Nos. 06-16995 and 06-16996 (CONSOLIDATED)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: GRAND JURY SUBPOENAS TO MARK FAINARU-WADA AND LANCE WILLIAMS

Case No. 06-16995
District Court No. CR-06-90225

IN RE: GRAND JURY SUBPOENA TO THE SAN FRANCISCO CHRONICLE

Case No. 06-16996
District Court No. CR-06-90355

On Appeal from the U.S. District Court
for the Northern District of California
The Honorable Jeffrey S. White

OPENING BRIEF OF APPELLANTS MARK FAINARU-WADA, LANCE WILLIAMS AND THE *SAN FRANCISCO CHRONICLE*

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CORPORATE DISCLOSURE STATEMENT

The *San Francisco Chronicle* is indirectly wholly owned by The Hearst Corporation, a privately held company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 18 U.S.C. § 3231 and Fed. R. Crim. P. 17(c). Jurisdiction over this appeal is conferred by 28 U.S.C. § 1291. The orders holding Messrs. Fainaru-Wada and Williams in civil contempt were entered pursuant to 28 U.S.C. § 1826 on September 25, 2006. The order holding the *San Francisco Chronicle* in civil contempt was entered on October 20, 2006. Notices of appeal were timely filed on October 24, 2006, pursuant to Fed. R. App. P. 4(a).

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Whether the district court erred in concluding that journalists subpoenaed to reveal their confidential sources before a federal grand jury enjoy no First Amendment protection whatsoever absent bad faith abuse of the grand jury process.

2. Whether the district court erred in concluding that there is no privilege under Federal Rule of Evidence 501 that protects against the compelled disclosure of journalists' confidential sources.

3. Whether the district court erred in concluding that, even if a reporter's privilege were held to exist, any balancing of interests weighs in favor of the government on the facts of this case.

The standard of review on the first two, purely legal questions is *de novo*; as the district court noted, they "focus on the legal issue presented – namely whether or not Movants are entitled to withhold the identity or identities of their confidential source or sources." (E.R.350) *See Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) ("*Shoen I*"). The standard of review on the third issue, because it involves questions of fact bearing on First Amendment liberties, is one of independent appellate review, which "carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 567 (1995) (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)).

STATEMENT OF THE CASE

These consolidated appeals challenge district court orders requiring the *San Francisco Chronicle* (the "*Chronicle*") and its reporters Mark Fainaru-Wada and Lance Williams to comply, on pain of imprisonment and serious fines, with grand jury subpoenas seeking the identity of confidential sources in a leak investigation. The subpoenas were prompted by an award-winning series of hundreds of articles published in the *Chronicle* revealing that a number of this nation's most prominent athletes had lied to the public about illegally using steroids and other performance-enhancing drugs. The *Chronicle*'s revelations were based in part on documents

that had been disclosed by the government as pretrial discovery material in a criminal prosecution, including grand jury transcripts, and were subject to a protective order.

No other court has ever compelled reporters to reveal their confidential sources in circumstances like those in this case. While reporters have been required to reveal their confidential sources to aid an ongoing investigation of crimes, as in the seminal case of *Branzburg v. Hayes*, 408 U.S. 665 (1972), the grand jury subpoenas here did not issue during the underlying grand jury proceedings investigating illegal steroid use. Instead, they issued from a second, separate grand jury investigating the improper disclosure of discovery material — well *after* the initial grand jury had concluded its proceedings, criminal indictments had issued, the ensuing criminal case was headed for public trial, and the government had disclosed as pretrial discovery 30,000 pages including testimony from the first grand jury proceeding. This case involves no compromise to law enforcement objectives or the possible Fifth or Sixth Amendment rights of defendants in the underlying criminal investigation.

Nor does this case involve any issue of national security or other urgent governmental necessity such as those that have been held to warrant such severe incursions upon press freedom in the past. In the 34 years since *Branzburg*, the Government has *never* obtained orders upheld in a litigated case compelling

reporters to disclose their confidential sources in a pure leak case unless the alleged leak compromised national security interests. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006), *cert. denied*, 125 S. Ct. 2977 (2005); *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006). The district court decision below, if upheld, will represent an unprecedented extension of subpoena power against the press into new terrain.

The *Chronicle* and its reporters declined to identify the source of their information and moved to quash the subpoenas on the grounds that the information sought was protected by the First Amendment and a reporter's privilege under Federal Rule of Evidence 501. The court below denied the motions, holding that journalists subpoenaed to reveal their confidential sources before a federal grand jury enjoy no First Amendment protection whatsoever absent proof that there was a bad faith abuse by the government of the grand jury process. It also declined to recognize any reporter's privilege under Rule 501.

The district judge expressly declined to consider in his legal analysis unrebutted evidence demonstrating the enormously beneficial public impact of the *Chronicle*'s reporting. By putting a face on the steroid problem for the first time, these articles transformed a largely abstract public health issue into one that captivated Americans, spurring widespread public debate virtually overnight. They prompted congressional scrutiny, led to changes in Major League Baseball

rules, and sparked reform from the high school athletic field to the Olympic arena. Ignoring these public policy benefits, the court treated the case as if it were indistinguishable from one involving national security or terrorism, or implicating Fifth or Sixth Amendment rights, none of which is involved here.

In light of their promises of confidentiality, and to permit this appeal to be heard, the *Chronicle* and its reporters respectfully declined to disclose their sources' identities following the denial of their motions to quash. The district court held them in civil contempt, ordering Fainaru-Wada and Williams imprisoned for up to eighteen months and the *Chronicle* to pay a fine of $1,000-per-day unless they complied with the subpoenas. These penalties have been stayed by the district court pending these consolidated appeals.

Because the district court's refusal to engage in any appropriate balancing of interests is in error as a matter of law, its orders should be vacated and an order entered quashing the subpoenas on the facts of this case.

STATEMENT OF FACTS

A. The Underlying BALCO Case

In the fall of 2003, a federal grand jury was impaneled in the Northern District of California to investigate the Bay Area Laboratory Co-Operative – "BALCO" – a California nutritional supplements company suspected of distributing illegal steroids and other performance-enhancing drugs. (Excerpts of

Record "E.R." 146-48) BALCO served some of the most well-known athletes in the world, including Major League Baseball players Barry Bonds and Jason Giambi, as well as Olympian Tim Montgomery, once the holder of the world record for the 100-meter dash. (*Id.*; E.R.154-55, 179-87) In the months that followed, a steady stream of elite athletes from baseball, football, and track and field were called before the grand jury. (E.R.150-87) The American public and Washington watched as more than two dozen U.S. athletic icons, all BALCO clients, appeared to testify. (*Id.*)

On February 12, 2004, the government announced a 42-count indictment against BALCO's two principals and two of its distributors – Barry Bonds' personal trainer and an Olympic track coach – for, among other things, possession with intent to distribute steroids.[1] Two weeks after the indictment, prosecutors provided defendants and their counsel discovery material in excess of 30,000 pages of documents pursuant to Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act, 18 U.S.C. § 3500. (E.R.189, 192, 197, 204)

The government notified defense counsel that it had deposited the bulk of discovery documents with a San Francisco copy service, and had lodged a

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[1] E.R.28-31; *see also* Clerk's Record ("C.R.") 12, Ex. 16. For ease of reference, all C.R. citations refer to docket entries in *In re Grand Jury Subpoenas to Mark Fainaru-Wada and Lance Williams*, District Court No. CR-06-90225. The *Chronicle* incorporated the reporters' record filed in support of their motion to quash, which was recognized and accepted by the district court. *See* E.R.448 (Declaration of Sadik Huseny, Vols. I-IV); *see also* E.R.395.

complete set of grand jury transcripts with one defendant's counsel but available to all. (E.R.204-06) The government voluntarily provided this discovery material on an expedited basis to enable the defense to prepare for trial and cross-examination of the government's witnesses. (*Id.*) There is nothing in the record that suggests that any of this testimony would have been sealed at trial or that the athletes were provided any promise of confidentiality before or after the disclosure of their testimony to the defense for trial preparation.

Ten days after the transcripts and other discovery materials were turned over to the defense pursuant to an oral agreement of confidentiality, on March 8, 2004, Judge Susan Illston of the Northern District of California filed a Stipulated Protective Order governing the use and disclosure of the discovery material. (E.R.210-20) The protective order was drafted by the government and executed by only some defendants and counsel and the government trial team. (E.R.218-20)

In July 2005, three of the four BALCO defendants pled guilty to conspiracy to distribute steroids, and two pled guilty to money laundering as well; the fourth BALCO defendant pled guilty to misbranding drugs. (E.R.241-42) Their sentences ranged from probation to an eight month sentence comprised of four months in a minimum security prison camp and four months of house arrest. (E.R.243) All the BALCO defendants have served their sentences.

