UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, Plaintiff, - against - JOHN ASHCROFT, in his official capacity as Attorney General of the United States, and THE UNITED STATES OF AMERICA, Defendants.	:	Case No. 04 CV 07677 (RWS) (FM) (ECF case)

MEMORANDUM OF LAW OF THE NEW YORK TIMES COMPANY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT ON ITS CLAIM FOR DECLARATORY RELIEF

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This memorandum of law is respectfully submitted on behalf of The New York Times Company ("The Times") in opposition to the motion to dismiss filed by John Ashcroft, in his official capacity as Attorney General of the United States, and the United States of America (the "government"), and in support of The Times' cross-motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons stated below, the government's motion should be denied and The Times' motion should be granted.

PRELIMINARY STATEMENT

This action was commenced by The Times in response to the government's threats to subpoena records from telephone companies that provide service to The Times that would reveal the identity of every person called by two of its journalists during time periods of eighteen and twenty-three days, respectively, in the aftermath of September 11, 2001. The government apparently seeks to obtain and/or review telephone records of Judith Miller and Philip Shenon as part of an investigation to uncover the identity of one or more government employees who allegedly "leaked" information to the reporters relating to the government's plans to block the assets of two Islamic charity organizations. Although the government will not reveal whether it has already obtained some or all of the telephone records, it has suggested at various times — most recently in its October 27, 2004 memorandum of law — that it may not yet have done so. The government has agreed, pending resolution of these cross-motions, not to issue any subpoenas for the telephone records going forward or to review any records it may have already obtained.

Disclosure of these telephone records to the government would not only constitute a massive violation of the journalists' privacy, but would also likely reveal the identities of dozens of confidential sources that have nothing to do with the government's investigation. The Times seeks the entry of a declaratory judgment that the records sought by the government are protected against compelled disclosure by the First Amendment, federal common law and the Department of Justice's own guidelines.[1]

In moving to dismiss this action, the government does not deny that its efforts will reveal the identities of many sources that are not even remotely relevant to its investigation. Nor does the government deny that this Court has subject matter jurisdiction over The Times' claims under 28 U.S.C. § 1331 and § 1346(a)(2); that venue is proper under 28 U.S.C. § 1391(b) and (e); or that the Court is empowered under 28 U.S.C. § 2201 to grant the declaratory relief sought. Rather, the sole basis of the government's motion to dismiss is that this Court should "decline to exercise its jurisdiction" because "an established statutory proceeding" — a motion to quash under Federal Rule of Criminal Procedure 17(c) — is available in the Northern District of Illinois, the district from which, the government suggests, the threatened subpoenas either have issued or will eventually issue.

Part I of this memorandum demonstrates why the government's motion must fail. First, the exception to the Declaratory Judgment Act for "special statutory proceedings" relied on

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1 The Times' Complaint also includes a request for the entry of a permanent injunction to enforce the terms of any declaratory judgment entered. The Times is not pressing its request for injunctive relief at this time but will do so if necessary to enforce the terms of any declaratory judgment entered.

by the government is extremely narrow and has only been applied in proceedings for habeas corpus; proceedings under the Civil Rights Act of 1964; motions to vacate criminal sentences; and various administrative proceedings. The government cites no case (and we are aware of none) holding that a potential motion to quash constitutes a "special statutory proceeding" for purposes of this narrow exception. Moreover, although the government argues that a motion to quash filed by The Times in the Northern District of Illinois would be more "efficient" than this action and that the remedies afforded by it would be "no less effective" than those available here, the opposite is true. First, there is no reason to believe that a motion to quash in the Northern District of Illinois would be any more expeditious than this action, where the parties have already agreed to an expedited briefing schedule for summary judgment. More critically, The Times cannot, as the government suggests, receive complete or even remotely adequate relief on a motion to quash in the Northern District of Illinois because it seeks a judgment that would, *inter alia*, protect it against future subpoenas that have been threatened but may have not yet been issued, as well as past subpoenas for which telephone records may have already been produced. A motion under Rule 17(c) to quash any existing subpoenas in the Northern District of Illinois (if indeed there are any) would only provide, at best, partial relief. Second, although it is well settled that district courts generally have discretion to exercise jurisdiction over declaratory judgment actions, district courts are *required* to exercise such jurisdiction if, as here, judgment will (1) serve a useful purpose in clarifying and settling the parties' legal relations, *or* (2) terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.

Part II of this memorandum sets forth the basis for The Times' cross-motion for summary judgment. The Second Circuit has consistently recognized and applied a reporter's

privilege under the First Amendment and federal common law which balances the need to compel information from a reporter against the private and public interests in a free press. The Department of Justice, recognizing the same need to balance the interests of prosecutors and the press, has implemented guidelines mirroring the reporter's privilege. Here, the government's efforts to obtain several weeks of telephone records that will reveal the identities of numerous sources with no connection whatsoever to the government's investigation cannot possibly be sustained after any balancing of interests, much less the strict demands of the First Amendment, federal common law and the Department of Justice guidelines.

FACTUAL BACKGROUND

On August 7, 2002, Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, wrote to The Times requesting a "voluntary interview" with Times reporter Philip Shenon, an award-winning journalist with extensive experience reporting on Middle Eastern affairs, as well as eighteen days of Mr. Shenon's telephone records. *See* November 12, 2004 Affidavit of Floyd Abrams ("Abrams Aff't"), Ex. 1.[2] Mr. Fitzgerald asserted that the records were sought in connection with an investigation into an alleged leak by a government employee about a planned raid on the offices of the Global Relief Foundation ("GRF"), an Islamic charity group accused of funding international terrorist operations. *Id.* The letter claimed that news of the raid had been leaked to Mr. Shenon, and that the government was attempting to ascertain the identity of the government employee who was the source of that information. *Id.* Mr. Fitzgerald

[2] The records requested covered the periods September 24, 2001 through October 2, 2001 and December 7, 2001 through December 15, 2001. *Id.*

acknowledged that the government was "mindful of the compelling reasons that a news agency would decline to cooperate with an investigation aimed at identifying its sources," but asserted "that those reasons are outweighed by the national interest in preventing leaks[.]" *Id.*

By letter dated August 13, 2002, The Times replied to Mr. Fitzgerald, stating that it had considered the government's request but could not comply because Mr. Shenon's news-gathering activities — and especially his conversations with confidential sources — were protected by the First Amendment, federal common law, the New York and District of Columbia Shield Laws, and the Department of Justice's own published guidelines. Abrams Aff't, Ex. 2. The letter added that while The Times appreciated the government's concerns over security, it could not assist the government by disclosing its confidential sources, especially without any showing of particularized need. *Id.* After sending the August 13, 2002 letter, The Times did not hear from the government about the matter for almost two years. *See* Abrams Aff't, Exs. 2, 3.

On July 12, 2004, Mr. Fitzgerald again wrote to The Times, reiterating the government's request for telephone records and an interview of Mr. Shenon, and expanding its request to include an interview with veteran Times reporter Judith Miller, and the production of twenty-three days of records reflecting her telephone calls. Abrams Aff't, Ex. 3.[3] The letter stated that the records were being sought in connection with an investigation into alleged leaks to Ms. Miller in "late September and early October 2001" and early December 2001, relating to the

[3] The records sought included all 18 days covered in the request for Mr. Shenon's records, plus the dates November 30, 2001 through December 4, 2001. *Id.*

government's plan to freeze the assets of GRF and other Islamic charities, including a Dallas, Texas-based organization known as the Holy Land Foundation ("HLF"). *Id.* The letter concluded by asserting that "[g]iven the significance of the investigation" and the "serious risk" caused by the leaks, if The Times did not immediately cooperate with the government's demands, the government would "obtain and review information from other sources, particularly those providing telephone service to the *New York Times*, Ms. Miller and Mr. Shenon." *Id.* The letter threatened to compel production of these records from these other sources "in very short order." *Id.*[4]

The Times replied by letter dated July 21, 2004, pointing out, among other things, that the government's previous letters failed even to attempt to satisfy the requirements of the Attorney General's guidelines and well-settled case law limiting the issuance of subpoenas to the press. Abrams Aff't, Ex. 4. The letter also expressed concern about the vastly overbroad scope of the government's demand:

> Obviously, were you to obtain such records, they would implicate not only the sources you claim exist with respect to the leaks you apparently are investigating, but, far more broadly, all of the sources that journalists Shenon and Miller had during [the] months indicated. This truly would be a fishing expedition well beyond any permissible bounds and would be a very serious violation of rights clearly protected by the First Amendment: with respect to all of their sources other than those implicated in your investigation, no showing would have been made by the government regarding the need to obtain those phone numbers and sources.

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[4] After receipt of Mr. Fitzgerald's letter, The Times contacted its telephone companies, requesting that they notify The Times upon the receipt of any government subpoena for the records of calls to Ms. Miller or Mr. Shenon and that they not turn over the records to the government without giving The Times the opportunity to litigate the issue first in court. The companies responded by advising that they would not inform The Times of any such subpoenas. Abrams Aff't at ¶ 9.

