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

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

JONATHAN R. DONNELLAN
KRISTINA E. FINDIKYAN
EVE B. BURTON
THE HEARST CORPORATION
300 W. 57th Street, 40th Floor
New York, New York 10019
Telephone: (212) 649-2000

FLOYD ABRAMS
SUSAN BUCKLEY
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
Telephone: (212) 701-3000

GREGORY P. LINDSTROM
SADIK HUSENY
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, California 94111
Telephone: (415) 391-0600

KATHLEEN M. SULLIVAN
QUINN EMANUEL URQUHART OLIVER & HEDGES LLP
555 Twin Dolphin Drive, Suite 560
Redwood Shores, California 94065
Telephone: (650) 801-5000

Attorneys for Appellants,
Mark Fainaru-Wada, Lance Williams
and the San Francisco Chronicle

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Other Authorities

INTRODUCTION

The government's opposition rests entirely on the sweeping premise that the government is entitled to have virtually any and all confidential source information from a journalist's notebook in any grand jury context. According to the government, there simply is no role for judges to consider First Amendment issues or values. The government advocates that there may be no balancing at all by this Court, notwithstanding that balancing is the "tried and traditional" way of resolving First Amendment conflicts between the press and law enforcement. This argument relies less on reason than the rigid claim that this Court is precluded from engaging in balancing by "binding precedent." It claims flatly that "*Branzburg* resolved the common-law argument" (G.A.B.42)[1] and that the district court's "per se rule in favor of the government and against the press in virtually any grand jury subpoena matter" is in fact "the law." (G.A.B.36) This, however, is inaccurate, as we showed in our opening brief and further demonstrate below.

The government's total reliance on the argument that this Court is effectively precluded from engaging in any balancing at all based upon the particular circumstances and interests at issue here is not surprising given its virtual surrender when it comes to the balancing process itself. In the final page of

---

[1] The government's answering brief is cited here as "G.A.B."; its excerpts of record as "G.E.R."; appellants' excerpts of record as "E.R."; and appellants' opening brief as "A.O.B".

its answering brief the government makes a remarkable concession: it cannot prevail on the record before the trial court once a balancing process is undertaken. To overcome any privilege, the government acknowledges, it will "need" to make a further demonstration to the district court to "present new information" since "the facts relating to the exhaustion of reasonable alternative sources have changed." (G.A.B.62)

The facts relating to exhaustion may have indeed changed – *i.e.*, the government may have done more to exhaust alternative sources after the district court's ruling than it did before – but what remains unchanged and unchangeable is that two journalists have been held in contempt and ordered imprisoned based upon orders that the government now effectively concedes cannot be sustained on the record before the court that issued them.

The government's reference to "new evidence" and "changed" facts is, at the least, an admission that the government failed to exhaust alternative sources *before* issuing subpoenas to the *Chronicle* and its reporters, as is required by the law and its own DOJ Guidelines. The government's spare recounting of its 17 month pre-subpoena investigative efforts, couched in vague and conclusory assertions without any citation to the record (since no record evidence exists to which citations could be referred), bears witness to this. (G.A.B.12-13) It also explains with undeniable

clarity why the government is so dependent upon its argument that this Court may engage in no balancing at all.

The government's abandonment of the balancing argument and request for a remand if balancing is required raises serious questions not only about the premise of its legal arguments and the nature of its investigation, but also the relevance of facts it does advance, principally e-mail correspondence between Mark Fainaru-Wada and Victor Conte, which figures prominently in its statement of facts. In contrast to the government's meager summary of its pre-subpoena investigation, these e-mails are given a detailed, multi-page treatment. (G.A.B.5-8, 10) The government studiously draws no conclusion from these e-mails, yet its layout of the correspondence is enormously suggestive that Conte is the reporters' source. If that is the conclusion the government has reached and wants this Court to reach, notwithstanding that the *Chronicle* has explicitly advised the government that the Conte e-mails are not responsive insofar as the subpoenas seek the source of transcripts (E.R.335-36), it ought to explain why it needs the reporters' testimony at all. If, on the other hand, the government is not pointing the finger at Conte – consistent with its request to augment the record on exhaustion with "new information" developed post-judgment – then the correspondence would appear to serve no legitimate purpose at all.

Even more provocative is the government's repeated assertion that the underlying conduct giving rise to its investigation – the disclosure of discovery materials in violation of a protective order – constitutes a federal crime. The government devotes an entire section of its brief to this notion. (G.A.B.55-59; 44 n.10) It goes so far as to say that the communications themselves "constituted" a crime. (G.A.B.58) The government, however, cites no federal criminal statute that prohibits such disclosures, nor could it – there is none. The violation of a pretrial protective order governing discovery is a serious transgression: it is not and never has been codified as a crime.

The absence of any criminal conduct in the transaction of this information serves to highlight a fundamental flaw in the government's argument for a per se rule barring any balancing of interests in the context of a grand jury subpoena. The government rests its all on this distinction between grand jury proceedings and others, acknowledging (as it must) the requirement of First Amendment balancing in civil and criminal cases. What the government disregards is that the underlying conduct here did not require a grand jury investigation at all; violation of a protective order is not an "infamous" or capital crime (like those at issue in *Branzburg*, *Scarce* and the *Lewis* cases) mandating indictment by a grand jury under the Fifth Amendment, a concept crucial to the *Branzburg* majority. The

BALCO district court was not obliged to refer the matter to the grand jury and in fact properly considered handling the investigation without one.

Judge Illston was free to investigate violations of her protective order by herself, by appointment of a private attorney, or by referral to federal prosecutors. She considered all three options before referring the matter to the Department of Justice. (G.E.R.137, 191-92, 198-99; E.R.283) Had she chosen either of the other two (non-grand jury) options, this Court's decision in *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975), would have required the district court to engage in a balancing of First Amendment rights. At least on these particular facts, then, the government's bright-line approach to grand jury subpoenas lacks any rational basis.

