

“Reporters”) to appear for depositions on January 8, 2004 (Rec. Docs. 43-45, 56-57). Plaintiffs Utah Gospel Mission, First Unitarian Church of Salt Lake City, Shundahai Network, Utah National Organization for Women and Lee J. Siegel respectfully file this memorandum of points and authorities opposing these Motions.

INTRODUCTION

The authorities cited by the Newspapers stand for the important proposition that, in many cases, the First Amendment shields a reporter from attempts to discover the source of his or her information. Plaintiffs, however, seek no such thing. Plaintiffs merely wish to establish that quotes attributed by the Reporters to Mayor Ross. C. “Rocky” Anderson, the central actor in the dispute currently before the Court, were accurately reported to the public. Finding that First Amendment liberties of the press are not jeopardized under these circumstances, courts have allowed depositions of the type contemplated by plaintiffs to proceed.

Plaintiffs acknowledge and are sympathetic to the Newspapers’ objection that the deposition of their reporters may not be necessary, depending on the testimony offered by Mayor Anderson at his deposition on January 9, 2004. When selecting a date for the deposition of the Reporters, however, plaintiffs were constrained by schedules imposed by other parties. The Court has established a deadline of Monday, January 12, 2004, for plaintiffs to supplement their motion for preliminary injunction. The City has indicated that the only time that Mayor Anderson is available for a deposition is Friday afternoon, January 9, 2004. In light of these scheduling difficulties, plaintiffs could not wait until after the Mayor’s deposition to notice the deposition of the Reporters. In an effort to accommodate the Newspapers’ concerns, however, plaintiffs have proposed to opposing counsel that (1) the Court should postpone ruling on the Newspapers’ motion until after plaintiffs have taken Mayor Anderson’s deposition; (2) on

Monday, January 12, 2004, plaintiffs will inform the Court whether they believe that, in light of Mayor Anderson's testimony, depositions of the Reporters are still necessary; (3) if needed, the Court will then hold a hearing on Tuesday, January 13, 2004 on the motions, so that if plaintiffs are allowed to proceed, they will be able to conduct the deposition of the Reporters before their Reply Memorandum in support of their Motion for Preliminary Injunction, which is due to the Court on Friday, January 23, 2004. Counsel for the Newspapers have indicated their willingness to proceed on this schedule, and the Court has agreed to schedule a hearing for January 13, 2004, if necessary.

In the event that such a hearing is necessary, however, plaintiffs have prepared the following memorandum, which addresses the other arguments presented by the Newspapers in support of their Motions to Quash.

ARGUMENT

Although the Newspapers have flooded plaintiffs and this Court with over thirty citations in their briefs, none of those cases cited by them deal with a situation like the one currently facing this Court. The Tribune admits in its brief that it "understands that, via the subpoena at issue, Plaintiffs seek confirmation that Mayor Anderson actually made statements attributed to him in various newspaper arguments." Trib. Memo. at 8. The Deseret News makes a similar acknowledgement. Deseret News Memo. at 4. In fact, prior to issuing these subpoenas, plaintiffs' counsel called counsel for the Newspapers to clarify their very limited goals for discovery and to suggest that the parties prepare sworn statements by the Reporters that would eliminate the need for their depositions altogether. The Newspapers refused, based on their concern that counsel for the City and/or the LDS Church would then seek to depose the

Reporters with regard to their declarations.¹ Plaintiffs respectfully submit that the dispute between plaintiffs and the Newspapers can easily be resolved, and that the Newspapers should assert their arguments against the City or the LDS Church should either of them seek to compel the deposition of their Reporters.

The Newspapers have not highlighted a single case involving a discovery request as limited as the one plaintiffs have made. Rather, they have simply recited the standard litany of First Amendment cases involving the compelled disclosure of source materials. Even *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977), the case upon which the Newspapers most heavily rely, involved the issue of whether a reporter could be compelled to disclose his confidential source. In this case, plaintiffs simply need the Reporters to verify that they accurately recorded and published various statements made by Mayor Anderson.² As the *Silkwood* court emphasized, “In holding that a reporter must respond to a subpoena, the Court is merely saying that he must appear and testify. He may, however, claim his privilege in relation to particular questions *which probe his sources.*” *Id.* at 437 (emphasis added).

