

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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

**REPLY MEMORANDUM OF THE NEW YORK TIMES COMPANY
IN FURTHER SUPPORT OF ITS CROSS-MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION TO THE GOVERNMENT'S
CROSS-MOTION FOR SUMMARY JUDGMENT**

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This memorandum is respectfully submitted on behalf of The New York Times Company (“The Times”) in opposition to the Government’s cross-motion for summary judgment and in further support of its own cross-motion for summary judgment.¹

PRELIMINARY STATEMENT

In its most recent submission to this Court, the Government urges, once again, that this Court should dismiss this action outright. In the alternative, the Government grudgingly cross-moves for summary judgment. The Government’s arguments in support of both of its motions cannot be sustained.

As regards the Government’s motion to dismiss, we will comment only briefly because the Government has nothing new to say. Unable to answer the points we made in our brief of November 24, 2004 detailing the fundamental fallacy of the Government’s position that Rule 17 is a “special statutory proceeding” that presents an adequate alternative to this declaratory judgment action, the Government has chosen simply not to respond to them at all. The Government has no answer to our point that Rule 17 has never been viewed as a “special statutory proceeding”; the Government has no answer to our point that if procedures under the Fed-

¹ The Memorandum of Law in Support of Defendants’ Motion to Dismiss the Complaint is referred to herein as “Gov’t Br.” followed by the relevant page number. Similarly, the 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 will be referred to herein as “Pl. Br.”; the Reply Memorandum of Law in Support of Motion to Dismiss the Complaint, and Request that Court Defer Consideration of Cross-Motion for Summary Judgment Pending Resolution of Motion to Dismiss will be referred to herein as “Gov’t Opp. I”; the Reply Memorandum of Law of the New York Times Company in Further Support of Its Motion for Summary Judgment will be referred to herein as “Pl. Opp.”; and, finally, the Memorandum of Law in Support of Government’s Cross Motion for Summary Judgment and in Opposition to Plaintiff’s Motion for Summary Judgment will be referred to herein as “Gov’t Opp. II.”

eral Rules were deemed to be “special statutory proceedings” the Declaratory Judgment Act would be largely superfluous; the Government has no answer to our point that if either of the two prongs of the *Continental Casualty* test is met — in fact, both are met here — the court is required to entertain jurisdiction. In order not to burden the Court with a repetition of our arguments, we respectfully refer the Court to pages 3 - 10 of our brief of November 24th.

If anything, the Government’s position on the merits of its summary judgment motion undermines its motion to dismiss. As the Court will recall, in its opening brief the Government argued that Rule 17 provided a wholly adequate and completely efficient procedure for The Times to challenge the Government’s effort to invade the relationship between The Times and literally more than dozens of its confidential sources, conceding The Times had standing to do so. Gov’t Br. at 8-9. Yet when forced to address the merits of this case, the Government now urges that The Times, after all, has no right to challenge subpoenas to The Times’s telephone providers. The Government surely cannot be permitted to claim on the one hand that Rule 17 is an adequate alternative to this proceeding in the face of its most recent claim that for The Times it is no alternative at all.

On the merits of the summary judgment motions the Government has also taken positions inconsistent with its prior submissions. In its earlier briefs, the Government made clear that it was seeking to learn the identities of the confidential sources of The Times’s journalists. Now the Government tells us that it simply wants to review third-party business records — records, we are told, that will not themselves reveal the journalists’ confidential sources but which will simply disclose “communications” between “telephones”. Since the production of telephone records simply reveals telephone numbers, the Government goes on to suggest, there is nothing

really important at stake here anyway. It is difficult to decide how to respond to such a disingenuous argument. It should, we think, suffice to say that since the Government's blunderbuss effort to discover who Ms. Miller and Mr. Shenon spoke to over a period of weeks will undeniably reveal the identities of dozens of confidential sources who have nothing whatsoever to do with the Government's investigation, the Government's actions cannot possibly be countenanced.

In a similar vein, for the first time the Government expresses some doubt that Ms. Miller's and Mr. Shenon's confidential sources are "confidential" at all. This position too is difficult to fathom. Both Ms. Miller and Mr. Shenon have provided unchallenged testimony that their sources for the information that interests the Government were "confidential". Indeed, since it first responded to the Government's request that The Times and its reporters agree voluntarily to discuss their newsgathering activities, The Times and its reporters have made clear they could not do so consistent with their obligations to their confidential sources. Like its suggestion that this case is only about "telephone numbers," this effort by the Government to mischaracterize what this case is about in order to prevail suggests more powerfully than we can that it cannot.

The Government's legal arguments are equally unpersuasive. In the face of clear Second Circuit precedent establishing that the First Amendment provides a significant degree of protection to reporters not to reveal confidential sources in both the civil *and* criminal contexts, the Government simply chooses to ignore that inconvenient fact and urges instead that there is basically no privilege at all. Justice Powell's concurring opinion in *Branzburg v. Hayes* is all but dismissed in the face of clear Second Circuit precedent concluding that the opinion is not only

critical to an understanding of the scope of the constitutional protections afforded to reporters, but, in the words of Judge Robert Sack, is “authoritative.” R.D. Sack, *Sack on Defamation* § 14.3.2, at 14-13 – 14-14 (3d ed. 2004). As for our arguments that the federal common law also provides protection, the Government insists that the issue is foreclosed once and for all by the Supreme Court’s decision in *Branzburg*. This is so, we are told, despite Congress’ express instruction three years after *Branzburg* that the federal courts should be responsive and flexible in recognizing privileges under federal common law — including the reporters’ privilege — and despite the now near-unanimous consensus among the States that reporters are privileged not to reveal their confidential sources. To suggest that the issue is foreclosed by *Branzburg* is to deny that Congress has anything to say about the development of federal evidentiary law.

But the most stunning deficiency of the Government’s submission in support of its motion for summary judgment is an evidentiary one. After accepting, for purposes of argument, that if there is a reporter’s privilege under the First Amendment (or, presumably, federal common law), it must satisfy the three-part test articulated by the Second Circuit in *In re Petroleum Products Litigation*, the Government blithely asserts that it has met each element of the test handily without the need for any evidentiary submission. To put it mildly, we disagree.

