you covered sports for this newspaper or any other newspaper?

JOHNSON NEWSPAPER CORP. v. MORTON

U.S. Court of Appeals
Second Circuit

JOHNSON NEWSPAPER CORP. d/b/a THE BATAVIA NEWS v. THE HON. GLENN R. MORTON, No. 88-7283. November 29, 1988

CERTIFICATE OF SERVICE

BY FAX

I, Barbara Cruz, hereby certify as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is Gibson, Dunn & Crutcher LLP, 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; I am employed in the office of Michael H. Dore, a member of the bar of this Court, and at his direction, on February 25, 2005, I served the following:

BENCH BRIEF RE: LIMITING SCOPE OF DIRECT AND CROSS-EXAMINATION OF MARTIN BASHIR; DECLARATION OF THEODORE J. BOUTROUS, JR.

on the interested parties in this action, by the following means of service:

☑ **BY FACSIMILE:** From facsimile number (213) 229-7520, I caused each such document to be transmitted by facsimile machine, to the parties and numbers indicated below. No error was reported by the machine.

Thomas W. Sneddon District Attorney Santa Barbara County 1105 Santa Barbara Street Santa Barbara, CA 93101-2007 Attorneys for Plaintiffs	Tel.: (805) 568-2300 Fax: (805) 568-2398
Thomas A. Mesereau, Jr. Collins, Mesereau, Reddock & Yu LLP 1875 Century Park East, 7th Floor Los Angeles, CA 90067 Attorneys for Defendant Michael Jackson	Tel.: (310) 284-3120 Fax:
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☑ **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated below, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Thomas W. Sneddon District Attorney Santa Barbara County 1105 Santa Barbara Street Santa Barbara, CA 93101-2007 Attorneys for Plaintiffs	Tel.: (805) 568-2300 Fax: (805) 568-2398
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☑ I am employed in the office of Theodore J. Boutrous, Jr., a member of the bar of this court, and that the foregoing document(s) was(were) printed on recycled paper.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this Certificate of Service was executed by me on February 25, 2005, at Los Angeles, California.

Barbara Cruz

Barbara Cruz

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