IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JASON O'GRADY, MONISH BHATIA, and KASPER JADE,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA,

Respondent,

APPLE COMPUTER, INC.

Real Party in Interest.

No. H028579

Santa Clara County Superior Court
Case No. 1-04-CV-032178

The Hon. James Kleinberg, Judge

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE ASSOCIATED PRESS, THE CALIFORNIA FIRST AMENDMENT COALITION, THE CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, THE COPLEY PRESS, FREEDOM COMMUNICATIONS INC., THE HEARST CORPORATION, LOS ANGELES TIMES COMMUNICATIONS, THE MCCLATCHY COMPANY, THE SAN JOSE MERCURY NEWS, SOCIETY OF PROFESSIONAL JOURNALISTS, AND THE STUDENT PRESS LAW CENTER IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

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

The Associated Press is a global news agency with headquarters in New York City and bureaus in every state and in more than 100 foreign countries. AP gathers and delivers news reports in text, photographic, audio and video formats to thousands of subscribing, print, broadcast and multimedia news organizations and other customers worldwide.

The California First Amendment Coalition is a non-profit and nonpartisan public interest organization dedicated to enhancing rights to freedom of speech and open government through educational programs, information services, and litigation. Founded in 1988, CFAC is a membership organization whose members include California newspapers and other news organizations, individual journalists, historians and other academics, community activists, and ordinary citizens who care about government access and accountability.

The California Newspaper Publishers Association is a trade association

representing the interests of over 650 daily, weekly and student newspapers. For over 120 years, CNPA has worked to defend and enhance the First Amendment rights, freedom of information and the public's right to know.

The Copley Press, Inc. publishes ten daily newspapers in California, Illinois and Ohio, including *The San Diego Union-Tribune*, and operates Copley News Service, an international news service. To insure the accuracy and completeness of their news reports, Copley Press journalists regularly rely on information provided in confidence.

Freedom Communications, Inc., dba *The Orange County Register*, headquartered in Irvine, California, is a privately-owned diverse media company of newspapers, broadcast television stations and interactive media businesses. Freedom's flagship newspaper is *The Orange County Register*, published in Santa Ana, California, with a daily circulation of more than 300,000.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, including *The San Francisco Chronicle*, consumer magazines, and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces programing for television, and is the majority owner of Hearst-Argyle Television, Inc., a publicly traded company that owns and operates numerous television broadcast stations, including KCRA-TV in Sacramento.

Los Angeles Times Communications LLC, dba *Los Angeles Times*, a wholly owned subsidiary of Tribune Company, publishes the *Los Angeles Times*, the largest metropolitan daily newspaper circulated in California. The *Los Angeles Times* publishes on-line at www.latimes.com. Its journalistic awards include 37 Pulitzer Prizes, five of which are gold medals for public service. Its Times Community News division publishes the *Daily Pilot*, *Glendale News-Press*, *Burbank Leader*, *Foothill Leader* and the *Huntington Beach Independent*.

The McClatchy Company publishes 12 daily newspapers and 18 non-daily newspapers in California and other states including *The Sacramento Bee*, *The Fresno Bee*, and *The Modesto Bee*. The newspapers have a combined average circulation of 1.4 million daily and 1.9 million Sunday.

The San Jose Mercury News, Inc., a subsidiary of Knight Ridder, Inc., publishes the *San Jose Mercury News*. *The Mercury News* is published in San Jose, California and circulated in the San Francisco Bay Area and throughout California. It is the premier news publication of Silicon Valley, and is nationally known for its coverage of high technology. Although the *Mercury News* strives to avoid the use of unnamed sources, its reporters often rely on confidential sources to provide important information that otherwise would not reach the public.

The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of

journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

The Student Press Law Center is a national not-for-profit corporation created to conduct legal research and offer information and advocacy for the purpose of promoting and preserving the free press and freedom of information rights of high school and college journalists. To that end, the Center has collected information on student press cases nationwide and has filed amicus briefs with the United States Supreme Court and various state and federal appellate courts.

Amici's interest in this case is in ensuring the free flow of information on matters of public importance and interest by preserving the news media's ability to pursue its constitutionally protected freedom to gather and report the news, free from intrusion by the government or other litigants. This case involves a number of important questions regarding the news media's ability to perform its constitutionally protected function: whether journalists' privilege to prevent the disclosure of confidential sources may be circumvented by subpoenaing a third-party who holds records of journalists' confidential communications incident to providing services to the journalist; whether journalists' qualified privilege to prevent the disclosure of confidential sources may be overcome without a showing that all alternative sources

of inquiry have been exhausted; whether the allegation of a violation of California's trade secret statutes obviates journalists' privilege to prevent the disclosure of confidential sources; and whether journalists may be punished consistent with the First Amendment under California's trade secret statutes for publishing information on a matter of public interest when the journalist did not participate in the illegal misappropriation of a trade secret.

Allowing journalists' confidential sources to be disclosed by subpoenaing third-party service providers, especially where there has been no showing that the information is not adequately available from other sources, would substantially impair journalists' ability to gather and report the news by deterring future sources from coming forward and turning journalists into – or at least creating a perception that they are – unwilling investigators for the government and other litigants. Punishing journalists who did not illegally obtain access to trade secrets for publishing information on a matter of public interest would impair the news media's ability to report on the activities of corporations and other businesses. The result will be a restriction in the flow of information to the public, inhibiting the public's ability to make informed choices related to government, industry, health and a host of other subjects that affect people's everyday lives.

