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Nos. 06-16995 & 06-16996 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# IN RE GRAND JURY SUBPOENAS TO MARK FAINARU-WADA & LANCE WILLIAMS

Case No. 06-16995

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# IN RE GRAND JURY SUBPOENA TO THE SAN FRANCISCO CHRONICLE

Case No. 06-16996

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Dist. Ct. Nos. CR-06-90225-JSW & CR-06-90355-JSW

---

**BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS BY ABC, INC.; ALM MEDIA, INC.; AMERICAN SOCIETY OF NEWSPAPER EDITORS; THE ASSOCIATED PRESS; THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.; THE BAKERSFIELD CALIFORNIAN; BELO CORP.; BLOOMBERG NEWS; CABLE NEWS NETWORK LP, LLLP; CALIFORNIA FIRST AMENDMENT COALITION; CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION; CBS BROADCASTING INC.; DOW JONES & COMPANY, INC.; ESPN, INC.; THE E.W. SCRIPPS COMPANY; GANNETT CO., INC.; LANDMARK COMMUNICATIONS, INC.; LOS ANGELES TIMES; MAGAZINE PUBLISHERS OF AMERICA, MEDIANEWS GROUP, INC.; THE MCCLATCHY COMPANY; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL PUBLIC RADIO, INC.; NBC UNIVERSAL; THE NEW YORK TIMES COMPANY; NEWSPAPER ASSOCIATION OF AMERICA; NEWSWEEK, INC., THE OREGONIAN; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; REPORTERS WITHOUT BORDERS; THE SAN DIEGO UNION-TRIBUNE; SOCIETY OF PROFESSIONAL JOURNALISTS; STEPHENS MEDIA LLC; TIME INC.; AND THE WASHINGTON POST**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29(c) and 26.1 of the Federal Rules of Appellate Procedure, *amici* provide the following disclosures of corporate identity:

1. ABC, Inc., alone or through its subsidiaries, owns ABC News, the ABC Radio Network, abcnews.com, and local broadcast television and radio stations that regularly gather and report news to the public, including KGO-TV in San Francisco, KABC-TV in Los Angeles and KFSN-TV in Fresno. ABC News produces, among other programs, World News Tonight, 20/20 and Nightline. ABC, Inc. is an indirect, wholly-owned subsidiary of The Walt Disney Company, a publicly-traded corporation.

2. ALM Media, Inc. publishes 34 national and regional magazines and newspapers, including *The American Lawyer*, *Corporate Counsel*®, and *The National Law Journal*® as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's *The Recorder,* for example, has been published in Northern California since 1877; the *New York Law Journal* was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later reported on by other national media.

3. The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing unfettered and effective press in the service of the American people.

4. The Associated Press is a not-for-profit membership corporation. It has no parents, subsidiaries or affiliates that have any outstanding securities in the hands of the public, has no publicly held stock and no publicly held company owns 10% or more of its stock. The members of AP are more than 1,500 newspapers and more than 5,000 television and radio stations throughout the United States. AP also serves thousands of subscribing newspapers, news networks and other publishers and distributors of news worldwide. Founded in 1846, AP is now the largest newsgathering organization in the world.

5. The Association of American Publishers, Inc. is the principal trade association for the U.S. book publishing industry, with over 300 members, comprising most of the major commercial book publishers in the United States, as well as smaller and medium-sized houses, non-profit publishers, university presses and scholarly societies.

6. The Bakersfield Californian is a daily newspaper of general circulation published in Bakersfield, CA. It is a private, family-owned company.

7. Belo Corp., a publicly-traded company, began in 1842 and today owns and operates newspaper, television, cable news, and interactive media assets across the nation. Belo publishes The Press-Enterprise, a daily newspaper of general circulation serving Southern California's Inland Empire. Belo's other daily newspapers include The Dallas Morning News. Belo's nineteen television stations include six stations in the nation's fifteen largest broadcast markets.

8. Bloomberg News is operated by Bloomberg L.P., which is comprised of more than 1,800 reporters in eighty-seven bureaus around the world. Bloomberg News publishes more than 4,000 news stories each day, electronically delivering business, financial, and legal news to more than 300,000 business and financial professionals in real-time through the Bloomberg Professional Systems, a propriety desktop system. Bloomberg News also operates as a wire service, distributing news to more than 375 newspapers in twenty-five countries. Bloomberg News operates eleven 24-hour cable and satellite news channels broadcasting worldwide in six different languages; WBBR, a 24-hour business news radio station; Bloomberg Press, a book publisher responsible for more than 100 book titles

a year; Bloomberg Magazines, which publishes two different magazines each month; and Bloomberg.com, which is read by the investing public more than 300 million times each month. Bloomberg L.P. is a privately held company. Merrill Lynch Pierce Fenner & Smith, Inc., a publicly traded company, owns more than 10% of the stock of Bloomberg L.P.

9. Cable News Network LP, LLLP ("CNN"), a division of Turner Broadcasting System, Inc., which is a subsidiary of Time Warner Inc., a publicly traded company, is one of the world's most respected and trusted sources for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; four Web sites, including CNN.com, the first major news and information Web site; CNN Pipeline, an on-demand broadband video service; CNN Newsource, the world's most extensively syndicated news service; and partnerships for four television networks and one Web site.

10. The California First Amendment Coalition ("CFAC") is a nonprofit public interest organization dedicated to advancing free speech and open-government rights. A membership organization, CFAC's activities include educational and informational programs, strategic litigation to enhance first amendment and access rights for the largest number of citizens, legal information and consultation services, and

legislative oversight of bills affecting free speech. CFAC's members are newspapers and other news organizations, bloggers, libraries, civic organizations, academics, freelance journalists, community activists – and ordinary individuals seeking help in asserting rights of citizenship. CFAC's offices are in San Rafael, California.

11. The California Newspaper Publishers Association ("CNPA") is a nonprofit trade association representing approximately 650 daily, weekly and student newspapers in California. CNPA has defended the First Amendment rights of publishers to disseminate and the public to receive news and information for well over a century.

12. CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS owns and operates broadcast television stations nationwide, including KPIX and KBHK in San Francisco, KCBS-TV and KCAL-TV in Los Angeles, KOVR and KMAX in Sacramento and KSTW in Seattle. CBS News produces morning, evening, and weekend news programming, as well as news and public affair magazine programs such as 60 Minutes and 48 Hours Investigates. CBS Broadcasting Inc. is a wholly-owned subsidiary of CBS Corporation, which is publicly traded.

13. Dow Jones & Company, Inc. publishes The Wall Street Journal, a daily newspaper with a national circulation of over 2 million each

business day, WSJ.com, a news website with more than 750,000 paid subscribers, Dow Jones Newswires, a collection of real-time electronic news services, Barron's, a weekly business and finance magazine, and, through its Ottaway Newspapers subsidiary, community newspapers throughout the United States, including in Stockton and Santa Cruz, California, and in Ashland and Medford, Oregon. Dow Jones & Company, Inc. is a publicly traded company.

