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17 UNITED STATES DISTRICT COURT  
18 NORTHERN DISTRICT OF CALIFORNIA  
19 SAN FRANCISCO DIVISION  
20

21 In re GRAND JURY SUBPOENAS TO  
MARK FAINARU-WADA  
22 AND LANCE WILLIAMS

Case No. CR-06-90225 MISC-JSW

**REPLY MEMORANDUM OF POINTS AND  
AUTHORITIES IN FURTHER SUPPORT OF  
MOTION TO QUASH SUBPOENAS BY  
MARK FAINARU-WADA AND LANCE  
WILLIAMS**

23 Date: August 4, 2006  
24 Time: 9:00 a.m.  
25 Place: Courtroom 2, 17<sup>th</sup> Floor  
26 Judge: Hon. Jeffrey S. White  
27  
28

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## INTRODUCTION

1  
2 The government's papers in opposition to the reporters' motion to quash are remarkable  
3 in many ways. But one thing is clear. They were crafted in a way to persuade the Court that the  
4 government has its man in the cross-hairs and its man is BALCO defendant Victor Conte. From  
5 this the government suggests that the reporters' vigilant efforts over the last two years to protect  
6 the confidentiality of their sources is of little moment and insinuates that there is very little worth  
7 protecting here. There is an overarching problem with this theory. The problem is that the  
8 theory is untrue and the government knows it. We will not speculate as to why the government  
9 decided to conceal these facts from the Court, but the effect of that decision was to present the  
10 Court with a set of papers that are, at their core, misleading.

11 The government devotes a large number of pages, virtually its entire rendition of the  
12 facts, to a selection of e-mails exchanged between *San Francisco Chronicle* reporter Mark  
13 Fainaru-Wada and Victor Conte.<sup>1</sup> Weeks ago, the government shared with the *Chronicle* the fact  
14 that it had obtained copies of these e-mails from Conte in a search of his house and its belief that  
15 Conte was the source of the leak of the grand jury transcripts. Apparently to confirm that belief,  
16 the government served a subpoena on the *Chronicle* seeking documents reflecting "any  
17 information ... regarding the identity of the individual or individuals" who provided the grand  
18 jury transcripts to the reporters or the *Chronicle*.<sup>2</sup> The *Chronicle* responded to the subpoena  
19

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20 <sup>1</sup> This section of the opposition brief was purportedly redacted by the government and filed  
21 under seal, though electronic copies of the redacted brief that the government filed with the  
22 Court and released to the media allowed recipients to easily view the redacted portions. Their  
23 contents have been fully reported by numerous media outlets. *See, e.g.,* Adam Liptak,  
24 *Prosecutors Can't Keep a Secret in Case on Steroid Use*, N.Y. Times, June 23, 2006, at A18. In  
25 fact, the entire brief was posted online by the New York Times in unredacted form after the  
26 faulty redacting was discovered. *See* [http://www.nytimes.com/packages/pdf/national/  
27 20060622balco\\_doc.pdf](http://www.nytimes.com/packages/pdf/national/20060622balco_doc.pdf) (June 22, 2006). The Court subsequently denied the government's  
28 motion to seal its opposition papers without prejudice. On July 3, 2006, the government filed a  
Renewed Administrative Motion to File Under Seal. The reporters oppose this motion in a  
separate brief filed today.

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

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

11 For the government now to highlight these e-mails to the Court suggesting some  
12 relevance to the subpoenas is beyond troubling. At a minimum, one would have expected full  
13 disclosure of the parties’ correspondence to avoid misleading the Court. In any event, if the  
14 linchpin of the government’s argument for issuing the subpoenas to the reporters is that the e-  
15 mails somehow tell the story of the transcripts’ leak, the *Chronicle*’s response to its subpoena –  
16 made well in advance of the government’s filing of its brief here – devastates that argument.  
17 That the government, knowing full well the lack of any connection between the e-mails and the  
18 subpoenas at issue, offered those e-mails without disclosing their irrelevancy to the Court  
19 suggests that what is involved here is what Justice White was talking about in *Branzburg* when  
20 he referred to grand jury investigations conducted other than in good faith. *Branzburg v. Hayes*,  
21 408 U.S. 665, 707-708 (1972). It brings to mind, as well, the *Branzburg* Court’s admonition that  
22 harassment of the press will not be tolerated. *Id.* Surely for the government to continue to press  
23 this matter, knowing what it knows now, is nothing short of harassment. The government’s  
24 highly unusual request for an unprecedented evidentiary hearing on this motion to quash –  
25 simply another device to question the reporters, without even the benefit of a ruling on their  
26 privilege claims – suggests as much as well. However one characterizes the government’s  
27 behavior, it is certainly a matter for the Court to consider in exercising its discretion in assessing  
28 whether the subpoenas should be quashed.

