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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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| In re GRAND JURY SUBPOENA, dated February 1, 2006,<br><br>JOSHUA WOLF,<br><br>Subpoenaed Party. | No. CR 06-90064 WHA<br><br>UNITED STATES' REPLY TO BRIEF OF AMICUS CURIAE ACLU<br><br>Date: August 1, 2006<br>Time: 9:00 a.m.<br>Judge: Hon. William H. Alsup |

## I. INTRODUCTION

Pursuant to the Court's Order of July 28, 2006, the United States responds to the ACLU's amicus curiae brief on behalf of Joshua Wolf ("Wolf"). In short, the ACLU essentially parrots Wolf's counsel's main argument, i.e. that journalists have a qualified First Amendment privilege in the context of a grand jury investigation into a federal crime. And, just like Wolf's counsel, the ACLU ignores the plain meaning of the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and the Ninth Circuit's consistent decision in *In re Grand Jury*

1 *Proceedings (Scarce),* 5 F.3d 397 (9th Cir. 1993). Instead, the ACLU relies upon
2 misinterpretations of inapplicable authorities. This situation and the controlling law could not be
3 more clear: there is no First Amendment privilege for a journalist to withhold information in the
4 context of a federal grand jury investigation into a federal crime. The fervor with which the
5 ACLU and Wolf make their arguments evidences nothing more than their extreme disagreement
6 with the state of the law, it does not in any way signal there is a debatable issue here.

7 The ACLU, without any support from the case law, places Wolf above every other
8 citizen, including the President, in our society in claiming that only journalists such as him, and
9 no one else, possesses such a First Amendment privilege. Quite to the contrary, if journalists
10 protecting confidential sources who were promised anonymity possess no such privilege, then
11 surely a self-proclaimed freelance journalist who videotapes public demonstrations without the
12 use of any "sources" and without making any promises of confidentiality can not possibly carve
13 out an exception to this established law.

14 **II. THE ACLU MISINTERPRETS THE APPLICABLE CASE LAW.**

15 The ACLU argument for a qualified First Amendment privilege for Wolf suffers from
16 three obvious and fundamental errors: (1) the ACLU misinterprets *Branzburg* (as they must,
17 because the language so clearly dispatches with their position); (2) the ACLU relies upon the
18 *Shoen* and *Farr* decisions, which are irrelevant; and (3) the ACLU misrepresents the holding of
19 the Ninth Circuit's *Scarce* decision.

20
21 **A. The Ninth Circuit has Expressly Rejected a Qualified First Amendment Privilege Under Wolf's Circumstances.**

22 The ACLU deals with *Branzburg* by relying upon language from Justice Powell's
23 separate and concurring opinion to create a the ACLU's desired result that a balancing is required
24 in all situations. *See* ACLU Brief at 5. This is simply not the law. The Supreme Court held in
25 *Branzburg* that a journalist may only refuse to comply with a grand jury subpoena in this context
26 if it was issued in bad faith. *Branzburg,* 408 U.S. at 707. If there is no evidence of bad faith in
27 Wolf's context then there is **no** balancing. The ACLU not only refuses to acknowledge this
28 unequivocal language of *Branzburg* and its progeny, but they also misrepresent the state of the

record herein.[1] The ACLU argues, incorrectly, that such balancing related to alleged bad faith did not occur before Judge James and has not yet occurred in the case. Perhaps the ACLU has not read Judge James' Order, wherein Judge James stated: "the facts in this case do not give rise to a finding of bad faith." *See* p. 6 of Exhibit B (Judge James' Order) to Finigan Declaration in Support of OSC re Contempt. Judge James also specifically found that Wolf failed to meet his burden that his information is irrelevant to the investigation (*Id*., at p. 4) and that there is no evidence that the investigation is improperly aiding state authorities to circumvent state law (*Id*., at p. 7).

