IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

v. Case No. 90,457

MERLAN DAVIS, District Court of Appeal
2nd District - No. 94-04304

Respondent.
_____/

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL SECOND DISTRICT

BRIEF OF AMICI CURIAE, NEWS-JOURNAL CORPORATION AND FIRST AMENDMENT FOUNDATION, IN SUPPORT OF THE STATE OF FLORIDA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Other Authorities:

STATEMENT OF THE INTEREST OF AMICI

NEWS-JOURNAL CORPORATION, which appears as amicus curiae by leave of the Court, is publisher of *The News-Journal*, a daily newspaper circulating primarily in Volusia and Flagler Counties. Since 1928, this newspaper publishing company has been controlled and operated by members of the Davidson family of Daytona Beach, and today *The News-Journal* is Florida's only remaining daily newspaper of general circulation still under local family control. News-Journal Corporation shares the interest of its fellow members of the media in protecting the integrity of the newsgathering process, and for reasons relating to its relative size and economic strength, News-Journal Corporation has a direct interest assuring that its newsgathering activities are not unduly burdened and that its proprietary rights are safeguarded by appropriate rules of this Court.

Subject to approval of the Court, THE FIRST AMENDMENT FOUNDATION ("Foundation") joins this amicus brief to urge the Court to fashion a solution to the larger issue. The Foundation is a not-for-profit organization whose membership consists of newsgathering organizations and other persons interested in protecting the right of public access to governmental information. The news media serve as the eyes and ears of the public by gathering and disseminating information about public affairs and government, much of which is by its nature nonconfidential. If this workproduct were readily subject to attachment by litigants and investigators, the Foundation believes that public access to such information would be encumbered. Therefore, the Foundation has an interest in advocating the protection of nonconfidential workproduct

of newsgatherers as an incident of its role in safeguarding the public access to government.

STATEMENT OF THE CASE AND OF THE FACTS

Amici accept the statement of the case and of the facts of the State and as supplemented by the brief of amicus Times Publishing Company and Diane Mason.

SUMMARY OF ARGUMENT

The Court should promulgate by rule a moderate balancing test to be applied whenever a subpoena is issued for the purpose of taking the product of newsgathering efforts. Such a test is needed to provide categorical protection of a constellation of interests implicated by media subpoenas, including not only the First Amendment interest in protecting the integrity of the newsgathering process, but also the interest in protecting against unduly burdensome subpoenas, infringement of intellectual property rights, and unwarranted use of subpoenas. Such a rule would serve the interests of justice by settling a controversy that recently has preoccupied and entangled the courts and the press in Florida.

I. THE COURT SHOULD ADOPT A RULE BALANCING THE COMPETING INTERESTS AFFECTED BY GRANTING OR DENYING COMPELLED DISCLOSURE OF THE NEWSGATHERING PRODUCT.

A. A comprehensive solution is needed.

Conflict between the freedom of the press and the inquisitorial power of the courts recently has preoccupied the press and courts of Florida. Some lower courts have unsettled the longstanding practice of protecting nonconfidential newsgathering product with a qualified privilege. This practice arose soon after the seminal decision of this Court in *Morgan v. State*, 325 So. 2d 40 (1976). The courts quickly understood that while *Morgan* "dealt with the confidentiality of an anonymous news source [,] there are serious first amendment questions which must be considered before a court can compel a reporter to testify concerning information received from [known sources]." *Times Pub. Co. v. Burke*, 375 So. 2d 297, 299 (Fla. 2d DCA 1979).[1] Abrogation of this settled practice now would profoundly affect the freedom of the press and the administration of justice in Florida.

The prospect that Florida may be on the cusp of a "post-privilege regime" threatens the integrity of the newsgathering process and the public interest it serves. In the interest of justice, this Court now should resolve the issue with an appropriate protective rule.

Amici write out of concern that the present controversy may not yield such a resolution because it is unnecessary to decide the categorical question certified by the

[1] *See also Tribune Co. v. Green*, 440 So. 2d 484, 486 (Fla. 2d DCA 1983), *rev. den.* 447 So. 2d 886 (Fla. 1984) (qualified privilege "applicable to criminal as well as civil cases and to confidential and nonconfidential sources of information"). To evidence the settled practice that arose under this authority, amici have compiled a table of 46 published but unreported decisions in which trial courts applied a qualified privilege to subpoenas seeking nonconfidential information. See Appendix A-1.

lower court. Upon any one or more of the narrower grounds argued by the State and all amici, the decision below was erroneous and should be quashed. Yet any such disposition would leave burning a controversy of great importance to the administration of justice in Florida.

B. The Court has the inherent power to resolve the issue by adopting a rule creating an appropriate qualified privilege.

An alternative path to a definitive resolution is open. The Court has the inherent power to adopt a qualified privilege as a rule governing practice and procedure of the courts. FLA. CONST., art. V, § 2(a). "Procedure is the machinery for carrying on the suit, including pleading, process, *evidence* and practice" *Heberle v. P.R.O. Liquidating Company*, 186 So. 2d 280, 282 (Fla. 1st DCA 1966) (e.s.); *See* FLORIDA EVIDENCE CODE, § 90.501 (commentary) ("creation of privileges [is] dependent upon legislative action or pursuant to the Supreme Court's rulemaking power"); EHRHARDT, FLORIDA EVIDENCE, § 501.1, note 1 (noting constitutional basis of power to promulgate rule adopting a privilege).

The Court has in the past exercised the power to create privileges. For example, the attorney-client privilege and mediator-client privilege derive from rules of court. FLA. R. PROF. RES. 4-1.6 and FLORIDA EVIDENCE CODE, §90.502 (attorney-client privilege); FLA. R. CERT. AND COURT-APPOINTED MEDIATORS, 10.080 (mediator-party privilege). Indeed, all privileges set forth in the evidence code derive in whole or in part from the judicial rule-making power. *In re Florida Evidence Code,* 372 So. 2d 1369 (Fla. 1979).

Even closer analogies to the qualified privilege for which amici advocate are to be found in the rules protecting work product and trade secrets, which are categorical balancing tests ordained by rule. FLA.R.CIV.P. 1.280(b)(3), (4) (work product); 1.280(c)(7) (trade secrets and confidential information). *Compare* FLORIDA EVIDENCE CODE, § 90.506 (privilege to withhold trade secrets).

The Court already has begun to exercise its inherent power to govern the conditions under which newsgathering product is taken by subpoena. *CBS, Inc. v. Jackson*, 578 So. 2d 698, 700, note 3 (Fla. 1991) (incorporating FLA.R.CIV.P., 1.280(c) into criminal rules "to protect the interest of media and similarly situated entities as well as [litigants]"). To arrive at a definitive resolution of the issue, it now would be appropriate to enlarge upon this beginning.

Therefore, it is the purpose of this brief to request that the Court adopt a rule of court creating a moderate balancing test to accommodate the competing interests affected by subpoenas seeking the newsgathering product. To the extent the Court deems it appropriate, amici respectfully request that this brief be accepted also as a writing proposing a change in the rules of court. *See* Rule 2.130(a)(2). Specifically, amici request that the Court adopt and apply the proposed rule in this case.[2]

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[2]Amici's proposed "moderate balancing rule" follows:

> 1. *Newsgathering product* is information obtained in the course of gathering news. *Sensitive information* is newsgathering product obtained from a confidential source, or other source if compelled disclosure would encumber the public interest in access to information from such other sources.
> 2. The proponent of a subpoena seeking newsgathering product from a nonparty newsgatherer must show that the information is relevant, not otherwise available, and sufficiently important to justify disclosure under the circumstances. Disclosure of sensitive information is justified only when the proponent shows a need sufficiently compelling to override the First Amendment interest in unencumbered access to news from such sources. Disclosure of other newsgathering product is

In the alternative, amici request that the Court conduct a special proceeding to study and formulate such a rule. *See* FLA. R. JUD. ADMIN., 2.130(f). If further study is deemed appropriate, the process by which the Court considered and adopted Rule 2.170 (authorizing cameras in the courtroom) commends itself as a venerable model for the proposed inquiry. *See In re Petition of Post-Newsweek Stations, Florida, Inc., for Change in Code of Judicial Conduct*, 327 So. 2d 1 (Fla. 1976).[3]

C. A new rule should codify protection of a constellation of interests implicated by press subpoenas through an appropriate categorical balancing rule.

