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'S PETITION FOR REHEARING OR REHEARING *EN BANC*

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I. INTEREST OF AMICUS

The American Civil Liberties Union of Northern California ("ACLU-NC") believes that the panel in this matter erred by affirming and endorsing the utter failure of the district court below to subject a grand jury request for complete disclosure of a journalist's unpublished materials to the judicial scrutiny and balancing of interests mandated by the United States Supreme Court, see Branzburg v. Hayes, 408 U.S. 665 (1972), and this Court, see In re Grand Jury Proceedings (Scarce), 5 F.3d 397 (9th Cir. 1993). As a result of this abdication of the judicial function and failure to follow precedent, a journalist is in prison without any showing by the government, or adequate evaluation by any court, as to whether the unpublished information sought by the grand jury bears more than a remote and tenuous relationship to any legitimate governmental interest, and in spite of a record that offers substantial reasons to conclude it does not.

The underlying facts of this case bear hallmarks of the governmental overreaching into areas of free speech and freedom of the press that has been a primary concern of the ACLU-NC. In the wake of a political protest demonstration at which a local police officer was injured, members of the Joint Terrorism Task Force ("JTTF") showed up at a journalist's home, questioned him about his connections to anarchist protest groups, and sought unpublished videotapes that he had taken of the demonstration. As discussed in the ACLU-NC

amicus brief filed before the panel (at pages 2-5), such JTTF visits for purposes of intelligence gathering concerning protest groups have been a disturbing pattern in recent years. The record before the district court included Mr. Wolf's sworn statements that the unpublished video bore no relationship to the crime that was put forward as the basis for the grand jury inquiry, along with evidence that the grand jury proceeding in this case has already damaged the journalist's ability to effectively engage in covering the activities and views of controversial non-mainstream groups. Yet, the district court and the panel essentially rubber-stamped the grand jury's subpoena for Mr. Wolf's unpublished information. Indeed, the district court even refused to review *in camera* the unpublished videotape to ascertain whether it had any connection to legitimate federal law enforcement interests.

The failure of the district court and the panel to follow the correct legal standard, as mandated by Branzburg and prior precedents of this Court, is an abdication of the necessary gatekeeper role that courts must play when these First Amendment interests are at risk, and creates a dangerous precedent on an issue of exceptional importance. This matter should be reheard by this Court *en banc*.

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

In Branzburg v. Hayes, 408 U.S. 665, 690 (1972), the Supreme Court made clear that while a federal grand jury has broad powers, its powers are not limitless. Where the material sought by a grand jury implicates First Amendment rights, the courts must ensure that the grand jury has a legitimate interest in that material. This is because "[n]ews gathering is not without its First Amendment protections." Id. at 707. Thus, grand jury investigations "instituted or conducted other than in good faith" would raise First Amendment concerns. Id. at 707-708. In a key concurrence Justice Powell described the types of facts that may justify quashing a grand jury subpoena seeking a reporter's unpublished information, including a showing that the information bears "only a remote and tenuous relationship to the subject of the investigation" or that no "legitimate need of law enforcement" exists. Id. at 710 (Powell, J., concurring).

Applying Branzburg, this Court recognized in Scarce v. United States, 5 F.3d 397, 401 (9th Cir. 1993), that the qualified "journalist's privilege" is available in the context of a grand jury investigation in at least three different situations:

> [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. at 401 (emphasis added). The Scarce Court properly followed prior decisions from this Circuit which recognize that the First Amendment provides protection to journalists in the grand jury context, and that the government may not overcome the journalist's rights without establishing its legitimate need for the particular information sought. Bursey v. United States, 466 F.2d 1059, 1086, 1091 (1972); In re Lewis, 501 F.2d 418, 423 (9th Cir. 1974); Lewis v. United States, 517 F.2d 236, 238 (9th Cir. 1975).

The panel's decision in this case rendered meaningless this legal standard of judicial review and balancing. The panel failed to engage in any balancing of the competing interests here, or even to compel the district court to review *in camera* the information sought by the grand jury, to confirm whether – as Mr. Wolf claims – the information truly is "remote and tenuous" from the grand jury investigation and not in furtherance of any legitimate federal interest. Instead, the panel simply asked whether the journalist had established governmental "bad faith" and – determining that Mr. Wolf had not met this burden – rejected his First Amendment arguments. (Memorandum Opinion ("Op.") at 4.) This narrow and crabbed view of what is required by the First Amendment interests at stake should not be allowed to stand as the law in this Circuit.

The record below provided more than enough facts to trigger the judicial review and scrutiny required to protect the First Amendment interests involved.

First, the request by local law enforcement for federal "assistance" in its investigation of the protestors and the assault on a police officer that occurred during the protest, a distinctly non-federal offense, resulted in Mr. Wolf being compelled to disclose unpublished journalistic materials that would be absolutely privileged under state law. Cal. Const. Art. I, § 2(b); Miller v. Superior Court, 21 Cal. 4th 883, 890-891 (1999) (prosecution has no right to journalist's unpublished materials).[1]

Second, the sole federal interest put forward to justify targeting Mr. Wolf was an investigation of an attempted arson of a police car, a potential violation of a federal statute because the City receives federal funds. But Mr. Wolf unequivocally stated under oath that he did not witness or videotape this alleged arson (ER 99), and, furthermore, there was no evidence put forward by the government to show that a police car was in fact burned.

