IN THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT, MIAMI-DADE COUNTY
CASE NO. 3D17-2301
L/T CASE NO.: 2016-030273-CA-01

ROBERT SULLIVAN, ARNOLD WEISSMANN, AND THOMAS STIEGHORST,

Petitioners,

v.

VEITCH INVESTMENTS 3, LLC AND COLIN VEITCH,

Respondents.

UNOPPOSED MOTION FOR LEAVE OF THE BRECHNER CENTER FOR FREEDOM OF INFORMATION, FIRST AMENDMENT FOUNDATION, FLORIDA PRESS ASSOCIATION, FLORIDA SOCIETY OF NEWS EDITORS, AND SOCIETY OF PROFESSIONAL JOURNALISTS OF FLORIDA TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI AND MOTION FOR REVIEW OF ORDER DENYING EMERGENCY MOTION TO STAY JOURNALIST DEPOSITIONS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Fla. R. App. P. 9.370, Movants move unopposed for leave to file the attached brief as *amicus curiae* in support of Petitioners/Appellants, Robert Sullivan, *et al.*, in the above-captioned case. The brief is submitted on behalf of the following entities, each of which is committed to the protection of journalists' rights in the state of Florida and has many years of expertise in advocating for the protection of the newsgathering process: The Brechner Center for Freedom of Information, the First Amendment Foundation, the Florida Press Association, the Florida Society of News Editors, and the Society of Professional Journalists of Florida.

Amici have consulted with and obtained consent from counsel for all named parties, and thus this brief is filed without objection of or prejudice to any of the participants in this case. Further, *Amici* believe that this case is of vital importance for the welfare of journalists and their sources beyond those involved in the case, and that the voice of those with many decades of experience working with journalists to protect their legal rights may help inform the Court's consideration. *Amici* have the shared concern that an unfavorable ruling upholding the trial court's illogically narrow construction of the Florida journalist's privilege will prejudice the rights of *Amici*'s members and constituents, by empowering litigants and law-enforcement agencies to compel journalists to testify about their

formulation of news coverage, in the process exposing the identities of sources who, unlike the source in this case, require the assurance of confidentiality to keep them safe. A Statement of Interest explaining the role of each *amicus* organization accompanies the attached brief, which is respectfully submitted for the Court's consideration.

Wherefore, and for the aforesaid reasons, *Amici* the Brechner Center for Freedom of Information, the First Amendment Foundation, the Florida Press Association, the Florida Society of News Editors, and the Society of Professional Journalists of Florida hereby request that this Motion be granted and that leave to filed the attached brief as *amicus curiae* be allowed.

Respectfully submitted, this 3rd day of November, 2017.

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STATEMENT OF INTEREST

The Brechner Center for Freedom of Information (the "Brechner Center") at the University of Florida in Gainesville exists to advance understanding, appreciation, and support for freedom of information in the state of Florida, the nation and the world. The Center's focus on encouraging public participation in government decision-making is grounded in the belief that a core value of the First Amendment is its contribution to democratic governance. Since its founding in 1977, the Brechner Center has served as a source of academic research and expertise about the law of gathering news, and the Center's legal staff is frequently called on to offer interpretive guidance about the rights of journalists in Florida and throughout the country.

The First Amendment Foundation ("FAF") is a Florida nonprofit organization that acts as an advocate of the public's right to oversee and access its government. The FAF provides information and training to journalists about the law of access to information in Florida, and offers guidance to legislators and policymakers about the law of gathering news.

The Florida Press Association is a private, non-profit, nonpartisan membership organization founded in 1879 comprised of Florida daily and weekly newspapers to protect the freedoms and advance the professional standards of the press of Florida. The Florida Press Association represents the interests of its

members in state and federal courts in cases addressing issues of access to government information and the protection of speech and press freedoms.

The Florida Society of News Editors ("FSNE") is dedicated to advancing the cause of responsible journalism in Florida. Founded in 1955 as the Florida Society of Editors, the organization provides awards, seminars, and discussion forums with the purpose of promoting and strengthening meritorious public-service journalism. The FSNE regularly appears as amicus in cases implicating the news media's ability to effectively gather and distribute information.

