

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

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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 MOTION FOR SUMMARY JUDGMENT**

FLOYD ABRAMS
SUSAN BUCKLEY
BRIAN MARKLEY
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for The New York Times Company

Of Counsel:

GEORGE FREEMAN
The New York Times Company

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PRELIMINARY STATEMENT

The Government's brief in further support of its motion to dismiss and in support of its "request" to suspend briefing on and defer consideration of The Times' motion for summary judgment is truly a remarkable submission. The same Government that agreed to a briefing schedule for Plaintiff's summary judgment motion now simply ignores the deadline it agreed to and ignores this Court's Order adopting that schedule. Gov't Opp. at 5 n.1.¹ The same Government that refused, when asked, to reveal whether its efforts to obtain telephone records was in aid of a grand jury investigation, let alone a grand jury sitting in Chicago, now excoriates The Times for seeking relief in this Court, rather than in Chicago, claiming that The Times is engaged in "procedural fencing" and "forum shopping." *Id.* at 3, 15-16. The same Government that insists that The Times' only recourse is to move to quash refuses *even now* to state whether any subpoenas have, in fact, been issued or to explain how such a motion could provide any relief as to documents the Government may already have obtained but not reviewed. And the same Government that condemns The Times in the most deliberately headline-seeking and sensationalized manner for having supposedly "compromised" its investigation simultaneously relies on public statements that say, in so many words, that nothing was compromised because no documents were destroyed after or in response to The Times' interviews with GRF representatives.

The Court will recall that The Times twice requested that the Government agree on a means to submit this dispute to a court of law for resolution. *See* November 12, 2004 Affidavit of Floyd Abrams ("Abrams Aff't"), Ex. 4 at 2; Ex. 6 at 5. The Government declined to do so. When The Times sought to meet with a high-ranking Justice Department official to see if it were possible to resolve this matter without the need of judicial intervention, he bluntly refused

¹ References to "Gov't Opp." are to Defendants' "Reply Memorandum 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."

to do so. *Abrams Aff't*, Ex. 7 at 1. To suggest, in light of those facts, that it is The Times that has acted improperly in finally turning to this Court for declaratory relief is simply disingenuous.

It is not difficult to divine why the Government is behaving in such a fashion. The Government well knows that whatever standard this Court applies in considering The Times' motion seeking to protect its confidential sources, the Government cannot begin to shoulder its burden of defeating the privilege for the simple reason that the records sought would reveal the identity of literally dozens of confidential sources having *nothing* to do with the grand jury's investigation. The Government can thus meet no test at all, and its solution to that dilemma is to decline even to try to do so. So be it. The consequence of the Government's willful gamesmanship is that our motion must, on this record, be granted.

As for the Government's motion to dismiss, now "supported" by a factual affidavit based largely on previously furnished inadmissible hearsay supplemented by new inadmissible hearsay (submitted on reply, no less), it is equally meritless. The Government cannot show that a statutory procedural alternative to this declaratory judgment action exists. Nor is it any answer for the Government to say, now, that The Times should have filed a motion elsewhere to quash subpoenas that — if they have been served at all — may well have been complied with months ago. The Government would not even tell The Times until it was brought before this Court that there was a grand jury sitting in the Northern District of Illinois conducting a leak investigation. To suggest that The Times must now seek relief from that district and to urge, at the same time, that no court (including that court) can provide The Times with any relief from the overreaching subpoenas still threatened by the Government is unpersuasive at best. What it demonstrates, at the very least, is that this action was both necessary and proper and, indeed, that it is the very type of action envisioned by the Declaratory Judgment Act.

In the end the Government is left to exclaim that The Times is trying to "enjoin" the work of a grand jury sitting in another district and is "encroach[ing] on" the authority of the

Chief Judge of the Northern District of Illinois in the process. Gov't Opp. at 9, 14-15. Neither, of course, is true. The Times is here in New York; so are the telephone companies that serve it. Venue is (as the Government's failure to object to it demonstrates) proper here, and declaratory relief is, accordingly, appropriate here. As for The Times' motion, it was duly scheduled and should be heard at this time by this Court. The Government's posturing, threats and about-faces have gone on long enough; it is time for this matter to be resolved.