The government's oversimplification of the law and disregard for the facts cannot withstand scrutiny. The law requires balancing; the facts require a finding that the government failed to demonstrate that once that process is undertaken, an order should properly issue requiring the disclosure of the journalists' confidential sources.

ARGUMENT

I. THIS COURT IS NOT, AS THE GOVERNMENT ERRONEOUSLY CLAIMS, PRECLUDED FROM ENGAGING IN A BALANCING OF FIRST AMENDMENT INTERESTS ON THE FACTS OF THIS CASE

A. A Per Se Rule Precluding First Amendment Balancing in Grand Jury Matters Cannot Be Reconciled With *Branzburg*, *Bursey* or Common Sense

The government acknowledges that this Court has repeatedly recognized the existence of a qualified reporter's privilege under the First Amendment in criminal and civil cases and the need for balancing where the privilege applies. What the government is banking on here is a rigid distinction between grand jury cases and all others, including criminal cases, a distinction it says precludes this Court from balancing First Amendment interests absent a showing of bad faith abuse of the grand jury function. In making this argument, the government asserts that there exists a "per se rule" favoring the government in virtually all grand jury matters, stating that "such a rule is the law." (G.A.B.36)

Yet the government ignores the many problems with its per se approach, particularly as applied to the facts of this case. *Branzburg* was decided by the slimmest of margins, with Justice Powell's pivotal fifth vote controlling the outcome and his concurring opinion limiting the scope of the majority opinion he joined.[2] Justice Powell's emphasis on "the limited nature of the Court's holding"

---

[2] As discussed in the Brief of Erwin Chemerinsky, Vincent Blasi, Susan

and his call for "case-by-case" balancing consistent with the "tried and traditional way" of adjudicating First Amendment claims place significant limitations on *Branzburg*'s sweep. *Branzburg v. Hayes*, 408 U.S. 665, 709-10 (1972) (Powell, J., concurring). Those limitations are entirely at odds with a bright-line bar against traditional First Amendment balancing. *See* Academic Amicus Br. at 13-19.

The government seeks to diminish the importance of Justice Powell's concurring opinion by claiming that it merely "underscored" the bad faith point made by the majority in *Branzburg*, and so leaves no room for balancing absent such a showing. (G.A.B.25-26) This is not a fair reading of Justice Powell, and is belied by the very language the government quotes from *Scarce*, but then ignores. (G.A.B.26) This Court in *Scarce* did not consign Justice Powell's concurring opinion to irrelevancy, but rather insisted that it be "[r]ead together with the majority opinion" and its language given effect. *In re Grand Jury Proceedings*

Estrich, Kenneth Karst, Laurie Levenson and Rodney Smolla as Amici Curiae in Support of Appellants ("Academic Amicus Br.") at 9 n.5, in *McKoy v. North Carolina*, 494 U.S. 433 (1990), Justice Scalia persuasively articulated the precedential significance of a concurring opinion by a Justice who joined a 5-4 majority in another case, stating that it "cannot add to what the majority opinion holds, binding the other four Justices to what they have not said; but it can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority.... I have never heard it asserted that four Justices of the Court have the power to fabricate a majority by binding a fifth to their interpretation of what they say, even though he writes separately to explain his own more narrow understanding." *Id.* at 462 n.3 (Scalia, J., joined by Rehnquist, C.J. and O'Connor, J., dissenting).

(Scarce), 5 F.3d 397, 401 (9th Cir. 1993). That language does not limit balancing to instances of bad faith only.

In his later concurring opinion in *Zurcher v. Stanford Daily*, 436 U.S. 547, 570 (1978), Justice Powell observed that his *Branzburg* concurrence had made clear that "in considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime." *Id.* at 570 n.3 (Powell, J., concurring); *see also Saxbe v. Washington Post Co.*, 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting) (explaining that "I emphasized the limited nature of the *Branzburg* holding in my concurring opinion," and that "a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated"). If Justice Powell's concurring opinion in *Branzburg* is to be given effect, as this Court said in *Scarce*, then the majority's opinion must be read narrowly, First Amendment interests must be recognized, and a balancing of interests must be conducted.

That is precisely what this Court concluded in *Bursey*, which remains the only decision by this Court involving a reporter's assertion of a First Amendment right not to identify individuals in the grand jury context. *Bursey* flatly rejected the government's bright-line argument "that the First Amendment is nugatory in a

grand jury proceeding." *Bursey v. United States,* 466 F.2d 1059, 1082 (9th Cir. 1972). It held that the grand jury context does not foreclose First Amendment balancing, but is simply a factor to consider in the balance. *Id.* It reasoned that "[i]t would be anomalous for courts to protect First Amendment rights from infringement by other branches of government, while providing no such protection from the acts of judicial agencies [*i.e.*, grand juries] over which the courts have supervisory as well as constitutional powers." *Id.* (citations omitted).

On rehearing, *Bursey* specifically declined a reading of *Branzburg* that would preclude case-by-case balancing. It concluded that "[a]lthough there is some language in Mr. Justice White's [majority] opinion in *Branzburg* implying that a grand jury investigation carries with it ingredients that may favor balance for the Government as against the First Amendment, the passage does not purport to disavow the balancing enunciated in" earlier Supreme Court cases. *Id.* at 1091 (citations and footnote omitted). In a footnote, the *Bursey* court punctuated the point, stating that Justice Powell's opinion reinforced its view of the "limited reach" of the majority's "rationale." *Id.* at 1091 n.2.