The Society of Professional Journalists of Florida ("SPJ Florida") is a state-level chapter of the nation's oldest and largest organization representing the interests of working journalists. 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.

INTRODUCTION AND SUMMARY

The ability of journalists to protect confidences shared by sources and amongst themselves is indispensable to effective investigative reporting. Because journalists perform a uniquely valuable civic watchdog role recognized as essential to a well-functioning democracy, every state has recognized a privilege that entitles journalists to withhold information demanded for use in judicial

proceedings. Florida has recognized a constitutionally grounded common-law privilege since 1976, and codified that privilege in 1998, but the decision below threatens the effectiveness of the privilege and, with it, the integrity of the newsgathering process, the confidentiality of editorial decision-making, and the safety of the whistleblowers on whom investigative journalists rely.

The core issue in this case is whether three journalists working for *Travel Weekly* (Robert Sullivan, Arnold Weissman and Thomas Stieghorst) can be compelled to testify about their evaluation of and response to an email from Defendant Kevin Sheehan, sent in response to a news article published on the travelweekly.com website, in which he offered the magazine more information about the subject matter of the story. This type of interchange with sources – and how journalists choose to act on it – is at the heart of what the reporter's privilege is meant to protect. Yet the trial court determined that the Sheehan email and the journalists' mental impressions of it were beyond the protection of Florida's privilege statute, Fla. Stat. § 90.5015, on the grounds that the email "was certainly not obtained while actively gathering news" and that "none of the information that may have been obtained in connection to the Sheehan email resulted in publication of a new article or in clarification of the one originally published."

The trial court erred in its illogically cramped reading of the phrase "obtained while actively gathering news" in the Florida privilege statute, a reading

that would leave the privilege easily circumvented and practically impossible to administer. To subject journalists to being deposed about their impressions upon receiving a tip from a news source would work a profound chilling effect on newsrooms everywhere. The Court should find that the privilege applies to the *Travel Weekly* journalists' communications with Sheehan and the internal discussions and considerations that followed, regardless of who initiated contact and regardless of whether the communications resulted in the publication of news.

ARGUMENT AND CITATION TO AUTHORITY

I. Rigorous adherence to the reporter's privilege advances essential public interests.

The journalists' privilege is intended "to allow journalists to collect the news from sources who would not otherwise disclose information if they were identified." *Ulrich v. Coast Dental Servs., Inc.*, 739 So. 2d 142, 143-44 (Fla. 5th DCA 1999). The rationale for recognizing the privilege "is that 'news gathering [is] an essential precondition to [the] dissemination of news …,' and that 'without some protection for seeking out the news, freedom of the press could be eviscerated,' because confidential news sources would soon dry up if journalists were automatically required to disclose same." *Miami Herald Pub. Co., Div. of Knight-Ridder, Inc. v. Morejon*, 529 So. 2d 1204, 1206 (Fla. 3d DCA 1988) (citations omitted). As one commentator observed in an article that set forth the case for codifying Florida's privilege in statute:

> As journalists are forced to disclose more information to a burgeoning class of litigants, a significant danger arises that journalists will be seen as an arm of the government. All sources, confidential or not, will hesitate to share information with reporters because of perceived biases shown by reporters testifying as witnesses.

Edward M. Mullins, *The Reporter's Right to Remain Silent: A Proposal for Legislation to Codify and Augment the Reporter's Privilege in Florida*, 43 FLA. L. REV. 739, 746 (September 1991).