As applied to nonconfidential newsgathering product, the qualified reporter's privilege is not a testimonial privilege but a categorical balancing test. Indeed, it bears no resemblance to a common law testimonial privilege which ordinarily applies only to a communication that originates in confidence. *See* 8 WIGMORE ON EVIDENCE, §2285. This false distinction led the lower court to erroneously conclude there could be no such privilege. *Davis v. State,* 692 So. 2d 924, 927 (Fla. 2d DCA 1997). As a guideline for balancing the interests that are categorically implicated when

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justified when the proponent shows the information to be reasonably needed for a legitimate purpose related to the administration of justice.
3. The proponent must reimburse the nonparty newsgatherer for the expenses incurred in making such information available and for any property interest taken by the subpoena.

[3]Twenty-six states have adopted "shield laws" or comparable rules creating some form of qualified privilege. *See* SMOLLA AND NIMMER ON FREEDOM OF SPEECH, § 25:17, n. 1 (identifying the following states as having adopted shield laws: Alabama, Alaska, Arizona, Arkansas, California, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Tennessee). In 1993, the Florida Legislature adopted such a statute, but the Governor vetoed it, and a new bill now is pending in the Legislature.

newgathering product is sought for discovery or evidence, however, the privilege is readily justified and consistent with analogous rules of practice.

Any proposal to compel disclosure of the newsgathering product should be an occasion for balancing competing interests. It is the unique insight of *Jackson* that while the First Amendment is prominent among the affected interests, it is not the exclusive interest. Against the evidentiary interests of the judicial process should be balanced a constellation of interests of the press arising out of the right to be free of undue encumbrance on access to information from sources, to be free of an undue structural burden attached to the newsgathering process, to be free of the undue, unfair, and uncompensated taking of intellectual property interests, and to be protected from unwarranted use of process. These interests arise under a continuum of constitutional, statutory, common law, and court rules protecting speech, due process, and other interests.

To be sure, the First Amendment is the brightest light in the constellation of interests, but it is not the only one. If its light were dimmed as the case under review proposes, the lesser lights would shine more brightly. When all is said and done, amici submit, the moderate balancing rule will be the least common denominator of protection appropriate for the full range of interests affected by press subpoenas.

Such a categorical balancing test would serve the interests of judicial administration. In theory, such a test would not be strictly necessary because such interests could be balanced on an *ad hoc* basis from case to case. *Rasmussen v. South Florida Blood Service, Inc.*, 500 So. 2d 533, 535 (Fla. 1987) ("In deciding whether a protective order is appropriate in a particular case, the court must balance the

competing interests that would be served by granting discovery or by denying it") (disclosural privacy interest of blood donors outweighed discovery interest of infected plaintiff). To avert protracted litigation, however, amici urge the Court to adopt the moderate balancing rule as a categorical balancing rule that establishes clear guidelines appropriate for the unique circumstances applicable to all press subpoenas.

The Court has approved similar categorical tests in other contexts. The work product rule derives from a comparable history. First recognized as a privilege implicit in existing rules and public policy, *Hickman v. Taylor*, 329 U.S. 495, 510 (1947), it later was codified in the civil rules. *See* FLA.R.CIV.P. 1.280(b)(3). *Compare, e.g.*, *Elkins v. Syken,* 672 So. 2d 517 (Fla. 1996) (establishing categorical protective standards for discovery of certain financial information from retained experts); *Dade County Medical Assoc. v. Hlis*, 372 So. 2d 117, 121 (Fla. 3d DCA 1979) (adopting categorical balancing rule for certain medical records to effect "a proper balancing of the competing interests to be served by granting discovery or by denying it"). *See also Kridos v. Vinskus*, 483 So. 2d 727 (Fla. 4th DCA 1986) (unwilling expert lacking personal knowledge not required to testify).

D. The unresolved issues involve substantial questions of predictive factual judgments that should be informed by empirical inquiry.

In the arguments for and against such a categorical balancing test, the greatest questions are empirical not doctrinal. It is settled that the newsgathering process must be afforded that measure of protection which is necessary to serve the public interest in access to news. *Morgan*; *See also Tribune Co. v. Huffstetler,* 489 So. 2d 722 (Fla.

1986). What are not settled are largely empirical and consequentialist questions concerning when and to what extent such protection is needed for that purpose.

The questions are predictive. Would an unconditional power to compel disclosure of the newsgathering product encumber public access to news from nonconfidential sources, impose a disparate burden on newsgathering organizations, infringe proprietary rights of such organizations, or lead to unwarranted use of process in the unique circumstances of press subpoenas? Conflicting answers to such questions arise not from conflicting doctrinal theories but from competing predictions of the pragmatic consequences of granting or denying protection.

These competing predictions are assumptions of facts in the nature of broad social empiricisms, which are usefully called "legislative facts" to distinguish them from the "adjudicative facts" developed in litigation. "`Adjudicative facts are the facts about the parties and their activities, businesses and properties .... Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.'" *Bowling v. Department of Insurance*, 394 So. 2d 165, 174, note 17 (Fla. 1st DCA 1981) (quoting 1 DAVIS, ADMINISTRATIVE LAW TREATISE, Sec. 7.02 at p. 413).

This distinction recognizes that legislative facts are broad empiricisms which the court determines as the premise of legal rules.[4]

The Court decides questions of legislative fact as a matter of law and may consider any appropriate information in formulating its determination of legislative fact. Thus in *South Florida Blood Service, Inc. v. Rasmussen*, 467 So. 2d 798, 806 (Fla. 3d DCA) *aff'd* 500 So. 2d 533 (1987), Judge Schwartz protested in dissent that "a court ought not . . . base a decision concerning the rights of those who come before it upon the supposed pragmatic consequences of a ruling when there is neither evidence in the record--nor means of acquiring it--as to what those results may be." Affirming the majority below, however, the Court considered empirical data showing legislative facts and through Justice Barkett said, "Our analysis of the interests to be served by denying discovery does not end with the effects of disclosure on the private lives of the fifty-one

[4]Professor Davis first articulated this distinction in a landmark article many years ago. DAVIS, AN APPROACH TO PROBLEMS OF EVIDENCE IN THE ADMINISTRATIVE PROCESS, 55 HARV. L. REV. 364, 402-403 (1942). *Compare* MONAGHAN, CONSTITUTIONAL FACT REVIEW, 85 COLUM. L. REV. 229 (1985) (influential commentary on plenary power of court to review predictive judgments or "constitutional facts") *with* FAIGMAN, "NORMATIVE CONSTITUTIONAL FACT-FINDING" EXPLORING THE EMPIRICAL COMPONENT OF CONSTITUTIONAL INTERPRETATION, 139 U. PA. L. REV. 541, 547 (1991) (arguing that Court often makes "factual suppositions" on a normative basis to serve its understanding of the Constitution). For collection of earlier commentary on this issue, *see* MONAGHAN, at p. 230, note 16. *See also Turner Broadcasting System, Inc. v. F.C.C.,* 114 S. Ct. 2445, 2471 (1994) ("factual finding . . . predictive in nature [is] predictive judgment"). *Compare Clinton v. Jones*, 117 S. Ct. 1636, 1648 (1997) (contention that defending civil litigation "may impose an unacceptable burden on the President's time and energy" was "predictive judgment [with] little support in . . . history"). Predictive judgments may be profoundly determinative of judicial outcomes. *See Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 864 (1992) (explaining that historical overrulings of precedent in *Brown v. Board of Education*, 347 U.S. 483 (1954) and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) were not "victories of one doctrinal school over another [but] applications of constitutional principle to facts as they had not been seen by the Court before").

donors in this case. Society has a vital interest [in the outcome]"). *Rasmussen v. South Florida Blood Service, Inc.*, 500 So. 2d 533, 537-538.[5]

To resolve the present controversy, therefore, the Court must assess competing predictions of the pragmatic consequences of granting or denying the qualified privilege for nonconfidential workproduct. Because the core issue is one of legislative fact and not adjudicative fact, the Court should decide such legislative facts *de novo* and should not confine its inquiry to review of adjudicative facts shown by the record proper. *Rasmussen,* 500 So. 2d at 537-538. Moreover, if the Court is not persuaded of the empirical basis for the media arguments, amici respectfully request that the Court conduct further factual inquiry and hear or receive further showings bearing on the empirical foundations of the legislative facts upon which media arguments are grounded. Such an inquiry could be conducted within the rulemaking process.