14. ESPN is the largest sports media company in the world. In the United States, it owns and operates multiple cable television networks (including the iconic "ESPN" network, as well as ESPN2, ESPNEWS, ESPN Classic, ESPN Deportes and ESPNU), a radio network, the most popular sports internet site, a broadband network, multiple magazines and a program syndication business. ESPN's newsgathering and reporting operations include its "SportsCenter" and "Outside The Lines" programs, the ESPNEWS network (devoted entirely to sports news and information) and numerous programs specializing in single-sport news and information, such as "Baseball Tonight. The Walt Disney Company is one of two ultimate parent companies of ESPN, Inc., and it issues shares of stock to the public. ESPN, Inc.'s second ultimate parent company, The Hearst Corporation, is privately held.

15. The E.W. Scripps Company is a publicly traded, diverse media concern with interests in newspaper publishing, broadcast television, national television networks, interactive media and television retailing. Nationwide, it operates 21 daily newspapers, 15 broadcast television stations, five cable and satellite television programming networks and a television retailing network. Scripps publishes two daily newspapers in California – the Ventura County Star and the Record Searchlight (Redding).

16. Gannett Co., Inc., . is an international news and information company that publishes 90 daily newspapers in the United States with a combined daily paid circulation of 7.3 million, including USA TODAY, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including USA Weekend, a weekly newspaper magazine with a circulation of nearly 23 million. Gannett's 23 television stations reach 20.1 million U.S. households. Gannett publishes four daily newspapers in California: The Salinas Californian, The Desert Sun, Tulare Advance-Register and Visalia Times-Delta. Gannett also owns KXTV-TV, an ABC television affiliate, in Sacramento. Gannett Co., Inc. is a publicly traded company.

17. Landmark Communications, Inc. is a privately held media company with interests in newspapers, television broadcasting, cable programming and electronic publishing. Its newspapers include The

Virginian-Pilot, the Greensboro News & Record, The Roanoke Times and more than one hundred community newspaper and special interest publications. Landmark Communications, Inc. owns television stations in Las Vegas (KLAS-TV) and Nashville (WTVF-TV), as well as the Weather Channel, which produces continuous, 24-hour national, regional and local weather-related programming received by more than 87 million households nationwide.

18. The Los Angeles Times is the largest metropolitan daily newspaper in the country, with a daily readership of nearly 2.2 million and about 3.3 million on Sunday. It is published by Los Angeles Times Communications LLC, a wholly owned subsidiary of Tribune Company, a publicly traded company. Its Times Community News division publishes the Daily Pilot, Glendale News-Press, Burbank Leader, Foothill Leader, the Huntington Beach Independent, Laguna Beach Coastline Pilot, La Cañada Valley Sun, and Crescenta Valley Sun. The Times also maintains a number of websites including www.latimes.com, a leading source of national and international news.

19. Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of

domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

20. MediaNews Group, Inc. is the fourth largest newspaper company in the United States, situated throughout California, the Rocky Mountain region and the Northeast. It is privately owned and operates over 50 daily newspapers and 120 non-daily publications with combined daily and Sunday circulation of approximately 2.6 million and 2.9 million, respectively. In California, MediaNews Group owns 32 daily newspapers, including in Northern California: The San Jose Mercury News, The Oakland Tribune, The Contra Costa Times, The Marin Independent Journal and The Monterey Peninsula Herald.

21. The McClatchy Company publishes 32 daily newspapers and 47 non-daily newspapers throughout the country, including the Sacramento Bee, the Miami Herald, the Star Tribune in Minneapolis, Minnesota, and the Kansas City Star. The newspapers have a combined average circulation of approximately 3,200,000 daily and 4,100,000 Sunday.

22. The National Association of Broadcasters ("NAB") is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts. NAB's members cover, produce, and broadcast the news and other programming to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate programming and information of all types.

23. National Public Radio, Inc. ("NPR") is a District of Columbia non-profit membership corporation. It produces and distributes its radio programming through, and provides trade association services to, nearly 800 public radio member stations located throughout the United States and in many U.S. territories. NPR's award-winning programs include *Morning Edition*, *All Things Considered*, and *Talk of the Nation* and serve a growing broadcast audience of over 25 million Americans weekly. NPR also distributes its broadcast programming online (adding additional reporting and features), to foreign countries through satellite and cable systems worldwide, and to U.S. Military installations via the American Forces Radio and Television Service.

24. NBC Universal is one of the world's leading media and entertainment companies. NBC Universal owns and operates the NBC

television network, a Spanish-language network (Telemundo), NBC News, and several news and entertainment networks including MSNBC and CNBC. NBC News produces the *Today* show, *NBC Nightly News with Brian Williams*, *Dateline* and *Meet the Press*. The General Electric Company is the parent corporation of NBC Universal, and Vivendi, S.A., a publicly traded entity, also owns more than 10% of the stock of NBC Universal.

25. The New York Times Company publishes The New York Times, a national newspaper distributed throughout the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The Company also publishes eighteen other newspapers, including The Boston Globe, and owns and operates eight television stations and two radio stations. In California, it publishes the The (Santa Rosa) Press Democrat, with a daily and Sunday circulation of about 90,000. The New York Times Company is publicly-traded.

26. The Newspaper Association of America ("NAA") is a nonprofit organization representing the $55 billion newspaper industry. NAA members account for nearly 90 percent of the daily circulation in the United States and a wide range of nondaily U.S. newspapers.

27. Newsweek, Inc. publishes the weekly news magazines Newsweek and Newsweek International, which are distributed nationally and internationally, and Arthur Frommer's Budget Travel magazine, which is distributed nationally. Newsweek, Inc. is a wholly owned subsidiary of The Washington Post Company. Berkshire Hathaway, Inc., a publicly held company, has a 10% or greater ownership interest in The Washington Post Company.

28. The Oregonian is a daily newspaper of general circulation based in Portland Oregon. The Oregonian is published by Oregonian Publishing Company LLC, which is an indirect subsidiary of Advance Publications, Inc., a privately held communications company that, directly or through subsidiaries, publishes daily newspapers in over 25 cities and weekly business journals in over 40 cities throughout the United States.

29. The Radio-Television News Directors Association ("RTNDA"), based in Washington, D.C., is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news directors and executives, news associates, educators and students in broadcasting, cable and other electronic media in over 30 countries. RTNDA is committed to encouraging excellence in electronic journalism, and upholding First Amendment freedoms.

30. The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee provides representation, guidance, and research in First Amendment litigation. The Reporters Committee was founded in 1970 in response to a wave of government subpoenas directed at journalists.

