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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re GRAND JURY SUBPOENAS TO MARK FAINARU-WADA AND LANCE WILLIAMS	Case No. CR-06-90225 MISC-JSW **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF MOTION TO QUASH SUBPOENAS BY MARK FAINARU-WADA AND LANCE WILLIAMS** Date: August 4, 2006 Time: 9:00 a.m. Place: Courtroom 2, 17th Floor Judge: Hon. Jeffrey S. White

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INTRODUCTION

The government's papers in opposition to the reporters' motion to quash are remarkable in many ways. But one thing is clear. They were crafted in a way to persuade the Court that the government has its man in the cross-hairs and its man is BALCO defendant Victor Conte. From this the government suggests that the reporters' vigilant efforts over the last two years to protect the confidentiality of their sources is of little moment and insinuates that there is very little worth protecting here. There is an overarching problem with this theory. The problem is that the theory is untrue and the government knows it. We will not speculate as to why the government decided to conceal these facts from the Court, but the effect of that decision was to present the Court with a set of papers that are, at their core, misleading.

The government devotes a large number of pages, virtually its entire rendition of the facts, to a selection of e-mails exchanged between *San Francisco Chronicle* reporter Mark Fainaru-Wada and Victor Conte.[1] Weeks ago, the government shared with the *Chronicle* the fact that it had obtained copies of these e-mails from Conte in a search of his house and its belief that Conte was the source of the leak of the grand jury transcripts. Apparently to confirm that belief, the government served a subpoena on the *Chronicle* seeking documents reflecting "any information ... regarding the identity of the individual or individuals" who provided the grand jury transcripts to the reporters or the *Chronicle*.[2] The *Chronicle* responded to the subpoena

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[1] This section of the opposition brief was purportedly redacted by the government and filed under seal, though electronic copies of the redacted brief that the government filed with the Court and released to the media allowed recipients to easily view the redacted portions. Their contents have been fully reported by numerous media outlets. *See, e.g.,* Adam Liptak, *Prosecutors Can't Keep a Secret in Case on Steroid Use*, N.Y. Times, June 23, 2006, at A18. In fact, the entire brief was posted online by the New York Times in unredacted form after the faulty redacting was discovered. *See* http://www.nytimes.com/packages/pdf/national/20060622balco_doc.pdf (June 22, 2006). The Court subsequently denied the government's motion to seal its opposition papers without prejudice. On July 3, 2006, the government filed a Renewed Administrative Motion to File Under Seal. The reporters oppose this motion in a separate brief filed today.

[2] The subpoena to the *Chronicle*, and the subsequent correspondence between its counsel and the government, are annexed as Exhibits 1-6 to the accompanying Affidavit of Eve Burton, sworn to July 7, 2006 ("Burton Aff't"). The subpoenas to the *Chronicle* and the reporters are identical. *Compare* Donnellan Aff't Exs. 77-78 *with* Burton Aff't Ex.1.

stating that it had no responsive documents. Shocked by the response, the government asked again for confirmation of this fact, indicating that the very e-mails now highlighted by the government in its brief would be responsive to the subpoena if they disclosed the source that provided the grand jury transcripts. Again, counsel for the *Chronicle* stated: "Let me be entirely clear. Those emails are not responsive to your subpoena ...." Still unsatisfied with the answer, the government asked again. In a final letter, counsel for the *Chronicle* wrote "I want to be sure you have no doubts ... the *Chronicle* has have no responsive documents" to the subpoenas seeking the names and materials from the source or sources that leaked the grand jury transcripts. The government got an answer – an accurate and honest answer, well before it filed its opposition brief – but not one it liked and therefore decided to simply ignore the facts.

For the government now to highlight these e-mails to the Court suggesting some relevance to the subpoenas is beyond troubling. At a minimum, one would have expected full disclosure of the parties' correspondence to avoid misleading the Court. In any event, if the linchpin of the government's argument for issuing the subpoenas to the reporters is that the e-mails somehow tell the story of the transcripts' leak, the *Chronicle's* response to its subpoena – made well in advance of the government's filing of its brief here – devastates that argument. That the government, knowing full well the lack of any connection between the e-mails and the subpoenas at issue, offered those e-mails without disclosing their irrelevancy to the Court suggests that what is involved here is what Justice White was talking about in *Branzburg* when he referred to grand jury investigations conducted other than in good faith. *Branzburg v. Hayes*, 408 U.S. 665, 707-708 (1972). It brings to mind, as well, the *Branzburg* Court's admonition that harassment of the press will not be tolerated. *Id.* Surely for the government to continue to press this matter, knowing what it knows now, is nothing short of harassment. The government's highly unusual request for an unprecedented evidentiary hearing on this motion to quash – simply another device to question the reporters, without even the benefit of a ruling on their privilege claims – suggests as much as well. However one characterizes the government's behavior, it is certainly a matter for the Court to consider in exercising its discretion in assessing whether the subpoenas should be quashed.

Perhaps the most insidious intended effect of the brief's focus on the Conte e-mails is how it seeks to mask the absence of *any* specific factual showing in support of the government's opposition. By holding itself out as having found its man (notwithstanding the contrary information previously provided to the government by the *Chronicle*), and by claiming that the *Chronicle*'s reporters have nothing more than a passing interest in confidentiality (notwithstanding the falsity of that claim), the government's less than truthful arguments cannot be countenanced.[3]

The government's attempt to mislead the Court is not confined to the facts, but runs throughout its brief. One particularly striking example may be found on the second page of its brief in opposition, where the government claims that the Supreme Court in *Branzburg* "rejected the contention, made by Movants here, that a common law qualified privilege should apply to reporters under Rule 501 of the Federal Rules of Evidence." Gov. Br. at 2. In fact, Rule 501 was not even enacted until three years after *Branzburg* was decided.

The government's schizophrenic approach to its own DOJ Guidelines is similarly problematic. On the one hand, it seeks to benefit from the reporters' supposed "acknowledge[ment] that the government has exercised great restraint under these rules." Gov. Br. at 30; *see also id.* at 30-31, 34. On the other, it ignores the thrust of Mr. Fainaru-Wada's and Mr. William's demonstration that in recent days the government has been anything but restrained. Nor can the government explain its failure to heed the DOJ Guidelines' express requirement of "exigent circumstances" other than to seek to read those words out of the Guidelines by dismissing the very language of the Guidelines that routinely has been applied over at least the last decade. The undisputed affidavits of former senior Justice Department officials in the Bush and Clinton Administrations demonstrate this.

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[3] The government also suggests that the reporters' source relationships were careless and casual, claiming that "[n]either [the reporters] nor Conte attempted to keep their relationship confidential, as the e-mail correspondence routinely was reported by [the reporters]." Gov. Br. at 4; *see also id.* at 4 n.2. To the contrary, the reporters took extraordinary care to live up to their promises of confidentiality to any and all confidential sources. As regards Conte and all other *on-the-record* sources, they quoted, with full attribution, from their sources. As regards *off-the-record* sources, they scrupulously protected the identity of those sources.

Once one wades past the smoke and mirrors, the government's brief is most striking in what it does *not* show, which makes clear by default that any balancing of interests in this case weighs in favor of the journalists here. Significantly, the government cites no harm that has resulted from the *Chronicle* publications. It concedes that there was no harm to law enforcement in the BALCO case – where defendants pled guilty and served time – offering instead the spectre of "potential harm" in future cases. Gov. Br. at 40. It likewise concedes that there was no harm to the BALCO defendants' Sixth Amendment rights, again arguing only that "such a leak could" cause harm in "future" cases. *Id.* at 41. Similarly, the government has no response to the reporters' detailed discussion of how grand jury secrecy interests are not implicated in this case (Opening Br. at 41-43), retreating to the most generalized statement of the "sanctity of grand jury proceedings" and "potential effect on future witnesses." Gov. Br. at 40; *id.* at 39-40. Beyond that, the government protests that grand jury secrecy interests were not diminished and that the transcripts were not effectively introduced in the BALCO criminal case, *id.* at 40, but the facts tell a different story.

