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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,	No. CR 06-90225 MISC (JSW) GOVERNMENT'S OPPOSITION TO MOTION TO QUASH GRAND JURY SUBPOENA Hearing Date: August 4, 2006 Hearing Time: 9:00 a.m. **[REDACTED VERSION]**

The United States of America, by and through the Special Attorneys to the United States Attorney General, hereby files this opposition to the motion to quash grand jury subpoena filed by movants Mark Fainaru-Wada and Lance Williams.

The government's opposition is based upon the attached memorandum of points and authorities, the files and records in this case, and such further evidence and argument as may be presented at any hearing on this matter. The government has filed separately, under seal, an unredacted version of the opposition, as well as the Declaration of Brian D. Hershman and exhibits, because those documents refer to matters occurring before the grand jury, within the meaning of Federal Rule of Criminal Procedure 6(e).

DATED: June 21, 2006

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Subpoenaed parties Mark Fainaru-Wada and Lance Williams ("Movants") move to quash duly authorized subpoenas issued to them by asserting, among other things, that the government's investigation does not involve "serious criminal conduct" because it involves a simple violation of a stipulated protective order. (Motion at 1, 35). Movants are seriously mistaken.

The criminal violations at issue here strike at the very heart of the secrecy of grand jury proceedings and the integrity of the judicial system. An order of this United States District Court, the Honorable Susan Illston, was blatantly violated by a party to a criminal proceeding who leaked secret grand jury testimony to Movants, reporters for the San Francisco Chronicle. The perpetrator then baldly lied to the Court in a sworn declaration denying his or her involvement in violation of 18 U.S.C. § 1623. If the leaker is a government employee, this deliberate violation of a Court order and false declaration to the Court undermines the trust we place in our public servants, as well as the leaker's obligations under Federal Rule of Criminal Procedure 6(e). If the leaker was a defendant or defense counsel, this egregious conduct was compounded by moving to dismiss the criminal indictment based on false accusations that the government had leaked the grand jury transcripts, perpetrating yet another fraud on the Court.

Under any scenario, this is no insignificant crime, as the Movants contend. The Honorable Susan Illston deemed it serious enough to refer this matter to the United States Department of Justice for investigation, and, as discussed in Section IV below, the government has pursued this matter in every way possible. Movants should not be allowed to shield this serious criminal conduct by asserting a "privilege" not supported by law.

Contrary to Movants' assertion, whether reporters retain a privilege to refuse to testify before a duly impaneled grand jury already has been ruled upon by the Supreme

Court and the Ninth Circuit. In Branzburg v. Hayes, 408 U.S. 665 (1972), the Supreme Court flatly rejected the claim that there is a First Amendment reporter's privilege that allows reporters to resist giving evidence in a grand jury investigation being conducted in good faith. The Court engaged in a thorough analysis of the competing interests, balancing the public's right to "every man's evidence" as the grand jury fulfills its vital role in law enforcement against the alleged chilling effect that giving evidence would have on news gathering activities. The Court came down firmly on the side of requiring reporters, like everyone else, to heed the grand jury's call for testimony.

On a record similar to the one in this case, the Court: held that the public interest in effective law enforcement outweighed the uncertain adverse effects from requiring those few reporters who have evidence of a crime to give evidence; recognized that courts should not be placed in the role of balancing law enforcement interests and the interests of reporters on a case-by-case basis; and concluded that courts should intervene only in cases where it is shown that an investigation is being conducted in bad faith. Where, as here, there is no such showing, there is no First Amendment reporter's privilege to resist giving evidence to a grand jury.

The Supreme Court in Branzburg also 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. The Court engaged in the balancing of interests that informs the creation of common law privileges and concluded that, in the grand jury context, the public's interest in law enforcement outweighs any adverse impact on news gathering.

Similarly, despite Movants' inaccurate characterization of binding Ninth Circuit precedent as "dictum" (Motion at 28), the Ninth Circuit determined in In re Grand Jury Proceedings (Scarce), 5 F.3d 397 (9th Cir. 1993), that there is no federal "reporter's privilege" to refuse to respond to a grand jury subpoena, under the First Amendment or common law. Following Branzburg, the Ninth Circuit held that a First Amendment

reporter's privilege "simply does not exist" in a good-faith grand jury investigation. Id. at 399-400. The circuit further "decline[d] to acknowledge such a privilege as a matter of federal common law" and held that doing so would "directly conflict[] with the Supreme Court's holding in Branzburg." Id. at 403. In two other cases, the Ninth Circuit upheld contempt convictions imposed where a broadcaster had attempted to claim a reporter's privilege but failed to show that the grand jury request was in bad faith. Lewis v. United States, 517 F.2d 236, 237-39 (9th Cir. 1975); Lewis v. United States, 501 F.2d 418, 422-23 (9th Cir. 1974). The Ninth Circuit, like the Supreme Court, therefore has squarely rejected Movants' position.

This law, as well as the other considerations discussed below, compels denial of the motion to quash.

II.

STATEMENT OF FACTS

A. The Balco Indictments

On February 12, 2004, a federal grand jury in this district returned an indictment in United States v. Conte et. al., CR No. 04-0044-SI, charging defendants Victor Conte, Jr., James Valente, Greg Anderson, and Remi Korchemny with conspiring to illegally distribute anabolic steroids in violation of 21 U.S.C. § 846, conspiring to distribute other performance-enhancing drugs in violation of 21 U.S.C. § 846, and money laundering in violation of 18 U.S.C. § 1956. Conte, Valente, and Anderson also were charged with several related narcotics offenses. (The indictments against Conte and his associates are collectively referred to as the "Balco indictments.") The Balco indictments were assigned to the Hon. Susan Illston, United States District Judge for the Northern District of California.

B. The Grand Jury Transcripts Are Produced in Discovery

Following the return of the Balco indictments, the government provided the defense with a complete set of discovery, including numerous witness interviews. At a

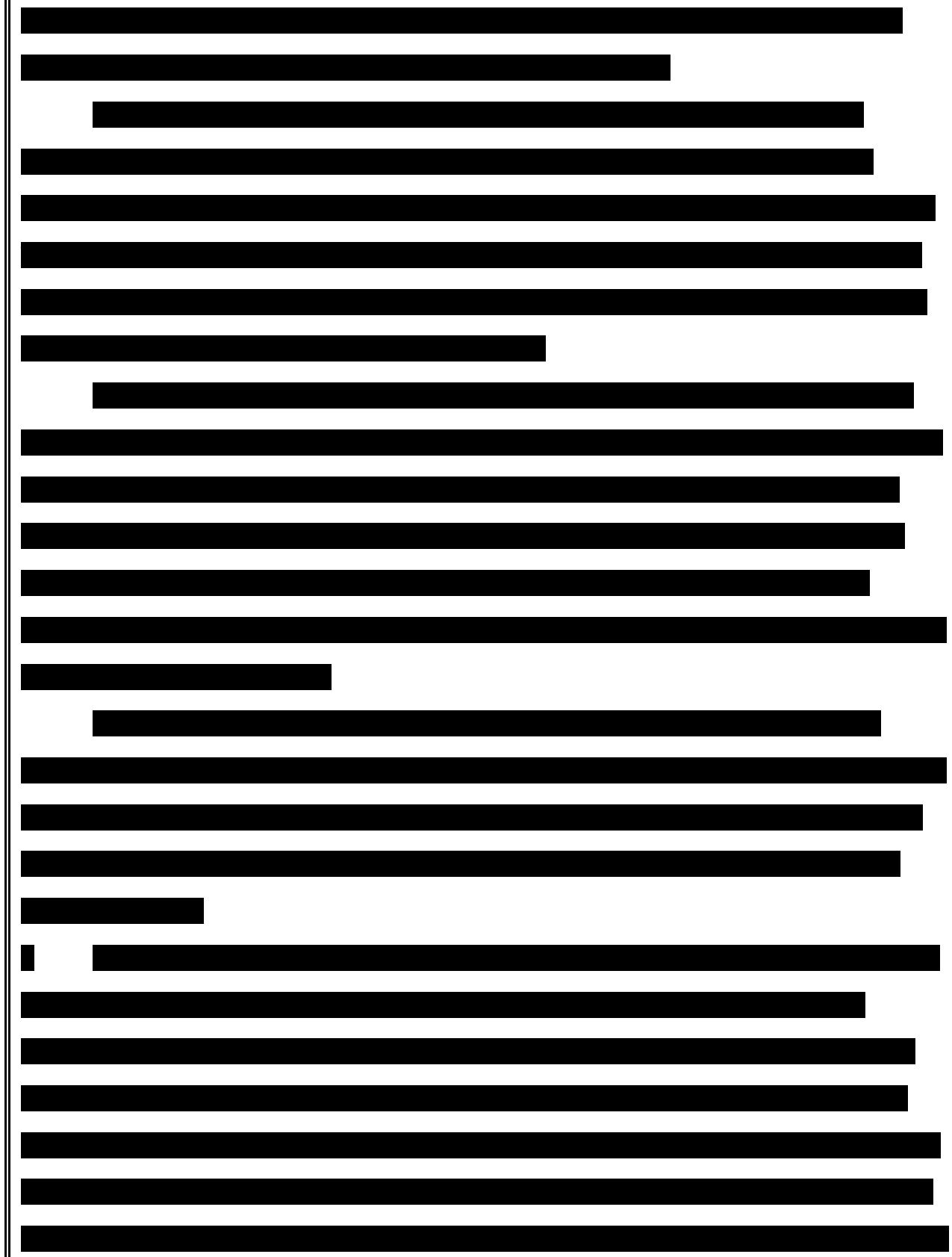
hearing on February 27, 2004, the government agreed, as part of its discovery obligations, to provide defense counsel a copy of the transcripts of grand jury testimony from various professional and amateur athletes, and defense counsel and the government agreed on the record that the production of the transcripts would be subject to a stipulated protective order. (Ex. A to Hershman Declaration at 4-6). On or about March 4, 2004, government counsel, as well as each defendant and his counsel, signed a stipulated protective order, which was entered by the District Court for the Northern District of California on March 8, 2004. The protective order prohibited the parties in United States v. Conte et. al., No. CR-04-0044 SI, from disseminating grand jury transcripts and other specified documents to the media or anyone beyond the parties and counsel in the case. (Ex. 23 to Donnelan Aff., filed by Movants in connection with the Motion). Other than being produced to the defense in discovery, the grand jury transcripts were not disseminated outside of the Northern District's United States Attorney's Office and the Internal Revenue Service.[1]