31. Reporters Without Borders is an international press freedom organization that has been defending people's right to inform and be informed for 20 years. It campaigns to obtain the release of imprisoned reporters, put an end to censorship, improve journalists' safety, support an independent media, and promote legal action that will bring to justice those responsible for murdering journalists.

32. The San Diego Union-Tribune is published by Copley Press, Inc., a privately held corporation which also owns nine other daily newspapers and operates Copley News Service, serving more than 1,000 clients worldwide.

33. The Society of Professional Journalists (SPJ) is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the

free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects the First Amendment guarantees of freedom of speech and press.

34. Stephens Media LLC is a privately held, nationwide newspaper company, which publishes daily and weekly newspapers in eight states from North Carolina to Hawaii, including the Las Vegas (NV) Review-Journal, the largest daily newspaper in Nevada.

35. Time Inc. is the largest publisher of general interest magazines in the world, publishing over 150 magazines in the United States and abroad. Its major titles include Time, Fortune, Sports Illustrated, People, InStyle, Real Simple, Money, and Entertainment Weekly. Time Inc. is indirectly wholly-owned by Time Warner Inc., a publicly traded company.

36. The Washington Post is a leading national newspaper. WP Company LLC d/b/a The Washington Post is a wholly-owned subsidiary of The Washington Post Company, which is publicly traded. Berkshire Hathaway, Inc., a publicly held company, has a 10% or greater ownership interest in The Washington Post Company.

## INTERESTS OF *AMICI CURIAE*

*Amici* are news, publishing and broadcast organizations and groups of professional journalists, each described in detail in the preceding Corporate Disclosure Statement. All *amici* or their members are engaged in or support the dissemination of news and information to the public, at times through the use of confidential sources. All *amici* believe that the district court's decision will inhibit their ability to report upon matters of public concern and urge this Court to reverse. This brief is filed with the consent of all parties, pursuant to Fed. R. App. P. 29(a).

## INTRODUCTION

The last time this Court addressed the scope of the journalist's privilege, it pointed to *Washington Post* reporter Bob Woodward as the paradigmatic example of an investigative journalist who is "protected by the [journalist's] privilege in his capacity as a newspaper reporter writing about Watergate." *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). But if the reasoning of the district court in this case is correct, Woodward had no meaningful privilege at all.

While their subject matter may be quite different, the investigation by the *San Francisco Chronicle*'s reporters into steroid use by professional athletes involved many of the same methods used by Woodward and

Bernstein to investigate the Watergate break-in. Both investigations revolved around federal grand jury probes into technically minor crimes that implicated misconduct with far broader significance to the public.[1] Both depended extensively on confidential sources that provided grand jury and other related information from a federal investigation, in possible violation of non-disclosure rules. Both spurred Congressional investigations and led to important institutional reforms. If the subpoenas in this case must be enforced, then no reporter today could make a promise of confidentiality to a contemporary Deep Throat that he is legally entitled to keep.

*Amici* respectfully submit that the view expressed in *Shoen* reflects the common-sense understanding of the meaning of "freedom of the press" that most Americans historically have shared. Throughout American history leak investigations have very rarely turned to reporters to reveal their sources, and where they have such efforts have typically been rebuffed by courts or legislatures. As a result, journalism based on so-called "leaks" of information from confidential sources has produced some of the most important and celebrated news reporting in American history.

[1] *See, e.g.*, Bob Woodward & Carl Bernstein, *Gray Seen Destroying Hunt's Files*, WASH. POST, Apr. 27, 1973 at 1 (FBI Director L. Patrick Gray III destroyed incriminating documents after being ordered to do so by John Ehrlichman and John W. Dean III, "FBI and other sources said."); l Bernstein & Woodward, *2 Linked to Secret GOP Fund*, WASH. POST, Sept. 18, 1972, at A1 (Jeb Stuart Magruder and Hebert L. Porter withdrew more than $50,000 from the secret accounts, "according to sources close to the Watergate investigation.").

Both the Justice Department's decision to issue these subpoenas and the district court's decision to enforce them, with penalties that vastly exceed any previously imposed on any American journalist for declining to identify a source, represent a clear break from the historical consensus that has well served the press, the public and the criminal justice system. The disconnect between the district court's rulings and the reality of our nation's practice and experience can only be reconciled by the application of a federal common law privilege, or similar balancing test pursuant to the First Amendment, that would be what its very name implies: a reflection of the common understanding of how the competing interests implicated by these subpoenas should be balanced. *See Jaffee v. Redmond*, 518 U.S. 1, 10 (1996)

This brief will attempt to provide the Court with a broader perspective on why the specific lessons of "reason and experience" require these subpoenas to be quashed, lessons often overlooked in discussions focused on abstract privilege doctrine. Part I of the brief demonstrates that the principle of protecting confidential newsgathering from government interference dates back to our nation's founding, has become well-established under state law, and historically has been respected by federal prosecutors and courts regardless of whether a privilege was formally recognized in any particular

jurisdiction. The subpoenas approved and issued by the Justice Department in this case represent a striking departure from historic norms.

Part II will demonstrate that these norms have made possible the investigation and reporting of many news reports of enormous public significance, stories that were investigated in the same manner as the *San Francisco Chronicle* reports at issue here. Therefore, both reason and experience strongly support the application of a reporter's privilege or comparable balancing test by the federal courts that would require reversal of the contempt orders here.

## ARGUMENT

### I.

### THE LESSONS OF HISTORY STRONGLY SUPPORT THE APPLICATION OF A REPORTER'S PRIVILEGE IN THE CIRCUMSTANCES OF THIS CASE

If, as the district court concluded, there is no legal impediment to enforcement of these subpoenas, then one would expect to find numerous examples of similar subpoenas being enforced every time an arguably illegal grand jury or other type of leak resulted in an important news story. Yet, historically journalists have rarely had to be concerned about the threat of government subpoenas seeking disclosure of such confidential sources. Throughout most of American history—dating back to the Founding era—restraints both formal and informal have limited the ability of prosecutors,

litigants and even legislators to compel journalists to disclose their sources. This restraint reflects a basic social consensus that, on balance, compelling reporters to disclose confidential sources is a bad idea.

Indeed, the history of disputes between the government and the press over disclosure of confidential sources reveals a consistent pattern: whether or not a formal privilege was recognized, the judicial system has, for the most part, exercised self-restraint and respected journalists' ability to protect their sources. Where self-restraint ceased, prosecutors seeking to exercise a broad right to compel the disclosure of reporters' sources have been regularly repudiated, either by legislatures adopting statutory protections, or by courts imposing common law and constitutional limitations on the compulsory disclosure of reporters' sources. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1170 (D.C. Cir. 2006) (Tatel, J., concurring) (the totality of state and federal constraints on compelling disclosure of sources makes "the case for a privilege here even stronger than in *Jaffee*."). Our nation's historic response to such subpoenas deserves careful consideration by this Court and powerfully supports the application of a formal legal privilege in this case, where the traditional voluntary restraint of the Department of Justice has been abandoned.