B. The *Chronicle*'s BALCO Reporting

The C*hronicle* published over 450 articles on the BALCO matter, of which several specifically referred to grand jury testimony. (E.R.222-45) On June 24, 2004, the *Chronicle* published articles by Fainaru-Wada and Williams revealing that track star Tim Montgomery had acknowledged to the grand jury that he had used BALCO-provided human growth hormone and the steroid known as "the clear", facts he had publicly denied. (E.R.247-54)

On December 2 and 3, 2004, the *Chronicle* published articles by Fainaru-Wada and Williams recounting the grand jury testimony of Barry Bonds and other baseball stars including Jason Giambi and Gary Sheffield. (E.R.256-71) The articles reported that Giambi, Sheffield and others admitted using "undetectable" steroids known as "the clear" and "the cream," and that Bonds admitted using substances that matched those descriptions exactly. (*Id.*)

Each of these articles was based on information revealed in grand jury transcripts provided to the reporters by confidential sources. (E.R.35, 120)

C. The Impact of the *Chronicle*'s Reporting

Immediately after the *Chronicle* reported that Bonds, Giambi, Sheffield and others had used performance-enhancing drugs, members of Congress denounced Major League Baseball ("MLB"), threatening to legislate unless MLB promptly tightened its steroid policies. (C.R.12, Exs. 33-35) "The grand jury [testimony]

made it clear," said Senator Joseph Biden. "There's no more saying it's only a rumor." (E.R.273) Through his spokesman, President Bush publicly admonished MLB that it needed to take strong steps to address the steroid problem. (C.R.12, Ex. 37) One month later, on January 13, 2005, MLB and the MLB Players Association announced an historic agreement, providing for the first time for random testing of athletes, with offenders receiving suspension anywhere from ten days to a year. (C.R.12, Ex. 38)

Pressure for further reform mounted in Congress nonetheless. According to one proponent of anti-steroid legislation, the *Chronicle*'s reporting was "critical in prompting Congress to hold hearings, pass legislation, and clean up professional athletics." (E.R.105) Those hearings began in March 2005, seeking to "get to the bottom of this growing scandal." (C.R.12-13, Exs. 47-51) Citing the grand jury testimony of Bonds, Giambi and Sheffield "about their steroid use," legislators admonished MLB for its failure to regulate rampant steroid abuse in the sport. (C.R.12, Ex. 49) By May 2005, three different bills designed to strengthen testing procedures and penalties for the use of performance-enhancing drugs in professional athletics were pending. (E.R.105; C.R.13, Exs. 52, 54, 55) At a September 2005 Senate hearing, professional league Commissioners were assembled and chastised about their "pathetic" attempts to control the use of performance-enhancing drugs. (C.R.13, Ex. 59)

In November 2005, MLB enacted a strict "three strikes" steroid policy. Far stronger than any before, the new policy imposed mandatory suspensions and a lifetime ban for third-time offenders; a program was also implemented to test all players at least twice each season and subject them to random testing year-round. (E.R.279-81) Former MLB Commissioner Fay Vincent observed that this was the direct result of the *Chronicle*'s stories. (E.R.109)

The *Chronicle*'s articles drew particular attention to the impact of steroids on the nation's youth, a central concern for legislators and other policymakers. (C.R.12-13, Exs. 25, 63-73) Parents of student athletes who had committed suicide after abusing steroids credited the *Chronicle*'s reporting with elevating the issue to one of widespread national concern. (E.R.47-48, 65-66) The California Interscholastic Federation – the governing body for high school sports in California – credited the *Chronicle* with prompting its adoption of binding anti-steroid policies in lieu of mere recommendations. (E.R.11-12)

Fainaru-Wada and Williams were honored with numerous awards for their reporting, including a George Polk Award and The Edgar A. Poe Award of the White House Correspondents' Association. (E.R.35-36, 120) On April 30, 2005, at a reception to present the latter award, President George W. Bush commended the reporters for their reporting on BALCO and the steroid scandal. "You've done a service," the President told them. (E.R.36, 120)

D. The Leak Investigation and the Motions to Quash

On December 3, 2004, following the *Chronicle* articles referring to the BALCO grand jury testimony of Bonds and others, Judge Illston issued a Notice to Parties informing them that she was referring the matter to the Department of Justice to determine the source of the leaks of the discovery material. (E.R.283) The Department of Justice commenced an investigation soon afterward. (C.R.13, Ex. 76) On May 5, 2006, the government served three identical subpoenas on Fainaru-Wada, Williams and the *Chronicle's* custodian of records. (E.R.40-42, 125-27, 327-29)

On May 31, 2006, Fainaru-Wada and Williams filed a motion to quash on the ground, among others, that the information sought was privileged from disclosure under the First Amendment and Federal Rule of Evidence 501. Their motion was supported by the unrebutted testimony of a dozen affiants. Many – including a congressman who proposed anti-steroid legislation, the former commissioner of baseball, a world-renowned steroids expert, and parents who blamed their children's suicides on steroid abuse – testified concerning the articles' beneficial impact and credited the *Chronicle*'s reporting for bringing about reform. (E.R.44-49, 62-66, 103-15)

California Attorney General Lockyer testified that compelled disclosure in this case would undermine State reporter's shield laws, in particular California's

sweeping constitutional protection. (E.R.68-92) Other witnesses, including Watergate journalist Carl Bernstein, described the deleterious effect compelled disclosure would have on the flow of important source-derived information to the public. (E.R.5-8, 94-101) Two affiants, former high-ranking Justice Department officials under Attorneys General Ashcroft and Reno, testified that no similar subpoena had been issued during their tenures except in a single instance involving "grave" national security concerns. (E.R.19, 53-54) One specifically testified that the subpoenas here did not comply with DOJ Guidelines and would not have been approved or issued under Attorney General Ashcroft. (E.R.17-20)

As the reporters' motion to quash was being briefed, the *Chronicle* began discussions with the government concerning the separate subpoena addressed to the newspaper. (E.R.364-65) Based on those conversations, it was understood by both that the subpoena was limited to the production of any documents that would reveal the identity of the source(s) who provided grand jury transcripts to the *Chronicle* or its reporters. The *Chronicle* informed the government in a series of letters that it had no such documents in its possession, custody or control. (E.R.374, 378-79, 384-85; *see also* E.R.323-42) The government responded that the *Chronicle*'s answer could not be accurate in light of the government's possession of numerous e-mail communications between reporter Fainaru-Wada and BALCO defendant Victor Conte showing, it believed, that Conte was the

source of grand jury transcripts. (E.R.364-65) The *Chronicle* advised the government once again that the Conte e-mails would not be responsive to the subpoena seeking information relating to the source of the grand jury transcripts. (E.R.378-79)

In response to the reporters' motion to quash, the government presented the district court with a detailed showing of the evidence it had amassed about Conte. (C.R.28, 51-52) In doing so, the government neglected to inform the district court that it had already been told by the *Chronicle* that nothing related to Conte was responsive to its subpoenas — either directly or indirectly. (*Id.*) Subsequent to the filing of the reporters' motion to quash, the government twice altered its interpretation of the subpoenas to expand their scope.[2] (E.R.367, 391, 397, 401) As a result, the *Chronicle* moved to quash on September 6, 2006. (E.R.447-48)

E. The District Court's Decisions Denying the Motions to Quash

On August 15, 2006, Judge White denied the reporters' motion to quash. While recognizing the "important policy considerations and concerns" raised by the reporters and concluding that confidential sources are "essential" in helping the press to fulfill its societal role, the court viewed *Branzburg*, 408 U.S. 665, and *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397 (9th Cir. 1993), as controlling in this case. (E.R.350-52) Judge White concluded that he was "require[d]" and

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[2] The government also reissued its subpoena to the *Chronicle* on July 19, 2006. (E.R.367, 387-89)

"bound" by those decisions to reject the reporters' claim of First Amendment protection because the subpoenas were issued in the context of a grand jury investigation. (E.R.352-53) Reading both decisions as precluding First Amendment balancing absent proof that there had been an "abuse of the grand jury process" tantamount to bad faith, he concluded that none had been shown here. (E.R.354-55)

The district court also declined to recognize a privilege under Federal Rule of Evidence 501, despite the overwhelming consensus across the country that reporters are privileged not to reveal their confidential sources, a consensus reflected in the fact that 49 of the 50 states have determined to afford legal protection in such circumstances. (E.R.356-57) While Judge White found the arguments in favor of a privilege "very compelling" (E.R.346), the court ruled that "unless and until the Supreme Court states that a common law reporter's privilege exists, or unless Congress enacts such a privilege, *Branzburg*'s mandate is binding," and in the court's view, precludes recognition of such a privilege in this Circuit. (E.R.357)

Having rejected any privilege under Rule 501, the district court observed that even if there were such a privilege, any balancing would be limited to consideration of the government's need and exhaustion of alternative sources, a test the court found would be easily satisfied by the government in this leak case.

In choosing that test, the district court made no distinction between leak and non-leak cases, between confidential and non-confidential source cases. (E.R.357-58) It disregarded this Court's long-standing instruction, articulated in *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995) ("*Shoen II*"), that any appropriate balancing standard must ensure that compelled disclosure of a journalist's confidential sources is the exception and not the rule. It rejected any test that balanced the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value. (E.R.358) *See Miller*, 438 F.3d at 1175 (Tatel, J., concurring); *Gonzales*, 459 F.3d at 185-86 (Sack, J., dissenting).

The district court adopted the same reasoning in denying the *Chronicle*'s motion to quash just over one month later. (E.R.395)

F. The District Court's Contempt Orders

On September 25, 2006, Fainaru-Wada and Williams were held in civil contempt and ordered imprisoned for up to eighteen months – longer than the combined sentences of all four convicted BALCO defendants – or "until such time as [they are] willing to give such testimony or provide such information." (E.R.407) The *Chronicle* was held in civil contempt on October 20, 2006, and ordered to pay a daily sanction of $1,000 until it complied. (E.R.409-10) The court below did not consider less coercive measures, nor did it explain why such

measures would be ineffective. All penalties have been stayed pending appeal. (E.R.407, 410)

SUMMARY OF ARGUMENT

Had the district court reached the balancing of interests that is required in this case by the First Amendment and Federal Rule of Evidence 501, the record makes clear that the subpoenas should have been quashed. The *Chronicle*'s revelation of information disclosing elite athletes' use of illegal drugs occurred not in the context of grand jury proceedings but later, in connection with an ensuing criminal case headed for a public trial with government witnesses whose identities were all well known. This case involves no issue of national security and no Fifth or Sixth Amendment interest. No law enforcement objective was compromised. The government's need to compel the reporters' disclosure of confidential sources is so slight in this case that two former high-ranking Justice Department officials have attested that throughout their tenures no subpoenas were ever issued to reporters in similar circumstances. And one of them, who served under Attorney General Ashcroft, observed that he would have rejected the application out of hand.

On the other side of the balance, the *Chronicle*'s articles put a name and face on an abstract public health issue for the first time. They were the singular catalyst for bringing the issue of steroids in sports to the forefront of public consciousness

and debate, instigating real and important changes to law and policy. At the same time, the record provides uncontroverted evidence of the devastating consequences that compelled disclosure of the reporters' confidential sources would have on the quality of information delivered to the American public.

