NO. 06-16403

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS,

JOSHUA WOLF,
Appellant/Recalcitrant Witness,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
for the Northern District of California
Honorable William Alsup, Presiding
No. CR 06-90064 MISC MMC

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA IN SUPPORT OF APPELLANT/RECALCITRANT WITNESS JOSHUA WOLF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Ninth Circuit Rule 26.1, amicus curiae American Civil Liberties Union of Northern California hereby certifies that no corporation or other public entity owns 10% or more of its stock.

DATED this 14th day of August 2006.

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INTEREST OF AMICUS[1]

The American Civil Liberties Union of Northern California ("ACLU-NC") seeks leave to file this amicus curiae brief because this case raises an issue that goes to the core of the First Amendment's protections for freedom of speech and of the press. The ACLU-NC firmly believes that a journalist's qualified privilege to withhold confidential sources *and* unpublished information is an extremely important aspect of this protection. As this Court's precedents establish, a court faced with the assertion of this privilege should engage in a careful balancing of the First Amendment and governmental interests at stake before ruling on whether the government is justified in compelling disclosure of the journalist's unpublished materials.

The district court below failed to engage in a full balancing of these interests. In finding the journalist in contempt for refusing to comply with the federal grand jury subpoena, the district court reasoned that it is the job only of the grand jury – and not of the court – to evaluate the journalist's showing and to make a determination as

[1] Attorneys for Amicus would like to acknowledge the assistance of Leo Goldbard, a third year student from Yale Law School, in the preparation of this brief.

to whether the subpoenaed material has more than a tenuous connection to any legitimate federal law enforcement criminal investigation. (Excerpts of Record ("ER") 142:3-6.) The court therefore refused to view *in camera* the journalist's unpublished videotape of a political demonstration before issuing its finding of contempt.

The ACLU-NC believes that the district court's ruling does not meet the First Amendment standards that apply to Mr. Wolf's assertions of privilege, standards which have been consistently enunciated by the Ninth Circuit. In this amicus brief, the ACLU-NC argues that the qualified journalist's privilege is available in the context of a grand jury investigation, and that the district court did not fulfill its responsibility to serve in these situations as a gatekeeper to provide a measure of protection for freedom of the press.

The ACLU-NC also has independent First Amendment concerns about the federal investigation at the heart of this case. This federal investigation was carried out by a Joint Terrorism Task Force ("JTTF"), and encompassed a political demonstration opposing United States foreign policies and also the activities of anarchist groups. A JTTF is an entity that includes representatives from

federal, state, and local law enforcement agencies, operating under the direction and out of the offices of the FBI. Such coordination in investigating terrorism is laudable. However, a disturbing pattern has emerged in the last five years that strongly suggests that JTTFs are being used as a means of investigating political protestors in general, and anti-war protestors in particular, going far beyond the JTTFs' mandate to investigate potential terrorism. As amicus argued to the district court, this factor is relevant to a judicial consideration of whether there is a legitimate federal law enforcement interest in the subpoenaed material that outweighs the First Amendment interests at stake.

In the past two years, documents obtained under the Freedom of Information Act by ACLU offices nationally have revealed a pattern of JTTF investigations of political activists. Records obtained by the ACLU in Pennsylvania, for example, document a JTTF investigation of the Thomas Merton Center, an organization described by the FBI as "a left wing organization advocating, among many political causes, pacifism." The documents discuss the Center's efforts to promote better understanding between Muslims and non-Muslims and its coordination with Muslim organizations. Similarly, a document

entitled "International Terrorism Matters" lists various anti-war protests in Pittsburgh and New York. See Jonathan S. Landay, "FBI targeted opponents of Iraq invasion," *Contra Costa Times*, March 15, 2006.

Documents obtained by the ACLU in Colorado describe other JTTF investigations of political activists, including Food not Bombs, an organization that distributes food to the homeless. The documents also chronicle the license plate numbers of anti-war activists who had gathered at a bookstore and what they were wearing. See Felisa Cardona, "FBI allegedly kept eye on nonviolent anti-war groups," *Denver Post*, March 29, 2006.