### A. The Fundamental Values Embodied In the Reporter's Privilege Date Back to Our Nation's Founding

The concept that journalists should be able to communicate with confidential sources free from state interference was not invented by modern journalism schools, but rather dates back to the origin of the Republic. Indeed, the controversy credited with first establishing uniquely American principles of freedom of the press—the prosecution and acquittal of New York publisher John Peter Zenger on charges of seditious libel in 1735—arose out of Zenger's refusal to identify to a grand jury the source of material appearing in his newspaper that harshly criticized New York's royal government. Because he would not identify his sources in the very first criminal "leak" investigation on record, Zenger was arrested and charged with criminal responsibility himself as the publisher. Ultimately, he was acquitted by a jury without ever revealing his sources. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring).

Zenger's commitment to protecting his "sources" quickly became a value shared by many other editors who comprised the eighteenth century "news media," consisting largely of journals made up of contributions from individual authors. Those authors not infrequently requested anonymity and their editor-publishers fought to honor the promises of confidentiality they had made against determined efforts by authorities to learn the authors'

identities. *Id.* at 360. For example, in 1779, Elbridge Gerry and other members of the Continental Congress sought to institute proceedings to compel a Pennsylvania newspaper publisher to identify the author of a column criticizing the Congress. Ultimately, arguments that "'[t]he liberty of the Press ought not to be restrained'" prevailed and the Congress did not take action to compel the disclosure. *Id.* at 361-62 (citation omitted). Just five years later, the New Jersey Legislature similarly declined to compel a newspaper editor, Isaac Collins, to identify the author of a critical article. *Id.* at 362-63.

These episodes were fresh in the mind of the Framers who, as Justice Thomas chronicled in *McIntyre*, unanimously "believed that the freedom of the press included the right to publish without revealing the author's name." *Id.* at 367. Several generations later, Congress in the nineteenth century would again try several times to compel journalists to identify their confidential sources, including sources who leaked information about pending legislation. Like their Revolutionary-era predecessors, the journalists who were targeted consistently refused and in a few cases were very briefly held in contempt.[2] By the twentieth century, Congress ceased

[2] For example, in 1848 a *New York Herald* reporter, John Nugent, was held in contempt by the Senate for refusing to identify the source who leaked the Treaty of Guadalupe-Hidalgo, which ended the Mexican War. Nugent was released after thirty days supposedly to "protect [] his health." In 1871, the *New York Tribune* reported details of the Treaty of Washington. Two reporters were held in

any effort to enforce legislative subpoenas for journalists' confidential sources, applying a kind of *de facto* privilege based on the recognition that such efforts are incompatible with a free press.[3]

While journalism has changed dramatically since the late eighteenth century, today's reporters, publishers and broadcasters perform essentially the same function as their Colonial-era predecessors: exercising their editorial judgment to enable some anonymous sources of information and opinion to reach a broad audience. Indeed, when Isaac Collins refused in 1784 to comply with the New Jersey Legislature's demands on the grounds that to testify would "'betray the trust reposed in me, and be far from acting as a faithful guardian of the Liberty of the Press,'" he articulated exactly the same reasons why the *Chronicle* and its reporters are currently resisting the subpoenas served on them. *Id.* at 362 (citation omitted).

### B. A Reporter's Privilege Under State Law Emerged in Direct Response to Attempts by Prosecutors to Enforce Subpoenas Like Those Issued Here

Although Congressional efforts to compel reporters to disclose sources had been largely abandoned by the twentieth century, around the

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contempt and then released after nine days. *See* Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 Va. L. R. 61, 77-79 (1950)

[3] For example, in 1945 the House Veterans Committee sought to compel a reporter to disclose the names of officials used as sources in articles criticizing the V.A. After initially citing the reporter for contempt, the Committee reversed itself by a vote of 13 to 2 and permitted the reporter to continue testifying without disclosing his sources. 36 Va. L. R. at 81.

same time occasional similar efforts began to arise in judicial proceedings. Most of these early disputes over judicial subpoenas to the press arose in state courts, typically in state grand jury proceedings.

### 1. *Jaffee* requires consideration of state shield laws and replaces this Court's previous test for recognition of common-law privileges

The state privilege laws that gradually emerged from these disputes are particularly important for this Court to consider because, the Supreme Court has made clear, the development of state law is a critical factor in deciding whether to recognize a federal common-law privilege. *Jaffee*, 518 U.S. at 12-14. The application of *Jaffee*'s analysis to the question of a reporter's privilege presents a question of first impression in this Circuit, because *Jaffee* effectively overruled this Court's previous framework for evaluating a common law privilege. Since *Jaffee*, no court within the Circuit has been called upon to apply its standards to a claim of reporter's privilege.

Prior to *Jaffee*, this Court held that the existence of a federal common law privilege must be determined solely by reference to the common law decisions of state courts, rather than state statutes. This Court thus declined to recognize a psychotherapist's privilege on the grounds that the privilege had no "common law foundations," but rather "has developed by state statutory enactment." *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989) (per curiam). Applying this approach, this Court in 1993 declined

to recognize a common law reporter's privilege, on the grounds that "the general common law rejects such a privilege," pointing to *Branzburg*'s observation that "'[a]t common law, *courts* consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury.'" *In re Grand Jury Proceedings*, 5 F.3d 397, 402-03 (9th Cir. 1993) *quoting Branzburg v. Hayes*, 408 U.S. 665, 685 (1972) (emphasis added).

*Jaffee* overruled this Court's interpretation of Rule 501 and its framework for recognizing a common law privilege:

> 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.

518 U.S. at 13. *Jaffee*'s elimination of any distinction between state statutes and judicial decisions necessarily requires reconsideration of this Court's earlier analysis of the common law reporter's privilege because, like the psychotherapist privilege, the reporter's privilege has also evolved primarily as a creature of statute. Indeed, cases within this Circuit since *Jaffee* considering other potential common law privileges have consistently surveyed the development of relevant state statutes and recognized privileges that would not likely have passed muster under this Court's pre-*Jaffee* test. *See, e.g., Folb v. Motion Picture Indus. Pension & Health Plans*,

16 F. Supp. 2d 1164, 1178-79 (C.D. Cal. 1998) (adopting a mediation privilege and noting that "a federal court should look to a consistent body of state legislative and judicial decisions adopting such a privilege"); *aff'd*, 216 F.3d 1082 (9th Cir. 2000); *In re Grand Jury Proceedings*, 949 F. Supp. 1487, 1493 (E.D. Wash. 1996) (recognizing a parent-child privilege and noting that a court may " look to policy determinations made by state legislatures as reflecting both reason and experience") (citation omitted).