The First Amendment and Federal Rule of Evidence 501 require a balance of interests in this case, and that balance should have led the district court to quash the subpoenas on the facts at issue here. Yet, the district court, acting contrary to the weight of authority in this Circuit, saw no role for the First Amendment at all.

The district court also declined to recognize, in a case of first impression in this Circuit following the Supreme Court's seminal decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), the existence of any reporter's privilege under Rule 501. In doing so, the district court ignored the standards articulated by the Supreme Court in *Jaffee*, and, in particular, the all but universal agreement among the states – and in California itself – that reporters are privileged not to reveal their confidential sources. Instead the district court adhered to the very analytic framework overruled by *Jaffee*. This was clear legal error. The law of this Circuit is clear that the intervening higher authority of the Supreme Court – in this case, *Jaffee* – must control. Moreover, as reflected in the testimony of California Attorney General Lockyer, failure to recognize a reporter's privilege under Rule 501 in this case

would undermine and frustrate the laws of a vast majority of states, including California.

The government's efforts to compel the reporters to disclose their sources – forcing a choice between source betrayal and prison – cannot be justified on this record.[3]

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO ENGAGE IN A PROPER BALANCING OF INTERESTS AS REQUIRED BY THE FIRST AMENDMENT AND FEDERAL RULE OF EVIDENCE 501

A. The First Amendment Requires Judicial Balancing of Interests Where Grand Jury Subpoenas Call For Confidential Source Information

The Supreme Court has spoken directly to the issue of confidential source protection only once, thirty-four years ago, in *Branzburg*, 408 U.S. 665. In *Branzburg*, by a 5-4 decision, the Supreme Court upheld contempt convictions for journalists who had failed to appear or testify before grand juries seeking information they derived from confidential sources. At the same time, the majority emphasized that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. Justice Powell, who joined the majority with his deciding vote, wrote separately in a concurring opinion to emphasize the

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[3] The district court also erred by failing to impose the least coercive sanction available to achieve the goals sought by the court, choosing imprisonment instead. (E.R.407) *See United States v. Flores*, 628 F.2d 521, 527 (9th Cir. 1980); *Lambert v. Montana*, 545 F.2d 87, 89-90 (9th Cir. 1976).

narrowness of the majority opinion. In so doing, Justice Powell observed that the Court's holding did not mean that "newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Id.* at 709 (Powell, J., concurring).

In clarifying the nature of these "constitutional rights," Justice Powell explained, in an oft-quoted passage, that:

> [I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates [a] confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. *The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.* The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 710 (emphasis added)(footnote omitted).

While *Branzburg* is no model of clarity,[4] a significant majority of federal courts that have considered whether the First Amendment provides protection to journalists from compelled disclosure of their confidential sources have concluded that it does, including this Court. These courts require a case-by-case balancing of

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[4] *Branzburg* has been referred to by one member of the Court as having been decided "by a vote of four and a half to four and a half." Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 635 (1975).

interests consistent with, as Justice Powell phrased it, "the tried and traditional way of adjudicating such questions." *Id.*

The district court in this case took a different tack, adopting instead the government's argument that *Branzburg* precluded it from engaging in any balancing or consideration of First Amendment interests whatsoever. (E.R.352-55) Significantly, the district court did not find an absence of First Amendment interests or that they were insubstantial. To the contrary, it recognized exactly what was at stake for the press – its ability to "bring[] issues to the forefront of public attention, which may lead to changes in policy and the law." (E.R.350) "Without question," the district court concluded, "confidential sources often are essential in assisting the press in that task." (E.R.351) The district court nevertheless held that it was barred from engaging in any First Amendment balancing analysis. It considered its hands tied by *Branzburg* and this Court's discussion of *Branzburg* in *Scarce*, which it read to mean it *must* automatically subordinate First Amendment interests in any case involving a grand jury subpoena in all but the most egregious cases of demonstrable prosecutorial misconduct.

The district court's categorical holding amounts to a *per se* rule in favor of the government and against the press in virtually any grand jury subpoena matter.[5]

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[5] The district court's proviso for balancing where there has been an "abuse of the grand jury process" is no concession to the First Amendment at all – such scrutiny would be warranted in *any* case irrespective of the existence of First

Such a rule is incompatible with the First Amendment and the role of federal courts. It would in effect foreclose courts from adjudicating First Amendment claims – something they are uniquely qualified to do – and require them instead to defer to prosecutorial judgments in all grand jury matters. This rule is particularly ill-suited to resolving First Amendment claims where the government is an interested party and any balancing it may (or may not) choose to do under its own DOJ Guidelines would not be subject to challenge or review by any court under the district court's decision. (E.R.360 n.9)

Making sense of the differing opinions in *Branzburg* requires a clear understanding of what exactly the press was seeking there. The press in *Branzburg* sought a level of protection strikingly different from the modest judicial balancing sought here. It advocated a strict-scrutiny-like standard that the Supreme Court characterized as "*a virtually impenetrable constitutional shield*," 408 U.S. at 697 (emphasis added), one analogous to the Fifth Amendment privilege against self-incrimination. *Id.* at 689-90. The near-absolute privilege sought by the press in *Branzburg* would have immunized journalists from testifying before grand juries in almost every circumstance. In fact, two of the three reporters in *Branzburg* had

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Amendment interests. *See* Fed. R. Crim. P. 17(c); *New York Times Co. v. Gonzales*, 382 F.Supp.2d 457, 491 (S.D.N.Y. 2005) (rejecting the government's argument that First Amendment balancing is limited to instances of bad faith as "tautological" because the recipient of an "abusive subpoena" already has the right to move to quash under Rule 17(c))(citing cases), *vacated on other grounds*, 459 F.3d 160 (2d Cir. 2006).

been granted protective orders shielding them from having to disclose their confidential sources, yet still they objected to any appearance before the grand jury, for any purpose. *Id.* at 670 (Branzburg), 677-78 (Caldwell). The proposed privilege was viewed as so "far-reaching," the Court feared it would "fasten[] a nationwide rule on courts" that would place reporters and their sources "either above the law or beyond its reach." *Id.* at 699. It was this notion that courts should abdicate "judicial control" that rallied a majority of the Court to its dismissal of the reporters' claims there. What did *not* gain the support of a majority – made abundantly clear by Justice Powell's concurring opinion – was the notion that First Amendment interests are absent in grand jury matters or may be disregarded.

Branzburg's vital corollary holding – one that requires active judicial engagement – is what emerges from the Court's ruling. In the context of its examination of First Amendment protections, the *Branzburg* Court said that "the powers of the grand jury are not unlimited and are subject to the supervision of a judge," *id.* at 688, and that "this system is not impervious to control by the judiciary," *id.* at 698. The concluding portion of the majority opinion noted that "[g]rand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Id.* at 708. It is this broader holding

that Justice Powell specifically emphasized, stressing the need for "case-by-case" balancing by courts, while underscoring "the limited nature" of the majority's precise holding rejecting a near-absolute privilege. *See id.* at 709-710.[6]

That is precisely how this Court has read *Branzburg* in every case to date involving a journalist's claim to confidential source protection. *See Shoen II*, 48 F.3d at 414-15; *Shoen I*, 5 F.3d at 1292-93; *United States v. Pretzinger*, 542 F.2d 517, 520-21 (9th Cir. 1976) (per curiam); *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975). Almost since the day *Branzburg* was decided, this Court has recognized that Justice Powell's fifth and deciding vote controlled the outcome in that case and that it recognized the existence of a qualified privilege for reporters in the grand jury context. *Shoen II*, 48 F.3d at 415 (citing Powell's concurrence, with *Shoen I* and *Farr,* for the principle that balancing is required); *Bursey v. United States*, 466 F.2d 1059, 1091 n.2 (9th Cir. 1972) (Powell's opinion

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[6] *See Gonzales*, 459 F.3d at 178 (Sack, J., dissenting). In *Gonzales*, the majority declined to address the government's reading of *Branzburg* because it concluded that the government had met its burden of overcoming the reporter's privilege in any event. *See id.* at 173-74. In his dissenting opinion, Judge Sack noted that although he disagreed with that finding, he joined the majority in rejecting the conclusion that the executive branch had the "sort of wholly unsupervised authority to police the limits of its own power under these circumstances." *Id.* at 177. This, he opined, resolved the "primary dispute between the parties," which was "not whether the [press] is protected in these circumstances, or what the government must demonstrate to overcome that protection, but to whom the demonstration must be made." *Id.* at 176. The *Gonzales* majority opinion "makes clear," he said, that the government's showing "must, indeed, be made to the courts, not just the Attorney General." *Id.* at 178 (footnote omitted).

"reinforces our view of the limited reach" of the majority opinion). These cases reflect a reading of *Branzburg* that clearly and consistently requires a case-by-case balancing of First Amendment interests, and a rejection of the view that *Branzburg* precludes balancing in grand jury matters.

This tradition begins with *Bursey*, which reversed a contempt order against two journalists who refused to answer questions before a federal grand jury concerning, *inter alia*, their newspaper's editorial operations, including the identification of writers. This Court made clear, in sweeping language, the need for a balancing of First Amendment interests in such cases and, in a later separate post-*Branzburg* opinion denying rehearing, stressed the consistency of its judgment with *Branzburg*. *See Bursey*, 466 F.2d at 1082-84, 1090-91.

More than twenty years later, in *Shoen I*, this Court reaffirmed the existence and need for a First Amendment-based privilege in "all judicial proceedings, civil and criminal alike." 5 F.3d at 1292 (citing *Farr*, 522 F.2d at 467). In so doing, the court looked back to *Farr*, which "held that the process of deciding whether the privilege is overcome requires that 'the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts, and a balance struck to determine where lies the paramount interest.'" *Id.* at 1292-93 (quoting *Farr*, 522 F.2d at 468).