In addition to being factually inaccurate, the ACLU's method of cherry picking from various portions of the *Branzburg* opinion to cobble together its desired interpretation has been expressly rejected by the Ninth Circuit. In *In re Grand Jury Proceedings (Scarce),* 5 F.3d 397 (9th Cir. 1993), the subpoenaed party likewise tried to support an argument for requiring a balancing test in all cases by combining aspects of the *Branzburg* majority opinion with Justice Powell's concurring opinion. *Scarce*, 5 F.3d at 400.

> Scarce argues that the Opinion of the Court, written by Justice White, represented only a plurality of the Court and that its one-time-only balancing of the conflicting interests is not authoritative. He contends that the concurrence of Justice Powell and the dissents of the other four Justices together represent a majority view in favor of rebalancing the interests at stake in every claim of privilege made before a grand jury. **This reading of *Branzburg,* however, is at odds with the majority opinion itself, and with the manner in which we have applied it in our own cases.**
>
> It is important to note that Justice White's opinion is *not* a plurality opinion. Although Justice Powell wrote a separate concurrence, he also signed Justice White's opinion, providing the fifth vote necessary to establish it as the majority opinion of the court.

*Id.* (Emphasis added and internal citation omitted). The only situation wherein the Court balances interests is if the subpoenaed party makes establishes some basis for a finding of bad faith, which Wolf has already failed to do.

In another failed effort to support its inaccurate interpretation of *Branzburg*, the ACLU

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[1] It is telling that the ACLU makes no mention of or effort to distinguish *In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 975 (D.C. Cir. 2005).

next relies upon the Ninth Circuit's decision in *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972) and then glosses right over the *Scarce* decision without any meaningful analysis. *See* ACLU Brief at 6-7. Once again, just as the Ninth Circuit expressly rejected the ACLU's interpretation of *Branzburg* in *Scarce*, the Ninth Circuit likewise expressly rejected the ACLU's use of *Bursey* in Wolf's situation. In *Scarce*, the subpoenaed party relied upon *Bursey* to assert a privilege and the Ninth Circuit unequivocally stated: "We conclude, however, that [*Bursey*] is applicable to the present case." *Scarce*, 5 F.3d at 402.

**B. The *Shoen* and *Farr* Decisions Are Irrelevant.**

For the same reasons set forth in the United States' Reply to Wolf's Contempt Answer, the ACLU's reliance upon the *Shoen* and *Farr* decisions is misplaced. *Shoen* is a civil defamation case with no analysis of *Branzburg's* application to the criminal context. *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993). The *Farr* case, cited within *Shoen* and relied upon by Wolf, had nothing to do with the federal grand jury context. *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975). *Farr* dealt with a California state court proceeding wherein a judge held a journalist in contempt while trying to uncover the identity of individuals who violated the judge's pretrial publicity order. The Ninth Circuit specifically noted in its holding that it was limited to "the facts presented by this record." *Farr*, 522 F.2d at 469. The ACLU slips *United States v. Pretzinger*, 542 F.2d 517 (9th Cir. 1976) into its string cite after *Farr* for alleged further authority that a qualified privilege applies here. *See* ACLU Brief at 7. A reading of *Pretzinger* reveals that the issue therein was whether a defendant was entitled, in the context of his criminal trial, to discover a journalist's source of information. *Pretzinger* had nothing to do with the grand jury.

**C. The ACLU Misinterprets the Ninth Circuit's *Scarce* Decision.**

The ACLU does not even attempt to distinguish *Scarce*, instead offering a misinterpretation of its holding. The ACLU interprets *Scarce* as having applied a balancing test to the subpoenaed party's situation and as "not repudiating the need for judicial balancing in cases such as the instant case." *See* ACLU Brief at 7. The ACLU is wrong on both accounts. First, the Ninth Circuit specifically did not reach a balancing test in *Scarce* because there was no evidence of bad faith. *Scarce*, 5 F.3d at 401-402. Second, in reaching that conclusion, the Ninth

Circuit relied on *Branzburg* and its own previous decisions in noting that no balancing is required in this situation:

> Moreover, although Justice Powell's concurrence itself refers to "interest balancing," it does not suggest that in each case there must be balancing of the particular information sought versus the newsman's request for confidentiality.
>
> . . .
>
> We reached this conclusion without inquiring whether the grand jury's interest in the information sought outweighed Lewis' First Amendment interests in keeping it confidential.