Id. The letter closed with the request that the government cooperate with The Times in bringing the dispute before a court, unless some resolution could be reached. *Id*. ("[W]e would intend to seek court resolution of the issue, and ask your cooperation that you not serve subpoenas on third parties, such as phone companies, until our discussions end, and we are able to plan to properly put this before the court."). Mr. Fitzgerald responded on July 27, 2004 with a brief letter stating, *inter alia*, that the government would "not delay further" and would "proceed" to obtain and/or review the Times' telephone records. Abrams Aff't, Ex. 5. Mr. Fitzgerald's letter did not respond to The Times' request to cooperate on a means to place the controversy before a court. *Id.*

Shortly after Mr. Fitzgerald's July 27 letter was received by The Times, its outside counsel, Floyd Abrams, called Mr. Fitzgerald. Abrams Aff't at ¶ 10. Among other things, Mr. Abrams asked Mr. Fitzgerald whether The Times' telephone records were being sought in connection with a pending grand jury investigation and whether the telephone records had already been obtained. Mr. Fitzgerald declined to answer either question. *Id.* Mr. Fitzgerald did agree to give Mr. Abrams a brief period of time to familiarize himself with the situation and agreed, in the interim, that the government would not seek to obtain any of The Times' telephone records that it had not already obtained and that it would not review any such records that it may have already obtained. *Id.*

Faced with the imminent disclosure of dozens of The Times' confidential sources, counsel for The Times wrote to Deputy Attorney General James B. Comey on August 4, 2004. Abrams Aff't, Ex. 6. The letter began:

> On behalf of The New York Times Company . . . we write to request a meeting with you to discuss the current efforts of the United States Attorney for the North-

> ern District of Illinois, Patrick Fitzgerald, to obtain telephone records of *New York Times* reporters Philip Shenon and Judith Miller. The issues presented by the government's decision to seek such records are extremely serious and we would urge you to provide us with an opportunity to discuss them with you at your earliest convenience.

Id. The letter explained that the records sought by Mr. Fitzgerald would reflect communications between Ms. Miller and Mr. Shenon and numerous confidential sources at a time when both journalists were investigating and reporting on a vast array of vitally important and controversial matters. *Id.* Revelation of the records, the letter made clear, "could likely identify the names of not one or two, but potentially dozens of confidential sources" without providing The Times an "opportunity to persuade a court of law that the records are protected from compelled disclosure by the First Amendment . . . ." *Id.* The six-page letter concluded with a request for a meeting with Mr. Comey; a request that the Justice Department not seek the telephone records; and, at the very least, that it not attempt to do so "in a way that makes it impossible for The Times and its journalists to assert their constitutional right[s]." *Id.* Mr. Fitzgerald and Mr. Abrams spoke again after delivery of The Times' August 4, 2004 letter and Mr. Fitzgerald agreed that, pending a response from Deputy Attorney General Comey, the government would continue to abide by Mr. Fitzgerald's previous representations. Abrams Aff't at ¶ 12.

On September 23, 2004, Deputy Attorney General Comey responded to The Times' August 4 letter. Mr. Comey denied The Times' request for a meeting, refused to advise The Times why the government needed the information and asserted that Mr. Fitzgerald had "properly balanced the national security interests at stake against the valued role of a free press." The government, he concluded, was "now obliged to proceed" to obtain and/or review the telephone records. Abrams Aff't, Ex. 7. Mr. Comey, like Mr. Fitzgerald, offered no clue about

whether the records had already been subpoenaed, whether subpoenas were forthcoming, where they might issue from, or whether or not the records were being sought in connection with a grand jury proceeding. After receipt of Mr. Comey's September 23 letter, The Times determined to file this action, seeking relief that would protect it against the government's broad demands for telephone records that would reveal, across the board, the many confidential sources with whom Ms. Miller and Mr. Shenon had spoken during the relevant periods.

Neither in its correspondence with The Times, nor in its October 27 memorandum, has the government once denied that by subpoenaing weeks of telephone records for two veteran journalists covering national security issues and other matters of profound national importance, it would learn the identity of numerous confidential sources who provided information to the journalists on a confidential basis. Nor has the government ever sought to deny that most, if not all, of these sources are wholly irrelevant to its investigation.

The profound harm that would result from the wholesale disclosure of these sources is set forth in the affidavits of Ms. Miller and Mr. Shenon. In addition to being a grievous violation of their personal privacy (Miller Aff't at ¶ 12; Shenon Aff't at ¶ 10), disclosure of the records would have dire consequences on the journalists' ability to do their jobs. *See* Miller Aff't ¶¶ 19-22; Shenon Aff't at ¶¶ 12-15. Both Ms. Miller and Mr. Shenon routinely rely on confidential sources. Ms. Miller, for instance, relied on confidential sources when she worked as an embedded reporter during the Iraq war with one of the most sensitive army units responsible for hunting for weapons of mass destruction (*see* November 12, 2004 Affidavit of Judith Miller ("Miller Aff't"), at ¶ 16); when she reported, as part of a Pulitzer Prize-winning series in Janu-

ary, 2001, on the threat posed by international terrorists, including Osama bin Laden and Al Qaeda (*id.* at ¶ 17); and when she was investigating her book, *Germs*, which was published in early September 2001, covering the real and serious threat presented by germ warfare (*id.* at ¶ 18). Without the benefit of information from confidential sources who spoke to her without fear of their identities being revealed, her reporting on the war, the Al Qaeda series, *Germs*, and, for that matter, the vast majority of stories written for *The Times* by Ms. Miller, could never have been published. *Id.* at ¶ 19.

The revelation of the identities of the many confidential sources spoken with by Ms. Miller over the twenty-three-day period in late 2001 would compromise her journalistic efforts. These sources provided information to Ms. Miller about an array of issues such as:

- financing and support for Al Qaeda from sensitive sources in Pakistan, Saudi Arabia, and the United Arab Emirates;
- cooperation between Pakistani intelligence and Al Qaeda before September 11;
- the government's preparedness for the attacks of September 11;
- the government's efforts to destroy Al Qaeda in Afghanistan post-September 11;
- the existence of weapons of mass destruction in Iraq;
- prevention of a nationwide smallpox epidemic;
- the government's efforts to destroy the spread of biological weapons worldwide; and
- the spread of anthrax and the resulting government investigation.

Id. at ¶ 13. Sources with respect to all those subjects would likely be revealed if the government had access to Ms. Miller's telephone records despite the fact that *none* of them are relevant to the government's investigation.

Mr. Shenon similarly testifies that in the fall of 2001 he spoke to sources about issues such as:

- continued threats from Al Qaeda;
- the government's investigation of the September 11 attacks;
- DOJ and FBI terrorism prevention efforts post-September 11;
- the proposed internal reorganization of the FBI;
- the investigation and prosecution of Zacarias Moussaoui, the alleged "20th hijacker" in the 9/11 plot; and
- the spread of anthrax and the resulting government investigation.

See November 9, 2004 Affidavit of Philip Shenon ("Shenon Aff't"), at ¶ 11. Although Mr. Shenon's sources on these serious and controversial issues of national importance have nothing at all to do with the government's investigation into who may have leaked information relating to the FBI's actions against Islamic charities, they would nevertheless be swept up in the government's demand for The Times' telephone records.

If the government is permitted to proceed as it plans, it will end up with a list of names of individuals, including current and former administration officials, who have determined, for one reason or another, to disclose important information to the press about matters of significant national interest, often facing the risk of serious personal consequences for doing so. *See* Shenon Aff't at ¶ 11; Miller Aff't at ¶ 13. Confidential sources often provide journalists with information that is critical of the government's policies, concerns potential crimes, abuses of power, and other wrongdoing. *See* Shenon Aff't at ¶ 12; Miller Aff't at ¶ 15. The disclosure of confidential sources would inevitably chill these individuals from providing information to the

press in the future. Faced with the risk of great personal hardship, including the possible loss of their jobs or possible harassment by their superiors, these "whistle-blowers" would likely stop providing information to journalists altogether if they did not believe it would be kept confidential. *See* Shenon Aff't at ¶ 13; Miller Aff't at ¶ 20. This would, as a result, greatly diminish the ability of Ms. Miller, Mr. Shenon and other reporters to do their jobs. *See* Shenon Aff't at ¶¶ 13, 14; Miller Aff't at ¶ 21.

As set forth in the affidavits of Ms. Miller and Mr. Shenon, if a journalist were to be compelled to disclose the identity of a confidential source, the journalist's integrity and independence — qualities that are essential to the journalist's ability to gain the trust of potential news sources and to investigate and report on newsworthy events — are likely to be compromised. As a result, potential sources who would otherwise be willing to speak to the journalist about controversial subjects may very well refuse to do so. *See* Shenon Aff't at ¶ 13; Miller Aff't at ¶¶ 20, 22. Compelling disclosure of the confidential sources at issue here will create the inevitable appearance that Ms. Miller and Mr. Shenon are, or readily can be, converted into an investigative arm of prosecutors and other government agents. Shenon Aff't at ¶ 13; Miller Aff't at ¶ 22. If anything, the fact that the confidential sources that will be disclosed here have no relation to any government investigation will make it even more likely that sources will be unwilling to disclose information in the future.