Farr presented this Court with the same essential question at issue here, on similar facts, and the analysis it conducted should apply in this case too. The "specific question" addressed by this Court in *Farr* was as follows: Where "the First Amendment protection announced by *Branzburg* collide[s] head-on with a compelling judicial interest in disclosure of the identity of those persons frustrating a duly entered order of the court," then "which of these conflicting rights is paramount?" *Farr*, 522 F.2d at 468. This Court held that the answer was to be found in a balancing of interests. *Id.* Therein lies the answer in this case as well.[7]

Dismissing these numerous authorities, the district court relied instead on a decision by this Court that did not involve the press, *Scarce*, 5 F.3d 397, to conclude that *Branzburg* all but eliminated First Amendment balancing in grand jury matters. The district court's reliance on *Scarce* is misplaced for several

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[7] The district court correctly concluded that "*Farr* is the most analogous [of this Court's reporter's privilege cases] to the factual circumstances presented by this case." (E.R.352 n.5) *Farr* involved a petition for habeas corpus filed by a reporter who had been held in contempt by a state court judge for not disclosing who gave him a confidential transcript in violation of a court order. The leaked document was a transcript of a confession by a co-defendant that implicated the defendant in an ongoing criminal trial and was the subject of a protective order barring its release. Precisely because the leak raised *significant and immediate Sixth Amendment issues*, the balance in *Farr* favored disclosure. The balance here, as shown in Section II below, does not. The balance has similarly favored the press in other criminal matters after *Farr* even where First Amendment interests were pitted against fair trial rights. *Pretzinger*, 542 F.2d at 520-21 (employing *Farr*'s balancing approach and affirming district court's refusal to order a reporter to reveal his source of information concerning the circumstances of defendant's arrest).

reasons. First, *Scarce* was not a reporter's privilege case – it involved a failed claim of "scholar's privilege." The communication at issue was a chance breakfast discussion between a graduate student – the "scholar" – who had written on militant environmental groups, including the one under investigation, and his house-sitter, concerning an article in the morning newspaper. The house-sitter was suspected of sending a press release on behalf of the group taking responsibility for the criminal acts discussed in the article. The graduate student refused to testify about what was said over the breakfast table. This Court "[a]ssum[ed] without deciding" that petitioner's reporter's privilege analogy applied in rejecting his unprecedented scholar's privilege claim. *Id.* at 399. It remains that *Scarce* did not adjudicate an actual case or controversy concerning the press' First Amendment right to protect its confidential sources and is not binding on that issue.

Even if *Scarce* were binding, its conclusion that *Branzburg*'s majority's opinion must be "[r]ead together" with the concurring opinion of its crucial fifth vote – Justice Powell – is one that necessitates case-by-case balancing in appropriate cases, as this Court has concluded in every *reporter's* privilege case it has decided. *Id.* at 401. Simply put, *Scarce* does not support the district court's reflexive deference to the government here, where the press is a party and seeks protection for its confidential sources.

The district court's opinion not only conflicts with *Branzburg* and numerous decisions of this Court, it runs against the grain of a larger body of First Amendment jurisprudence. That body provides that "generally applicable laws" that do not single out the press – such as the requirement that all citizens comply with subpoenas – deserve special scrutiny when applied in a way that burdens First Amendment rights. In those cases, the Supreme Court has consistently engaged in a balancing of interests, applying heightened (or "intermediate") constitutional scrutiny where concerns about burdening speech are more than incidental.[8]

Balancing is particularly fitting here, where the government's subpoenas impose so significant a burden on First Amendment interests. The subpoenas here pose a far greater danger to robust reporting and First Amendment interests than the subpoenas in *Branzburg* because they come in the context of a leak investigation.

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[8] *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 532-35 (2001) (balancing First Amendment value of information obtained through unlawful eavesdropping against privacy interests promoted by wiretap law and holding that punishing media distribution of the illegally intercepted information violated First Amendment); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662-64 (1994) (balancing competing First Amendment interests in challenge to "must carry" rules and holding that rules, which raised First Amendment concerns by requiring cable systems to carry local broadcast channels, were justified because they promoted multiplicity of viewpoints); *see also Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 740-41 (1996) (plurality opinion) (Court's First Amendment analysis centers on a "balance of competing interests and the special circumstances of each field of application")(citing cases).

A leak case, unlike any other, singles out speech and directly targets newsgathering on a matter of public concern. It also implicates the core constitutional function of the press to act as a counterbalance to government secrecy. The Supreme Court has repeatedly recognized the value of leaked material in informing the public, in particular where it concerns the operations of our courts and our government. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837-38 (1978) (reversing conviction of newspaper for violation of criminal statute barring disclosure of confidential proceedings before commission investigating charges against judge); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (affirming right to publish "Pentagon Papers").

In addition, "the dynamics of leak inquiries afford a particularly compelling reason for judicial scrutiny of prosecutorial judgments" because they "typically require the government to investigate itself" and carry the threat of retaliation against the press. *Miller*, 438 F.3d at 1176 (Tatel, J., concurring); *accord Gonzales*, 459 F.3d at 177 (Sack, J., dissenting) (quoting same). For all these reasons, leak cases are an especially appropriate category for judicial balancing, far more so than in *Branzburg*, where the criminal conduct under investigation (*i.e.*, drug trafficking, rioting, assassination plots) did not implicate the press or the First Amendment at all.

The district court's conclusion that *Branzburg* establishes a rigid rule precluding judicial review of First Amendment challenges to grand jury subpoenas is unpersuasive. It ignores numerous authorities of this Court requiring balancing in cases involving reporters' confidential sources and renounces the central role of the judiciary in deciding First Amendment controversies. As this Court held in *Bursey*, one does not check his or her First Amendment rights at the grand jury room door. *See* 466 F.2d at 1082. The mere "invocation" of grand jury interests does not "automatically override First Amendment rights" or "carry the Government's burden." *Id.* at 1086. It "is simply one of the factors that must be taken into account in striking the appropriate constitutional balance." *Id.* at 1082.

B. This Court Should Recognize a Reporter's Privilege Under Federal Rule of Evidence 501

The existence of a reporter's privilege under Federal Rule of Evidence 501– separately and independently from the First Amendment – presents a question of first impression in this Circuit following the Supreme Court's decision in *Jaffee*, 518 U.S. 1, which set forth the applicable analytic framework in recognizing a psychotherapist-patient privilege. There is now an overwhelming consensus in this country that a reporter's privilege exists and must be given effect. The district court erred in refusing to recognize it here.

In 1975, three years after *Branzburg* was decided, Congress enacted Rule

501 of the Federal Rules of Evidence which, rather than enumerate a number of specific federal privileges, provided that privileges in federal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. Rule 501 applies with equal force in civil cases, criminal cases and grand jury proceedings. *See* Fed. R. Evid. 1101.

Originally, the Proposed Rules of Evidence defined nine specific testimonial privileges and indicated that these were to be the exclusive privileges absent constitutional mandate, Act of Congress, or revision of the Rules. *See* 56 F.R.D. 183, 230-261 (1972) (Proposed Rules 501-513). Congress rejected that rigid framework in the original proposal in favor of Rule 501's flexible mandate. *See Jaffee,* 518 U.S. at 8 n.7; *Trammel v. United States*, 445 U.S. 40, 47 (1980); *see also United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.25 (1984) ("Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them.") The legislative history makes clear that, in approving this flexible approach, Congress expected the federal courts to reassess the question of whether a reporter's privilege exists under federal common law. As Congressman Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, stated when presenting the Conference Report to the House, Rule 501 was "not intended to freeze the law of privileges as it now exists." Its

language, he said, "permits the courts to develop a privilege for newspaperpeople on a case-by-case basis." 120 Cong. Rec. 40890, 40891 (1974).[9]

In interpreting Rule 501, the Supreme Court has repeatedly noted Congress' intent to keep the federal law of privilege fluid. "In rejecting the proposed Rules and enacting Rule 501," the Court has held that "Congress manifested an affirmative intention not to freeze the law of privilege," but rather to "leave the door open to change," *Trammel*, 445 U.S. at 47, and to "'continue the evolutionary development of testimonial privileges.'" *Jaffee*, 518 U.S. at 9 (quoting *Trammel*, 445 U.S. at 47).

The Supreme Court's most comprehensive analysis of the obligations imposed on federal courts by Rule 501 is set forth in its ground-breaking decision in *Jaffee* in which the Court, in the absence of any federal legislation to that effect, recognized a federal privilege for communications between psychotherapists and their patients and social workers and their clients. In concluding that recognition of such a privilege was compelled by Rule 501, the Court identified three factors to be considered in undertaking the analysis: 1) whether important private and public interests would be served by recognition of the privilege; 2) whether the

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[9] As the legislative history of Rule 501 reveals, Congress intended for the federal law of privilege in all areas to develop on a case-by-case basis. *See* S. Rep. No. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059; H.R. Rep. No. 93-650 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7076; and H.R. Conf. Rep. No. 93-1597 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7110.

evidentiary cost of recognizing the privilege was likely to be modest; and 3) whether similar protections were afforded by the states. In *Jaffee*, analysis of those factors led the Court to recognize the privilege sought there. As regards the journalist/source relationship, application of the *Jaffee* standards unequivocally supports a finding that there is a reporter's privilege that protects the *Chronicle* and its reporters from compelled disclosure of their confidential sources in this case.

That the reporter's privilege serves important private and public interests has been clear in this Circuit since the Court's decision in *Bursey*. As the Court observed there, such protections for the press serve private ends but, in addition and more importantly, they serve the critical public function of making sure that the public is kept informed:

> The First Amendment interests in this case are not confined to the personal rights of [the journalists]. Although their rights do not rest lightly in the balance, far weightier than they are the public interests in First Amendment freedoms that stand or fall with the rights that these witnesses advance for themselves. Freedom of the press was not guaranteed solely to shield persons engaged in newspaper work from unwarranted governmental harassment. The larger purpose was to protect public access to information.... In the context of litigation, vindication of these public rights secured by the First Amendment is primarily committed to persons who are also asserting their individual constitutional rights.

Bursey, 466 F.2d at 1083-84 (citations omitted); *see also Shoen I*, 5 F.3d at 1292. As the Third Circuit observed in recognizing a reporter's privilege under Rule 501:

> The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to

> require belaboring. A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information ... to the public.

Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir. 1979) (citations omitted). Federal courts across the country have consistently emphasized these strong public and private interests in determining the existence of the reporter's privilege in other contexts. *See, e.g., Zerilli v. Smith*, 656 F.2d 705, 710-11 (D.C. Cir. 1981); *Baker v. F & F Investment*, 470 F.2d 778, 782 (2d Cir. 1972). In short, confidentiality is essential for the reporters to sustain the relationships they need with sources and to obtain sensitive information from them. Without it, the press cannot effectively serve the public by keeping it informed.

Thus, just as the Supreme Court concluded in *Jaffee* that the psychotherapist-patient privilege serves "[t]he mental health of our citizenry," an interest the Court found to be "a public good of transcendent importance," 518 U.S. at 11, there is a growing consensus today among federal courts that the reporter's privilege serves the political, economic and social health of our citizenry by allowing the public to make informed decisions. The Department of Justice itself has recognized just that by the adoption of guidelines designed to protect reporters' confidential sources, guidelines which apply equally in civil cases, criminal cases and the grand jury context. *See* 28 C.F.R. § 50.10. As this Court

put it in *Shoen I,* "[r]ooted in the First Amendment, the privilege is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest "'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.'" 5 F.3d at 1292 (citations omitted).

The second factor identified in *Jaffee* is also satisfied here: the important interests served by the reporter's privilege outweigh the likely evidentiary costs. This is because, without a privilege, sources will be much less likely to provide information to the press that prosecutors and/or litigants will be interested in discovering. The *Jaffee* Court's analysis of the psychotherapist-patient privilege in this regard is equally applicable here:

> If the [psychotherapist-patient] privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioners seek access — for example, admissions against interest by a party — is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

Jaffee, 518 U.S. at 11-12.

The third factor identified in *Jaffee* looks to whether there is a consensus among the states in favor of recognizing the privilege. In *Jaffee,* the Court specifically relied upon the fact that "all 50 States and the District of Columbia

have enacted into law some form of psychotherapist privilege." *Id.* at 12. "[T]he policy decisions of the States," the Court held, "bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." *Id.* at 12-13. In light of the general consensus in favor of the privilege, the Court concluded that "[d]enial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id.* at 13.

A similar overwhelming consensus exists today about the reporter's privilege. (E.R.70-71, 76-92) Today, 32 states (plus the District of Columbia) have "shield laws."[10] Of the 18 states without statutory shield laws, all but one —

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[10] *See* Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300-.390; Ariz. Rev. Stat. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Const. art. 1, § 2(b); Cal. Evid. Code § 1070; Colo. Rev. Stat. § 13-90-119; Del. Code Ann. tit. 10, §§ 4320-26; D.C. Code §§ 16-4702-4703; Fla. Stat. § 90.5015; Ga. Code Ann. § 24-9-30; 735 Ill. Comp. Stat. 5/8-901—5/8-909; Ind. Code §§ 34-46-4-1, 34-46-4-2; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-1459; Md. Code. Ann., Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws §§ 767.5a, 767A.6; Minn. Stat. §§ 595.021-.025; Mont. Code Ann. §§ 26-1-902—26-1-903; Neb. Rev. Stat. §§ 20-144—20-147; Nev. Rev. Stat. 49.275, 49.385; N.J. Stat. Ann. §§ 2A:84A-21.1—21.5; N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat. § 8-53.11; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code Ann. §§ 2739.04, 2739.12; Okla. Stat. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510-.540; 42 Pa. Cons. Stat. Ann. § 5942(a); R.I. Gen. Laws §§ 9-19.1-1—9-19.1-3; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208. The New Mexico legislature adopted a shield law in 1973, but the statute was struck down three years later by the New Mexico Supreme Court as an act in excess of legislative authority. After the New Mexico Supreme Court adopted the journalist's privilege as an evidentiary rule in 1982 (*see* N.M.R. Evid. 11-514), the legislature reasserted its original privilege, which is currently codified at N.M. Stat. § 38-6-7. For a history of the privilege in New Mexico, *see* Daniel M. Faber,

Wyoming, which has remained silent on the issue — have recognized a reporter's privilege in one context or another.[11] The nation-wide consensus is also reflected

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Comment, *Coopting the Journalist's Privilege: Of Sources and Spray Paint*, 23 N.M. L. Rev. 435, 440 (1993). Connecticut is the most recent state to have adopted a shield law. *See* Conn. Public Act No. 06-140 (Reg. Sess.). The Governor signed H.B. 5212 on June 6, 2006 and it took effect on October 1, 2006.

[11] *See Idaho v. Salsbury*, 924 P.2d 208 (Idaho 1996) (criminal); *In re Wright*, 700 P.2d 40 (Idaho 1985) (criminal); *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977) (civil); *Kansas v. Sandstrom*, 581 P.2d 812 (Kan. 1978) (criminal); *In re Letellier*, 578 A.2d 722 (Me. 1990) (grand jury); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991) (grand jury); *Sinnott v. Boston Retirement Board*, 524 N.E.2d 100 (Mass. 1988) (civil); *Ayash v. Dana-Farber Cancer Institute*, 706 N.E.2d 316 (Mass. App. Ct. 1999), *cert. denied*, 126 S. Ct. 397 (2005) (civil); *Missouri ex rel. Classic III, Inc. v. Ely*, 954 S.W.2d 650 (Mo. Ct. App. 1997) (civil); *New Hampshire v. Siel*, 444 A.2d 499 (N.H. 1982) (criminal); *Opinion of the Justices*, 373 A.2d 644 (N.H. 1977) (civil statutory proceeding); *Hopewell v. Midcontinent Broadcasting Corp.*, 538 N.W.2d 780 (S.D. 1995) (civil); *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675 (Tex. App. 1991) (civil); *Vermont v. St. Peter*, 315 A.2d 254 (Vt. 1974) (criminal); *Brown v. Virginia*, 204 S.E.2d 429 (Va. 1974) (criminal); *Clemente v. Clemente*, 56 Va. Cir. 530 (2001) (civil); *Philip Morris Co. v. ABC, Inc.*, 36 Va. Cir. 1 (1994) (civil); *Clampitt v. Thurston County*, 658 P.2d 641 (Wash. 1983) (civil); *Senear v. Daily Journal-American*, 641 P.2d 1180 (Wash. 1982) (civil); *Washington v. Rinaldo*, 673 P.2d 614 (Wash. Ct. App. 1983) (criminal), *aff'd on other grounds*, 689 P.2d 392 (Wash. 1984); *West Virginia ex rel. Charleston Mail Ass'n v. Ranson*, 488 S.E.2d 5 (W. Va. 1997) (criminal); *West Virginia ex rel. Hudok v. Henry*, 389 S.E.2d 188 (W. Va. 1989) (civil); *Kurzynski v. Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995) (civil); *Zelenka v. Wisconsin*, 266 N.W.2d 279 (Wis. 1978) (criminal); *Wisconsin v. Knops*, 183 N.W.2d 93 (Wis. Ct. App. 1971) (grand jury). In Mississippi, a trial court has concluded that the state constitution provides a basis for a qualified reporter's privilege. *Hawkins v. Williams*, No. 29,054 (Miss. Cir. Ct. Hinds Co. Mar. 16, 1983) (unpublished opinion). In both Mississippi and Utah, trial courts have applied the reporter's privilege in both civil and criminal contexts. *See Pope v. Village Apartments, Ltd.*, No. 92-71-436 CV (Miss. 1st Cir. Ct. Jan. 23, 1995) (unpublished opinion) (Gibbs, J.) (civil); *Mississippi v. Hand*, No. CR89-49-C(T-2) (Miss. 2d Cir. Ct. July 31, 1990) (unpublished opinion) (criminal); *In re Grand Jury Subpoena*, No. 38664 (Miss. 1st Cir. Ct. Oct. 4, 1989) (unpublished

in the DOJ's own guidelines.

A final factor that this Court must consider in determining whether a reporter's privilege should be recognized under Rule 501 is the treatment afforded reporters under the law of California. *See, e.g., Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996) (in determining federal law of privilege, court "may also look to state privilege law — here, California's — if it is enlightening"); *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975)("*Lewis II*")("In determining the federal law of privilege in a federal question case, absent a controlling statute, a federal court may consider state privilege law.").

California has one of the strongest shield laws in the nation. (E.R.69) Indeed, it is the only shield law in the nation that is embodied in the state's constitution. It provides that a newsperson "shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured ... or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." Cal. Const. art. 1, § 2(b); *see also* Cal. Evid. Code § 1070 (same). "The

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opinion) (grand jury); *Lester v. Draper*, No. 000906048 (Utah 3d Dist. Ct. Jan. 16, 2002) (Frederick, J.) (unpublished opinion) (civil case); *Utah v. Koolmo*, No. 981905396 (Utah 3d Dist. Ct. Mar. 29, 1999) (Hilder, J.) (unpublished opinion) (criminal case). In Hawaii, a reporter's privilege has been recognized by the federal district court there in a diversity action. *See De Roburt v. Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981) (civil).

shield law is, by its own terms, *absolute* rather than qualified in immunizing a newsperson from contempt for revealing unpublished information obtained in the newsgathering process." *Miller v. Superior Court*, 21 Cal. 4th 883, 890 (1999) (emphasis in original).

In *Playboy Enterprises, Inc. v. Superior Court*, 154 Cal. App. 3d 14, 27-28 (2d Dist. 1984), the Court of Appeal emphasized that the elevation of the shield law to constitutional status "clearly manifest[s] the intent to afford newspersons the highest level of protection under state law.... It has long been acknowledged that our state Constitution is the highest expression of the will of the people acting in their sovereign capacity as to matters of state law. When the Constitution speaks plainly on a particular matter, it must be given effect as the paramount law of the state." The only exception to its absolute terms arises when the shield law clearly and unmistakably conflicts with a defendant's federal constitutional right to a fair trial. *Miller*, 21 Cal.4th at 891. That interest is definitively missing in the instant case. There is no question that these subpoenas would be quashed if issued across town in a California state courthouse.