Most recently, documents obtained by the ACLU-NC from the Defense Department demonstrate that the JTTF was briefed by and coordinated with Homeland Security and/or Defense Department officials who gathered information on counter-recruitment protests at UC Berkeley and Santa Cruz – protests that were later included in a Defense Department anti-terrorism database. See Demian Bulwa,

"Terror database tracks UC Protests," *San Francisco Chronicle*, July 19, 2006.[2]

In this case, the JTTF was activated to assist local authorities in this investigation only three days after a demonstration at which a San Francisco police officer was assaulted, and in a context where Mr. Wolf is raising credible claims questioning the legitimacy of the *federal* law enforcement interest in this incident.

It is clear that the JTTF's "assistance" to SFPD provides a means of seeking unpublished materials from a journalist and questioning him about his associations with anarchist groups, in the face of a state constitutional shield that would absolutely prohibit the local police from obtaining Mr. Wolf's unpublished information in their parallel investigation of the incident. Mr. Wolf has made a showing that this compelled disclosure will interfere with his ability to cover the activities of such groups, by making him part of the JTTF

[2] This pattern is reminiscent of the kind of abuses associated with the FBI's COINTELPRO program in the 60's and 70's, as documented in the Church Committee Report: "The crescendo of improper intelligence activity in the latter part of the 1960's and the early 1970's shows what we must watch out for: In time of crisis, the Government will exercise its power to conduct intelligence activities to the fullest extent. The distinction between legal dissent and criminal conduct is easily forgotten." Final Report of the Select Committee Report to Study Governmental Operations, Senate Report No. 94-755, 94th Congress, 2d Session, April 26, 1976, p. 289.

investigative team. The ACLU-NC believes that the critically important First Amendment interests at stake in this case are heightened in the context of this larger controversy surrounding JTTF overreaching with respect to constitutionally-protected protest activities of dissident groups.

I. STATEMENT OF FACTS

Joshua Wolf, an independent journalist and videographer, has been subpoenaed before a federal grand jury, seeking his unpublished videotapes of a political demonstration at which a San Francisco police officer was assaulted and injured. (ER 82, 90-91.) Three days after the demonstration, the SFPD made a request for federal law enforcement assistance in its investigation. (ER 45, 91.) The only federal interest in this investigation put forward by the federal prosecutors is the possibility that an SFPD police vehicle was burned or attempted to be burned, and that this might violate a statute that makes it a federal crime to damage, or attempt to damage, "by means of fire or an explosive," any property owned by any entity receiving federal funds. 18 U.S.C. § 844(f). (ER 111:1.) However, there has been no showing that the police car in question was burned or

damaged in any way, or even that anyone attempted to burn the vehicle. (ER 16.)

A few days after the initial invitation to join the investigation, FBI agents, along with an SFPD officer, appeared at Mr. Wolf's home in their capacity as members of the JTTF, seeking his unpublished video footage of the demonstration. (ER 99.) They also questioned him about his connections to anarchist groups who were involved in the protest. (ER 99.) Mr. Wolf has refused to turn over the unpublished material, which is now the subject of the federal grand jury subpoena that is at issue in this case.

Mr. Wolf filed a motion to quash the subpoena, claiming among other defenses that he is privileged from answering the subpoena as a journalist under the First Amendment. (ER 90.) Mr. Wolf's claims were rejected by the district court. (Id.) On August 1, 2006, Mr. Wolf was held in civil contempt, and he was ordered incarcerated until he complies with the grand jury subpoena. (ER 168.) This appeal was taken from the order of contempt. (ER 170.)

II. THE JOURNALIST'S PRIVILEGE IS A CORE FIRST AMENDMENT PROTECTION AND RECOGNIZED BY THIS COURT IN GRAND JURY PROCEEDINGS.

The importance of a free press to an informed public and a free society is a core principle of the First Amendment. The courts have long recognized the connection between a robust press and the informed citizenry necessary for our democracy, as well as the dangers of governmental actions that by undermining the press thereby endanger the free and full flow of information that is the primary goal of the First Amendment. E.g., Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 51 (1971); accord Estes v. Texas, 381 U.S. 532, 539 (1965) (recognizing the role of the press as "a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences").