There was no "grand jury leak" here in the sense that phrase is commonly understood. The *Chronicle* articles based on the transcripts were published post-indictment, after the grand jury had completed its investigation of defendants, at a time when defendants were actively preparing for a public trial. This in itself is significant. The early timing, scope and completeness of the government's pretrial disclosure was extraordinary. Only two weeks after the indictments, the government turned over a "complete set" of pretrial discovery materials – tens of thousands of pages – including *all* grand jury transcripts, without even waiting for the entry of a written protective order. Gov. Br. at 3-4. This was not the government simply complying with its discovery obligations; it chose this unusual course. *See* Fed. R. Crim. P. 16(a)(3) & 26.2 (no obligation to disclose government witnesses' grand jury testimony until after direct examination of witness at trial). As discussed at one of the pretrial conferences, this was never intended to be "normal discovery." Hershman Decl. Ex. U, p.5. The government also made a pre-disclosure agreement with defense counsel that they would "be able to discuss [the discovery materials] with witnesses in order to prepare for trial." *Id.* at pp. 5-6. Every step was

consistent with the government's repeated claims that it intended to quickly take the case to a public trial. Hershman Decl. Ex. A at 7, 11-13; Ex. BB at 8. By providing this information to defendants in a criminal case, as the government did at its discretion, there was no longer a guarantee that the information, once protected by "the sanctity of the grand jury" process, would never become public. As a matter of law, once the government took the material from the grand jury in the post-indictment context and provided it to parties to a criminal case, that material no longer retained the same degree of grand jury protection and no witness could prudently believe at that point that his or her privacy ultimately would be protected.

The ill-conceived basis for the government's subpoenas, its repeated efforts to mislead this Court, its disregard for its own guidelines, the nature of the offense under investigation, and the lack of any demonstrable harm from the *Chronicle's* publications – all of this, when properly applied to the law, discussed below, leads to but one conclusion: the government's subpoenas should be quashed.

ARGUMENT

The government's legal arguments primarily consist of rigid assertions of the preclusive effect of the Supreme Court's decision in *Branzburg* and the Ninth Circuit's decisions in *Scarce* and the *Lewis* cases. Framed as such, these claims – which on their face do not survive scrutiny – expose the government's efforts to avoid the balancing of interests required under the reporter's privilege and Fed. R. Crim. P. 17(c). The government greatly overstates the scope of existing legal authority and the degree to which it controls this Court's examination of the issues at hand. There exists no legal authority that precludes the Court in this case from recognizing a qualified reporter's privilege under Fed. R. Evid. 501 or the First Amendment, and certainly none that bars it from conducting a discretionary review of the reasonableness and oppressiveness of the government's subpoenas in accordance with Fed. R. Crim. P. 17(c). While the government might wish otherwise, all of these roads lead to balancing, and a balance of the competing interests *in this particular case* warrants a finding by this Court quashing the subpoenas.

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

A. Common Law Privilege

The government makes much of the claim that there exists "binding" precedent that divests the Court of any authority to quash the subpoenas here. As with its rendition of the facts, however, this overstates the law. There is no binding Ninth Circuit decision on common law reporter's privilege under Fed. R. Evid. 501. That is because existing Ninth Circuit precedent on common law reporter's privilege was superseded by *Jaffee v. Redmond*, 518 U.S. 1 (1996). The binding Supreme Court decision on the recognition of privileges under Fed. R. Evid. 501 is *Jaffee*, not *Branzburg*, which predated the enactment of Rule 501 by several years. In response to the government's claim that only the Supreme Court can change the law of common law privilege, the answer is *it has*. This case presents the Court with an issue of first impression in this Circuit concerning the existence of a federal common law reporter's privilege following the Supreme Court's decision in *Jaffee*.

In *Jaffee*, in light of the enactment by Congress of the Federal Rules of Evidence in 1975, the Supreme Court abandoned the static, strictly backward-looking, pre-Rule 501 approach to evaluating common law privileges. Heeding the legislative mandate of Rule 501, the Court declared that the courts' obligation to recognize and give effect to common law privileges under that rule is a forward-looking, dynamic concept to be developed on an ongoing basis, giving full effect to recent developments in case law and legislation. The law of privilege, *Jaffee* held, is something to be constantly reevaluated and examined anew in light of developments in every area of law. In so holding, *Jaffee* specifically rejected the precise analytic model employed by the Supreme Court in *Branzburg* and the Ninth Circuit in *In re Grand Jury Proceedings* (*Scarce v. United States*), 5 F.3d 397 (9th Cir. 1993), and *Lewis v. United States*, 517 F.2d 236 (9th Cir. 1975) ("*Lewis II*"), which relied exclusively on notions of historical common law. The government has no response to this reality, which was discussed at length in movants' opening brief. *See* Opening Br. at 27-30.

The Supreme Court upset *Scarce*'s foundation when it accepted certiorari in the *Jaffee* case to resolve a circuit split on the issue of the psychotherapist/patient privilege. The Ninth Circuit was on the (ultimate) losing side of that split, having rejected such a privilege seven years before in *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989). *See Jaffee*, 518 U.S. at 7 (citing *In re Grand Jury Proceedings*). In recognizing the psychotherapist/patient privilege, the Supreme Court in *Jaffee* specifically rejected the analytic underpinnings of *In re Grand Jury Proceedings*, and abrogated its holding. *See* Opening Br. at 29-30. The key principle upon which the Ninth Circuit 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). That key principle had been employed by the Ninth Circuit not only to reject a psychotherapist/patient privilege under Rule 501 in *In re Grand Jury Proceedings*, but also to reject a reporter's privilege under Rule 501 in *Lewis II* and *Scarce*. These Ninth Circuit cases share two common characteristics: they were decided pre-*Jaffee*, and they were based on an analytic principle overturned and rejected by the Supreme Court in *Jaffee*.[4] *Jaffee* is the only Rule 501 case binding on this Court. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (where Supreme Court authority is clearly irreconcilable with prior circuit authority, "district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court [the Ninth Circuit] as having been effectively overruled").

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[4] *Scarce* and *Lewis II* share another characteristic – their discussion of a common law reporter's privilege based on Fed. R. Evid. 501 was *dicta*. The government's effort to transform the Ninth Circuit's *dicta* in those cases 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 decision in the case'" are "'therefore not precedential'" and need not be followed by this Court. *Best Life Assur. Co. v. Comm'r*, 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."). Without question, *Scarce* is a case of scholar's privilege, which certainly cannot "control the judgment" regarding an issue of reporter's privilege here "when the very point is presented for decision." In *Lewis II*, the court acknowledged that the appellant did not even argue for a common law privilege.

In *Lewis II*, the Court of Appeals was dismissive of a common law reporter's privilege based on *Branzburg*'s pre-Rule 501 and pre-*Jaffee* conclusion that historically, "courts consistently refused to recognize the existence" of such a privilege. 517 F.2d at 238. Again, in *Scarce*, the Court of Appeals stated that it was "no more inclined" to run against the grain of *Branzburg*'s retrospective analysis of historical common law than it was in *Lewis II*. 5 F.3d at 402-03. However, three years later, *Jaffee* made clear that this traditional *Branzburg*-era approach to common law privilege may not be perpetuated under Rule 501:

> 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 (emphasis added).