As we demonstrated in our moving papers, Ms. Miller and Ms. Shenon wrote dozens of articles during the fall of 2001 that relied on confidential sources who have nothing to do with the Government’s investigation and whose identities may very well be revealed by the production of the Times’s telephone records. How can the Government possibly assert that the identity of Ms. Miller’s confidential source for an article about the spread of anthrax is “highly material and relevant” to the Government’s investigation here? How can the Government possi-

bly claim that the identity of Mr. Shenon's confidential source for an article concerning the prosecution of Zacarias Moussaoui is "critical" to its investigation here? And how can the Government say with straight face that there is *no dispute at all* about its supposed exhaustion of alternative sources when there most certainly is a dispute about just that?

The Government's only answer to its gross evidentiary failure can be found in footnotes scattered throughout its submissions. According to the Government, it is precluded by Fed. R. Crim. Proc. 6(e) from sharing its proof *with this Court*. As this Court well knows and as is apparent from the face of Rule 6(e), that is simply untrue. If the Government wanted to offer evidence that it had met its evidentiary burden, it had both ample means and ample opportunity to do so. It didn't because it couldn't.

In the end the Government's efforts to obfuscate the real issues presented to this Court and to trivialize its burden under the law of this Circuit to justify its attempted wholesale intrusion into the relationship between The Times and its reporters and their confidential sources fails miserably as, on this record, it must. The government's motions should be denied and summary judgment entered in favor of The Times.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE TIMES FROM THE GOVERNMENT'S EFFORT TO OBTAIN ITS TELEPHONE RECORDS

The Government argues that the First Amendment affords no protection in this case no matter how many confidential sources will be disclosed by its investigation and regardless of whether those sources are even remotely relevant to that investigation. The Government's argument is two-fold. First, it asserts that the usual protections against disclosure of con-

fidential sources do not apply here because it is not subpoenaing journalists directly, but instead “merely seeking business records of a third party.” As shown below, this argument is inconsistent with relevant case law, the DOJ’s guidelines for subpoenaing the press, and the Government’s prior assertions *in this case*. Second, the Government argues that the constitutional and common law protections otherwise afforded to The Times do not apply here because the Government is engaged in a “good faith” grand jury investigation. As shown below, this argument misreads the Supreme Court’s decision in *Branzburg v. Hayes*, including the critical concurrence of Justice Powell, and all but ignores binding Second Circuit precedent interpreting that decision.

A. The Times Has A First Amendment Right To Challenge The Government’s Actions Here

Burying its head, ostrich-like, the government argues that The Times has “no First Amendment interest in third-party records and no right to block the government’s access to such records.” Gov’t Opp. II at 28.² That argument is wholly inconsistent with the well-reasoned cases cited in our opening brief — which the Government does not address — holding that jour-

² As noted above, it is difficult to reconcile this position with the Government’s continued insistence that Rule 17 provides The Times with an adequate alternative to this action and its claim that The Times should have filed a motion to quash in the Northern District of Illinois. When it filed this action The Times did not know (despite having asked) that a grand jury had been convened to investigate these matters (let alone that it was sitting in Chicago). For the Government to advise The Times that its telephone records would “be sought” but at the same time to decline to advise how, where or by whom hardly put The Times on “notice” that it should seek relief from the issuance of grand jury subpoenas before the Northern District of Illinois. In any event, even now that the existence of this grand jury has come to light, a motion to quash under Rule 17 cannot provide The Times with any relief as to subpoenas that may have already been served and complied with (if indeed there were any), nor can it protect The Times from subpoenas that have been threatened but have not yet been issued.

nalists may challenge subpoenas issued to third parties, including telephone companies. *See* Pl. Br. at 15 n.6.

In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1996 WL 575946 (M.D.N.C. Sept. 6, 1996), for example, ABC sought a protective order with respect to third-party subpoenas “directed to hotels, letter-carrier services, and telecommunications companies.” *Id.* at *1. Food Lion argued that ABC did not have standing because the subpoenas were issued to third parties. Rejecting that argument, the court held that ABC had standing to bring its action because “the subpoenas clearly infringe[d] ABC’s First Amendment rights with regard to its confidential sources.” *Id.* at *2. Even though the discovery was “not requested directly from ABC,” the court held that “the inquiries directed to third parties nonetheless implicate[d] ABC’s privilege.” *Id.* (emphasis added). Thus, the court concluded, Food Lion was required to bear the same burden in overcoming the privilege as if it had sought the information directly from ABC or its reporters. *Id.* (“Since the subpoenas implicate ABC’s First Amendment protections, Food Lion must show that the information sought is crucial to the outcome of a claim or defense in this action and the information cannot be obtained from any other source.”) *Id.*

Similarly, in *Philip Morris Cos. v. American Broadcasting Cos.*, No. LX-816-3, 1995 WL 301428 (Va. Cir. Ct. Jan 26, 1995), Philip Morris sought to discover ABC’s confidential sources by issuing subpoenas to credit card companies, airlines, and telephone companies. *Id.* at *1. The court held that ABC had standing to challenge the subpoenas because they infringed ABC’s rights against disclosure of confidential sources:

The 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. This type of discovery will deter sources from

divulging information and deter reporters from gathering and publishing information. . . . The subpoena of third party records in order to trace a reporter[']s movements and thereby identify confidential sources is tantamount to asking the reporter directly, therefore the reporter's qualified privilege against disclosure of confidential sources is held to extend to any and all documentary or electronically compiled evidence that is the product of the reporter's news gathering activities.

Id. at *5-*6.

Although the Second Circuit has not yet been faced with a case in which a member of the press sought to challenge a third-party subpoena to protect confidential sources, it has held that parties may challenge third-party subpoenas when their First Amendment rights are threatened. In *Local 1814, International Longshoremen's Ass'n v. Waterfront Commission*, 667 F.2d 267 (2d Cir. 1981), for example, the Court permitted a labor union and its political action committee to challenge, on First Amendment grounds, a subpoena served on a third party, finding that:

Here, the government-compelled disclosure is directed at a third party, NYSA, rather than directly at the Fund or Local 1814. But First Amendment rights are implicated whenever government seeks from third parties records of actions that play an integral part in facilitating an association's normal arrangements for obtaining members or contributions. . . . [T]he payroll-deduction mechanism administered by NYSA plays an integral role in facilitating the First Amendment rights of longshoremen to contribute to the Fund. We therefore deem the NYSA records entitled to the same protection available to records of the Fund.