A. This Court Has Recognized a Qualified First Amendment Journalist's Privilege that Overcomes a Grand Jury's Subpoena to Obtain Information with No More than a Tenuous Relationship to Any Legitimate Federal Law Enforcement Interest.

This Court has held that the journalist's privilege is a "'partial First Amendment shield' that protects journalists against compelled disclosure in *all judicial proceedings, civil and criminal alike.*" Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993) (emphasis added)

(quoting Farr v. Pitchess, 522 F.2d 464, 467-68 (9th Cir. 1975)). This privilege is not absolute; rather, it is a qualified privilege that requires a judicial balancing of the interests in compelling disclosure against the First Amendment interests weighing against disclosure.

In Branzburg v. Hayes, 408 U.S. 665 (1972), the United States Supreme Court addressed the issue of the journalist's privilege in the context of a federal grand jury subpoena. Writing for a 5-4 majority, Justice White refused to recognize such a privilege in the cases before the Court, while at the same time recognizing that the First Amendment interests at stake in such a compelled disclosure required constitutional protection from government overreaching:

> News gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.

Id. at 707-708. The Court reiterated that "[w]e do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." Id. at 708.

Justice Powell, the deciding vote in the majority opinion, wrote a separate concurring opinion explaining the "limited nature of the Court's holding":

> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, *if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement*, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. *The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.*

Id. at 710 (Powell, J., concurring) (emphasis added).

This Court has applied the Branzburg decision in four decisions involving a federal grand jury subpoena.[3] This Court first addressed Branzburg in Bursey v. United States, 466 F.2d 1059 (1972),

[3] Amicus believes that the First Amendment privilege in the grand jury context is broader than stated in these opinions, and is controlled by Shoen, 5 F.3d 1289. However, amicus addresses the analysis described in these opinions because it so clearly applies here, and should have *compelled* a more careful balancing by the district court of the competing interests here.

overruled on other grounds, In re Grand Jury Proceedings, 863 F.2d 667, 669-70 (9th Cir. 1988). In a decision that was issued the day after Branzburg, the Bursey Court held that certain grand jury questions posed to reporters for the Black Panther Party newspaper abridged constitutional protections for the press. The Court *rejected* the government's argument that the fact that this investigation was a grand jury proceeding relieved the court of the need for First Amendment balancing:

> We reject the Government's second contention that the First Amendment is nugatory in a grand jury proceeding. No governmental door can be closed against the Amendment. No governmental activity is immune from its force. That the setting for the competition between rights secured by the First Amendment and antagonistic governmental interests is a grand jury proceeding is simply one of the factors that must be taken into account in striking the appropriate constitutional balance.

Id. at 1082. While noting the difference between grand juries and other forms of governmental inquiries, the Court concluded that "none of the differences provides any basis for applying the First Amendment less rigorously to grand jury proceedings." Id.

The Bursey Court recognized that "public access to information" was at stake when assertions of the journalist's privilege are at issue. Id. at 1084. Accordingly, the Court spelled out the

factors that must be considered before a court should override the First Amendment interests that underlie the journalist's privilege:

> The relationship between the information sought and the interest the Government forwards may be sometimes remote and sometimes substantial. The degree of infringement of First Amendment rights depends on the specific subject of the inquiry and the means by which the information is adduced. An adequate foundation for inquiry must be laid."

Id. at 1086 (citation omitted).

On petition for rehearing in Bursey, the government argued that Branzburg undermined the rationale of the Court's decision. The Ninth Circuit refused to adopt that broad reading of Branzburg, and explicitly rejected the government's argument that Branzburg required the Court "to disavow the balancing standards" it had articulated in its original decision, noting that "Mr. Justice Powell's reading of Mr. Justice White's opinion reinforces our view of the limited reach of the plurality's rationale." Id. at 1091 n.2.