### 2. The development of a reporter's privilege among the states strongly supports recognition of a federal privilege

When the experience of the states is surveyed, the "general common law" as the Supreme Court now defines that term indisputably embraces a reporter's privilege. Even more important, the historical evolution of that privilege once again follows a strikingly consistent pattern that strongly supports the recognition of a federal privilege. The vast majority of state reporter's privilege statutes, often called "shield laws," were enacted in two waves as an explicit repudiation of judicial decisions to imprison journalists for refusing to disclose their sources. Thus, a reporter's privilege under state law emerged not as an abstract affirmation of new legal principles, but rather as a confirmation of historical values intended to repudiate the very kinds of subpoenas issued in these cases.

In fact, the "reporter's privilege" has a much longer history within the states than the psychotherapist privilege or others recently adopted pursuant to federal common law. The first formal privilege was enacted by Maryland's legislature in 1896 after *Baltimore Sun* reporter John Morris was jailed for refusing to reveal to a grand jury his sources for stories about alleged bribery of elected officials.[4] The basic dynamic that led to the Maryland shield law – a journalist was subpoenaed (usually by a grand jury) and briefly jailed for declining to identify sources, which prompted legislative action to prevent similar incidents in the future – would be repeated by many other states over the course of the next century.

Thus, a large number of shield laws were enacted in the mid-1930s in response to several high-profile incidents in which eight reporters were imprisoned for periods ranging from five to forty days.[5] While the only state-court appellate opinion emanating from any of these incidents declined to recognize a formal privilege,[6] seven states (including California) responded to them almost immediately by enacting statutory privileges; three more followed suit within a few years. Like Maryland's statute, all but

[4] *Knew the Grand Jury's Secrets: A Reporter of a Baltimore Paper Imprisoned for Contempt of Court*, CHICAGO DAILY TRIBUNE, Dec. 23, 1886; 36 Va. L. R. at 66.

[5] For example, three *Washington Times* reporters and a *New York Tribune* journalist served brief prison sentences for declining to comply with state grand jury subpoenas seeking sources for stories about vice crimes. 36 Va. L. Rev. at 71-74

[6] *People ex rel. Mooney v. Sheriff*, 199 N.E. 415 (N.Y. 1936).

one of these laws provided absolute protection from compelled disclosure of confidential sources.[7] The experience of the 1930s, which produced one state judicial decision rejecting a reporter's privilege but many more statutes enacting one, illustrates why this Court's prior practice of only considering the results of common law adjudication would be inconsistent with the requirements of *Jaffee*.

For roughly thirty-five years after the mid-1930s, we have found virtually no examples of meaningful efforts to compel non-party reporters to disclose their sources. For example, one study of the years 1960-68 found that only about a dozen newsgathering-related subpoenas were even served on the press, most of which presumably did not seek information about confidential sources. John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 Colum. Hum. Rts. L. Rev. 57, 64 n.24 (1985) ("Osborn"). In the early 1970s, however, federal prosecutors began to issue an unprecedented wave of federal grand jury subpoenas that culminated in the Supreme Court's decision in *Branzburg*. As a result, another ten states adopted shield laws

[7] ALA. CODE tit. 7, § 370 (enacted in 1935); ARIZ. CODE ANN. § 23 (in 1937); ARK. STAT. ANN. tit. 43, § 917 (in 1936); CAL. CODE CIV. PROC. § 1881(6) (in 1935); IND. ANN. STAT. § 2-1733 (enacted in 1941); KY. REV. STAT. § 421.100 (in 1936); MD. ANN. CODE GEN. LAWS art. 35, § 2 (in 1896); MICH. STAT. ANN. § 28.945(1) (in 1949); MONT. REV. CODE §§ 93-601-1, 93-601-2 (in 1943); N.J. STAT. ANN. § 2:97-11 (in 1933); OHIO GEN. CODE § 6319-2a (in 1941); PA. STAT. ANN. tit. 28, § 330 (in 1937).

within roughly a year of *Branzburg*, to prevent state prosecutors from issuing similar subpoenas.[8]

California's experience was a typical example of this dynamic. California's shield law was originally enacted in 1935, but it was amended in response to a series of cases, including this Court's decision in *Farr v. Pitchess,* 522 F.2d 464 (9th Cir. 1975), one of the last of the *Branzburg*-era cases. *Farr* affirmed the denial of a *habeas corpus* petition filed by former *Los Angeles Herald-Examiner* reporter William Farr, who had been incarcerated several years earlier by a state court for declining to identify a source who leaked information in violation of a protective order entered in the criminal trial of Charles Manson. Within the state courts, Farr's incarceration was affirmed on two distinct grounds, one by the trial court and another by the Second District Court of Appeal. *Farr v. Superior Ct*, 99 Cal. Rptr. 342 (2d Dist. 1971). Both grounds were subsequently repudiated: first by the Legislature, which amended the shield law in 1971 to make it applicable to former journalists (of which Farr was one), *Cal. Evid. Code* § 1070, and then by the voters, who added the shield law to the California

[8] 59 Del. Laws ch. 163, § 1 (enacted in 1974); 1973 Minn. Laws ch. 735, §§ 1-5 (in 1973); 1973 Neb. Laws 380, §§ 1-4 (in 1973); NEV. REV. STAT. §§ 49.275 (in 1971); 1970 N.Y. Laws ch. 615, § 1 (in 1970); 1973 N.D. Laws ch. 258, § 1 (in 1973); OKLA. STAT. tit. 12, § 2506 (in 1974); 1973 Or. Laws ch. 22, §§ 2-6 (in 1973); 1971 R.I. Pub. Laws ch. 86, § 1 (in 1971); 1973 Tenn. Pub. Acts ch. 27, §§ 1-3 (in 1973).

Constitution after *Farr* held that it violated the separation of powers. *See In re Willon*, 55 Cal. Rptr. 2d 245, 255 (6th Dist. 1996).

Over the course of the next several decades, seven more states and the District of Columbia adopted privilege statutes, again often in direct reaction to incidents in which reporters were briefly jailed.[9] At present, 32 states and the District of Columbia have statutory shield laws. *New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457, 502-04 & nn. 34-40 (S.D.N.Y. 2005), *rev'd*, 459 F.3d 160 (2d Cir. 2006) (citing statutes). Since almost all of these statutes were enacted to repudiate judicial efforts to enforce grand jury subpoenas, all state shield laws apply to grand jury subpoenas. Moreover, all but one of the remaining 18 states that have not enacted shield laws have recognized a privilege pursuant to common law, state constitutions, or the First Amendment. *Id.* (citing cases).

