REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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May 8, 2023

The Honorable Elizabet Rodriguez, Department CC
Bakersfield County Superior Court
1415 Truxtun Avenue
Bakersfield, California 93301

Re: Letter in Support of Non-Party Media Organization The Bakersfield Californian's Motion to Quash Defendant's Subpoena *Duces Tecum* in *State of California v. Robert Roberts*, (BF191473A)

Your Honor:

The Reporters Committee for Freedom of the Press ("Reporters Committee" or "RCFP") respectfully writes regarding the ongoing criminal proceedings against Mr. Robert Roberts (*State of California v. Robert Roberts*, BF191473A) in support of the Motion by the Bakersfield Californian to quash Defendant's Subpoena *duces tecum* seeking disclosure of unpublished journalistic work product.

The Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. We write to underscore the importance of California's constitutional and statutory protections for journalistic work product. Compelled disclosure of the information sought by Mr. Roberts here would chill newsgathering, thereby depriving the public of necessary information.

As detailed in the Bakersfield Californian's motion, on February 23, 2022, Ms. Ishani Desai, a reporter with The Bakersfield Californian, interviewed Mr. Sebastian Parra, who has also been charged in Mr. Alcala's killing. The Bakersfield Californian published a February 27, 2023 article based in part on that jailhouse interview. Defendant's Subpoena seeks a recording of the interview, Ms. Desai's notes from the interview, and the "list of questions" Ms. Desai asked Mr. Parra.

California's Shield Law, which indisputably applies to the information sought by Defendant's Subpoena, recognizes that compelled disclosure of information gathered in the course of newsgathering must be protected to ensure the free flow of information between journalists and their sources. Enforcing the instant Subpoena would chill newsgathering and thereby deprive the public of key information about the criminal justice system.

I. California's Shield Law protects journalistic work product from compelled disclosure.

California has enacted statutory and constitutional safeguards to protect journalists from efforts to access their work product. Article I, § 2(b) of the California Constitution and section 1070 of the Evidence Code enshrine a shield law that "safeguard[s] the free flow of information from the news media to the public, one of the most fundamental cornerstones assuring freedom in America." *In re Willon*, 47 Cal. App. 4th 1080, 1091 (1996).

News organizations play an essential role in informing public discussion about matters of public concern. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). Compelling reporters to turn over information obtained in the course of newsgathering harms the reporting process, to the ultimate detriment of the public. It embroils reporters in time-consuming litigation and diverts news organizations' already scarce resources away from newsgathering.

Furthermore, newsgathering relies on candid communication between journalists and their sources. Courts have long recognized the potential for subpoenas directed at the media to stifle reporting by chilling these reporter-source relationships. *See Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("[J[ournalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant"); *Cusamano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) ("Courts afford journalists a measure of protection from discovery initiatives in order not to undermine their ability to gather and disseminate information."); *Gonzales v. NBC, Inc.*, 194 F.3d 29, 35 (2d Cir. 1998) (noting that the threat of compelled disclosure may cause sources to be "deterred from speaking to the press, or insist[] on remaining anonymous, because of the likelihood that they w[ill] be sucked into litigation"); *Schoen v. Schoen*, 5 F.3d 1289, 1295 (9th Cir. 1993) (noting "a 'lurking and subtle threat' to the vitality of a free press if disclosure of non-confidential information 'becomes routine and casually, if not cavalierly, compelled'").

Likewise, compelled disclosure of journalistic work product undermines public trust in the media because it effectively deputizes journalists as investigative arms of the government. To play its crucial role in society, the press must not only be independent, but also be perceived as independent. *See Richmond Newspapers*, 448 U.S. 571–72 (1980) ("To work effectively, it is important that society's criminal process satisfy the appearance of justice."); *Gonzales*, 194 F.3d at 35 (acknowledging "the symbolic harm of making journalists appear to be an investigative arm of . . . the government" and emphasizing the "paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters"). The more closely journalists and news organizations are associated with the compelled disclosure of their work product and communications with sources at the behest of the government or third-party litigants, the less access journalists will have to people, places, and events that urgently call for press coverage. Similarly, when the fruits of newsgathering are coopted for government or third-party litigants' agendas, public trust in the news media's independence suffers.

California's legislature recognized these considerations in enacting the state's Shield Law, which protects a journalist from contempt for refusing to disclose "(1) unpublished information, or (2) the source of information, whether published or unpublished." *Delaney v. Superior Court*, 50 Cal. 3d 785, 797 (1990). The California electorate elevated this protection from a statute to the state constitution in 1980. This broad protection ensures that a robust, independent press can engage in the unfettered newsgathering necessary in a democratic society.