C. Movants' Efforts to Obtain the Secret Grand Jury Transcripts

[redacted]

[1] [redacted]

[2] [redacted]



[redacted]

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D. Disclosure of the Montgomery Grand Jury Transcript

On June 24, 2004, in two articles written by Movants, the Chronicle published detailed and verbatim portions of the November 2003 grand jury transcript of Tim Montgomery. [redacted]

[redacted]

E. The Court's Inquiry Into the Leak

The Court held a hearing in the Balco case on June 25, 2004 -- the day after the initial Chronicle articles. During the hearing, the Court expressed concern about the leak and the apparent disclosure of secret grand jury information in violation of the Court's order. (Ex. U to Hershman Decl.). The Court asked the government what efforts it had made to determine the source of the leak. (Id. at 3). Government counsel, Jeff Nedrow, indicated that the government was not responsible for the leak and noted that the transcripts had been produced to defense counsel and defendants in discovery. (Id. at 3-4). Counsel for defendant Greg Anderson also expressed outrage at the leak, and requested that the Court order the government to initiate a grand jury investigation. (Id. at 4-5). Anderson's request was joined by counsel for the other defendants, including Conte's counsel. (Id. at 5). Defendants' counsel argued to the Court that the leak denied defendants their right to a fair trial, and suggested that the government was the source of the leak. (Id. at 6). The Court requested, and all counsel and parties agreed, to provide declarations as to their handling of the grand jury transcripts and the discovery. (Id. at 9-11).

[redacted]

[redacted]

[3] [redacted]

[redacted]

G. The Court Conducts Further Hearings on the Leak

In response to the Court's request at the June 25, 2004 hearing, each of the parties and their counsel who had access to the grand jury transcripts submitted declarations to the Court. (Ex. AA to Hershman Decl.). Everyone who submitted a declaration denied, under penalty of perjury, being responsible for distributing the Montgomery transcript to the San Francisco Chronicle or any unauthorized person. (Id.). As the district court subsequently noted at an August 27, 2004 hearing, the record thus consists of "abject denials" from all parties regarding the leak of the Montgomery transcript. (Ex. BB to Hershman Decl. at 14).

H. Defendants Move to Dismiss the Indictment for Outrageous Government Conduct

[redacted], on or about October 8, 2004, each of the defendants moved to dismiss the indictment on the grounds that the government had engaged in outrageous conduct and that government-generated publicity surrounding the leaks prevented them from obtaining a fair trial. (Exs. 81 and 82 to Donnelan Aff.). In denying defendants' motion to dismiss, the Court noted that defendants accused the government of being the source of the leak but failed to produce any evidence to support their assertion. (Ex. 82 at 2).

[redacted]

[redacted]

I. The Bonds and Giambi Grand Jury Leaks

On December 3, 2004, Conte appeared on the television news show "20/20" and gave an interview about his involvement in Balco and his admitted distribution of steroids to Montgomery, Marion Jones, and other amateur and professional athletes. (Ex. DD to Hershman Decl.). In an article published in the Chronicle on December 2, 2004, Conte indicated that he had agreed to the interview because "[t]he world deserves to know the truth. I am soon going to tell the world the truth as I know it." (Id.).

On the same day as the article about Conte's "20/20" appearance, the Chronicle, in articles written by Movants, published detailed accounts of the grand jury transcripts of several professional athletes, including Barry Bonds, Jason Giambi, Gary Sheffield, and others. As with the Montgomery disclosure, the articles contained detailed and verbatim excerpts from the grand jury transcripts, including admissions by Bonds, Giambi and Sheffield that they had used, knowingly or unknowingly, steroids supplied by Balco and co-defendant Greg Anderson. (Exs. 28-30 to Donnelan Aff.). Movants reported that they had "reviewed" transcripts of the grand jury proceedings, and they described in detail comments made by the prosecutors and the witnesses, as well as documents shown to the witnesses during the grand jury proceedings. (Id.).

J. The Court Refers the Matter to the Department of Justice

On December 3, 2004, the Hon. Susan Ilston issued a notice to the parties in the

Balco case. Judge Ilston noted the apparent leak of grand jury transcripts and discovery material in violation of the Court's protective order and "referred the matter to the United States Department of Justice for investigation, either internally or if necessary through independent counsel, in order to determine the source of the disclosures." (Ex. 75 to Donnelan Aff.). Shortly thereafter, the United States Attorney's Office ("USAO") for the Central District of California, acting through a Special Attorney to the United States Attorney General ("SAAG"), in conjunction with the Federal Bureau of Investigation ("FBI"), initiated an investigation into the source of the leaks.[4]

K. Government's Investigation into the Leaks

Following the referral from Judge Illston, the SAAG conducted an exhaustive investigation into the source of the leaks.[5]

[redacted]

[4] Because attorneys from the USAO for the Northern District of California had access to the grand jury transcripts and were therefore subjects of the investigation, the USAO for the Central District of California was tasked with investigating the leaks to avoid any appearance of impropriety.

[5] To the extent the court needs additional information concerning the scope of the government's investigation, at the court's request the government will provide a detailed description of the steps the government has taken and individuals the government has interviewed in an ex parte, in camera filing.

[redacted]

On May 5, 2006, the SAAG issued the subject subpoenas to Movants, after obtaining the required authorization from the Attorney General.

III.

UNDER BINDING CASE LAW, NO "REPORTER'S PRIVILEGE" PRECLUDES THE ENFORCEMENT OF A GRAND JURY SUBPOENA AGAINST JOURNALISTS

"Traditionally the grand jury has been accorded wide latitude to inquire into

violations of criminal law." United States v. Sells Engineering, Inc., 463 U.S. 418, 424 (1983) (quotation omitted). Movants argue that this Court should cut back on that discretion by applying a "reporter's privilege" to enable them to refuse to comply with the grand jury's subpoena. Both the Supreme Court and the Ninth Circuit, however, have held definitively that there is no reporter's privilege to avoid testifying in response to a federal grand jury subpoena. Branzburg v. United States, 408 U.S. 665 (1972); In Re Grand Jury Proceedings (Scarce), 5 F.3d 397 (9th Cir. 1993). These decisions reject arguments seeking to ground such a privilege either in the First Amendment or in the common law. See, e.g., In re Special Proceedings, 373 F.3d 37, 44 (1st Cir. 2004) ("In Branzburg, the Supreme Court flatly rejected any notion of a general-purpose reporter's privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege."); Scarce, 5 F.3d at 399, 403 (holding First Amendment reporter's privilege "simply does not exist" in grand jury context and declining to follow district court case that applied common law reporter's privilege "on the ground that it directly conflicts with the Supreme Court's holding in Branzburg").

These decisions bind this court, which need look no further to conclude that the motion must be denied. In re Grand Jury Subpoena (Judith Miller), 438 F.3d 1141, 1147 (D.C. Cir. 2006) ("Unquestionably, the Supreme Court decided in Branzburg that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter."); see also Hart v. Massanari, 266 F.3d 1155, 1175 (9th Cir. 2001) ("A district court bound by circuit authority . . . has no choice but to follow it, even if convinced that the authority was wrongly decided."); Yong v. INS, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) ("once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it"). Nevertheless, the government below responds fully to all of

Movants' arguments, including even those the government believes are precluded by the binding holdings in Branzburg and Scarce.

A. The First Amendment Does Not Provide Reporters with a Privilege to Avoid Grand Jury Testimony

1. Binding Supreme Court Precedent

In Branzburg, the Supreme Court considered and rejected the claims of several reporters that they should be privileged under the First Amendment to avoid appearing before federal grand juries to discuss information that they obtained in confidence. The Court held that there was no such privilege. Branzburg, 408 U.S. at 667; see also Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (under Branzburg, "the First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigations, even though the reporter might be required to reveal a confidential source."); University of Pennsylvania v. EEOC, 493 U.S. 182, 201 (1990) (Branzburg "rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary").

Having been served with grand jury subpoenas, the reporters in Branzburg argued for a qualified First Amendment reporter's privilege. Without such a privilege, they claimed, future sources would be deterred from providing information to the press "to the detriment of the free flow of information protected by the First Amendment." 408 U.S. at 679-80. The reporters asserted that they should be required to testify only if the government demonstrated that the testimony was relevant to a crime that the grand jury was investigating, that the information was unavailable from other sources, and that the need for the testimony was compelling. Id. at 680.

The Supreme Court expressly declined to interpret the First Amendment "to grant newsmen a testimonial privilege that other citizens do not enjoy," noting that the creation

of new testimonial privileges obstructs the search for truth. Id. at 690, 691 n.29. The Court stated that a reporter's privilege is not needed to assure the free flow of information:

> Grand juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas. Nothing before us indicates that a large number or percentage of all confidential news sources falls into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task.

Id. at 691. The Court not only anticipated no significant constriction of the flow of information to the press, id. at 693, it also rejected the argument

> that the public interest in possible future news about crime from undisclosed and unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

Id. at 695.

Though the record in Branzburg contained affidavits and amicus briefs asserting that requiring grand jury testimony from the press would significantly impede news gathering, see id. 681 n.20, 693-94, 699 n.37, the Court concluded that the adverse effect on news gathering of requiring testimony from the limited group of reporters who witness crimes or receive evidence of a crime would not be significant enough to outweigh the public interest in law enforcement. Id. at 690-91. As the Court reasoned in rejecting the reporter's assertions:

> Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures are widely divergent and to a great extent speculative. It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees.