Finally, the government's per se rule approach to avoid balancing defies common sense. The government acknowledges that *Branzburg* and *Scarce* do permit First Amendment balancing in some circumstances, but argues that it arises only when a grand jury subpoena is issued in bad faith. (*E.g.*, G.A.B.55) This

position is demonstrably wrong and analytically indefensible.

It is wrong because whether or not First Amendment interests are implicated, *any* grand jury subpoena served in bad faith or for purposes of harassment is subject to quash. *See, e.g., United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991) (holding, without considering any First Amendment interests, that "[g]rand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass"). In fact, all that is required in order to quash a grand jury subpoena is that it be "unreasonable or oppressive," *see* Fed. R. Crim. Proc. 17(c), a standard less demanding than a showing of bad faith or harassment. The government's position thus is indefensible because it gives lip service to a First Amendment balancing that, in practice, would never take account of the First Amendment at all. A subpoena issued in bad faith or for purposes of harassment would always be quashed without need for any First Amendment consideration.

B. Whatever the General Rule, this Case Falls Outside *Branzburg*'s "Precise Holding" and the District Court's Per Se Approach Would Provide Courts With the Power to Arbitrarily Strip Journalists of First Amendment Rights

Even if one accepted the district court's premise that *Branzburg* and *Scarce* should be read to limit First Amendment balancing in cases where the facts "fall squarely within those of *Branzburg,*" this is not such a case. This Court has sought

to contain *Branzburg*'s narrow and "precise holding" to its facts and only rarely has applied it to subordinate First Amendment rights – in *Scarce* and the *Lewis* cases.[3] This case not only falls outside that "precise holding," it does so in a way that demonstrates the fallacy of setting up a bright line rule premised entirely on the context of grand jury proceedings.

Balanced against the First Amendment in *Branzburg* was the Fifth Amendment's mandate that the sole method for charging certain crimes – "capital, or otherwise infamous crime[s]" – is by grand jury indictment. 408 U.S. at 687. The Supreme Court referred to these matters implicating the grand jury's "constitutionally mandated" role as "'serious criminal cases.'" *Id.* (quoting *Costello v. United States*, 350 U.S. 359, 362 (1956)).[4] *Branzburg* involved four such cases consolidated on appeal, two for drug trafficking (*Branzburg*), the third for serious civil disorders caused by the Black Panther Party – including fires, turmoil and gunfire (*Pappas*) – and the fourth for threats, conspiracy and attempts

---

[3] Those cases did not raise serious First Amendment issues, so there was little, if anything, to subordinate in any event. *Scarce* was not a press case and the two *Lewis* cases did not involve confidential sources or information. *Lewis v. United States*, 501 F.2d 418, 422 (9th Cir. 1974) ("*Lewis I*") ("No question of confidentiality of source could be present"); *Lewis v. United States,* 517 F.2d 236, 238 (9th Cir. 1975) ("*Lewis II*") ("virtually indistinguishable" from *Lewis I*). The *Lewis* cases were not relied upon by the district court in its First Amendment analysis.

[4] Consistent with this focus on "capital, or otherwise infamous crime[s]," the *Branzburg* court made clear that it was concerned with "reprehensible" crime "threatening to the public interest." *Id.* at 692. It spoke of "securing the safety of the person and property of the citizen." *Id.* at 700.

to assassinate the President, as well as civil disorders and interstate travel to incite a riot, all by the Black Panthers (*Caldwell*). 408 U.S. at 667-77. All were "'serious criminal cases'" as the Supreme Court used that term, requiring indictment by a grand jury and pitting the Fifth Amendment against the journalists' First Amendment claims.

Scarce also involved criminal conduct implicating the Fifth Amendment's requirement of indictment by a grand jury, specifically, breaking and entering by a militant environmental group that spread hydrochloric acid throughout a university's laboratories and set free or stole its animals, causing approximately $100,000 in damage.[5] The *Scarce* court held that the "circumstances of [that] case fall squarely within those of *Branzburg*." 5 F.3d at 400. In reviewing *Branzburg*'s "precise holding" the *Scarce* court invoked its same terminology, echoing the reference to "serious criminal cases" and limiting *Branzburg*'s application to cases involving grand jury investigation of "'serious criminal conduct.'" 5 F.3d at 400, 402 (citation omitted). The Supreme Court and this Court have used that specific shorthand not to diminish the seriousness of other violations, but to draw a line around the distinct category of conduct at issue in *Branzburg* – crimes requiring indictment by grand jury under the Fifth Amendment. This category of conduct is

---

[5] Similarly, the *Lewis* cases involved the bombing of the office of the California Attorney General by the Symbionese Liberation Army (*Lewis I*), and the bombing of a Los Angeles hotel by a group claiming responsibility for the explosion (*Lewis II*).

the only one implicating the Fifth Amendment and the only one at issue in *Branzburg*, *Scarce* and *Lewis*.

Whatever else may be said about a protective order violation during pretrial discovery, it is not conduct of the sort at issue in *Branzburg* or *Scarce* and does not implicate the Fifth Amendment's requirement of indictment by a grand jury.[6] The protective order here is, by its terms, punishable by contempt. The Supreme Court has held that contempt is not an "infamous crime" and therefore need not be prosecuted by indictment. *See Green v. United States*, 356 U.S. 165, 183 (1958), *overruled in part on other grounds*, *Bloom v. Illinois*, 391 U.S. 194 (1968). Unlike prosecutions for "infamous" or capital crimes implicating the Fifth Amendment, contempt proceedings "are not intended to punish conduct proscribed as harmful by the general criminal laws." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 800 (1987). "Rather, they are designed to serve the limited purpose of vindicating the authority of the court." *Id.*

The facts here make clear that there should be a balancing of First Amendment interests. Violation of a protective order simply does not raise the same competing constitutional concern considered in *Branzburg* because it does

---

[6] The leak investigation here involves conduct that also is far different from that at issue in *In re Grand Jury Subpoena, Judith Miller,* 438 F.3d 1141 (D.C. Cir.), *cert. denied*, 125 S.Ct. 2977 (2005) and *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006), which involved alleged violations of national security.

not fall within the category of conduct for which grand jury indictment is mandatory under the Fifth Amendment.[7] In short, it falls outside *Branzburg*'s precise and narrow holding.