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

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

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

24 \_\_\_\_\_  
25 <sup>3</sup> The government also suggests that the reporters' source relationships were careless and  
26 casual, claiming that "[n]either [the reporters] nor Conte attempted to keep their relationship  
27 confidential, as the e-mail correspondence routinely was reported by [the reporters]." Gov. Br. at  
28 4; *see also id.* at 4 n.2. To the contrary, the reporters took extraordinary care to live up to their  
promises of confidentiality to any and all confidential sources. As regards Conte and all other  
*on-the-record* sources, they quoted, with full attribution, from their sources. As regards *off-the-*  
*record* sources, they scrupulously protected the identity of those sources.

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

15           There was no “grand jury leak” here in the sense that phrase is commonly understood.  
16 The *Chronicle* articles based on the transcripts were published post-indictment, after the grand  
17 jury had completed its investigation of defendants, at a time when defendants were actively  
18 preparing for a public trial. This in itself is significant. The early timing, scope and  
19 completeness of the government’s pretrial disclosure was extraordinary. Only two weeks after  
20 the indictments, the government turned over a “complete set” of pretrial discovery materials –  
21 tens of thousands of pages – including *all* grand jury transcripts, without even waiting for the  
22 entry of a written protective order. Gov. Br. at 3-4. This was not the government simply  
23 complying with its discovery obligations; it chose this unusual course. *See* Fed. R. Crim. P.  
24 16(a)(3) & 26.2 (no obligation to disclose government witnesses’ grand jury testimony until after  
25 direct examination of witness at trial). As discussed at one of the pretrial conferences, this was  
26 never intended to be “normal discovery.” Hershman Decl. Ex. U, p.5. The government also  
27 made a pre-disclosure agreement with defense counsel that they would “be able to discuss [the  
28 discovery materials] with witnesses in order to prepare for trial.” *Id.* at pp. 5-6. Every step was

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

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

#### 14 ARGUMENT

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

28

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

4 **A. Common Law Privilege**

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

16 In *Jaffee*, in light of the enactment by Congress of the Federal Rules of Evidence in 1975,  
17 the Supreme Court abandoned the static, strictly backward-looking, pre-Rule 501 approach to  
18 evaluating common law privileges. Heeding the legislative mandate of Rule 501, the Court  
19 declared that the courts’ obligation to recognize and give effect to common law privileges under  
20 that rule is a forward-looking, dynamic concept to be developed on an ongoing basis, giving full  
21 effect to recent developments in case law and legislation. The law of privilege, *Jaffee* held, is  
22 something to be constantly reevaluated and examined anew in light of developments in every  
23 area of law. In so holding, *Jaffee* specifically rejected the precise analytic model employed by  
24 the Supreme Court in *Branzburg* and the Ninth Circuit in *In re Grand Jury Proceedings (Scarce*  
25 *v. United States)*, 5 F.3d 397 (9th Cir. 1993), and *Lewis v. United States*, 517 F.2d 236 (9th Cir.  
26 1975) (“*Lewis II*”), which relied exclusively on notions of historical common law. The  
27 government has no response to this reality, which was discussed at length in movants’ opening  
28 brief. *See* Opening Br. at 27-30.