We turn now to the legal issues before the Court: (1) whether the action should be dismissed because of the availability of an "alternative statutory procedure," as the government urges, and (2) whether a judgment should be entered declaring that the records sought by the

government are protected from compelled disclosure under the First Amendment, federal common law and the Department of Justice guidelines.[5]

ARGUMENT

I. THE COURT SHOULD DENY THE GOVERNMENT'S MOTION TO DISMISS

In considering a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure, the court must "accept as true all the factual allegations in the complaint" and draw all reasonable inferences in favor of the plaintiffs. *See Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 163 (1993); *Walker* v. *City of New York*, 974 F.2d 293, 298 (2d Cir. 1992). "[T]he court should not dismiss the complaint for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Ricciuti* v. *New York City Transit Authority*, 941 F.2d 119, 123 (2d Cir. 1991) (*quoting Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)).

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5 One issue *not* before the Court is whether the two Times journalists did, as the government asserts, "tip off" the two charities before they were raided. *See* Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint ("Gov't Br.") 2-3, 5. The first thing that must be said about these statements is that they are unsupported by a single document of evidentiary value placed before this Court; they are simply assertions — or, better put, slurs. The government's fanciful claims — irrelevant as they are — are addressed by Ms. Miller and Mr. Shenon in their respective affidavits. The affidavits make clear, *inter alia*, that the charities had long been the subject of intensive investigation by the government — one had even sued The Times for defamation over its reporting of the government's investigation — and were well-aware that the government planned to take action against them long before they were contacted by the journalists in December 2001. *See* Miller Aff't ¶¶ 5-8; Shenon Aff't ¶¶ 8-9.

A. This Court Has Jurisdiction Over This Action, Venue Is Proper, And The Times Has Standing

As a threshold matter, the government does not deny that the Court has jurisdiction over this matter, or that the usual indicia of venue are present. Article III, Section 2 of the United States Constitution states that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States . . . ." Likewise, Title 28 of the United States Code provides that the district courts shall have original jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States" (28 U.S.C. § 1331) and "[a]ny . . . civil action or claim against the United States . . . founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department . . . ." 28 U.S.C. § 1346. Venue, too, is appropriate. Section 1391 of Title 28 provides that "[a] civil action wherein jurisdiction is not founded solely on diversity of citizenship" may be brought in "(1) a judicial district where any defendant resides, if all defendants reside in the same State," or "(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated . . . ." 28 U.S.C. § 1391(b). Subsection (e) of that same section provides that

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

Just as the government does not dispute that jurisdiction and venue are appropriate under the Federal Rules, it does not dispute that The Times has standing to sue in connection

with demands made of its telephone companies. In fact, the government acknowledges that The Times is a proper plaintiff because it has a "legally cognizable interest in the materials or information sought" by the government. Gov't Br. 8-9.[6]

While the government does not contest The Times' standing to bring this action generally, it does urge that The Times has no standing to contest the propriety of subpoenas that have been threatened but that have not yet been issued. Gov't Br. 7 n.5. This argument is inconsistent with the very nature of declaratory relief. While it is true that requests for declaratory relief should not be entertained for "hypothetical or abstract" controversies, the whole point of declaratory relief is that it allows resolution of actual disputes before the controversy has "ripened to a point at which an affirmative remedy is needed." *See* 10 C.A. Wright, A.R. Miller & M.K. Kane, *Federal Practice and Procedure: Civil 3d* § 2751 (1998). This situation, where subpoenas have been explicitly threatened but may not have been issued, presents a classic scenario for declaratory relief. Furthermore, because this dispute involves First Amendment rights, the exis-

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6 Courts have routinely held that reporters have standing to contest efforts to obtain information from third parties if that information will implicate the reporters' First Amendment and privacy rights. *See Philip Morris Cos.* v. *American Broadcasting Cos.*, No. LX-816-3, 1995 WL 301428, at *5 (Va. Cir. Ct. Jan. 26, 1995) (holding that ABC had standing to challenge subpoenas to credit card companies, airlines, and telephone companies because "[t]he implications of allowing the subpoena of third party records in order to identify confidential sources are grave and strike at the fundamentals of a free press protected by the First Amendment"); *Food Lion, Inc.* v. *Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1996 WL 575946, at *1-2 (M.D.N.C. Sept. 6, 1996) (holding that ABC and its reporters had standing to seek protective order in connection with subpoenas "directed to hotels, letter-carrier services, and telecommunications companies," because the subpoenas "seriously intrude[d] on the privacy of" the reporters and "clearly infringe[d] ABC's First Amendment rights with regard to its confidential sources"); *see also Local 1814, Int'l Longshoremen's Ass'n* v. *Waterfront Commission*, 667 F.2d 267, 271 (2d Cir. 1981) (holding that labor union and its political action committee had standing to assert their First Amendment privacy rights in a case involving subpoena issued to a third-party employer).

tence of a case and controversy is even clearer. *See City of Houston* v. *Hill*, 482 U.S. 451, 459 n.7 (1987) (holding that plaintiff had standing to seek declaratory and injunctive relief where a "'genuine threat'" existed that he would be prosecuted under overbroad statute) (citation omitted); *Steffel* v. *Thompson*, 415 U.S. 452, 458-59 (1974) (holding that petitioner presented an "actual controversy" within the meaning of Article III and the Declaratory Judgment Act where threat of prosecution for distributing handbills was not "imaginary or speculative"); *see also Carlin Communications, Inc.* v. *Smith*, No. 83 Civ. 9004 (CBM), 1984 WL 330, at *6 (S.D.N.Y. May 8, 1984) (holding that plaintiff had presented a justiciable case or controversy, even though it could not establish "imminent and irreparable injury" for purposes of a preliminary injunction; "the Supreme Court has held that ripeness and standing requirements are relaxed when First Amendment rights are involved"), *aff'd*, 749 F.2d 113 (2d Cir. 1984). *Natco Theatres, Inc.* v. *Ratner*, 463 F. Supp. 1124, 1127 (S.D.N.Y. 1979) (holding that plaintiff had standing to challenge ordinance where plaintiff had received letter threatening enforcement).

The threat to The Times in this case is real and it is imminent. *See* July 12, 2004 Letter from Patrick J. Fitzgerald to George Freeman, Abrams Aff't Ex. 3 ("[W]e have been duly authorized to obtain and review information from other sources . . . [and] intend to do so in short order"); July 27, 2004 Letter from Patrick J. Fitzgerald to George Freeman, Abrams Aff't Ex. 5 ("We will not delay further and will proceed"); September 23, 2004 Letter from James B. Comey to Floyd Abrams, Abrams Aff't Ex. 7 ("[W]e are now obliged to proceed").

B. The "Special Statutory Proceeding" Exception To Rule 57 Relied On By The Government Is Not Applicable Here And, In Any Event, The Alternative Proceeding Suggested By The Government Does Not Provide The Potential For Complete Relief

The government argues that because Fed. R. Crim. P. 17(c) — setting forth the procedure for a motion to quash — provides a "special statutory proceeding" for adjudication of this dispute, the Court should dismiss this action.[7] The government's argument is based on a portion of the Advisory Committee Notes to Rule 57, stating that "[a] declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case . . . ." Fed R. Civ. P. 57 Advisory Committee's Note (1937). The government's reliance on this narrow exception is misplaced.

The Declaratory Judgment Act provides that in a "case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201.[8] The purpose of the Declaratory Judgment Act was explained in *Beacon Construction Co.* v. *Matco Electric Co.*, 521 F.2d 392 (2d Cir. 1975):

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[7] Rule 17(c) provides that "[o]n motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."

[8] The Declaratory Judgment Act incorporates a list of controversies that will not support declaratory judgment actions: actions related to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986; a proceeding under section 505 or 1146 of title 11; or any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country. 28 U.S.C. § 2201. Obviously none of these exceptions applies here.

> The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish the purpose intended, *i.e*. to afford a speedy and inexpensive method of adjudicating legal disputes without invoking the coercive remedies of the old procedure, and to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships.

Id. at 396 (quotations omitted). The Court in *Beacon* observed that there is a "case or controversy" warranting declaratory relief if "'the facts alleged, under all circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Id.* at 397 (*quoting Maryland Casualty Co.* v. *Pacific Co*., 312 U.S. 270, 273 (1940)). According to Wright and Miller, the Declaratory Judgment Act "gives a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy and in cases in which a party who could sue for coercive relief has not yet done so." *Federal Practice and Procedure: Civil 3d, supra* § 2751. Moreover, it is clear from the face of Rule 57, which sets forth the procedure for obtaining a declaratory judgment, that "existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." *See also Continental Casualty Co*. v. *Coastal Savings Bank*, 977 F.2d 734, 736 (2d Cir. 1992) ("'It seems well settled that the mere pendency of another action involving the same set of facts does not in and of itself preclude the exercise of the declaratory jurisdiction.'") (citation omitted); *Cicero* v. *Olgiati*, 426 F. Supp. 1213, 1220 (S.D.N.Y. 1976) ("[T]he absence of an available remedy at law is not an essential prerequisite to the grant of declaratory relief.").