SUMMARY OF ARGUMENT

Journalists perform the vital and constitutionally protected function of informing the public on a wide range of matters of public importance. To that end a qualified First Amendment privilege from compelled disclosure of journalists' confidential sources has been recognized in California law as necessary to protect journalists' ability to gather and report the news. At a minimum, this qualified privilege may not be overcome unless all other potential sources of information have been exhausted. The plaintiff in this case has attempted to subvert this protection by directing discovery at third-parties who hold information about the non-party journalists' confidential sources as part of their provision of e-mail service to the journalists. The Superior Court erred in permitting this line of discovery to proceed before the plaintiff had sustained its heavy burden of overcoming the qualified privilege, particularly where the plaintiff has failed to depose other known potential sources of information.

In so ruling, the Superior Court placed significant emphasis on the plaintiff's allegation that the disclosure and publication of trade secrets is illegal under California law. Because the First Amendment protects journalists from liability for publishing even illegally obtained information on matters of public interest and importance where the journalists did not participate in the illegality, and because allegations of illegality do not permit a court to ignore the protections from compelled

disclosure of confidential sources provided by the First Amendment and California law, the Superior Court's emphasis on the trade secret statutes was misplaced.

ARGUMENT

I. The First Amendment protects journalists from attempts by litigants to reveal their confidential sources.

In order to maintain the free flow of information to the public on matters of public interest and importance, journalists are afforded a qualified privilege under the First Amendment not to reveal their confidential sources or other unpublished information. When information about journalists' confidential communications is held by third-parties incident to those third-parties' provision of services to journalists, the qualified privilege protects against attempts to compel disclosure of confidential sources directed at those third-parties as well. While this qualified privilege is not absolute, at minimum the First Amendment requires that government or other litigants exhaust all other potential sources of information before they may overcome the privilege and seek discovery from journalists. Because the plaintiff in this case has failed to exhaust all other potential sources of information, the plaintiff cannot overcome the protections of the qualified privilege and obtain discovery of the non-party journalists' confidential sources.

A. A qualified First Amendment reporter's privilege is recognized in California.

The reporter's privilege was first articulated by the U.S. Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Branzburg*, the Court decided three cases involving journalists' obligations to appear before a grand jury and testify about alleged criminal activity that they witnessed. *Id*. at 667-81. Although the majority found no privilege protecting reporters who are eyewitnesses to crimes from testifying before grand juries, it acknowledged that "without some protection for seeking out the news, freedom of the press would be eviscerated." *Id*. at 681.

A majority of the justices – four dissenters and one who otherwise concurred with the Court – also made clear that reporters enjoy a qualified privilege, based on the First Amendment, to resist compelled disclosure of their newsgathering activities. *Id*. at 709 (Powell, J., concurring); *Id*. at 725-52 (Stewart, J., dissenting); *Id*. at 711-25 (Douglas, J., dissenting).

In his critically important concurring opinion effectively establishing a majority recognition of a constitutionally based privilege, Justice Powell wrote separately to emphasize the limited nature of the Court's holding, and to explicitly advocate a case-by-case balancing test to determine journalists' claims of privilege.

> The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold ... that state and federal authorities are free to "annex" the news media as "an investigative arm of government." ... 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. In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

Id. at 709-10 (Powell, J., concurring).

Any subpoena of a reporter implicates the First Amendment. Journalists object to subpoenas because they inevitably turn them into "investigative arms" of police, prosecutors, criminal defense attorneys and civil litigants. As Justice Stewart noted in his dissent in *Branzburg*, the failure to recognize this impact of subpoenas marks a "disturbing insensitivity to the critical role of an independent press in our society." *Id*. at 725 (Stewart, J., dissenting).

Following *Branzburg*, the Supreme Court of California has recognized a qualified First Amendment privilege for reporters to prevent disclosure of their confidential sources and other unpublished information. *Mitchell v. Superior Court*, 37 Cal.3d 268, 279 (1984); *Miller v. Superior Court*, 21 Cal.4th 883, 899 (1999). In *Mitchell*, the court found that:

> "The First Amendment ... guarantees a free press primarily because of the important role it can play as a vital source of public information. Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this

> news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant."

37 Cal.3d at 274-5 (quoting *Zerilli v. Smith*, 656 F.2d 705, 710-11 (D.C.Cir. 1981)) (internal citations omitted). While recognizing the judicial policy "favoring full disclosure of relevant evidence," the court found that in civil cases, such as the one before this Court, "courts must recognize that the public interest in a non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure." *Id.* at 276-7 (quoting *Baker v. F&F Investment*, 470 F.2d 778, 784-5 (2d Cir. 1972).[1]

The Ninth U.S. Circuit Court of Appeals has also recognized a qualified First Amendment privilege. *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (*Shoen I*). "Rooted in the First Amendment, the privilege is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.'" *Id*. (quoting *Herbert v. Lando*, 441 U.S. 153 (1979) (Brennan, J., dissenting) (internal quotation omitted)). "A civil defamation lawsuit is important. But it is not the only

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[1] *See also New York Times Company v. Superior Court*, 51 Cal.3d 453, 456 (1990) (holding that while the absolute protection provided by California's shield law may be overcome in a criminal case based on a defendant's constitutional right to a fair trial, there is no similar right sufficient to overcome the shield law in a civil personal injury action).

thing that is important." *Id*. at 1302 (Kleinfeld, J., concurring).

In order to provide the public with information about matters of public importance and interest, journalists must sometimes rely on confidential sources. The cases cited above all support the principle that if journalists are compelled to become investigators for government or civil litigants, confidential sources will no longer be willing to provide information to journalists. The result will be a restriction in the flow of information to the public, inhibiting the public's ability to make informed choices related to government, industry, health and a host of other subjects that affect people's everyday lives. This principle was recognized by the citizens of California in incorporating the state shield law into the state constitution.