II. A JUDGMENT AS TO THE EXTENT TO WHICH AN UNCHECKED POWER OF INQUISITION INTO NONCONFIDENTIAL INFORMATION WOULD ENCUMBER THE PUBLIC ACCESS TO NEWS IS A PREDICTIVE JUDGMENT.

A. The Court has held that newsgathering is protected by a qualified privilege implicit in the First Amendment.

The first question of legislative fact is whether and to what extent an unchecked power to inquire would encumber public access to news from nonconfidential sources.

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[5]Though the Court does not use the term "legislative fact," its landmark decisions are appropriately notable for their findings of facts of that nature. *See, e.g., United States v. Dempsey,* 635 So. 2d 961, 964 (Fla. 1994) ("Rather than being valued merely for their services or earning capacity, children are valued for the love, affection, companionship, and society they offer their parents"); *Waite v. Waite*, 618 So. 2d 1360, 1361 (Fla. 1993) ("[T]his Court and its advisory commissions have had an opportunity to review legal issues relevant to the doctrine of interspousal immunity. As a result of that review we now find that there no longer is a sufficient reason warranting a continued adherence to the doctrine. . . "); *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973) ("One of the most pressing social problems facing us today is the automobile accident problem, for the bulk of tort litigation involves the dangerous instrumentality known as the automobile").

The lower court oversimplified this question by categorically assuming that the privilege is not needed with respect to any nonconfidential source of information. *Davis,* 692 So. 2d at 927. This is not a doctrinal ruling but a predictive judgment which should be subjected to empirical scrutiny. We should begin not by assuming but by asking to what extent the rationale of *Morgan* applies in the nonconfidential setting.

The rationale is clear. The Court has held that the First Amendment necessarily implies some protection for the process of gathering information. *Huffstetler*; *Morgan*. This follows the pivotal view of Justice Powell in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that such implicit protection means that "a reportorial privilege should be recognized in some circumstances." *Morgan,* 325 So. 2d at 954. *See Huffstetler*, 489 So. 2d at 723 ("In *Morgan* this Court embraced Justice Powell's assertion that the application of the reporter's privilege in a given case involves striking a proper balance between constitutional and societal interests").

Morgan held that the First Amendment implies a qualified privilege against revelation of confidential sources because of "the interest in assuring public access to information that comes to the press from confidential informants." *Id.* at 955. Thus *Morgan* recognized the privilege not because the information was confidential but because the privilege furthered the public interest in access to such information. It holds as a matter of law that an unchecked power to compel disclosure of confidential sources jeopardizes "the public interest in unencumbered access to information from anonymous sources." *Id.* at 956.

Therefore, the qualified privilege is an instrument for protecting the integrity of the newsgathering process and thus the public interest in access to information.

Morgan, 325 So. 2d at 953. In the two decades since *Morgan*, the Court has never said this purpose is served only when confidential revelations are at stake, and through most of this period, *Burke* and *Green* have stood as unconflicted authority that the qualified privilege protects nonconfidential information.

To be sure, the Court refused to extend the privilege to a reporter or cameraman who witnesses or records a relevant event in a criminal case. *Miami Herald Pub. Co. v. Morejon*, 561 So. 2d 577, 580 (Fla. 1990); *CBS, Inc. v. Jackson*, 578 So. 2d 698 (Fla. 1991). But these holdings were carefully limited. In *Morejon*, the Court held only that the qualified privilege did not "protect[] journalists from testifying as to their eyewitness observations of a relevant event in a subsequent court proceeding," *Id.* at 580, and in *Jackson*, the Court added only that there was "no significant difference in the examination of an electronic recording of an event and verbal testimony about the event." *Id.* at 700.

In neither case did the Court establish a strict doctrine limiting *Morgan* to confidential sources. The Court reasoned that compelling testimony concerning the reporter's percipient observations of an event would not encumber future reportorial and hence public access to such information. *Accord, Delaney v. Superior Court*, 789 P.2d 934, 951 (Cal. 1990) (allowing discovery of eyewitness observations on facts closely comparable to *Morejon*).

Although the Court was careful to limit its holdings in *Morejon* and *Jackson*, two district courts nonetheless have assumed that *Jackson* preempted the entire question.[6]

[6] *See Kidwell v. State*, 1997 WL 330298 (Fla. 4th DCA June 11, 1997) (equating jailhouse interview of accused with witnessing of relevant event); *Davis v. State*, 692 So. 2d 924 (Fla. 2d DCA 1997) ("the privilege has no application in a criminal proceeding unless based upon the

As a matter of plain legal method, these cases got *Jackson* wrong. Although *Jackson* cited but did not disapprove *Green, Gold Coast* ignored *Green*, and *Davis* said, "*Green* is no longer viable." *Davis*, 692 So. 2d at 926. This is not reasonable, if for no other reason than that *Jackson* took the pain to specify only two cases that it intended to overrule.[7] It seems even less reasonable when it is remembered that the Court previously had cited *Green* with approval in *Huffstetler,* 489 So. 2d at 723, and less reasonable still when it is noted that the Court ruled narrowly even though both parties in *Morejon* had argued strenuously for a broad categorical ruling based on confidentiality.[8]

As a matter of substance, moreover, *Davis* got *Jackson* wrong. *Davis* wrongly assumed that the distinction between *Jackson* and *Morgan* is "that of confidentiality." *Id.* at 927. This is a false dichotomy. The distinction between these cases rests more fundamentally on whether the privilege is required to protect the public interest in access to information. The Court has not held and should not hold that the protection

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potential implication of a confidential source"); *Gold Coast Publications, Inc. v. State,* 669 So. 2d 316, 318 (Fla. 4th DCA), *rev. den.*, 682 So. 2d 1099 (Fla. 1996) ("a balancing test is unnecessary where the information sought is not confidential"); *Tampa Television, Inc. v. Norman,* 647 So. 2d 904 (Fla. 2d DCA 1994) (possibly construing *Jackson* to exclude any privilege for nonconfidential information). *See also Dollar v. State,* 685 So. 2d 901, 903 (Fla. 5th DCA 1996) (dictum that court was unaware of privilege applicable to nonconfidential information of newsgatherer).

[7]*See Jackson*, 578 So. 2d at 700, note 2 (disapproving "to that extent" *CBS, Inc. v. Cobb*, 536 So. 2d 1067 (Fla. 2d DCA 1988) and *Johnson v. Bentley*, 457 So. 2d 507 (Fla. 2d DCA 1984).

[8]Among the methodological errors of the lower courts has been their failure to adhere to the controlling rationale of *Morgan* where this Court construed the several opinions of *Branzburg*. Regardless of how many other readings of these opinions may be possible, the *Morgan* reading controls Florida Courts. Nevertheless, a hallmark of *Davis* and *Kidwell* is their extended reinterpretations of *Branzburg*, the inappropriateness of which is readily shown. *See, e.g., Kidwell*, 1997 WL 330298, *6 ("[W]e reaffirm the principal that a Florida District Court of Appeal takes its direction from the Florida Supreme Court on matters of federal law as to which the United States Supreme Court has not spoken definitively").

of a confidential source is the only circumstance in which the public interest in access to information merits protection under the qualified privilege. The Court should follow the rationale of *Morgan* so far as the pragmatic reality shows it to be appropriate.