In passing Fed. R. Evid. 501, Congress "manifested an affirmative intention not to freeze the law of privilege," but rather to "leave the door open to change," *Trammel v. United States*, 445 U.S. 40, 47 (1980), and to "'continue the evolutionary development of testimonial privileges.'" *Jaffee*, 518 U.S. at 9 (quoting *Trammel*, 445 U.S. at 47). Congress could hardly have been clearer that its intent was to authorize the courts to re-examine the reporter's privilege issue in the years after *Branzburg*. As Congressman Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, observed in presenting the Conference Report to the House, the language of Rule 501 "permits the courts to develop a privilege for newspaperpeople on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspaper people any protection they may have from State newsperson's privilege laws." 120 Cong. Rec. H 12253-54 (daily ed. Dec. 18, 1974). Thus, the Supreme Court's ruling in *Branzburg* in 1972 relating to First Amendment protection for journalists' confidential sources, however it is read, is not at all dispositive of the claim that a federal common law privilege exists today. If, as Congress insisted, the law of privilege is to be both fluid and reflective of changing times and circumstances, to suggest that the law of privilege — or perhaps it is only the law of reporter's privilege — was set in stone in 1972 is to reject the essence of Rule 501 and the very concept of

a developing federal common law of privilege.

The government admits, as it must, that the law has changed dramatically since *Branzburg* was decided in 1972, as more states have come to recognize a reporter's privilege by statute or case law. Gov. Br. at 32. *Jaffee* makes clear that that is one of the most relevant inquiries. That 49 states and the District of Columbia now agree that a journalist's confidential sources are deserving of protection to promote the free flow of information to the public cannot be lightly ignored. Opening Br. at 23-24 nn. 5-6. Indeed, as *Jaffee* instructs, "the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one," *Jaffee*, 518 U.S. at 12-13. To deny the existence of a federal common law privilege in the face of the States' near-unanimous recognition that such protection is indeed critical to maintaining a citizenry informed about important issues of our day, "would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id.*; *see* Lockyer Aff't ¶ 8, Ex. B at 2-3.

In apparent recognition of the force of the virtual unanimity among the States on this topic, the government seeks to chip away at our demonstration that 49 of the States and the District of Columbia have now recognized that a journalist is entitled to protection from the forced disclosure of his or her confidential sources by suggesting that in many of those states that have adopted the reporter's privilege as a matter of state common law, the decisions cited are decisions of lower state courts. Gov. Br. at 33. This is incorrect. Of the 18 states that have adopted a reporter's privilege as a matter of state common law (in addition to the 31 that have adopted it by statute), the State's highest court decided the matter in 12 of the states; intermediate appellate courts issued the ruling in three of the states; state trial courts issued the pertinent ruling in two of the states and in one, the matter was decided by a federal district court. *See* Opening Br. at 23 n.6.[5]

[5] If anything, the consensus concerning a reporter's privilege is even greater than that which existed for a psychotherapist privilege at the time of *Jaffee*. Unlike the latter privilege at the time *Jaffee* was decided, the reporter's privilege has all-but total support from federal courts of appeal. *Compare Shoen v. Shoen*, 5 F.3d 1289, 1292 n.5 (9th Cir. 1993) ("*Shoen I*") (citing cases); *Zerilli v. Smith,* 656 F.2d 705, 711 (D.C. Cir. 1981); *Riley v. City of Chester*, 612 F.2d

The government also argues that even if there is a consensus that some form of reporter's privilege exists in the context of civil and criminal trials, there is no such consensus concerning the application of the reporter's privilege in the grand jury context. Gov. Br. at 32. But this argument ignores the Court's Rule 501 analysis in *Jaffee*, in which the Court looked first to whether a psychotherapist-patient privilege existed in any form under federal common law, and then considered whether it made sense to apply the privilege in the context of licensed social workers. The argument made by the government here — that the Court should consider whether the privilege exists in the grand jury context alone — is similar to that rejected by the seven-Justice *Jaffee* majority in concluding that the relevant inquiry, in the first instance, was whether a psychotherapist privilege exists at all. *Jaffee*, 518 U.S. at 16-17. Having answered that question in the affirmative, the Court then went on to reason that it made no sense to distinguish between licensed social workers and other mental health practitioners. The Court concluded that it agreed with the Court of Appeals' holding that "'[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose.'" *Id.* at 17 (quoting *Jaffee v. Redmond*, 51 F.3d 1346, 1358 n.19 (7th Cir. 1995)).

The same analysis should apply here. The relevant inquiry in the first instance is whether there is a consensus as to whether a common law privilege exists that protects journalists from being required to disclose their confidential sources. As we have previously shown, it clearly does. Then the Court must ask whether it makes sense to permit such protection in the context of civil cases, while denying such protection in criminal cases. We respectfully submit that it does not. As the Third Circuit held in *Cuthbertson*, a reporter's "interest in protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship created by compelled disclosure of sources and unpublished notes does not change because the case is civil or criminal." *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir.

708, 714-15 (3d Cir. 1979); *Baker v. F & F Investment*, 470 F.2d 778, 782 (2d Cir. 1972), *with Jaffee,* 518 U.S. at 7-8 (citing circuit split in which three courts of appeals had recognized the psychotherapist-patient privilege and four had concluded that no such privilege existed).

1980). The distinction is particularly untenable in a case where the subpoenas are being pursued not by a criminal defendant — where competing constitutional rights are implicated — but by the government. In any event, whatever might have been the case when *Branzburg* was decided, an overwhelming majority of jurisdictions — 42 States plus the District of Columbia — now recognize the existence of a reporter's privilege in *criminal* cases either by statute or by common law.[6] The Court of Appeals in this circuit has recognized the privilege in criminal cases as well. *See Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975). Similarly, the DOJ Guidelines make no distinction between civil, criminal, or grand jury cases. *See* 28 C.F.R. § 50.10; *see also* Fed. R. Evid. 1101(c) (providing that "[t]he rule with respect to privileges applies at all stages of all actions, cases, and proceedings").

The government also suggests that no privilege should be recognized because the precise contours of the privilege would be difficult to fashion. Specifically, the government points to the issue of who should hold the privilege. Gov. Br. at 31. The States have had little difficulty defining who is covered by the privilege. For example, the California shield law, embodied in