Significantly for the instant case, the Court on rehearing reaffirmed the limits that the First Amendment set on overriding the journalist's privilege even in the grand jury setting:

> We refused, however, to issue a carte blanche to a grand jury to override First

> Amendment rights simply because *the questions that the witness refused to answer might have something vaguely to do with conduct that might have criminal consequences*. We were obliged to draw some lines that were not on the Supreme Court's balance sheet. Thus, we required the grand jury to establish that there was a "substantial connection" between the information sought and the criminal conduct which the Government was investigating before the witnesses could be held in contempt for refusing to answer questions that cut deeply into First Amendment rights.

Id. at 1091 (emphasis added). Thus, the Court concluded: "We have reexamined our analysis of the factors involved in balancing the First Amendment rights against the governmental interests asserted to justify compelling answers to the questions here involved, and we have concluded that the balance we struck is not impaired by Branzburg." Id.

The Ninth Circuit next addressed this issue in two cases arising from a federal grand jury investigation into incidents involving the bombing of buildings and the kidnapping of Patricia Hearst. In re Lewis, 501 F.2d 418 (9th Cir. 1974) ("Lewis I"); Lewis v. United States, 517 F.2d 236 (9th Cir. 1975) ("Lewis II"). The Lewis decisions reaffirmed the need for judicial balancing and scrutiny to protect journalists from being "called upon to give information

bearing only a remote and tenuous relationship to the subject of the investigation." Lewis II, 517 F.2d at 238 (quoting Branzburg, 408 U.S. at 710 (Powell, J., concurring)). In its two *per curiam* decisions, the Lewis Court affirmed the judicial determinations made by the district court in rejecting the privilege because there was no evidence that the requests were remote or tenuous to legitimate law enforcement interests. Lewis I, 501 F.2d at 423.

These summary dispositions were not surprising under the Lewis facts – there was undisputed evidence of serious federal crimes that had actually occurred and the evidence sought was tape recordings provided to the journalist by the very groups claiming responsibility for committing these crimes. This is a far cry from the instant case, where the government has submitted no evidence that the alleged arson of an SFPD police car even occurred, where there are uncontradicted claims by the journalist that the unpublished videos have no bearing on any alleged arson, and where the court refused to view *in camera* the unpublished videotape to enable it to make an informed threshold determination if the footage has more than a remote or tenuous connection to a legitimate federal criminal investigation. (ER 16, 99, 142:3-6.)

Finally, the Court last addressed this issue in In re Grand Jury Proceedings (Scarce), 5 F.3d 397 (9th Cir. 1993) ("Scarce"), in which it found that the government's interest in obtaining information from a scholar (who the Court assumed *arguendo* was covered by the journalist's privilege) outweighed his interests in refusing to comply with the subpoena. But here too, the Ninth Circuit followed the reasoning of Justice Powell's concurrence in Branzburg, and stated that "where there is, in effect, an abuse of the grand jury function," the courts should intervene. Id. at 401. The Scarce Court went on to reiterate three separate circumstances that would each justify judicial balancing of the competing interests in the individual case:

> [W]here a grand jury inquiry is not conducted in good faith, *or* where the inquiry does not involve a legitimate need of law enforcement, *or* has only a remote and tenuous relationship to the subject of the investigation then, the balance of interests struck by the Branzburg majority may not be controlling.

Id. (emphasis added). But in sharp contrast to the instant case, the record made it clear that Scarce did not even attempt to argue in the district court that the information sought had only a tenuous relationship to legitimate federal law enforcement interests. Id. at 400.

Finally – and significantly – the Scarce Court affirmed its earlier decision in Bursey, noting that there the Court rejected the subpoenas due to "the lack of a substantial connection between the information sought and the criminal conduct the Government was investigating." Id. at 402. The Court explained that "[t]his is consistent with the limited area for balancing of interests described by Justice Powell and consistent with our discussion thereafter in the Lewis cases." Id.

Thus, the Ninth Circuit consistently has recognized the need for judicial balancing and scrutiny in cases such as this one, where there have been credible questions raised about whether the federal investigation is supported by legitimate federal law enforcement interests and whether the subpoenaed material has more than a tenuous connection to such legitimate federal interests. As set forth below (see Section III, infra), the district court did not adequately carry out this critical gatekeeper role.