Id. at 271. Although *Local 1814* did not involve the protection of confidential sources, it did involve First Amendment rights and its reasoning is applicable here, where subpoenas to The Times's telephone companies will inevitably infringe upon the First Amendment rights of The Times and its reporters. See also *Bergman v. Senate Special Committee on Aging*, 389 F. Supp. 1127, 1130 (S.D.N.Y. 1975) ("The plaintiffs have standing to challenge the legality of the subpoenas [issued to third-party banks] on the ground that the forced disclosure of the materials re-

quested would allegedly violate their federal constitutional rights” under the First Amendment.); *Pollard v. Roberts*, 283 F. Supp. 248, 259 (E.D. Ark.) (three judge court) (holding that, while “ordinarily a depositor does not have any standing to prevent a bank from producing bank records of his account in obedience to a subpoena,” the associational rights of political party members gave the political party standing to prevent disclosure), *aff’d*, 393 U.S. 14 (1968); *cf. United States v. Miller*, 425 U.S. 435, 444 n.6 (1976) (observing that First Amendment claims may be implicated by demands for records of third parties).³

The Government’s citations to cases involving *Fourth Amendment* challenges to third-party subpoenas are inapposite. So too is the Government’s citation to *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co.*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979), a highly fractured opinion of the D.C. Circuit that was implicitly rejected by the Second Circuit in *Local 1814*. See 667 F.2d at 271 (citing *Reporters*

³ The Second Circuit is not alone in holding that parties may challenge third-party subpoenas when those subpoenas threaten their First Amendment rights. See, e.g., *National Commodity and Barter Ass’n v. United States*, 951 F.2d 1172, 1174 (10th Cir. 1991) (considering motion by organization to intervene and quash grand jury subpoena issued to third-party banks where organization members’ First Amendment associational rights were implicated); *Brock v. Local 375, Plumbers International Union of America*, 860 F.2d 346, 349 (9th Cir. 1988) (holding that union and political fund could seek to quash subpoenas issued by the U.S. Secretary of Labor to fund’s administrator and bookkeeper if the First Amendment rights of their members might be compromised); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1234 (11th Cir. 1988) (holding that First Amendment protections could be invoked to quash a grand jury subpoena to a third-party brokerage firm); *First National Bank v. United States*, 701 F.2d 115, 118 (10th Cir. 1983) (holding that First Amendment rights to association would be “chilled equally whether the associational information is compelled [by grand jury subpoena] from the organization itself or from third parties”); *United States Servicemen’s Fund v. Eastland*, 488 F.2d 1252, 1261 (D.C. Cir. 1973) (“If the forced disclosure of the information . . . violates [the association’s] First Amendment rights, then it is too clearly an aggrieved person when a third person is under compulsion by the defendants to disclose this information to warrant discussion.”), *rev’d on other grounds*, 421 U.S. 491 (1975); *Noske v. United States*, Civ. Nos. 6-87-399, 6-87-400, 1989 WL 252446, at *1 (D. Minn. Mar. 21, 1989) (issuing protective order from subpoena seeking telephone records from third-party telephone company, based in part on First Amendment interests of a church and its members).

Committee as authority contrary to its holding that union and fund had standing to assert First Amendment rights with respect to third-party subpoenas).

The Government's argument that The Times may not assert its First Amendment rights in response to the Government's efforts to obtain records from its telephone service providers is also inconsistent with the Government's own earlier assertions that The Times would have standing to contest the subpoenas on a motion to quash in the Northern District of Illinois. *See* Gov't Br. at 8-9. Indeed, the Government's opening brief included a number of citations to support that argument, including one to the recent decision of this Court in *Alloco Recycling, Ltd. v. Doherty*, 220 F.R.D. 407, 411 (S.D.N.Y. 2004), which held, *in the Government's own words*, that "a party has standing to raise privilege objections to documents sought from third part[ies]." Gov't Br. at 8-9.

Finally, the Government's argument conflicts with the Department of Justice's own guidelines for subpoenaing the press. The Government has acknowledged that the guidelines, discussed at length *infra*, Section IV, specifically protect the press against subpoenas to telephone companies. *See* Gov't Br. at 3 n.2. Indeed, it is those guidelines that compelled the Government to provide notice to The Times that it intended to seek The Times's telephone records, notice that permitted this litigation to be commenced. *Id.* at 5. If the Government is correct that The Times may not now seek relief with respect to those subpoenas, the guidelines' notice requirement would be meaningless — a result surely not contemplated by the Department of Justice when they were enacted.

B. The First Amendment Protects Against Compelled Disclosure of Confidential Sources

Although the Government acknowledges (as it must) that, based on *Branzburg*, journalists are protected by the First Amendment when called to submit evidence in grand jury investigations (Gov't Opp. II at 31), the Government argues that those protections extend no farther than as against investigations conducted in bad faith or for purposes of harassment. Gov't Opp. II at 20. The Government's reading of *Branzburg* and particularly Justice Powell's critical concurring opinion — an opinion consistently relied on by the many courts, including the Second Circuit, that have recognized a First Amendment privilege — is analytically unworkable and finds no support in *Branzburg* itself or the Second Circuit cases interpreting it.

The Government argues that Justice Powell's opinion — which recognized a “privilege” requiring a “case-by-case” balancing of “vital constitutional and societal interests” — was meant only to clarify the majority's finding that reporters are protected against subpoenas issued for purposes of bad faith or harassment. This interpretation of Justice Powell's opinion cannot be correct. That is because protecting reporters from a grand jury investigation conducted in bad faith or for purposes of harassment plainly does not implicate any “asserted claim of *privilege*” or a “*constitutional right*” based on the First Amendment. Justice Powell could not — as the Government claims — simply have been referring to the fact that reporters, like everyone else, are protected against subpoenas issued as part of bad faith investigations without legitimate law enforcement purposes. Every citizen, regardless of whether First Amendment interests are implicated, already has the right to move to quash abusive subpoenas under Federal Rule of

Criminal Procedure 17(c).⁴ Indeed, after discussing the reporter’s protection against bad faith and harassment, Justice Powell next observed — in a passage of particular importance to this case — that a reporter may assert First Amendment rights if “called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation,” or if the reporter has “some other reason to believe that his testimony implicates confidential source relationship without legitimate need of law enforcement.” *Branzburg*, 408 U.S. at 709-10. Such are the First Amendment claims made here, where *The Times* is challenging the Government’s effort to obtain the identities of numerous confidential sources bearing not just a “remote and tenuous relationship” — but *no relationship at all* to the subject of the Government’s investigation.

