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IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

In re GRAND JURY SUBPOENA dated February 1, 2006, and June 8, 2006, Plaintiff, v. JOSHUA WOLF, Subpoenaed Party.	Case No. CR 06-90064 MISC MMC **BRIEF OF AMICUS CURIAE ACLU IN SUPPORT OF JOSHUA WOLF'S ANSWER TO OSC RE:CONTEMPT** Date: August 1, 2006 Time: 9:00 a.m. Judge: Hon. William H. Alsup

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DAVIS WRIGHT TREMAINE LLP

INTEREST OF AMICUS[1]

The American Civil Liberties Union of Northern California ("ACLU") seeks leave to file this amicus curiae brief because it believes that 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 The ACLU firmly believes that a journalist's qualified privilege to withhold confidential sources and unpublished information is an extremely important aspect of this protection. 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and governmental interests at stake before ruling on whether the government is justified in seeking the journalist's unpublished materials.

The prior opinion filed in this matter failed to engage in a full balancing of these interests. Judge Maria Elena James held only that "the First Amendment does not shield a reporter or news organization from responding to a subpoena in a criminal case, unless the reporter can show that the grand jury investigation was conducted in bad faith." In re Grand Jury Investigation, Joshua Wolf, No. CR 06-90064 MISC MMC (N.D. Cal. April 5, 2006) (order denying Joshua Wolf's motion to quash subpoena). The government is taking a similar position before this Court in this proceeding, arguing that the United States Supreme Court has already decided the fate of journalists like Mr. Wolf. The ACLU believes that these are not full and accurate statements of the extent of the First Amendment journalist's privilege, and they ignore other important considerations that this Court should consider. The ACLU argues in this brief that the First Amendment journalist's privilege is not irrelevant in a criminal investigation, and that this Court has an obligation to carefully weigh the respective interests.

The ACLU has independent First Amendment concerns about the federal investigation at the heart of this case. That this investigation was carried out by a Joint Terrorism Task Force ("JTTF"), and was related to an anti-war demonstration and encompassed the activities of anarchist groups, is consistent with a disturbing nationwide pattern of JTTF activities, where, under the guise of fighting "terrorism," political activists and anti-war demonstrators have been

[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.

targeted for investigation. The ACLU believes this factor is relevant to this Court's consideration of whether there is a legitimate federal law enforcement interest here that outweighs the First Amendment interests at stake.

A JTTF is an entity that encompasses 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 that strongly suggests that JTTFs have been used as a means of investigating protestors in general, and anti-war protestors in particular, going far beyond their mandate to investigate potential terrorism.

In the past two years, documents obtained under the Freedom of Information Act by ACLU offices nationally have revealed a pattern of the JTTF's investigation of political activity. 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 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.[2]

[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.

Most recently, documents obtained by the ACLU of Northern California from the Defense Department demonstrate that the JTTF was briefed 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.[3]

In this case, the Joint Terrorism Task Force was activated to assist local authorities in this investigation only three days after the incident, 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 JTTF "assistance" 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 Constitution that would absolutely prohibit the state from obtaining Mr. Wolf's "unpublished" information.

The journalist is asserting that this compelled disclosure will interfere with his ability to cover the activities of such groups, by making him part of the investigation effort. Mr. Wolf's interests here, and his legitimate concerns about his ability to continue to work as a journalist, are the very reason the vast majority of states and federal Circuits have enacted or recognized a journalist's right to refuse to disclose unpublished information. The ACLU believes that critically important First Amendment interests are at stake in this case, especially in the context of this larger controversy surrounding JTTF overreaching with respect to First Amendment protest activities.

STATEMENT OF FACTS

Joshua Wolf, an independent journalist, has been subpoenaed before a federal grand jury as part of an investigation led by the San Francisco Police Department (SFPD) and Joint Terrorism

[3] In American Civil Liberties Union of Northern California, et al vs. U.S. Department of Defense, et al. (C-06-01698 WHA), this Court granted plaintiffs' motion for summary judgment and ordered expedited processing of their FOIA request for information concerning government information-gathering about the activities of anti-war protestors and organizations. While that case did not raise directly issues related to JTTFs, it did raise concerns about the federal government's intelligence gathering activities of protest groups.