The Advisory Committee Notes to Rule 57 state, as the government points out, that a declaratory judgment "may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case." The Notes further state, however, that "general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings." Fed. R. Civ. P. 57 Advisory Committee's Note (1937). Furthermore, courts interpreting this narrow exception have thus far limited the phrase "special statutory proceedings" to petitions for habeas corpus and motions to vacate a criminal sentence, *see Clausell* v. *Turner*, 295 F. Supp. 533, 536 (S.D.N.Y. 1969); proceedings under the Civil Rights Act of 1964, *see*, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 296 (1964) (Title II); *Pennsylvania Nurses Ass'n* v. *Commonwealth of Pennsylvania*, Civ. No. 86-1586, 1991 WL 120200, at *2 (M.D. Pa. Aug. 8, 1988) (Title VII); and certain administrative proceedings, *see*, *e.g.*, *Deere & Co.* v. *Van Natta*, 660 F. Supp. 433, 436 (M.D.N.C. 1986) (proceeding for decision on patent validity before Patent and Trademark Office examiners); *Cavanaugh* v. *Texas Instruments, Inc.*, 440 F. Supp. 1124, 1128 (S.D. Tex. 1977) (EEOC investigation proceedings under Age Discrimination in Employment Act, 29 U.S.C. § 626). There is no authority supporting the proposition that a motion to quash is a "special statutory proceeding." We are aware of no case, and the government cites none, holding that a motion to quash brought under Rule 17(c), or a motion under any other Federal Rule of Criminal or Civil Procedure, constitutes a "special statutory proceeding."

More fundamentally, a motion to quash cannot, as the government claims, provide The Times with complete relief. In support of its argument for dismissal, the government contends that The Times "may assert its claim of privilege, and obtain a complete resolution of the

issue, through a motion to quash . . . ." Gov't Br. 9. That argument, however, fails to take into account the government's own repeated suggestions, both orally and in writing before this Court, that (1) the threatened subpoenas may have not yet have issued and (2) the government may have already obtained The Times' telephone records, but has not yet reviewed them. *See* Abrams Aff't at ¶¶ 10, 12; Gov't Br. 7, n.5. Rule 17(c) provides no authority or mechanism for a court to quash *potential* subpoenas that have been threatened but which have not yet been issued. Nor does it provide an avenue for relief in situations where subpoenas have been issued and there has been full compliance by the subpoenaed party. An action for declaratory judgment, on the other hand, which allows the court to "declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought," provides for ideal relief — *i.e.*, a judgment that the records already obtained must be destroyed and/or that no such records shall be obtained in the future.

Finally, the "alternative procedure" proffered by the government is no alternative at all if a litigant cannot know in advance when and where a subpoena might issue. Until the filing of the government's motion here, The Times did not know — despite having asked — whether any subpoenas had issued or were to issue. *See* Abrams Aff't at ¶10. Nor did it know — despite having asked — that any subpoenas issued would be in aid of a grand jury sitting in the Northern District of Illinois. *Id.* That is precisely the reason The Times sought declaratory relief from this Court in the district where The Times and its telephone records may be found. It is also precisely what is contemplated by the Declaratory Judgment Act.

C. The Court Is Required To Entertain The Times' Request For A Declaratory Judgment Because Its Judgment Will Serve A Useful Purpose In Clarifying And Settling The Legal Relations In Issue And Will Terminate And Afford Relief From The Uncertainty, Insecurity, And Controversy Giving Rise To The Proceeding

Though the government makes much of the fact that a "[d]eclaratory judgment is not available as of right," Gov't Br. 6, this Court is required to entertain this action if it finds that either prong of a well-settled two-part test has been met. In *Starter Corp.* v. *Converse, Inc.*, 84 F.3d 592, 597 (2d Cir. 1996), the Second Circuit held that "[w]hile it is true that a district court's determination whether to exercise declaratory jurisdiction is denominated as discretionary, a district court is *required* to entertain a declaratory judgment action '(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, or (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding'" (*quoting Continental Casualty*, 977 F.2d at 737) (emphasis added); *see also Tomoka Re Holdings, Inc.* v. *Loughlin*, No. 03 Civ. 4904 (NRB), 2004 WL 1118178, at *3 (S.D.N.Y. May 19, 2004) ("Under Second Circuit precedent, a court *must* entertain a declaratory judgment action" if either prong is met) (emphasis in original) (quotations omitted); *Miramax Film Corp*. v. *Abraham*, No. 01 Civ. 5202 (GBD), 2003 WL 22832384, at *15 (S.D.N.Y. Nov. 25, 2003) ("Notwithstanding the discretionary nature of affording [declaratory] relief, 'a district court is required to entertain a declaratory judgment action'" if either of the prongs of the *Continental Casualty* test is met). The law is unambiguous in the Second Circuit that "[i]f *either* prong is met, the action must be entertained." *Continental Casualty Co*., 977 F.2d at 737 (emphasis added). This action plainly meets both of the factors mandating the exercise of jurisdiction.

The rationale of the two-prong *Continental Casualty* test is to "avoid the use of the declaratory judgment procedures when the result would be to make inconclusive or abstract determinations, to try the controversy piecemeal, or to try particular issues without settling the entire controversy." *See Maryland Casualty Co*. v. *Rosen*, 445 F.2d 1012, 1014 (2d Cir. 1971). Here there is no danger that the relief sought would be inconclusive or abstract. Nor is there a chance that either of the parties will receive piecemeal relief. In fact, it is only through this action, as we demonstrated above, that The Times can obtain complete relief. Declaratory relief in this action will definitively determine whether or not the government can obtain the telephone records it seeks consistent with the First Amendment, federal common law and the Department of Justice guidelines. A decision by the Court will "clarify" and "settle," once and for all, the parties' dispute. A decision by the Court will also "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding."[9] *Id*.

II. THE TIMES' CROSS-MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED

In considering a motion for summary judgment in an action for declaratory relief, courts apply the standard under Rule 56 that is applicable to any other summary judgment motion. *Roe* v. *City of New York*, 232 F. Supp. 2d 240, 251 (S.D.N.Y. 2002). Rule 56(c) of the

[9] The last several pages of the government's memorandum are dedicated to an argument that The Times cannot meet the standards for a "preliminary injunction." Gov't Br. 13-16. The Times does not, however, seek preliminary relief, but instead seeks summary judgment on its claim for declaratory relief. Because the government has already agreed that pending resolution of these cross-motions, it would not issue any subpoenas for the telephone records or review any records it may have already obtained, preliminary relief is no longer necessary.

Federal Rules of Civil Procedure provides that a motion for summary judgment may be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." *See also Celotex Corp*. v. *Catrett*, 477 U.S. 317, 322-23 (1986). For the reasons set forth below, The Times' cross-motion for summary judgment should be granted because, as a matter of law, the government's efforts to compel disclosure of The Times' confidential sources cannot be reconciled with the First Amendment, federal common law, or the Department of Justice's own guidelines.

It is well established in this Circuit that a reporter's confidential sources are protected against compelled disclosure by the First Amendment and under federal common law. Similarly, the Department of Justice's own codified guidelines serve to protect reporters' sources by providing, *inter alia*, that "the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." 28 C.F.R. § 50.10(a) (2004).

As shown below, the government cannot possibly demonstrate under *any* applicable standard that its demand for three weeks of telephone records reflecting the identities of numerous irrelevant confidential sources satisfies any test, much less the stringent requirements of the First Amendment, federal common law and the Department of Justice guidelines. If there is any protection at all for confidential sources, it must serve to protect the identity of the sources at issue here. There can be no articulation of governmental and/or prosecutorial need that justifies the broad and indiscriminate revelation of so many confidential sources having nothing to do

with any relevant investigation. Because the government cannot overcome the protections against compelled disclosure under any applicable test, the Court should declare that the telephone records at issue are privileged and protected from compelled disclosure and should enter summary judgment for The Times.

A. Confidential Sources Are Protected Against Compelled Disclosure By The First Amendment To The United States Constitution, Federal Common Law And The Department of Justice's Guidelines For Issuing Subpoenas To The Press

The law is clear in this Circuit that the government may not compel disclosure of the identity of a confidential source unless it meets a stringent test that reflects a paramount public interest in the existence and maintenance of a vigorous, aggressive and independent press capable of furthering robust, unfettered debate about matters of public interest. This is based on the firm recognition that effective newsgathering depends significantly on journalists' ability to secure the confidence and trust of their sources.

1. Confidential Sources Are Protected Against Compelled Disclosure By The First Amendment To The United States Constitution

Federal courts have consistently recognized the existence of a reporter's privilege under the First Amendment that protects journalists from being compelled to testify about their newsgathering activities or their confidential sources. This privilege has its roots in Justice Powell's critical concurring opinion in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). The Second Circuit, too, has developed a long, well-established tradition of upholding a reporter's privilege in both civil and criminal cases. *See generally Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir.

1972); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982); *United States* v. *Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *Gonzalez* v. *National Broadcasting Co*., 194 F.3d 29, 36 (2d Cir. 1999).