1 The Supreme Court upset *Scarce*'s foundation when it accepted certiorari in the *Jaffee*  
 2 case to resolve a circuit split on the issue of the psychotherapist/patient privilege. The Ninth  
 3 Circuit was on the (ultimate) losing side of that split, having rejected such a privilege seven years  
 4 before in *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989). See *Jaffee*, 518 U.S. at 7  
 5 (citing *In re Grand Jury Proceedings*). In recognizing the psychotherapist/patient privilege, the  
 6 Supreme Court in *Jaffee* specifically rejected the analytic underpinnings of *In re Grand Jury*  
 7 *Proceedings*, and abrogated its holding. See Opening Br. at 29-30. The key principle upon  
 8 which the Ninth Circuit decision rested was that state statutory law is irrelevant, thus limiting the  
 9 analysis of "experience" to historical common-law roots (the other basis was the subsidiary  
 10 principle that only Congress could adopt a privilege lacking such roots). That key principle had  
 11 been employed by the Ninth Circuit not only to reject a psychotherapist/patient privilege under  
 12 Rule 501 in *In re Grand Jury Proceedings*, but also to reject a reporter's privilege under Rule  
 13 501 in *Lewis II* and *Scarce*. These Ninth Circuit cases share two common characteristics: they  
 14 were decided pre-*Jaffee*, and they were based on an analytic principle overturned and rejected by  
 15 the Supreme Court in *Jaffee*.<sup>4</sup> *Jaffee* is the only Rule 501 case binding on this Court. See *Miller*  
 16 *v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (where Supreme Court authority is  
 17 clearly irreconcilable with prior circuit authority, "district courts should consider themselves  
 18 bound by the intervening higher authority and reject the prior opinion of this court [the Ninth  
 19 Circuit] as having been effectively overruled").

20  
 21 <sup>4</sup> *Scarce* and *Lewis II* share another characteristic – their discussion of a common law  
 22 reporter's privilege based on Fed. R. Evid. 501 was *dicta*. The government's effort to transform  
 23 the Ninth Circuit's *dicta* in those cases into controlling precedent is contrary to over a century of  
 24 well-settled law. Statements "made during the course of delivering a judicial opinion," but  
 25 which are "unnecessary to the decision in the case" are "therefore not precedential" and need  
 26 not be followed by this Court. *Best Life Assur. Co. v. Comm'r*, 281 F.3d 828, 834 (9th Cir.  
 27 2002) (quoting Black's Law Dictionary 1100 (7th ed. 1999)); see also *Cohens v. Virginia*, 19  
 28 U.S. (6 Wheat.) 264, 399 (1821) ("It is a maxim, not to be disregarded, that general expressions,  
 in every opinion, are to be taken in connection with the case in which those expressions are used.  
 If they go beyond the case, they may be respected, but ought not to control the judgment in a  
 subsequent suit, when the very point is presented for decision."). Without question, *Scarce* is a  
 case of scholar's privilege, which certainly cannot "control the judgment" regarding an issue of  
 reporter's privilege here "when the very point is presented for decision." In *Lewis II*, the court  
 acknowledged that the appellant did not even argue for a common law privilege.

1 In *Lewis II*, the Court of Appeals was dismissive of a common law reporter's privilege  
2 based on *Branzburg*'s pre-Rule 501 and pre-*Jaffee* conclusion that historically, "courts  
3 consistently refused to recognize the existence" of such a privilege. 517 F.2d at 238. Again, in  
4 *Scarce*, the Court of Appeals stated that it was "no more inclined" to run against the grain of  
5 *Branzburg*'s retrospective analysis of historical common law than it was in *Lewis II*. 5 F.3d at  
6 402-03. However, three years later, *Jaffee* made clear that this traditional *Branzburg*-era  
7 approach to common law privilege may not be perpetuated under Rule 501:

8 It is of no consequence that recognition of the privilege in the vast majority of  
9 States is the product of legislative action rather than judicial decision. *Although*  
10 *common-law rulings may once have been the primary source of new*  
*developments in federal privilege law, that is no longer the case.*

11 518 U.S. at 13 (emphasis added).

12 In passing Fed. R. Evid. 501, Congress "manifested an affirmative intention not to freeze  
13 the law of privilege," but rather to "leave the door open to change," *Trammel v. United States*,  
14 445 U.S. 40, 47 (1980), and to "continue the evolutionary development of testimonial  
15 privileges." *Jaffee*, 518 U.S. at 9 (quoting *Trammel*, 445 U.S. at 47). Congress could hardly  
16 have been clearer that its intent was to authorize the courts to re-examine the reporter's privilege  
17 issue in the years after *Branzburg*. As Congressman Hungate, Chairman of the House Judiciary  
18 Subcommittee on Criminal Justice, observed in presenting the Conference Report to the House,  
19 the language of Rule 501 "permits the courts to develop a privilege for newspaperpeople on a  
20 case-by-case basis. The language cannot be interpreted as a congressional expression in favor of  
21 having no such privilege, nor can the conference action be interpreted as denying to newspaper  
22 people any protection they may have from State newsmen's privilege laws." 120 Cong. Rec.  
23 H 12253-54 (daily ed. Dec. 18, 1974). Thus, the Supreme Court's ruling in *Branzburg* in 1972  
24 relating to First Amendment protection for journalists' confidential sources, however it is read, is  
25 not at all dispositive of the claim that a federal common law privilege exists today. If, as  
26 Congress insisted, the law of privilege is to be both fluid and reflective of changing times and  
27 circumstances, to suggest that the law of privilege — or perhaps it is only the law of reporter's  
28 privilege — was set in stone in 1972 is to reject the essence of Rule 501 and the very concept of

1 a developing federal common law of privilege.