In any event, if the Government is correct that Justice Powell’s opinion should be read as creating a privilege and requiring a balancing test only in cases of bad faith subpoenas, it is not at all clear what, exactly, should be balanced. On the one side of the scale is the weightiness of the First Amendment interest advanced; on the other side is a subpoena issued in bad faith or for purposes of harassment. *See* Gov’t Opp. II at 20-21. There are, of course, no circumstances under which such a subpoena would *not* be quashed. There is no First Amendment interest so insubstantial that it would ever yield to a subpoena issued in bad faith and/or for purposes of harassment. The Government’s interpretation of Justice Powell’s concurrence would thus render the opinion, and the privilege it recognizes, completely meaningless.

⁴ *See, e.g., United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991) (holding, without considering any First Amendment interests, that “[g]rand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass”); *In re Impounded*, 241 F.3d 308, 313 (3d Cir. 2001) (same); *In re Grand Jury Proceedings*, 896 F.2d 1267, 1278 (11th Cir. 1990), *vacating as moot*, 904 F.2d 1498 (11th Cir. 1990) (en banc) (same).

What may be most telling about the Government's argument concerning *Branzburg*, however, is its failure to come to grips with the fact that what it views as The Times's "misinterpretation" of that case, Gov't Opp. II at 7, is precisely the reading that it has been given by the Second Circuit. The Court in *Baker v. F & F Investment*, 470 F.2d 778, 785 (2d Cir. 1972), for example, citing Justice Powell's opinion, observed 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 "*even in the context of a criminal investigation.*" (emphasis added). Grasping for a way to distinguish this explicit language from the Second Circuit, the Government argues that the *Baker* Court meant — even though it did not say — that the privilege should only apply where there is evidence of bad faith or harassment. Gov't Opp. II at 24. A close reading of *Baker* demonstrates, however, that the Court did not even refer to the potential for bad faith and harassment, but instead, quoting from Justice Powell's opinion, recognized a broadly applicable First Amendment-rooted journalist privilege not limited to one type of case or one set of facts:

We note that Mr. Justice Powell, in a separate concurrence, emphasized the limited nature of the Court's holding, and expressly stated that in his view *Branzburg* did not compel a journalist "to give information bearing only a remote and tenuous relationship to the subject of the [grand jury] investigation." Significantly, he said that even in criminal proceedings, "[t]he 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."

470 F.2d at 784 (quoting *Branzburg*, 408 U.S. at 710 (Powell concurring)). There is simply no basis to conclude, as the Government urges, that the privilege recognized in *Baker*, based on a

clear and correct interpretation of Justice Powell’s opinion, does not apply in the context of all grand jury proceedings.⁵

Nor does the Government have a serious answer to the Second Circuit’s decision in *United States v. Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983), in which, as set forth in our opening brief, the Court upheld, on First Amendment grounds, a subpoena to a reporter in a criminal trial where there was no evidence of bad faith or harassment. Applying the privilege, the Court in *Burke* 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.” *Id.* at 77. In reaching this conclusion, the Second Circuit also reiterated that in *Baker*, it had read *Branzburg* to mean that courts should “balance First Amendment values even where a reporter is asked to testify before a grand jury.” *Id.* Faced with a criminal case in which there was no evidence of bad faith, and in which the Second Circuit concluded for a second time that the First Amendment protects against compelled disclosure by journalists in the context of grand jury in-

⁵ The Government makes much of the fact that the Second Circuit in *Baker* “distinguished” *Branzburg*. Gov’t Opp. II at 23. A fair reading of the case, however, demonstrates that the Court merely found that the interests of compelling disclosure of confidential sources in a civil case are less weighty than the interests of compelling disclosure in a criminal investigation. In other words, the Court merely found that whether a case is civil or criminal is one factor to consider when applying the privilege. 470 F.2d at 784. The Court did not find, as the Government suggests, that the reporter’s privilege is applicable only in civil cases. The Government’s citation to *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982) — in which the Court recognized that Justice Powell was the “deciding vote” in *Branzburg* and characterized his concurrence as “important” — is similarly unavailing. *Id.* at 8 n.9. In the Government’s own words, the Court in *In re Petroleum Products* “reasoned that civil cases such as the one before it present a *less compelling argument* for disclosure than . . . grand jury investigations.” Gov’t Opp. II at 24 (emphasis added). Again, the Court found that the civil/criminal distinction was a factor when balancing the interests at stake, but did not find the privilege to be inapplicable in the context of grand jury investigations. 680 F.2d at 8.

vestigations, the Government, in a telling demonstration of the weakness of its argument, simply asserts in conclusory fashion with no explanation, that the Second Circuit in *Burke* “misinterpreted” both *Baker* and *Branzburg*. Gov’t Opp. II at 25 n.16. With all due respect, we disagree.

The Government also argues that the opinion of the Second Circuit in *Burke*, if not a “misinterpretation” of *Branzburg*, is inapplicable to this case in any event because it dealt with a criminal trial, not a grand jury proceeding. See Gov’t Opp. II at 24 (“Plaintiff’s claim that the reporter’s privilege applies in criminal cases glosses over the distinction between criminal trials and grand jury investigations.”). The Government does not attempt to explain why this distinction is “important,” or even relevant, except to observe that the Second Circuit has “never applied the privilege to allow a reporter to resist compliance with a subpoena in the context of a grand jury investigation.” *Id.* (emphasis in original). What the Government fails to disclose however, is that the Second Circuit has never had to decide the question, and therefore, has also never *refused* to apply the privilege in the grand jury context. Moreover, as noted above, whenever the Court has considered the applicability of the privilege to grand jury proceedings in dicta, *i.e.*, in *Baker* and in *Burke*, it has explicitly stated that the privilege applies. See *Baker, supra*; *Burke, supra*.⁶

⁶ While, as the Government observes, *Burke* was “limited” by *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993) and *Gonzalez v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999), as noted in our opening brief, that limitation was only as to how much of a showing is needed to overcome the privilege in the criminal context. 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”); see also Pl. Br. at 29 n.11. Neither *Cutler*, *Gonzalez*, or any other case has ever found the privilege to be inapplicable in criminal proceedings. In *Cutler*, for instance, the Court did not, as the Government suggests, decline to apply the reporter’s privilege, but instead found that the defendant was entitled to discovery from a reporter under any standard of relevance, including the one set forth in *Burke*. 6 F.3d at 75.