Id. at 693-94. The Court further responded to the reporter's claim that news sources would dry up by stating, "this is not the lesson that history teaches us. . . . From the beginning of our country the press has operated without constitutional protection for press

informants, and the press has flourished." Id. at 698-99.

The Court noted that it would not be wise public policy to confer constitutional protection on those who commit crimes or have information concerning a crime, id. at 691, and that "it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy." Id. at 695-96.

The court in Branzburg also recognized that the case-by-case balancing of interests that the reporters sought to implement their asserted privilege would "present practical and conceptual difficulties of a high order." Id. at 701-06. It would cause the courts to "be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance" and would make courts "inextricably involved in distinguishing between the value of enforcing different criminal laws." Id. at 705-06.

Near the end of its opinion, the Court in Branzburg noted that "news gathering is not without its First Amendment protections," because grand jury proceedings "instituted or conducted other than in good faith" would present problems. Id. at 707. This sort of "[o]fficial harassment of the press" for non-law-enforcement purposes would not be justified and would be subject to motions to quash. Id. at 708; see In re Special Proceedings, 373 F.3d at 45 ("What Branzburg left open was the prospect that in certain situations -- e.g., a showing of bad faith purpose to harass -- First Amendment protections might be invoked by the reporter.").

In a brief concurring opinion, Justice Powell, who signed and joined the majority opinion, underscored the "good faith" point made by the majority:

> As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe his testimony implicates confidential source relationship without legitimate need of law enforcement, he will have access to the court on a motion to quash and

> an appropriate protective order may be entered. The asserted claim of privilege should be judged on its facts by striking the proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 709-10.

Movants argue that Justice Powell "controlled the outcome" of the majority opinion, and that his concurrence recognized a "qualified privilege" in the context of grand jury proceedings, which, Movants argue, means this Court must do a "case-by-case balancing" of the interests at stake. (Motion at 32). The Ninth Circuit has squarely rejected this argument, however, recognizing that Justice Powell fully joined the majority opinion:

> [The appellant] contends that the concurrence of Justice Powell and the dissents of the other four Justices together represent a majority view in favor of rebalancing the interests at stake in every claim of privilege made before a grand jury. This reading of Branzburg, however, is at odds with the majority opinion itself, and with the manner in which we have applied it in our cases.
>
> It is important to note that Justice White's opinion is not a plurality opinion. Although Justice Powell wrote a separate concurrence, he also signed Justice White's opinion, providing the fifth vote necessary to establish it as the majority opinion of the court.

Scarce, 5 F.3d at 400.

Thus, while Justice Powell's brief concurrence refers to "interest balancing," it does not require that the interests of the press and the grand jury must be balanced in every case. Rather, Justice Powell's opinion "must be understood to mean that [balancing is to occur] where a grand jury inquiry is not conducted in good faith, or where the inquiry does not involve a legitimate need of law enforcement, or has only a remote and tenuous relationship to the subject of the investigation." Id. at 401. That is, Justice Powell's concurrence is properly read to emphasize the need for balancing only where there has been "an abuse of the grand jury function"; any broader reading of the concurrence would make it inconsistent with the majority opinion in which he joined. Id. Consistent with this reading of the Powell concurrence, the Branzburg majority

recognized that bad-faith use of the grand jury would "pose wholly different issues" under the First Amendment than the typical case when a reporter attempts to invoke a privilege." Branzburg, 408 U.S. at 707.

Movants do not claim that the grand jury in this case is being used in bad faith to harass newsmen. Rather they seek to rely on a more general privilege against responding to grand jury subpoenas. Because Branzburg is binding authority establishing that there is no such privilege, it alone compels the denial of Movant's motion.

2. Binding Ninth Circuit Precedent

Branzburg's holding that there is no reporter's privilege against responding to grand jury subpoenas has been embraced by three binding Ninth Circuit opinions: Lewis v. United States, 501 F.2d 418 (9th Cir. 1974) ("Lewis I"); Lewis v. United States, 517 F.2d 236 (9th Cir. 1975) ("Lewis II"); and Scarce, 5 F.3d at 397. All three decisions, each joined by three different Ninth Circuit judges, squarely held that a reporter is not privileged on First Amendment grounds to refuse to provide confidential-source information in response to a good-faith grand jury subpoena.

In Lewis I, a radio station manager was held in contempt of court for refusing to provide the grand jury with a copy of a document his station's reporter obtained from a confidential source, and for refusing to answer the grand jury's questions about the document. 501 F.2d at 419-20. The manager claimed "a privilege based upon the station's right to protect the sources of news information," and that compelling production of the document and his testimony "violated his First Amendment rights of free press and associational privacy." Id. at 420, 422. The court rejected this argument. Quoting Branzburg, the court indicated that the manager was excused from responding to the grand jury subpoena only if the subpoena was issued "other than in good faith." Id. at 422-23. Because there was no evidence that the grand jury subpoena was issued in the course of "official harassment of the press," the manager was not privileged to avoid the grand jury subpoena, and the contempt order was affirmed. Id. at 423.

In Lewis II, the same station manager again was held in contempt for refusing to comply with a similar grand jury subpoena. Again, the court recognized that "the [F]irst [A]mendment does not afford a reporter a privilege to refuse to testify before a federal grand jury as to information received in confidence." 517 F.2d at 238. In rejecting the manager's claim that "a qualified [F]irst [A]mendment privilege survived Branzburg," the court reiterated that under Branzburg such a privilege may be invoked only where the grand jury investigation is "instituted or conducted other than in bad faith." Id. at 238. Because the manager had not shown bad faith, the court affirmed his contempt order. Id. at 238.

Finally, in Scarce, a scholar who was an expert on animal rights groups and on the "radical environmental movement" refused to answer questions propounded by a grand jury about his conversations with a suspect in an attack by the "Animal Liberation Front" on laboratories at the scholar's university. 5 F.3d at 398-99. Held in contempt, the scholar claimed that he obtained the confidential information in furtherance of his scholarly research, and that he had a First Amendment privilege to withhold it, akin to a reporter's privilege. Id. at 399. In deciding the case, the court assumed "that scholarly inquiry enjoys the same freedom of press protections that traditional news gathering does." Id. Nevertheless, the court rejected the scholar's claim on the ground that the reporter's First Amendment privilege "simply does not exist" under Branzburg. Id. As in Lewis I and Lewis II, the court held that a reporter must show bad faith in order to assert a privilege. Id. at 400 (reporter not entitled to First Amendment privilege unless he shows bad faith, harassment, information sought without legitimate need, or information that has only tenuous relationship to investigation); see also id. at 401 (restatement of factors that take "bad faith" case outside of Branzburg).

Lewis I, Lewis II, and Scarce are, like Branzburg, binding authority that compel the rejection of Movants' claims. Movants attempt to distinguish the cases, but they cannot.

Movants claim that Lewis I was decided not on the First Amendment but on a "somewhat narrow ground" involving a document obtained by an "anonymous tip." (Motion at 33) (quoting Lewis I). But Movants take all the quotations they use to distinguish Lewis I from a portion of the opinion that did not analyze the reporter's privilege but instead addressed the station manager's due process claim that the trial court erred in failing to review his late-filed motion alleging illegal electronic surveillance. 501 F.2d at 422. Wholly separately, as discussed above, the court squarely confronted the First Amendment privilege claim, analyzing and rejecting that claim. Id. at 422-23. Movants' only reason for distinguishing Lewis II is that the case was similar to Lewis I. (Motion at 33). There is no valid basis for distinguishing either case, as each squarely rejected any general First Amendment reporter's privilege to refuse to respond to a good-faith grand jury subpoena.

Movants attempt to distinguish Scarce on the ground that it was "not even a press case" but a claim involving an asserted scholar's privilege. (Motion at 33). But the court decided Scarce under the assumption that the asserted scholar's privilege was co-extensive with any reporter's privilege, and it proceeded to analyze the claim under the law applicable to reporter's privilege. 5 F.3d at 399. This was not at all an implausible assumption, as the scholar in Scarce had authored a book, essays, and other publications on the environmental movement and animal rights groups, and he claimed that the confidential information he obtained was relevant to his research. Id. at 398-99. In any event, the court did not hold -- as Movants appear to wish (Motion at 33-34) -- that the scholar had raised a faulty First Amendment analogy between his work and a reporter's work. Rather, the court squarely held that there was no First Amendment reporter's privilege to refuse to respond to a good-faith grand jury subpoena.

In the face of clear Ninth Circuit authority following Branzburg in refusing to recognize a reporter's privilege in the context of grand jury subpoenas, Movants rely on Ninth Circuit cases addressing the reporter's privilege outside the grand jury context,

drawing general conclusions that they improperly seek to apply to grand jury subpoenas. (Motion at 35). In particular Movants rely on two civil cases, Shoen I and Shoen II, in which the court recognized that a reporter's privilege applies as against motions to compel discovery in a defamation action. See Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993) (Shoen I); Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995) (Shoen II). These decisions, which are consistent with the law of most circuits, see Shoen I, 5 F.3d at 1292 n.5, have no application to Movants' claims, as civil discovery cases lack any public law enforcement interest, which provides the basis for the rejection of the privilege in grand jury proceedings. See, e.g., Branzburg, 408 U.S. at 700. As the D.C. Circuit recently stated about Zerilli v. Smith, 656 F.2d 705, 713 (D.C. Cir. 1981), in which it had applied a reporter's privilege in a civil case:

> Zerilli has no force in the present case. Even if Zerilli states the law applicable to civil cases, this is not a civil case. Zerilli could not subtract from the Supreme Court's holding in Branzburg. Zerilli, along with several other lower court decisions cited by appellants, may recognize or at least suggest the possibility of privileges under various circumstances. None of them can change the law applicable to grand juries as set forth in Branzburg.