ARGUMENT

In its two briefs, the Government does not (as it cannot) dispute that the telephone records it seeks will reveal the identities of dozens of confidential sources having nothing to do with its investigation. *See* November 12, 2004 Affidavit of Judith Miller ("Miller Aff't"), at ¶ 13; November 9, 2004 Affidavit of Philip Shenon ("Shenon Aff't"), at ¶ 11. Nor does the Government deny in either of its two briefs that this Court has jurisdiction over this matter pursuant to Article III, Section 2 of the United States Constitution and 28 U.S.C. §§ 1331 and 1446, or that venue is appropriate under 28 U.S.C. § 1391. *See* Times Br. at 2.² The Government also never disputes that the Declaratory Judgment Act "should be liberally construed" to accomplish its intended purpose, *i.e.*, "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." *Beacon Construction Co. v. Matco Electric Co.*, 521 F.2d 392, 397 (2d Cir. 1975) (citation omitted). Instead, the Government bases its entire legal argument in support of its motion to dismiss on a seldom-used and narrowly crafted "exception" to the broad applicability of the Declaratory Judgment Act, an exception that arises only where a "special statutory proceeding" exists for the

² References to "Times Br." are to 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."

adjudication of the claims at issue. As set forth below and in The Times' opening brief, there is simply no authority for applying this narrow exception here.

The "special statutory proceeding" exception finds its roots in a single sentence in the Advisory Committee Notes to Fed. R. Civ. P. Rule 57 (1937).³ Although those notes were authored nearly 70 years ago, the exception has been invoked in only a handful of reported cases involving discrete statutory remedies.⁴ No court has ever held that a motion to quash or any other action authorized by the Federal Rules of Criminal or Civil Procedure constitutes a "special statutory proceeding" for purposes of Rule 57.

The only case cited by the Government in support of its argument that the "special statutory proceeding" exception should be applied here is *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964), a case that defeats rather than advances the Government's claim. In *Katzenbach*, the Supreme Court concluded that, notwithstanding the broad right to seek relief under the Declaratory Judgment Act, sections 204 through 207 of Title II of the Civil Rights Act of 1964 created a "special statutory proceeding" for determination of parties' rights and duties under that statute, including specifically tailored substantive remedies created by Congress.⁵ As such, the Court

³ Tellingly, in neither of its two briefs does the Government even quote the entire relevant sentence of the Advisory Committee Notes, the second half of which states, "general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings." *Id.*

⁴ As set forth in The Times' opening brief, the exception has been applied only in cases where the alternative remedy was a petition for habeas corpus, motions to vacate a criminal sentence, proceedings under the Civil Rights Act of 1964, and certain administrative proceedings. *See* Times Br. at 19 (*citing, e.g., Clausell v. Turner*, 295 F. Supp. 533, 536 (S.D.N.Y. 1969); *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964); *Pennsylvania Nurses Ass'n v. Commonwealth of Pennsylvania*, Civ. No. 86-1586, 1991 WL 120200, at *2 (M.D. Pa. Aug. 8, 1988); *Deere & Co. v. Van Natta*, 660 F. Supp. 433, 436 (M.D.N.C. 1986); *Cavanaugh v. Texas Instruments, Inc.*, 440 F. Supp. 1124, 1128 (S.D. Tex. 1977)).

⁵ Section 204 of Title II authorizes civil actions for preventive relief, including permanent or temporary injunctions and restraining orders, and it specifically permits intervention in those actions

Footnote continued on next page.

found, relief under the Declaratory Judgment Act was unavailable to those invoking rights under Title II.

There is no analogous statutory scheme here as the Government's strained efforts to manufacture one reveals. The only "statute" the Government can point to in this case is 18 U.S.C. § 3484. That statute provides in its entirety:

§ 3484. Subpoenas — (Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Form, contents and issuance of subpoena, Rule 17(a).

Service in the United States, Rule 17(d), (e)(1).

Service in foreign country, Rule 17(d), (e)(2).

Indigent defendants, Rule 17(b).

On taking depositions, Rule 17(f).

Papers and documents, Rule 17(c).

Disobedience of subpoena as contempt of court, Rule 17(g).

18 U.S.C. § 3484. Because Rule 17 is referenced in section 3484, the Government reasons, the Rule is really sort of a "statute" after all. Gov't Opp. at 8-9. And, because the Rule establishes a

Footnote continued from previous page.

by the United States Attorney General. Section 204 also authorizes district courts to appoint an attorney for the complainant in a Title II action, to award attorneys fees, waive fees, costs, or security to commence the action, and refer actions to the Community Relations Service established by Title X of the Act. Section 205 authorizes the statutorily created Community Relations Service to make a full investigation of any complaint referred to it and to hold hearings, with specific guidelines, as necessary. Section 206 grants authority to the Attorney General to bring civil actions with specifically defined criteria, authorizes the Attorney General to seek a three judge court, and authorizes the chief judge of the circuit or the presiding circuit judge to designate judges to hear and determine the case. Finally, Section 207 states that district courts shall have jurisdiction of all proceedings under Title II and shall exercise that jurisdiction regardless of whether the parties have exhausted all administrative or other remedies. *See* 42 U.S.C. §§ 2000a-3 to 2000a-6 (2000).