Task Force (JTTF) of the possible arson of an SFPD police vehicle at a protest march that took place in San Francisco on July 8, 2005. The SFPD was investigating a physical assault on a police officer at the same location and time. Three days after the incident, the SFPD requested federal law enforcement assistance.

Immediately thereafter, several SFPD and FBI agents, acting in their roles as JTTF, came to Mr. Wolf's home seeking unpublished video footage of the demonstration taken in the proximity of these incidents. They also questioned him about his connections to anarchist groups. 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.

The grand jury seeks unedited footage taken by Mr. Wolf of the protest and his testimony concerning the footage. The grand jury already possesses edited versions of the footage broadcast to the public. Mr. Wolf has refused to release the unedited footage to the grand jury. Mr. Wolf filed a motion to quash the subpoena, claiming among other defenses that he is privileged from answering the subpoena as a newsperson under the First Amendment. Mr. Wolf's claims were rejected on April 5, 2006 and June 15, 2006 and, since he continues to refuse to answer the subpoena, he now faces charges of civil contempt. Mr. Wolf continues to assert as a defense to the charges that he is privileged from answering the subpoena under the First Amendment.

ARGUMENT

I. THE JOURNALIST'S PRIVILEGE IS A CORE FIRST AMENDMENT PROTECTION EXPLICITLY RECOGNIZED BY THE NINTH CIRCUIT AS APPLICABLE TO UNPUBLISHED MATERIALS AND TO CRIMINAL CASES.

The importance of a free press to an informed public and a free society is a core purpose and 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 main purpose of the First Amendment to maintain. E.g., Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 51 (1971) (quoting 6 Writings of James Madison, 1790-1802, at 336 (G. Hunt ed. 1906)); 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. The Ninth Circuit Has Recognized the Existence of a Qualified First Amendment Journalist's Privilege in Criminal and Civil Cases.

One aspect of this constitutional protection is the qualified privilege of journalists to withhold the names of sources and unpublished material. As recognized by the Ninth Circuit, 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) (Shoen I) (emphasis added) (quoting Farr v. Pitchess, 522 F.2d 464, 467-68 (9th Cir. 1975)). This privilege is not absolute; rather, it 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 had earlier 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.

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).

In light of the recognition in the majority opinion that "newsgathering is not without its First Amendment protection," and of Justice Powell's concurrence, a significant majority of the Circuits that have addressed the issue post-Branzburg have recognized the continued existence of a qualified newsperson's privilege to refuse to disclose confidential sources or unpublished information, and the obligation of the courts when compelling testimony from journalists to balance the specific governmental and First Amendment interests involved. See, Bruno & Stillman, Inc. v. Globe Newspaper Corp., 633 F.2d 583, 595-96 (1st Cir. 1980); United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980); LaRouche v. National Broadcasting Co., 780 F.2d 1134, 1139 (4th Cir. 1986); Miller v. Transamerican Press, 621 F.2d 721, 725 (5th Cir. 1980); Cervantes v. Time, Inc., 464 F.2d 986, 992-93 & n.9 (8th Cir. 1972); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-37 (10th Cir. 1977); Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981); see also 8 Robert D. Sack, Sack on Defamation § 14.3.2, 14-13, 14-14 (3d ed. 2006).

The Ninth Circuit first addressed the Branzburg decision in a case involving a federal grand jury subpoena. Bursey v. United States, 466 F.2d 1059 (1972), overruled on other grounds, In re Grand Jury Proceedings, 863 F.3d 667, 669-70 (9th Cir. 1988). In a decision that was issued the day after Branzburg, the Bursey Court held that the grand jury questions posed to reporters for the Black Panther Party newspaper abridged constitutional protections for the press. In weighing the respective interests, the Court stated that "[w]hen First Amendment interests are at stake, the Government must use a scalpel, not an ax." Id. at 1088. 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.