> The free flow of information to the public is one of the most fundamental cornerstones assuring freedom in America. Guarantees must be provided so that information to the people is not inhibited. However, that flow is currently being threatened by actions of some members of the California Judiciary. They have created exceptions to the current Newsman's Shield Law, which protects the confidentiality of reporters' news sources. And the use of confidential sources is critical to the gathering of news. *Unfortunately, if this right is not protected, the real losers will be all Californians who rely on the unrestrained dissemination of information by the news media*.

Delaney v. Superior Court, 50 Cal.3d 785, 803 (1990) (quoting Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Primary Elec. 19 (June 3, 1980) (emphasis in original)).[2]

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[2] Voter intent may be ascertained from ballot arguments. *Delaney*, 50 Cal.3d at 801.

B. The privilege extends to information that would reveal confidential sources that is held by third-parties incident to providing services to journalists.

The plaintiff in this case has attempted to subvert the protections of the First Amendment by compelling the disclosure of confidential sources from the non-party journalists' Internet service provider instead of directly from the journalists themselves.[3] However, whether the disclosure of journalists' confidential sources is made directly by the journalist, or by a journalist's Internet service provider, telephone provider, document storage service or any other business that holds information about confidential sources incident to providing services to the journalist, the same harms occur and the same First Amendment protections are implicated.

"First Amendment rights are implicated whenever government seeks from third parties records of actions that play an integral part in facilitating an association's normal arrangements for obtaining members or contributions." *Local 1814 v. Waterfront Commission*, 667 F.2d 267, 271 (2d Cir. 1981). *Local 1814* involved an investigation by a state commission into allegations of coercion in a labor union's fund raising practices. *Id*. at 269. In order to identify potentially coerced union members, the commission subpoenaed a shipping association that administered the

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[3] The plaintiff has similarly attempted to subvert the protections of California's shield law. Cal. Const., Art. I., § 2(b). Because the subpoenas in this case are barred by the First Amendment, *amici* do not further address the protections also provided by the shield law.

union's payroll deduction plan. *Id*. at 269-70. The Second U.S. Circuit Court of Appeals found that even though the subpoena was directed at a third-party and not directly to the union or its members, because the third-party played an "integral role" in facilitating the union members' First Amendment rights, the third-party records were entitled to the same protection as the records of the union. *Id*. at 271. *See also Doe v. Harris*, 696 F.2d 109, 115 (D.C. Cir. 1982) (holding that an individual whose records were subpoenaed from a third-party in a grand jury investigation had the right to seek declaratory relief concerning those subpoenas and the issuance of future subpoenas); *Pollard v. Roberts*, 283 F.Supp.248, 258-9 (E.D. Ark. 1968) (three judge panel) (holding that First Amendment association interest prevented subpoena of contribution records from third-party bank), *aff'd*, *Roberts v. Pollard*, 393 U.S. 14 (1968) .

Subpoenas for journalists' telephone toll records were barred by the First Amendment in *New York Times Co. v. Gonzales*, No. 04 Civ. 7677 (RWS), 2005 WL 427911 (S.D.N.Y. Feb. 24, 2005). The case involved a federal government investigation into alleged leaks to *The New York Times* of information from a terrorism investigation. *Id*. at 3. In order to determine the *Times*' confidential source or sources of information, the government subpoenaed the *Times*' telephone service provider, and the *Times* sued to block the subpoenas. *Id*. at 7-9. The U.S. District Court for the Southern District of New York held:

> [I]t is determined that the First Amendment interest at issue, *i.e.,* the protection of newsgathering that depends on information obtained from confidential sources, is the same whether the government compels testimony from The Times' reporters concerning the names of their confidential sources or instead compels production from third parties of records evidencing telephone communication between such reporters and their confidential sources. Therefore, the telephone records are protected by the qualified reporter's privilege.

Id. at 45.

Similarly, the U.S. District Court for the Middle District of North Carolina has held that subpoenas directed to journalists' hotels, letter-carrier services and telecommunications companies were barred by the First Amendment. *Food Lion v. Capital Cities/ABC*, No. 6:92CV00592, 1996 WL 575946, 2 (M.D.N.C. Sept. 6, 1996). "[T]he subpoenas clearly infringe ABC's First Amendment rights with regard to its confidential sources. Although the discovery is not requested directly from ABC, the inquiries directed to third-parties nonetheless implicate ABC's privilege." *Id*.

The U.S. Department of Justice has recognized in its guidelines for issuance of subpoenas to the news media that subpoenas directed to third-parties may implicate reporters' freedom to investigate and report the news. 28 C.F.R. § 50.10 Mirroring the requirements of a qualified First Amendment privilege, the guidelines, which have remained in their current form since 1980, require that before U.S. Attorneys may issue subpoenas for journalists' telephone toll records, they must take "all reasonable alternative investigative steps." 28 C.F.R. § 50.10 (b). Subpoenas for telephone

records may not be issued without prior authorization of the Attorney General, and should be based on "reasonable ground to believe that a crime has been committed and that the information sought is essential to the successful investigation of that crime," and "directed at relevant information regarding a limited subject matter" covering a "reasonably limited time period." 28 C.F.R. § 50.10 (g). The guidelines also require U.S. Attorneys to attempt negotiations with the news media before requesting subpoenas for telephone toll records unless negotiations would pose a "substantial threat to the integrity of the investigation." 28 C.F.R. § 50.10 (d).