In *In re Willon*, 47 Cal. App. 4th 1080 (6th Dist. 1996), the Court of Appeal was asked to consider whether it was consistent with California's Constitution to hold two journalists in contempt for refusing to identify a confidential source who leaked information about a criminal defendant's confession in violation of the trial

court's protective order entered in the notorious criminal case concerning the murder of 12-year old Polly Klaas. The information learned by the journalists from someone "close to the case" was broadcast on the first day of jury selection. The following day, the trial judge played a videotape of the broadcast and asked the parties to address his concern that the information was obtained by the reporters in violation of the court's protective order. According to the Court of Appeal, the trial judge observed that

> If these statements were in fact obtained from a person subject to the order, the reporter involved would have "no privilege to disclose this so-called confidential source." The court had an "obligation" to discover who had violated the protective order; otherwise "a court order means nothing."

In re Willon, 47 Cal. App. 4th at 1086.

The reporters in *Willon* were subpoenaed to appear before the court and asked to reveal the identity of the source "close to the case." Both refused and were held in contempt. On appeal the contempt citations were annulled on the basis of Article 1, section 2. After tracing the history of the California shield law and its elevation to constitutional status by the voters of California, the Court of Appeal held that a trial court's interest in protecting the integrity of its own orders and processes was no longer an interest sufficient to overcome the reporter's shield. *In re Willon*, 47 Cal. App. 4th at 1094-97.

That the California Constitution provides complete protection for reporters

from the type of subpoena at issue here makes clear that there is a strong public policy in this Circuit in favor of protecting reporters from such forced disclosure. In his affidavit that is part of the record here, Attorney General Bill Lockyer provides powerful evidence as to why this is so:

> When Californians voted to include a strong shield law in their state Constitution, they made a deliberate policy choice on where to strike the balance between the public's interest in forcing reporters to disclose confidential sources and its interest in a robust free press.... California voters understood that an intimidated press cannot effectively inform the public, and when the public is not informed, our democracy cannot properly function. When the government can compel journalists to reveal their sources, and jail them for refusing, it endangers not just the freedom of the press, but the people's liberty.

(E.R.69-70) While we do not suggest that the California Constitution governs in this case, the protection it provides should weigh heavily in favor of finding an equivalent reporter's privilege under Rule 501.

The question of whether a reporter's privilege should be recognized under Rule 501 in light of the Supreme Court's ground-breaking decision in *Jaffee* and the now virtually universal agreement among the states — most particularly California — that such a privilege should be recognized is one of first impression in this Circuit. The court below erred by ignoring *Jaffee*'s authority and relying instead on *dicta* in *Lewis II*, 517 F.2d 236 (9th Cir. 1975), and *Scarce*, 5 F.3d 397 (9th Cir. 1993), declining to recognize a reporter's privilege under Rule 501. This was clear legal error by the district court. Both of those rulings predate *Jaffee* and

neither can survive *Jaffee*'s analysis.

In *Lewis II*, this Court commented, in *dictum,* that it would be difficult to urge that a common law privilege could be recognized in 1978 in light of the Supreme Court's then recent decision in *Branzburg*. *Branzburg* itself, which was decided three years before Rule 501 was adopted, did not consider the issue of whether a reporter's privilege should be recognized under federal common law. *See Miller*, 438 F.3d at 1160 (Henderson, J., concurring); *id.* at 1170-71 (Tatel, J., concurring); *but see id.* at 1154-55 (Sentelle, J., concurring), *cert. denied*, 125 S. Ct. 2977 (2005).[12] But even assuming *arguendo* that *Branzburg* could be read as rejecting a federal common law privilege — which it cannot — much has changed since *Branzburg* was decided in addition to the adoption of Rule 501. While a mere 17 states provided some sort of statutory protection to reporters with respect to confidential sources in 1972 (*see Branzburg*, 408 U.S. at 689 & n.27), now, as noted above, 49 states plus the District of Columbia provide absolute or qualified protection for reporters. The Supreme Court considered just this sort of trend sufficient to support recognition of a testimonial privilege in *Jaffee*. 518 U.S. at

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[12] The "questions presented" to the *Branzburg* Court were all narrowly limited to a First Amendment claim. *See id.* at 1170-71 (Tatel, J., concurring). No federal common law issue was raised; nor could one have been in that three of the four cases in *Branzburg* came to the Court from state courts where federal common law is not implicated. *See* Association of the Bar of the City of New York, Committee on Communications and Media Law, *The Federal Common Law of Journalists' Privilege: A Position Paper* at 11-12 & n.4 (Fall 2005), *available at http://www.nycbar.org.*

12-13.

In *Scarce*, this Court also suggested in *dictum* that it was constrained from recognizing a reporter's privilege by the Supreme Court's decision in *Branzburg* notwithstanding Congress' subsequent adoption of Rule 501. *See Scarce*, 5 F.3d at 402-03. This suggestion is at odds with the task *Jaffee* later concluded federal courts had been given by Congress to evaluate new privileges on the basis of both reason and experience. If the development of privileges is to remain fluid (as *Jaffee* makes clear), courts must look to the state of the law at the time the privilege is asserted (as *Jaffee* demands).

After acknowledging that the reporter's privilege had been recognized by many federal courts, this Court in *Scarce* also expressed reluctance to follow its sister circuits on the grounds that a reporter's privilege had not been widely recognized in grand jury cases. *See Scarce*, 5 F.3d at 403 & n.2. This analysis also cannot survive *Jaffee*. In *Jaffee*, the Court looked first to whether a psychotherapist/patient privilege existed in any form under Rule 501 (concluding that it did) and then considered whether it should apply in the specific context of that case (involving social workers). The suggestion that a court should first consider whether there is a consensus that a privilege exists in grand jury cases rather than examine whether there is a consensus that the privilege exists at all is similar to the argument proffered by the dissenters in *Jaffee* and rejected by the

seven-member majority. *Jaffee*, 518 U.S. at 15-17, 20-21 (Scalia, J., dissenting). While the application of the privilege and the ultimate result may vary depending on the context of the case, the question of whether there *is* a privilege cannot depend on the caption of the case.[13]

It is not surprising that the Court's comments in *Lewis II* and *Scarce* cannot be reconciled with the Supreme Court's later analysis in *Jaffee*. This Court simply had a different approach to Rule 501 in its pre-*Jaffee* decisions than the approach later espoused by the Supreme Court. This is best evidenced by the decision in *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989), where this Court considered whether a psychotherapist/patient privilege should be recognized under Rule 501, the precise issue later considered by the Supreme Court in *Jaffee*. In *In re Grand Jury Proceedings*, this Court declined to recognize a

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[13] Since *Jaffee*, the issue of whether there is a reporter's privilege under federal common law has been considered in two grand jury cases: *In re Grand Jury Subpoena, Judith Miller*, and *New York Times Co. v. Gonzales*. Five of six Circuit Judges have now either concluded that such a privilege exists or assumed its existence in conducting a balancing of interests. Only one Judge rejected it. In the *Miller* case, the panel could not agree as to whether a reporter's privilege should be recognized under federal common law. One member concluded that it should be recognized in light of *Jaffee*, 438 F.3d at 1166 (Tatel, J., concurring); one member considered it unnecessary to decide the issue but observed that the court was not foreclosed from doing so by *Branzburg*, *id.* at 1160 (Henderson, J., concurring); the third member declined to recognize such a privilege, *id.* at 1153 (Sentelle, J., concurring). In *Gonzales*, one panelist concluded that the privilege should be recognized in light of *Jaffee*, 459 F.3d at 179-84 (Sack, J., dissenting); and the remaining two first assumed a similar result and then concluded that the privilege would be overcome on the particular facts before it. *Id.* at 169.

psychotherapist/patient privilege on two grounds. First, it reasoned that since the psychotherapist/patient privilege was not historically recognized at common law, the fact that many states had adopted such a privilege by statute was irrelevant to the Rule 501 analysis which, this Court perceived, was strictly limited to evaluating historical common law foundations for a privilege. *Id.* at 565. In *Jaffee,* the Court flatly rejected that argument:

> It is of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than judicial decision. Although common-law rulings may once have been the primary source of new developments in federal privilege law, that is no longer the case. In *Funk v. United States*, 290 U.S. 371 (1933), we recognized that it is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both "reason" and "experience." *Id.* at 376-381. That rule is properly respectful of the States and at the same time reflects the fact that once a state legislature has enacted a privilege, there is no longer an opportunity for common law creation of the protection.

Jaffee, 518 U.S. at 13 (additional citations omitted).

The second basis offered by this Court in *In re Grand Jury Proceedings* for declining to recognize a federal privilege for psychotherapists and their patients was also flatly rejected by the Supreme Court in *Jaffee.* This Court reasoned that because its inquiry under Rule 501 was limited to an examination of common law foundations for a privilege, only Congress could adopt a privilege that lacked historic common law roots. *In re Grand Jury Proceedings*, 867 F.2d at 565. As *Jaffee* would later make clear, that is precisely the wrong analysis under Rule 501.

> [Rule 501] did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather *directed federal courts* to "continue the evolutionary development of testimonial privileges."

Jaffee, 518 U.S. at 8-9 (citing *Trammel v. United States*, 445 U.S. 40, 47 (1980)) (emphasis added). To focus exclusively on whether a privilege has historical common law roots, as this Court did in *In re Grand Jury Proceedings, Lewis II* and *Scarce*, is an inquiry that simply does not survive *Jaffee*.