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

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

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

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

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

26 \_\_\_\_\_  
27 708, 714-15 (3d Cir. 1979); *Baker v. F & F Investment*, 470 F.2d 778, 782 (2d Cir. 1972), with  
28 *Jaffee*, 518 U.S. at 7-8 (citing circuit split in which three courts of appeals had recognized the  
psychotherapist-patient privilege and four had concluded that no such privilege existed).

1 1980). The distinction is particularly untenable in a case where the subpoenas are being pursued  
 2 not by a criminal defendant — where competing constitutional rights are implicated — but by  
 3 the government. In any event, whatever might have been the case when *Branzburg* was decided,  
 4 an overwhelming majority of jurisdictions — 42 States plus the District of Columbia — now  
 5 recognize the existence of a reporter’s privilege in *criminal* cases either by statute or by common  
 6 law.<sup>6</sup> The Court of Appeals in this circuit has recognized the privilege in criminal cases as well.  
 7 *See Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975). Similarly, the DOJ Guidelines make no  
 8 distinction between civil, criminal, or grand jury cases. *See* 28 C.F.R. § 50.10; *see also* Fed. R.  
 9 Evid. 1101(c) (providing that “[t]he rule with respect to privileges applies at all stages of all  
 10 actions, cases, and proceedings”).

11 The government also suggests that no privilege should be recognized because the precise  
 12 contours of the privilege would be difficult to fashion. Specifically, the government points to the  
 13 issue of who should hold the privilege. Gov. Br. at 31. The States have had little difficulty  
 14 defining who is covered by the privilege. For example, the California shield law, embodied in  
 15

16 <sup>6</sup> *See* Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300-.390; Ariz. Rev. Stat. §§ 12-2214,  
 17 12-2237; Ark. Code Ann. § 16-85-510; Cal. Const. Art. I, § 2(b); Cal. Evidence Code § 1070;  
 18 Colo. Rev. Stat. § 13-90-119; Del. Code Ann. tit. 10, §§ 4320-26; Fla. Stat. Ann. § 90.5015; Ga.  
 19 Code Ann. § 24-9-30; 735 Ill. Comp. Stat. Ann. 5/8-901 to 8-909; Ind. Code §§ 34-46-4-1, 34-  
 20 46-4-2; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-1459; Md. Code Ann.,  
 21 Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws Ann. §§ 767.5a, 767A.6; Minn. Stat. Ann. §§  
 22 595.021-.025; Mont. Code Ann. §§ 26-1-902, 26-1-903; Neb. Rev. Stat. §§ 20-144 to 20-147;  
 23 Nev. Rev. Stat. Ann. §§ 49.275, 49.385; N.J. Stat. Ann. §§ 2A:84A-21.1 to 21.5; N.M. Stat. Ann.  
 24 § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat. § 8-53.11; N.D. Cent. Code § 31-01-  
 25 06.2; Ohio Rev. Code Ann. §§ 2739.04, 2739.12; Okla. Stat. Ann. tit. 12, § 2506; Or. Rev. Stat.  
 26 §§ 44.510-.540; 42 Pa. Cons. Stat. Ann. § 5942(a); R.I. Gen. Laws §§ 9-19.1-1 to 9-19.1-3; S.C.  
 27 Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208; *Idaho v. Salsbury*, 924 P.2d 208 (Idaho  
 28 1996) (criminal); *In re Wright*, 700 P.2d 40 (Idaho 1985) (criminal); *Kansas v. Sandstrom*, 581  
 P.2d 812 (Kan. 1978) (criminal); *In re Letellier*, 578 A.2d 722 (Me. 1990) (grand jury); *In re  
 John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991) (grand jury); *New Hampshire  
 v. Siel*, 444 A.2d 499 (N.H. 1982) (criminal); *Brown v. Virginia*, 204 S.E.2d 429 (Va. 1974)  
 (criminal); *Washington v. Rinaldo*, 673 P.2d 614 (Wash. Ct. App. 1983) (criminal), *aff’d on  
 other grounds*, 689 P.2d 392 (Wash. 1984); *West Virginia ex rel. Charleston Mail Ass’n v.  
 Ranson*, 488 S.E.2d 5 (W. Va. 1997) (criminal); *Zelenka v. Wisconsin*, 266 N.W.2d 279 (Wis.  
 1978) (criminal); *Wisconsin v. Knops*, 183 N.W.2d 93 (Wis. 1971) (grand jury). In both  
 Mississippi and Utah, trial courts have applied the reporter’s privilege in the criminal context.  
*See Mississippi v. Hand*, No. CR89-49-C(T-2) (Miss. 2d Cir. Ct. July 31, 1990) (unpublished  
 opinion) (criminal case); *Utah v. Koolmo*, No. 981905396 (Utah 3d Dist. Ct. Mar. 29, 1999)  
 (Hilder, J.) (unpublished opinion) (criminal case).