In *Branzburg*, the Supreme Court was presented with a case concerning journalists who had been held in contempt for failure either to appear or testify before grand juries that were investigating criminal conduct that the reporters had learned about in the course of preparing stories for publication. The Supreme Court upheld the contempt convictions in a 5-4 decision. But Justice Powell, who joined the majority with his deciding vote, wrote separately in a concurring opinion to illustrate the narrow scope of the majority opinion. In so doing, Justice Powell clarified that the Court's holding did not mean that "newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Branzburg*, 408 U.S. at 709 (Powell, J., concurring). In clarifying the nature of these "constitutional rights," Justice Powell explained, in an oft-quoted passage, that:

> [I]f 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 that 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 to privilege should be judged on its facts by the striking of a 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 710 (emphasis added). Justice Powell's opinion further clarifies that courts are required to judge such assertions of privilege "on [their] facts" and on "a case-by-case basis," by balancing

the "vital constitutional and societal interests" of freedom of the press, on the one hand, and the obligation of citizens to give relevant testimony concerning criminal conduct on the other. *Id.* at 709-10. Courts interpreting *Branzburg*, including the Second Circuit and this Court, have concluded that Justice Powell's opinion is controlling. As Judge Sack has summarized post-*Branzburg* law, "[b]ecause Justice White's plurality opinion was rather enigmatic and Justice Powell's was the pivotal fifth vote, his concurring opinion has been treated as authoritative." 2 R.D. Sack, *Sack on Defamation* § 14.3.2, at 14-13 – 14-14 (3d ed. 2004).[10]

The same year that the Supreme Court decided *Branzburg*, the Second Circuit decided *Baker* v. *F & F Investment.* In *Baker*, the Court recognized that the public and private interest in compelling a reporter's testimony must be weighed against the public interest in non-disclosure of the reporter's confidential sources. 470 F.2d at 783. The Court in *Baker* affirmed the district court's refusal to order a journalist to reveal the name of a source he had interviewed. The interests of non-disclosure prevailed, the Court held, because the plaintiff who sought the source's identity had not exhausted all other available sources of the information. *See id.*

10 *See also In re Petroleum Products Antitrust Litigation*, 680 F.2d at 8 & n.9 (noting that Justice Powell's concurrence "emphasized the limited nature of the Court's holding" and that, because Powell "cast the deciding vote[,] . . . his reservations are particularly important in understanding the decision"); *Baker* v. *F & F Investment*, 470 F.2d at 784 (noting that "Mr. Justice Powell, in a separate concurrence, emphasized the limited nature of the Court's holding," and that a balancing of interests on a case-by-case basis was the appropriate analysis); *In re Consumers Union of the United States, Inc.*, 495 F. Supp. 582, 586 (S.D.N.Y. 1980) (citing Powell concurrence for the proposition that "[t]he Supreme Court instructs in *Branzburg* . . . that resolution of the balance of interests implicated by subpoenas of non-party journalists should be approached on a case-by-case basis, with careful attention to the facts of each case"); *In re Forbes Magazine*, 494 F. Supp. 780, 781 (S.D.N.Y. 1980) ("In *Branzburg*[,] . . . the Supreme Court directed that lower courts strike the balance between the First Amendment interest and the 'obligation of all citizens to give relevant testimony with respect to criminal conduct . . . on a case-by-case basis . . . .'") (quoting Powell, J., concurring).

("While we recognize that there are cases — few in number to be sure — where First Amendment rights must yield, we are still mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms."). Though *Baker* was a civil case, the Court observed that the balancing test identified by Justice Powell in *Branzburg*, applied in the grand jury context as well. *Id.* at 778 ("[A]s Mr. Justice Powell noted in [*Branzburg*], instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation . . . .").

The Court in *Baker* explained the purpose of this reporter's privilege as follows:

> [The reporter's privilege] reflect[s] a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment, *see e.g.*, *New York Times* v. *Sullivan*. Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis . . . . The deterrent effect such disclosure is likely to have upon future "undercover" investigative reporting . . . threatens freedom of the press and the public's need to be informed. It thereby undermines values which traditionally have been protected by federal courts applying federal public policy.

470 F.2d at 782 (internal citation omitted). In describing the "significant public and private interests" against compelling disclosure of confidential sources, the Court quoted from a memorandum of Governor Nelson Rockefeller to the New York legislature, approving New York's Shield Law:

> Freedom of the press is one of the foundations upon which our form of government is based. A representative democracy, such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news. The threat to a newsman of being charged with contempt and of being imprisoned for failing to disclose his information or its sources can significantly reduce his ability to gather vital information . . . .

Id. at 782 (*quoting Memorandum of Governor Rockefeller Approving the Shield Law*, 1970 N.Y.S. Legis. Ann., at 508).

Ten years later, in *In re Petroleum Products Antitrust Litigation*, the Second Circuit reversed an order of civil contempt against a publisher who refused to disclose confidential sources and, in so doing, created a specific three-part test for applying the balancing articulated in *Baker*. 680 F.2d at 7 ("The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: [1] highly material and relevant, [2] necessary or critical to the maintenance of the claim, and [3] not obtainable from other available sources."). In *Gonzalez* v. *National Broadcasting Co*., 194 F.3d 29 (2d Cir. 1999), the court later applied the journalist's privilege even in the context of *non*-confidential materials. *Id.* at 35 (applying reporter's privilege to non-confidential materials and observing that "permitting litigants unrestricted, court-enforced access to journalist's resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties").

The three-part *Petroleum Products* test was applied by the Second Circuit in a criminal case in *United States* v. *Burke*, where the court quashed a defendant's subpoena to a news magazine. 700 F.2d 70 (2d Cir. 1983). The Court concluded that it could find "no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence" and that "the standard of review should remain the same." *Id.* at 77. While two subsequent cases, *United States* v. *Cutler*, 6 F.3d 67 (2d Cir. 1993), and *Gonzalez*, 194 F.3d

subsequent cases, *United States* v. *Cutler*, 6 F.3d 67 (2d Cir. 1993), and *Gonzalez*, 194 F.3d 29, held that *Burke* was "limited to its facts," that limitation was only as to how much of a showing is needed to overcome the privilege in the criminal context. *Compare Cutler*, 6 F.3d at 73, *with Gonzalez*, 194 F.3d at 34 n.3. Whatever the effect of *Cutler* and *Gonzalez*, it is indisputable that *Burke* still stands solidly for the proposition that the reporter's privilege applies in criminal cases. *See Gonzalez*, 194 F.3d at 34 n.3 (observing that the limitation of *Burke* was meant only "to lower the bar of the showing required of [criminal] defendant[s] to obtain disclosure of reporters' materials").[11]

This Court, citing *Baker*, *Petroleum Products*, and *Burke*, *supra*, has repeatedly applied the First Amendment journalist's privilege in the civil and criminal context alike. *See*, *e.g.*, *In re Forbes Magazine*, 494 F. Supp. at 781 (observing that "[i]n *Branzburg* v. *Hayes*, the Supreme Court directed that lower courts strike the balance between the First Amendment interest and the 'obligation of all citizens to give relevant testimony with respect to criminal conduct . . . on a case-by-case basis . . .'") (citations omitted); *Persky* v. *Yeshiva University*, No. 01 Civ. 5278 (LMM), 2002 WL 31769704, at *2 (S.D.N.Y. Dec. 10, 2002) ("'This circuit has long recognized the existence of a qualified privilege for journalistic information.' . . . This privilege is

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[11] In *Burke*, the Court required a "clear and specific showing" of the three factors to overcome the reporter's privilege. Read together, *Burke*, *Cutler*, and *Gonzalez* indicate that the privilege applies in the criminal context, but that something less than a "clear and specific" showing may be required to overcome it. While no court has articulated this less-stringent test for use in criminal cases, as shown below, *infra* Section II.B., because so much of the information sought by the government in this case is wholly irrelevant, the government cannot overcome any balancing test, particularly one that requires some showing that the information sought is "highly material and relevant" and "necessary or critical to the maintenance" of its investigation.

based, at least in part, on the importance of the First Amendment protections of freedom of speech and the press.") (quoting *Gonzales* and *Baker*, *supra*) (internal citation omitted); *United States ex rel. Vuitton et Fils S.A.* v. *Karen Bags, Inc.*, 600 F. Supp. 667, 669-70 (S.D.N.Y. 1985) ("In this Circuit, the reporter's qualified privilege is recognized as extending to both civil and criminal cases"); *In re Pam Am Corp.*, 161 B.R. 577, 584-85 (S.D.N.Y. 1993) (citing *Petroleum Products*, *supra*); *Bradosky* v. *Volkswagen of America, Inc.*, No. M8-85 (SWK), 1988 WL 5433, at *1 (S.D.N.Y. Jan. 15, 1988) (citing *Burke*, *supra*); *Consumers Union*, 495 F. Supp. at 586 (citing *Branzburg* and *Baker*, *supra*); *In re Consumers Union*, 4 Media L. Rep. (BNA) 2119, 2120 (S.D.N.Y. 1978) (citing, *inter alia*, *Baker*, *supra*).

Courts in other Circuits have also recognized and applied the reporter's privilege in criminal cases, including the grand jury context. In *United States* v. *Cuthbertson*, for example, the Third Circuit held that "the interests of the press that form the foundation for the [reporter's] privilege are not diminished because the nature of the underlying proceeding out of which the request for information arises is a criminal trial." 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981). In *Cuthbertson*, the Third Circuit was explicit that "journalists possess a qualified privilege not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases. *Id*. An *en banc* Third Circuit reached the same conclusion in a grand jury setting in *In re Grand Jury Subpoena of Williams*, 963 F.2d 567 (3d Cir. 1992) (en banc). The court in *Williams* affirmed the lower court's decision to quash the subpoena directed at a reporter, as well as certain press and broadcasting companies, to produce documents and disclose confidential sources in a grand jury investigation of a leak in a criminal trial. *Id*. *See also Zerilli* v. *Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (noting that *Branzburg*

stands for proposition that a qualified privilege exists even where a reporter is called before a grand jury to testify).