In any event there is no rational basis for concluding that the privilege applies in the context of criminal trials and not in the context of grand jury investigations. Just as the Second Circuit has observed that the civil or criminal nature of a case is a relevant factor in the balancing test (*see* note 5, *supra*, citing *Baker*, 470 F.2d at 784; *In re Petroleum Products*, 680 F.2d at 9), the type of criminal investigation or type of criminal trial may be a factor when *applying* the reporter's privilege. There is no basis to decide whether or not a privilege *exists* based on the context of a case. The law does not recognize, for instance, one attorney-client privilege for the civil context and another (or none at all) for criminal trials and/or grand jury investigations. The scope of the privilege may vary depending on the context, but whether there *is* a privilege rooted in the First Amendment cannot be dependent on the caption of a particular case. That is particularly true of a privilege that, after all, finds its roots in Justice Powell's concurring opinion in *Branzburg*, a case that arose in the grand jury context.⁷

II. FEDERAL COMMON LAW PROTECTS JOURNALISTS AGAINST COMPELLED DISCLOSURE OF CONFIDENTIAL SOURCES

In our opening brief, we pointed out that, in addition to the constitutional protections recognized in *Branzburg* and the opinions of the Second Circuit, federal common law provides an independent basis for granting summary judgment in favor of the Times. We urged the Court to follow the reasoning of the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996), and to recognize, pursuant to Fed. R. Evid. 501, an absolute privilege to protect confidential sources on the basis that: (1) such a privilege would plainly serve important private and public interests

⁷ Even the Department of Justice's own guidelines (discussed *infra*, Section IV) do not distinguish between criminal trials and grand jury investigations. *See* 28 C.F.R. § 50.10.

by maintaining the free flow of information and thus allowing the public to make informed decisions; (2) those interests outweigh the likely evidentiary costs of such a privilege; (3) there is a national consensus favoring such protection, as reflected in the statutes and/or common laws of 49 states and the District of Columbia, as well as the Department of Justice's own internal guidelines for subpoenaing the press; and (4) the New York State Shield Law, which the Court may properly consider in recognizing a common law privilege, provides absolute protection against the disclosure of confidential sources.

The Government responds by arguing that the Court may not recognize such a privilege because *Branzburg*, even though it was decided three years prior to the adoption of Rule 501 and long before the development of our national consensus favoring a privilege, decided the question once and for all. Gov't Opp. II at 32-33. The Government also argues that there is "no consensus for an absolute reporter's privilege," or one that would preclude enforcement of the particular type of non-party subpoenas at issue here. *Id.* As shown below, the Government's arguments are unavailing.

The Government argues first that in light of *Branzburg*, it would be "inappropriate" for this Court to undertake the analysis mandated by the Supreme Court in *Jaffee*. Gov't Opp. II at 33. It is hardly "inappropriate," however, for this Court to do precisely what is required by Rule 501. If, as Congress insisted, the law of privilege is to be both fluid and reflective of changing times and circumstances, to suggest that the law of privilege was set in stone in 1972 is to reject the essence of Rule 501 and the very concept of a developing federal common law of privilege. Congress could hardly have been clearer that its intent in enacting Rule 501 was to authorize the courts to re-examine the reporter's privilege issue in the years after

Branzburg. See 120 Cong. Rec. H 12254 (1974) (Congressman Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, stated when presenting the Conference Report to the House that Rule 501 was “not intended to freeze [the] law of privileges as it now exists,” and its language “permits the courts to develop a privilege for newspaper people on a case-by-case basis.”). Indeed, if a court did not consider changed circumstances since *Branzburg* in analyzing the existence of a reporter’s privilege under federal common law, it would be eschewing the very role Congress intended it to play.⁸

While the Government spends several pages of its second opposition brief quoting and paraphrasing the reasoning of *Branzburg*, it does not (and cannot) dispute that the protections afforded reporters around the country have been expanded dramatically since that opinion was decided in 1972. See Pl. Br. at 35-40. As *Jaffee* makes clear, that is one of the most relevant inquiries in evaluating the existence of a privilege. *Jaffee*, 518 U.S. at 12-13. That 49 states and the District of Columbia now agree that a journalist’s confidential sources are deserving of protection to promote the free flow of information to the public cannot be lightly ignored. Indeed, as *Jaffee* instructs, “the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend . . . an existing one.” *Id.* To deny the existence of a federal common law privilege in the face of the States’ near-unanimous recognition that such protection is indeed critical to maintaining a citizenry informed about important issues of

⁸ The Government argues that Congress’ failure to pass a federal shield law since *Branzburg* is a “clear[] indicator” that a privilege should not be recognized. Gov’t Opp. II at 34 n.20. If the courts always waited for Congress to enact testimonial privileges before finding them under federal common law however, the common law would always be superfluous, rendering Rule 501 meaningless and simply ignoring *Jaffee*.

our day “would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.” *Id.*

The Government’s only attempt to address the building consensus among the States is to assert, without citing any cases or statutes, that there is “no consensus for an absolute reporter’s privilege, much less a privilege that would preclude the enforcement of the subpoenas at issue in this case[.]” Gov’t Opp. II at 33.

In arguing that there is no consensus for an absolute privilege, the Government tellingly does not (because it cannot) dispute the existence of such a consensus for a *qualified* privilege.⁹ In any event, several States, including New York, have enacted or recognized absolute protection for confidential sources. *See* N.Y. Civ. Rights Law § 79-h (McKinney 1992); *see also, e.g.*, D.C. Code Ann. §§16-4702(1), 4703(b) (2001). As noted in our opening brief, the Court may take special notice of the New York Shield Law in recognizing an absolute common law privilege. *See* Pl. Br. at 38-39 (citing, *e.g.*, *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987) (finding that in federal question cases courts should not “ignore New York’s policy of giving protection to professional journalists” under the Shield Law)).

In *Baker*, the Second Circuit noted that the trial judge had looked to the New York Shield Law “[t]o inform his judgment concerning appropriate federal public policy in the area of a newsmans’ privilege.” 470 F.2d at 781. The *Baker* court agreed that looking to the

⁹ Although we believe that the Court should recognize an absolute privilege under federal common law (as was done in *Jaffee*), at the very least it would be appropriate for the Court to recognize a broadly applicable qualified privilege.

New York Shield Law was appropriate, stating that “New York . . . State law, while not conclusive in an action of this kind, 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.” *Id.* at 782 (citation omitted). Significantly, at the time that *Baker* was decided, the New York Shield Law provided only for a qualified privilege. *See* N.Y. Civil Rights Law § 79-h (as added by L. 1970, ch. 615, § 1). Not surprisingly, therefore, *Baker* only recognized a qualified privilege. In 1990, however, the Shield Law was amended to provide for absolute protection for information gathered by the press in confidence, including the identity of confidential sources. *See* N.Y. Civil Rights Law § 79-h (as amended by L. 1990, ch. 33, § 1). Because, as *Baker* stated, it would be appropriate for the Court to look to the New York Shield Law in determining the extent of the reporter’s privilege under federal common law, this amendment points strongly toward the development of an absolute privilege for confidential sources.