B. A Journalist's Unpublished Material is Covered by the First Amendment Privilege, Even if it is Not Confidential.

This Court has specifically recognized that the qualified First Amendment privilege extends not only to confidential sources, but

also to unpublished material. Below, the district court was unwilling to recognize Mr. Wolf's privilege in this information, which the court described as "public," and which it apparently considered unworthy of protection. (ER 146:5-17, 151:3-6, 162:16-18, 163:1-3.) Indeed, the court trivialized Mr. Wolf's interest in this unpublished information by describing it as "the cuttings and the clippings on the cutting room floor that are at stake here." (ER 163:1-3.) Mr. Wolf contends the district court erred, and that asking him to give the government the unpublished videotape is essentially the same as asking him to reveal a confidential source. (ER 99:22-100:2.) The district court's dismissal of important (and constitutionally recognized) interests in refusing to disclose this information – regardless of whether it is properly characterized as confidential or simply unpublished – was not consistent with Ninth Circuit precedent.

In Shoen, this Court held that the journalist's privilege applied to unpublished information, even if not confidential. 5 F.3d at 1292. In so ruling, the court relied on supporting authority from the First, Second, and Third Circuits, as well as scholarly commentary. Id.; see United States v. La Rouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988); von Bulow v. von Bulow, 811 F.2d 136, 142 (2d Cir. 1987);

United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980); Duane D. Morse & John W. Zucker, The Journalist's Privilege in Testimonial Privileges 474-75 (Scott N. Stone & Ronald S. Liebman eds., 1983).

The court identified four key interests justifying a First Amendment journalist's privilege for unpublished material: "'the threat of administrative and judicial intrusion into the newsgathering and editorial process; the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool of government or of a private party; the disincentive to compile and preserve non-broadcast material; and the burden on journalists' time and resources in responding to subpoenas.'" Shoen, 5 F.3d at 1294-95 (quoting La Rouche Campaign, 841 F.2d at 1182.) The Court further explained, in language that applies with equal force here:

> [T]he compelled disclosure of non-confidential information harms the press [sic] ability to gather information by "damaging confidential sources' trust in the press' capacity to keep secrets and, in a broader sense, by converting the press in the public's mind into an investigative arm of prosecutors and the courts. *It is their independent status that often enables reporters to gain access, without a pledge of confidentiality, to meetings or places where a policeman or a politician would not be welcome.* If perceived as an adjunct of the police or of the courts, journalists might well

> be shunned by persons who might otherwise give them information without a promise of confidentiality, barred from meetings which they would otherwise be free to attend, and to describe, or even *physically harassed if, for example, observed taking notes or photographs at a public rally.*"

Id. at 1295 (citation omitted; emphasis added). The Court found "this body of circuit case law and scholarly authority *so persuasive* that we think it unnecessary to discuss the question further." Id. at 1295 (emphasis added). The Court concluded "that the journalist's privilege applies to a journalist's resource materials even in the absence of the element of confidentiality," although lack of confidentiality may be considered in balancing the competing interests to determine whether disclosure should be ordered. Id. at 1295-1296.

The concerns that motivated the vast majority of states and federal circuits to recognize a journalist's privilege are at their nexus here. In fact, a number of the concerns that the Shoen Court recognized as underlying the privilege are very much at risk in this case, especially the adverse effect on the newsgathering function when a journalist "appear[s] to be an investigative arm of the judicial system or the research tool of government." 5 F.3d at 1294-95. Can it truly be doubted that dissident groups like the anarchists will shun and deny access to anyone whom they believe is or may be gathering

information about them for the government, whether confidential or not? Mr. Wolf declares that a significant wedge has already been driven between himself and his subject, based only on the unfulfilled possibility that he will comply with the government subpoena. (ER 99:26-100:2.) In a very real and practical sense, Mr. Wolf has no choice but to refuse to comply with the subpoena if he hopes to continue his work chronicling this group (and other similar groups) for dissemination of information to the public. (Id.)

If the government has free rein to transform independent journalists into police photographers, then the government has been given a tool that can be used to prevent the public from learning about such groups and their non-mainstream views. As the Supreme Court has recognized, the media serves as a surrogate for the public in obtaining information of public interest. Richmond Newspapers v. Virginia, 448 U.S. 555, 572-73 (1980) (citation omitted). The public's window into groups like these should not be closed absent a showing of a legitimate government need for the information sought. As this Court explained in Bursey:

> Freedom of the press was not guaranteed solely to shield persons engaged in newspaper work from unwarranted governmental harassment. The larger

> purpose was to protect public access to information.