The law in this Circuit and others is clear, therefore, that a qualified privilege under the First Amendment protects reporters from compelled disclosure of confidential source information. As shown below in Section II.B., the government's plan to obtain and/or review telephone records reflecting the identities of numerous confidential sources with no relevance to the government's investigation cannot possibly tip the balance in favor of compelled disclosure.

2. Confidential Sources Are Also Protected Under Federal Common Law

In addition to the constitutional privilege that applies to protect against compelled disclosure of a reporter's confidential sources, the records sought by the government are also privileged from disclosure under federal common law. Indeed, federal common law provides a separate and independent basis for granting summary judgment to The Times.

Three years after *Branzburg* was decided, Congress enacted the Federal Rules of Evidence, which, rather than enumerate a number of specific federal privileges, provided that privileges in federal criminal cases "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." Fed. R. Evid. 501.[12] Originally, the Proposed Rules of Evidence defined nine specific testimonial privileges and indicated that these were to be the exclusive privileges absent constitutional

[12] Federal Rule of Evidence 1101 makes clear that Rule 501 applies to grand jury proceedings.

mandate, Act of Congress, or revision of the Rules. *See* 56 F.R.D. 183, 230-61 (1972) (Proposed Rules 501-513). Congress rejected the rigid framework in the original proposal in favor of Rule 501's flexible mandate. *See Jaffee* v. *Redmond*, 518 U.S. 1, 8 n.7 (1996); *Trammel* v. *United States*, 445 U.S. 40, 47 (1980). The legislative history makes clear that, in approving this flexible approach, Congress expected the federal courts to reassess the question of whether a reporter's privilege exists under federal common law. As Congressman Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, stated when presenting the Conference Report to the House, Rule 501 was not intended to freeze the law of privileges as it existed, and its purpose was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis." *Trammel*, 445 U.S. at 47 (citing 120 Cong. Rec. 40891 (1974)).[13]

The Supreme Court has held that, although the general rule under the common law is that "'the public . . . has a right to every man's evidence,'" "[e]xceptions from the general rule . . . may be justified, however, by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Jaffee*, 518 U.S. at 9 (citations omitted). The development of a privilege under Rule 501 is justified if protecting confidential communications of a particular sort "'promotes sufficiently important interests to outweigh the need for probative evidence . . . .'" *Jaffee*, 518 U.S. at 9-10 (quoting *Trammel*, 445 U.S. at 51). That is plainly true of the reporter's privilege.

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[13] The legislative history of Rule 501 makes clear that Congress intended for the federal common law of privilege to develop on a case-by-case basis. *See* S. Rep. No. 93-1277, at 6-7, 11-13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051; H.R. Rep. No. 93-650, at 8-9 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075; H.R. Conf. Rep. No. 93-1597, at 7-8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098.

The Supreme Court's application of these principles in *Jaffee* is instructive. In recognizing a psychotherapist-patient privilege under Fed. R. Evid. 501, the Court noted that protecting communications between psychotherapists and patients serves important private and public interests. "Effective psychotherapy," the Court noted, "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. . . . For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. . . . By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests." *Id*. at 10-11.

The Court also concluded that the costs of recognizing the psychotherapist-patient privilege, in terms of a loss of potentially relevant evidence, were modest. Without a privilege, the Court reasoned, there would likely be a chill on the very type of evidence sought, *e.g.*, parties would be unlikely to make statements against their interest to a therapist if they knew in advance that any statements could later be disclosed either to governmental authorities or adversarial litigants. *Id.* at 11-12.

That the reporter's privilege serves important private and public interests is clear from the affidavits of Ms. Miller and Mr. Shenon as well as the decisions of the Second Circuit and this Court. *See* Miller Aff't at ¶¶ 12-23; Shenon Aff't at ¶¶ 10-15; *see also Baker*, 470 F.2d at 782 (recognizing "significant public and private interests" in "the maintenance of a vigorous, aggressive[,] . . . unfettered debate over controversial matters"; *citing New York Times* v. *Sullivan*, 376 U.S. 254 (1964)); *see also Burke*, 700 F.2d at 77 (recognizing the "important social in-

terests in the free flow of information"); *Gonzalez*, 194 F.3d at 35 (noting that journalist's privilege is designed to "'to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources" and to preserve the "'pivotal function of reporters to collect information for public dissemination'") (*quoting Petroleum Product, supra*, and *Baker, supra*); *United States* v. *Marcos*, No. SSSS 87 CR. 598 (JFK) 1990 WL 74521, at *2 (S.D.N.Y. June 1, 1990) (observing that "effective gathering of newsworthy information in great measure relies upon the reporter's ability to secure the trust of news sources;" that "[m]any doors will be closed to reporters who are viewed as investigative resources of litigants;" and that "[t]he hindrance to the free flow of information which accompanies this perception is inimical to the First Amendment").

Thus, just as the Supreme Court concluded that there was a consensus that the psychotherapist-patient privilege serves "the mental health of our citizenry," an interest that the Court found to be "a public good of transcendent importance," it is clear that the reporter's privilege serves the political, economic and social health of our citizenry by allowing the public to make informed decisions. As this Court observed so aptly in *Baker*, "[i]t is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so too will a people remain free. Freedom of the press may be stifled by direct or, more subtly, by indirect restraints. Happily, the First Amendment tolerates neither, absent a concern so compelling as to override the precious rights of freedom of speech and the press." 470 F.2d at 785.

Moreover, the important interests served by the reporter's privilege outweigh the likely evidentiary costs. This is because, without a privilege, sources will be far less likely to

make statements to the press that prosecutors and/or litigants will be interested in discovering. The *Jaffee* Court's analysis of the psychotherapist-patient privilege in this regard is equally applicable here:

> If the [psychotherapist-patient] privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioners seek access — for example, admissions against interest by a party — is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

Jaffee, 518 U.S. at 11-12.

In *Jaffee*, the Court recognized a privilege under Rule 501, in part because "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege." *Id*. at 12. Noting that "[w]e have previously observed that the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one," the Court held that in light of the consensus on the State level about the propriety of the psychotherapist-patient privilege, "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id*. at 12-13.

Today, 31 states (plus the District of Columbia) have enacted "shield laws" to protect journalists from compelled disclosure of, *inter alia*, confidential sources.[14] Of the 19

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[14] *See* Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300-.390; Ariz. Rev. Stat. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Evidence Code § 1070; Colo. Rev. Stat. § 13-90-119;

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states without statutory shield laws, all but one — Wyoming, which has remained silent on the issue — have recognized a reporter's privilege in one context or another.[15] In fact, the protec-

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Del. Code Ann. tit. 10, §§ 4320-26; Fla. Stat. Ann. § 90.5015; Ga. Code Ann. § 24-9-30; 735 Ill. Comp. Stat. Ann. 5/8-901 to 8-909; Ind. Code Ann. §§ 34-46-4-1, 34-46-4-2; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-1459; Md. Code. Ann., Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws Ann.§§ 767.5a, 767A.6; Minn. Stat. Ann. §§ 595.021-.025; Mont. Code Ann. §§ 26-1-902, 26-1-903; Neb. Rev. Stat. §§ 20-144 to 20-147; Nev. Rev. Stat. Ann. 49.275, 49.385; N.J. Stat. Ann. §§ 2A:84A-21.1 to 21.5; N.M. Stat. Ann. § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat. § 8-53.11; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code Ann. §§ 2739.04, 2739.12; Okla. Stat. Ann. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510-.540; 42 Pa. Cons. Stat. Ann. § 5942(a); R.I. Gen. Laws §§ 9-19.1-1 to 9-19.1-3; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208.