The adoption of an absolute common law privilege, as opposed to qualified balancing test, is also supported by the Supreme Court’s decision in *Jaffee*. There, the Court explicitly rejected the balancing test implemented by the Court of Appeals for the Seventh Circuit on the following grounds:

Making the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in [*Upjohn v. United States*], if the purpose of the privilege is to be served, the participants in the confidential conversation “must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”

518 U.S. at 17-18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)). The same concerns should animate this Court’s decision in recognizing an absolute journalist’s privilege under federal common law.

The Government also suggests that a privilege should not be recognized under federal common law because the precise contours of the privilege would be difficult to fashion. Gov’t Opp. II at 37 n.22. As examples, the Government points to the issues of who should hold the privilege and who should have the right to waive it. *Id.* The States, however, have had little difficulty defining who is covered by the privilege. For example, the New York Shield law protects 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[.]” N.Y. Civ. Rights Law § 79-h(a)(6) (McKinney 1992). The D.C. Shield Law protects anyone employed by the news media, broadly defined to include, *inter alia*, “[a]ny printed, photographic, mechanical or electronic means of disseminating information to the public.” D.C. Code Ann. § 16-4701(9) (2001). Similarly, Delaware protects anyone earning his or her principal livelihood by “obtaining, or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds or images in a form available to the general public.” Del. Code Ann. tit. 10 § 4320(4) (Michie 1999 & Supp. 2002). And Minnesota protects any person “who is or has been directly engaged in the gathering, procuring, compiling, editing or publishing of information . . . to the public.” Minn. Stat. § 595.023 (West 2000). As for the waiver issue, almost every federal and state court to have considered the question has held that the reporter’s privilege belongs to the reporter, not the source. *See, e.g., United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *Ventura v. Cincinnati Enquirer*, No. Civ. A. C-1-99-793, 2001

WL 1842471, at *4 (S.D. Ohio Aug. 7, 2001); *Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984); *Los Angeles Memorial Coliseum Commission v. National Football League*, 89 F.R.D. 489, 494 (C.D. Cal. 1981); *Diaz v. Eighth Judicial District Court*, 993 P.2d 50, 57 (Nev. 2000); *In re Paul*, 513 S.E.2d 219, 223-24 (Ga. 1999).

The Government also urges that the existence of the Department of Justice's Guidelines argues against the recognition of a common law privilege. Gov't Opp. II at 38. The argument is particularly disingenuous in light of the position espoused one page later in the Government's brief that the Guidelines are simply internal prosecutorial protocols that have no force or effect in this case. *See id.* at 39-41. In any event, the Government misses our point. At the least, the Guidelines evidence a consensus that reporters must be afforded protection even in the context of the federal criminal justice system. That is a significant factor under *Jaffee* in analyzing whether a privilege should be recognized under Rule 501.

In response to the unrebutted testimony of the six individuals who have submitted affidavits to this Court attesting to the fact that the flow of information to the public would be seriously impaired if the Government were permitted to compel the identity of a reporter's confidential sources, the Government can only say that their view is "speculative" citing, once again, to *Branzburg*. Gov't Opp. II at 37 (quoting *Branzburg*, 408 U.S. at 691). But, again, much has changed since *Branzburg*, including mounting empirical evidence confirming what common sense would suggest: that in the absence of protections for confidential sources, the public is deprived of important information, particularly information about the workings of government. *See, e.g.*, J.E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 Colum. Hum. Rts. L. Rev. 57 (1985); M. Langley & L.

Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 Geo. Wash-
ington L. Rev. 13, 25-33, 41 (1988). Moreover, *Branzburg*'s suggestion that the proponent of a
common law privilege had failed to submit sufficient empirical proof that the lack of such a
privilege would deter confidential communications, 408 U.S. at 690-91, 693, has not survived
Jaffee. There, the Court did not demand empirical proof regarding the percentage of confidential
psychotherapist-patient relationships likely to be affected by the denial of a privilege. Rather,
the Court relied largely on common sense and the prospect that "the mere possibility of disclo-
sure *may* impede development of the confidential relationship necessary for successful treat-
ment." *Jaffee*, 518 U.S. at 10 (emphasis added). The Court further suggested that, without
promises of confidentiality, patients might be less than completely frank with their therapists or
unwilling to talk about embarrassing facts, emotions, memories, or fears. *Id.* at 10-11. In short,
Jaffee, along with other post-Rule 501 cases, significantly lowers the bar in terms of requiring
empirical support for the recognition of a common law privilege. *See also Swidler & Berlin v.*
United States, 524 U.S. 399, 409-410 & n.4 (1998) (recognizing posthumous application of the
attorney-client privilege notwithstanding scant empirical proof concerning its impact); *Trammel*
v. United States, 445 U.S. 40, 51-52 (1980) (recognizing, under Rule 501, exception to marital
privilege without reference to any empirical evidence as to the likely impact of not recognizing
the exception). *See generally* E. Chemerinsky, *Protect the Press: A First Amendment Standard*
for Safeguarding Aggressive Newsgathering, 33 U. Rich. L. Rev. 1143, 1147-48 (2000).

Finally, the Government argues that the record before this Court "is even more
speculative" than the record in *Branzburg* because the "reporters [here] may be witnesses to an
illegal leak of information." Gov't Opp. II at 37. What the Government glosses over, again, is
that this case is not about the harm that would result from the disclosure of a single source. At

stake here are dozens of confidential sources, most of whom provided vital information to Ms. Miller and Mr. Shenon about subjects as important as the existence of weapons of mass destruction in Iraq; cooperation between Pakistani intelligence and Al Qaeda; a potential smallpox epidemic; the spread of anthrax; and the 9/11 Commission — all of which have nothing to do with the Government's apparent investigation. The potential for harm is certainly not, as the Government urges, more speculative than it was in *Branzburg* or any other case where the identity of a single source may be compromised. Surely, the compelled disclosure of even one confidential source would cause immeasurable harm to a journalist's ability to gather news. The harm caused by the compelled disclosure of the numerous irrelevant sources that are in danger here, however, is significantly more concrete, if not palpable.