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[6] *See* Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300-.390; Ariz. Rev. Stat. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Const. Art. I, § 2(b); Cal. Evidence Code § 1070; Colo. Rev. Stat. § 13-90-119; Del. Code Ann. tit. 10, §§ 4320-26; Fla. Stat. Ann. § 90.5015; Ga. Code Ann. § 24-9-30; 735 Ill. Comp. Stat. Ann. 5/8-901 to 8-909; Ind. Code §§ 34-46-4-1, 34-46-4-2; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-1459; Md. Code. Ann., Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws Ann. §§ 767.5a, 767A.6; Minn. Stat. Ann. §§ 595.021-.025; Mont. Code Ann. §§ 26-1-902, 26-1-903; Neb. Rev. Stat. §§ 20-144 to 20-147; Nev. Rev. Stat. Ann. §§ 49.275, 49.385; N.J. Stat. Ann. §§ 2A:84A-21.1 to 21.5; N.M. Stat. Ann. § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat. § 8-53.11; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code Ann. §§ 2739.04, 2739.12; Okla. Stat. Ann. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510-.540; 42 Pa. Cons. Stat. Ann. § 5942(a); R.I. Gen. Laws §§ 9-19.1-1 to 9-19.1-3; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208; *Idaho v. Salsbury*, 924 P.2d 208 (Idaho 1996) (criminal); *In re Wright*, 700 P.2d 40 (Idaho 1985) (criminal); *Kansas v. Sandstrow*, 581 P.2d 812 (Kan. 1978) (criminal); *In re Letellier*, 578 A.2d 722 (Me. 1990) (grand jury); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991) (grand jury); *New Hampshire v. Siel*, 444 A.2d 499 (N.H. 1982) (criminal); *Brown v. Virginia*, 204 S.E.2d 429 (Va. 1974) (criminal); *Washington v. Rinaldo*, 673 P.2d 614 (Wash. Ct. App. 1983) (criminal), *aff'd on other grounds*, 689 P.2d 392 (Wash. 1984); *West Virginia ex rel. Charleston Mail Ass'n v. Ranson*, 488 S.E.2d 5 (W. Va. 1997) (criminal); *Zelenka* v. *Wisconsin*, 266 N.W.2d 279 (Wis. 1978) (criminal); *Wisconsin v. Knops*, 183 N.W.2d 93 (Wis. 1971) (grand jury). In both Mississippi and Utah, trial courts have applied the reporter's privilege in the criminal context. *See Mississippi v. Hand*, No. CR89-49-C(T-2) (Miss. 2d Cir. Ct. July 31, 1990) (unpublished opinion) (criminal case); *Utah v. Koolmo*, No. 981905396 (Utah 3d Dist. Ct. Mar. 29, 1999) (Hilder, J.) (unpublished opinion) (criminal case).

the State Constitution as well as statute, protects "[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service," or "a radio or television news reporter or other person connected with or employed by a radio or television station." Cal. Const. art. I § 2(b); Cal. Evid. Code § 1070(a), (b). Delaware protects anyone earning his or her principal livelihood by "obtaining, or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds or images in a form available to the general public." Del. Code Ann. tit. 10 § 4320(4). And Minnesota protects any person "who is or has been directly engaged in the gathering, procuring, compiling, editing or publishing of information . . . to the public." Minn. Stat. § 595.023.

While the government admits that "state privilege law is relevant under *Jaffee*'s analytic framework," it suggests in another breath that the California Shield Law, which affords absolute protection from the very type of disclosure that the government seeks here, has no relevance whatsoever. Gov. Br. at 33. While it is true that we do not contend that the Shield Law applies in this case, which is governed by federal law, it is far from true that the Shield Law is irrelevant in determining what the scope of the common law privilege should be. As we noted in our opening brief, federal courts have frequently given great weight to the existence of state shield laws in applying the privilege in federal question cases. Opening Br. at 24-25.

The government also urges that the existence of the Department of Justice's Guidelines argues against the recognition of a common law privilege. Gov. Br. at 30. The argument is particularly disingenuous in light of its position that the Guidelines are simply internal prosecutorial protocols that have no legal force or effect. *See id.* at 47. The government again misses our point. The Guidelines evidence a consensus that reporters must be afforded protection even in the context of the federal criminal justice system. That is a significant factor under *Jaffee* in analyzing whether a privilege should be recognized under Rule 501.

Recognizing a federal common law reporter's privilege here not only comports with Rule 501 as articulated by the Supreme Court in *Jaffee*, it comports also with basic notions of federalism and fairness. *See* Lockyer Aff't ¶¶ 7-8 & Ex. B.

B. First Amendment

The government does not contest that the Court of Appeals has repeatedly recognized the existence of a qualified reporter's privilege under the First Amendment in criminal as well as civil cases and the need for a balancing of First Amendment interests where the privilege applies. The government further concedes that the Court of Appeal's rulings in the *Schoen* cases, which broadly articulate those principles, "are consistent with the law of most circuits." Gov. Br. at 23. What the government is banking on is a rigid distinction between grand jury cases and other contexts (including criminal trials themselves) in applying that law, a distinction it says precludes this Court from recognizing a privilege absent a showing of prosecutorial bad faith. In fact, this is the only basis on which the government seeks to distinguish *Farr*, which is the case most directly on point in every other respect. Gov. Br. at 23-24. This is a distinction that is not sustainable. *Branzburg* and the Ninth Circuit cases discussing it are not as limiting as the government says.

The government overstates the scope and impact of *Branzburg* and *Scarce* in a number of ways. First, citing *Scarce* as authority, it claims that the concurring opinion of Justice Powell, the pivotal fifth vote in *Branzburg*, should be given no independent effect because it merely "underscored" the bad faith point made by the majority in that case, and so leaves no room for balancing absent such a showing. Gov. Br. at 18-20. This is not a fair reading of *Scarce* or Justice Powell, and is belied by the very language the government quotes from *Scarce*, but then ignores. Gov. Br. at 19. More importantly it misses the point. The Ninth Circuit 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. 5 F.3d at 401.[7] That

[7] The Court of Appeals' reading of Justice Powell's concurrence as essential and controlling is persuasive and supported. In *McKoy v. North Carolina*, 494 U.S. 433 (1990), Justice Scalia and Justice Blackmun debated the precedential significance of a concurring opinion by a Justice who joined a 5-4 majority in another case. Justice Blackmun argued that "the meaning of a majority opinion is to be found within the opinion itself; the gloss that an individual Justice chooses to place upon it is not authoritative." *Id.* at 448 n.3 (Blackmun, J., concurring). Justice Scalia responded — persuasively, we think — as follows:

That is certainly true where the individual Justice is not needed for the majority.

language does not limit balancing to instances of bad faith only.

Justice Powell wrote specifically to stress "the limited nature of the Court's holding" and the need for a "case-by-case" balancing of First Amendment and law enforcement interests. *Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring). In his later concurring opinion in *Zurcher v. Stanford Daily*, 436 U.S. 547, 570 (1978), he 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 the Court of Appeals said in *Scarce*, then the majority's opinion must be read narrowly, First Amendment interests must be regarded as ever-present, and a balancing of interests must be conducted.

Consistent with the limited nature of the holding in *Branzburg*, the Ninth Circuit in *Farr* specifically left open the possibility of balancing in grand jury matters that do not involve "serious criminal conduct." *See* Opening Br. at 34-35. It reaffirmed this ruling in *Scarce*, expressly stating that *Branzburg* limited balancing only in grand jury investigations involving

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> But where he is, it begs the question: the opinion is *not* a majority opinion except to the extent that it accords with his views. What he writes is not a "gloss," but the least common denominator. To be sure, the separate writing 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). The majority opinion in *McKoy* did not address the issue that engaged Justices Blackmun and Scalia.

"'serious criminal conduct.'" *Scarce*, 5 F.3d at 402 (quoting *Farr*, 522 F.2d at 467-68). The government attempts to respond to this in two ways. First, it cites language in *Branzburg* (a case that, of course, predated both *Farr* and *Scarce* and which was, in turn, discussed in both) discussing the difficulty of requiring courts to make value judgments between crimes. Gov. Br. at 18. Second, it takes the position that the protective order violation in this case is in fact a serious crime. *Id.* at 39. Whatever conceptual difficulties other cases might present in determining whether a serious crime is at issue, this is not such a case. This case involves no "serious criminal conduct" of the sort at issue in *Scarce*, the *Lewis* cases and *Branzburg*. On the spectrum of criminal conduct, the matters under investigation here are on the far and lesser end from matters of national security, terrorism, and violence to persons and property.