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

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

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

26 Recognizing a federal common law reporter’s privilege here not only comports with Rule  
27 501 as articulated by the Supreme Court in *Jaffee*, it comports also with basic notions of  
28 federalism and fairness. *See Lockyer Aff’t ¶¶ 7-8 & Ex. B.*

1           **B.     First Amendment**

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

14           The government overstates the scope and impact of *Branzburg* and *Scarce* in a number of  
 15 ways. First, citing *Scarce* as authority, it claims that the concurring opinion of Justice Powell,  
 16 the pivotal fifth vote in *Branzburg*, should be given no independent effect because it merely  
 17 "underscored" the bad faith point made by the majority in that case, and so leaves no room for  
 18 balancing absent such a showing. Gov. Br. at 18-20. This is not a fair reading of *Scarce* or  
 19 Justice Powell, and is belied by the very language the government quotes from *Scarce*, but then  
 20 ignores. Gov. Br. at 19. More importantly it misses the point. The Ninth Circuit in *Scarce* did  
 21 not consign Justice Powell's concurring opinion to irrelevancy, but rather insisted that it be  
 22 "[r]ead together with the majority opinion" and its language given effect. 5 F.3d at 401.<sup>7</sup> That

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

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

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

2 Justice Powell wrote specifically to stress “the limited nature of the Court’s holding” and  
 3 the need for a “case-by-case” balancing of First Amendment and law enforcement interests.  
 4 *Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring). In his later concurring opinion in  
 5 *Zurcher v. Stanford Daily*, 436 U.S. 547, 570 (1978), he observed that his *Branzburg*  
 6 concurrence had made clear that “in considering a motion to quash a subpoena directed to a  
 7 newsman, the court should balance the competing values of a free press and the societal interest  
 8 in detecting and prosecuting crime.” *Id.* at 570 n.3 (Powell, J., concurring); *see also Saxbe v.*  
 9 *Washington Post Co.*, 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting) (explaining that “I  
 10 emphasized the limited nature of the *Branzburg* holding in my concurring opinion,” and that “a  
 11 fair reading of the majority’s analysis in *Branzburg* makes plain that the result hinged on an  
 12 assessment of the competing societal interests involved in that case rather than on any  
 13 determination that First Amendment freedoms were not implicated”). If Justice Powell’s  
 14 concurring opinion in *Branzburg* is to be given effect, as the Court of Appeals said in *Scarce*,  
 15 then the majority’s opinion must be read narrowly, First Amendment interests must be regarded  
 16 as ever-present, and a balancing of interests must be conducted.

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

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22 But where he is, it begs the question: the opinion is *not* a majority opinion except  
 23 to the extent that it accords with his views. What he writes is not a “gloss,” but  
 24 the least common denominator. To be sure, the separate writing cannot add to  
 25 what the majority opinion holds, binding the other four Justices to what they have  
 26 not said; but it can assuredly narrow what the majority opinion holds, by  
 explaining the more limited interpretation adopted by a necessary member of that  
 majority. . . . I have never heard it asserted that four Justices of the Court have  
 the power to fabricate a majority by binding a fifth to their interpretation of what  
 they say, even though he writes separately to explain his own more narrow  
 understanding.

27 *Id.* at 462 n.3 (Scalia, J., joined by Rehnquist, C.J. and O’Connor, J., dissenting). The majority  
 28 opinion in *McKoy* did not address the issue that engaged Justices Blackmun and Scalia.