By contrast, in at least one case, courts have permitted precisely the kind of limited deposition that plaintiffs have proposed here. In *Brinston v. Dunn*, 919 F. Supp. 240 (S.D. Miss. 1996), the district court found that a magistrate judge acted properly when he compelled a journalist to submit to a deposition under oath so that the reporter could answer questions regarding the truthfulness and accuracy of the contents of the article, including whether statements attributed to the plaintiff were, in fact, made by the plaintiff. *Id.* at 244. A deposition

¹ Mr. Snyder’s submission of an affidavit to this Court, however, seems to belie the Newspapers’ expression of concern.

² As noted previously, declarations from Ms. May and Mr. Snyder stating as much would obviate any need for the plaintiffs to conduct depositions. In fact, the affidavit submitted by Mr. Snyder provides almost all of the information that plaintiffs would seek to obtain from his deposition. Adding one additional paragraph to the affidavit would neither harm the First Amendment nor inflict an undue burden on the Newspapers.

limited to such narrow parameters “does not impermissibly infringe on the First Amendment right to freedom of the press.” *Id.* See also Alan S. Wasserstrom, *Reportorial Privilege as to Nonconfidential News Information*, 60 A.L.R.5th 75 at §10 [b].

Plaintiffs merely seek verification of reported statements rather than disclosure of nonpublished source material and information.³ As a result, this Court need not grapple with the extent to which the First Amendment provides a privilege against the disclosure of nonconfidential information. See *United States v. Smith*, 135 F.3d 963, 970 n.2 (5th Cir. 1998) (finding no privilege against disclosure of nonconfidential information but noting the conflict among the circuits). This difficult question has divided the courts because evidentiary privileges “are not lightly created nor expansively construed, for they are in derogation of the search for truth.” *United States v. Nixon*, 418 U.S. 683, 710 (1974)). Likewise, there is a “well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.” *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991); see also *Branzburg*, 408 U.S. at 682 (“The First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.”). By suggesting that the First Amendment prevents a party from even verifying the accuracy of statements published by the media, the Tribune essentially seeks to transform *Branzburg*’s recognition of qualified immunity for the press into absolute immunity from discovery. Such an expansive interpretation of *Branzburg* goes far beyond what the First Amendment requires, and finds no support in the caselaw.

³ For this reason, this case is distinguishable from, for example, *Bottomly v. Leucadia*, 24 Media L. Rep. 2118 (D. Utah 1996). In *Bottomly*, the court refused to allow the depositions of reporters to determine whether their news source were, in fact, lawyers prohibited from speaking about the case due to a protective order from the court.

The Newspapers' main complaint is that plaintiffs have not exhausted other avenues for gathering the information that they wish to obtain by deposing the Reporters. Specifically, they insist that depositions of the Reporters prior to the deposition of Mayor Anderson are premature. Plaintiffs believe that they have addressed this concern through the proposal outlined at the beginning of this memorandum. If the Mayor disputes the veracity of statements attributed to him by the Reporters, however, they are clearly in the best position to vindicate the accuracy of their reports.⁴

As for the other prongs of the *Silkwood* test, *see* 563 F.2d at 438, the information sought by the plaintiffs is extremely important to the resolution of the underlying dispute (i.e., “goes to the heart of the matter”) and is certainly relevant. The Mayor’s numerous public statements acknowledging that the relinquishment of the public easement would be unethical, unprincipled, and a betrayal of the public interest are, in many ways, is the most compelling evidence supporting of plaintiffs’ claims. They are extremely important for establishing the context within which Salt Lake City’s actions occurred and the message that a reasonable person would take from the City’s decision to completely give in to the Church’s demands, which is a critical component of plaintiffs’ Establishment Clause claim.⁵ Furthermore, with regard to the “type of controversy,” plaintiffs have alleged constitutional violations in their underlying complaint, which are the most serious grievances to appear in the federal courts. Although plaintiffs

⁴ This case is unlike *Parsons v. Watson*, 778 F. Supp. 214 (D. Del. 1991), where the plaintiff sought to depose a reporter to prove his assertion that the plaintiff himself had been misquoted in the news article. *Id.* at 219 (“[P]laintiff himself is a source of information regarding exactly what was said during the conversation.”). Furthermore, the *Parsons* court emphasized that the plaintiff could also call upon other witnesses to the disputed conversations to verify his version of events. In this case, by contrast, although some of Mayor Anderson’s may have been made in the presence of others, plaintiffs have learned that Mayor Anderson frequently called Ms. May and Mr. Snyder for one-on-one conversations to explain his proposals for resolving the Main Street dispute. With regard to these quotes, the Mayor and the Reporters are the only sources to which plaintiffs can turn.