Importantly, the scope of the privileges recognized within the states would in most instances require that the subpoenas issued here be quashed. Seventeen states recognize an absolute privilege applicable in all judicial proceedings,[10] and roughly the same number recognize a qualified privilege

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[9] For example, in 1999 North Carolina enacted a law after a local television journalist was jailed for two hours. *See In re Owens*, 517 S.E.2d 605 (N.C. 1999); N.C. Gen Stat. § 8-53.11.

[10] Ala. Code § 12-21-142; Ariz. Rev. Stat. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Evid. Code § 1070; Del. Code Ann. tit. 10, §§ 4320-26; D.C. Code Ann. §§ 16-4701 to 4704; Ind. Code §§ 34-46-4-1 & 34-46-4-2; Ky. Rev. Stat. Ann. § 421.100; Md. Code Ann., Cts. & Jud. Proc. § 9-112; Mont. Code Ann. §§ 26-1-901 to 903; Neb. Rev. Stat. §§ 20-144 to

that cannot be overcome merely by a showing that the information is highly relevant and the state has exhausted all alternative means of identifying the source.[11] Rather, those states require some additional showing of a compelling public interest in the enforcement of a subpoena that resembles the balancing test applied by Judge David Tatel in the recent *Miller* case, a balance that when applied to the facts of this case would plainly require the subpoenas to be quashed. *Miller,* 438 F.3d at 1175 (Tatel, J., concurring) (courts "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").

Finally, there is no evidence that the existence of strong state shield laws has inhibited state law enforcement efforts, as evidenced by the brief *amicus curiae* submitted by state attorneys general in this case. In short, the history of state-law recognition of a reporter's privilege is an archetypical example of "'the evolutionary development of testimonial privileges'" envisioned by *Jaffee* and strongly supports the application of a federal

147; Nev. Rev. Stat. § 49.275; N.J. Stat. Ann. §§ 2A:84A-21 to 2A:84A-21.8; N.Y. Civ. Rights Law § 79-h; Ohio Rev. Code Ann. §§ 2739.04 & 2739.12; Or. Rev. Stat. §§ 44.510-.540; 42 Pa. Cons. Stat. § 5942.

[11] *See, e.g.*, Alaska Stat. §§ 09.25.310-320; Colo. Rev. Stat. § 13-90-119; Fla. Stat. Ann. § 90.5015; La. Rev. Stat. Ann. § 45:1453; Minn. Stat. Ann. § 595.024; N.M. R. Evid. 11-514; N.D. Cent. Code § 31-01-06.2; Tenn. Code Ann. § 24-1-208.

privilege to quash the subpoenas served in these cases. *Jaffee,* 518 U.S. at 8 (*quoting Trammel v. United States*, 445 U.S. 40, 47 (1980)).

### C. These Subpoenas Represent a Sharp Break with Past Federal Practice Declining to Seek Disclosure of Journalists' Sources

The history of subpoenas in federal courts is equally instructive in understanding why "reason and experience" support the formal application of a federal privilege or balancing test. Even more than their state counterparts, the available historical evidence suggests that, with the exception of the few years surrounding *Branzburg*, federal prosecutors have very rarely sought to compel reporters to identify confidential sources. In effect, federal prosecutors have largely recognized a kind of *de facto* privilege that obviated the need for recognition of a more formal one in many federal jurisdictions. In this respect, the subpoenas issued in this and several other recent cases represent a sharp break with past practice, a break that the collective experience of both state and federal courts indicates will exact a price from press freedom far beyond any service paid to the ends of criminal justice.

We are aware of only one reported federal court decision prior to the 1960s addressing a subpoena issued to a non-party journalist in a criminal proceeding, and in that case the reporter was excused from testifying on grounds unrelated to the reporter's privilege. *See Burdick v. United States*,

236 U.S. 79 (1915) (journalist was entitled to assert a Fifth Amendment privilege). Indeed, the *Branzburg* era in the early 1970s appears to be the only time in American history when federal prosecutors made a practice of issuing subpoenas to the press for confidential sources. However, just as state legislatures and state courts did in response to subpoenas issued by state prosecutors, many lower federal courts and ultimately even the Justice Department itself reacted so negatively to the practice that the historical *status quo* was effectively restored shortly after the *Branzburg* decision. Many lower federal courts increasingly recognized some form of privilege and in 1973 the Justice Department adopted internal guidelines that had the practical effect of virtually eliminating efforts to serve and enforce subpoenas such as those issued in this case. 28 C.F.R. § 50.10.

As a result, almost thirty years passed between this Court's 1975 decision in *Farr* and the next federal court decision to affirm the enforcement of a subpoena for a journalist's confidential source. *See In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004). During those three decades *amici* are aware of just two federal judicial decisions arising from subpoenas issued by federal grand juries or prosecutors seeking confidential sources from journalists. Both involved alleged grand jury leaks to the media, and both subpoenas were quashed. *In re Williams*, 963 F.2d 567 (3d

Cir. 1992) (en banc); *In re Grand Jury Subpoenas*, 8 Media L. Rep. 1418 (D. Colo. 1982).[12]

Thus, the lessons of "reason and experience" overwhelmingly point to recognition of a federal privilege applicable to these subpoenas. The protection of confidential newsgathering has deep roots in American history; the states have reached a virtual consensus recognizing a broad reporter's privilege without any evidence of injury to local law enforcement; and for virtually all of American history the federal criminal justice system has worked well without needing to issue such subpoenas.

Unfortunately, this case appears to be part and parcel of a recent policy of departure from the Justice Department's historic respect for the confidentiality of journalists' sources. If these contempt orders are affirmed, it is reasonable to expect that more subpoenas for journalists' sources will follow and the norms that have historically governed the relationship between government and the press will be seriously altered. The overwhelming weight of our collective national experience demonstrates that such a shift would not be in the interest of the public or ultimately of the criminal justice system itself.

[12] By its own account the Justice Department issued "little more than a handful" of subpoenas for confidential sources during that roughly 33-year period. *See* http://judiciary.senate.gov/testimony.cfm?id=1637&wit_id=4704 (last visited on Dec. 6, 2006). The case law suggests that most or all ultimately did not result in any disclosure of sources.

## II.

## THE HISTORIC RESPECT ACCORDED TO JOURNALISTS' ABILITY TO SPEAK TO SOURCES IN CONFIDENCE HAS PROVED VITAL TO ENSURING THE FREE FLOW OF INFORMATION TO THE PUBLIC

The lessons of "reason and experience" are equally apparent from the results of this nation's historical practice of respecting the confidence of journalists' communications with their sources. That practice reflects the recognition that preserving the confidentiality of communications with sources is important to ensuring that the press effectively performs its constitutionally-authorized role.