On petition for rehearing in Bursey, the government argued that Branzburg undermined the rationale of the Court's decision. The Ninth Circuit rejected that broad reading of Branzburg: "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. at 1091.

The Ninth Circuit reaffirmed the qualified First Amendment newsperson's privilege in Shoen I, 5 F.3d 1289. In that case, the Ninth Circuit specifically stated "that the journalist's privilege recognized in Branzburg was a 'partial First Amendment shield' that protects journalists against compelled disclosure *in all judicial proceedings, civil and criminal alike*." Id. at 1292 (emphasis added) (quoting Farr v. Pitchess, 522 F.2d 464, 467 (9th Cir. 1975)); see also United States v. Preizinger, 542 F.2d 517, 520-21 (9th Cir. 1976) (per curiam) (applying balancing test in criminal case). In U.S. v. Cuthbertson, 630 F.3d 139, 147 (3rd Cir. 1980), the Third Circuit reached the same conclusion:

> [T]he interests of the press that form the foundation for the privilege are not diminished because the underlying proceeding out of which the request for the information arises is a criminal trial. CBS's interest in protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship by compelled disclosure of sources and unpublished notes does not change because a case is civil or criminal.

The Ninth Circuit has, subsequent to Bursey, found in a grand jury proceeding that the government's interest in obtaining information from a scholar outweighed the interests of the scholar (who the Court assumed arguendo was covered by the journalist's privilege) in refusing to comply with the subpoena. In re Grand Jury Proceedings, 5 F.3d 397 (9th Cir. 1993) ("Scarce"). Yet Scarce did not repudiate the need for judicial balancing in cases such as the instant case, where there have been credible questions raised about whether the federal investigation is supported by legitimate federal law enforcement interests and whether the subpoena for the

unpublished videotapes has more than a tenuous connection to legitimate federal interests. Id. at 401.

B. The Ninth Circuit has Recognized that this Qualified First Amendment Journalist's Privilege Applies to Unpublished Material.

The Ninth Circuit has also specifically recognized that the qualified First Amendment privilege can extend not only to confidential sources, but also to unpublished material such as that at issue in this case. The Ninth Circuit has held that "the journalist's privilege applies to a journalist's resource materials even in the absence of the element of confidentiality." Shoen I, 5 F.3d at 1295. The court relied on supporting authority from the First, Second, and Third Circuits, as well as scholarly commentary. Id. See La Rouche Campaign, 841 F.2d at 1182; von Bulow v. von Bulow, 811 F.2d 136, 142 (2d Cir. 1987); Cuthbertson, 630 F.2d at 147; Duane D. Morse & John W. Zucker, The Journalist's Privilege in Testimonial Privileges 474-75 (Scott N. Stone & Ronald S. Liebman eds., 1983); see also infra Subsection II.C for discussion of importance of privilege for both confidential and unpublished material.

The Shoen Court identified four key interests justifying a First Amendment newsperson'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.

In Cuthberston, the Third Circuit affirmed the journalist's qualified privilege to refuse to disclose unpublished information, recognizing that the "compelled production for a reporters' source materials can constitute a significant intrusion into the newsgathering and editorial processes." Id. at 147. The court noted that the "public policy favoring the free flow of information to the public that is the foundation for the privilege" would be "substantially undercut" without protection for unpublished materials. Id.

II. IN BALANCING THE GOVERNMENTAL AND FIRST AMENDMENT INTERESTS IN THIS CASE, THE COURT MUST GIVE WEIGHT TO THE SERIOUS CLAIMS THAT HAVE BEEN RAISED ABOUT WHETHER THERE IS A LEGITIMATE FEDERAL LAW ENFORCEMENT INTEREST IN MR. WOLF'S UNPUBLISHED VIDEOTAPE.