B. The qualified privilege should extend to any information the access to which would be jeopardized by exposure to an unchecked power of inquisition.

The reality is that the sources of information gathered for publication cannot be divided neatly into the categories of confidential and nonconfidential. Between the confidential source of *Morgan* and the percipient observation of *Morejon* is a vast array of newsgathering techniques. This is a great polychotomous category including, without limitation, research of public records, electronic research techniques, attendance at public meetings, and interviews of all manner of sources such as public information officers, eyewitnesses of events, persons accused of crimes, and persons who are victims of crimes. The assumption made by *Davis* that all such information gathering techniques are equally insensitive to the power of inquisition is overly simplistic and false. While some of these techniques may be as resistant to encumbrance as the observations in *Morejon*, others would be as sensitive as the interviews in *Morgan*.

As a matter of empirical fact, that same interest in unencumbered access to information which *Morgan* protected is present in this case. The interview of Nicole Terry by Diane Mason yielded an intensely personal portrayal of the victim and her plight at the hands of the defendant.[9] The subject of the interview clearly had certain expectations concerning the use to which her revelations would be put, and those

[9]See Appendix A-2 (copy of news article added to record on appeal by order of this Court).

expectations would not have included the interrogation desired by defendant. Under the ground rules of *Green*, those expectations would have been reasonable.

Under *Davis*, however, the interview would be conducted under dramatically different rules. The subject must expect that the reporter could be forced to submit to hostile interrogation concerning her interpretation of the interview, her notes and other records of the interview, drafts, memoranda to editors, and other evidence of the conversation. The reporter may also be required to testify concerning the time, place, and circumstances of the interview, the impressions she formed concerning the subject's demeanor, and any other matters that might seem pertinent to establishing or undermining any fact in the case.

The constitutional question posed by *Davis* is whether such new ground rules would encumber public access to information from such sources. *Morgan*, 325 So. 2d at 956 (striking balance "in favor of the public interest in unencumbered access to information from anonymous sources"). To the amici, it is self-evident that *Davis* would encumber access because such a source would be sensitive to the prospect of future interrogation of her interviewer by the accused perpetrator and therefore substantially less likely to speak freely to the reporter. *Compare Delaney,* 789 P.2d at 949 (if disclosure of nonconfidential information "would somehow unduly restrict the newsperson's access to future sources and information," it is "sensitive" and should be protected the same as confidential).

C. The question of what newsgathering techniques beyond the interview of confidential informants are sensitive to the power of inquisition should be studied on an empirical basis.

Although amici see the empirical fact of the sensitivity of this source as self-evident and urge the Court to find accordingly, amici nonetheless must concede that this is a predictive judgment. To decide the question, it is necessary to find or assume that an unchecked power of inquisition into such interviews would, or would not, jeopardize the public access to information derived from such interviews. *Davis* simply assumed this fact, and *Kidwell* inappropriately treated it as an issue of adjudicative fact. It said the "reporter here has made no plausible showing that even nonconfidential sources will dry up if not protected by the qualified privilege." *Kidwell*, 1997 WL 330298 at *7. The key argument of amici is that such a finding is legislative and thus cannot be explored readily in an adjudicative proceeding. Yet the Court should be informed of the pragmatic consequences of its ruling through an appropriate empirical study before adopting such a rigid rule of constitutional law as *Davis* and *Kidwell* have done.

Therefore, amici respectfully urge the Court to address the empirical question of whether and to what extent nonconfidential sources of information are sufficiently sensitive to the power of interrogation to merit the protection afforded by *Morgan.*

III. THE EXTENT TO WHICH AN UNCHECKED POWER TO COMPEL DISCLOSURE OF THE NEWSGATHERING PRODUCT WOULD IMPOSE A DISPARATE BURDEN ON NEWSGATHERING ORGANIZATIONS IS AN EMPIRICAL QUESTION.

A. *Jackson* raises substantial questions concerning the scope of protection of the media.

The argument for applying a qualified privilege to nonconfidential information continues beyond the protection of sensitive information.[10] The media further contend that unchecked exposure to the inquisitorial power would lay a disparate burden on newsgathering organizations. In *Jackson* the Court responded by construing the burden in terms of property rights and framing a solution in terms of the protective rules of court. To achieve this protection in a criminal case, the Court effectively incorporated FLA.R.CIV.P., 1.280(c), into the Rules of Criminal Procedure. *Id.* at 700, note 3. Thus construed, the Court stated the Criminal Rules were "broad enough to protect the media and similarly situated entities, as well as those seeking discovery." *Id*. at 701.

By construing the disparate burden argument in terms of property rights, *Jackson* raises a substantial empirical question. How broad is a rule that protects the interests of the media? This question leads back to the argument underlying the media claim of privilege under the First Amendment. The factual contours of the disparate burden argument therefore bear on the full implications of the property rights analysis in *Jackson*. Ultimately this, too, requires a predictive judgment that usefully could be made the subject of empirical study.

B. An unchecked power of inquisition would impose a disparate burden on the press which further implicates the First Amendment.

[10]Additional arguments based on First Amendment interests made by fellow amici are supported but not repeated here.

The media argue that the aggregate incidental impact of an unchecked power of subpoena would impose a disparate burden of constitutional significance upon newsgathering organizations. *Compare United States v. O'Brien*, 391 U.S. 367, 388 (1968). The predictive judgment underlying this argument has received important judicial support.[11]

When a law imposes a burden on conduct that is inextricably intertwined with speech and the burden arises directly out of the exercise of the protected right, the First Amendment is implicated. *Morgan*, 325 So. 2d at 956 ("The First Amendment is clearly implicated when government moves against a member of the press because of what she has caused to be published"). This broad principle can be perceived in *Miami Herald v. Tornillo,* 418 U.S. 241 (1974) (law having effect of imposing a financial penalty on the basis of the content of a newspaper violates the First Amendment). *See also News & Sun Sentinel v. Board of County Commrs,* 693 F. Supp. 1066, 1072 (S.D. Fla. 1987) (following *Tornillo*) ("The press can be muzzled or curbed not only by censorial legislation but also by legislation that threatens its financial viability or impairs in any significant way its ability to publish and distribute its material"). *Accord, Memphis Publishing Co. v. Leech*, 539 F. Supp. 405 (W.D. Tenn. 1982).

The disparate burden argument is based on the predicted consequences of an unchecked subpoena power, but the Court has not been persuaded of the accuracy of

[11]The brief of amici Cape Publications, et al., ably marshals the case law, and amici do not repeat that effort here. It is notable, however, that even courts which have not been persuaded by this argument have conceded its persuasive force. *E.g., Miami Herald Pub. Co. v. Morejon*, 529 So. 2d 1204, 1207-1208 (Fla. 3d DCA) *aff'd* 561 So. 2d 577 (Fla. 1990) ("We are not unmindful, however, of petitioners' forceful arguments to the contrary supported by some non-binding, but not unimpressive, authority" (*citing United States v. Blanton*, 534 F. Supp. 295, 296 (S.D. Fla. 1982); *Loadholtz v. Fields*, 389 F. Supp. 1299, 1302-1303 (M.D. Fla. 1975); *Schwartz v. Almart Stores, Inc.*, 42 Fla. Supp. 165, 166 (Fla. 11th Cir. Ct. 1975) (Schwartz, J.)).

the prediction. In *Jackson*, the Court interpreted the burden as nothing more than "mere inconvenience," *Id*. at 700, and said that relief was to be found in compensation for proprietary interests. What is lacking, then, is not agreement on doctrine but persuasion on the pragmatic consequences. When the *Jackson* Court said, "We *see* no realistic threat of restraint or impingement on the news-gathering process . . .", *Id*. at 700 (e.s.), it could only have referred to what it *saw* in the evidentiary record of the case before it.