The same concerns that arise when journalists' telephone records are subpoenaed are present when journalists' e-mail records are the subject of attempts to disclose confidential communications, and thus the same protections must apply. "Assuming a communication is otherwise privileged, the use of the company's e-mail system does not, without more, destroy the privilege." *In re Asia Global Crossing*, Nos. 02 B 15749(SMB), 02 B 15750(SMB), 2005 WL 646842, 1 (Bankr.S.D.N.Y. March 21, 2005) (holding that an employee's use of a company e-mail system to communicate with an attorney does not waive the attorney-client privilege so that the company may discover the employee's e-mail in civil litigation). Subpoenas for journalists' e-mail may be of even greater concern than subpoenas for telephone toll records, because while toll records identify the time, duration and parties to a call, they do not disclose the contents of the conversation. *Reporters Committee for*

Freedom of the Press v. American Telephone & Telegraph, 593 F.2d 1030, 1036, 1046, 1056-57 (D.C. Cir 1978);[4] *See also Smith v. Nixon*, 606 F.2d 1183, 1189 n.34 (D.C. Cir. 1979) (Wiretapping of a journalist's telephone "a much more intrusive invasion" than acquisition of telephone toll records). The disclosure of confidential e-mail would reveal not only the identity of the journalist's sources, but also the content of confidential communications, and would be just as damaging as the disclosure of telephone toll records to journalists' ability to obtain confidential information in the future, if not more so.

Whether a subpoena seeks telephone toll records, e-mail or any other record held by a third-party incident to the third-party's provision of services to a journalist, it is clear that the real party in interest is the journalist, not the third-party. It is the journalist's confidential communications with a source that are the ultimate target of the subpoena, and it is the journalist's ability to obtain information and disseminate it to the public that will be harmed, just as if the subpoena were issued directly to the journalist.

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[4] The D.C. Circuit Court of Appeal's ruling in *Reporters Committee* that the subpoena of telephone toll records was not barred by the First Amendment is inapposite. The holding was limited to subpoenas in criminal investigations, and was based on a finding that the journalists enjoyed no First Amendment privilege in good faith criminal investigations, so no privilege could be applied to journalists' phone records either. *Reporters Committee*, 593 F.2d at 1041, 1051-2. *See Gonzales*, 2005 WL 427911, 45. This case involves subpoenas in civil litigation, and the California courts have recognized a First Amendment privilege in civil cases.

That it is the subscriber and not the Internet service provider who has an interest in the content of e-mail maintained by the service provider is recognized in the federal Stored Communications Act. 18 U.S.C. § 2701 *et seq*. The act prohibits an "electronic communication service" from disclosing "to any person or entity" the contents of electronic communications stored, carried or maintained by the service. 18 U.S.C. § 2702 (a). None of the exceptions to the act – which apply when the customer has given consent, disclosure is incident to providing service, or pursuant to various law enforcement exceptions – allow disclosure pursuant to a subpoena in civil litigation. 18 U.S.C. § 2702 (b), (c); 18 U.S.C. § 2703. As the non-party journalists explain in their Petition and Memorandum, this federal statute absolutely bars the subpoenas at issue in this case and is dispositive. Petitioners and Non-party Journalists Jason O'Grady, Monish Bhatia, and Kasper Jade's Petition for a Writ of Mandate and/or Prohibition; Memorandum of Points and Authorities at 22-24.

Because the intent of the subpoenas in this case is to discover the confidential sources of the non-party journalists, and because the effect of subpoenas to journalists' Internet service providers will be the same as if the subpoenas were directed to the journalists themselves, the qualified First Amendment privilege against disclosure of journalists' sources must apply just as if the journalists were themselves subpoenaed. The protections of the First Amendment would be illusory if they could be so easily avoided by directing discovery to third-parties who hold records of

journalists' confidential communications incident to services provided to the news media.

C. The privilege has not been overcome in this case because the plaintiff has not exhausted all other potential sources of information.

A civil litigant's ability to overcome journalists' qualified First Amendment privilege should be the exception not the rule, and a rare exception at that. "Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished. Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters." *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981). "[R]outine court-compelled disclosure of research materials poses a serious threat to the vitality of the newsgathering process." *Shoen v. Shoen,* 48 F.3d 412, 416 (9th Cir. 1995) (*Shoen II*). *See also Mitchell*, 37 Cal. 3d at 277.

At a minimum, the qualified First Amendment privilege requires that all alternative sources of information be exhausted before the privilege has been overcome and a subpoena may be directed at a journalist. "The values resident in the protection of the confidential sources of newsmen certainly point towards compelled disclosure from the newsman himself as normally the end, and not the beginning, of the inquiry." *Carey v. Hume*, 492 F.2d 631, 638 (D.C. Cir. 1972). This obligation to exhaust all alternative sources may not be ignored simply because of a fear that it

would be "time-consuming, costly, and unproductive." *Zerilli*, 656 F.2d 705. Because the plaintiff in this case has not exhausted all alternative sources of the information they seek, they cannot overcome the qualified privilege.

In *Mitchell*, the Supreme Court of California articulated five factors to be considered before the qualified privilege may be overcome: (1) The nature of the litigation and whether the reporter is a party, 37 Cal.3d at 279; (2) The relevance of the information, *Id*. at 280 ("[M]ere relevance is insufficient to compel discovery; disclosure should be denied unless the information goes to the heart of the plaintiff's claim." (internal quotation omitted)); (3) Whether alternative sources have been exhausted, *Id*. at 282 ("[D]iscovery should be denied unless the plaintiff has exhausted *all alternative sources* of obtaining the needed information. Compulsory disclosure of sources is the *last resort*, permissible only when the party seeking disclosure has *no other practical means of obtaining the information*." (emphasis added) (internal citations omitted)); (4) The importance of protecting confidentiality in the case at hand, *Id*.; and (5) Whether the plaintiff has made a "prima facie showing," *Id*. at 283.