“procedure” for moving to quash subpoenas, it should therefore be viewed as a “special statutory proceeding.” Simply to state the argument exposes the desperation of the Government’s theory. *Id.*

Neither Rule 17, or for that matter section 3484, contains remedies even remotely similar in substance and specificity to the carefully constructed remedies in Title II that were considered by the Supreme Court in *Katzenbach*. Rule 17(c) merely provides that “[o]n motion made promptly, the court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive.” Section 3484, set forth above, simply refers the reader to Rule 17. The Government’s unsupported assertion that section 3484 triggers the narrow exception to Rule 57 because it is a “statute” and its equally untenable claim that Rule 17 provides for a “proceeding” that is “specially tailored” for situations such as this are implausible arguments at best. Indeed, under the Government’s theory, any procedure available under the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure (all of which are referenced in the United States Code) would suffice to satisfy the “special statutory proceeding” requirement. Such logic would turn the Declaratory Judgment Act into a wholly unavailable vehicle for obtaining relief and an utterly superfluous Act of Congress. That is not the law nor could it be.

The Government also argues that despite clear precedent, this Court is not required to entertain The Times’ motion for declaratory relief even if it determines that the judgment either (1) will serve a useful purpose in clarifying and settling the legal relations at issue, or (2) will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding. The Government’s argument is rooted in *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286-87 (1995). In *Wilton* the Supreme Court held that a district court has discretion in determining whether or not to entertain a claim for declaratory relief. But nothing in *Wilton* is inconsistent with the cases cited in The Times’ opening brief, several of which were decided long after *Wilton* was. The cases cited by The Times explicitly recognize that courts have discretion in exercising jurisdiction over certain actions for declaratory relief. But what those cases hold is

that *if* a court determines that *either* prong of the largely subjective two-prong test is met, the court *must* entertain jurisdiction. *See Starter Corp. v. Converse, Inc.*, 84 F.3d 592, 597 (2d Cir. 1996) (“While 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 Co. v. Coastal Savings Bank*, 977 F.2d 734, 737 (2d Cir. 1992)) (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).⁶

In any event, even if the Court were not required to exercise jurisdiction over this action, it should do so. As set forth in The Times’ opening brief, declaratory relief is designed to provide “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

⁶ *See also Digigan, Inc. v. iValidate, Inc.*, No. 02 Civ. 420 (RCC), 2004 WL 203010, at *3 (S.D.N.Y. Feb. 3, 2004) (“A district court ‘must 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.’”) (internal citation omitted); *Spirit Partners, L.P. v. audiohighway.com*, No. 99 Civ. 9020 (RJW), 2000 WL 685022, at *9 (S.D.N.Y. May 25, 2000); *BankBoston (Guernsey) Ltd. v. Schupak*, No. 99 Civ. 0876 (BSJ), 2000 WL 423526, at *2 (S.D.N.Y. Apr. 18, 2000).

and in cases in which a party who could sue for coercive relief has not yet done so.” *See* 10B C.A. Wright, A.R. Miller & M.K. Kane, *Federal Practice and Procedure: Civil 3d* § 2751, at 456 (1998). Here, the Government still refuses to state whether or not the records it has repeatedly told The Times it wants have already been subpoenaed, whether they have been obtained, and whether they have been reviewed. Even after extensive correspondence, direct questions posed by The Times’ counsel, and a full round of briefing, the record is barren on all aspects of these questions *except* the Government’s intent to obtain and review the records. Declaratory relief is thus not just an appropriate remedy, it is the only remedy to provide complete relief. While the Government continues to argue that The Times “need only file a motion to quash” in the Northern District of Illinois to obtain the relief it seeks (Gov’t Opp. at 12), it repeats, simultaneously, that no court, whether in the Northern District of Illinois or anywhere else, can properly quash subpoenas that have been threatened but have not yet been issued.⁷ Thus, the “alternative” offered by the Government is, by its own admission, no alternative at all.