The district court in this case found the argument for a Rule 501 reporter's privilege "very compelling" (E.R.65), acknowledging that "*Scarce* pre-dates *Jaffee*" and also that "the legal landscape within the states indeed may have changed since *Branzburg* was decided." (E.R.357) It nevertheless declined to recognize the privilege, considering itself bound by *Lewis II* and *Scarce*. "[T]he Ninth Circuit's position on the issue appears clear: unless and until the Supreme Court states that a common law reporter's privilege exists ... *Branzburg*'s mandate is binding." (*Id.*) The answer to the district court's reasoning that only the Supreme Court can change the law of common law privilege set forth in *Branzburg* is that *it has*. *Branzburg* predated enactment of Rule 501 by several years and employed an analytic model – one focused exclusively on historical common law roots, disregarding recent developments in legislation and case law – that is entirely at odds with Rule 501. *Jaffee* made that clear, rejecting the precise analytic model employed by the Supreme Court in *Branzburg* and this Court in

Scarce and *Lewis II*. Thus, even if *Scarce* and *Lewis II* were considered more than *dicta* on the appropriate analysis under Rule 501, their value as precedent was superseded by *Jaffee*. *Jaffee* is the only case binding on this Court on the issue:

> Ordinarily, a three-judge panel "may not overrule a prior decision of the court." *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). When "intervening higher authority" is irreconcilable with a prior decision of this court, however, "a three-judge panel of this court ... should ... reject the prior opinion of this court as having been effectively overruled." *Id.* at 900.

Overstreet v. United Bhd. of Carpenters and Joiners, 409 F.3d 1199, 1205 n.8 (9th Cir. 2005).

Since the Supreme Court's decision in *Jaffee*, numerous federal courts, including two district courts in this Circuit, have employed its analysis to recognize new evidentiary privileges under Rule 501. *See, e.g., Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998) (recognizing a privilege for all communications made in conjunction with a formal mediation proceeding); *In re Grand Jury Proceedings, Unemancipated Minor Child*, 949 F. Supp. 1487 (E.D. Wash. 1996) (recognizing a privilege for confidential communications between a parent and an unemancipated minor child); *see also Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003) (recognizing privilege for communications made in furtherance of settlement negotiations).

Applying the *Jaffee* factors, with special solicitude to California's strong

mandate in favor of a reporter's privilege, this Court in a case of first impression post-*Jaffee* should recognize and give effect to a Rule 501 privilege that protects confidential source information.

C. The Proper Standard in a Leak Case Requires That Compelled Disclosure Be the Exception, Not the Rule

This Circuit has long followed a flexible balancing approach to motions to quash subpoenas seeking journalists' source information. *See Shoen II*, 48 F.3d at 415; *Shoen I*, 5 F.3d at 1292-93; *Pretzinger*, 542 F.2d at 520; *Farr*, 522 F.2d at 468; *Bursey*, 466 F.2d at 1091. This Court has never "formalize[d] this balance by identifying the specific showing required to pierce the journalist's privilege," except once in *Shoen II*. 48 F.3d at 415-16 (citations omitted). There the court set forth a three part standard requiring the requesting party to show that the material sought is (1) unavailable despite exhaustion of all reasonable alternative sources, (2) noncumulative, and (3) clearly relevant to an important issue in the case. *Id.* at 416. The district court determined this to be the applicable test in the event a Rule 501 privilege was recognized. This, however, constituted legal error, for the balancing in a leak case involving confidential sources requires more.

Shoen II's three part test – a classic formulation designed for a *non-leak* case involving requests for *non*-confidential information – should be only the beginning of the analysis here, not the end. Using *Shoen II*'s factors alone, the balance will

often weigh in the government's favor in a leak case, since the identity of the source is directly at issue. Far more applicable here than *Shoen II*'s test is the premise upon which it was based: "The test we adopt must," this Court concluded, "ensure that compelled disclosure is the exception, not the rule." *Id.* at 416. The same sensitivity to First Amendment interests was and is necessary here in fashioning a balancing analysis appropriate for a leak case involving confidential sources.

Two recent cases provide examples of how such a standard might be structured. In *Miller*, Judge Tatel's concurring opinion sets forth a balancing standard specifically designed for leak cases. 438 F.3d at 1173-74. That standard is premised on the reality – acknowledged by the Government in that case – that "when the government seeks to punish a leak, a test focused on need and exhaustion will almost always be satisfied." *Id.* at 1174. "In leak cases," Judge Tatel wrote, courts "must consider not only the government's need for the information and exhaustion of alternative sources, but also the two competing public interests lying at the heart of the balancing test." *Id.* at 1175.

> *Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value.* That framework allows authorities seeking to punish a leak to access key evidence when the leaked information does more harm than good ....

Id. (emphasis added). Judge Tatel noted that this approach to balancing was based in part on the Justice Department's own guidelines, 28 C.F.R. § 50.10(a), and the Supreme Court's "similar requirement of 'legitimate news interest,' meaning 'value and concern to the public at the time of publication,' in assessing restrictions on government employee speech." *Id.* at 998 (citing *City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam)).[14]

In *Gonzales*, Judge Sack agreed that a test limited to need and exhaustion "strikes no balance at all" in a leak case. 459 F.3d at 185 (Sack, J., dissenting). He proposed an alternative three-part test (applied by the majority as well, but found to be overcome on the facts of that case, *id.* at 171 n.5) which effectively compressed the *Shoen II* factors into the first two prongs and adopted a public interest standard similar to Judge Tatel's for the third prong. The third prong would require the government to make a "clear and specific showing" that "'nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and maintaining a free flow of information to citizens.'" *Gonzales*, 459 F.3d at 187 (Sack, J., dissenting) (citation omitted).

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[14] Judge Tatel ultimately concluded in *Miller* that the balance tipped in favor of the government under this test, as the value of the leaked information in that case (identifying a CIA covert agent as such) was slight and the potential harm was great. 438 F.3d at 1178-79, 1182.

These are examples of the sort of balancing that would augment the *Shoen II* standard in a way to "ensure that compelled disclosure is the exception, not the rule," 48 F.3d at 416, in a leak case involving confidential sources. Judge White explicitly and incorrectly rejected the argument that matters of public interest should be considered in striking a balance in a privilege rooted in Rule 501.

II. THE BALANCE OF INTERESTS UNDER THE FIRST AMENDMENT AND FEDERAL RULE OF EVIDENCE 501 TIPS IN FAVOR OF THE *CHRONICLE* AND ITS REPORTERS ON THE PARTICULAR FACTS OF THIS CASE

Disclaiming any legal requirement to balance, the district court nonetheless purported to do so in considering appellants' argument that Rule 501 provides a privilege in this case. (E.R.358-59) The district court's analysis was perfunctory and its conclusion cannot be reconciled with the factual record. Judge White concluded without more that:

> [T]he Court is satisfied that the Government has established that it has exhausted all reasonable alternatives to discover the source of the leak absent Movants' testimony and production of documents. Before the grand jury in this case was ever convened, the parties in the BALCO case submitted declarations to Judge Illston documenting their handling of grand jury materials, and the Government has submitted waivers obtained from its own employees as well as other materials tending to show they have exhausted all reasonable alternatives to obtain this information. (*See* Hershman Decl., Exs. AA, FF, GG and Hershman Reply Decl, Ex. 1) The Court also concludes that the Government has established that the testimony would not be cumulative in that it would appear to be the only first-hand evidence of the identity or identities of the source or sources. Finally the Court concludes that the Government has established that the testimony and

> documents requested by the grand jury are relevant to an important issue in the investigation. Indeed, they are central to the investigation.

(*Id.*)

If this were all that were required to defeat it, the reporter's privilege is little privilege at all. We address each of the factors considered by Judge White and then turn to the factor he declined to weigh: the importance of the information reported vs. the importance of the government's claimed interest.

A. Relevance

The *Chronicle* and its reporters concede that the testimony sought is relevant to the government's inquiry. By definition the identity of the leaker is relevant to an investigation into the identity of the leaker. That this is so simply serves to demonstrate that additional factors must be considered in a leak case if, as this Court has cautioned, compelling reporters to disclose their confidential sources is to be the exception, not the rule. Otherwise, the government would be entitled to identify each and every confidential source of any journalist merely by serving a grand jury subpoena, giving it full discretion with limited or no judicial review.

B. Cumulativeness

On the issue of cumulativeness, the only evidence in the record of which we are aware suggests that the government is seeking information virtually identical to what it already has. We know from the record that the government has already obtained numerous e-mails between Conte and Fainaru-Wada that it insists are

germane to its investigation. And we know from the dispute about the *Chronicle*'s response to the subpoena that the government is adamant that the *Chronicle* must produce those same e-mails, notwithstanding that the government already has the same or similar information and the *Chronicle*'s testimony that the e-mails do not reveal who leaked the transcripts at all. What that tells us at the very least is that the government has not considered the issue of cumulativeness and that it has failed to demonstrate that it has carried its heavy burden on this factor.

C. Exhaustion of Alternative Sources

The government also did not meet its burden of demonstrating that all reasonable alternative sources of information had been exhausted. In fact the record shows quite the opposite. The only evidence offered by the government to show what it actually did as part of its leak investigation were materials submitted to a Magistrate Judge to obtain a search warrant for Victor Conte's house (E.R.288, 308) and dozens of the e-mails actually seized as a result of that search reflecting that Conte communicated from time to time with Fainaru-Wada.[15]

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[15] Judge White could cite no evidence at all that the *government* had done anything to exhaust alternative sources before subpoenaing these journalists. The only evidence he did cite consisted of (1) the declarations required by Judge Illston from the parties to the BALCO case (executed long *before* the government's investigation began and long *before* the grand jury testimony of Bonds and Giambi was revealed), (2) an irrelevant draft memo of an interview of one of the prosecutors in the BALCO case and (3) documents signed by certain government employees (all *after* the subpoenas to the reporters were issued) waiving any

(C.R.51, Exs. C-T, V-Z, CC) The government's showing not only mocks the exhaustion requirement but is in direct contravention of DOJ's own guidelines which require government attorneys to turn to reporters only as a last resort. *See* 28 C.F.R. § 50.10(b). It also reveals that the government apparently focused its efforts entirely on Conte alone. Given the *Chronicle*'s testimony that information relating to Conte is not even responsive to the government's subpoenas, the government is surely required to do more in demonstrating that it has exhausted all reasonable alternative sources.[16]

The exhaustion requirement takes on particular significance in a leak case because, by the very nature of a leak investigation, other factors — such as relevance — are so easily met by the government. But the district court showed no inclination to examine seriously the government's investigative efforts before approaching the journalists here. The law requires more. For example, in *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992), the court quashed a grand jury subpoena issued to the

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confidentiality agreements they may have had with any reporters after disclaiming that they had any. (E.R.358)

[16] After appellants' filing of the notices of appeal, the government made an *ex parte* filing with the district court. (C.R.100) At a subsequent hearing on appellants' objections to that filing, which were overruled, the district judge gave the government his approval to file those same *ex parte* materials with this Court. (C.R.107) Whatever they may be, these materials had no bearing on the district court's decisions below and cannot have any possible bearing on this appeal, as they were not even before the district court until after it rendered its final orders and the notices of appeal were filed.

press in a leak investigation arising from a criminal case on a record much like the one here. The leaked documents were FBI interview reports (302's) that related rumors of corruption involving various public officials and were produced to defendants during pretrial discovery subject to a protective order. *Id.* at 359, 361-62. Applying the reporter's privilege in the grand jury context, the *Williams* court found the government's showing insufficient to overcome the privilege. It concluded that the government had not made adequate efforts to obtain the information from other potential sources. *Id.* at 370.