The Ninth U.S. Circuit Court of Appeals has held that "[o]nce the privilege is properly invoked, the burden shifts to the requesting party to demonstrate a sufficiently compelling need for the journalist's materials to overcome the privilege. *At a minimum, this requires a showing that the information sought is not obtainable from another source*." *Shoen I*, 5 F.3d at 1296 (emphasis added). Even where non-

confidential information is at issue, the Ninth Circuit's test for overcoming the qualified privilege requires exhaustion. *Shoen II*, 48 F.3d at 416.[5] Requested material must be "(1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case. We note that there must be a showing of actual relevance; a showing of potential relevance will not suffice." *Id*. The U.S. Department of Justice guidelines for issuance of subpoenas to the news media require that "[a]ll reasonable alternative attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media." 28 C.F.R. § 50.10 (b).

Courts that have addressed the exhaustion requirement of the qualified privilege have applied it very strictly. In *Mitchell*, the California Supreme Court found that the qualified privilege had not been overcome because other known sources had not been deposed. 37 Cal.3d at 282. "There may well be an irreducible core of information which cannot be discovered except through the Mitchells, but plaintiffs have not yet reduced their discovery to that core." *Id*. In *Shoen I*, the Ninth Circuit held that the privilege had not been overcome because one of the parties had not been deposed, although he had been served with "written interrogatories which

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[5] The Ninth Circuit does not appear to have articulated a test for overcoming the privilege when disclosure of confidential information is requested, but presumably it would be at least as protective as the test for non-confidential information.

produced uninformative answers." 5 F.3d at 1296. "Written interrogatories are rarely, if ever, an adequate substitute for a deposition when the goal is discovery of a witness' recollection of conversations." *Id*. at 1297. In *Zerilli*, the D.C. Circuit found that the privilege had not been overcome because identified witnesses had not been deposed. 656 F.3d at 125-6.

> At the very least, they could have deposed the four employees who had the greatest knowledge about the logs. It is quite possible that interviewing these four individuals could have shed further light on the question whether the Justice Department was responsible for the leaks. Nor can appellants escape their obligation to exhaust alternatives because they were willing to accept the Justice Department's statement that an internal investigation had not revealed any wrongdoing by employees. Permitting this kind of gamesmanship would poorly serve the First Amendment values at stake here.

Id. The court noted that "the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure." *Id*. at 714 (citing *Carey*, 492 F.2d at 639). *See also Star Editorial v. U.S. District Court*, 7 F.3d 856, 861 (9th Cir. 1993) (finding privilege overcome only when all non-confidential sources had been deposed); *New York Times Co. v. Gonzales*, 2005 WL 427911, 47 (Privilege not overcome when "the government has tacitly acknowledged that it possesses the wherewithal to search its own internal records."); *Condit v. National Enquirer*, 289 F.Supp.2d 1175, 1180 (E.D.Cal. 2003) ("Plaintiff is not required to depose everyone in the Justice department to locate the source, but plaintiff must make some reasonable attempt to exhaust that alternative source."); *Rogers v. Home Shopping*

Network, 73 F.Supp.2d 1140, 1145-6 (C.D.Cal. 1999) (Privilege not overcome despite ten depositions, including all eyewitnesses, because other potential witnesses on the premises or with knowledge not deposed); *Food Lion*, 1996 WL 575946, 2 (Privilege not overcome when plaintiff had access to more than 100 identified witnesses and requested discovery of news media records to find discrepancies); *Los Angeles Memorial Coliseum Commission v. National Football League*, 89 F.R.D. 489, 494 (C.D.Cal. 1981) (Privilege not overcome where requesting party failed to show exhaustion); *But see Anti-Defamation League v. Superior Court*, 67 Cal.App.4th 1072, 1095 (Cal. Ct. App. 1998) (Finding exhaustion after defendants, named sources and one other witness deposed, but not requiring further discovery from government agency that was the source of leaked information).

The plaintiff in this case has failed to exhaust "all alternative sources of obtaining the needed information," so the non-party journalists' qualified First Amendment privilege to prevent disclosure of their confidential sources has not been overcome and the subpoenas directed to their Internet service provider must be quashed. *Mitchell*, 37 Cal. 3d at 282. Although the plaintiff has identified approximately 30 employees who had access to the presumed source of the leaked information, it has not deposed any of them.[6] Petition of Non-Party Journalists at 9-

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[6] The Superior Court noted that it would be an "unusual step" for the plaintiff to depose its own employees. Order After Hearing ("Order"), 9:20-21 (Pet. Ex. 34, 463:20-21). One or more of the plaintiff's employees are the

10. The plaintiff has not attempted to depose sources identified in the non-party journalists' published articles. *Id*. The plaintiff has not demonstrated that it has conducted computer forensic examinations of its or its employees' computers. *Id*. Nor has the plaintiff demonstrated that it has hired outside investigators who may conduct an internal investigation without fear of reprisal. *Id*.