Judith Miller, 438 F.3d at 1149.

In addition to the civil cases, Movants also rely on a criminal case that did not involve grand jury testimony. In Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), the court held that a reporter did not have a privilege to refuse to disclose to a state court the identity of an individual who had leaked confidential information in violation of a court order. Recognizing that it was faced with a "non-grand jury case[]," the court in Farr balanced the claimed First Amendment privilege against the need for disclosure and concluded that the reporter's First Amendment interest must give way to the judicial interest in enforcing its orders. Id. at 468-69. But the Farr court also recognized that in cases involving grand jury subpoenas, the balancing need not be done at all:

> The precise holding of Branzburg subordinated the right of the newsmen to keep secret a source of information in face of the more compelling requirement that a grand jury be able to secure factual data relating to its investigation of serious criminal conduct.

Id. at 467-68; see also Scarce, 5 F.3d at 402 (Farr, which balanced conflicting interests only because it arose in non-grand-jury context, supports conclusion that reporters have no First Amendment privilege to refuse to testify before grand jury).[6]

Finally, Movants cite one grand jury subpoena case, decided one day after Branzburg, in which the Ninth Circuit held that members of the Black Panther Party had a First Amendment privilege to refuse to respond to certain questions by the grand jury. Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972). The case involved a crackdown on the Black Panther organization, including its newspaper, and the refusal to answer dozens of questions about the structure and operations of the newspaper, the identity of members of the group, and the details of the organization's funding. Id. at 1068-69. The court held that only the questions relating to an identifiable crime (plotting to kill the President) had to be answered; the other questions infringed First Amendment freedoms. Id. at 1087-88.

In ruling on a rehearing petition, the court distinguished the case from Branzburg, holding that "[n]ews gathering is not involved in our case" (rather, the case apparently involved the associational and free-speech rights that the Black Panther organization had). Id. at 1090. Further, the court stated that nothing in its opinion "permits a grand jury witness to refuse on First Amendment grounds to identify a person whom he has seen committing a crime" and that "witnesses can be required to answer questions much less directly relating to criminal conduct." Id. at 1090-91. With regard to the questions having only "something vaguely to do with conduct that might have criminal consequences," the court required the balancing of interests. Id. at 1091. This was consistent with Branzburg's statement that "bad faith" or "official harassment" involves a

[6] Another criminal case Movants cite involved a criminal defendant's irrelevant request that a reporter reveal his source. In United States v. Pretzinger, 542 F.2d 517, 520-21 (9th Cir. 1976), the court held that a district court did not err in denying a defendant's motion to order a reporter to disclose his confidential source, where, the court found, the information was not relevant to the defendant's argument that a search warrant was necessary. This case does not bear on a reporter's alleged privilege to refuse to respond to a grand jury subpoena.

different First Amendment question than does a good-faith grand jury subpoena, and was in accord with Justice Powell's concurring view that balancing is required where information is sought without a legitimate law enforcement need or where it bears only a remote and tenuous connection to an investigation. 408 U.S. 707-08, 709-10. See Scarce, 5 F.3d at 402 (Bursey was "consistent with the limited area for balancing of interests described by Justice Powell"). Bursey has no application where, as here, there is no dispute that the grand jury investigation is being conducted in a good faith effort to address criminal conduct.

Movants having shown no valid basis for distinguishing them, Branzburg, Lewis I, Lewis II, and Scarce all constitute binding precedent demonstrating that reporters have no First Amendment privilege to refuse to comply with a good-faith grand jury subpoena. Because this case indisputably involves a good-faith grand jury subpoena, Movants have no First Amendment privilege to refuse to comply with it and this court need not engage in any balancing of interest.

B. This Court Cannot and Should Not Create a Common Law Reporter's Privilege to Avoid Grand Jury Testimony

1. Binding Supreme Court and Ninth Circuit Precedent

Apart from their constitutional argument, Movants argue that this Court should create a federal common law reporter's privilege through which a reporter can resist a grand jury subpoena. (Motion at 18-31). Movants contend that this Court should use Federal Rule of Evidence 501 to fashion the privilege, and they assert that Jaffee v. Redmond, 518 U.S. 1 (1996), in which the Supreme Court recognized a testimonial privilege for psychotherapists, provides authority for creating such a privilege. (Motion at 18-31). Movants fail to acknowledge however, that both the Supreme Court in Branzburg and the Ninth Circuit cases applying it have concluded that there is no common law reporter's privilege to resist compliance with a grand jury subpoena.

In the course of rejecting a constitutionally based reporter's privilege, Branzburg

also rejected a common law privilege. Branzburg analyzed the common law and expressly declined to create a reporter's privilege in the grand jury context, emphasizing the burdens such a privilege would impose on the functions of the grand jury. 408 U.S. at 685-91. The Court noted that "the great weight of authority" was against recognition of the privilege in the grand jury context, that "[a]t common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury," and that this view of the law was "very much rooted in the ancient role of the grand jury." Id. at 685-86. After considering the argument that "some newsmen rely a great deal on confidential sources" and that some sources might not come forward if newsmen might have to testify, the Court stated:

> [T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen.

Id. at 693.

Thus, Branzburg rejected a common law privilege. See, e.g., In re Special Proceedings, 373 F.3d at 44 (Branzburg flatly rejected any "newly hewn common law privilege"); In re Grand Jury Proceedings, 810 F.2d 580, 584 (6th Cir. 1987) (creation of common law reporter's privilege in the grand jury context is "tantamount to . . . substituting, as the holding of Branzburg, the dissent . . . for the majority opinion."); Judith Miller, 438 F.3d at 1154 (Sentelle, J., concurring) ("I think it therefore indisputable that the High Court rejected a common law privilege in the same breath as its rejection of such a privilege based on the First Amendment."). Though one federal appellate judge has asserted that Branzburg left room for lower courts to determine the existence of a common law privilege, see Judith Miller, 438 F.3d at 1170-71 (Tatel, J., concurring), the Ninth Circuit has definitively rejected such a view.

In 1975, three years after Branzburg, the Ninth Circuit recognized that Branzburg settled the issue of a common-law privilege:

> It would be difficult to argue for a federal common law reporter's privilege to

> withhold confidential information from a federal grand jury in the face of this recent and authoritative statement that the general common law rejects such a privilege, and appellant does not make such an argument.

Lewis II, 517 F.2d at 238. While this observation was not essential to the court's decision, in 1993, in Scarce, the circuit squarely rejected any federal common law reporter's privilege, recognizing that the argument for the creation of a common law privilege "directly conflicts with the Supreme Court's holding in Branzburg." Scarce, 5 F.3d at 402-03.[7] The court considered the reasoning of a district court that was then the only federal court to have applied a common law reporter's privilege against grand jury subpoenas under Rule 501, see 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), and expressly rejected the reasoning of that opinion. 5 F.3d at 403.

Thus, Branzburg and Scarce constitute binding precedent rejecting a federal common law privilege allowing a reporter to refuse to respond to a grand jury subpoena.

2. A Change in the Law Can Be Made Only by the Supreme Court and, In Any Event, Is Not Warranted

Given Branzburg's analysis and holding, Movants' arguments for creation of a common law privilege rest on their premise that "much has changed" since the Supreme Court's opinion. (Motion at 19).

As an initial matter, even if there had been dispositive changes, it would be inappropriate for this Court to change the law where the Supreme Court has previously expressed its view of the appropriate balancing of societal interests in the grand jury context and concluded that there is no constitutional or common law reporter's privilege. As the Court has instructed, lower courts must "'leav[e] to this Court the prerogative of overruling its own decisions.'" Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting

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[7] Movants assert without explanation that Scarce's rejection of the federal common law privilege was "dictum." (Motion at 28). It was not. The holding was essential to the circuit's opinion. Had there been a federal common law privilege, the circuit would have had to analyze whether its application was warranted on the facts of Scarce, a question it did not need to reach only because it had rejected the existence of any privilege.

Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989)).

In any event, the "changes" on which Movants' rely do not support a rejection of Branzburg's holding. In arguing for the creation of a common law privilege, Movants rely on the post-Branzburg adoption of Federal Rule of Evidence 501. (Motion at 19-21). Rule 501 states that witness privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The adoption of this rule in no way changes the fact that Branzburg resolved the common law argument. Rule 501 was not intended to work a change in law; it simply enacted into the evidence code the Supreme Court's long-standing description of the federal common law as to witnesses. See Wolfle v. United States, 291 U.S. 7, 12 (1934). The rule was meant to "leave the law of privileges in its present state" and provided that the common law of privileges would continue to be developed by the federal courts. Fed. R. Evid. 501 (advisory committee note). Because Rule 501 retained the common law of privileges, Branzburg's rejection of the reporter's privilege, which continues to represent the Supreme Court's resolution of the issue, remains the law. As the Ninth Circuit stated in Scarce:

> We discern nothing in the text of Rule 501, however, that sanctions the creation of privileges by federal courts in contradiction of the Supreme Court's mandate.

5 F.3d at 403 n.3.

Nor is the Court's analysis called into question by the Court's recognition in Jaffe of a privilege in the wholly separate context involving a psychotherapist and a patient. To the contrary, the Supreme Court's balancing in Branzburg of societal interests to reject a reporter's privilege in the grand jury context addressed the very principles set forth in Jaffe and remains sound today.

In analyzing whether courts should adopt a new testimonial privilege at common law and under Rule 501, the starting point is the time-honored principle that the public has a right to "every man's evidence," and therefore the general rule disfavors testimonial

privileges. Jaffee, 518 U.S. at 9. Branzburg recognized this principle, noting that it "is particularly applicable to grand jury proceedings." 408 U.S. at 688. Branzburg emphasized the historic role of the grand jury, an institution with constitutional status. Id. at 686-87. The Court stated:

> Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in the process.