In any event, the government's effort to read *Scarce* and *Branzburg* to avoid balancing simply cannot be sustained as a matter of common sense. The government acknowledges that those cases do permit a balancing of interests where reporters invoke a privilege, mandated by the First Amendment, to decline to testify in response to federal grand jury subpoenas. But that privilege, according to the government, arises only when a grand jury subpoena is issued in bad faith. Gov. Br. at 19-20. The government's position is demonstrably wrong and analytically unworkable.

It is wrong because *every* citizen has the right to move to quash a grand jury subpoena that is served in bad faith or for purposes of harassment whether or not First Amendment interests are implicated. *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 re Impounded*, 241 F.3d 308, 313 (3d Cir. 2001) (same); *In re Grand Jury Proceedings*, 896 F.2d 1267, 1278 (11th Cir. 1990), *vacating as moot*, 904 F.2d 1498 (11th Cir. 1990) (en banc) (same). In fact all citizens have the right to move to quash grand jury subpoenas that are "unreasonable or oppressive," *see* Fed. R. Crim. Proc. 17(c), a standard considerably more liberal than whatever standard may be mandated by the First Amendment.

The government's position is indefensible because it presupposes a balancing test with

nothing on one side of the scale to balance. Having accepted that *Scarce* read *Branzburg* to provide for a balance of interests in some cases to determine whether a claim of First Amendment privilege should prevail, what are we to balance under the government's view of things? On the one side of the scale we have the weightiness of the First Amendment interest advanced; on the other side we have a subpoena issued in bad faith or for purposes of harassment. Under what circumstances will such a subpoena *not* be quashed? What sort of First Amendment interest is so insubstantial that it must yield to a subpoena issued in bad faith and/or for purposes of harassment? Surely, any such view of balancing is no balancing at all.

What Justice Powell urged and what *Branzburg* accordingly concludes, is that "a proper balance" must be struck on the facts of each case "between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." 408 U.S. at 710. On the facts of this case, as discussed in Section II, we do not believe any balance can be struck in favor of intruding into so sensitive a relationship as that between a journalist and his confidential sources.

C. Rule 17(c)

The government says nothing about Rule 17(c), other than – once again – to argue that *Branzburg* and *Scarce* preclude this Court from even considering, let alone exercising its discretion to determine whether the subpoenas are oppressive and unreasonable by engaging in a balancing of interests. Gov. Br. at 47-50. The government entirely misses the point. As made clear in one of the decisions cited by the government, even in the absence of any reporter's privilege – indeed, even in the face of hostility towards it – subpoenas to reporters are still subject to challenge and scrutiny under Rule 17(c). *See McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003). The Ninth Circuit has been clear on the standard for review of a motion to quash under Rule 17(c), as recently as last year in *In re Grand Jury Subpoena to Nancy Bergeson*, 425 F.3d 1221 (9th Cir. 2005). The standard is an open-ended one of "discretionary, case-by-case inquiry." *Id.* at 1225-26. The Supreme Court has similarly stated that determination of reasonableness and oppressiveness under Rule 17(c) "'depends on the context.'" *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991) (citation omitted). The only limit on that

inquiry is abuse of discretion. *Bergeson*, 425 F.3d at 1224. The government offers no authority for the proposition that conducting a balancing of interests or considering First Amendment implications of subpoenas would amount to an abuse of discretion. In fact, the authority cited by movants demonstrates otherwise. Opening Br. at 45-46, 48-50.

Bergeson is a textbook example of how the Court's discretion may be applied where the government issues a subpoena governed by the DOJ Guidelines seeking to intrude upon a confidential relationship, even when it is seeking to inquire only about concededly non-privileged matters. In *Bergeson*, the district court conducted a searching inquiry, focusing on the government's adherence to the DOJ Guidelines in issuing a subpoena to an attorney, as well as the impact on the relationship between the attorney and client even though the communications were neither privileged nor confidential. The district court also required the government to establish a "compelling purpose" for issuing the subpoena – something beyond need. *Bergeson*, 425 F.3d at 1225. The Court of Appeals affirmed the district court's analysis and its ruling quashing the subpoena, holding that it was not an abuse of discretion. The Court of Appeals added that the sort of circumstances that might justify subpoenaing a lawyer to testify against a client would be "the risk of imminent physical harm to others." *Id.* at 1227.

Thus, *Bergeson* makes clear that even in the absence of any privilege, the impact of a subpoena on a confidential relationship and the government's adherence to its own guidelines are appropriate avenues of inquiry and analysis. The Ninth Circuit in fact goes to lengths to stress the open-ended, context-driven nature of the analysis required. Here, the government reads the DOJ Guidelines' express requirement of "exigent circumstances" into irrelevancy and asserts that its reading is beyond legal challenge. *See* Gov. Br. at 45-46.[8] This cannot be right.

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[8] The government claims that "exigent circumstances" (28 C.F.R. § 50.10(f)(4)) has no independent meaning, but rather is cumulative of the additional independent requirements of need and exhaustion. *See* Gov. Br. at 45-46; *see also* 28 C.F.R. § 50.10(f)(1), (3). It even rejects the definition of that term set forth in its own United States Attorneys' Manual (USAM), and criticizes us for citing it. Gov. Br. at 45. The DOJ Guidelines use the term "exigent circumstances" without definition in two provisions, one dealing with subpoenas to journalists, the other dealing with arrests of members of the news media. *See, e.g.*, 28 C.F.R. § 50.10(f), (h). The USAM section addresses both of those provisions, and defines "exigent circumstances" as

Standing issues aside, the DOJ Guidelines are published in the Code of Federal Regulations and certainly stand for something. They should mean what they say and be adhered to. However one may reasonably define "exigent circumstances," it is a requirement of the Guidelines and they do not exist here. *See* Section II, *infra*.

Given the significance of *Bergeson*, the space devoted to its discussion in the opening brief, and the importance of a Rule 17(c) balancing in this case, it is peculiar that the government does not address it at all. Instead, the government seeks to distinguish *In re Grand Jury Subpoena*, 829 F.2d 1291 (4th Cir. 1987), claiming that movants "rely almost entirely" upon it, when in fact it was cited just once without discussion.

The unreasonable and oppressive nature of the subpoenas at issue here is manifest, as the circumstances set forth in the following section make clear. The Court should exercise its discretion and quash the subpoena pursuant to Fed. R. Crim P. 17(c).

II. ANY BALANCING OF INTERESTS LEADS TO THE CONCLUSION THAT THE SUBPOENAS SHOULD BE QUASHED

The proper standard in a leak case involving confidential sources must include a balancing of interests that will "ensure that compelled disclosure is the exception, not the rule." *Schoen v. Schoen*, 48 F.3d 412, 416 (9th Cir. 1995) ("*Shoen II*"). The appropriate standard, we submit, should 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.

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those "where immediate action is required to avoid the loss of life or the compromise of a security interest." *See* Corallo Aff't Ex. B. This definition is consistent with (1) how both the Ashcroft and Reno administrations interpreted the term over the last decade and, based on DOJ's much longer history of restraint in issuing subpoenas to reporters in leak cases, those of presidential administrations before them, *see* Corallo Aff't ¶ 7, Gorelick Aff't ¶ 7, Opening Br. at 50-51; and (2) the common understanding and dictionary definition of the term. *See* Merriam Webster's Collegiate Dictionary (10th ed. 1995) ("requiring immediate aid or action"). The government nonetheless seeks to limit the definition to the arrest provision of the DOJ Guidelines. This makes no sense. The only basis it cites for reading "exigent circumstances" into a nullity with respect to the subpoena provision is a 2005 statement by a Deputy Attorney General, which is proffered as an authoritative interpretation of the term. Gov. Br. at 45. In fact, the term is never mentioned in the DAG's statement. *See* Hershman Decl. Ex. HH at 3.