The Government’s only other response to The Times’ assertion that it cannot receive complete relief on a motion to quash is to assert again that The Times has no standing to contest the propriety of subpoenas that have been threatened but have not yet been issued. *See* Gov’t Opp. at 13 (“[T]he propriety of subpoenas which may or not be issued in the future is not a claim or controversy conferring jurisdiction upon the Court.”). This is not, however, a situation

⁷ The Government states that The Times’ fear of future subpoenas is unwarranted because “[t]here is no basis to speculate that, if a decision is made to issue additional subpoenas for records of Times reporters in the future, notice would not be given to plaintiffs as it was in this case.” Gov’t Opp. at 13. This assertion ignores the fact that the “notice” provided to The Times in August 2002 and July 2004 failed to indicate that The Times’ telephone records were being sought in connection with a grand jury investigation, much less one pending in Illinois. *Abrams Aff’t ¶ Exs. 1, 3*. More fundamentally, the Government misses the point that The Times does not know whether any or all of the “noticed” (*i.e.* threatened) subpoenas for its telephone records have yet been issued. Moreover, as noted in The Times’ opening brief, a motion to quash would be ineffective in protecting The Times against the Government’s review of records that it may have already obtained. *See* Times Br. at 20.

where potential harm to The Times is “hypothetical or abstract.” Wright, Miller & Kane, *supra*, § 2757, at 468 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)). The Government has explicitly and repeatedly threatened to subpoena The Times’ telephone records and has deliberately suggested either that such subpoenas are imminent or that The Times’ telephone records have already been obtained but not yet reviewed. Moreover, in making this argument, the Government tellingly ignores the cases cited in The Times’ opening brief holding that the “actual controversy” requirement of Article III and the Declaratory Judgment Act is relaxed when First Amendment rights are involved. *See* Times Br. at 15-16 (*citing, e.g., City of Houston v. Hill*, 482 U.S. 451, 459 n.7 (1987); *Steffel v. Thompson*, 415 U.S. 452, 458-59 (1974); *Carlin Communications, Inc. v. Smith*, No. 83 Civ. 9004 (CBM), 1984 WL 330, at *6 (S.D.N.Y. May 8, 1984), *aff’d*, 749 F.2d 113 (2d Cir. 1984); *Natco Theatres, Inc. v. Ratner*, 463 F. Supp. 1124, 1127 (S.D.N.Y. 1979).

Faced with the reality that this Court has jurisdiction, that venue is proper, that declaratory relief is appropriate and that The Times has standing to seek relief to protect itself from past, present and future subpoenas, the Government makes a last ditch effort in support of dismissal by arguing in strident terms that the relief sought by The Times is “unprecedented” and that declaratory relief is inappropriate in the context of a grand jury subpoena. Gov’t Opp. at 1-2. But if The Times cannot seek declaratory relief against the issuance of future subpoenas or against the review of materials already obtained by the Government, then it can seek no relief at all. Moreover, the propriety of the type of relief sought here by The Times was recognized by the Court of Appeals for the District of Columbia in *Doe v. Harris*, 696 F.2d 109 (D.C. Cir. 1982). In that case the court held that an individual whose records were subpoenaed from a third-party in a grand jury investigation had the right to seek declaratory and injunctive relief against those subpoenas and the issuance of *future* subpoenas by “any United States Attorney’s Office.” *Id.* at 113. The plaintiff in *Doe*, upon learning that an Assistant United States Attorney had subpoenaed and obtained his medical records from the Veterans Administration, filed a civil

action against the prosecutor, “other . . . District of Columbia law enforcement officials” and Veterans Administration officials. The plaintiff sought “a judgment declaring the subpoena and release of his medical files illegal, and an injunction barring the defendants ‘or anyone acting on their behalf’” from issuing future subpoenas for such records *Id.* at 110. In response to the lawsuit, the defendants moved to dismiss the plaintiff’s claims as moot, submitting declarations that the plaintiff’s medical records had already been obtained, but that no use had been made of them in connection with the grand jury investigation; no copies had been made; no notes had been taken; few persons had access to them; and that the government would surrender the originals. The district court dismissed the case as moot. Without ruling on the merits of the plaintiff’s claim that the subpoena was illegal, the Court of Appeals reversed and remanded the case, finding that the claim was not moot because there was a risk that a prosecutor in some jurisdiction could issue future subpoenas to reacquire the records. *Id.* at 112-13. Even though the defendants submitted declarations that they contemplated no further acquisition or use of the records, the court found that because the defendants took the position that the original grand jury subpoena was lawful and because they would not *completely* foreclose the possibility of reacquiring the records, the plaintiff had the right to seek relief against the issuance of *future* grand jury subpoenas served in any jurisdiction. *Id.* at 113 (“[W]e cannot dismiss as negligible that Doe may encounter repetition of the official conduct that gave rise to this suit. If any United States Attorney’s Office should believe Doe’s medical records relevant to a future investigation, a similar subpoena . . . would properly issue[.]”) (emphasis added). The court found such relief to be appropriate because there was a “reasonable expectation” that the plaintiff would be subjected to future subpoenas. *Id.* at 112. Here, the possibility of future subpoenas being issued is at least that likely. *See Abrams Aff’t ¶¶ 10, 12; Memorandum of Law in Support of Defendants’ Motion to Dismiss the Complaint, at 7 n.5.*

On the merits, because the Government has opted to make no submission to counter The Times’ motion for summary judgment and its assertion of privilege, we respectfully

refer the Court to pages 22 through 48 of The Times' opening brief.⁸ We add the following brief points in response to the Government's abbreviated "summary" of its position on summary judgment.