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[1] The panel asserted that Mr. Wolf produced no evidence that he is a journalist protected by California's Shield Law. (Op. at 4 n.1.) The Shield Law is far broader than the panel suggests. It protects freelance journalists like Mr. Wolf who, as the panel recognized, sold a portion of his outtakes to "several television stations" (Op. at 5 n.2). People v. Von Villas, 10 Cal. App. 4th 201, 231-32 (1992); Playboy Enterprises, Inc. v. Superior Court, 154 Cal. App. 3d 14, 28-29 (1984). It also protects bloggers. O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 1457 (2006). Consistent with the broad protections provided by California's Shield Law, California courts thus have refused to make value judgments about what does or does not constitute "news" or "journalism" and instead have protected all who "gather information for communication to the public," as Mr. Wolf did here. Cal. Const. Art. 1, § 2(b).

Third, Mr. Wolf made a showing that the grand jury subpoena had already adversely affected his ability to cover anarchist groups and attend meetings and rallies by in a very real sense turning him – and other journalists like him – "into an investigative arm of the prosecutors and the courts." Shoen v. Shoen, 5 F.3d 1289, 1295 (9th Cir. 1993) (citation omitted).

All of the above raise the very concerns delineated in the case law that bear on the question of whether the intrusions on the First Amendment interests of the journalist (and the public) are justified by the relationship of the subpoenaed information to legitimate federal law enforcement interests. If the government has free reign to transform independent journalists into police photographers, then the government has a tool that can be used to prevent the public from learning about controversial non-mainstream groups. The district court and the panel, relying on a narrow and incorrect legal standard, brushed aside all these concerns as not amounting to a sufficient showing of "bad faith" by the government.

In few cases will a district court have before it such a strong showing of a tenuous connection between the subpoenaed journalistic material and any legitimate federal interest, including the lack of evidence that a *federal* crime even occurred. But this is such a case. If the inquiry demanded by Branzburg and this Court's precedents is to mean anything, it must mean something here. Without this inquiry, the judiciary foregoes its gatekeeper role mandated to protect journalists'

First Amendment rights. It interferes with Mr. Wolf's relationship with his sources. (ER 99.) And it does so notwithstanding the fact that the district court refused to review the videotape *in camera*, and thus it had no basis for evaluating Mr. Wolf's claim that the videotape contains no evidence of the purported arson. (ER 141-142.) ACLU-NC submits that here, if anywhere, notwithstanding the timing of Mr. Wolf's request, the district court should not have abrogated this critical inquiry to the grand jury, although that is exactly what it did, and what the panel decision endorsed. (ER 142, 143, 150.)

III. A JOURNALIST'S UNPUBLISHED MATERIAL IS COVERED BY THE FIRST AMENDMENT PRIVILEGE, EVEN IF IT IS NOT CONFIDENTIAL.

The panel also erred in trivializing the nature of the material sought by the grand jury, simply because it was not gathered under an express promise of confidentiality. (Op. at 5 n.2.) This Court has specifically recognized that the qualified First Amendment privilege extends not only to confidential sources, but also to unpublished material. Shoen, 5 F.3d at 1292 (citations omitted). This disregard of the precedents of this Court – on a matter so central to the core values of a free press – alone merits *en banc* consideration.

The Shoen Court identified four key interests necessitating a journalist's qualified privilege for unpublished material. Id. at 1294-95 (citation omitted). The Court explained, in language that applies with particular force here, that one

fundamental problem with compelling disclosure of even non-confidential unpublished information is that it "convert[s] the press in the public's mind into an investigative arm of prosecutors and the courts." Id. at 1295 (citation omitted). "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." Id. (citation omitted). Thus, reporters are entitled to protection even when chronicling events in public places. Id. (citation omitted). 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 this Court in Shoen to recognize the privilege for non-confidential unpublished information 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 a research tool of government... ." 5 F.3d at 1294-95 (citation omitted). Mr. Wolf's declaration is uncontroverted 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.) Rehearing is necessary to correct

this deviation from this Court's precedents, and to restore a principle that is central to the First Amendment's protection for a free press.

IV. CONCLUSION

The panel did not abide by this Court's precedents. It ignored language from Scarce, 5 F.3d at 401, establishing that courts must intervene when a grand jury seeks a reporter's privileged information without an adequate government interest. It also disregarded Shoen, 5 F.3d at 1295-1296, holding that non-confidential materials also are protected by the First Amendment. The result is a decision that destroys Mr. Wolf's significant First Amendment interests, undermines the public interest in an active and free press, and abdicates the necessary judicial role in balancing these First Amendment interests with legitimate law enforcement needs.

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This matter should be reheard *en banc*, and the subpoena to Mr. Wolf ordered quashed.

DATED this 19th day of October, 2006.

Respectfully submitted,

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The foregoing brief complies with the requirements of Federal Rule of Appellate Procedure 29(d) and Circuit Rule 40-1(a). 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 2,091, not including the caption page, 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 19th day of October, 2006.

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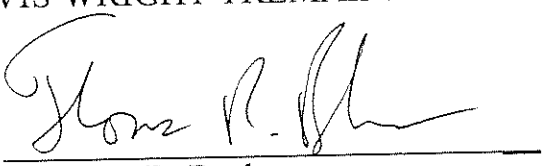
By: 

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