See Opening Br. at 36-38.[9] In a nutshell, the question is whether the leak did more harm than good. *Id.* The answer is clearly not in this particular case. The facts reflect a demonstrable public benefit from the reporting, against which the government is unable to articulate any concrete harm.

The public interest in the reporting by Mr. Fainaru-Wada and Mr. Williams cannot be denied. Nor can the public impact. *See* Opening Br. at 7-10. Those articles instantly transformed the steroid problem from a largely abstract and relatively obscure public policy issue to one that captivated Americans and still holds their attention. It did so by calling into question the personal veracity of revered sports superstars and, by extension, the fairness and legitimacy of the professional games they play. It prompted reevaluation of record-breaking accomplishments that became the source of endless debates – debates that continue today – over the need for asterisks in the record books next to those accomplishments, if they should be recognized at all. Perhaps most important, it led Americans to take greater note of the associated public health issues and the impact on children, issues that had galvanized policymakers long before they were brought to prominence by association with the athletes who patronized BALCO.

The *Chronicle*'s reporting, in particular its revelations concerning baseball stars Barry Bonds and Jason Giambi, set in motion a rapid chain of events. The timeline tells the story. Policymakers immediately seized the moment, stoking public dialogue with urgent calls for reform, particularly in Major League Baseball (MLB). These efforts were led by ranking members of Congress and joined by the President himself. Opening Br. at 7. Calls for legislation in the absence of strict self-regulation by MLB forced an historic steroid policy change by MLB and its players' union a month later. *Id.*; Donnellan Aff't Ex. 38. Viewed as insufficient, a series of congressional hearings were then held, at which specific athletes were

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[9] The government effectively argues that any standard of balancing is too stringent. Gov. Br. at 37 & n.11. It even suggests that something *less* than need and exhaustion – the standard in non-leak cases involving *non*-confidential sources, *see Schoen II*, as well as under the DOJ's own guidelines – might be the appropriate standard, but cites nothing in support. *Id.* The government's unsupported arguments are not persuasive.

invited to testify and MLB was criticized for not going far enough. Opening Br. at 7-8; Donnellan Aff't Exs. 47-51. Proposed legislation was introduced to directly regulate drugs in professional sports. Donnellan Aff't Exs. 52-58; Sweeney Aff't ¶ 6. This prompted a second, and significantly stiffer, MLB policy change – year-round testing, long suspensions, and ultimately a "three strikes you're out" policy. Donnellan Aff't Ex. 61. The release of the reporters' book *Game of Shadows*, based largely on their reporting for the *Chronicle*, prompted MLB earlier this year to take action again, appointing former Senator Mitchell to investigate allegations of the use of steroids and other performance-enhancing drugs in baseball. *See id.*, Ex. 62; Vincent Aff't ¶ 5. That investigation is ongoing.

It is not only the public events but the personal stories that tell of the impact. Parents of young athletes whose children died from steroid use tell how the reporters' BALCO articles elevated the issue to one of widespread national concern and provided them a platform to reach larger and more attentive audiences, including Congress and other legislative bodies. *See* Garibaldi Aff't ¶¶ 16, 18; Hooton Aff't ¶¶ 14-15. A congressman who represents part of Cooperstown, New York, home of Baseball's Hall of Fame, and a leading proponent of the Anabolic Steroid Control Act of 2004, tells how reporting by Mr. Fainaru-Wada and Mr. Williams was critical in prompting Congress to pass performance-enhancing drug legislation. *See* Sweeney Aff't ¶ 7. Present and former MLB commissioners speak of the role the *Chronicle*'s BALCO series played in sparking MLB reform. *See* Vincent Aff't ¶ 4; Donnellan Aff't Ex. 62. Those stories also prompted the California Interscholastic Federation – the governing body for high school sports in California – to adopt anti-steroid policies in May 2005. *See* Blake Aff't ¶ 4. A recognized steroids expert and leader of the World Anti-Doping Agency offers his strong view that Mr. Fainaru-Wada and Mr. Williams brought national attention to a public health issue of great importance. *See* Wadler Aff't ¶ 8.

Another measure of the beneficial public impact of the reporting is the recognition it has received for public service and journalistic excellence in informing the public on matters of significant public importance. The accolades began with laudatory letters from readers across the nation, including federal and state congresspersons – one of whom remarked that "your

reporting has directly contributed to Congressional action and to [MLB]'s reforming its steroid policy" – to a former Marine Corps General, to teachers and children. Fainaru-Wada Aff't Ex. B; Williams Aff't Ex. B. Mr. Fainaru-Wada and Mr. Williams also received several of the most prestigious awards in journalism for their BALCO reporting, including the George Polk Award, and the White House Correspondents' Association's Edgar A. Poe Award. It was at the award ceremony for the latter prize that President Bush himself gave the reporters his personal thanks for their articles, telling them "you've done a service." Fainaru-Wada Aff't ¶ 8; Williams Aff't ¶ 10.

The government's bald claim that the public value of the *Chronicle*'s reporting was "minimal," and that the government is due all the credit for raising public consciousness concerning steroids in sports, is unsupported, unpersuasive, and belied by all of the evidence before the Court. *See* Gov. Br. at 41. While the President's 2004 State of the Union address and the public announcement of the BALCO indictments certainly reflected the government's concern with the issue, it was the *Chronicle*'s subsequent reporting that linked the problem to household names – including superstars of America's favorite pastime – and put a face on the problem for the first time. *See* Sweeney Aff't ¶ 7; Garibaldi Aff't ¶ 16; Hooton Aff't ¶¶ 14-15; Vincent Aff't ¶ 4; Wadler Aff't ¶ 8. In keeping with a long history of the best of public service journalism in the United States, the *Chronicle* also educated the public about government conduct and decision-making, raising serious questions about its handling of the BALCO case. In particular, the reporting shed light on the government's decision to protect prominent athletes from public criticism – let alone prosecution – by deleting their names from public filings, providing them with wholesale immunity, and allowing the BALCO defendants to plead guilty without even naming the athletes. *See, e.g.*, Donnellan Aff't Ex. 24 (see articles numbered 35, 114, 390, 392, 419, all available on www.SFGate.com). More than anything, the *Chronicle*'s reporting raised questions about the government's decision to stand by and leave the public uninformed about the way in which honored athletes used illegal drugs to gain competitive advantage while they deceived the public about that use.

On the other side of the scales, the government has put forth no evidence of actual harm.

Here, the leak clearly did *not* do more harm than good. The lack of any actual harm flowing from the leak is not disputed. The government concedes there was no actual harm to law enforcement interests in the BALCO case, claiming only the potential for harm in "future" cases. Gov. Br. at 40, 42. In fact, the BALCO defendants had already been indicted at the time of publication; they plead guilty over a year ago and have served time in prison for their actions. *See* Opening Br. at 40; Donnellan Aff't Exs 16-17. The government similarly concedes, as it must, that there was no actual harm to the BALCO defendants' fair trial rights. Again the government points to the possibility of such harm in "future" cases, but can point to none here. Gov. Br. at 41-42. The government in fact refuted defendants' claims of harm from the leaks when they were advanced, and Judge Illston agreed, ruling weeks after the *Chronicle* published the last of its articles disclosing BALCO grand jury testimony that they had no basis. *See* Opening Br. at 40-41; Donnellan Aff't Exs. 21, 81-82.