15 *See Connecticut State Bd. of Labor Relations* v. *Fagin*, 370 A.2d 1095 (Conn. Super. Ct. 1976) (civil); *De Roburt* v. *Gannett Co*., 507 F. Supp. 880 (D. Haw. 1981) (civil); *Idaho* v. *Salsbury*, 924 P.2d 208 (Idaho 1996) (criminal); *In re Wright*, 700 P.2d 40 (Idaho 1985) (criminal); *Winegard* v. *Oxberger*, 258 N.W.2d 847 (Iowa 1977) (civil), *cert. denied*, 436 U.S. 905 (1978); *In re Pennington*, 581 P.2d 812 (Kan. 1978) (criminal), *cert. denied*, 440 U.S. 929 (1979); *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); *Sinnott* v. *Boston Retirement Board*, 524 N.E.2d 100 (Mass.) (civil), *cert. denied*, 488 U.S. 980 (1988); *Ayash* v. *Dana-Farber Cancer Institute*, 706 N.E.2d 316 (Mass. App. Ct. 1999) (civil); *Missouri ex rel. Classic III, Inc*., 954 S.W.2d 650 (Mo. Ct. App. 1997) (civil); *New Hampshire* v. *Siel*, 444 A.2d 499 (N.H. 1982) (criminal); *Opinion of the Justices*, 373 A.2d 644 (N.H. 1977) (civil statutory proceeding); *Hopewell* v. *Midcontinent Broadcasting Corp*., 538 N.W.2d 780 (S.D. 1995) (civil), *cert. denied*, 519 U.S. 817 (1996); *Dallas Morning News Co*. v. *Garcia*, 822 S.W.2d 675 (Tex. App. 1991) (civil); *Vermont* v. *St. Peter*, 315 A.2d 254 (Vt. 1974) (criminal); *Brown* v. *Virginia*, 204 S.E.2d 429 (Va.) (criminal), *cert. denied*, 419 U.S. 966 (1974); *Clemente* v. *Clemente*, 56 Va. Cir. 530 (2001) (civil); *Philip Morris Co., Inc*. v. *ABC, Inc*., 36 Va. Cir. 1 (1995) (civil); *Clampitt* v. *Thurston County*, 658 P.2d 641 (Wash. 1983) (civil); *Senear* v. *Daily Journal-American*, 641 P.2d 1180 (Wash. 1982) (civil); *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); *West Virginia ex rel. Hudok* v. *Henry*, 389 S.E.2d 188 (W. Va. 1989) (civil); *Kurzynski* v. *Milwaukee Magazine*, 538 N.W.2d 554 (Wis. Ct. App. 1995) (civil); *Zelenka* v. *Wisconsin*, 266 N.W.2d 279 (Wis. 1978) (criminal); *Wisconsin* v. *Knops*, 183 N.W.2d 93 (Wis. Ct. App. 1971) (grand jury). In Mississippi, a trial court has concluded that the state constitution provides a basis for a qualified reporter's privilege. *Hawkins* v. *Williams*, Hinds County Circuit Court, No. 29,054 (March 16, 1983) (unpublished opinion). In both Mississippi and Utah, trial courts have applied the reporter's privilege in both civil and criminal contexts. *See Pope* v. *Village Apartments, Ltd*., No. 92-71-436 CV (Miss. 1st Cir. Ct. Jan. 23, 1995) (unpublished opinion) (Gibbs, J.) (civil); *Mississippi* v. *Hand*, No. CR89-49-C(T-2) (Miss. 2d Cir. Ct. July 31, 1990) (unpublished opinion) (criminal); *In re Grand Jury Subpoena*, No. 38664 (Miss. 1st Cir. Ct. Oct. 4, 1989) (unpublished opinion) (grand jury); *Lester* v. *Draper*, No. 000906048 (Utah 3d Dist. Ct.

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tion of confidential sources has now even been recognized in countries around the world that typically afford far less protection to journalists than the United States. *See*, *e.g*., *Goodwin* v. *United Kingdom*, [1996] 22 E.H.R.R. 123 (European Ct. of Human Rights) (holding that Article 10 of the European Convention on Human Rights provides protection against the disclosure of confidential sources, and stating that "[p]rotection of journalistic sources is one of the basic conditions for press freedom."); *Roeman and Schmit* v. *Luxembourg*, Applic. No. 51772/99 (European Ct. of Human Rights 2003) (same); *R*. v. *National Post*, [2004] 236 D.L.R. (4th) 551 (quashing order to compel reporter to disclose his confidential sources in connection with criminal investigation because the "eroding of the ability of the press to perform its role in society cannot be outweighed by the Crown's investigation" and compelling a reporter to "break a promise of confidentiality would do serious harm to the constitutionally entrenched right of the media to gather and disseminate information").[16]

Several additional factors also strongly support a finding that there is a reporter's privilege grounded in federal common law. First, this Court should take serious account of the

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Jan. 16, 2002) (Frederick, J.) (unpublished opinion) (civil case); *Utah* v. *Koolmo*, No. 981905396 (Utah 3d Dist. Ct. March 29, 1999) (Hilder, J.) (unpublished opinion) (criminal case).

[16] *See also European Pacific Banking Corp*. v. *Television New Zealand Ltd*., [1994] 3 N.Z.L.R. 43 (Ct. App. Wellington) (New Zealand) (establishing general rule protecting confidential sources in all cases, both in discovery and at trial); *Oyegbemi* v. *Attorney-General of the Federation & Ors*, [1982] F.N.L.R. 192 (Fed. of Nigeria LR) (Nigeria); *Prosecutor* v. *Radoslav Brdjanin and Momir Talic*, Case No. IT-99-36-AR 73.9 (International Criminal Tribunal for former Yugoslavia 2002) (establishing qualified privilege for war correspondents even when no confidential sources are involved); Freedom of Press Act, Chapter 3, Article 1 (Sweden); Code of Criminal Procedure, Article 109(2) (France); Media Act of 1981, Article 31 (Austria); Criminal Procedure Code, Section 53 (Germany).

New York State Shield Law, codified at N.Y. Civ. Rights Law § 79-h (McKinney 1992), which provides journalists with an *absolute* privilege not to disclose confidential information. *Id*. at 79-h(b). The privilege applies broadly to any "professional journalist," defined as anyone "who, for gain or livelihood, is engaged in gathering [or] preparing . . . news intended for a . . . professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public[.]" *Id*. at 79-h(a)(6).[17]

The Second Circuit and this Court have looked consistently to the Shield Law in protecting journalist's from compelled disclosure in federal question cases. In *Baker*, 470 F.2d 778, for example, the Second Circuit looked to the New York and Illinois shield laws in deciding a motion to compel a reporter's testimony about a confidential source in a civil rights class action. *Id*. at 780. The court noted that while the state shield laws were "not conclusive in an action of this kind," they reflected "a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters," and were thus clearly relevant to the inquiry as to the scope of the First Amendment privilege under federal common law. *Id*. at 782. Similarly, in *von Bulow by Auersperg* v. *von Bulow*, the court found that in federal question cases courts should not "ignore New York's policy of giving protection to professional journalists" under the Shield Law. 811 F.2d 136, 144 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987). *See also Behar* v. *IRS*, 779 F. Supp. 273,

[17] The term "news" is also defined broadly to include "written, oral, pictorial, photographic, or electronically recorded information or communication concerning . . . matters of public concern or public interest or affecting the public welfare." *Id*. at 79-h(a)(8).

274 (S.D.N.Y. 1991) (observing that it is appropriate for courts in federal question cases to take the Shield Law into account and that the "underlying policies" of the Shield Law and the First Amendment privilege are "congruent"); *see generally Cuthbertson*, 630 F.2d at 146 n.1 (finding that state law was "independent and congruent basis of authority" for the reporter's privilege under federal common law); *Gulliver's Periodicals, Ltd.* v. *Chas. Levy Circulating Co.*, 455 F. Supp. 1197, 1200 (N.D. Ill. 1978) (looking to Illinois Reporter's Privilege Act in federal question case because in cases where "there is no controlling federal statute on the asserted privilege, the district court for its guidance may consider existing state law concerning the privilege").

That the Shield Law provides *absolute* protection for reporters makes clear that there is a particularly strong public policy in this district in favor of protecting reporters from such forced disclosure. That policy is bolstered as well by the enactment by the Department of Justice of a policy that requires the DOJ not to issue subpoenas to members of the press unless the standard factors of the qualified privilege are met first. *See* 28 C.F.R. § 50.10. Those guidelines require members of the Department not to issue subpoenas to members of the press in criminal cases *unless*: (1) all reasonable attempts to obtain the information from alternative sources have been exhausted; (2) negotiations with the media have been pursued in which the government clarifies what its needs are in the case and its willingness to respond to concerns of the media; and (3) the Attorney General has authorized the subpoena after considering, among other things, whether there are reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation of that crime. *See* 28 C.F.R. § 50.10(b), (c), and (f)(1). The guidelines further provide that absent "exigent circumstances," subpoenas to the press must be "limited to

the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information." *Id.* at § 50.10(f)(4). The guidelines further support a finding of a common law privilege.

All these factors demonstrate the existence of a strong consensus in this district and elsewhere that journalists should not be compelled to reveal their confidential sources. This Court should accordingly conclude that based on the confluence of these multiple factors there is a federal common law privilege that provides absolute protection for confidential source information.

3. Confidential Sources Are Protected Pursuant To The Department Of Justice's Own Guidelines For Subpoenaing The Press

A reporter's confidential source information is also protected independently by the Department of Justice's guidelines, promulgated in direct response to numerous criticisms regarding increases in media subpoenas. J.N. Mitchell, *Free Press and Fair Trial: The Subpoena Controversy*, 59 Ill. Bar J. 282, 283 (Dec. 1970). Upon announcing the guidelines, Attorney General Mitchell noted that "a free press is the condition of a free society," *id.* at 286 (internal citations omitted), and made clear that the guidelines were designed to create a balance between the demands of government investigation and the breathing space needed by journalists to investigate and report on issues of the day. *Id.* at 291-92. Reflecting these sentiments, the preamble to the guidelines observes:

> Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as

> broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function.

The guidelines require that with respect to "every" attempt to subpoena information from the media, the Department of Justice must "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." 28 C.F.R. § 50.10(a). In striking that balance, the guidelines provide that subpoenas to the press in criminal cases should seek only information that is "essential to a successful investigation," and must not be used "to obtain peripheral, nonessential, or speculative information." *Id*. at § 50.10(f)(1). Absent "exigent circumstances," the guidelines also require that subpoenas be "limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information." *Id.* at § 50.10(f)(4).