Moreover, the absence of any "constitutional mandate" warranting a grand jury investigation in this case readily exposes the error in creating a wooden distinction between grand jury cases and other matters. Recognition of First Amendment rights cannot rest on that distinction where the court whose protective order was violated was free to pursue the matter through means other than a grand jury. To sanction such a rule would be to approve a scheme where judges could unintentionally but nevertheless effectively strip away First Amendment rights as a matter of discretion based on the manner they choose to pursue protective order violations.

Courts may choose to address contempt in one of three ways – directly by the court itself,[8] by appointment of a special prosecutor,[9] or referral to the

---

[7] The conduct investigated is, at bottom, contempt of court stemming from violation of a protective order. (G.A.B.12) That was the basis for Judge Illston's Notice referring the matter to DOJ. (E.R.283) To the extent the government relies upon additional criminal theories to avoid application of the First Amendment – *i.e.*, perjury and obstruction of justice – they are derivative of contempt, having arisen out of Judge Illston's investigation rather than the disclosure of transcripts. Significantly, Judge Illston did not ask the government to investigate those derivative theories.

[8] *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry. Co. Sandefur*, 266 U.S. 42, 65 (1924) ("That the power to punish for contempts is

government for criminal prosecution. *See* Fed. R. Crim. P. 42. The first two of these investigatory means involve no grand jury power and thus afford a subpoenaed party the ability to invoke a reporter's privilege under this Court's precedents, as was the case in *Farr*. (*See* A.O.B.23-25) Outside the grand jury context, it is settled law in this Circuit that First Amendment balancing is required. *Id*. Only the last of the three options at the court's disposal carries with it the possibility of grand jury power and, if the district court's reading of *Branzburg* and *Scarce* is upheld, the means unilaterally to divest reporters of any First Amendment argument. Such a reading would, as applied to the facts here, transform the court's legitimate authority to pursue contempt as it sees fit in the interests of justice, to an unconstitutional power to choose whether and when to allow the press to assert its First Amendment rights. Any such rule would be inconsistent with a long line of Supreme Court cases holding that legal or procedural schemes that vest public officials with sufficient discretionary power to decide the fate of citizens' First Amendment rights are presumptively unconstitutional. *See generally* Laurence Tribe, *American Constitutional Law* §§ 12-38, 12-39 (2d ed. 1988).

---

inherent in all courts, has been many times decided and may be regarded as settled law.")

[9] *Young*, 481 U.S. at 793; *see also* Fed. R. Crim. P. 42(a)(2).

The district court in the BALCO case, Judge Illston, in fact considered all three options available for investigating the protective order violation at issue and struggled with the choice. Over several months and at least two hearings, she considered referring the matter to the government (G.E.R.137), appointing a private attorney as special prosecutor (G.E.R.192), and holding a hearing herself (G.E.R.198-99). "It's hard to know exactly what to do," she said. (G.E.R.191). In the end, she referred the matter to the government (E.R.283), which then commenced a grand jury investigation.[10]

If Judge Illston had made a different choice, there would have been no grand jury investigation at all and no basis for the government to argue – much less the district court to conclude – that it was precluded from conducting a balance of First Amendment interests. To the contrary, this Court's precedent would have *required* the district court to undertake a First Amendment balancing in those (non-grand jury) proceedings. *See Farr*, 522 F.2d at 468 (balance of First Amendment interests required in criminal case involving leak); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) ("*Shoen I*") (balancing required in all civil and criminal cases). First Amendment rights cannot rise or fall on the district court's discretionary choice as to where to steer an investigation. In cases involving

---

[10] Judge Illston's order itself did not suggest a grand jury investigation. (E.R.283) It requested an internal government investigation or an independent counsel investigation (and DOJ is not an independent counsel).

violation of a protective order, at least, a rigid distinction between grand jury and other matters cannot stand. First Amendment interests must be balanced.

II. THE COURT IS EMPOWERED TO AND SHOULD RECOGNIZE A REPORTER'S PRIVILEGE UNDER FED. R. EVID. 501

The government's first and principal line of defense here is to confuse two entirely different conceptions of "common law" and declare that "*Branzburg* resolved the common law argument" (G.A.B.42) in favor of a reporter's privilege once and for all in 1972.[11] In fact, the discussion of common law in *Branzburg* has no bearing whatsoever on whether a reporter's privilege ought to be recognized under Rule 501. For starters, *Branzburg* did not address the existence of a common law reporter's privilege on a substantive level – the question was not even before it. (*See* A.O.B.41 n.12) Rather, it noted the historical fact that a number of states (all of which have since recognized the existence of a reporter's privilege) had declined to adopt a privilege over the years. *Branzburg*, 408 U.S. 665, 685-86 (citing cases). But as importantly, when Congress enacted Rule 501 several years after *Branzburg* it dictated an entirely different conception of common law privilege, one not fully articulated until the Supreme Court's decision in *Jaffee v. Redmond,* 518 U.S. 1 (1996). Neither *Branzburg* nor the pre-*Jaffee* decisions of

---

[11] This runs contrary to testimony by a high-ranking DOJ official, who told the Senate last year that *Branzburg* resolved the *constitutional* question, but "[t]here's still an open question as to whether or not there may be a privilege under common law." 2006 WL 1546981 (Matthew Friedrich testimony) (June 6, 2006).

this Court that followed it provide any barrier here to recognition of a Rule 501 reporter's privilege, in a case of first impression in this circuit post-*Jaffee*.