The similarities between the record in *Williams* and this case are striking. As in the BALCO litigation, all the attorneys in *Williams* were called before the court and denied that they violated the order or knew of any violation. *Id.* at 363. In quashing the subpoenas, the *Williams* court focused on what else the government could have done but failed to do before issuing subpoenas to reporters. The government in *Williams* made no attempt to subpoena or question under oath any of the defendants, defense counsel, counsels' defense teams or support staffs, or the government's own office staff. *Id.* at 363-64. The same is true here. The record in *Williams* reflected no internal investigation by the government to rule out the possibility the documents were stolen or otherwise procured from the United States Attorney's Office or FBI. *Id.* at 365. Again, the same is true here.

D. Public Interest Balancing

The final factor the district court should have considered in this case also weighs decidedly in the journalists' favor. The *Chronicle*'s articles focused public attention on an issue of great importance and transformed what was principally a debate among policymakers into a national dialogue which led to real reform. The record thoroughly documents the *Chronicle*'s role in these events and the galvanizing impact its reports had. *See supra* at pp. 8-10.

On the other side of the scale, the harm caused by the leak is minimal. An important factor for this Court to consider at the outset – and one we submit weighs heavily against the government – is the nature of the alleged wrongdoing. Against the First Amendment interests in this case there is no breach of national security, no act of terrorism, no violent crime that would go unpunished. Instead, there is violation of a protective order in a criminal case that is now long over. The leaked information, at the time, was intended by all concerned soon to be disclosed at a public trial, and its disclosure in the *Chronicle* caused no demonstrable harm to anyone.

There is no precedent for compelling the *Chronicle* and its reporters to disclose their confidential sources on these facts. Indeed, in the 34 years since *Branzburg* there is virtually no precedent at all for compelling reporters to disclose sources in a leak case, on any set of facts. Up until the *Miller* and *Gonzales* cases

there had been only a single reported case – *Williams*, discussed above – where the Department of Justice sought to compel a reporter to divulge his confidential source in the context of a grand jury leak investigation. It can thus be said with authority that but for the two recent cases that raised national security issues (*Miller*, 438 F.3d 1141; *Gonzales*, 459 F.3d 160), and one aberration 15 years ago that resulted in a loss for the government (*Williams, supra*), there has never been another grand jury leak case litigated against the press by the Department of Justice. This history speaks directly to how slight the government's need for the information really is.

While the government's determination to pursue the reporters in this case sets precedent by marking an unfortunate breach in the social contract between government and the press, it provides no basis whatsoever for adopting a constitutional rule that would defeat the reporter's privilege in every leak case.[17] There is nothing in the record to explain what makes this case so different, so extraordinary, so dangerous to the national interest, that it warrants compelling the reporters here to disclose their sources.

First, there was no adverse impact on the BALCO investigation. By the time any of the *Chronicle* articles concerning athletes' testimony appeared in print,

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[17] The long-standing basis for this "social contract" has been the government's strict adherence to its own Guidelines, adherence considered by the Supreme Court in *Branzburg* and cited there as an important safeguard for the press. 408 U.S. at 706-07 & n.41. Those Guidelines were disregarded here. *See infra* at 59.

BALCO's principals and main distributors had been indicted; the case had proceeded to the discovery phase. All the defendants pleaded guilty and two were sentenced to prison. BALCO was put out of business.

Second, the disclosure of athletes' testimony concerning their own drug use had no effect on defendants' Fifth or Sixth Amendment rights. The BALCO district court and the government made this point clearly in response to motions by two of the BALCO defendants seeking dismissal of their indictments on grounds of prejudicial pretrial publicity. (C.R.12-13, Exs. 21, 81-82) Neither the government nor the court was persuaded by the defendants' arguments; the motions were denied several weeks after the last *Chronicle* article at issue was published. (C.R.13, Ex. 82)

Third, the government's disclosure of the information at issue here as discovery material necessarily diminished the interest in maintaining secrecy that would otherwise attach to grand jury testimony in a pre-indictment or pre-disclosure setting. Although the government suggests that the leak of discovery material in this case is synonymous with a leak of information directly from grand jury proceedings that is simply inaccurate. Secrecy interests were diminished the moment the indictments were handed down. *See, e.g., Metzler v. United States*, 64 F.2d 203, 206 (9th Cir. 1933) ("After the indictment has been found and made public and the defendants apprehended, the policy of the law does not require the

same [grand jury] secrecy as before."). While grand jury transcripts in the pre-indictment phase are "traditionally kept secret," that is not the rule after indictment. *See Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1185 & n.13 (9th Cir. 2006) (citing *In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778, 782 (9th Cir. 1982) ("It is sometimes possible for a nonparty to a grand jury proceeding to obtain access even to the transcripts of those proceedings" after indictment)). When the government took the next step and voluntarily made the decision to disseminate the transcripts very early in the case as part of its discovery or Jencks Act (18 U.S.C. § 3500) disclosure, those materials lost the protection that Fed. R. Crim. P. 6(e) provides as well as the secrecy policies surrounding that rule.

At a minimum, the government's production of the discovery material to defendants shortly after their indictments, combined with its push for an early trial date, reflects its understanding *and intention* that the athletes' testimony *would* be introduced at a public trial and would not – could not – be kept secret much longer. Their stories had moved from the realm of the grand jury to the courtroom. Secrecy interests had given way to the government's need to prove its case at trial and its obligation to provide full disclosure so that the defense could prepare for cross-examination of those witnesses whose testimony would be relevant at trial. (E.R.189, 192, 204-05)

Finally, as supported by the testimony of former Justice Department officials Corallo and Gorelick, the government's failure to abide by the DOJ Guidelines also weighs against disclosure of the reporters' sources. *Williams*, 766 F. Supp. at 371; *see Lewis II*, 517 F.2d at 238-39; *see also* E.R.17-20, 53-54. Those guidelines make clear that subpoenas to the press for unpublished (here confidential) information should only be issued in "exigent" circumstances. 28 C.F.R. § 50.10(f)(4). The U.S. Attorneys' Manual defines "exigent" circumstances as those where "immediate action is required to avoid the loss of life or the compromise of a security interest." U.S. Attorneys' Manual, title 9, Section 13.400. This is consistent with how the guidelines were interpreted as recently as John Ashcroft's tenure as Attorney General, where "exigent" circumstances were those considered necessary to prevent imminent death or bodily harm. (E.R.18) A top official in the Ashcroft DOJ testified here that these subpoenas would not have issued during his tenure precisely because of the absence of exigent circumstances. (E.R.19-20) In fact, no similar subpoenas were issued during that or the prior administration. (E.R.19, 52-53) Whatever one's definition, an investigation into violation of a stipulated protective order a year after the BALCO defendants were convicted does not amount to an exigent circumstance. It suggests that this is an investigation of a leak simply for the leak's sake.

At the end of the day what we have here is a series of stories that changed the face of professional sports and may have saved lives. On the government's side of the balance, we apparently have a quest to punish an already convicted felon and an otherwise ambiguous effort to vindicate a protective order. Neither the *Chronicle* nor Fainaru-Wada or Williams advance the claim that a violation of a protective order is something lightly to be dismissed. It is not. What they do urge is that under any proper balancing of the First Amendment interests undeniably at issue in this case, the privilege should not yield on these facts.

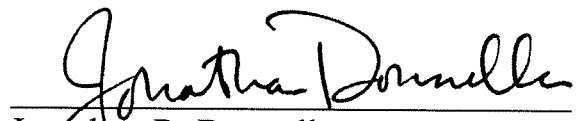
"You did a service," the President said to these journalists. On balance and under these specific facts, the law should not demand that the journalists serve 18 months in jail (and their newspaper pay substantial fines) for protecting the sources(s) who gave them the information to do so.

CONCLUSION

This Court should reverse the district court's orders denying appellants' motions to quash and vacate the orders finding appellants in contempt.

Dated: November 30, 2006

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBERS 06-16995 AND 06-16996

I certify that:

The attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with a size-volume limitation established by separate court order filed October 25, 2006, granting Appellants' request to expand the word limit on joint briefs submitted by more than one party pursuant to Ninth Circuit Rule 28-4, and is proportionately spaced, has a typeface of 14 points or more and contains 15,393 words.

Dated: November 30, 2006

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 505 Montgomery Street, Suite 2000, San Francisco, CA 94111-2562.

I served the below listed document(s) described as:

OPENING BRIEF OF APPELLANTS MARK FAINARU-WADA, LANCE WILLIAMS AND THE *SAN FRANCISCO CHRONICLE*

on **December 1, 2006**, I served the above document(s) on the following party to this cause by overnight delivery as follows:

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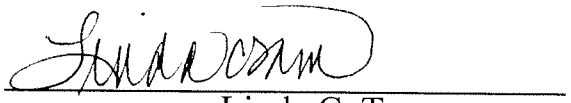
I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **December 1, 2006**, at San Francisco, California.



Linda C. Tam