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

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

18 It is wrong because *every* citizen has the right to move to quash a grand jury subpoena  
19 that is served in bad faith or for purposes of harassment whether or not First Amendment  
20 interests are implicated. *See, e.g., United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991)  
21 (holding, without considering any First Amendment interests, that “[g]rand juries are not  
22 licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation  
23 out of malice or an intent to harass”); *In re Impounded*, 241 F.3d 308, 313 (3d Cir. 2001) (same);  
24 *In re Grand Jury Proceedings*, 896 F.2d 1267, 1278 (11th Cir. 1990), *vacating as moot*, 904 F.2d  
25 1498 (11th Cir. 1990) (en banc) (same). In fact all citizens have the right to move to quash grand  
26 jury subpoenas that are “unreasonable or oppressive,” *see* Fed. R. Crim. Proc. 17(c), a standard  
27 considerably more liberal than whatever standard may be mandated by the First Amendment.

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

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

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

15       **C.     Rule 17(c)**

16       The government says nothing about Rule 17(c), other than – once again – to argue that  
17 *Branzburg* and *Scarce* preclude this Court from even considering, let alone exercising its  
18 discretion to determine whether the subpoenas are oppressive and unreasonable by engaging in a  
19 balancing of interests. Gov. Br. at 47-50. The government entirely misses the point. As made  
20 clear in one of the decisions cited by the government, even in the absence of any reporter's  
21 privilege – indeed, even in the face of hostility towards it – subpoenas to reporters are still  
22 subject to challenge and scrutiny under Rule 17(c). *See McKevitt v. Pallasch*, 339 F.3d 530, 533  
23 (7th Cir. 2003). The Ninth Circuit has been clear on the standard for review of a motion to quash  
24 under Rule 17(c), as recently as last year in *In re Grand Jury Subpoena to Nancy Bergeson*, 425  
25 F.3d 1221 (9th Cir. 2005). The standard is an open-ended one of "discretionary, case-by-case  
26 inquiry." *Id.* at 1225-26. The Supreme Court has similarly stated that determination of  
27 reasonableness and oppressiveness under Rule 17(c) "depends on the context." *United States*  
28 *v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991) (citation omitted). The only limit on that

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

5 *Bergeson* is a textbook example of how the Court's discretion may be applied where the  
6 government issues a subpoena governed by the DOJ Guidelines seeking to intrude upon a  
7 confidential relationship, even when it is seeking to inquire only about concededly non-  
8 privileged matters. In *Bergeson*, the district court conducted a searching inquiry, focusing on the  
9 government's adherence to the DOJ Guidelines in issuing a subpoena to an attorney, as well as  
10 the impact on the relationship between the attorney and client even though the communications  
11 were neither privileged nor confidential. The district court also required the government to  
12 establish a "compelling purpose" for issuing the subpoena – something beyond need. *Bergeson*,  
13 425 F.3d at 1225. The Court of Appeals affirmed the district court's analysis and its ruling  
14 quashing the subpoena, holding that it was not an abuse of discretion. The Court of Appeals  
15 added that the sort of circumstances that might justify subpoenaing a lawyer to testify against a  
16 client would be "the risk of imminent physical harm to others." *Id.* at 1227.

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

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

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

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

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

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

15 The proper standard in a leak case involving confidential sources must include a  
 16 balancing of interests that will “ensure that compelled disclosure is the exception, not the rule.”  
 17 *Schoen v. Schoen*, 48 F.3d 412, 416 (9th Cir. 1995) (“*Schoen II*”). The appropriate standard, we  
 18 submit, should weigh the public interest in compelling disclosure, measured by the harm the leak  
 19 caused, against the public interest in newsgathering, measured by the leaked information’s value.

20  
 21 those “where immediate action is required to avoid the loss of life or the compromise of a  
 22 security interest.” *See* Corallo Aff’t Ex. B. This definition is consistent with (1) how both the  
 23 Ashcroft and Reno administrations interpreted the term over the last decade and, based on DOJ’s  
 24 much longer history of restraint in issuing subpoenas to reporters in leak cases, those of  
 25 presidential administrations before them, *see* Corallo Aff’t ¶ 7, Gorelick Aff’t ¶ 7, Opening Br. at  
 26 50-51; and (2) the common understanding and dictionary definition of the term. *See* Merriam  
 27 Webster’s Collegiate Dictionary (10th ed. 1995) (“requiring immediate aid or action”). The  
 28 government nonetheless seeks to limit the definition to the arrest provision of the DOJ  
 Guidelines. This makes no sense. The only basis it cites for reading “exigent circumstances”  
 into a nullity with respect to the subpoena provision is a 2005 statement by a Deputy Attorney  
 General, which is proffered as an authoritative interpretation of the term. Gov. Br. at 45. In fact,  
 the term is never mentioned in the DAG’s statement. *See* Hershman Decl. Ex. HH at 3.