An internal investigation conducted by the plaintiff's own security employees is not exhaustion of all alternative sources. Such an investigation is simply not comparable to under-oath depositions of all potentially knowledgeable persons enforced by the court's civil and criminal contempt powers. *See Zerilli*, 656 F.2d at 708-9, 714-15 (Internal Justice Department investigation not a substitute for depositions); *Shoen I*, 5 F.3d at 1297 (Written interrogatories not a substitute for depositions). It is probable that one of the plaintiff's employees has already been dishonest with the plaintiff by disclosing privileged documents. It would be a slight step for that same employee to be dishonest with the plaintiff's investigators to cover up the disclosure. It would be another thing entirely for that employee to lie to the court under oath and penalty of perjury. The plaintiff may also have an incentive to conduct a less-than-thorough investigation of its own employees. Unless all of the

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probable source of the leak in this case and presumably the unnamed "Doe" defendants plaintiff is suing. It is hardly unusual to require the plaintiff to depose individuals who are the likely source of the harm the plaintiff alleges to have suffered and the ultimate targets of plaintiff's investigation.

approximately 30 employees who had access to the presumed source of the leaked information improperly disclosed it, the plaintiff is in the uncomfortable position of treating some of its innocent and loyal employees as suspects. While turning to journalists may instead seem like a convenient and more comfortable alternative, it is one which the First Amendment does not permit. Journalists have a First Amendment privilege not to become the investigative tools of litigants – the plaintiff's employees do not. If for no other reason than this failure to exhaust potential alternative sources of information, the plaintiff has failed to overcome the non-party journalists' qualified First Amendment privilege.

II. Allegations of illegality do not obviate the protections of the First Amendment.

In ruling that the subpoenas to the non-party journalists' Internet service provider were not barred by the qualified First Amendment privilege, the Superior Court placed significant emphasis on the plaintiff's allegation that the disclosure and publication of trade secrets is illegal under California law.[7] The Superior Court's

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[7] The Superior Court stated: "On the one hand there is the movants' claim to 'free speech' which, as even a casual student of that issue knows, is rife with complexities and restrictions. On the other hand, there is the undisputed right to protect intellectual property as expressed in California civil and criminal law." Order, 3:21 to 4:2 (Pet. Ex. 34, 457:21 to 458:2). This statement in particular turns the First Amendment on its head, by casually purporting to place statutory authority over constitutional rights. *See also* Order, 4:13-15, 6:9-13, 8:9-10, 11:2-4, and 11:18 to 12:5 (Pet. Ex. 34, 458:13-15, 460:9-13, 462:9-10, 465:2-4, and 465:18 to 466:5).

emphasis is misplaced for two reasons. First, publication of illegally disclosed information on a matter of public interest is protected under the First Amendment where the journalist did not participate in the illegal acquisition of the information. Second, an allegation of illegality does not permit the government or a civil litigant to circumvent the protections of the journalist's privilege to prevent disclosure of confidential sources.

A. Publication of trade secrets by journalists who did not violate the law in obtaining them is protected by the First Amendment.

In order to perform its constitutionally protected function of informing the public on matters of public interest and importance, the news media often reports information that the government, corporations or others would prefer to remain secret. Recent corporate scandals involving Worldcom, Enron and the tobacco industry all undoubtedly involved the reporting of information that the companies involved would have preferred to remain unknown to the public. Even when corporate activity does not involve malfeasance, the actions of private companies, the products they produce and the services they provide can have a profound impact on people's choices about their health, economy and lives. Just because a statute seeks to protect the secrecy of such information does not mean that the First Amendment protections provided to the news media to inform the public are wiped away. "Since those activities are protected by the First Amendment, state law may not impinge upon them by characterizing the

activities as tortious. Stated differently, the constitutional protection accorded normal news-gathering activities does not depend upon the characterization of the cause of action seeking to impose sanctions upon its exercise." *Nicholson v. McClatchy Newspapers*, 177 Cal.App.3d 509, 520 (Cal. Ct. App. 1986).

The U.S. Supreme Court addressed this issue in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *Bartnicki* involved state and federal wiretapping statutes which prohibited the interception of "any wire, oral, or electronic communication" and the disclosure of any such communication by someone "knowing or having reason to know" the communication was illegally intercepted. *Id*. at 519-21. During contentious collective-bargaining negotiations between a Pennsylvania local school board and teachers' union, an unidentified individual intercepted and recorded a telephone conversation between two union representatives. *Id*. at 518-19. The unidentified individual placed a tape of the conversation in the mailbox of the head of a taxpayers' group opposed to the union, who delivered it to local radio commentator Fred Vopper. *Id*. at 519. Vopper broadcast the tape, and the union representatives sued for violation of the state and federal statutes. *Id*.

The Supreme Court held that even though the disclosure of the intercepted communication violated the state and federal statutes, it was nonetheless protected by the First Amendment. *Id*. at 525.

> The persons who made the disclosures did not participate in the interception, but they did know – or at least had reason to know – that

> the interception was unlawful. ... Nevertheless, having considered the interests at stake, we are firmly convinced that the disclosures made by respondents in this suit are protected by the First Amendment.

Id. at 517-18. The court based its holding on three factors:

> First, respondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else. Third, the subject matter of the conversation was a matter of public concern. If the statements about the labor negotiations had been made in a public arena – during a bargaining session, for example – they would have been newsworthy. This would also be true if a third party had inadvertently overheard Bartnicki making the same statements to Kane when the two thought they were alone.

Id. at 525 (internal citations omitted). "[I]t would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." Id. at 529-30. "[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id*. at 535.

Like the wiretapping statutes at issue in *Bartnicki*, the trade secret statutes that form the basis of the plaintiff's suit in this case prevent disclosure "by a person who knows or has reason to know" that it was improperly acquired. Cal. Civ. Code § 3426.1 (b); *See also* Cal. Penal Code § 499c. As in *Bartnicki*, it is probable in this case that the person who misappropriated trade secrets from the plaintiff and gave them to the non-party journalists violated the law in doing so. But also as in

Bartnicki, the non-party journalists' subsequent publication of that illegally intercepted information is protected by the First Amendment.