466 F.2d at 1083-1064.

Shoen not only should be, but is, binding here on the issue of whether the First Amendment protects unpublished information. Its reasoning was not limited to civil cases (the issue presented there). Rather, it rendered a decision that the First Amendment protects information that is not confidential, as well as confidential information, in both civil and criminal contexts.

III. THE DISTRICT COURT DID NOT ADEQUATELY EVALUATE THE COMPETING INTERESTS AT STAKE BEFORE REJECTING MR. WOLF'S ASSERTION OF PRIVILEGE.

A. The Court Failed to Evaluate Adequately the Legitimacy of the Government's Asserted Interest.

The showing that the government has made to support its claim that a federal law enforcement interest exists in the unpublished videotape is exceedingly flimsy. The government has made no showing that any police car was damaged or burned or attempted to be burned, although this was the purported basis for JTTF involvement. (ER 16.) And the district court refused to review the unpublished videotape, which could have helped the court to assess whether it had any connection to a legitimate federal law enforcement interest.

The district court stated, "it's not even clear to the court that there was a crime committed, but that is the purpose of the grand jury to sort out whether there was or there was not." (ER 150:10-12.) With respect to whether this was a legitimate federal criminal investigation of damage to a police car, the court had only this to say: "[m]aybe it is Mickey Mouse. But that's what they are entitled to do if it is Mickey Mouse." (ER 143:20-21.)

While the court correctly acknowledged the grand jury's role, it did not carry out the important and distinct judicial role when a journalist has raised credible claims about whether there is more than a tenuous connection between the privileged information and legitimate law enforcement interests. To abdicate completely that judicial responsibility is inconsistent with the judicial balancing and scrutiny that this Court has required before the First Amendment privilege claim is rejected.

The federal government's subpoena has already caused the "harms" noted by this Court in Shoen to Mr. Wolf's journalistic activities. If Mr. Wolf is imprisoned for protecting his unpublished videotapes, the message will be sent to other journalists in this state who similarly provide the public with information about the activities

of those engaged in protest and dissent that the state shield law has a gaping hole in its promised protections, because federal prosecutors have virtually absolute discretion to make the journalists part of any federal law enforcement investigative effort.[4] In light of the consequences that this will have to the public's access to information, the credible questions that Mr. Wolf has raised about the legitimacy of the federal law enforcement interests asserted here merited the district court's serious consideration. This was not given.

B. The District Court Was Not Entitled to Abdicate to the Grand Jury the Determination Whether Mr. Wolf's Unpublished Footage Bore More Than a Remote and Tenuous Connection to a Federal Crime.

The district court committed another fundamental error when it abdicated to the grand jury its own obligation to determine whether Mr. Wolf's unpublished footage bore more than a remote or tenuous relationship to the crime allegedly being investigated. Mr. Wolf asked the court to review his unpublished videotape *in camera* to evaluate for itself whether it included footage relating to the purported

[4] Certainly the JTTF's sudden interest in investigating demonstrators for potential violation of this very broad federal statute – punishing attempts to damage *any* property belonging to *any* entity receiving *any* federal funds (which would include all public property) – suggests that this will not be the last demonstration that becomes the subject of a federal grand jury investigation.

attempted arson. (ER 141:14-25.) The court responded, "[t]hat's what the grand jury is for." (ER 142:1.) It emphasized "[t]he grand jury is supposed to make that evaluation, not me." (ER 142:3-4.) But that is not solely the grand jury's role – it is also the court's role in a case such as this.