III. THE GOVERNMENT HAS NOT BEGUN TO MAKE THE SHOWING NECESSARY TO OVERCOME THE REPORTER'S PRIVILEGE

If, as we have urged, this Court were to ground its decision in an absolute privilege under federal common law, no further inquiry is required. The Times's cross-motion for summary judgment should be granted and the Government's cross-motion for summary judgment should be denied.

If, however, the Court were to apply the qualified privilege recognized by the Supreme Court and 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. The Government must demonstrate that its interest in the information outweighs the harm to First Amendment interests that would result from disclosure and it

must meet its burden of showing that the Times's telephone records are (1) highly material and relevant, (2) necessary or critical to the maintenance of the claim, and (3) not obtainable from other available sources. *See Petroleum Products*, 680 F.2d at 7; *Burke*, 700 F.2d at 77-78. The Government has completely failed to meet its burden.

In its Second Opposition brief, the Government claims in the most conclusory fashion that “[i]t is obvious from the nature of the investigation . . . and the nature of the information sought,” that it has satisfied the three-part *Petroleum Products* test. *See Gov't Opp. II* at 42. It is far from “obvious,” however, that the Government has even begun to make that showing. First, the Government has made no showing that the many sources of The Times having nothing to do with this investigation could possibly be both “highly material and relevant” and “necessary or critical” to the maintenance of its investigation.

Furthermore, the Government has plainly failed to demonstrate that it has exhausted all reasonable alternative sources of the identity of the leaker(s). The only evidence submitted by the Government in this regard is the statement of Patrick J. Fitzgerald in his affirmation that the Government “reasonably exhausted alternative investigative means.” *See Affirmation of Patrick J. Fitzgerald*, ¶ 8. Surely, when the Second Circuit crafted the “exhaustion” requirement of the qualified privilege, it did not intend for that requirement to be overcome merely by a self-fulfilling conclusory assertion. If it were so easy to overcome the privilege, confidential sources would never be protected. Mr. Fitzgerald's affirmation does not demonstrate whether the Government has interviewed all government employees with access to the “leaked” information, whether it has examined the telephone records of all those employees, or what other steps it has taken that would avoid the need to engage in an intrusion of the re-

porter/source relationship so large and offensive that it would force disclosure of dozens of sources that have nothing to do with the Government's purported needs.

Similar assertions were expressly rejected in *In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd*, 963 F.2d 567 (3d Cir. 1992), a case that involved an investigation into the identity of the person who improperly leaked an FBI report to the news media. In *Williams*, the Government served grand jury subpoenas on a reporter and various media outlets. Opposing a motion to quash, the Government argued that "there are no reasonable alternative avenues of investigation" because it would not be "feasible" to interview the "hundreds of persons" who had access to the report. The Court, in a decision affirmed by the Third Circuit without an opinion, rejected the Government's claim, finding that "not only is the Government's effort to obtain the information from other sources feasible, but it is also necessary." *Id.* at 369. Indeed, courts have repeatedly held that those seeking to compel disclosure of confidential sources by the media must first conduct as many as 60 depositions before the exhaustion requirement will be met. *See In re Roche*, 448 U.S. 1312 (1980) (Brennan, J., as Circuit Justice, staying order of contempt against reporter where identity of confidential sources could have been discovered through depositions of 65 other witnesses); *Petroleum Products*, 680 F.2d at 9 & n.11 (noting that requiring 60-65 depositions to discover confidential source before contempt sanctions are imposed on a reporter was reasonable); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981) (stating that "requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure").

Nor has the Government even begun to demonstrate how its purported interest in obtaining Ms. Miller's and Mr. Shenon's telephone records outweighs the immense harm to First

Amendment interests that would result from compelled disclosure. The Government dismisses, but does not in any way rebut, the six affidavits before the Court, which set forth in detail the critical First Amendment interests that are at stake in this case.¹⁰ For its part, the Government merely claims that “[t]he court may take judicial notice of the fact that it is widely known that records of telephone service providers are available to the government, and to date that common knowledge has had no apparent impact [sic] on the availability of source information, including information delivered by telephone.” Gov’t Opp. II at 44-45. Notwithstanding this assertion, it is not at all clear that the Government can freely obtain journalists’ telephone records from their telephone companies — that is, after all, the subject of this lawsuit — much less that there is some kind of conventional wisdom of this fact. The Government essentially asks the Court to take judicial notice of the Government’s own opinion that compelled disclosure of telephone re-

¹⁰ See e.g. Affidavit of Judith Miller, ¶ 14 (“Based on my years of experience as an investigative journalist, I firmly believe that allowing the government to obtain the identity of reporters’ sources by issuing subpoenas to the reporters’ telephone companies, would seriously impede the ability of all reporters to gather and report the news.”); Affidavit of Philip Shenon, ¶ 12 (“Based on my extensive experience as an investigative journalist, I strongly believe that allowing the government to obtain the identity of my sources would greatly hinder my ability to gather and report news in the future, as well as that of all reporters.”); Affidavit of Scott Armstrong, ¶ 19 (“In my professional opinion, if this court allows prosecutors to view journalists’ phone records and identify a large number of confidential sources, it would do catastrophic damage to the quality of information available on national security issues.”); Affidavit of Jack Nelson, ¶ 8 (“[I]f the government is successful in its attempt and learns the identities of sources for not only the Global Relief stories but any other stories on which the reporters worked during that time period, it would have a severe chilling effect on sources and not only damage the reporter’s ability to do his job, but the ability of all reporters covering government to do their jobs.”); Affidavit of Jeffrey H. Smith, ¶ 7 (“[B]ecause of the vital role the news media plays in a democratic system of government, the government should have to meet a very high burden to justify either compelling members of the news media to disclose their sources or obtaining the identities of those sources through compelled disclosure of third-party records.”); Affidavit of Anna Nelson, ¶ 5 (“Requiring journalists to reveal the identities of their sources, or obtaining the identity of those sources through telephone record subpoenas, would impoverish our knowledge of contemporary history since confidential sources are often the only sources available to the journalist and thus the original source for historians seeking to unravel public policy or foreign policy.”).

cords revealing dozens of confidential sources would have no effect on newsgathering capabilities. The Government's request is improper and its conclusion — contradicted by six sworn affidavits — is flawed.¹¹

Apparently uncomfortable with its failure to provide any evidentiary support for its claim that it has met the Second Circuit's three-part test to defeat the privilege, the Government explains that it certainly would have liked to but that it was precluded from doing so by the constraints of Federal Rule of Criminal Procedure 6(e). The argument is frivolous. On its face, Rule 6(e) provides a mechanism whereby the Government *easily* could have put supporting grand jury materials regarding the nature and scope of its investigation before this Court. The Rule states that the court where the grand jury is sitting may authorize disclosure of secret grand jury information "in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). All the Government would have to do to put such information in the record here is request the Chief Judge of the Northern District of Illinois to allow the transfer of such materials as are necessary under seal to this Court. *See* Fed. R. Crim. P. 6(e)(3)(G). In fact, Rule 6(e) expressly contemplates that this Court is likely to be in a better position to determine how grand jury materials impact this case more so than any other.