The nature of this evidentiary problem is well articulated in *Marketos v. American Employers Insurance Company*, 460 N.W.2d 272, 279-280 (Mich. App. 1990). The court rejected the disparate burden argument as supported by nothing more than "a bald, self-serving conclusion which is totally unsupported by any documentary evidence or empirical data. Without evidence, we are left to guess as to what the administrative burdens have been in the past and are likely to be in the future."

The *Marketos* court was right to perceive the question in empirical terms but wrong to treat it as a question of adjudicative fact. The media do not argue that any isolated instance of compelled disclosure in itself imposes a greater burden than that imposed upon any other citizen. Rather, the media argue that there is a structural relationship between its First Amendment newsgathering work and the aggregate impact of subpoenas. This empirical claim could only be proved in a setting appropriate for the finding of legislative facts. Because the facts are not adjudicative, neither *Morejon* nor *Jackson* afforded the forum for proving up this predictive claim. Given the opportunity before an appropriate fact-finding tribunal commissioned by this

Court, however, the media could adduce documentary or empirical evidence bearing on the issue of legislative fact needed to support its predictive judgment.

Therefore, amici believe this predictive judgment concerning the pragmatic consequences of granting or denying protection from subpoenas could be revisited. Based on such a study, the Court might be persuaded to apply "constitutional principle to facts as they had not been seen by the Court before." *Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. at 864. In any case, the Court deserves to be fully advised.

C. Significant cost accounting issues arise in determining the cost of making information available to the courts under the compensatory rule of *Jackson*.

Even if the Court were not persuaded of the disparate burden argument, such a study would assist the Court in clarifying the breadth of the protective rule of *Jackson.* The Court said that a media organization should not "be required to furnish photographs, videotapes, or similar tangible property acquired in the course of its business . . . without being reimbursed for the reasonable expenses incurred in making such property available." *Id*. at 700. If this rule is "broad enough to protect the interest of the media," *Id.* at 700-701, the question is what should be taken into account in determining the reasonable expenses incurred in making such property available.

Assume that CBS had complied with the subpoena in *Jackson* by making a VHS copy of its original broadcast quality footage and producing the cameraman to operate a VHS player and testify to the authenticity of the footage at deposition and subsequently at trial. How would CBS account for the reasonable expenses incurred in making the property available? Did the Court mean to say only that the expense

would be calculated in incremental terms? Is this expense only the cost of a new blank VHS cassette? Would it include the time of the technician who searches out the relevant footage and operates the video recorder in making the copy? Would it include a charge for the use of the equipment involved in making the copy? If so, what cost accounting principles are to be used in calculating that cost? Would costs be based solely on use of the equipment in the studio, or would it also include use of the studio?

Would the reasonable cost of making the information available cover the fully burdened payroll cost of the employee who prepared the copy and of the employee who testified or would the witness receive only the standard witness fee? If opinion testimony is elicited on the basis of the technical expertise of a cameraman or engineer who testifies, is there to be reimbursement under the expert witness rule? *See* FLA.R.CIV.P., 1.390(c).

What of the costs incurred in obtaining the original video? Could the litigant reap where CBS had sown or must it bear a portion of the sunk cost in fielding a news crew to obtain this video? If the crew had shadowed the arresting officers for a week in order to obtain a few minutes of tape when the arrest finally occurred, what part of the costs associated with that newsgathering endeavor should be absorbed by the proponent of the subpoena?

To be sure, the litigants would argue that the sunk cost of acquiring the video footage is that of the network and the proponent of the subpoena should be charged little more than the marginal cost of a blank VHS cassette on which CBS copied its footage. Most litigants would argue the reimbursement issue as if it were no more

complicated than the issue of the cost of photocopies of payroll records of a party's employer obtained pursuant to a pick-up subpoena. *See* FLA.R.CIV.P., 1.351.

However, the media understand the issue in larger terms. When the Court said that the protective rules are "broad enough to protect the media," it was responding to the argument that the press will be especially burdened by unlimited subpoena powers, given the nature of its information gathering business. If the Court meant to hold the press harmless against the full extent of the burden, this is a much larger concept of reimbursement than litigants might assume. In that large sense, the cost accounting issues collapse into the burden issues, and thus the argument comes full circle to the question of the extent of the burden subpoenas impose upon the newsgathering organization.

If the principal source of relief from subpoenas is to be the compensatory rule of *Jackson*, there is every prospect that these cost accounting issues will lead to protracted litigation. In itself, this is a strong reason to study a new rule of court.

IV. THE EXTENT TO WHICH SUBPOENAS APPROPRIATE INTELLECTUAL PROPERTY RIGHTS PROTECTED BY COMMON LAW AND FEDERAL COPYRIGHT LAW AND THUS RAISE DUE PROCESS ISSUES SHOULD BE CONSIDERED IN FORMULATING A RULE.

A. Intangible property rights of third party media organizations are affected by subpoenas.

Though the First Amendment is always the paramount concern of newsgathering organizations, *Jackson* correctly identifies the presence of proprietary rights as well. These rights in the past have been subsumed within the First Amendment protection inasmuch as the qualified privilege protects property rights just as it protects newsgathering rights. A significant reduction of First Amendment protection would

alter that stasis, however, and in a post-privilege regime, proprietary issues quickly would emerge and demand attention.

It is a key holding of *Jackson* that property rights are implicated by subpoenas of nonconfidential material. The Court held that a nonparty should not "be required to furnish photographs, videotapes, or similar tangible property acquired in the course of its business . . . without being reimbursed for the reasonable expenses incurred in making such property available." *Id.* at 700. The minority agreed that subpoenas implicate proprietary interests. Perhaps because he disagreed that compensation as opposed to fairness was the sole condition for producing property, Justice McDonald wrote in partial dissent that "if the owner objects to producing such proprietary material, the party seeking the material should demonstrate to a judicial tribunal that it is relevant, that no alternative source exists, and that the party has a need for the information." *Id.* at 701 (McDonald, J., dissenting in part).[12]

Jackson appropriately recognizes that property rights are taken by subpoenas and should be compensated. Compelled disclosure, copying, and display of proprietary

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[12]Even though the majority described photographs and videotapes as "tangible" property, it seems improper to assume the Court meant to ignore intangible property rights. *See Pinellas County v. Brown*, 450 So. 2d 240, 242 (Fla. 2d DCA 1984) ("The definition of `property' in condemnation cases is sufficiently broad to extend to intangible and incorporeal rights, such as contractual obligations and leasehold interests"). *Compare City of Oakland v. Oakland Raiders,* 646 P.2d 835, 839 (Cal. 1982) (no distinction between tangible and intangible property for takings purposes). Any distinction between tangible and intangible property would seem to be arbitrary and problematic. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (although state law is generally determinative of property rights for due process purposes, "a state, by *ipse dixit*, may not transform private property into public property without compensation") (interest on funds while on deposit in state court was part of the underlying property notwithstanding state's characterization as nonproperty).

information, writings, photographs, and videotapes infringes common law and Federal intellectual property rights and raises questions concerning due process, public purpose, just compensation, and fair use that should be considered before a third party media organization is forced to comply with a subpoena. Due respect for these rights requires a threshold balancing of interests on essentially the same terms as for the newsgathering interest.

This argument will close a circle. Its purpose is to show even if the First Amendment were inapplicable in whole or in part to subpoenas directed to the newsgathering product, interest balancing as a precondition to compelled disclosure of intellectual property remains necessary. For once the Court has this information in its files, the media cannot and will not suggest that the public should be deprived of access to it. Therefore the time to protect the proprietary interest is *before* the compelled disclosure. Here as with the other interests, the moderate balancing test serves that protective purpose.