With the ranks of full-time salaried newsroom employees diminishing, news organizations are increasingly reliant on the public to alert them to news developments, and technology has made it easier than ever for the public to do so. In recognition of this new reality, media organizations are setting up secure "drop sites" for leakers and whistleblowers to send encrypted messages in a way that protects them against detection.[1] It is now not at all uncommon for news organizations to publish articles based on "crowdsourced" information submitted by total strangers with whom the journalists have no prior relationship. *See, e.g.*, Amanda Zamora, "Unlocking the power of crowdsourcing by working with readers—and other journalists," *Medium.com*, Jan. 15, 2016 (discussing how

[1] Among the well-known news publications opening up online "tip submission" portals are *The New York Times* (https://www.nytimes.com/newsgraphics/2016/news-tips/), *The New Yorker* (https://projects.newyorker.com/securedrop/), *The Nation* (https://www.thenation.com/article/how-to-send-the-nation-a-confidential-tip/), and *The Intercept* (https://theintercept.com/source/).

nonprofit news site ProPublica used technology to gather submissions from readers about their experience with medical errors in hospitals, and observing that "more newsrooms are using digital tools to gather news in collaboration with their audiences"). These industry norms and practices represent the widely understood reality in the field that "newsgathering" often begins with expressing an interest in a subject area and inviting those with information to reach out and initiate a conversation.

II. The trial court's ruling undermines the effectiveness of the privilege.[2]

A. Newsgathering relies heavily on unsolicited communications initiated by sources.

The trial court's ruling makes the journalist's privilege worthless in situations where journalists receive unsolicited overtures from previously unknown sources, a routine occurrence in the news business. If the initial overture from a source to a news organization, and the news organization's assessment of that communication prior to formulation of a story, are to be declared outside the boundaries of the privilege and "fair game" for discovery, then there is little practical usefulness in protecting the communications that follow. Litigants will be able to expose the source of leaks and harass news organizations by prying into the

[2] *Amici* assume for purposes of this brief that Florida law applies to the Petitioners' communications with Sheehan. However, if the Court finds that New Jersey law governs as the situs of the communications at issue (as argued in the journalists' Petition), then the Court should vacate the ruling below and direct the trial court to reanalyze the Petitioners' entitlement to privilege under New Jersey law.

process of formulating news, dissuading journalists from making and internally sharing candid assessments of the reliability of the tips they receive.

Perhaps the most famous recent example of a journalist receiving an unsolicited offer of information is that of former National Security Agency contractor Edward Snowden, who made himself known to documentary filmmaker Laura Poitras by way of an email outreach that eventually resulted in the formation of a confidential source relationship. *See* Peter Maas, "How Laura Poitras Helped Snowden Spill His Secrets," *The New York Times Magazine*, Aug. 13, 2013. Under the trial court's understanding of the journalist's privilege, Poitras could be forced to sit for a deposition to describe the receipt of her initial email from Snowden and how she reacted to it, up to some indeterminate later point at which (in the trial court's view) the "active newsgathering" process began.

Less-well-known examples of significant news stories based on, or aided by, unsolicited tips abound. *The Oregonian* recently published an acclaimed package of investigative reports by staff writer Bethany Barnes about a serial harasser who managed to bounce from one school-teaching job to another over a period of decades, evading professional sanctions despite multiple student complaints. Bethany Barnes, "Benefit of the Doubt," *The Oregonian*, Aug. 17, 2017. An article in the *Columbia Journalism Review* described how Barnes relied on tips from

readers who came forward after reading her initial article, offering new information that moved the story forward:

> Months into the reporting, Barnes got an anonymous email from another victim who had read about the lawsuit against [the teacher]. She'd never reported her own harassment, but wanted Barnes to know that the other girls were telling the truth because it had happened to her, too. She didn't want to be contacted, and signed the email 'not ready, never will be.'

Alexandra Neason, "The *Oregonian*'s shocking teacher investigation," *Columbia Journalism Review*, Oct. 18, 2017.

In short, the scenario at issue in *Travel Weekly* – a publication posts an article, a reader with knowledge of the subject contacts the publication with more information – is an everyday staple of the newsgathering process. The journalist's privilege must necessarily attach when a source furnishes information to a person or organization known to be a journalist in connection with the formulation of a news publication, even when the journalist has not initiated contact or is not actively pursuing a specific story.