A. The Existence of a Reporter's "Common Law" Privilege is Not Addressed, Much Less Foreclosed, By *Branzburg*

The existence of a federal common law reporter's privilege was not argued before or decided by the Supreme Court in *Branzburg*. The majority made no mention of any such claim, writing that "petitioners Branzburg and Pappas and respondent Caldwell press *First Amendment claims*," 408 U.S. at 679 (emphasis added), which is to say, *only* First Amendment claims. The parties' briefs bear this out. In *Branzburg* and its companion cases the questions presented were all strictly limited to the First Amendment. *See* Association of the Bar of the City of New York, Committee on Communications & Media Law, *The Federal Common Law of Journalists' Privilege: A Position Paper* 11-12 n.4 (Fall 2005) (available at http://www.nycbar.org) (quoting Questions Presented from briefs and writs).

What is left, then, are a few passing references to common law in *Branzburg*'s majority opinion, none of which may be viewed as binding statements deciding the issue of federal common law in that case. Specifically, the Court stated:

> At 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.

408 U.S. 685 (citations omitted). This observation was followed by citation to decades-old decisions of eleven states.[12] The Court refers to this same sentence again later in the opinion, in the context of looking to what "history teaches us" in rejecting an argument for a *First Amendment* privilege. 408 U.S. at 698. Far from any holding of the Court on the question of whether a federal common law privilege existed then or ought to exist going forward, these observations must be read as *dicta* meant to provide ballast for the Court's constitutional conclusion.[13]

---

[12] Eight of the eleven states cited by the *Branzburg* court (California, Georgia, Florida, New York, New Jersey, Colorado, Pennsylvania and Oregon) have since enacted statutory shield laws; the remaining three (Texas, Hawaii and Massachusetts) have also recognized the existence of a reporters' privilege in one context or another, including the grand jury context (Massachusetts). Compare *id.* with A.O.B.35-37 nn.10-11. Moreover, eight of those eleven states (California, Florida, New York, Colorado, Texas, Massachusetts, Hawaii and Oregon) have joined here as *amici curiae* urging reversal of the district court and recognition of a Rule 501 privilege.

[13] While the government places great weight on the *Miller* court's treatment of *Branzburg* in its brief, the fact is that two of the three judges there acknowledged that *Branzburg* did not reach, much less decide the common law question. *Miller*, 438 F.3d at 1171 (Tatel, J., concurring) ("having examined the briefs and lower court opinions, I see no evidence that the parties ever even argued for a separate common law privilege"); *id.* at 1160 (Henderson, J., concurring, citing *Branzburg*, 408 U.S. at 667) ("*Branzburg v. Hayes* addressed only 'whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the *First Amendment*.").

B. In Any Event, the Concept of "Common Law" Under Rule 501 is Entirely Different From that Referred to in *Branzburg*, *Scarce* and *Lewis II*, Presenting a Question of First Impression Post-*Jaffee*

Even if *Branzburg* could be said to have decided whether a federal common law reporter's privilege existed in 1972, the analysis demanded today by Rule 501 employs a conception of common law that is radically different from the pre-*Jaffee* view set forth in *Branzburg* and followed by this Court in *Scarce* and *Lewis II*. The government's efforts to blur these two distinct conceptions of common law to support its argument that there exists "binding" precedent resolving the Rule 501 question cannot change this fact.

The term "common law" has no single meaning. Among the many definitions are: (1) judge-made law as distinguished from statutes; and (2) "a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy," *Edgerly v. Barker*, 31 A. 900, 905 (N.H. 1891). *See also* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 177-78 (2d ed. 1995). Rule 501 refers to "*principles* of the common law as they may be interpreted by the courts in the light of reason and experience," Fed. R. Evid. 501 (emphasis added), suggesting the second sense articulated above. In contrast, *Branzburg*'s conception of common law, as discussed in Point II.A., was aligned with the first sense. 408 U.S. at 685.

In *Jaffee*, the Supreme Court resolved a circuit split on the very question of which of these two common law conceptions should control in approaching the question of privileges under Rule 501: reference to historical roots in decisional law (like in *Branzburg*), or reference to the full scope of relevant legal authority like it exists at the time of decision, irrespective of source or history. *Jaffee* held that the latter approach – grounded in the present, not the past, reflected in the full range of legal authority, not just case law – is what is required by Rule 501. As *Jaffee* demonstrates, Rule 501 requires courts to determine and evaluate the present state of the law in all its manifestations.

Jaffee itself grounded its recognition of a Rule 501 privilege for psychotherapists, social workers and their patients exclusively in state statutes. Case law was considered, but was not the touchstone for analysis. As the dissent pointed out, there were no historical common law roots to speak of for a psychotherapist privilege, much less one for social workers. Only one intermediate state court had recognized a psychotherapist privilege, in an unpublished decision. *Jaffee*, 518 U.S. at 25 & n.1 (Scalia, J., dissenting). *Jaffee* nevertheless found the privilege to be rooted in "reason and experience," citing the consensus of the states as reflected in statutory law. If *Jaffee* had employed *Branzburg*'s conception of common law, it could not have recognized the privilege. But under Rule 501's concept of common law, it did so.

In resolving the circuit split in *Jaffee*, the Court clearly abrogated or overruled decisions of all those circuits – including this circuit (*In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989)) – that had rejected a psychotherapist-patient privilege on the basis of a traditional, historically-rooted common law analysis.[14] That was the method of Rule 501 analysis employed in this circuit (and other circuits) prior to *Jaffee*, not only in the psychotherapist context, but in other contexts as well, including the reporter's privilege discussions in *Lewis II* and *Scarce*, which took their cue from *Branzburg*. That method of Rule 501 analysis does not survive *Jaffee*.