B. Common law intellectual property rights are often taken through enforcement of subpoenas.

Unpublished fruits of the newsgathering process comprise intellectual property of the newsgatherer which must be accorded appropriate protection from deprivation by subpoena before the material becomes part of the judicial record. The United States Supreme Court has held that "[c]onfidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit." *United States v. Carpenter*, 484 U.S. 19, 26 (1987) (*citing* 3 W. FLETCHER, CYCLOPEDIA OF LAW OF PRIVATE

CORPORATIONS, § 857.1 at 260 (rev. ed. 1986)). Thus a *Wall Street Journal* reporter who fed a broker yet unpublished tips concerning future items in the "Heard on the Street" column was guilty of stealing property under the Federal mail fraud act.

The Court reasoned that "[t]he Journal had a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of the `Heard' column." *Id.* Quoting from a landmark case, the Court said:

> [N]ews matter, however little susceptible of ownership and dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise.

Id., (quoting International News Service v. Associated Press, 248 U.S. 215, 236 (1918) (enjoining unauthorized use by INS of early AP dispatches)). *Compare Inrecon v. Village Homes at Country Walk,* 644 So. 2d 103, 105 (Fla. 3d DCA 1994) (construing FLORIDA EVIDENCE CODE, § 90.506).

The compelled disclosure of such confidential proprietary information is a taking for Fifth Amendment purposes even if it is an otherwise lawful exercise of police power and for a public purpose. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1013-1014 (1984). *Compare Jacobs Wind Electric Company v. Dept. of Transportation,* 626 So. 2d 1333, 1337 (Fla. 1993) (patent holder not preempted by Federal law may assert takings claims in Florida courts).

The underlying purpose of the *INS* doctrine is to protect the public interest in access to news. "If services like AP were not assured of property rights in the news they pay to collect, they would cease to collect it." *National Basketball Association v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997) (no misappropriation because

information not hot news). The purpose of recognizing the proprietary interest of a news organization in the unpublished fruit of the newsgathering effort therefore resonates with *Morgan*. The property rights and First Amendment interests cannot be entirely disassociated.

In the present case, the proposed subpoena threatened to take that species of property which was protected in *Carpenter* and *INS*. The defendant sought to subpoena the reporter solely for the purpose of discovering whether the victim had made a statement to the reporter that was inconsistent with her testimony. Did the victim tell the reporter she had slammed on the brakes with the intent of causing the defendant to run into her from behind? Although the published story did not report such an admission, the defendant theorized that the victim may have told the reporter more than the newspaper had published. There was no privilege for such a statement, defense counsel argued, because it was not a confidential interview. "[I]f [the statement] didn't make it into the column it was simply because [the reporter] edited it out for her own journalistic purposes." R. 824-825.

Precisely because any such information remained unpublished by reason of an editorial decision, the information remained the exclusive property of the newspaper. *Carpenter*; *INS*. Before this property lawfully could be appropriated, there should have been due consideration of the rights of its proprietor, which would include at least pre-deprivation due process, a determination of public purpose, and just compensation. *Jackson; Joint Ventures, Inc. v. Dept. of Transportation,* 563 So. 2d 622, 627 (Fla. 1990) (law effecting a taking without due process and just compensation is unconstitutional). *See Ruckelshaus*, 467 U.S. at 1012 (rejecting EPA argument that

government had the power of "preemption" of common law intellectual property); *Jacobs Wind Electric Company* (intellectual property subject to taking).

Amici do not suggest that due respect for such property rights as were recognized in *Carpenter* should create an insurmountable obstacle to judicial appropriation of the property for use as discovery or evidence. However, amici do argue that in a regime where First Amendment rights no longer protect such property, the Court nonetheless must recognize the Fifth Amendment rights of the media. *Ruckelshaus. Compare Jacobs Wind Electric Company. See also* FLA. CONST., art I, § 9; art X, § 6(a). Moreover, it is not possible to ignore the implications of the First Amendment when taking property that exists solely by reason of protected newsgathering activities. *Tornillo; News & Sun-Sentinel*. Once the material becomes part of the file, these rights are dissipated. Therefore, at a minimum, the taking of such information must be preceded by a hearing to determine whether the taking serves a public purpose and that the proprietor of the information is compensated for its just value. *Joint Ventures*. The moderate balancing test for which amici advocate would afford such due process.

C. Federal copyright interests often are infringed by subpoenas.

In most cases the intellectual property at stake is protected not by common law but by the Copyright Act of 1976 (Title 17 United States Code) (the "Act"). On the basis of authorities to be discussed immediately below, there is no doubt that intellectual property rights protected by the Copyright Act are implicated when a subpoena coerces the owner of a copyrighted work to allow the work to be copied,

displayed, or otherwise infringed for the use of parties in litigation. In that event, the only privilege for such copying is the privilege of fair use, which is a fact-specific issue to be determined from case to case. Act, § 107; *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 561 (1985).

1. The tangible objects of subpoenas duces tecum in many cases are works protected by copyright.

As *Jackson* makes clear, subpoenas directed to newsgathering organizations compel the production for copying and display of unpublished writings, photographs, and videotapes created by employees of newsgathering organizations. Such items usually constitute works of authorship. These items almost always are copyrightable because copyright protection "subsists . . . in original works of authorship fixed in any tangible medium of expression." Act, § 102(a).

Unpublished writings are often the target of subpoenas. For example, a typical subpoena duces tecum called upon a reporter for *The News-Journal* to produce and submit for copying "[a]ny and all records, documents, supplemental reports, recorded statements, field notes and photographs in connection with the investigation of [a certain accident]." The writings covered by that subpoena included original works of authorship the copying of which would infringe the copyright of the newspaper.[13]

[13]*Harper & Row*, 471 U.S., at 557 (original expression is protected even when it recounts the "history of the times"); NIMMER ON COPYRIGHT, § 2.11[B] ("Notwithstanding the denial of protection for the facts set forth in factual account, it is clear that protection will be accorded to the literal form of expression of such an account if such form is original with the copyright claimant"). *See Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (unpublished letters of George Washington held infringed). *See also, e.g., Salinger v. Random House, Inc.,* 811 F.2d 90 (2d Cir.) *cert. den.* 484 U.S. 890 (1987) (unpublished writings of reclusive author held infringed).

Visual works are even more frequently subpoenaed. Unpublished news photographs are original works of authorship meriting protection under the Act.[14] For the same reason that still photographs are protected works, it is beyond dispute that a videotape recording of an event is a "motion picture" within the protection of the Act.[15]

2. Enforcement of subpoenas may effect an infringement.

The enforcement of a subpoena directed to such works infringes or takes the property interest. The Act grants to copyright proprietors "exclusive rights to do and to authorize" the reproduction, adaptation, distribution, public performance, and public display of their works. Act, §§ 101, 106. These are protected as property rights under the Act. *See Sony Corp. v. Universal City Studios,* 464 U.S. 417, 433 (1984) ("[A]nyone who trespasses into [the copyright owner's] exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, `is an infringer of the copyright.'" (citing Act, § 501(a)).

Typically a subpoena duces tecum infringes or takes the copyright property interest by requiring that the owner submit the work for copying or for display at the

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[14] *Time, Inc. v. Bernard Geis Assoc.,* 293 F. Supp. 130, 141 (S.D.N.Y. 1968) (frames of Zapruder film of JFK assassination were copyrightable photographs of a newsworthy event). *See also Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932, 934 (S.D.N.Y.). *aff'd* 281 F. 83 (2d Cir. 1922) (photographs are original works because "no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike"); *Bleistein v. Donaldson Lithographing Co.,* 188 U.S. 239, 250 (1903) (chromolithographs copyrightable as the "personal reaction of an individual upon nature").