Under the first part of the *Bartnicki* test, it has not been alleged, let alone proven, that the non-party journalists played a part in the illegal interception of the information. Nor have the non-party journalists been civilly or criminally charged with violation of the trade secret statutes. 532 U.S. at 525. Under the second part of the test, the non-party journalists' access to the information was obtained lawfully, even though the information itself may have been intercepted unlawfully by someone else. *Id*. Under the third part of the test, the information the non-party journalists reported was on a matter of public concern. *Id*.

If the information about the plaintiff's yet-to-be-released product had been disclosed by the plaintiff in a public forum, or inadvertently overheard, it certainly would have been newsworthy. *Id*. Presumably, the plaintiff will issue press releases when it announces the product in hopes that the news media will report on the product. The issue in this case is not whether the information published by the non-party journalists is newsworthy, the plaintiff is upset rather at when the newsworthy information was released. But the plaintiff's preferred timing of the release is not one of the factors recognized by the Supreme Court in *Bartnicki* – presumably the plaintiffs in that case would never have wanted the information released, so if that had been a factor it would have been dispositive. It is for the news media to decide, not

the plaintiff or the courts, when information becomes newsworthy.

The Superior Court erroneously relied on *Bartnicki* and the Supreme Court of California's decision in *DVD Copy Control Association v. Bunner*, 31 Cal.4th 864 (2003), for the proposition that the First Amendment does not protect journalists' right to publish trade secrets. Order, 6:13-16 (Pet. Ex. 34, 460:13-16). These cases do not support such a broad proposition, and the differences between the two cases illustrate why the publication of the information in this case is protected.

The Supreme Court in *Bartnicki* specifically did not decide the issue of whether the First Amendment would protect the disclosure of "trade secrets or domestic gossip or other information of purely private concern." 532 U.S. at 533. California's trade secret statutes are very broad in the definition of what they protect:

> "Trade Secret" means information, including a formula, pattern, compilation, program, device, method, technique or process that:
> (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Cal. Civ. Code § 3426.1 (d); *See also* Cal. Penal Code § 499c (9). Under an expansive reading of this definition, virtually any information that a company attempts to keep secret, and that could even potentially provide an economic value by remaining secret, is protected. Companies could prevent reporting on myriad matters of public interest and importance, including malfeasance, the development of harmful

or unethical products or services, unfair business practices and anything else they would rather the public not know. Such a broad definition would essentially allow companies to control how they are covered in the news media, at the expense of the public. The Supreme Court's failure to answer the question of whether a "trade secret", which it did not attempt to define, would be protected under its test in *Bartnicki* cannot be taken as holding that the Court would permit a prohibition on speech so broad, particularly given the level of protection it found under the facts of *Bartnicki*.

The Superior Court cites *Bartnicki* for the proposition that "[r]eporters and their sources do not have a licence to violate criminal laws such as Penal Code § 499c." Order, 8:9-10 (Pet. Ex. 34, 462:9-10). What *Bartnicki* actually held on this issue, in a footnote, is that:

> Our holding, of course, does not apply to punishing parties for obtaining relevant information unlawfully. "It would be frivolous to assert – and no one does in this case – that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."

532 U.S. at 532 n.19 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972)). This language does not mean that California's trade secret statutes are immune from constitutional scrutiny. It simply stands for the proposition, not contested in this case, that the First Amendment does not permit journalists to trespass, break and enter, steal

or violate other generally applicable criminal laws in order to gather information. The journalists in this case did none of these things.[8]

The Supreme Court of California's decision in *DVD Copy Control Association v. Bunner* is distinguishable on its facts from the case before this Court. *Bunner* involved an Internet Web site operator, Andrew Bunner, who posted a computer program called DeCSS on his Web site. 31 Cal.4th at 871-2. The DeCSS program allowed users to break the encryption mechanism, called CSS, that protects movies in DVD format from being copied. *Id*. Bunner did not create the program, but obtained it from another Web site, and he claimed to have posted it to allow users of the Linux computer operating system to view DVD movies on their computers and to improve the DeCSS program. *Id*. at 872. The Copy Control Association, the industry group that administered the use of CSS, sought an injunction against Bunner and others from publishing the program because it had been created using improperly acquired trade secrets. *Id*. at 872-3.

The Supreme Court of California, in upholding the injunction, did not hold that there is no First Amendment protection for journalists to publish trade secrets. The court instead held that "*Bartnicki* implicitly acknowledges that a balancing of First

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[8] Receipt or publication of stolen information is not comparable to the receipt of stolen property, because the latter does not involve a prohibition on speech. *Bartnicki*, 532 U.S. at 530 n.13. For this reason the Superior Court's comparison to a "fence" of stolen property is inapplicable. Order, 11:20 to 12:3 (Pet. Ex. 34, 465:20 to 466:3).

Amendment interests against government interests in protecting trade secret content may yield a different result" than was reached in *Bartnicki*. *Id*. at 883. The court found that the trade secrets involved in the DeCSS program conveyed "*only* technical information about the method used by specific private entities to protect their intellectual property" and were posted by Bunner not to comment on a public issue, but to allow Linux users to view DVDs and to improve DeCSS. *Id*. at 883-4 (emphasis in original). "Indeed, only computer encryption enthusiasts are likely to have an interest in the *expressive* content – rather than the uses – of DVD CCA's trade secrets." *Id*. at 884. "Disclosure of this highly technical information adds nothing to the debate over the use of encryption software or the DVD industry's efforts to limit unauthorized copying of movies on DVD's." *Id*. at 884.