As discussed above, the First Amendment interests involved in judicially compelled disclosure of unpublished information require that the Court in this case weigh the legitimate federal law enforcement interests in compelling the disclosure of the unpublished videotapes against Mr. Wolf's and the public's interest in preserving the privilege against their disclosure. Such a balancing did not occur in the hearing before Magistrate James on the motion to quash (see p. 1, supra), and has not yet occurred in this case. There are a number of aspects of the government actions leading to the subpoena of Mr. Wolf that raise serious concerns that are directly relevant to this Court's determination as to the outcome of this balancing, and that weigh in favor of granting Mr. Wolf protection under the First Amendment.

A. The Circumvention By Federal and Local Law Enforcement Authorities of the Absolute Protection Mr. Wolf Would Enjoy Under the California Constitution Is a Factor That Should Be Weighed in the Balance.

The record in this case shows that the SFPD approached federal authorities for assistance a mere 3 days after the July 2005 incident. 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, and seeking unpublished videotape footage that Mr. Wolf had shot while covering the public protest.

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 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. See Miller v. Superior Court, 21 Cal. 4th 883, 890-91 (1999) (applying absolute privilege to state criminal subpoena of unpublished materials). Importantly, California's Constitution expressly

protects "unpublished" information, including the kinds of outtakes sought by the grand jury's subpoena to Mr. Wolf.[4] This kind of forum shopping may not in and of itself constitute a bad faith investigation, but it is relevant to this Court, which must be convinced that the federal interest in these unpublished materials bears more than a tenuous relationship to a legitimate federal investigation. Scarce, 5 F.3d at 401. The possibility that the federal courts are being used as a means of circumventing a state policy adopted by Californians and enshrined in the State Constitution should be of concern to this Court.

B. The Federal Enforcement Authorities' Apparent Failure to Show that they Have Adhered to Department of Justice Guidelines in Issuing a Subpoena to Mr. Wolf Is Another Relevant Factor.

To give appropriate weight to the First Amendment interests, the courts have held that an important factor in balancing the respective interests is that the government demonstrate that it has exhausted all reasonably available alternatives. Shoen v. Shoen, 48 F.3d 412, 416 (9th Cir. 1995) (Shoen II). This factor is in fact echoed and amplified in the Department of Justice's own guidelines, which apply to criminal cases and federal grand jury subpoenas. 28 C.F.R. § 50.10. The Department of Justice, recognizing the importance of not unnecessarily interfering with the newsgathering process, has laid down clear guidelines for subpoenaing newspersons. These require federal authorities, before subpoenaing a journalist, to make reasonable efforts to acquire information possessed by the newsperson from other sources, demonstrate that the sought after information is more than peripherally related to a criminal investigation, and engage in negotiation with the journalist.

[4] As defined in Article I, Section (2)(b), "unpublished information' includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, *outtakes*, photographs, *tapes* or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated." (Emphasis added.) Although the California Shield Law originally protected only against disclosure of confidential sources, when California voters overwhelmingly approved the amendment to the law in 1990 including protection for "unpublished information" whether given in confidence or not, the Shield Law was elevated to constitutional status. The amendment was specifically to rectify the trend of the California courts to create certain exceptions and limitations to the statutory privilege under California Evidence Code Section 1070. Playboy Enterprises, Inc. v. Superior Court, 154 Cal. App. 3d 14, 27 (1984).

Thus, even if the authorization of the United States Attorney General has been obtained, as the government now asserts, the facts before this Court do not show that the need and exhaustion requirements of the guidelines have been met. Rather, the record shows that the FBI received a request for assistance three days after the underlying incident, and that the first federal involvement in this matter was a JTTF visit to Mr. Wolf's home, where a demand was made to view the unpublished materials. Whether the federal prosecutors conducted themselves according to their own internal guidelines should be taken into account by this Court, which should independently be satisfied that no reasonable alternatives exist. See Shoen II, 48 F.3d at 416.[5]

C. Mr. Wolf's Ability to Function as a Journalist Is Threatened by this Subpoena; Jailing Mr. Wolf Will Chill Others Engaged in Constitutionally Protected Activities.