It is not entirely surprising that the Government refuses to even attempt to overcome the privilege asserted by The Times. That is because, as set forth in The Times' opening brief, there can be no justification for the wholesale disclosure to the Government of literally dozens of confidential sources bearing no relationship to *any* pending investigation. Put simply, for the Government to overcome The Times' assertion of privilege, it would have to demonstrate that the speculative possibility that Ms. Miller or Mr. Shenon telephoned a confidential source concerning government action against HLF or GRF during several weeks in the fall of 2001 and that the Times' telephone records might reveal that call, outweighs the grave harm that would inevitably result from the indiscriminate disclosure of so many confidential sources. Compelled disclosure of these sources is all the more inappropriate because the sources have nothing to do with the Government's investigation, but instead provided the journalists with confidential information about such serious and controversial matters as the Government's preparedness for the attacks of September 11; the Government's investigation of those attacks; 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 investigation.

In its "summary" of its position regarding the merits of this dispute, the Government principally argues that the reporter's privilege under the First Amendment and federal

⁸ Having failed to respond to The Times' statement submitted in compliance with Local Rule 56.1, the Government has conceded the accuracy of each of the facts set forth therein. S.D.N.Y. Loc. R. 56.1(c).

common law does not apply in the context of a grand jury. Gov't Opp. at 19-21. As the Government would have it, journalists have *no protection at all* against the release of newsgathering materials and confidential source information in the grand jury context, regardless of what little, if any, relevance those materials or sources have to any pending investigation. The Government could, under its theory, have started its "leak" investigation by subpoenaing all of The Times' telephone records or the journalists themselves, even before seeking to obtain any discovery from non-media witnesses.

The Government's theory is not only flatly inconsistent with Justice Powell's controlling concurrence in *Branzburg v. Hayes*, 408 U.S. 665 (1972), but also those courts, including the Second Circuit, that have recognized the need to balance the interests of prosecutors and the press in all circumstances, including criminal trials and grand jury investigations. As set forth in The Times' opening brief, the Second Circuit has applied the reporter's privilege in the context of a criminal trial, observing 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[.]" See *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); see also *United States v. Orsini*, 424 F. Supp. 229 (E.D.N.Y. 1976) (quashing subpoenas issued by defendant in criminal trial), *aff'd mem.*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977); cf. *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (concluding that a reporter's "interest in protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship created by compelled disclosure of sources and unpublished notes does not change because the case is civil or criminal"). The Second Circuit has also explicitly recognized that the reporter's privilege applies in the grand jury context. See *Baker v. F & F Investment*, 470 F.2d 778, 785 (2d Cir. 1972) (interpreting *Branzburg* for the proposition that "instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation"); cf. *In re Grand Jury Subpoena of Williams*, 766

F. Supp. 358 (W.D. Pa. 1991) (quashing grand jury subpoena requesting testimony concerning confidential sources), *aff'd*, 963 F.2d 567 (3d Cir. 1992) (en banc); *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (reading *Branzburg* as holding that “a qualified privilege would be available in some circumstances even where a reporter is called before a grand jury to testify”).

The Government also argues that there should be no reporter’s privilege in the grand jury context under federal common law because, the Government asserts, *Branzburg* has settled that question once and for all. Gov’t Opp. at 21. But the Government never even attempts to come to grips with Federal Rule of Evidence 501 and the Supreme Court’s ruling in *Jaffee v. Redmond*, 518 U.S. 1 (1996), which, as set forth in The Times’ opening brief, applied a radically different approach than had *Branzburg* in determining whether a privilege exists under federal common law. *See* Times Br. 31-40.

If the Court concludes, as it must, that even some balancing of interests is required by the First Amendment and federal common law, then The Times’ motion for summary judgment should be granted.

CONCLUSION

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

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Respectfully submitted,

CAHILL GORDON & REINDEL LLP

By: /s/ Floyd Abrams
FLOYD ABRAMS
SUSAN BUCKLEY
BRIAN MARKLEY
80 Pine Street
New York, New York 10005
(212) 701-3000

Of Counsel:

GEORGE FREEMAN
The New York Times Company

Attorneys for The New York Times Company