B. The newsgathering process protected by the privilege includes acceptance of unsolicited tips from sources, even when the tip does not produce a news story.

The statutory reporter's privilege protects against compelled disclosure of information obtained "while actively gathering news" or compelled testimony about such information. Fla. Stat. § 90.5015(2). Once information is found to be

subject to the privilege, a court may order disclosure only after a demanding burden has been satisfied.

That the statute was meant expansively to protect every phase of the process of disseminating news is illustrated by the breadth of its coverage, which applies to editors and publishers as well as reporters. Fla. Stat. § 90.5015(1)(a). A publisher certainly would never be "actively gathering news" in the literalist sense that the trial court contemplates. A publisher typically would have scant hands-on involvement in the formulation of any particular article, yet might come into possession of confidential information second-hand, such as by meeting with the editor-in-chief. Practically none of a publisher's information would ever come from the "active gathering" of news if understood to mean only "interviewing newsmakers," yet publishers are as entitled to the benefit of the shield law as are the reporters they supervise.

In context, the phrase "while actively gathering news" is most logically understood not as an invitation to parse the nature of journalists' on-the-job activity, but as a boundary between observations made in a journalistic capacity versus those made off-duty. For instance, Reporter Adams is attending an off-hours cocktail party at which he overhears Brown say, "I'm going to kill that guy," just before a shot rings out and Carter falls dead. At Brown's murder trial, Adams' testimony is not subject to a claim of privilege, as nothing about the circumstances

indicates that he was actively gathering news, even if the event unexpectedly turned out to be newsworthy. These are the types of situations for which the qualifier "actively gathering news" was intended: To distinguish settings in which a journalist is a participant or a spectator in a non-journalistic capacity, neither of which is the case here. The phrase cannot be read to place an artificial "starter's pistol" on the newsgathering process, which in practice would be impossible to administer.

To play out the *Travel Weekly* scenario under the trial court's understanding of the reporter's privilege, there is no discernible starting point at which the privilege "switches on." Suppose that, upon reviewing Sheehan's message, a *Travel Weekly* journalist immediately reaches the decision that the message is newsworthy and worth pursuing as a story. Is *that* the moment at which the privilege activates? Or does it activate later, when the journalist confers with his editor about turning the information into a news article? If the response is, "I don't think this is a story," does the privilege switch off again? Or does the privilege switch on only when the journalist picks up the phone to call Sheehan for an interview – and does it switch off again if the journalist leaves a voice mail that Sheehan fails to return? The confounding absurdity of line-drawing under the trial court's non-standard is self-evident. If neither journalist nor source knows where the privilege begins and ends, that uncertainty will itself powerfully chill the

willingness of sources to run the risk of exposure by coming forward to volunteer information.

Other privileges are understood to encompass conversations leading up to the formation of the privileged relationship, and the reporter's privilege must necessarily be understood in the same way for it to have its intended beneficial effect. Like the journalist's privilege, communications between attorney and client are generally deemed confidential and privileged. Fla. Stat. § 90.502. This attorney-client privilege protects any disclosure that a client makes to an attorney, in confidence, for the purpose of securing legal advice or assistance, *Southern Bell Tel & Tel. Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994), and is designed "to encourage full and frank communication between attorneys and their clients," thereby promoting broader public interests. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1991).

When questions arise about whether an attorney-client relationship has been formed for purposes of activating the privilege, courts liberally construe the concept of the "relationship" to give the privilege its intended effect. In general, as long as the prospective client is seeking legal advice or representation and reasonably believes the communication will be confidential, the consultation is privileged. *State v. Rabin*, 495 So. 2d 257, 260 (Fla. 3d DCA 1986); *In re Colocotronis Tanker Sec. Litig.*, 449 F. Supp. 828, 831-32 (S.D.N.Y. 1978). This is

so even if the would-be client ultimately never retains the attorney and never becomes a full-fledged "client," in the traditional sense of the word. *Hoyas v. State*, 456 So. 2d 1225, 1228 (Fla. 3d DCA 1984). Without this extension of the privilege to those who are simply consulting with an attorney, the privilege would be rendered useless, because any communications taking place prior to the formal acceptance of the relationship and retention of the attorney would then be subject to investigative subpoenas and discovery requests. The decision to retain an attorney requires the potential client to be able to disclose private, often self-incriminating information—the very information that the privilege is designed to protect. The journalist's privilege must be understood in this same commonsense fashion for it to have any value at all.