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. As examples of the "harms" the could flow from compelled disclosure, the Shoen Court explicitly noted adverse consequences to the newsgathering function that in fact have been raised in this case by Mr. Wolf:

> 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 politician wouldn't be welcome. If perceived as an adjunct of the police or 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 should 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 (quoting Morse and Zucker, supra, at 474-75) (emphasis added).

[5] In fact, the Supreme Court in Branzburg noted that the existence of guidelines laid down by the Attorney General were significant and a "major step" in assuring protection for the press from the dangers inherent in compelled testimony in grand jury settings. 408 U.S. at 706-07.

The federal government's subpoena has already caused the "harms" noted by the Ninth Circuit in Shoen I. It has interfered with Mr. Wolf's relationship with anarchist and anti-war groups that he covers as a freelance journalist. It has limited his access to protestors and his ability to cover demonstrations. (See Declaration of Joshua Wolf in Support of Subpoenaed Party Motion for De Novo Determination.) Mr. Wolf has refused to comply with this subpoena because he believes that if he is viewed by these groups as cooperating with the government, he will no longer be able to perform his vital role of covering these groups. If Mr. Wolf is imprisoned for protecting his unpublished information in this federal case, the message will be sent to others who similarly provide the public with information about the activities of those engaged in protest and dissent that their constitutionally-protected activities are in jeopardy.

Mr. Wolf's concerns about his ability to continue to report on the protests and activities of social activists warrant this Court's careful consideration, particularly in light of serious questions that have been raised about the legitimacy of the federal law enforcement interests asserted here. The government should not be permitted to usurp a journalist's unpublished information – and curtail the public's ability to learn information about these groups' activities – without a strong showing that its interests outweigh the significant First Amendment interests that are at stake. Here, the constitutional issues go well beyond Mr. Wolf's activities. Imprisoning Mr. Wolf based on his protection of unpublished information – information that would be absolutely protected if these issues had arisen in state court – will inevitably diminish the protection afforded to *all* journalists who provide information that the public is wholly dependent upon.

III. CONCLUSION

It is beyond dispute that important First Amendment interests are at risk by Mr. Wolf's threatened imprisonment, and that factors that are before this Court weigh against rejection of his claim of privilege. Only this Court's adherence to a balancing of interests consistent with the First Amendment will maintain and vindicate the constitutional protections for a free press, particularly

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for journalists like Mr. Wolf, who provide the public with information about groups outside the main stream of the nation's social and political life.

DATED this 27th day of July 2006.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke
Rachelle L. Wilcox

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA

By: Thomas Burke for
Alan L. Schlosser

DAVIS WRIGHT TREMAINE LLP

Proof of Service

I, Pamela S. Baron, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is One Embarcadero Center, Suite 600, San Francisco, California 94111-3611.

I caused to be served the following document:

BRIEF AMICUS CURIAE ACLU IN SUPPORT OF JOSHUA WOLF'S ANSWER TO OSC RE:CONTEMPT

I caused the above document to be served on each person on the attached list by the following means:

☐ I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on_____, following the ordinary business practice. *(Indicated on the attached address list by an* [M] *next to the address.)*

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☑ I consigned a true and correct copy of said document for facsimile transmission on July 27, 2006. *(Indicated on the attached address list by an* [F] *next to the address.)*

☑ I enclosed a true and correct copy of said document in an envelope, and consigned it for hand delivery by messenger on July 27, 2006. *(Indicated on the attached address list by an* [H] *next to the address.)*

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business.

Executed on July 27, 2006, at San Francisco, California.

Pamela S. Baron

PAMELA S. BARON

DAVIS WRIGHT TREMAINE LLP

Service List

Key:	[M] Delivery by Mail	[FD] Delivery by Federal Express	**[H] Delivery by Hand**
	[F] Delivery by Facsimile	[FM] Delivery by Facsimile and Mail	

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