The government concedes that, under *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003), a panel of this Court may overrule a prior panel decision when an intervening Supreme Court case contradicts the earlier precedent. (G.A.B.41) Here, it is not necessary to overrule *Scarce* and *Lewis II* on Rule 501 grounds because the discussion in each was *dicta*.[15] But even if they were binding, *Gammie*

---

[14] *In re Grand Jury Proceedings* is cited in *Jaffee* at 518 U.S. at 7. The key principle on which that decision rested was that state statutory law is irrelevant, thus limiting the analysis of "experience" to historical common-law roots (the other basis was the subsidiary principle that only Congress could adopt a privilege lacking such roots). This analytic principle was flatly rejected by *Jaffee*.

[15] The government concedes, as it must, that *Lewis II*'s Rule 501 discussion was *dicta*, given the court's acknowledgement that the appellant did not even argue for a common law privilege. (G.A.B.39) The common law discussion in *Scarce* is also *dicta* and the government's effort to transform it into controlling precedent is contrary to over a century of well-settled law. Statements "'made during the course of delivering a judicial opinion,'" but which are "'unnecessary to the

would require this Court to follow the analytic framework of *Jaffee*, not *Scarce* or *Lewis II*.

Gammie offered specific guidance as to when it is appropriate to set aside circuit precedent in favor of intervening higher authority: "[T]he issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have *undercut the theory or reasoning underlying the prior circuit precedent* in such a way that the cases are clearly irreconcilable." *Gammie*, 335 F.3d at 900 (emphasis added).

As the *Gammie* court described it, the process of reconciling outdated circuit precedent with prevailing Supreme Court analysis requires a "pragmatic approach[] to an evolving body of common law" that aims to avoid "an inconsistency between our circuit decisions and the reasoning of state or federal authority embodied in a decision of a court of last resort." *Id.* at 899-900. To that end, this Circuit, in reexamining precedent to determine its continuing authority,

---

decision in the case'" are "'therefore not precedential'" and need not be followed by this Court. *Best Life Assurance Co. v. Commissioner*, 281 F.3d 828, 834 (9th Cir. 2002) (quoting Black's Law Dictionary 1100 (7th ed. 1999)); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) ("It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision."). *Scarce* was and remains a case of scholar's privilege and certainly should not "control the judgment" here regarding the issue of reporter's privilege "when the very point is presented for decision."

has not limited its inquiry to whether the holding of an intervening case directly addresses the holding of a prior case. Instead, it has asked whether "the *rationale* of [the prior case] and the cases following it...have been rejected by the Supreme Court." *United States v. Lancellotti*, 761 F.2d 1363, 1366-67 (9th Cir. 1985) (emphasis added) (holding that Circuit case regarding admissibility of seized evidence had been "effectively overruled" by new Supreme Court analysis). Recent decisions of this Circuit illustrate that proper application of the *Gammie* rule requires adoption of new Supreme Court analysis wherever practical. *See, e.g., Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1020 (9th Cir. 2006); *United States v. Plouffe*, 445 F.3d 1126, 1130 (9th Cir. 2006); *Stern v. Gill*, 345 F.3d 1036, 1043 (9th Cir. 2003).

The government downplays the stark change of focus in *Jaffee* (G.A.B.43-44), but the claim that *Jaffee* can coexist with *Branzburg*, *Scarce* and *Lewis II* rings hollow in light of their entirely distinct methods of analysis. *Jaffee* has altered the approach to Rule 501 privilege analysis in such a fundamental way as to require this Court to reassess its earlier discussion of the issue.

Moreover, because Rule 501 requires evaluation of the state of the law as it exists right now, even if the courts in *Branzburg*, *Scarce* and *Lewis II* had employed the appropriate analytic framework required under Rule 501 in light of *Jaffee* – which clearly they did not because *Jaffee* had not yet been decided – this

Court would still be obliged to revisit the issue as it stands *today*, 35 years after *Branzburg* and 14 years after *Scarce*. *See Jaffee*, 518 U.S. at 8-9 (Rule 501 "did not freeze the law governing the privileges of witnesses ... at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.'") (citations omitted).

To see how much the law has changed since *Branzburg*, one need only look to the brief *amicus curiae* filed on behalf of 24 states and the Commonwealth of Puerto Rico urging recognition of a federal reporter's privilege under Rule 501. Thirty five years ago, *Branzburg* cited decisions from eight of those states in support of its conclusion that a reporters' privilege did not enjoy broad support at the state level. *Branzburg*, 408 U.S. at 685-86 (citing cases). Today, those states are urging this Court that recognition of a "common law" privilege under Rule 501 is vital to their interests and the national interest and that failure to do so would undermine the law and policy of 49 states, the District of Columbia, and Puerto Rico. The lesson of *Jaffee* is that such a sweepingly broad consensus among the states as exists today is precisely the sort of showing of "reason and experience" that should now lead to the recognition of a federal reporter's privilege under Rule 501.

C. There is Every Bit as Much Consensus Among the States Concerning the Need for a Privilege Here as There Was in *Jaffee*

The government takes pains to identify disparities in the precise scope and contours of different states' privilege laws to support an argument that there "is no consensus" among the states on the need for a privilege. (G.A.B.49-54) These same arguments were made to the Supreme Court in *Jaffee*, and championed by its dissent, but to no avail. They fare no better here.