[15] NIMMER ON COPYRIGHT, § 2.09[D][1] ("a work is no less a motion picture or other audiovisual work because the images are embodied in a video tape, video disc or other tangible form"). *See, e.g., Los Angeles News Service v. KCAL-TV Channel 9,* 108 F.3d 1119 (9th Cir. 1997) (copyright in videotape of Reginald Denny beating infringed by news broadcast); *Los Angeles News Service v. Tullo,* 973 F.2d 791 (9th Cir. 1992) (copyright interest in broadcast news infringed by off-air clipping service); *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1496-1498 (11th Cir. 1984) *cert. den*., 471 U.S. 1004 (1985) (same).

trial, or both. For example, in *Johnson v. Bentley*, 457 So. 2d 507, 508 (Fla. 1984), *disapproved, Jackson*, 578 So. 2d at 700, note 2, the subpoena required the respondent to produce "copies of any and all photographs and proof sheets regarding the subject accident." The effect of such a subpoena is to compel the proprietor to make and surrender copies of its photographs. When the state through the process of the courts compels the owner to make a copy of a protected work or to suffer the parties to copy protected works, the property right of the proprietor has been taken by act of the state. *Ruckelshaus*. Unless privileged, this is an infringement and it is a taking. *Jacobs Wind Electric Company*.

Not only does the subpoena almost inevitably lead to forced copying or display of the property, it may also make the work a judicial record by placing it in a court file as part of the record of the case or into an investigatory file of a prosecutor or agency that will become a public record. As a judicial record or a public record, it ordinarily may be copied by any member of the public. FLA. CONST., art. I, § 24(a); FLA. R. JUD. ADMIN, 2.051; FLA. STAT., § 119.07(1)(a). *Compare HRS v. Southpointe Pharmacy,* 636 So. 2d 1377 (Fla. 1st DCA 1994) (no implicit exception to public records act for copyright interests of author of a record). If that occurs, the effect of enforcing the subpoena is to convert the private property right into public property, and in that case the subpoena takes substantial rights in the work and not merely a copy.

Emphatically, amici do not argue that judicial records should not be open to the public. On the contrary, it is eminently proper that private intellectual property be converted into public property when it is taken for use in evidence or for other judicial purposes. In Florida courts, such information absolutely must be open to public

examination. FLA. CONST., art I, § 24(a). In extraordinary cases, it may be appropriate to fashion a protective order that forbids further copying of such material. In no event, however, should a copyright interest be used as a ground to prevent public access to a judicial or public record.

This means that the time for protecting intellectual property interests is at the inception of the taking. When the subpoena is served to compel the production, copying, or public display of intellectual property, the question of whether and to what extent its enforcement will constitute an unprivileged taking of intellectual property must be considered. This is the minimal requirement of due process. *Joint Ventures.* The first question is whether the use of copyright property is privileged as a fair use.

3. The only privilege for evidentiary use of copyright property is the fair use privilege.

The doctrine of fair use may authorize the use of copyright property for discovery or evidence. In that event, no taking would occur by enforcement of the subpoena. However, there is no other privilege in either the Federal or state governments to use copyright material without the consent of the owner. *E.g. Time, Inc.*, 293 F. Supp. at 134 (finding fair use by private author of sketches which copied frames from Zapruder Tape).[16] Congress has explicitly provided that the states and their officers have no privilege to infringe copyrights and has authorized infringement actions against the states. *See* Act, §§ 501(a), 511 (Act of November 15, 1990, Pub.

[16]*See* 28 U.S.C. § 2848(b) (right of action for infringement by Federal government to recover "reasonable and entire compensation as damages for his infringement." *See* H.R. REP. No. 624, 86th Cong., 1st Sess 2 (1959) (legislative history)); NIMMER ON COPYRIGHT, § 12.01[E][1] (commenting on actions against United States).

L. No. 101-553, 90th Cong. 2d Sess, 104 Stat. 2749) (infringer may be a State, officer or instrumentality of state in official capacity).[17]

Therefore, whether the coerced copying or displaying of a protected work in a judicial proceeding is an infringement depends strictly on whether the coerced use is a fair use. Act, § 107; *Harper & Row*, 471 U.S., at 561.[18]

To be sure, the use of copyright material as evidence in litigation is generally assumed to be a fair use. Indeed, the legislative history of Section 107 mentions that use in a "legislative or judicial proceeding" is an example of a fair use. 17 U.S.C. § 107 (1976), as amended by Act of October 24, 1992, Pub. L. No. 102-492, (1992); H.R. REP. No.94-1476, 94th Cong., 2d Sess. 65 (1976) ("H.R. REP. No. 94-1476"). However, this mention does not create a categorical exemption from the statute. In *Harper & Row*, 471 U.S. at 561, the Court said that the framers of the Act "resisted

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[17]*See Seminole Tribe of Florida, Inc. v. Florida*, 116 S. Ct. 1114 (1996) (Eleventh Amendment bars Congress from abrogating immunity by exercise of Article I powers under Indian Commerce Clause) *but compare Id*. 116 S. Ct., at 1131, note 16 ("an individual [whose copyright interest is infringed] may obtain injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908) in order to remedy a state officer's ongoing violation of Federal law"). *See also Honda Research and Development Co., Ltd., v. Loveall,* 687 F. Supp. 355 (E.D. Tenn 1987) (granting injunctive relief to restrain unfair use of copyrighted material in state court proceedings) *See* NIMMER ON COPYRIGHT, § 12.01[E][2][b] (commenting on Eleventh Amendment issue).

[18]*See Religious Technology Center v. Wollersheim,* 971 F.2d 364 (9th Cir. 1991) (fair use analysis to determine claim of infringement for copying of documents for use by expert witness); *Association of Medical Colleges v. Cuomo,* 928 F.2d 519, 522 (2d Cir. 1991) (state defended law requiring copyrighted MCAT test to be filed as state public record on fair use grounds); *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. [1982]) *cert. den.*, 459 U.S. 879 (1982) (upholding jury verdict of fair use where copy of alleged obscene film taken for evidence in nuisance action on ground that use was not "commercially exploitative"); *Ross v. Miller's Rexall Drugs, Inc.,* 1990 WL 314290 (Ga. Super. 1990), 1991 Copr.L.Dec. ¶ 26,786 (commercial evidentiary photographer protected by copyright from subpoena issued to take workproduct without compensation at the customary market rates). *Accord* NIMMER ON COPYRIGHT, § 13.05[D][2]; PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW, 2D ED. 485-487 (hereafter cited as PATRY); KWALL, GOVERNMENTAL USE OF COPYRIGHTED PROPERTY: THE SOVEREIGN'S PREROGATIVE, 67 TEX. L. REV. 685, 730-753 (1989).

pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis." Congress has expressly approved this interpretation of legislative intent. H.R. REP. 102-836. *See also, Los Angeles News Service,* 108 F.3d, at 1121 (enumeration of news reporting as exemplary fair use in the Act was not determinative).

Therefore, while it is clear that an appropriate use of copyrighted material in a judicial proceeding ordinarily would qualify as a fair use, it is beyond the power of a court to hold as a matter of law that any use proposed by a subpoena would be, *per se,* a fair use. Each proposed taking of copyright property must be judged under the particular facts and circumstances.

4. To protect against unfair or uncompensated taking of copyright property by subpoena duces tecum, the Court should adopt the proposed balancing test.

When a subpoena duces tecum offers to effect a taking of copyright property, the recipient should have recourse to appropriate protection from the issuing court. Under *Jackson*, a news organization may test the copyright fairness of a subpoena by motion for protective order under Rule 1.280(c).[19] In that case, the question is what criteria

[19]*Compare* 28 U.S.C. § 1338(a) (granting exclusive Federal jurisdiction of cases "arising under" the Copyright Act). Nevertheless, a rule protecting nonparties from unfair or uncompensated taking of intellectual property protected by the Copyright Act would be within the inherent power of the Court. FLA. CONST., art. V, § 2(a); *Jackson,* 578 So. 2d at 700, note 3; FLA.R.CIV.P 1.280(c)(7). *Compare Jacobs Wind Electric Company v. Department of Transportation*, 626 So. 2d 1333; *HRS v. Southpointe Pharmacy,* 636 So. 2d 1377 (Fla. 1st DCA 1994) (allowing state to raise (unsuccessfully) copyright as defense in Chapter 119 action). *See generally* NIMMER ON COPYRIGHT, § 12.01[A] (jurisdictional test under the Act is currently controlled by *T. B. Harms Co. v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964) *cert. den.* 381 U.S. 915 (1965) (exclusivity of Federal jurisdiction does not extend to an action that involves only "[t]he general interest that copyrights, like all other forms of property, should be enjoyed by their true owner . . .")).

a state court would follow to determine whether and to what extent the subpoena would compel a fair use or an unfair use for which compensation should follow. The moderate balancing test achieves that purpose.