Journalists regularly depend on anonymous sources to report stories about matters of public concern. One recent examination of roughly 10,000 news media reports concluded that fully thirteen percent of front-page newspaper articles relied at least in part on anonymous sources.[13] While there is healthy debate within the journalism profession about the appropriate uses of confidential sources, all sides of that debate agree that they are at times essential to effective news reporting.[14]

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[13] *See generally State of the News Media 2005*, http://www.stateofthemedia.org /2005/index.asp (last visited Dec. 6, 2006).

[14] *See generally Reporters and Confidential News Sources Survey 2004*, http://www.firstamendmentcenter.org/_news.aspx?id=14922 (last visited Dec. 6, 2006).

The information anonymous sources make available to the public through the press has proved to be vitally important to the operation of our democracy and the oversight of powerful institutions, both public and private. Stories based on confidential source material regularly receive the nation's most coveted journalism awards, including the Pulitzer Prize[15] and the George Polk Awards for Excellence in Journalism.[16] *See, e.g.*, Osborn at 74 (confidential sources played "a significant role" in two-thirds of the stories nominated for Pulitzer Prizes).

Even more important, some of the most significant investigative stories in our history have arisen out of circumstances just like those presented here, where confidential sources may have violated a statutory or

[15] For example, the Pulitzer Prize in Investigative Journalism for 2005 was awarded to Nigel Jaquiss, of *Willamette Week*, who relied on confidential sources in his "investigation exposing former governor [Neil Goldschmidt's] long concealed sexual misconduct with a 14-year-old girl." *See* http://www.pulitzer.org/year/2005/investigative-reporting (last visited Dec. 6, 2006). In 1996, the Pulitzer Prize for National Reporting was awarded for the *Wall Street Journal's* reporting on the use of ammonia to heighten the potency of nicotine in cigarettes. *See* http://www.pulitzer.org/year/1996/national-reporting (last visited Dec. 6, 2006). *See* Alix M. Freedman, *Impact Booster: Tobacco Firm Shows How Amonia Spurs Delivery of Nicotine*, WALL STREET JOURNAL, Dec. 28, 1995, at A1, col. 6. The 1999 Pulitzer went to Jeff Gerth and the staff of *The New York Times* "for a series of articles that disclosed the corporate sale of American technology to China, with U.S. government approval despite national security risks, prompting investigations and significant changes in policy." *See* http://www.pulitzer.org/year/1999/national-reporting (last visited Dec. 6, 2006). This series relied heavily on "highly classified intelligence reports," as well as interviews with confidential sources. *See* Jeff Gerth, *Reports Show Chinese Military Used American-Made Satellites*, THE NEW YORK TIMES, June 13, 1998, at A1.

[16] Last year, the George Polk Awards for Magazine Reporting, Military Reporting, and Sports Reporting all went to articles based on confidential source material. *See* http://www.brooklyn.liu.edu/polk/polk04.html (listing awards) (last visited Dec. 6, 2006).

common law duty by talking to the press in order to expose information of substantial public concern. Beyond Watergate, there are many similarly compelling examples of reports that would never have reached the public if a journalist could not credibly promise confidentiality to a source, such as:

> Pentagon Papers – The Pentagon's secret history of America's involvement in Vietnam was, of course, leaked to *The New York Times* and *The Washington Post*. *See New York Times Co. v. United States*, 403 U.S. 713 (1971). In refusing to enjoin publication of the leaked information, Justices of the Supreme Court recognized that the newspapers' sources may well have broken the law, *id.* at 754 (Harlan, J., dissenting), and they were in fact prosecuted, albeit unsuccessfully, after later coming forward. *See* Sanford J. Ungar, *Federal Conduct Cited As Offending 'Sense of Justice'; Charges Dismissed in 'Papers' Trial*, WASH. POST, May 12, 1973, at A1. Nonetheless, "[i]n revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders had hoped and trusted they would do," *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring), and there is now a broad

consensus that no legitimate reason existed to conceal the Papers from the public in the first place.[17]

<u>Neutron Bomb</u> – Journalist Walter Pincus of *The Washington Post* relied on anonymous sources in reporting that President Carter planned to move forward with the development of a so-called "neutron bomb," a weapon that could inflict massive casualties through radiation without extensive destruction of property.[18] While the information disclosed to Pincus was likely classified, the public outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon and no Administration has since attempted to revive it.[19]

<u>Enron</u> – In a groundbreaking series of articles, the *Wall Street Journal* relied on confidential sources and leaked corporate

[17] Solicitor General Erwin N. Griswold, who argued the government's case, wrote some twenty years later that he had not "seen any trace of a threat to the national security from the publication." Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, A25.

[18] *See, e.g.*, Walter Pincus, *Carter Is Weighing Radiation Warhead*, WASH. POST, June 7, 1977, at A5; Walter Pincus, *Pentagon Wanted Secrecy On Neutron Bomb Production; Pentagon Hoped To Keep Neutron Bomb A Secret*, WASH. POST, June 25, 1977, at A1.

[19] *See* Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77 Post Articles*, WASH. POST, Oct. 23, 1984, at A12 (quoting former Defense Secretary Harold Brown as stating that "[w]ithout the [*Post*] articles, neutron warheads would have been deployed").

documents to reveal the illegal accounting practices of Enron.[20] Confidential sources provided the *Journal* with "confidential" information about two partnerships operated by Enron Chief Financial Officer Andrew Fastow, which were used to hide corporate debt from the company's investors.[21]

Abu Ghraib – In April 2004, CBS News and Seymour Hersh, writing for *The New Yorker*, first reported accounts of abuse at Abu Ghraib prison in Iraq.[22] Relying on photographs graphically depicting such abuse in the possession of Army officials and a classified report by Major General Antonio M. Taguba that was "not meant for public release,"[23] CBS and Hersh documented conditions in the Iraqi prison. After these incidents became public, other military sources stepped

[20] Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron's Success, And Now to its Distress*, WALL ST. J., Nov. 2, 2001, at A1.

[21] Rebecca Smith & John R. Emshwiller, *Enron CFO's Partnership Had Millions in Profit*, WALL ST. J., Oct. 19, 2001, at C1; John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron's Fall, A Culture of Operating Outside Public's View*, WALL ST. J., Dec. 5, 2001, at A1.

[22] 60 Minutes II, Apr. 28, 2004, http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml?CMP=ILC-SearchStories (last visited Dec. 6, 2006); Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004.