Id. at 690. In short, the public's right to every man's evidence is most important in the grand jury context, such as where a reporter may have knowingly received an illegal leak of information and is the only witness who can identify the leaker.

The right of the public to every man's evidence can give way when "reason and experience" show that a proposed privilege "promotes sufficiently important interests to outweigh the need for probative evidence." Jaffee, 518 U.S. at 9-10 (quotation omitted). The Supreme Court in Branzburg addressed this issue as well and stated:

> On the records before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

408 U.S. at 690-91. Thus, Movants' heavy reliance on civil cases "in various contexts" (Motion at 21-22, 30-31) to articulate the interests that support a reporter's privilege is beside the point. The interest in a qualified reporter's privilege may at times outweigh the value of civil discovery, see Shoen I, 5 F.3d at 1292 (qualified privilege results when journalist "become[s] the target of civil discovery"), without overriding the far stronger public interest in law enforcement.

Since Branzburg, reason and experience provide an even stronger argument for why a reporter's privilege against grand jury subpoenas need not be crafted. That decision has existed for over 34 years -- with the Ninth Circuit and other circuits uniformly denying privilege claims -- and yet the free press, relying on confidential

sources, has thrived. "From the beginning of our country the press has operated without constitutional protection for press informants and the press has flourished." Branzburg, 408 U.S. at 698-99. Branzburg, it appears, was dead-on in reasoning that its ruling -- continuing the long-standing common-law tradition -- would not mean that confidential sources would in fact "dry up" because of a possible reporter grand jury appearance. See 408 U.S. at 694-95 (considering situation where source has not engaged in criminal conduct but has information about it). Moreover, because the leak here appears to have been from the outset a disclosure of court-protected information, if this type of criminal leak is "chilled" by judicial rulings, then the result will be the reduction in such crime -- not a result to be avoided. In fact, a contrary ruling could increase this sort of crime, by tempting reporters to seek out court-protected information in high-profile investigations, in hopes of landing a big story.

Further, Branzburg recognized that the government would exercise restraint in issuing grand jury subpoenas (unlike, perhaps, private parties in civil litigation, who can be expected to litigate any permissible matter on their clients behalf). See 408 U.S. at 694 (in some criminal cases government may never call reporter as witness, or prosecution may not insist on his testifying). Branzburg accordingly noted that the Attorney General had developed a set of rules for prosecutors to apply in connection with issuing subpoenas to members of the press. The Department of Justice's internal guidelines on media subpoenas have been revised over the years and are followed by the Department. See 28 C.F.R. § 50.10. While these guidelines, by their terms, do not "create or recognize any legally enforceable right in any person," 28 C.F.R. § 50.10(n), the Department of Justice's self-regulation of its issuance of media subpoenas provides an alternative means of advancing the societal interests promoted by the creation of a privilege, a factor further distinguishing this case from Jaffe. Even Movants acknowledge that the government has exercised great restraint under these rules. (Motion at 2) ("Until recently, the Government rarely issued subpoenas to journalists seeking to identify their confidential

sources"). Thus, even under the facts as Movants paint them, the restraint long exercised by the Department of Justice has served to vindicate the central policy decision reflected in Branzburg's reasoning -- that the lack of a reporter's privilege in the grand jury context would not prove too costly to freedom of the press.[8]

Yet another factor clearly distinguishes Jaffe. Jaffe noted that the failure of a privilege to be among the nine originally proposed for inclusion in the Rules of Evidence disfavors recognition of the privilege. 518 U.S. at 14-15 (citing United States v. Gillock, 445 U.S. 360, 367-68 (1980), which denied an unlisted privilege). A reporter's privilege was not among the nine proposed. See Proposed Rules 501-513, 56 F.R.D. 183, 230-61. A related indicator is that 34 years have passed since Branzburg without passage of a federal "shield law," despite the Supreme Court's statement that Congress was free to pass such a statute if it perceived an evil that needed to be addressed. Branzburg, 408 U.S. at 706.

In conducting the balancing of interests, the Supreme Court also noted the difficulties of administering the qualified privilege in the grand jury context, a factor that still weighs against recognition of such a privilege. A qualified privilege would "embroil the courts in preliminary factual and legal determinations" and "distinguishing between the value of enforcing different criminal laws." Id. at 705-06. This is even more true today than it was at the time of Branzburg. Today, a large cadre of reporter-"bloggers" exist on the internet, ready to report in a web log information they obtain. See 438 F.3d at 1156-57 (Sentelle, J., concurring) ("does the privilege also protect the proprietor of a web log . . .? If not, why not? How could one draw a distinction . . .?"). If unlawful leaking to bloggers were shielded by privilege, government officials and others subject to Rule 6(e) and protective orders could, readily and with impunity, engage in unlawful leaking of

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[8] It is far from clear that the "qualified" privilege that Movants seek would function any differently in protecting free speech, for confidential sources could still be ordered revealed to a grand jury, so long as the district court's "flexible balancing approach" determines that they must be. (Motion at 36).

information through trusted friends or political operatives who would disclose the information to the public.

The only change since Branzburg that lends a modicum of support to Movant's policy argument is that since 1972 additional states have recognized some form of a reporter's privilege. See Jaffe, 518 U.S. at 12-13 (relying, as one factor in creating federal privilege, on psychotherapist-privilege laws in all 50 states). Movants argue that all but one state has recognized a reporter's privilege. (Motion at 23). This claim, however, significantly overstates the relevant facts.

First, while the number of states with some form of statutory privilege has increased by fifteen (from 17 to 32) since Branzburg, Movants fail to acknowledge that some of the state statutes expressly do not apply a privilege in the criminal context at issue here. See Colo. Rev. Stat. Ann. § 13-90-119(2)(d) (shield law does not apply to information based on newsperson's personal observation of felony); Minn. Stat. Ann. § 595.024(Subd. 2)(1) (exception from shield law for information "clearly relevant to a gross misdemeanor or felony"); N.C. Gen. Stat. § 8-53.11(d) ("a journalist has no privilege against disclosure of any information, document or item obtained as the result of the journalist's eyewitness observations of criminal or tortious conduct"). Many of the other statutes apply flexible standards, such that courts may construe them not to shield information relating to criminal conduct. See, e.g., In re Grand Jury Proceedings (Ridenhour), 520 So. 2d 372, 376 (La. 1988) (indicating that reporter cannot move to quash subpoena if he "has witnessed any criminal activity or has physical evidence of a crime").

Second, those states without a statute establishing the privilege have recognized the privilege, as Movants acknowledge, only "in one context or another." (Motion at 23). Many of the state court decisions that Movants cite arise from civil proceedings, and they may well not extend to criminal proceedings at all. See, e.g., Hopewell v. Midcontinent Broadcasting Corp., 538 N.W.2d 780, 781 n.6 (S.D. 1995) (opinion relates to only civil

proceedings because "[i]n criminal proceedings, the interest of the public in law enforcement . . . may outweigh the journalist's need for confidentiality"). Other of Movant's cases are lower court decisions that do not represent definitive statements of state common law. In all, this situation falls short of demonstrating an "overwhelming consensus" (Motion at 23) on the extension of a qualified reporter's privilege to the context at issue here: a grand jury, acting in good faith, seeking information from a reporter relevant to the investigation of a crime.

Movants place special emphasis on the California "shield law" which broadly protects reporters from contempt proceedings in state courts for failing to disclose confidential-source information. (Motion at 25-27). Movants do not contend that the California "shield law" governs this case (Motion at 27), nor could they. See Lee v. United States Department of Justice, 287 F. Supp. 2d 15, 17 (D.D.C. 2003). Rather, Movants suggest that the existence and breadth of the California "shield law" provides additional support for their contention that this Court should create a qualified reporter's privilege pursuant to Rule 501. In contrast to the California statute, however, is the federal system, in which no "shield law" has been adopted -- despite repeated efforts at such legislation by interested parties -- and very few courts have applied a reporter's privilege in the grand jury context. The wide divergence in approaches among different jurisdictions, both in whether to recognize a privilege and in defining the nature and scope of the privilege, demonstrates clearly that there is no consensus here as there was in Jaffe. Because of the policy decisions necessary in defining the nature and scope of any privilege, this Court should -- even if not bound by Branzburg and Scarce -- leave such a decision to the political branch. See Judith Miller, 438 F.3d at 1156 (Sentelle, J., concurring) (explaining that "even if we are authorized to make that decision, reasons of policy and separation of powers counsel against our exercising that authority").

While state privilege law is relevant under Jaffe's analytic framework, the situation here is not nearly as compelling as that in Jaffe. In any event, Jaffe was a Supreme Court

case decided in the absence of a binding precedent such as Branzburg. State laws cannot trump Branzburg's balancing of interests and clearly expressed view of the inappropriateness of a common law privilege. Moreover, the balance struck by the Supreme Court in Branzburg and applied by the Ninth Circuit in Scarce is the proper balance of societal interests. As the Court noted, reporters will have First Amendment protection in cases of harassment and bad faith investigations, as well as protection through the executive branch's self-regulation through the Department of Justice guidelines. This system has functioned well since Branzburg, and it need not be revisited today.[9]

IV.

IN ANY EVENT, THE GOVERNMENT HAS SATISFIED ALL REQUIREMENTS FOR OVERCOMING ANY QUALIFIED REPORTER'S PRIVILEGE

As discussed above, binding Supreme Court and Ninth Circuit precedent establishes that there is no reporter's privilege in criminal cases, under the First Amendment or under common law. Even if such a privilege applied, however, Movants concede that it would be a qualified privilege. (Motion at 36-45). To this end, Movants import a balancing test from civil cases and argue it should apply here. (Id.). Assuming arguendo -- contrary to binding case law -- that a qualified privilege applies to refuse to testify before a grand jury in a criminal case, Movants cannot rely on any such privilege in this case.