Of particular relevance here, the Guidelines were amended in 1980 specifically to provide protection for journalist's telephone records. The amendment was prompted by revelations that the DOJ had subpoenaed the home telephone records of a *Times* reporter from a telephone company and had instructed the telephone company to keep the subpoena secret for 90 days, thus ensuring that there would be no timely challenge of the subpoena. Robert Pear, *Justice Dept. Restricts Subpoenas for Reporters and Phone Records*, N.Y. Times, Nov. 13, 1980, at A30. The 1980 amendments provided, *inter alia*, that subpoenas for reporters' telephone records should be "as narrowly drawn as possible," should be "directed at relevant information regarding

a limited subject matter" and should cover a "reasonably limited time period." 28 C.F.R. § 50.10(g)(1).

B. No Matter What Standard Is Applied, The Government's Plans Do Not Pass Muster

The government's plan to obtain and/or review telephone records reflecting the identities of dozens of confidential sources with the hope that some might turn out to be relevant in its ongoing investigation cannot withstand the scrutiny of the First Amendment, federal common law or the Department of Justice guidelines. Whatever standard the Court chooses to apply, the Government cannot come close to satisfying it here.

If, as we urged above, this Court were to ground its decision in federal common law and if, as we also demonstrated, the Court should conclude that federal common law provides absolute protection against compelled disclosure of a journalist's confidential sources, no further inquiry is required and The Times' motion for summary judgment should be granted without further inquiry. Having established that the telephone records sought would reveal literally dozens of sources who provided information on a confidential basis to *Times* journalists in the course of their newsgathering activities, the privilege attaches and absolute protection should be applied.

If the Court were to apply the qualified privilege recognized by this Circuit as a matter of constitutional law or if it were to conclude that the federal common law provides for only a qualified privilege, then the Court must undertake the balancing test articulated by the Second Circuit to determine if the government has sustained its burden to defeat the privilege. A similar balancing test should also be applied if the Court were to ground its decision on the force of the

DOJ Guidelines themselves. As we demonstrate below, given the sheer scope of the information the government seeks, it cannot meet any balancing test whether the source of that test is found in the First Amendment, federal common law or the DOJ Guidelines.

The government has refused to articulate to The Times its need for the information it seeks; nor has the government explained, as the guidelines require, what steps (if any) it has taken to obtain the information from other, non-media sources.[18] 28 C.F.R. §50.10(b). That said, there can be no articulation of "need" that would validate a discovery demand so broad that it would sweep in dozens of confidential sources having no relationship at all to the government's investigation. If there is any protection at all against the compelled disclosure of confidential sources (as indeed there is), the government's blunderbuss approach here cannot be sustained.

The government cannot demonstrate that the overwhelming number of confidential sources reflected in the telephone records it seeks are in the slightest, relevant to its investigation, much less that they are "highly material and relevant" and "necessary or critical to the maintenance" of its investigation. *Burke*, 700 F.2d at 77-78; *Gonzalez*, 194 F.3d at 31. Far from being central or critical to the government's case, the sources would simply be casualties of the government's sweepingly overbroad approach, their confidentiality sacrificed because the government believes that the telephone records it seeks might also contain some relevant information. It is not enough to overcome the qualified privilege, however, for the government to argue — as

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[18] 28 C.F.R. § 50.10(b).

we expect it will — that the source or sources it is seeking to identify might be among the many confidential sources reflected in The Times' telephone records. *See Pugh* v. *Avis Rent-A-Car System, Inc.*, No. M8-85, 1997 WL 669876, at *4 (S.D.N.Y. Oct. 28, 1997) ("This 'hunch,' without more, does not constitute a clear and specific showing that the . . . information sought is highly material and relevant . . . [or] is necessary or critical to [defendant's] claim . . . ."); *Karen Bags*, 600 F. Supp. at 670 (same).

Just as the government cannot meet the standard for overcoming the qualified privilege, it cannot satisfy the requirements of its own guidelines, which require, as noted, that subpoenas to the press in criminal cases seek information that is "essential to a successful investigation," and not be used "to obtain peripheral, nonessential, or speculative information." *Id*. at § 50.10(f)(1). Moreover, given that the government's investigation has been ongoing for over two years, it is difficult to believe — and neither Mr. Fitzgerald nor Mr. Comey has given us reason to do so — that there is now some "exigent circumstance" that requires the government to seek more than the authentication of published information. *Id.* at § 50.10(f)(4). For the government to obtain and/or review the telephone records it seeks would constitute a gross failure to satisfy its self-imposed obligation to strike a "proper balance," let alone to value the "public's interest in the free dissemination of ideas and information."

It is no answer for the government to argue that the guidelines are merely internal, non-binding protocols. It is true that the guidelines contain a disclaimer that they "are not intended to create or recognize any legally enforceable right in any person. . . ." Yet numerous courts have concluded that the guidelines create enforceable rights and are an independent means for journal-

ists to resist compelled disclosure of their confidential sources. *See United States* v. *Blanton*, 534 F. Supp. 295, 297 (S.D. Fla. 1982) (quashing subpoena in criminal case and holding that "if the party seeking the information is the United States, it must follow the Department of Justice guidelines, 28 C.F.R. § 50.10, which impose similar requirements [*i.e.*, as those imposed by the privilege case law] as well as a duty to negotiate in good faith with the reporter and his or her counsel"); *In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358, 371 (W.D. Pa. 1991), *aff'g* 963 F.2d 567 (3d Cir. 1992) ("In arriving at its decision [to quash a grand jury subpoena directed at a reporter], this Court has also considered § 50.10 of 28 Code of Federal Regulations. . . . It is manifestly clear that the government has not discharged the obligation imposed by these regulations."); *see also In re Petroleum Products Litigation*, 680 F.2d at 8 (citing guidelines with approval in holding that various state government litigants had failed to "carry their burden of first seeking the information" they sought from non-press sources).[19]

Beyond a specific application of the standards for overcoming the reporter's privilege and the Department of Justice guidelines, the government's plan to seek The Times' telephone records cannot withstand the general balancing of interests required by Justice Powell and the well-settled line of Second Circuit cases starting with *Baker*. On one side of the scale are the severe consequences that would result from compelled disclosure of dozens of irrelevant confi-

[19] The guidelines are enforceable despite their built-in disclaimer because, as the Supreme Court has found, "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where internal procedures are possibly more rigorous than otherwise would be required." *Morton* v. *Ruiz,* 415 U.S. 199, 235 (1974); *see also United States* v. *Caceres*, 440 U.S. 741, 751 n.14 (1979) (refusing to apply exclusionary rule in criminal prosecution in connection with surveillance tapes made by IRS agent against IRS policy but still finding that the agency had a duty to comply with the regulations).

dential sources; on the other is the government's unsubstantiated hope that among these sources will be the "leaker" it seeks to identify. The consequences of disclosure, we submit, significantly outweigh the government's speculative interests. While most reported cases in this area of law have dealt with the grave consequences that would result from disclosure of a single source who has at least some relevance to the underlying case or investigation, here, where the government will be able to learn the identities of numerous sources with no relevance at all to the government's inquiry, the costs of allowing disclosure cannot be borne.

Those costs will be felt not only by Ms. Miller and Mr. Shenon, but also other reporters at The Times and, for that matter, reporters across the country who would wake up to a new reality that the government could obtain and review a broad swath of their telephone records regardless of the number of irrelevant confidential sources that might be revealed whenever it suspects that the reporters communicated with the subject of a leak investigation. Under such circumstances, it will be demonstrably less likely that sources — facing the risk that records of their conversations with investigative reporters could be obtained by the government without even a showing by the government of the most basic relevance — will come forward in the future. Miller Aff't at ¶ 22; Shenon Aff't at ¶ 13. Sources disclosing corruption, fraud, harassment, failed policies and the like, would have no confidence that the reporter on the other end of the phone line would, or could, keep their conversation confidential. The importance that such confidential sources play in the everyday flow of information cannot be overstated. In her affidavit, Ms. Miller joins in the views expressed more than thirty years ago by Max Frankel, former Executive Editor of *The Times*, in an affidavit he submitted to this Court in the *Pentagon Papers* case. *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). Frankel said at the time:

> We have been taught, particularly in the past generation of spy scares and Cold War, to think of secrets as secrets — varying in their "sensitivity" but uniformly essential to the private conduct of diplomatic and military affairs and somehow detrimental to the national interest if prematurely disclosed. By the standards of official Washington — government and press alike — this is an antiquated, quaint and romantic view. For practically everything that our government does, plans, thinks, hears and contemplates in the realms of foreign policy is stamped and treated as secret — and then unraveled by that same government, by the Congress and by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information.

See Miller Aff't at ¶23, Ex 8.

In this case, the result of permitting the government to obtain the identity of numerous confidential sources without making any showing of the relevance of those sources, would render hollow any future promises of confidentiality and would serve to obstruct the free flow of information. Such a result is inimical to the very purpose of the First Amendment. As the Supreme Court held in *Mills* v. *Alabama*, 384 U.S. 214 (1966):

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . [T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

Id. at 218-19. And as the Court stated in *Grosjean* v. *American Press Co*., 297 U.S. 233 (1936):

> The predominant purpose of the . . . [First Amendment] was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

Id. at 250.

Because the government's speculative "need" cannot outweigh the critical harm that would result from disclosure of Ms. Miller's and Mr. Shenon's confidential sources, the Court should declare that the telephone records at issue are protected under the First Amendment, federal common law and Department of Justice guidelines.

CONCLUSION

This Court should deny the Defendants' Motion to Dismiss and grant Plaintiff's Motion for Summary Judgment.

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Respectfully submitted,

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