[23] Hersh, *supra* note 14.

forward, but only "on the condition that they not be identified because of concern that their military careers would be ruined."[24]

Fertility Fraud – Finally, while reporting based on confidential leaks often involves matters of major national import, it also affects issues important to local communities. For example, in 1996 the *Orange County Register* received the Pulitzer Prize for its reporting on the unethical practices of the previously acclaimed UCI fertility clinic in Irvine, California. Using medical records obtained from an anonymous source, the paper documented how eggs retrieved from at least sixty patients were implanted in others, without the knowledge or consent of the donors.[25] The disclosure of these records to the *Register* may have violated applicable law, yet the facts that the newspaper reported resulted in the criminal prosecution of the physicians involved, "prompted the American Medical Association to

[24] *See, e.g.*, Todd Richissin, *Soldiers' Warnings Ignored*, BALT. SUN, May 9, 2004, at 1A; Miles Moffeit, *Brutal Interrogation in Iraq*, DENVER POST, May 19, 2004, at A1 (relying on confidential "Pentagon documents" and interview with a "Pentagon source with knowledge of internal investigations into prisoner abuses").

[25] Susan Kelleher & Kim Christensen, *Fertility Fraud; Baby Born After Doctor Took Eggs Without Consent*, ORANGE COUNTY REGISTER, May 19, 1995, at A01.

rewrite its fertility-industry guidelines," and instigated legislative action.[26]

What is particularly striking about such examples is that even when a source may arguably have violated a legal duty by providing information to a journalist, the subsequent reporting often spurs prosecution of much more serious crimes. *Amici* respectfully submit that a compilation of those serious crimes that have gone unpunished because a journalist was permitted to protect his source would be a very short list indeed, and it would pale in comparison to the scores of criminal prosecutions undertaken as a result of news reports containing information gleaned from confidential sources. Thus, as the Supreme Court observed in discussing anonymous speech more broadly, although "[t]he right to remain anonymous may be abused when it shields fraudulent conduct," it remains the case that, "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*, 514 U.S. at 357.

The widespread legal protection historically afforded journalists in both state and federal courts reflects the recognition that, on balance, the value of many of these news reports outweighed the value of compelling reporters to reveal their sources to help prosecute the underlying leaks that

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[26] Kim Christensen, *Fertility Bills Seen as Effective Steps*, ORANGE COUNTY REGISTER, Aug. 30, 1996, at A26.

made the reports possible. Thus, virtually no state shield laws contain exceptions for such "leaks." Moreover, the very recent practice of issuing federal subpoenas to reporters to resolve leak investigations represents a sharp departure from past practice, which has provoked equally sharp divisions within the federal judiciary. *See New York Times Co. v. Gonzales*, 459 F.3d 160, 174-189 (2d Cir. 2006) (Sack, J., dissenting); *Miller*, 438 F.3d 1111 (panel divides three ways on the question of recognizing a common law privilege); *Lee v. Department of Justice*, 428 F.3d 299 (D.C. Cir. 2005) (D.C. Circuit denies rehearing *en banc* by 4-4 vote), *cert. denied*, 126 S.Ct. 2351 (2006). Thus, while in the abstract it may seem counterintuitive to apply a privilege that might have the effect of leaving a leak violation unsolved, *amici* respectfully submit that this nation's historical choice to do exactly that reflects the mature functioning of a healthy democracy.

One of the defining principles of a functioning democracy is the recognition of the natural tension between two competing values: government's need at times to act secretly to protect the public welfare and the reality that laws criminalizing whole categories of speech will sometimes deprive the public of information important to its welfare. *United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring) ("Criminal restraints on the disclosure of information threaten the ability of the press to scrutinize and report on government activity"). While in the

abstract it would be ideal if legislators, regulators and prosecutors could always strike the perfect balance between the two, both history and logic suggest otherwise. As a result, the ability of a free press to act as a kind of safety valve allowing information that may be vital to health and safety to reach the public is a well-established, historically-validated principle of American democracy. Thus, for more than two hundred years, government has sought to keep its secrets, journalists at times have sought to expose them, and the judiciary for the most part has wisely remained a neutral observer of that constitutionally-sanctioned contest. *Id.* at 1085 ("The Constitution, in other words, establishes the contest, not its resolution.").

Such leak cases, therefore, present fundamentally different questions than did *Branzburg*, where reporters were thought to have witnessed criminal conduct such as violations of narcotics laws, conduct that had no relationship to speech about matters of overriding public concern. 408 U.S. at 667-77. In this case, what the reporters "witnessed" were sources providing newsworthy information about matters of unquestioned public significance. Such facts present strikingly different balancing considerations, whether they be applied pursuant to the First Amendment, federal common law, or the Federal Rules of Criminal Procedure. *See, e.g.*, *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978) (holding that information leaked to the press by a confidential source "lies

near the core of the First Amendment" because it concerned the "public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect").

We do not mean to suggest that journalists have absolute *carte blanche* to conceal the identities of those who may have violated non-disclosure laws. Although at least one-third of the states would apply an absolute privilege in the present circumstances, neither appellants nor these *amici* seek one here. Rather, *amici* urge the application of a privilege that weighs the important values implicated by both sides of disputes like this one, on a case-by-case basis. Here, the facts provide a particularly compelling case for applying a privilege. This is not a case like *Farr*, where the information leaked merely enabled a reporter to "scoop" some interesting aspect of a criminal trial. Rather, as subsequent events have demonstrated, confirmation that professional athletes were using steroids proved to be important for the public and its elected officials to know for larger reasons wholly unrelated to the particulars of the underlying BALCO case.

The decision of the district court, however, leaves nothing to balance. It held that federal law recognizes no privilege at all in these circumstances, and in the alternative applied this Court's test for *nonconfidential* information adopted in *Shoen. In Re Grand Jury Subpoenas*, 438 F. Supp.

2d 1111, 1120 (N.D.Cal. 2006). Applying the *Shoen* test to leak investigations involving confidential sources leaves nothing to balance in practice, because it effectively makes the government's interest in identifying the source of a leak dispositive in all cases. Such a presumption is fundamentally inconsistent with this nation's historic respect for journalist-source relationships and the important journalism that respect has allowed to flourish.

## CONCLUSION

For all of these reasons, *amici* respectfully request this Court apply the lessons of "reason and experience" to reverse the contempt orders.

Dated: December 8, 2006.

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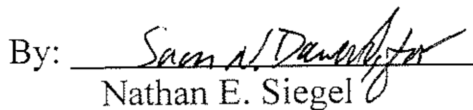
By: 
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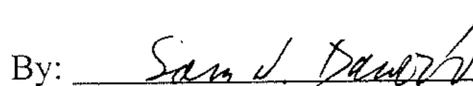
By: 

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Pursuant to Fed.R.App.P. 32(a)(7), I certify that this Brief is proportionally spaced, has a typeface of 14 points and contains 6,999 words (including the headings, footnotes and quotations, but excluding all other permitted material). This certification is based on the word count feature in the word-processing system used to prepare this brief.

Dated: December 8, 2006.

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Executed on December 8, 2006, at San Francisco, California

Pamela J. Maiwandi