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[9] Even if a journalist were privileged to not testify before the grand jury in this case, the privilege should not extend to shield the production of documents or tangible items in the reporter's possession. Even the most widely accepted and constitutionally based privileges offer no protection against the production of physical evidence that may be evidence of a crime. See e.g., Schmerber v. California, 384 U.S. 757, 764 (1966) ("compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate [the privilege against self-incrimination]."); In Re January 1976 Grand Jury, 534 F.2d 719 (4th Cir. 1976) (grand jury subpoena requiring attorney to turn over fruit of crime did not violate privilege against self-incrimination or attorney-client privilege); United States v. Scott, 784 F.2d 787, 792-93 (7th Cir. 1986) (grand jury subpoena for fingerprints, palm prints, and handwriting exemplars of defendant's husband did not violate privilege against adverse spousal testimony).

Even under the balancing test proposed by Movants, the government has satisfied the requirements to overcome the privilege. As Movants recognize, the Ninth Circuit has held in civil cases that, in balancing the public interest in protecting a reporter's sources against the private interest in compelling disclosure in the context of civil litigation, the Court should consider whether the information sought is (a) unavailable despite exhaustion of all reasonable sources; (b) non-cumulative; and (c) clearly relevant to an important issue in the case. (Motion at 37, citing Shoen). The subpoenas to Movants easily satisfy these civil-case requirements.[10]

First, Movants do not seriously dispute that the information sought is unavailable despite exhaustion of all reasonable sources. Because the subpoena relates to a leak of grand jury information in violation of a protective order, Movants are the only individuals, other than the leaker himself, who would have personal knowledge of the leaker's identity. See N.L.R.B. *v.* Mortensen, 701 F. Supp. 244, 249 (D.D.C. 1988) (compliance required where reporters were the only other participants in conversations with source and, thus, were the "direct and most logical" source of information regarding statements made during conversations). As discussed above in section II, in response to the Court's inquiry, all of the parties who potentially had access to the grand jury transcripts submitted declarations to the Court denying any involvement in, and knowledge of, the dissemination of the transcripts. The result, as characterized by the Court, was "abject denials" by the witnesses. The information sought thus is unavailable from any source other than Movants.

Moreover, prior to the issuance of the challenged subpoenas, all reasonable alternative sources of the information sought by the subpoenas had been explored. In addition to the declarations obtained by the Court, the government obtained a search

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[10] As discussed below, see n. 11, the government believes that if the Shoen balancing is applied in criminal cases, it should be applied to more readily favor disclosure. Nevertheless, below we discuss the Shoen balancing as applied in civil cases.

warrant for Conte's residence (based on extensive investigation as detailed in the sealed search warrant affidavit), issued subpoenas for Conte's business computer and records, obtained a pen register, interviewed numerous witnesses, obtained declarations from various athletes whose testimony was illegally disclosed, and obtained waivers of confidentiality from a number of individuals who had access to the transcripts. This lengthy and substantial investigation by the government plainly satisfies any "exhaustion" requirement.

Second, the information sought is non-cumulative. Although the government has conducted an extensive investigation, no party has admitted being the source of the leak. In fact, the opposite is true; the potentially responsible parties have denied, under penalty of perjury, being the source of the leak. Therefore, the information sought from Movants, the only party other than the leaker with personal knowledge of the identity of the leaker, plainly is not cumulative.

Moreover, as the Supreme Court has made clear, the grand jury's duty is to "inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." See United States v. R. Enterprises, 498 U.S. 292, 297 (1991); see also Branzburg,„408 U.S. at 701 ("A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'") (quoting United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970)). Evidence that supports a finding of innocence, as well as of guilt, is of central importance to the successful completion of a grand jury investigation. Thus, "[t]he investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged." Branzburg, 408 U.S. at 700 (quoting Costello v. United States, 350 U.S. 359, 364 (1956)); see also, R. Enterprises, 498 U.S. at 297-99 (quoting United States v. Dionisio, 410 U.S. at 17) (grand jury investigations must be allowed to proceed broadly to avoid "frustrating the public's interest in the fair and expeditious administration of the

criminal laws."). Given the important policy interests in the successful completion of the grand jury investigation, the information being sought plainly satisfies the second prong of the balancing test.

Third, the information sought is not only relevant to an important issue in the case, but is likely to constitute direct evidence relating to guilt or innocence, and therefore is of central importance to the investigation. See In re Special Proceedings, 373 F.3d 37,45 (1st Cir. 2004) (finding that there was no doubt that testimony of reporter who received video tape leaked in violation of protective order was highly relevant to a good faith criminal investigation); Lee v. United States Department of Justice, 287 F. Supp. 2d 15, 19 (D.D.C. 2003) (identity of sources who leaked to reporters information identifying plaintiff as criminal suspect was crucial to plaintiffs case in defamation action against purported leakers).

Notwithstanding the balancing test articulated by the Ninth Circuit in civil cases, Movants assert, without explanation, that the balancing test in a criminal case should be significantly more stringent than that in a civil case. (Motion at 37).[11] Where, as here, the grand jury is investigating criminal conduct relating to false declarations, obstruction of justice, and criminal contempt, among other crimes, Movants' assertion that the Court should apply a more stringent test is without merit. The more stringent test that Movants seek is one that would involve the courts in weighing 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. (Motion at 38). Such a test would be an undesirable, and perhaps unconstitutional, interference with the executive function, because it would make the courts "inextricably involved in distinguishing

[11] If the Shoen balancing test is applied in criminal cases, the government agrees with Movants that the test should be "only the beginning of the analysis, not the end" (Motion at 37), but not because the test should be more strict in criminal cases. To the contrary, if Shoen's civil-case balancing test is applied in criminal cases, it should be applied in a manner that recognizes that the public's interest in law enforcement will compel disclosure more readily in criminal cases than in civil ones.

between the value of enforcing different criminal laws," Branzburg, 408 U.S. at 705-06, a job normally entrusted to the executive branch. Further, "by requiring testimony from a reporter in investigations involving some crimes but not in others," courts would be making a "value judgment that a legislature had declined to make" about the value of different crimes, contrary to the judicial role, which "is not to make the law but to uphold it in accordance with their oaths." Id. at 706. Even under Movants' proposed more stringent balancing test, however, the government overcomes the qualified privilege in this case.

As Movants must acknowledge, the public has an essential interest in the "detection and prosecution of crime." See In re Possible Violations of 18 U.S.C. 371, 564 F.2d 567, 571 (D.C. Cir. 1977); see also Branzburg, 408 U.S. at 710. If anything, the public's interest is heightened in this case, because the crimes being investigated involve conduct threatening the integrity of court proceedings and the sanctity of grand jury secrecy, namely the deliberate and intentional disclosure of secret grand jury information in violation of a Court order, false declarations to the Court about such leak, and potential obstruction of justice by moving to dismiss a criminal indictment based on false accusations as to the source of the leak.

In light of the above, the public's First Amendment interest in not deterring the future free flow of information to the press is outweighed here by the public's interest in law enforcement. While Movants are being asked to identify a confidential source, the nature of the relevant communications -- namely, the alleged illegal disclosure of grand jury transcripts -- render any interest in non-disclosure on the part of the source unworthy of protection, and of little weight, if any, in the balance. See also Branzburg, 408 U.S. at 691-92 ("Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.").

As recognized in Lee, 287 F. Supp. 2d at 23 (citing Branzburg at 691-92), it is doubtful whether any "truly worthy First Amendment interest resides in protecting the identity of government personnel who disclose to the press information that [legally] they may not reveal." To the contrary, the public has a strong interest in the reporting, and prosecution, of criminal conduct that the reporter has first-hand information of. See Branzburg, 408 U.S. at 697.

Furthermore, Movants' assertion that the conduct at issue here does not involve "serious criminal conduct" (Motion at 35) is legally and factually inaccurate. To begin, the government submits that the knowing and deliberate violation of Judge Illston's order in a criminal proceeding is a "serious" crime, notwithstanding Movants' attempt to minimize the significance of the conduct. The violation of the Court order in the case at bar is more significant because it involved the disclosure of secret grand jury proceedings. The Supreme Court consistently has recognized that "the proper functioning of our grand jury system depends upon the secrecy of the grand jury proceedings." United States v. Procter & Gamble Co., 356 U.S. 677 (1958) (emphasis added). For this reason, "[u]nlike typical judicial proceedings, grand jury proceedings and related matters operate under a strong presumption of secrecy." See In re Sealed Case, 151 F.3d 1085, 1069-71 (D.C. Cir. 1998).

As the Supreme Court has recognized, grand jury secrecy safeguards a number of distinct interests. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-19 (1979). Among these are the encouragement of voluntary participation by witnesses and the protection of witnesses from retribution and inducements. Id. If grand jury proceedings were made public, many prospective witnesses would be deterred from presenting testimony due to fears of retribution based on the knowledge that those against whom they testify would be aware of their testimony. Procter & Gamble, 356 U.S. at 681. Similarly, witnesses who did appear before the grand jury would be less likely to testify fully and frankly, as they would be subject to retribution as well as inducements.

Id. Preserving the secrecy of the proceedings also assures that "persons who are accused but exonerated by the grand jury will not be held up to public ridicule." Douglas Oil Co., 441 U.S. at 219 (footnote omitted).

Notwithstanding the well-recognized public policy considerations relating to grand jury secrecy, Movants assert that such concerns are not present here because the case already was indicted when the leak occurred, the government produced the grand jury transcripts in discovery, and the disclosure allegedly did not affect the defendants' Sixth Amendment rights. (Motion at 40-42). Movants' argument misses the point.

First, the government produced the grand jury transcripts subject to a protective order prohibiting their dissemination to the media. That the government complied with its discovery obligations does not suggest, as Movants assert, that the government was unconcerned with grand jury secrecy, nor does it diminish the important public policies related to grand jury secrecy.

Second, the transcripts were not "effectively introduced into the criminal case," as Movants argue. (Motion at 43). Although Movants correctly point out that the transcripts could have been disclosed in a public trial, no such trial occurred here, and at the time of dissemination a protective order was in place.