This case closely resembles that of *Florida Times-Union* reporter Matt Dixon, whose testimony was sought – unsuccessfully – in connection with his coverage of a controversy involving the firing of an aide to Florida's lieutenant governor. As reported at the time, fired Capitol staffer Carletha Cole "said she was reaching out to the *Times-Union* in an effort to fix what she says is a broken office." Matt Dixon, "Staffer: Jennifer Carroll's office 'like a juvenile school'; infighting could impact Scott's priorities," *The Florida Times-Union*, Sept. 9, 2011. Cole shared with Dixon a surreptitiously made recording of conversations among Capitol staffers reflecting dissension within Gov. Rick Scott's staff. Matt

Dixon, "Listen: Jennifer Carroll's top aide criticizes Rick Scott, his chief of staff," *The Florida Times-Union*, Sept. 12, 2011. When the State Attorney sought to prosecute Cole for making the recording without consent, Dixon was subpoenaed to testify, but a Florida circuit court quashed the subpoena, citing both the statutory and common-law journalist's privileges.

There is no indication that Dixon was pursuing a news story about dysfunction within the lieutenant governor's staff before Cole contacted him to tell her story and share the recording. Yet the Leon County Circuit Court had no difficulty finding Dixon's activities in receiving the information volunteered by Cole to be covered by the privilege against testifying: "Any information or knowledge possessed by Matt Dixon relating in any way to matters material to the Cole case was gathered for the purpose of writing news stories." *See State v. Cole*, Order Granting Motion of Morris Publishing Group, LLC, and Matt Cole to Quash Subpoena and for Protective Order, No. 11 CRF 03254, 2012 WL 7188564 (Fla. Cir. Ct. Nov. 14, 2012) at *2. The court did not parse out Dixon's activities to protect only those that followed receipt of the initial leak (what the trial court in this case would call "active newsgathering"). The same should hold true in this case – indeed, even more so, as this is a purely private civil dispute rather than, as in *Cole*, a felony criminal prosecution, where the argument that the public's interest in justice overrides the privilege is stronger.

The trial court further erred in suggesting that the privilege should not apply because Sheehan's information did not result in publication of a new story. To set up a statutorily unsupported "success test" for newsgathering so that only newsgathering efforts that turned out to be immediately productive were entitled to the privilege would penalize exactly the kind of risk-taking journalism that most serves the public interest. It is an everyday occurrence in newsrooms that journalists receive information that never makes it into publication, but that activity does not cease to be "newsgathering." The doctor-patient privilege does not apply only to patients who are cured, and the attorney-client privilege does not apply only when the lawyer wins the case. If the Court tells journalists that their ability to protect confidences will be lost if their reporting does not result in an immediately tangible piece of published work, journalists will be dissuaded from pursuing speculative stories and incentivized to stick to "safe" ones – the stories for which the privilege is needed least.

In addition to being statutorily unsupported and destructive to investigative journalism, the trial court's "success test" is simply impracticable to administer. It replaces a bright line – that journalists have the privilege whenever they are on duty collecting and analyzing information – with a line blurred beyond discernment. Journalists often speak of "saving string" in which they set aside bits of information they have learned for weeks, months, or even years at a time, until it