It is undisputed that California's constitutional and statutory shield law applies to the information Mr. Roberts seeks from the Bakersfield Californian. In a civil case, the inquiry ends there: the shield law provides absolute protection from compelled disclosure. *New York Times Co. v. Superior Court*, 51 Cal. 453, 457 (1990). In a criminal case, courts balance the protections of the shield law against a criminal defendant's right to a fair trial. *Delaney*, 50 Cal. at 807. To overcome the shield law's protections, a criminal defendant must make a threshold showing, resting "on more than mere speculation," that there is a reasonable possibility that the information sought would materially assist their defense. *Id.* at 808. Even if a defendant meets that bar, a court must then consider whether countervailing factors, including the sensitivity of the information and the rationales underlying the shield law, counsel against disclosure. *Id.* at 809–810.

This is not a low hurdle. To illustrate, in *People v. Sanchez*, a criminal defendant charged with three counts of first-degree murder sought unpublished information from a journalist who had written two articles based on several jailhouse interviews with him: one in which he was quoted appearing to profess his innocence and another in which he was quoted appearing to profess culpability. 12 Cal. 1, 49–50 (1995). Even though the defendant argued that the materials could be used to impeach the journalist—who testified about the quoted statements—and provide mitigating circumstances around the defendant's state of mind, the Court ultimately held that the defendant had failed to meet his burden to overcome the shield law's protection. *Id.* at 57–58.

II. Enforcing Defendant's Subpoena would chill newsgathering and thereby deprive the public of key information.

Enforcing Defendant's Subpoena would chill newsgathering because it will deter individuals from speaking to the press for fear their published statements—and mere speculation about their off-the-record statements—will provoke fishing expeditions for information that goes against their penal interests. Furthermore, the specter of litigation over unpublished materials will deter news organizations and journalists from reporting on criminal proceedings and individuals impacted by the criminal justice system.

Here, Mr. Roberts bases his Subpoena on inconsistencies between Mr. Parra's statements to Ms. Desai, and his statements in the preliminary hearing in an effort to question Mr. Parra's credibility. But the California Supreme Court has held that even where a journalist wrote articles with quoted material that spoke directly to a defendant's culpability and testified about those quotes, the defendant's interest in impeachment did

not outweigh the shield law's protection. *Sanchez*, 12 Cal. at 57–58. Mr. Roberts's interest is even more attenuated here, where Mr. Parra's published statements do not speak to Mr. Roberts's culpability, but instead involve inconsistencies about the sequence of events and Mr. Parra's own motivations: subjects that are already open to cross-examination at trial. This interest is insufficient to justify overcoming the shield law, especially considering the impact disclosure would have on newsgathering.

It is not a given that individuals facing criminal jeopardy will speak with the press. Often, journalists can only obtain newsworthy information of public interest by assuring interviewees confidentiality and agreeing to leave certain information unpublished. *See Gonzales*, 194 F.3d. Enforcing Mr. Roberts's Subpoena will chill newsgathering from individuals who fear their interviews may provoke fishing expeditions for statements against their penal interest or—like here—even their mere credibility.

Furthermore, compelled process also threatens to constrain the editorial discretion of the news media by impacting its "selection and choice of material" for publication. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973). Journalists may hesitate to investigate newsworthy matters of public interest for fear their work will embroil them in litigation. Likewise, news organizations may be reluctant to publish "any information they fear would excite the interest of current or prospective litigants." *United States v Marcos*, 1990 WL 74521 at *2 (S.D.N.Y. June 1, 1990). Here, where an interviewee faces charges in a high-profile homicide prosecution, the upshot of enforcing Defendant's Subpoena and chilling newsgathering would be less fulsome reporting on criminal proceedings and the individuals impacted by the criminal justice system.

In enacting the shield law, the California Legislature and electorate recognized the importance of safeguarding against these outcomes. Enforcing the instant subpoena would wreak concrete harms on newsgathering regarding the criminal process, ultimately to the public's detriment.

III. Conclusion

For the foregoing reasons, and those set forth in The Bakersfield Californian's Motion, Reporters Committee respectfully urges this Court to grant the Motion to Quash Mr. Roberts's Subpoena *duces tecum*.
Dated: May 8, 2023

Sincerely,

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