The legislative history of the Copyright Act shows that the use of copyright property for legitimate evidentiary purposes should be tested by a standard tailored for that particular context. The 1976 House Report stated that use of copyright material in legislative reports would be fair if "the length of the work or excerpt published and the number of copies authorized are reasonable under the circumstances, and the work itself is directly relevant to a matter of legitimate legislative concern. . ." H.R. REP. NO. 1476, at 73. Since judicial use is closely comparable to such legislative use and not otherwise mentioned in the history, this comment offers guidance for a protective standard.

The leading treatise on the fair use doctrine draws on this passage to observe that "reasonable use of copyrighted materials for purposes directly related to a governmental purpose--is sound. The use must, however, be reasonable: the government should not be permitted to avoid its responsibility to respect private property by engaging in activities that, if done by the private sector, would be regarded as infringing." PATRY, at 486.

The proposed moderate balancing test accomplishes this minimal level of protection. Unless the information is relevant and not otherwise available, the taking of the information would be neither reasonable nor justified. Unless it is actually needed for a legitimate purpose in the case, the taking is superfluous and not related to a legitimate governmental purpose. Any lesser standard would readily exceed the

standard set forth in the legislative history. However, the moderate balancing test ordinarily will afford essentially the same protection as the fair use doctrine.

Still this three-part test is only the minimum. While it may satisfy most of the fair use factors, there remains the issue of commercial exploitation. The Act requires the court to consider "the effect of the use upon the potential market for or value of the copyrighted work." Act, § 107. This is "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. Therefore, even if all other factors are satisfied, the use is not fair if it expropriates the commercial value of a work. *Jartech*; *Ross*.

Depending on the circumstances, an unchecked power to subpoena copyright property from the media may intrude on commercial interests. In *Ross*, a Georgia trial judge entered a protective order requiring a litigant to pay a commercial evidentiary photographer the going rate for his work. In a post-privilege regime, newsgathering organizations whose photographs are taken for the same purpose will be similarly situated. *Compare Ross with Johnson* (subpoena duces tecum sought photographs for evidence in civil case). If it were shown that the subpoena in *Johnson* affected a comparable commercial interest, a party seeking to take the work should be required to compensate for the value of the work taken.[20] *See also Delaney*, 789 P.2d at 821 (Mosk, J., concurring) (journalists "are especially prone to be called upon by litigants seeking to minimize the costs of obtaining needed information").

[20]The information age has introduced the concept of "content provider" which has had its impact on the industry. Thus the monthly newsletter of the Florida Press Association for May of 1994 reports at page 7 that "copyrights are becoming increasingly significant to newspapers as the industry looks at ways other than newsprint to deliver information."

Thus the compensatory prong of the moderate balancing rule is an important element of the test. See Note 2, ¶3, above. As *Jackson* makes clear, the compensatory right should be broad enough to protect the interest of the media.

V. THE MODERATE BALANCING RULE WILL PROTECT NEWSGATHERING ORGANIZATIONS FROM UNWARRANTED SUBPOENAS.

A moderate balancing test as a condition to the enforcement of subpoenas directed to newsgathering organizations would not innovate so much as it would codify and contextualize existing policies and principles. Neither a civil nor a criminal litigant has an unqualified right to process for any imaginable purpose, and *Jackson* pointed to existing legal principles which it said were "broad enough to protect the interest of the media." *Jackson*, 578 So. 2d at 700-701 and note 3. Amici therefore believe the moderate balancing rule is consistent with *Jackson*.

Aside from First Amendment and proprietary interests, neither a media organization nor any other nonparty should be required to submit to unwarranted subpoenas. A criminal defendant is entitled to use the process of the Court only to compel the production of "material evidence shown to be available and capable of being used by him in aid of his defense." *Green v. State*, 377 So. 2d 193, 202 (Fla. 3d DCA 1979). "[T]he constitutional right to compulsory process is not absolute, and the state legitimately may require that a defendant requesting such process at state expense establish some colorable need for the person to be summoned, lest the right be abused by those who would make frivolous requests." *Ashley v. State*, 433 So. 2d 1263, 1269 (Fla. 1st DCA 1983). *Compare United States v. Valenzuela-Bernal,* 458 U.S. 858 (1982) (to make out a violation of his Sixth Amendment right by reason of denial of

access to a witness, a defendant must make at least a plausible showing of how a witness' testimony would have been both material and favorable to his defense). A court should quash subpoenas of witnesses "whose supposed testimony was affirmatively shown to bear no legal pertinence whatever to the issues of the case and thus could not be of any potential assistance in the legitimate defense of the pending charges." *State v. Domenech*, 533 So. 2d 896 (Fla. 3d DCA 1988). "One who could shed no light on the issues of a case, civil or criminal, did not have to testify at deposition or trial. . . ." *Kridos,* 483 So. 2d at 731. See also *Young v. Metropolitan Dade County*, 201 So. 2d 594 (Fla. 3d DCA 1983) (Subpoena quashed when physician swore in affidavit that he had no knowledge of facts).

These principles are captured by the proposed moderate balancing rule, and moderation plainly is necessary to protect the interests of the press and the public. In the present case, the lower court immoderately concluded that in the absence of a First Amendment interest, the newspaper should have been compelled to respond to process even though the defendant made no plausible showing of need for the witness. Whether or not it was correct to hold no First Amendment privilege existed, the court should not have equated the absence of such a privilege with a duty to respond, willy nilly, to the subpoena. Under *Green*, 377 So. 2d, at 202, which was cited pointedly in *Jackson* at note 3, a defendant must show that the subpoena would compel production of "material evidence capable of being used by him in aid of his defense." *Green*, at 202. The unverified speculation of counsel that examination of the reporter might lead to impeachment evidence should never be sufficient to justify a fishing expedition against a reporter. *Equifax Corporation v. Cooper*, 380 So. 2d 514, 515 (Fla. 5th DCA

1980) (per Hersey joined by Downey and Anstead) ("gratuitous speculation of counsel" insufficient to justify fishing expedition against third party investigator). The moderate balancing rule would incorporate the standards of *Green* and would provide a standard to guide the courts in comparable situations.

CONCLUSION

Therefore, amici that the Court adopt the moderate balancing rule and quash the decision of the Second District Court of Appeals. In the alternative, amici urge the Court to quash the decision below on narrower grounds and institute an appropriate rulemaking process that would lead to the adoption of such a rule as the moderate balancing rule.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a photocopy of the foregoing has been furnished by U.S. Mail to Allyn Giambalvo, Esq., Assistant Public Defender, 14250 49th Street North, Clearwater, FL 34622; Helene S. Parnes, Esq., Assistant Attorney General, 2002 N. Lois Avenue, #700, Tampa, FL 33607-2366; Patricia Fields Anderson, Esq., Rahdert, Anderson, McGowan & Steele, P.A., 535 Central Avenue, St. Petersburg, FL 33701; Raymond Ehrlich, Esq., Holland & Knight, 400 North Ashley, P.O. Box 1288, Tampa, FL 33601-1288; Sanford L. Bohrer, Esq., Holland & Knight, 400 North Ashley, P.O. Box 1288, Tampa, FL 33601-1288; Greg D. Thomas, Esq., Holland & Knight, 400 North Ashley, P.O. Box 1288, Tampa, FL 33601-1288; David S. Bralow, Esq., Holland & Knight, 400 North Ashley, P.O. Box 1288, Tampa, FL 33601-1288; James B. Lake, Esq., Holland & Knight, 400 North Ashley, P.O. Box 1288, Tampa, FL 33601-1288, this _____ day of July, 1997.

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