In rejecting these arguments, the Supreme Court focused instead on the fact that each state had adopted the privilege in some manner, notwithstanding the lack of uniformity in scope and application. It held that the appropriateness of recognizing "a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law *some form of* psychotherapist privilege." *Id.* at 12 (emphasis added). The Court expressly dismissed petitioner's argument that state laws must be uniform in order to find a privilege under Rule 501:

> Petitioner acknowledges that all 50 state legislatures favor a psychotherapist privilege. She nevertheless discounts the relevance of the state privilege statutes by pointing to divergence among the States concerning the types of therapy relationships protected and the exceptions recognized.... These variations in the scope of the protection are too limited to undermine the force of the States' unanimous judgment that some form of psychotherapist privilege is appropriate.

518 U.S. at 14 n.13 (citations omitted).

In *Jaffee*, petitioner dedicated seven pages to explaining the differences among the various state statutes, citing "a potpourri of exceptions and conflicting views on the types of therapy relationships that are entitled to a privilege and implement each state's balancing of confidentiality and governmental interests." Brief of Petitioner, 1995 WL 723662, at *31. They argued that the lack of uniformity undermined any conclusion of consensus, as it reflected different policy choices about which relationships were entitled to confidentiality and under which circumstances that confidentiality would be respected. *Id.* at *38.

Here, the government tries the same tactic, arguing that the claim of consensus is an overstatement because several states "expressly deny a privilege" in the grand jury context.[16] (G.A.B.49-50) This same argument was rejected by the Supreme Court in *Jaffee*, where petitioner cited several jurisdictions that expressly denied communications to social workers. 1995 WL 723662, at *35-36. Arguing the same point conversely, the government here claims that the "state law landscape falls far short of demonstrating a 'virtually universal agreement' on the extension of a qualified reporter's privilege to the context at issue here." (G.A.B.52) Again, *Jaffee* does not require universal agreement on the applicability of the privilege to the facts at hand. Instead, it looks to whether states agree that

---

[16] The government also tries to distinguish state laws by saying one or more do not apply to grand jury leak matters. (G.A.B.49-51) This is not a grand jury leak investigation. The grand jury testimony at issue was disclosed by the government as Section 3500 Jencks Act material.

"*some form*" of the privilege is appropriate. 518 U.S. at 14 n.13. Employing *Jaffee*'s standard, the fact that forty-nine states and the District of Columbia have established "some form" of protection for reporters reflects an overwhelming consensus supporting this Court's recognition of a Rule 501 privilege.

Finally, the government argues that the privilege advocated here should not be recognized because it includes no crime-fraud exception, suggesting that the privilege sought is even stronger than the attorney-client privilege. Not so. Unlike the attorney-client privilege, the reporter's privilege urged here is a *qualified* privilege which can be overcome on a balancing of interests. No special exception is necessary under these circumstances. Moreover, the government's premise for advancing this argument – that the communication of the government's trial evidence in a criminal case, which had already been disclosed to the criminal defendants and which was subject only to a protective order to protect the defendants from pretrial publicity, is a federal crime – is a false one. Neither the source communications with the reporters nor the *Chronicle*'s subsequent publication constitute criminal acts under the federal criminal law. The government fails to cite a single statute supporting its position because there is none.

III. THE STANDARD FOR BALANCING IN A LEAK CASE INVOLVING CONFIDENTIAL SOURCES MUST TAKE INTO ACCOUNT THE PUBLIC INTEREST TO ENSURE THAT COMPELLED DISCLOSURE IS NOT THE RULE

The government has no response to this Court's mandate in *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995) ("*Shoen II*") that any balancing test must ensure that disclosure be the exception and not the rule when performing a balance of interests in response to a claim of reporter's privilege. Rather, the government argues that evaluation of the public interest in a leak case would be improper because it would require the Court to make value judgments concerning the enforcement of criminal laws, and to assess the public value of news reporting. (G.A.B.60-61) Whatever pause it may have given the Supreme Court in *Branzburg* to pass on the public value of news reports vis-à-vis the public interest in enforcing certain criminal laws, the Court has done just that repeatedly in the decades since. Public interest balancing is commonplace in First Amendment law and *Branzburg*'s *dictum* on this point should present no barrier to this Court undertaking such a balancing in this case.

In numerous post-*Branzburg* cases where the press itself was found to have actually violated criminal laws by publishing secret or private information (unlike here, where there is no such charge) the Supreme Court has balanced First Amendment and law enforcement interests and held that the First Amendment barred prosecution where the publication at issue was newsworthy and the press

violated no law in acquiring the information. *See Bartnicki v. Vopper*, 532 U.S. 514, 534-35 (2001) (finding the published information "unquestionably a matter of public concern" and holding that "[i]n these cases, privacy concerns [raised by the government] give way when balanced against the interest in publishing matters of public importance"); *Florida Star v. B.J.F.*, 491 U.S. 524, 536, 541 (1989) (finding it "clear ... that the news article concerned a 'matter of public significance'" and that imposing liability pursuant to state criminal statute violated the First Amendment); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103, 106 (1979) (affirming order barring prosecution as violative of First Amendment where newspaper "lawfully obtained truthful information about a matter of public significance" and state's asserted interest in anonymity of juvenile offenders was not of the highest order); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839, 842 (1978) (reversing guilty verdict, finding none of state's interests in maintaining confidentiality of judicial commission proceedings outweighed First Amendment rights where article reported on matters of public interest).

In each of these cases the Court assessed the public value of the reporting and made a judgment as to the relative public interest in law enforcement based on the facts of that particular case. This Court should undertake the same sort of balancing here.