The government has also failed to articulate, much less demonstrate, any actual harm to grand jury secrecy interests in the BALCO case. It is reduced, instead, to citing abstract principles, such as the "sanctity of grand jury proceedings," without any regard for the facts of this matter. Gov. Br. at 40. Even so, these ungrounded claims that grand jury secrecy interests were harmed cannot be reconciled with the facts. The procedural posture of the case at the time the *Chronicle* articles were published flies in the face of any such claim. The BALCO principals had been indicted and therefore the grand jury investigation as to them *was concluded*; the transcripts had been willingly produced by the government months before in the course of pretrial discovery and in full anticipation of a public trial where the witnesses would appear and their grand jury testimony placed directly at issue. By virtue of this procedural posture alone, most if not all of the grand jury secrecy interests articulated by the Supreme Court are categorically inapplicable – they could not possibly have been implicated at that stage of proceedings. *See* Opening Br. at 42-43 (discussing grand jury secrecy interests identified in Supreme Court case law). Whatever secrecy interests may have remained would have been significantly diminished at the time of the articles' publication by the government's introduction of the transcripts through pretrial discovery into the criminal case – a case, by all indications at

the time, on the verge of a public trial. *See, e.g., Metzler v. United States*, 64 F.2d 203, 206 (9th Cir. 1933) ("After the indictment has been found and made public and the defendants apprehended, the policy of the law does not require the same [grand jury] secrecy as before."). In any event, the government has made no effort to show on this motion that publication caused actual harm to a recognized grand jury secrecy interest.

The government has not articulated any other actual harm that resulted from the leak. Unable to do so, the government focuses much of its energy arguing that it has exhausted alternative sources. *See* Gov. Br. at 13-14. The government, however, provides little factual basis for this claim other than production of the irrelevant Conte e-mails. *See generally* Hershman Decl. Although the *Chronicle* made clear in no uncertain terms that those e-mails are not responsive to its subpoenas, *see* Burton Aff't Exs. 1-6, the government's entire recitation of facts nevertheless demonstrates an almost singular focus on Conte, who was the subject of a search and seizure, subpoena, pen register, and more. No other person appears to have been subject to that scrutiny. Beyond that, the government points to interviews with athletes – who would not have had access to transcripts but had every right to disclose their grand jury testimony – and its collection of waivers from government employees.[10] It is unclear how either of these activities relates to an exhaustion of alternative sources.[11]

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[10] That the government obtained waivers from all its employees is not surprising, for refusal to provide one likely would place one's job at peril. These waivers, however, have no effect on the reporters' interest in confidentiality, and no legal effect. *Miller*, 438 F.3d at 1177 (Tatel, J., concurring). The law is plain that the privilege is the reporter's, not the source's. *See, e.g., United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) ("Nor does the fact that the government has obtained waivers from its witnesses waive [the reporters'] privilege. The privilege belongs to CBS, not the potential witnesses, and it may be waived only by its holder."); *Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984) ("Initially, and the Court believes dispositively, the privilege belongs to the movant journalist and not to the defendant. Therefore, even if the notes and tapes in question are of defendant's own words, she is not entitled to 'waive' the privilege for the movant.") (internal citation omitted); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 89 F.R.D. 489, 494 (C.D. Cal. 1981) ("The journalist's privilege belongs to the journalist alone and cannot be waived by persons other than the journalist."); *Anderson v. Nixon*, 444 F. Supp. 1195, 1198 (D.D.C. 1978) ("the privilege 'is that of the reporter and not the informant' or the public") (citation omitted).

[11] The government's suggestion that the reporters have conceded that there was an exhaustion of alternative sources or other requirements that the government has an affirmative burden to demonstrate is incorrect. *See* Gov. Br. at 45 n.15.

Another important factor for the Court to consider in balancing – and one we submit weighs heavily against the government – is the nature of the alleged wrongdoing. The conduct under investigation here is not serious criminal activity involving terrorism, national security, or violence to person or property. It is in the nature of contempt of court stemming from violation of a protective order issued some two years ago, in a criminal case that is now long over. Donnellan Aff't Ex. 75. Without in any way diminishing the importance of enforcing courts' protective orders, contempt violations are simply not in the same class of conduct as was the criminal activity under investigation in cases such as *Branzburg* and *Scarce*. The Supreme Court has in fact made clear that contempt cases are in a different category altogether, one not aimed at truly serious criminal conduct. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 800 (1987) (contempt proceedings "are not intended to punish conduct proscribed as harmful by the general criminal laws"); *Green v. United States*, 356 U.S. 165, 183 (1958) (contempt is not an "infamous crime" and therefore need not be prosecuted by indictment), *overruled in part on other grounds*, *Bloom v. Illinois*, 391 U.S. 194 (1968); 3A Charles A. Wright et al. *Federal Practice and Procedure Crim. 3d* § 710, at 491 (2004) (the use of "indictment from a grand jury" as a means to address contempt "is not an inevitable result nor does it seem a desirable one."). To the extent there are now other focuses of the government's investigation they are, in the end, derivative of that same mandate to investigate contempt.

The government's decision to take this leak investigation as far as it has, and to seek now through litigation to compel the reporters here to reveal their confidential sources, has virtually no precedent in the 34 years since *Branzburg*, and none at all in a case involving conduct of the sort at issue here. The government does not dispute that up until the Judith Miller case there had been only a single reported case in all the years since *Branzburg* where the Department of Justice sought to compel a reporter to divulge his confidential source in the context of a grand jury leak investigation. *See* Opening Br. at 50-51.[12] Nor does it dispute that no such subpoenas were

[12] It was this record of consistent restraint over seven presidential administrations spanning three decades that led one commentator in 1999 to refer to the DOJ Guidelines as the "hidden federal shield law." *See* Adam Liptak, *The Hidden Federal Shield Law: On the Justice*

issued as recently as the Ashcroft and Reno administrations, except in one instance relating to national security. *Id.* at 44 (*citing* Corallo and Gorelick Aff'ts); Corallo Aff't ¶ 8.

It can thus be said with authority that but for two recent cases that raised national security issues (*Miller*, 438 F.3d 1141; *New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457 (S.D.N.Y. 2005), *appeal argued*, No. 05-2639-CV (2d Cir. Feb. 13, 2006)), and one aberration 15 years ago that resulted in a loss for the government (*In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992)), there has never been another grand jury leak case litigated by the Department of Justice. There has certainly never been one that originated with an investigation into a suspected violation of a protective order. At the very same time, it can also be said that throughout that period the federal government has routinely and consistently carried out leak investigations in numerous high-profile cases – even public corruption cases – without seeking to compel reporters to disclose their confidential sources. *See* Opening Br. at 51 & n.22 (citing cases, including those involving former President Clinton, former Mayor Marion Barry, former Congresswoman Beth Myerson, and boxing promoter Don King); Corallo Aff't ¶ 8.

The government's radical break from this laudable history of prosecutorial restraint – reflected in the near absence of litigation and a record of leak investigations that consistently and predictably stopped short of pursuing reporters – to pursue the reporters here, on these facts, is something of a mystery. The government never explains what makes this case so different, so extraordinary, that it warrants a sea change from 34 years of consistent practice to now pursue subpoenas under circumstances where they have never been pressed before. It likewise has no response to Mr. Corallo's conclusion that the subpoenas here would not have issued even as recently as the Ashcroft administration other than to say it is "irrelevant." Gov. Br. at 46.