accumulates into a publishable whole. For instance, investigative reporter-turned-screenwriter David Simon told *Esquire* about how he patrolled drug-ridden neighborhoods of Baltimore "saving string to write a four-part series on what ailed the city police department." *See* David Simon, "David Simon on His Days at The Baltimore Sun: A Newspaper Can't Love You Back," *Esquire* (Feb. 16, 2008). Would Simon's acclaimed investigative journalism be regarded as unworthy of the reporter's privilege if it did not provably result in a published article within three months? Six months? A year? The trial court provides no standard. Moreover, proving that a particular interview, conversation or email exchange resulted in the publication of journalistic work would itself require invading the privilege. If police sought to depose Simon for the identities of the drug dealers he interviewed whose remarks never made it into publication, would Simon have to testify about how those conversations contributed to his understanding of the drug trade to qualify those conversations as privileged, thus requiring breach of the privilege to prove its existence? Or would David Simon be forced to compromise the confidentiality of his journalistic work process by divulging that he has another series of articles in the works for imminent future publication in which those drug dealers will be quoted?

To use another familiar example, journalists from a number of national news organizations were leaked a copy of the so-called "Trump dossier" in which a

British intelligence operative purported to be relaying humiliating personal information about President Trump that the Russian government was said to be holding for its blackmail value. Yet some major news outlets reportedly declined, at least initially, to publish the incendiary allegations in the documents. *See* FoxNews.com, *Ex-spy goes back undercover amid Trump dossier controversy*, Jan. 12, 2017 (reporting after online news outlet BuzzFeed published the 35-page file that "[s]everal other news organizations, including the *New York Times* and the *Washington Post*, had access to the dossier but declined to publish the material because it could not be verified"). If the trial court's errant view of the privilege were correct, and journalistic activity is unprivileged if it fails to result in published news, journalists from the *Post* and *Times* could be subpoenaed in the ongoing libel suit against BuzzFeed over publication of the dossier[3] and could be compelled to testify about their mental impressions in analyzing the documents and how they concluded that the documents were unworthy of publication. This cannot be the law. It is vitally important to the integrity of journalism that journalists feel safe making difficult judgment calls to refrain from publishing questionable information without concern that their decision process will be dissected in a courtroom. It would be perverse and self-defeating for the law to set up an

[3] Tom Porter, "Russian Bankers Sue BuzzFeed Over Publication of Unverified Trump Dossier," *Newsweek*, May 27, 2017.

incentive for journalists to prematurely publish shaky information out of fear that the privilege will be forfeited.

The notion that reporting loses its privileged status if it does not result in a tangible piece of published news fundamentally misconceives the way journalists work, in particular investigative journalists who may spend months or even years pursuing the same story without any publicly visible sign of "newsgathering." If this notion were to become engrafted onto the privilege statute, the statute would be readily gamed by litigants – for instance, by "racing to the courthouse" and filing preemptive litigation before a journalist has had time to publish.

C. The trial court erred in failing to analyze, and apply, Florida's common-law privilege.

Inexplicably, the trial court failed even to acknowledge the existence of Florida's common-law reporter's privilege, which by itself is grounds for reversal. By its express terms, the privilege statute leaves preexisting legal remedies for journalists undisturbed, Fla. Stat. § 90.5015(5), meaning that the common-law privilege survived enactment of the statute and must be analyzed in parallel with the statutory privilege. Even granting the incorrect assumption that the statutory privilege was understood to be limited to the "active" gathering of news as the trial court erroneously applied that term, the common-law privilege is arguably broader, as it has been recognized to extend to "both confidential and nonconfidential information gathered in the course of a reporter's employment," *State v. Davis*, 720

S.2d 220, 227 (Fla. 1998), without reference to whether the reporter was "actively gathering" news at the time. The common-law privilege plainly should apply to Petitioners' dealings with Sheehan, and the failure to consider and apply it constitutes reversible error.

CONCLUSION

For the foregoing reasons, the Court should grant the relief sought by Petitioners and affirm that the Florida journalist's privilege protects the work product and mental impressions of all journalists—reporters, editors, and publishers—regardless of whether the journalist or the source initiates the contact, regardless of whether the communication pertains to an article on which the journalist is presently working, and regardless of whether the communication results in the publication of news.

Respectfully submitted, this 3rd day of November, 2017.

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I HEREBY CERTIFY that this petition is in Times New Roman 14-point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210.

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