IV. REGARDLESS OF WHAT STANDARD IS APPLIED, THE GOVERNMENT HAS EFFECTIVELY CONCEDED THAT IT CANNOT PREVAIL IN A BALANCE OF INTERESTS ON THE RECORD BEFORE THIS COURT

The government offers no responsive argument at all to appellants' demonstration that the subpoenas should be quashed in the event a balancing of interests is required.[17] What it does offer is the startling concession that it is now unable to meet its burden of defeating any qualified privilege, as a result of information reflected in *ex parte* materials it seeks permission to file.[18] Whatever that *ex parte* filing contains, we know that it reveals the government is not capable of demonstrating that it exhausted alternative sources before subpoenaing the journalists, in contravention of this Court's precedents and in violation of the DOJ's own guidelines. *See Shoen I*, 5 F.3d at 1292-93; 28 C.F.R. § 50.10(a) (2006). We know this from the extraordinary passage at the very end of the government's brief, where it acknowledges that it will "need" to make a further presentation to the district court to overcome any privilege. (G.A.B.62-63) This,

---

[17] The government offers the conclusory assertion in its statement of facts that it "exhaust[ed] its alternative sources" (G.A.B.13), yet concedes by its silence that it never brought witnesses before the grand jury and does not attempt to explain why that would have been a useless act. *See, e.g., United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1114 (9th Cir. 2005) (requiring under wiretap statute – which also requires government exhaustion of alternative investigative techniques – a clear explanation of why calling grand jury witnesses is futile before judge may authorize a wiretap), *amended on denial of rehearing*, 437 F.3d 854 (9th Cir. 2006).

[18] Appellants have opposed that motion.

of course, is simply a euphemistic way of saying that it failed to meet its burden at the district court level and hence cannot meet it here.

In the event the Court grants the government's motion to file *ex parte* and denies appellants' request for an opportunity to review and respond to the materials, appellants offer the following points for the Court's consideration.

First, if the secret submission reveals that the government has information suggesting that there are other potential sources the government failed to pursue before serving the subpoenas, opposing the motions to quash and then seeking harsh sanctions against the reporters and their newspaper, the contempt orders should be vacated. Second, if it casts doubt on the notion that Victor Conte was the likely source of the journalists' information, the entire opening section of the government's brief describing its efforts to implicate Mr. Conte should be disregarded and an inference drawn that the government had an insufficient basis to proceed to subpoena the journalists here. In that case, the contempt orders should be vacated based on the government's inability to meet the exhaustion test. Third, if the secret submission reveals that the government has amassed additional admissible information, the Court should re-evaluate whether the government has met its burden of demonstrating a need for the journalists' testimony and, alternatively, whether the information sought from the journalists is cumulative of information the government already has. If either assumption is true, the

contempts should be ordered vacated.

Regardless of what the *ex parte* materials may or may not show, the government's failure to provide any responsive argument on the issue of balancing tells this Court all it needs to know. The government has not even begun to explain why this Court should be the first ever to compel journalists to disclose their confidential sources in the context a DOJ leak investigation that did not involve national security or terrorism. It touts DOJ's record of self-restraint and respect for First Amendment values (G.A.B.46-47), but offers no explanation of why, as former Justice Department official Mark Corallo noted (E.R.19-20), it has so markedly departed from that record here.[19] Even the government's repeated claim that violation of the protective order was a criminal act would not adequately explain such a departure, but as discussed above that assertion is not accurate in any event.

The lack of harm to the government is unrebutted and the reporting's beneficial impact undisputed. Now, in addition, there is a demonstrable failure to

---

[19] The government engages in creative classification in representing that it rarely issues subpoenas to the press. (G.A.B.47) DOJ has targeted at least 10 reporters and news organizations over the last two years, serving four subpoenas in this case alone. *See, e.g., Miller*, 438 F.3d 1141; *Gonzales*, 459 F.3d 160. By contrast, affiants Corallo and Gorelick collectively served six years between 1994-2005 during which only a single subpoena was issued. (E.R.16-17, 19; 51, 53-54) DOJ's representation that it has sought only 13 media subpoenas in 15 years is also suspect since that number could not, given its count of 12 a year earlier, include the four subpoenas issued here. *Compare* G.A.B.47 *with* 2005 WL 2661303 (Chuck Rosenberg testimony) (Oct. 19, 2005).

exhaust alternative sources. Under any standard of balancing, the government has not even approached a showing sufficient to overcome either the First Amendment interests at issue or a Rule 501 reporter's privilege.

CONCLUSION

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

Dated: January 9, 2007

Respectfully submitted,

Jonathan R. Donnellan
Kristina E. Findikyan
Eve B. Burton
THE HEARST CORPORATION

Floyd Abrams
Susan Buckley
CAHILL GORDON & REINDEL LLP

Kathleen M. Sullivan
QUINN EMANUEL URQUHART OLIVER & HEDGES LLP

Gregory Lindstrom
Sadik Huseny
LATHAM & WATKINS LLP

Attorneys for Appellants

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 8388 words.

Dated: January 9, 2007

Jonathan R. Donnellan

Attorney for Appellants, Mark Fainaru-Wada, Lance Williams and the San Francisco Chronicle

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 described as:

Reply Brief of Appellants Mark Fainaru-Wada, Lance Williams and the *San Francisco Chronicle*

on **January 10, 2007**, I served the above document(s) on the following party to this cause by overnight delivery as follows:

Douglas M. Miller, Esq.
Michael J. Raphael, Esq.
Assistant United States Attorneys
Special Attorneys to the
United States Attorney General
1300 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Express Mail or other express service carrier. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained for receipt of overnight mail by Express Mail or other express service carrier; such documents are delivered for overnight mail delivery by Express Mail or other express service carrier on that same day in the ordinary course of business, with delivery fees thereon fully prepaid and/or provided for. I deposited in Latham & Watkins LLP's interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail

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 **January 10, 2007**, at San Francisco, California.

Linda C. Tam