*Id.* (Citing *In re Lewis*, 501 F.2d 418 (9th Cir. 1974) and *In re Lewis*, 517 F.2d 236 (9th Cir. 1975). In other words, unless the limited circumstances of potential abuse of the grand jury process are present, there is no balancing of interests and the journalist must comply with the subpoena. Indeed, the Ninth Circuit held in *Scarce* that "[u]nder the circumstances presented by this case, the privilege to which Scarce lays claim by analogy simply does not exist." *Scarce,* 5 F.3d at 399 (emphasis added).

**D. The ACLU's Balancing Analysis is Irrelevant Because Wolf's Bad Faith Claim has Already Been Rejected and There is no Balancing of Interests Absent Bad Faith.**

As pointed out, Judge James analyzed Wolf's alleged bad faith claims and rejected them. Judge Chesney implicitly did so as well in affirming Judge James. Undeterred, the ACLU raises these issues anew as if they have never been addressed. The heart of the ACLU's argument is really that Wolf's journalistic activities have been and will be negatively impacted and others will be "chilled." *See* ACLU Brief at 11-12. This argument fails for several reasons.

First and foremost, the Supreme Court and Ninth Circuit, as set forth herein, have specifically rejected Wolf's desire to balance his alleged interests in this context. He is required by law, as is every other citizen in the United States, to provide the information necessary to the grand jury investigation. Although the ACLU's argument therefore requires no further response, the government does so briefly to expose its frivolous nature.

Second, to the extent these proceedings have impacted Wolf at all and/or "chilled" any other journalist, it is entirely through Wolf's own conduct. He and his counsel have seized every possible opportunity to publicize this case and bring attention to Wolf. Every aspect of these

proceedings has been extensively detailed on Wolf's own website at http://joshwolf.net/blog/ and he and his counsel have held numerous press conferences. Of course, this is obviously Wolf's right and there is nothing wrong with exercising it. The irony and injustice is that the ACLU uses Wolf's own advertising of his situation to accuse the government of harassing him. It is the epitome of hypocrisy to create one's own alleged predicament and then blame the government for it.

Third, and perhaps most illuminating is that Wolf's own conduct belies the argument being made on his behalf by lawyers. The ACLU relies upon Wolf's June 5, 2006, Declaration in stating that Wolf's access to protestors and ability to cover demonstrations has been interfered with. *See* ACLU Brief at 12. Again, Wolf has publicized his case, not the government. Further, this impact, if true, is certainly not evident in some of Wolf's own efforts to take full advantage of his self-created publicity and thrust himself into the spotlight. For example, Wolf admitted in a June 14, 2006, entry on his website that interpreting his case as extremely as the ACLU does is "probably a bit dramatic." *See* Exhibit A to Finigan Declaration in Support of United States Reply to Wolf's Answer to OSC re Contempt. Wolf made similar statements during an interview, also available via his own website: "I doubt they (the U.S. government) would use it (the grand jury) to make an example out of myself and to scare the public into staying away from protests and from expressing their dissent"; and "I'm inclined to feel that protest videos are about as effective as protest's (sic) themselves: more often than not, not very effective at all." *See* Exhibit A to Finigan Declaration filed in support hereof and concurrently herewith.

Thus, not only does the ACLU's argument based on balancing journalistic interests have no support in the law in this context, i.e. grand jury criminal investigation, but the ACLU's effort to make Wolf its "poster boy" for this campaign is undercut by Wolf's own words.

## III. CONCLUSION

Beyond the ACLU's gratuitous critique of the FBI and political rhetoric, is a fatally flawed argument supported by nothing more than bootstrapped misinterpretations of inapplicable cases to arrive at their desired result. An honest reading of *Branzburg* and *Scarce* inexorably

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leads to only one conclusion: the grand jury is entitled as a matter of law to the evidence in Wolf's possession related to the demonstration.

DATED: July 31, 2006

Respectfully submitted,

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___________/s/__________________
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