Bunner is significantly different than the case before this Court. *Bunner* dealt with trade secrets that were highly technical in nature, and that were published only for the mechanical function they performed in breaking DVD encryption, not to inform the public. DeCSS was not posted as news, it was posted as a tool. In this case, the information at issue is about the pending release of a consumer product by a major manufacturer – information of widespread public interest – and was posted as news to inform the public that the product existed. *See also Anti-Defamation League v. Superior Court*, 67 Cal.App.4th 1072, 1077 (Cal. Ct. App. 1998) (Publishing of information in violation of privacy statute protected by First

Amendment when done for journalistic purposes, but would not be if privately disclosed to a foreign government or others).

In *Bunner*, the Copy Control Association would not have made its trade secrets public at any time, so long as it intended to use them to encrypt DVDs. In this case, the plaintiff obviously would have made the information at issue public when it announced the product. *See also DVD Copy Control Association v. Bunner*, 116 Cal.App.4th 241, 254-5 (Cal. Ct. App. 2004) (Court of Appeals on remand noting that case was analytically difficult because in the normal trade secret misappropriation case a competitor has as much interest in keeping the trade secret away from the public as the plaintiff, where here the defendant "wanted the whole world to have it"). In *Bunner*, the defendants were still free to publish information about DeCSS and to discuss DVD encryption, they were only barred from publishing the "highly technical information" – the program itself. *Bunner*, 31 Cal.4th at 884. In this case, because the trade secret is the very existence of the product, enforcement of the statute in situations such as this would prevent any discussion.

The public depends on the news media to provide information needed to make informed choices about their government, their health, their consumer choices and their lives. "The First Amendment therefore bars interference with this traditional function of a free press in seeking out information by asking questions." *Nicholson*, 177 Cal.App.3d at 519.

> Such techniques, of course, include asking persons questions, including those with confidential or restricted information. While the government may desire to keep some proceedings confidential and may impose the duty upon participants to maintain confidentiality, it may not impose criminal or civil liability upon the press for obtaining and publishing newsworthy information through routine reporting techniques.

Id. at 519-20. Because the publication by the non-party journalists in this case was protected by the First Amendment, the Superior Court erred in focusing on the trade secret statutes to find that the First Amendment protection from the disclosure of journalists' confidential sources did not apply.

B. The mere allegation of illegality is insufficient to breach the reporter's privilege.

The Superior Court erred in allowing the plaintiff's allegations of a violation of the trade secret statutes to overcome the protections of the qualified First Amendment privilege. The non-party journalists in this case have not even been civilly or criminally charged with violating the trade secret laws, let alone convicted or found liable. "[T]he conclusory allegation of a conspiracy cannot serve to transform privileged behavior of the media defendants into tortious behavior." *Nicholson*, 177 Cal.App.3d at 521.

> This rule has particular applicability where the alleged object of the conspiracy, the publication of newsworthy information, is a matter the media defendants were constitutionally privileged to do and the only acts the defendants are alleged to have done pursuant to the conspiracy were privileged. Under such circumstances plaintiff cannot be permitted to avoid the effect of the constitutional privilege by the mere

artifice of alleging that defendants acted pursuant to a conspiracy.

Id. "We do not believe the alleged unlawfulness of petitioners' information-gathering activities is dispositive of their right to the protection of the First Amendment." *Anti-Defamation League*, 67 Cal.App.4th at 1091.

In *Mitchell*, the California Supreme Court identified the factors to be considered in weighing whether the qualified privilege had been overcome. 37 Cal.3d at 279-83. An allegation of illegality may be considered among those factors where appropriate, but nowhere does *Mitchell* suggest that such an allegation, standing alone, is sufficient grounds for a court to sidestep the protections of the First Amendment altogether.[9] Specifically, the factors addressing whether the journalist is a party, the relevance of the information sought, and whether the plaintiff has made out a prima facie case all might take into account the allegations of illegal behavior. *Id*. But as discussed in section I.C., *supra*, regardless of how these factors might be applied in this case, because the plaintiff has failed to satisfy the exhaustion prerequisite, the plaintiff cannot overcome the protection of the qualified First Amendment privilege.

The Superior Court's fundamental approach in this case was flawed. The court focused on the trade secret statutes and proceeded as if the non-party journalists'

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[9] Although the Superior Court did address the *Mitchell* factors, the analysis was fleeting and cursory at best. Order, 9:13 to 10:8 (Pet. Ex. 34, 463:13 to 464:8).

objections were normal discovery objections, thereby subordinating the journalists' constitutional rights to the trade secret statutes. "But discovery which seeks disclosure of confidential sources, and information supplied by such sources, is not ordinary discovery." *Mitchell*, 37 Cal.3d at 279. The Superior Court erred in not giving due deference to the constitutional rights implicated by the plaintiff's subpoenas. This approach damages not only journalists' ability to gather and report the news, but ultimately the public's ability to be informed.

CONCLUSION

For the aforementioned reasons, *amici curiae* respectfully urge this court to grant the petition of the non-party journalists and issue a writ of mandate and/or prohibition directing the Superior Court to vacate its order denying petitioners' motion for a protective order and issue a new and different order granting the motion for a protective order.

Respectfully submitted April 7, 2005,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the attached brief complies with the form, size and length requirements of Cal. R. App. Pro. 14(b) and (c) because it was prepared in a proportionally spaced type using WordPerfect 10 in Times New Roman 13-point font double-spaced, and contains 8,941 words, excluding the portions of the brief exempted by Cal. R. App. Pro. 14(c).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of April, 2005, I caused one copy of the foregoing Brief to be mailed to the following recipients, an original and four copies to be mailed to the clerk of the Court of Appeals, four copies to be mailed to the clerk of the Supreme Court, and one copy to be mailed to the clerk of the Superior Court via USPS Express Mail in accordance with Cal. R. App. Pro. 15(c), Cal. R. App. Pro. 40.1, and Cal. R. App. Pro. 44(b)(2):

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