Third, Movants fail to address the potential harm to the government and law enforcement in securing testimony from future grand jury witnesses because of the illegal disclosure. Because of the subject matter of the investigation, the Balco case attracted significant media attention and public interest. The leak therefore drew public attention to a situation in which grand jury testimony was not kept "secret," a circumstance which may cause witnesses in future grand jury investigations (including cases involving "some sort of violent or organized crime or enterprise" (Motion at 43)), to be reluctant to testify or to testify truthfully when they are summoned before a supposedly "secret" grand jury. Thus, the harm from this very public disclosure raises the precise concerns addressed in Douglas Oil.

Finally, Movants' claim that the leak "had no effect on defendants' Sixth Amendment rights" (Motion at 40) misses the point. In future cases, such a leak could adversely impact a defendant's right to a fair trial, supporting efforts to address the leak now to deter future similar leaks. Moreover, that defendants sought to dismiss the indictment because of the leak provides added weight for pursuing the leak, because the harm that would be cause by such a dismissal presents an unacceptable risk. In addition, to the extent a defendant himself may have caused the leak, and then used it to his tactical advantage in an attempt to obtain dismissal of the indictment (all the while using Movants as witting pawns in his fraud on the Court), there is no basis for protecting the defendant from investigation.

On the other hand, the leaked information's public value, if any, is minimal. Movants characterize the "leaked information" as providing the initial basis for publicly valuable reporting on "the use of performance enhancing drugs at every level of sports, from high school playing fields to major league ball parks and Olympic arenas." (Motion at 39). Movants' characterization of the "leaked information" with such a broad stroke is not supported by the record. As Movants' exhibits and declarations make clear, the topic of steroid use in professional and amateur sports received significant media attention long before the "leak" of grand jury testimony. (Exs. 1-17, 24 to Donnelan Aff.). Indeed, it was the government's investigation of Balco and subsequent indictment of Conte and others on February 12, 2004 -- well before the leak of grand jury testimony -- that raised the public's consciousness concerning steroid use in sports. In contrast, the "leaked information" served only to titillate and hold up to public ridicule[12] those athletes who admitted using steroids before the grand jury; witnesses who testified under the belief that their grand jury testimony would be "secret." Given the important public policy issues

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[12] One of the primary public policy reasons for grand jury secrecy is to avoid the type of public ridicule caused by the disclosure here. Douglas Oil Co., 441 U.S. at 219. The fact that the witnesses were professional athletes in no way undermines their right to have their grand jury testimony remain secret.

noted above, including (1) the integrity of court proceedings and compliance with Court orders; (2) the sanctity of grand jury proceedings; (3) the potential effect on future witnesses who testify before a grand jury; (4) the public trust in government officials; and (5) the potential fraud on the Court, the significant harm potentially caused by the leak plainly outweighs the value of obtaining attention-getting information relating to athlete-celebrities.

An additional factor the Court should consider in balancing the public's interest in law enforcement with any associated burden on news gathering is the existence of any waiver of confidentiality by the reporter's sources. Where sources have waived any claim of confidentiality with respect to the subject conversations, that waiver insulates the reporter from accusations of a breach of confidentiality, and limits the potential impact on their credibility and trustworthiness in the eyes of other "sources." The source's waiver essentially operates as an agreement for the reporter to treat the substance of the subject conversations as "on the record" or "for attribution." Such agreements made by confidential sources are honored by members of the news media every day and eliminate any conceivable interest in confidentiality. See McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003). Here, thirteen parties who had access to the grand jury transcripts agreed to waive any promise of confidentiality given to them by Movants and agreed that Movants could disclose their identity and the content of any such communications.[13] (Ex. GG to Hershman Decl.). Although only Movants and the leaker know whether a waiver has been executed by the person who provided the transcripts, this Court may consider the waivers in assessing the public's interest in non-disclosure. See Schoen, 5 F.3d at 1295 (absence of confidentiality may be considered "as a factor that diminishes the journalist's, and the public's, interest in non-disclosure").

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[13] Every government source who had access to the transcripts executed the waiver at the SAAG's request. Although each of the defendants and defense counsel in United States v. Conte expressed outrage at the leaks and moved to dismiss the indictment based on outrageous government misconduct, none of them were willing to sign the waiver.

Movants' claims that the subpoenas will impinge on their ability to gather and report the news, and that compliance would have adverse effects on their news gathering efforts in the future are, like the claims made in Branzburg, generalized and speculative, and based on predictions by journalists which the Supreme Court noted in Branzburg are properly viewed in the "light of professional self-interest." 408 U.S. at 693-95. As the Supreme Court noted in Branzburg, even assuming that Movants and other journalists rely heavily on confidential sources and that some sources may be deterred from furnishing information based on the risk that reporters may be called before a grand jury, this does not prove that such a risk will have a significant impact on the free flow of information protected by the First Amendment. Branzburg, 408 U.S. at 693.

Indeed, the only sources who likely would be deterred from speaking to the press by the prospect of a reporter being required to testify in the grand jury are those involved in criminal conduct, which sources are "[n]either above the law or beyond its reach." Id. at 699. In any event, as the majority reasoned in Branzburg, whatever speculative risk is created by requiring journalists to provide grand jury testimony is worth taking because the alternative -- allowing crime to go undetected or unpunished -- is unacceptable.

Movants' specific claim that requiring the disclosure of sources would impinge on reporters' ability to uncover government misconduct (Motion at 46-48) rings hollow, given that the investigation in this case does not involve government misconduct, unless the misconduct is the leak itself.[14] Rather, this investigation involves information that may have been released in violation of a specific Court order, that divulged secret grand jury testimony, and that may have done so in an attempt to gain a tactical advantage in criminal proceedings. No public policy protects the "free flow" of information regarding secret grand jury testimony prohibited from disclosure by a valid Court order.

[14] Moreover, to the extent the leak itself constitutes government misconduct, that is, the leak was by a government employee, there is no confidentiality interest because all government employees known to have access to the leaked materials have signed waivers.

Accordingly, public policy weighs heavily in favor of, rather than against, "chilling" such disclosures by parties to criminal proceedings. Moreover, even if compelling compliance with the subpoenas may create an incidental burden on news gathering, as noted in Branzburg, it cannot seriously be maintained that it is better to write about government misconduct than to prosecute it. See Branzburg, 408 U.S. at 692. In the absence of essential evidence, such unlawful conduct cannot be prosecuted.

In circumstances like this case, reporters have a powerful motive not just to receive information resulting from criminal conduct, but to encourage the criminal conduct that results in their obtaining the information. Wherever there is a grand jury investigation involving a subject of public interest, or involving public figures, a journalist can -- as Movants have demonstrated -- advance their careers by being the first to obtain that secret grand jury information and publish it. Reporters may also have a profit motive to obtain that information, for example by -- as Movants have also demonstrated -- publishing a book that features the secret information they obtained. If reporters are shielded from ever having to testify as to the identity of the source who illegally provided the information, reporters will have every incentive to continue to seek out "leakers" and prompt them to illegally disclose such material. To recognize a privilege in this context would, in effect, eliminate any deterrent to reporters actively seeking out court-protected information. The public interest supports no such thing, under any balancing test.

V.

THE SUBPOENAS TO MOVANTS MEET AND EXCEED THE DEPARTMENT OF JUSTICE GUIDELINES

Movants argue that the issuance of the present subpoenas is not in compliance with the Department of Justice ("DOJ") guidelines for issuing subpoenas to news media because there are no "exigent" circumstances and the alleged crime being investigated is

not serious.[15] (Motion at 40, 44-45). Movants' assertion is based on a misreading of the relevant guidelines and is without merit. As an initial matter, Movants' interpretation of 28 C.F.R. § 50.10 and the U.S. Attorney's Manual ("USAM"), title 9, Section 13.400, is inaccurate. Specifically, the USAM requires that "exigent circumstances" -- including, by way of example, situations where "immediate action is required to avoid the loss of life or the compromise of a security interest" -- exist when a member of the news media is to be interrogated, indicted or arrested without first obtaining the express approval of the Attorney General. (See USAM, title 9, Section 13.400, attached as Ex. B to Corrallo's affidavit in support of Motion) (emphasis added). Movants concede, as they must, that the SAAG obtained the express approval of the Attorney General to issue the present subpoenas. Thus, the USAM "exigent circumstances" requirement is inapplicable.

Moreover, Movants erroneously claim that the "exigent circumstances" requirement in 28 C.F.R. § 50.10 is limited to situations where "immediate action is required," relying on the USAM's examples of exigent circumstances from the context where a reporter is going to be interrogated, indicted, or arrested without the approval of the Attorney General. This is a misguided attempt to import the definition of "exigent circumstances" from an unrelated context where immediate action is the very reason why approval from the Attorney General cannot practically be obtained. More importantly, however, the "exigent circumstances" requirement in 28 C.F.R. § 50.10 is not limited to such situations where "immediate action is required." As the Deputy Attorney General has testified to Congress, the term "exigent circumstances," in 28 C.F.R. § 50.10, "has been interpreted consistently to permit compulsion of additional types of evidence if it is apparent that there are no other sources to obtain the information and that the information is otherwise essential to the case." (Ex. HH to Hershman Decl.). The Department of

[15] Movants apparently concede that the other criteria for issuance of a subpoena to the media were satisfied, namely (1) there exist reasonable grounds to believe that a crime has occurred and that the information is essential; (2) exhaustion of alternative sources; (3) the subpoena is limited in scope; and (4) the subpoenaed party refused to comply voluntarily. See 28 C.F.R. § 50.10.

Justice has broad discretion to interpret its own regulations. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Here, as discussed above, there are no other sources to obtain the information and the information is essential. Thus, the requirements of 28 C.F.R. § 50.10(f)(4), along with all the other requirements set forth in 28 C.F.R. § 50.10, have been met in this case.