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

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

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

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

1 invited to testify and MLB was criticized for not going far enough. Opening Br. at 7-8;  
2 Donnellan Aff't Exs. 47-51. Proposed legislation was introduced to directly regulate drugs in  
3 professional sports. Donnellan Aff't Exs. 52-58; Sweeney Aff't ¶ 6. This prompted a second,  
4 and significantly stiffer, MLB policy change – year-round testing, long suspensions, and  
5 ultimately a “three strikes you’re out” policy. Donnellan Aff't Ex. 61. The release of the  
6 reporters' book *Game of Shadows*, based largely on their reporting for the *Chronicle*, prompted  
7 MLB earlier this year to take action again, appointing former Senator Mitchell to investigate  
8 allegations of the use of steroids and other performance-enhancing drugs in baseball. *See id.*, Ex.  
9 62; Vincent Aff't ¶ 5. That investigation is ongoing.

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

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

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

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

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

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

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

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

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

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

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

1 Another important factor for the Court to consider in balancing – and one we submit  
2 weighs heavily against the government – is the nature of the alleged wrongdoing. The conduct  
3 under investigation here is not serious criminal activity involving terrorism, national security, or  
4 violence to person or property. It is in the nature of contempt of court stemming from violation  
5 of a protective order issued some two years ago, in a criminal case that is now long over.  
6 *Donnellan Aff't Ex. 75*. Without in any way diminishing the importance of enforcing courts'  
7 protective orders, contempt violations are simply not in the same class of conduct as was the  
8 criminal activity under investigation in cases such as *Branzburg* and *Scarce*. The Supreme Court  
9 has in fact made clear that contempt cases are in a different category altogether, one not aimed at  
10 truly serious criminal conduct. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S.  
11 787, 800 (1987) (contempt proceedings “are not intended to punish conduct proscribed as  
12 harmful by the general criminal laws”); *Green v. United States*, 356 U.S. 165, 183 (1958)  
13 (contempt is not an “infamous crime” and therefore need not be prosecuted by indictment),  
14 *overruled in part on other grounds, Bloom v. Illinois*, 391 U.S. 194 (1968); 3A Charles A.  
15 Wright et al. *Federal Practice and Procedure Crim. 3d* § 710, at 491 (2004) (the use of  
16 “indictment from a grand jury” as a means to address contempt “is not an inevitable result nor  
17 does it seem a desirable one.”). To the extent there are now other focuses of the government’s  
18 investigation they are, in the end, derivative of that same mandate to investigate contempt.

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

26 \_\_\_\_\_  
27 <sup>12</sup> It was this record of consistent restraint over seven presidential administrations spanning  
28 three decades that led one commentator in 1999 to refer to the DOJ Guidelines as the “hidden  
federal shield law.” *See* Adam Liptak, *The Hidden Federal Shield Law: On the Justice*

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

3 It can thus be said with authority that but for two recent cases that raised national security  
4 issues (*Miller*, 438 F.3d 1141; *New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457 (S.D.N.Y.  
5 2005), *appeal argued*, No. 05-2639-CV (2d Cir. Feb. 13, 2006)), and one aberration 15 years ago  
6 that resulted in a loss for the government (*In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991),  
7 *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992)), there has never been another  
8 grand jury leak case litigated by the Department of Justice. There has certainly never been one  
9 that originated with an investigation into a suspected violation of a protective order. At the very  
10 same time, it can also be said that throughout that period the federal government has routinely  
11 and consistently carried out leak investigations in numerous high-profile cases – even public  
12 corruption cases – without seeking to compel reporters to disclose their confidential sources. *See*  
13 Opening Br. at 51 & n.22 (*citing* cases, including those involving former President Clinton,  
14 former Mayor Marion Barry, former Congresswoman Beth Myerson, and boxing promoter Don  
15 King); Corallo Aff't ¶ 8.

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

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

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*Department's Regulations Governing Subpoenas to the Press*, 1999 Ann. Surv. Am. L. 227  
28 (1999).