Viewing *in camera* the unpublished video was critical for the district court's assessment of whether Mr. Wolf's footage bore more than a remote or tenuous relationship to the government's asserted interest, and therefore its determination of whether Mr. Wolf could claim the First Amendment privilege. Mr. Wolf asserted multiple times in his filings and in court that his unpublished video contained nothing relevant to the federal criminal investigation, while the prosecutor, relying on pure conjecture, asserted otherwise. (ER 69:6-10, 99:9-16, 144:21-25; August 1, 2006 Transcript at 31:15-34:10.) The district court chose to accept the government's assertion without viewing the unpublished footage. The court's refusal to view the footage *in camera* rendered essentially meaningless the "remote and tenuous relationship" test laid out in Scarce. The Ninth Circuit consistently has affirmed that judges have a limited but critical role as a constitutional filter, and not as a rubber stamp, when considering

grand jury subpoenas of journalists' confidential sources or unpublished materials.

In justifying its bare minimal scrutiny of the relationship of the videotape to legitimate federal interests and to First Amendment concerns, the district court placed great emphasis on the fact that the activities of the demonstrators presumably captured on the video took place *in public*. (E.g., ER 151:8-11.) However, the fact that individuals chose to participate in the anarchist demonstration at issue in this case does not by itself mean that First Amendment rights are not implicated by compelled disclosure by (and to) the government of the identities of public protesters.

The courts have long recognized that one aspect of the First Amendment's protection for speech and associational activities is a right to engage in those activities anonymously, and without revealing one's identity to the government. This is particularly applicable to dissident and controversial groups. See e.g., Talley v. California, 362 U.S. 60, 65 (1960) ("Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all"); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) ("Anonymity is a shield from the

tyranny of the majority"); Justice For All v. Faulkner, 410 F.3d 760, 765 (5th Cir. 2005) (recognizing importance of anonymity in distributing "controversial ideas" on college campuses); American Knights of the Ku Klux Klan v. City of Goshen, 50 F. Supp. 2d 835, 839 (N.D. Ind. 1999) (ordinance prohibiting KKK members from wearing masks during public demonstrations violates their "rights to express themselves and associate anonymously"); Ghafari v. Municipal Court, 87 Cal. App. 3d 255, 266 (1978) (recognizing that "anonymous public appearance" may be related to a demonstrator's First Amendment rights); but see Church of the American Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197 (2d Cir. 2004).

Amicus fully recognizes that there is no right to anonymity when engaged in unlawful conduct, and also that the SFPD was certainly justified in its criminal investigation of this incident and of demonstrators involved. However, before the district court ordered Mr. Wolf to become a part of the JTTF investigation of this anarchist demonstration and anarchist activities by turning over his unpublished video footage, the court should have reviewed the unpublished videotape *in camera*. Such a review may have established that the video footage had no more than a remote connection to any federal

crime, but was rather a visual recording of persons engaged solely in lawful, constitutionally-protected associational and expressive activity. If that is the case, that fact would be germane to the judicial balancing determination, and to whether certain portions of the unpublished footage should not be disclosed to the grand jury. Thus, the court should have at least viewed the tape before determining that the government's legitimate interests in this footage outweighed the First Amendment interests at risk.

The court's failure to conduct *in camera* review of the subpoenaed testimony stands in stark contrast to the accepted practice of other federal and California courts when confronted with assertions of a reporter's privilege. In La Rouche Campaign, a criminal defendant sought to subpoena the unpublished footage of a broadcast news program to assist in its defense. The news program asserted First Amendment privilege. The First Circuit approved the district court's decision to order review of the subpoenaed unpublished footage *in camera* before releasing it to the defendants in order " to minimize intrusion." 841 F.2d at 1178. The Third Circuit, faced with an identical scenario, also approved a district court's conclusion that it could not determine the applicability of the First Amendment

privilege without viewing *in camera* the unpublished video footage at issue. Cuthbertson, 630 F.2d at 143. The California Supreme Court, in applying the state's constitutional shield law to a subpoena by a criminal defendant, has also explicitly recognized the importance of proceeding with *in camera* review of the subpoenaed material before rejecting a reporter's "colorable" assertion of privilege. Delaney v. Superior Court, 50 Cal. 3d 785, 789-90 (1990).