Further, Movants' claim that "exigent circumstances"is limited to the "immediate action" examples in the USAM makes little or no sense. As contemplated in 28 C.F.R. § 50.10 and as set forth in the Corrallo affidavit, the approval process for a subpoena to the media is time-consuming and involves review by numerous levels within DOJ. Thus, if a subpoena could only be approved where "immediate action" was required to avoid loss of life, the lengthy review process (not to mention lengthy court proceedings) would mean that no subpoena ever would be issued.[16]

Moreover, the affidavits of Mark Corrallo and Jamie Gorelick concerning what another administration would or would not have done under these circumstances is irrelevant. It cannot be disputed that neither Mr. Corrallo nor Ms. Gorelick reviewed the relevant information and detailed documentation supporting issuance of the present subpoenas. Nor can it be disputed that, after review by all the relevant individuals in the current administration, the Attorney General approved issuance of the present subpoenas. It is also unclear whether Mr. Corrallo and Ms. Gorelick considered that the Hon. Susan Illston specifically referred this matter to the DOJ to investigate fully, or that a fraud may have been perpetrated on the Court by a defendant to a criminal proceeding. In any event, whether or not individuals in the chain of command for previous administrations would have approved or recommended against the subpoenas is not relevant to the Court's

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[16] Throughout the Motion, Movants attempt to contrast the present subpoena to that issued in Miller, which Movants' claim (and the Court found) involved serious criminal conduct. **(**Motion at 38 n.14, 40**).** Yet, if Movants' interpretation of the applicable guidelines were correct, the subpoena in Miller would not have complied with DOJ guidelines because there was no "immediate action" required to avoid loss of life or the compromise of a security interest in that case.

determination.

Finally, even if it were true that issuance of the subpoenas did not comply with DOJ guidelines, which it is not, any argument based on the DOJ guidelines has no bearing on the instant claim to quash the present subpoenas, because the DOJ guidelines expressly do "not create or recognize any legally enforceable right in any person." 28 C.F.R. § 50.10(n). The courts repeatedly have held that the guidelines do not create enforceable rights. See Miller, 438 F.3d at 1152; In re Special Proceedings, 373 F.3d 37, 44 n.3 (1st Cir. 2004); In re Grand Jury Subpoena American Broadcasting Companies, Inc., 947 F. Supp. 1314, 1322 (D. Ark. 1996); see also In re Grand Jury Proceedings No. 92-4, 42 F.3d 876, 880 (4th Cir. 1994) (holding that special prosecutor's failure to comply with guidelines regarding issuance of subpoenas to attorney, even if applicable, were not enforceable by witness through motion to quash). And the guidelines' very nature indicates that they do not confer a substantive right on any party, and are not judicially enforceable. The guidelines are not required by the Constitution or statute. In re Special Proceedings, 373 F.3d 37, 44 n.3 (1st Cir. 2004). They include a purely internal enforcement mechanism. Their purpose is to guide the Department's exercise of discretion in determining whether, and when, to seek the issuance of subpoenas to reporters, rather than to confer substantive or procedural benefits upon individual reporters. Thus, the guidelines are of the kind to be enforced internally by the agency, and do not provide a basis for judicial enforcement through motions to quash. See In re Shain, 978 F.2d 850, 853 (4th Cir. 1992) (holding reporters have no right to seek enforcement of DOJ guidelines before being compelled to testify). Therefore, the guidelines have no force or effect here.

VI.

FEDERAL RULE OF CRIMINAL PROCEDURE 17(C)(2) DOES NOT PROVIDE AN INDEPENDENT BASIS FOR QUASHING THE SUBPOENAS

Movants also argue that the subpoenas should be quashed as "unreasonable" under

Federal Rule of Criminal Procedure 17(c)(2). (Motion at 45-51). If a trial or grand jury subpoena seeks privileged information, a litigant can move to quash it pursuant to Rule 17(c)(2). But, as shown above in Section III, there is no applicable privilege in this case. Also as discussed above in section III, both Branzburg and Scarce outlined the circumstances under which a grand jury subpoena to a reporter is unreasonable. Branzburg, 408 U.S. at 707-08; Scarce, 5 F.3d at 400, 401. Under this case law, a reporter can succeed in quashing a subpoena as unreasonable under Rule 17(c)(2) by showing that "a grand jury investigation is not conducted in good faith," "does not involve a legitimate need of law enforcement," or "has a remote and tenuous relationship to the subject of an investigation." Scarce, 5 F.3d at 401.[17] Movants are not arguing that there is such bad faith involved in this investigation.

Contrary to Movants' assertion, Rule 17(c) does not provide an independent basis to quash a subpoena on First Amendment grounds where, as here, binding Supreme Court and Ninth Circuit precedent have held the information sought is not privileged under that Amendment. Essentially, Movants attempt to circumvent Branzburg, Scarce, and Lewis by imposing under Rule 17(c) a purported First Amendment balancing test based on the alleged burden on reporters' confidential source relationships and ability to report newsworthy issues. (Motion at 47-48). Yet Branzburg addressed these same concerns in rejecting the applicability of a reporter's privilege. Therefore, Movants' request that the court engage in further balancing is unwarranted.[18] See McKevitt, 339 F.3d at 533 (citations omitted) (under Rule 17(c), "courts should simply make sure that a subpoena

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[17] Though a reporter can move to quash a subpoena on these grounds, the government need not demonstrate need or relevance to support a grand jury subpoena issued to another individual. In re Grand Jury Subpoenas, 926 F.2d 847, 854 (9th Cir. 1991).

[18] Indeed, one wonders why the courts would have needed to analyze the existence of a First Amendment reporter's privilege at all if a trial court could, short of finding a privilege, take into consideration "First Amendment implications" (Motion at 46) and quash a subpoena. This effectively would be creating a privilege where there is none.

duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas. . . . We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist.").

In arguing for such Rule 17(c) authority, Movants rely almost entirely on a case, In re Grand Jury Subpoena, 829 F.2d 1291, 1293-98 (4th Cir. 1987), that granted the motion to quash the subpoena based on its conclusion that the subpoena was overly broad. The case involved subpoenas to videotape distributors that were issued in the course of an obscenity investigation. The court suggested that the government was engaging in a "paradigmatic 'fishing expedition'" and found the subpoenas overly burdensome. Id. at 1302. Significantly, the court did not rule that all such subpoenas would be improper, or that the government was precluded from subpoenaing information relevant to the grand jury investigation. Rather, the court instructed the government that future such subpoenas should be done through the least-intrusive means of requesting relevant material. Id. at 1302.

In contrast, in this case, the subpoena issued to Movants is narrowly tailored, seeks limited and specific categories of documents, and requests testimony related to the central issue in the investigation. Under these circumstances, Movants' assertion that the subpoena is "unreasonable and oppressive" (Motion at 46) is not well-taken. Indeed, in the context of a grand jury subpoena for possibly obscene materials, with its attendant First Amendment implications, the Supreme Court has held that a subpoena cannot be quashed on relevancy grounds unless there is "no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." R. Enterprises, 498 U.S. at 301 (stating that test concerns relevancy, not whether subpoena is overly burdensome).[19] Here, there is no

[19] Movants also cite cases involving issues in other contexts in which First Amendment implications were taken into account in the course of balancing interests. (Motion at 46-47 &

dispute that the information being sought is relevant to the general subject of the grand jury's investigation.

Finally, even assuming a balancing test were appropriate under Rule 17(c), the outcome of any balancing test would weigh in favor of compelling compliance with the subpoena for the reasons discussed in Section IV, above. The government has issued subpoenas seeking information relevant to a particular crime, and there is a strong public interest in seeing that crime solved and prosecuted. Any promise of confidentiality given by Movants to the perpetrator of the crime cannot outweigh the public's interest in seeing justice done, and in vindicating the interests of the Court and the grand jury.

VII.

REQUEST FOR AN EVIDENTIARY HEARING

The government requests an evidentiary hearing in order to cross-examine the following witnesses who submitted affidavits in support of the Motion: (1) Mark Fainaru-Wada; (2) Lance Williams; (3) Mark Corrallo; (4) Jamie Gorelick; and (5) Bill Lockyer. The government anticipates that the questioning will be short and concise, not invade areas of alleged privilege, and that the entirety of the questioning will last less than an hour. To the extent the Court believes that the affidavits submitted by the above-referenced individuals are not relevant to the issues presented in the Motion and therefore the court elects to strike the affidavits, the government withdraws its request for an evidentiary hearing. If Movants elect to withdraw one or more of the affidavits, the government likewise will withdraw its request to cross-examine that particular affiant. Otherwise, the government submits that it is entitled to cross-examine affiants about the

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n.19). In the instant context of responding to subpoenas, First Amendment implications have been taken into account in Branzburg and Scarce in denying a reporter's privilege against grand jury subpoenas, as well as in the cases that fashioned a qualified privilege in the civil cases. Given the resolutions in this area of the scope of any privilege, another level of balancing is not appropriate under Rule 17(c).

factual assertions made and conclusions reached in the affidavits, as well as the bases therefor. To the extent the Court requests a more detailed offer of proof as to the anticipated areas of inquiry, the government requests leave to submit its offer of proof in camera, under seal, so as not to unfairly prejudice the government by informing the witnesses in advance about the questions the government intends to ask.

VIII.

REQUEST FOR A CLOSED HEARING

The government does not believe that it will be necessary to seal the courtroom and conduct a closed hearing, unless the court intends to inquire about matters raised in the government's under seal filing, or matters raised by the government in its under seal, in camera filing. To the extent the court intends to inquire about such matters, or other matters subject to Fed. R. Crim. Proc. 6(e), the government believes that the court should seal the court room to preserve issues of grand jury secrecy, consistent with N.D. Cal. Local Rule 79-5.

IX.

CONCLUSION

For the foregoing reasons, the government requests that the Court deny Movants' Motion.

DATED: June 21, 2006

Respectfully submitted,

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