¹¹ Attempting unsuccessfully to further downplay the First Amendment interests at stake, the Government makes the preposterous claim that "[m]ere telephone records alone will not identify any confidential source but rather, at best, will supply leads which, with additional investigation, will enable the government to identify the source of the subject disclosures." Gov't Opp. II at 43-44. Of course, the First Amendment interests at stake in this case are the same whether the Government compels the names of The Times's confidential sources, or "merely" their telephone numbers.

The Government cites *In re Sealed Case*, 250 F.3d 764 (D.C. Cir. 2001), for the proposition that it “is precluded from disclosing matters occurring before the grand jury, even to this Court.” Gov’t Opp. II at 42 n.24. What that case actually demonstrates, however, is how easily the Government could have submitted grand jury materials in this case. In *Sealed Case*, the D.C. Circuit held that the Government had improperly disclosed secret grand jury matters to another district court *on its own*, without making a petition to the court supervising the grand jury. The Court observed that the “proper course” would have been simply to petition the court supervising the grand jury — something that the Government apparently could not be bothered to do here. 250 F.3d at 770. *See also In re Grand Jury Proceedings (Miller Brewing Co.)*, 687 F.2d 1079, 1098 (7th Cir. 1982) (affirming district court’s decision to grant Government’s request to disclose certain grand jury materials in connection with a judicial proceeding pursuant to former Rule 6(e)(3)(C)(i), now found at Fed. R. Crim. P. 6(e)(3)(E)(i)).

The Government acted at its own peril when it chose to make no real factual submission in this case even after the Court gave it a second chance to do so. As shown herein, the Government has completely failed to meet its burden.

IV. THE DEPARTMENT OF JUSTICE GUIDELINES CREATE A PRIVATE RIGHT OF ACTION FOR JOURNALISTS TO CHALLENGE THE GOVERNMENT’S EFFORTS TO COMPEL DISCLOSURE OF CONFIDENTIAL SOURCES

In response to our argument that the Government has violated its own guidelines in seeking a broad swath of the Times’s telephone records, the Government insists that the Department of Justice Guidelines, 28 C.F.R. § 50.10 (2004), do not confer any rights upon members of the press. Two of the cases cited by the Government in support of this argument, however,

are inapposite because they involved a special prosecutor or Independent Counsel to whom the Guidelines do not fully apply. See *In re Special Proceedings*, 373 F.3d 37, 44 & n.3 (1st Cir. 2004) (“The regulations are not themselves binding on the special prosecutor . . . [because] a special prosecutor is not a member of the Justice Department.”); *In re Grand Jury Subpoena American Broadcasting Cos.*, 947 F. Supp. 1314, 1322 (D. Ark. 1996) (“To require the Independent Counsel to obtain express authorization of the Attorney General for issuance of this subpoena would be contrary to the purpose of the [Independent Counsel] statute.”). Moreover, the only case cited by the Government that squarely addresses the enforceability of these DOJ guidelines (as opposed to other Department of Justice Guidelines or other agency regulations) does so only in *dicta*, having already held that the Government had complied with the Guidelines. See *In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992) (“There is no question that the government’s attorneys did follow the prescribed procedure for securing authorization from the Attorney General.”). At the same time, the Government has no answer to the cases cited in our opening brief which hold unequivocally that the DOJ guidelines *do* create a private right of action and the Government must satisfy their strict requirements before issuing subpoenas. See Pl. Br. at 44-45 (citing, *e.g.*, *In re Williams*, 766 F. Supp. at 371 (“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.”); *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 that 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 our opening brief we cited *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), which holds that it is incumbent upon agencies to follow their own procedures. Pl. Br. at 45 n.19. The Government argues that *Morton* is distinguishable because it concerns regulations whose “nature” and “purpose” is to “confer substantive and procedural benefits” on those seeking to assert them. Gov’t Opp. II at 40 & n.23. Far from illustrating a distinction, however, the Government demonstrates precisely why *Morton* favors recognition of a private right of action under the guidelines. The 1980 amendment to the guidelines that guards against subpoenas for telephone records 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. See R. Pear, *Justice Dept. Restricts Subpoenas for Reporters and Phone Records*, N.Y. Times, Nov. 13, 1980, at A30. The 1980 amendment is just the kind of regulation discussed in *Morton*.¹² It is difficult to imagine any intended beneficiary of the 1980 amendments other than the *Times* reporters in this case and those similarly situated. Other courts, employing this reasoning, have relied on the Guidelines as an independent ground for quashing Government subpoenas directed to the news media. See *In re Williams*, 766 F. Supp. at 371 n.13 (citing *Morton*); *Blanton*, 534 F. Supp. at 297 (same).

The Government has also failed to make any showing that it complied with the Guidelines in this case. The Government has failed, for instance, to articulate any “exigent circumstances” that require the government to seek more than the authentication of published in-

¹² The 1980 amendment provides, *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).

formation, as required by the Guidelines. *Id.* at § 50.10(f)(4). Nor does the Government demonstrate that the numerous confidential sources it will obtain are “essential to a successful investigation,” and are not “peripheral, nonessential, or speculative.” 28 C.F.R. § 50.10(f)(1). The Guidelines also require — and the Government has not shown — that “[a]ll reasonable attempts should be made to obtain information from alternative sources” and “all reasonable alternative investigative steps should be taken” before even *considering* issuing a subpoena for a reporter’s telephone records. *Id.* at § 50.10(b). As discussed *supra*, Section III, the Government has submitted no evidence that would even begin to demonstrate that it has complied with these provisions. The Government has shown no indication that it is attempting to strike a “proper balance,” let alone to value the “public’s interest in the free dissemination of ideas and information,” as its own guidelines require. *Id.* at §50.10(a).

CONCLUSION

This Court should deny the Government's Cross-Motion for Summary Judgment and should grant the Cross-Motion for Summary Judgment of The Times.

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Respectfully submitted,

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