1 investigation outside the national security context. Indeed, the only factual basis the government  
 2 sets out in its brief is both myopic and misleading. Even assuming the government was right  
 3 about the law in this case – which clearly it is not – its approach here brings to mind the Ninth  
 4 Circuit’s reaction to the government’s subpoena in *Bergeson*, where it quashed on Rule 17(c)  
 5 grounds: “The government is not automatically entitled to subpoena a lawyer to testify against  
 6 his client merely because the Constitution does not prohibit it and the material is not privileged.”  
 7 425 F.3d at 1225-26.

8         Against the First Amendment interests in this case there is no breach of national security,  
 9 no act of terrorism, no violent crime that would go unpunished. There is only the dissemination  
 10 of information to the public – information that was of genuine public interest, concern and  
 11 import and, at the time, was intended by all concerned soon to be disclosed at a public trial –  
 12 which caused no demonstrable harm to anyone. We submit that to enforce the government’s  
 13 subpoenas in this particular case, where there is no serious criminal conduct at issue, there has  
 14 been no demonstrable harm, there is no precedent, and no overriding justification has been  
 15 articulated – indeed, the only articulation is one calculated to mislead this Court – would strike a  
 16 devastating blow to First Amendment values and would not serve the public interest. To the  
 17 contrary, it would effectively send a message to the journalistic community and the public at  
 18 large that, for the first time, the government would and could harass the press at will, compelling  
 19 them to disclose confidential sources on the basis of any sort of investigation, on the basis of any  
 20 sort of factual record, even where the only factual record is one of misrepresentations to the  
 21 Court. If ever there were a decision that would send shock waves through the press and threaten  
 22 the flow of genuinely valuable information to the public, that would be it. *See Bernstein Aff’t ¶¶*  
 23 *7-10; Nelson Aff’t ¶¶ 7-8; Parks Aff’t ¶ 7.*<sup>13</sup>

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

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

4 **III. THE GOVERNMENT’S REQUEST FOR AN EVIDENTIARY**  
5 **HEARING SHOULD BE DENIED**

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

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

24 We have canvassed the law in this district and this Circuit and have located no authority  
25 for the proposition that an evidentiary hearing is necessary, let alone required, in the  
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27 *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 Geo. Wash. L. Rev.  
28 13, 25-33, 41 (1988).

1 circumstances present here. Indeed, the only case we have found discussing the evidentiary  
2 record on a reporter's motion to quash a grand jury subpoena in this Circuit is *In re Caldwell*,  
3 311 F. Supp. 358 (N.D. Cal. 1970), one of the four cases ultimately consolidated for  
4 consideration before the Supreme Court in *Branzburg* itself. The opinions of the district court,  
5 the Ninth Circuit and the Supreme Court in the *Caldwell* case all make clear that the evidentiary  
6 record there consisted of affidavits submitted by Caldwell and the government; indeed the  
7 affidavits are extensively referenced in the courts' opinions.<sup>14</sup> In fact, in its brief to this Court  
8 the Government goes so far as to claim that the record submitted in *Branzburg* is quite similar to  
9 the record submitted here in support of its argument that the same result that obtained in  
10 *Branzburg* should obtain here. Gov. Br. at 2. Apparently we are thus to infer from the  
11 Government's arguments that while such a record was sufficient for the courts, including the  
12 Supreme Court, to make an appropriate determination of the issue in the *Caldwell* case, such a  
13 record should not appropriately be relied on by this Court. The argument is unpersuasive.

14 Outside the reporter's privilege context, courts in this Circuit routinely, indeed  
15 instinctively, consider motions to quash grand jury subpoenas on the basis of affidavits submitted  
16 by the parties. See *United States v. Chen*, 99 F.3d 1495, 1498-99 (9th Cir. 1996) (in the context  
17 of a motion to quash a grand jury subpoena on the basis of the attorney-client privilege,  
18 describing the record as consisting of affidavits submitted by the Government, "declarations"  
19 submitted by the movants, and several declarations and affidavits submitted by attorneys  
20 involved in the matter being investigated); *In re Grand Jury Subpoena (Osterhoudt)*, 722 F.2d  
21 591, 592, 595 (9th Cir. 1983) (in the context of a motion to quash a grand jury subpoena on the

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

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

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

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**CONCLUSION**

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

Respectfully Submitted

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Dated: July 7, 2006

By: \_\_\_\_\_ /S/

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