In sum, the government has failed to explain to this Court why it should be the first in at least 34 years, if ever, to compel a reporter to divulge his confidential source to aid a leak

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Department's Regulations Governing Subpoenas to the Press, 1999 Ann. Surv. Am. L. 227 (1999).

investigation outside the national security context. Indeed, the only factual basis the government sets out in its brief is both myopic and misleading. Even assuming the government was right about the law in this case – which clearly it is not – its approach here brings to mind the Ninth Circuit's reaction to the government's subpoena in *Bergeson*, where it quashed on Rule 17(c) grounds: "The government is not automatically entitled to subpoena a lawyer to testify against his client merely because the Constitution does not prohibit it and the material is not privileged." 425 F.3d at 1225-26.

Against the First Amendment interests in this case there is no breach of national security, no act of terrorism, no violent crime that would go unpunished. There is only the dissemination of information to the public – information that was of genuine public interest, concern and import and, at the time, was intended by all concerned soon to be disclosed at a public trial – which caused no demonstrable harm to anyone. We submit that to enforce the government's subpoenas in this particular case, where there is no serious criminal conduct at issue, there has been no demonstrable harm, there is no precedent, and no overriding justification has been articulated – indeed, the only articulation is one calculated to mislead this Court – would strike a devastating blow to First Amendment values and would not serve the public interest. To the contrary, it would effectively send a message to the journalistic community and the public at large that, for the first time, the government would and could harass the press at will, compelling them to disclose confidential sources on the basis of any sort of investigation, on the basis of any sort of factual record, even where the only factual record is one of misrepresentations to the Court. If ever there were a decision that would send shock waves through the press and threaten the flow of genuinely valuable information to the public, that would be it. *See* Bernstein Aff't ¶¶ 7-10; Nelson Aff't ¶¶ 7-8; Parks Aff't ¶ 7.[13]

[13] The government submits that any claims that, without a reporter's privilege, sources would "dry up" and news gathering would be seriously impeded are, as they were in 1972, speculative. Gov. Br. at 43-44 (citing *Branzburg*). But the empirical evidence in support of the reporter's privilege has mounted since the Court's decision in *Branzburg*. *See, e.g.*, John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 Colum. Hum. Rts. L. Rev. 57 (1985); Monica Langley & Lee Levine,

Under any standard of balancing – whether public harm versus public benefit, reasonableness and oppressiveness, or need and exhaustion – the facts here weigh strongly in favor of quashing the subpoenas.

III. THE GOVERNMENT'S REQUEST FOR AN EVIDENTIARY HEARING SHOULD BE DENIED

During the course of the telephonic conference with the Court on June 1, 2006, the government advised the Court that it wished to cross-examine several persons who submitted affidavits in support of the reporters' motion to quash and asked that an evidentiary hearing be held in connection with the motion so that it would have the opportunity to do so. After some discussion, the Court indicated that the government should, at the time of its opposition, show why any cross-examination was necessary.

Rather than file a motion or other formal application making such a showing, at the conclusion of its brief in opposition to the motion to quash, the government has included a short statement requesting that an evidentiary hearing be held so that the government may cross-examine the following affiants: Reporters Mark Fainaru-Wada and Lance Williams, Mark Corallo, Jamie Gorelick and Bill Lockyer. The government makes no showing at all — by way of affidavit or otherwise — as to why an evidentiary hearing is necessary on the motion to quash. Nor does it cite to any persuasive legal authority — or indeed any authority — in support of its request. Instead the government offers to present the Court, in camera and under seal, with an offer of what it will attempt to prove through its requested cross-examination of these witnesses so long as that offer is not shared with the movants or the public. Gov. Br. at 50-51. The government's request — unburdened by any factual showing of need or any citation to supporting legal authority — should be denied.

We have canvassed the law in this district and this Circuit and have located no authority for the proposition that an evidentiary hearing is necessary, let alone required, in the

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Branzburg Revisited: Confidential Sources and First Amendment Values, 57 Geo. Wash. L. Rev. 13, 25-33, 41 (1988).

circumstances present here. Indeed, the only case we have found discussing the evidentiary record on a reporter's motion to quash a grand jury subpoena in this Circuit is *In re Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970), one of the four cases ultimately consolidated for consideration before the Supreme Court in *Branzburg* itself. The opinions of the district court, the Ninth Circuit and the Supreme Court in the *Caldwell* case all make clear that the evidentiary record there consisted of affidavits submitted by Caldwell and the government; indeed the affidavits are extensively referenced in the courts' opinions.[14] In fact, in its brief to this Court the Government goes so far as to claim that the record submitted in *Branzburg* is quite similar to the record submitted here in support of its argument that the same result that obtained in *Branzburg* should obtain here. Gov. Br. at 2. Apparently we are thus to infer from the Government's arguments that while such a record was sufficient for the courts, including the Supreme Court, to make an appropriate determination of the issue in the *Caldwell* case, such a record should not appropriately be relied on by this Court. The argument is unpersuasive.

Outside the reporter's privilege context, courts in this Circuit routinely, indeed instinctively, consider motions to quash grand jury subpoenas on the basis of affidavits submitted by the parties. *See United States v. Chen*, 99 F.3d 1495, 1498-99 (9th Cir. 1996) (in the context of a motion to quash a grand jury subpoena on the basis of the attorney-client privilege, describing the record as consisting of affidavits submitted by the Government, "declarations" submitted by the movants, and several declarations and affidavits submitted by attorneys involved in the matter being investigated); *In re Grand Jury Subpoena (Osterhoudt)*, 722 F.2d 591, 592, 595 (9th Cir. 1983) (in the context of a motion to quash a grand jury subpoena on the

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[14] *Branzburg*, 408 U.S. at 676 (plurality opinion describing record before district court on initial motion to quash as follows: "The motion was supported by amicus curiae memoranda from other publishing concerns and by affidavits from newsmen asserting the unfavorable impact on new sources of requiring reporters to appear before grand juries. The Government filed three memoranda in opposition to the motion to quash, each supported by affidavits."); *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970) (referring to and quoting extensively from affidavits contained in the record and referring to appellants' "moving papers" and "brief," as well as the written "response of the United States" to assertions made in the affidavits); *In re Caldwell*, 311 F. Supp. at 361-62 (describing record before district court as consisting of memoranda and affidavits submitted by the parties, briefs and affidavits filed by amici curiae, news articles, and oral argument, and relying upon this "record" in setting forth its findings).

basis of the attorney-client privilege, indicating that the record before the district court consisted of affidavits wherein the government represented that the information being sought was relevant to the grand jury's inquiry and necessary to complete the investigation); *In re Grand Jury Proceedings*, 562 F. Supp. 486, 486 (N.D. Cal. 1983) (in the context of a motion to quash a grand jury subpoena on the basis of the marital privilege, describing the record as consisting of oral argument, briefs submitted by the parties, and the "declarations of the parties"); *see also In re Grand Jury Subpoena (Verplank)*, 329 F. Supp. 433, 434 (C.D. Cal. 1971) (on motions to quash grand jury subpoenas on the basis of several privileges and on First Amendment grounds, record before the district court consisted of briefs submitted by both parties following oral argument). This is hardly surprising. The notion of permitting adversaries to cross-examine affiants in the context of motions to quash (or, for that matter, motions for protective orders) without some showing of serious need would do little to ease the burden on our already overburdened federal district courts. In fact, we have located no case within this Circuit in which a party requested, much less was granted, the opportunity to cross-examine those who submitted affidavits in support of a motion to quash a grand jury subpoena.

The government has offered no basis for conducting an evidentiary hearing here and its request should be denied.

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CONCLUSION

For the reasons set forth above, Mark Fainaru-Wada and Lance Williams respectfully request that the Court grant the Motion to Quash the Subpoena served upon them by the government.

Respectfully Submitted

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