These holdings reflect the widespread use of *in camera* review by federal courts to determine the applicability of a variety of evidentiary privileges in both criminal and civil contexts. *In camera* review is "a practice both long-standing and routine in cases involving claims of privilege." In re Grand Jury Subpoenas, 318 F.3d 379, 386 (2d Cir. 2003). Federal courts have required *in camera* review of testimony before rejecting an assertion of a government informant's privilege, United States. v. Amador-Galvan, 9 F.3d 1414, 1417 (9th Cir. 1993); official information privilege, Soto v. City of Concord, 162 F.R.D. 603, 613-14 (N.D. Cal. 1995) (after threshold showing by asserter of privilege); and attorney-client privilege, United States v. Zolin, 491 U.S. 554, 572 (1989). These courts all reached the practical conclusion that determining the applicability of a privilege to

particular testimony is impossible without reviewing that testimony *in camera*. The district court should not have dismissed out of hand such an *in camera* review before sending Mr. Wolf to prison.

C. The Circumvention by Federal and Local Law Enforcement Authorities of the Absolute Protection Mr. Wolf Would Under the California Constitution is a Factor That Should Have Been Weighed in the Balance.

The doubts Mr. Wolf raised concerning the legitimacy of the government's interest particularly should have been given greater weight in light of the (at least) *de facto* circumvention by enforcement authorities of California's Shield Law. Cal. Const. Art. I, § 2(b). The record in this case shows that the SFPD approached federal authorities for assistance a mere three days after the July 2005 incident. (ER 45.) The SFPD was in the early stages of an investigation of a serious but certainly non-federal offense – a physical attack on a police officer – and there is no reason to believe that they lacked resources for this investigation or that they had exhausted all other investigative avenues. The request for federal assistance was followed within days with a visit to Mr. Wolf's home by local and federal agents operating as the Joint Terrorism Task Force. (ER 99.)

These undisputed facts lend credence to Mr. Wolf's claim that there is no legitimate federal law enforcement interest in this

investigation, but that it is instead being pursued as a means of circumventing California's Shield Law. Cal. Const. Art. I, § 2(b). That constitutional provision would certainly have barred the local authorities from obtaining Mr. Wolf's videotapes as they investigated the incident and the injuries inflicted on the officer. See Miller v. Superior Court, 21 Cal. 4th 883, 890-91 (1999) (applying absolute privilege to state criminal subpoena of unpublished materials).

California's Constitution expressly protects "unpublished" information, including the kinds of outtakes sought by the grand jury's subpoena to Mr. Wolf.[5] This kind of forum shopping may not in and of itself constitute a bad faith investigation, but it was relevant to the issue before the district court, which needed to determine that the federal investigation at issue was legitimate and that the alleged federal offense had more that a tenuous connection with the unpublished videotape. Scarce, 5 F.3d at 401. That the federal grand

[5] As defined in Article I, Section (2)(b), "unpublished information" includes outtakes and "all other information not disseminated to the public ... whether or not related information has been disseminated." Although the California Shield Law originally protected only against disclosure of confidential sources, when California voters overwhelmingly elevated the Shield Law to constitutional status in 1990, they also approved the amendment to the law to include protection for "unpublished information" whether given in confidence or not. Playboy Enterprises, Inc. v. Superior Court, 154 Cal. App. 3d 14, 27 (1984).

jury might be used as a means of circumventing a state policy adopted by Californians and enshrined in the California Constitution should have been of concern to the court.

IV. CONCLUSION

It is beyond dispute that important First Amendment interests have been placed in jeopardy by Mr. Wolf's ongoing imprisonment, and that several factors weighing in favor of Mr. Wolf's claim of privilege improperly went unconsidered by the district court. Only judicial adherence to a balancing of interests consistent with the First Amendment will maintain and vindicate the constitutional protections for a free press, particularly for journalists like Mr. Wolf, who provide the public with information about groups outside the mainstream of the nation's social and political life. Accordingly, this Court should reverse and vacate the order of contempt.

DATED this 14th day of August 2006.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Federal Rules of Appellate Procedure 29(d) and 32. The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, the word count of the brief is 6,359, not including the table of contents, table of citations, certificate of service, certificate of compliance, and any addendum containing statutes, rules or regulations required for consideration of the brief.

DATED this 14th day of August 2006.

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I, Natasha Majorko, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

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