⁵ These factors distinguish this case from *Re/Max Int’l, Inc. v. Century 21 Real Estate Corp.*, 846 F. Supp. 910 (D. Colo. 1994), where the court emphasized that the deposition of the reporter offered nothing to assist with the resolution of the issue whether there was a substantive basis for claims made in advertising, and would only be used to impeach the credibility of a party to the dispute. *Id.* at 912.

acknowledge that their burden is higher in civil, as opposed to criminal cases, plaintiffs' complaint seeks to vindicate some of the most important principles upon which this country was founded – the freedom of speech and expression and the separation of church and state.

The Newspapers attempt to confuse the real issues presented in this case by suggesting that Plaintiffs are looking for “records” or “notes, tapes, outtakes or other unpublished materials.” Trib. Memo. at 7. *See also* Deseret News Memo. at 5-6 (listing string citation about disclosure of videotape interview outtakes, notes and tangible things).⁶ Plaintiffs seek no such thing. Rather, they merely seek to lay the proper evidentiary foundation so that these important admissions by Mayor Anderson can be presented to the court. Therefore, Plaintiffs need not (and do not) dispute that the First Amendment considerations involved in the cases cited by the Tribune were worthy of protection. Plaintiffs' point is simply that those considerations are not present in this case.

CONCLUSION

Therefore, for the foregoing reasons, the Newspapers' Motions to Quash and/or for Protective Order should be denied.

⁶ For example, the Deseret News cites *In re Application to Quash Subpoena*, 79 F.3d 346 (2d Cir. 1996), but fails to mention that the subpoena in that case sought video out-takes of portions of interviews not included in the news broadcast. Furthermore, in that case, the reporters were protected by a specific state reporters' shield law. *Id.* at 351 (“Several courts have held that in order to find unpublished news to be critical or necessary within the meaning of [the New York Shield Law], there must be a finding that the claim for which the information is to be used “virtually rises or falls with the admission or exclusion of the proffered evidence.”). As the Newspapers are forced to acknowledge, Utah has not chosen to provide reporters with protections greater than the First Amendment or federal common law would require.

Respectfully submitted this 5th day of January, 2004.

MARK J. LOPEZ
SHARON M. McGOWAN
American Civil Liberties Union Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500

JANELLE P. EURICK USB # 8801
American Civil Liberties Union of Utah
Foundation, Inc.
355 North 300 West, Suite # 1
Salt Lake City, UT 84103
Telephone: (801) 521-9862

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Plaintiffs' Consolidated Memorandum in Opposition to Motions to Quash and/or for Protective Order by the Salt Lake Tribune and Heather May and by the Deseret News and Brady Snyder was sent to:

Randy L. Dryer
Parsons Behle & Latimer
One Utah Center
201 South Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, Utah 84145

*Attorney for Brady Snyder and The Deseret
Morning News*

Steven W. Allred
Boyd A. Ferguson
451 South State Street, Suite 505A
Salt Lake City, Utah 84111

*Attorneys for Defendant Salt Lake City
Corporation and Mayor Ross C. "Rocky"
Anderson (courtesy copy)*

Michael Patrick O'Brien
Jones, Waldo, Holbrook & McDonough
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

*Attorney for The Salt Lake Tribune and
Heather May*

Alan L. Sullivan
Snell & Wilmer, LLP
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004

*Attorney for the Church of Jesus Christ of
Latter-Day Saints (courtesy copy)*

by electronic mail and by second-day Federal Express this 5th day of January, 2004.

JANELLE P. EURICK
AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION, INC.

MARK J. LOPEZ
SHARON M. MCGOWAN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.

Attorneys for Plaintiffs

By:

SHARON M. MCGOWAN