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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MARK BOAL, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

Case No. 2:16-CV-05407-GHK-GJS

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 36 MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFFS' *EX PARTE* APPLICATION

[Notice of Motion and Motion and [Proposed] filed Concurrently Herewith]

Date: August 29, 2016
Time: 9:30 a.m.
Judge: Honorable George H. King
Courtroom: 650

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INTRODUCTION

This case arises out of a threatened subpoena from a military prosecutor to civilian members of the news media, Plaintiffs Mark Boal and Flakjacket LLC d/b/a Page 1 (collectively, "Boal"), for confidential or non-confidential but unpublished recordings made by Boal of his interviews with U.S. Army Sgt. Robert Bowdrie Bergdahl. The Reporters Committee for Freedom of the Press and 36 other media organizations (collectively, "*amici*") write in support of Boal's *Ex Parte* Application for Temporary Restraining Order and for Order to Show Cause Why Defendants Should Not Be Preliminarily Enjoined from Issuing and Enforcing Subpoena.

The compelled disclosure of a journalist's unpublished work product or confidential materials has a destructive effect upon the news media's ability to gather news and report on matters of public concern. Accordingly, the Ninth Circuit has recognized a reporter's privilege against such compelled disclosure in both criminal and civil proceedings alike. *See Farr v. Pitchess,* 522 F.2d 464, 467 (9th Cir. 1975); *Shoen v. Shoen*, 5 F.3d 1289, 1292, 1295 (9th Cir. 1993) ("*Shoen I*"). *Amici* write to explain the important policy reasons underpinning the recognition of the reporter's privilege. In addition, *amici* support Boal's arguments that the reporter's privilege extends to Boal, because Boal had the intent, at the inception of the newsgathering process, to disseminate to the public information regarding Sgt. Bergdahl's disappearance from an Army outpost in Afghanistan. *See Shoen* I, 5 F.3d at 1293–94.

This is important not just to establish that Boal, specifically, is entitled to protection, but because as the definition of what constitutes journalism and what form it takes continues to advance at a rapid pace, established protections for journalists must continue to evolve to encompass a wide variety of forms and formats. Finally, *amici* urge the Court to address Boal's claims now, so that he can avoid unnecessary and irreparable injury. The issuance of the subpoena to a member of the news media can lead to a lengthy legal process that chills newsgathering activity, which is protected by the First Amendment. *California First Amendment Coalition v. Calderon*, 150 F.3d 976, 981 (9th Cir. 1998) (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). Moreover, in this case, any proceeding to enforce the military subpoena against Boal, who is a civilian, would have to be brought in federal district court; accordingly, in the interest of judicial efficiency and to protect Boal's First Amendment rights, this Court should grant Boal the relief he seeks in the instant proceeding. For these reasons, as well as those set forth in Boal's Memorandum of Points and Authorities, *amici* urge this Court to grant Boal's *Ex Parte* Application.

INTEREST OF AMICI CURIAE[1]

The Reporters Committee for Freedom of the Press ("Reporters Committee"), ABC, Inc., American Society of News Editors, AOL Inc. – The Huffington Post, The

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Associated Press, Association of Alternative Newsmedia, Association of American Publishers, Inc., The Boston Globe, LLC, Cable News Network, Inc., California Newspaper Publishers Association, CBS Broadcasting Inc., The Center for Investigative Reporting, The E.W. Scripps Company, First Amendment Coalition, First Look Media Works, Inc., Fox News Network LLC, Freedom of the Press Foundation, International Documentary Assn., Investigative Reporting Workshop at American University, Jigsaw Productions, The McClatchy Company, The Media Consortium, MPA – The Association of Magazine Media, The National Press Club, National Press Photographers Association, National Public Radio, Inc., NBCUniversal Media, LLC, New England First Amendment Coalition, The News Guild – CWA, Newspaper Association of America, Radio Television Digital News Association, Reporters Without Boarders, Serial Podcast, LLC, Society of Professional Journalists, Student Press Law Center, Tully Center for Free Speech, and The Washington Post submit this brief in support of Boal in this matter.

Amici are media entities and organizations representing professional journalists and media entities. Each of the *amici*, or their members, are engaged in the dissemination of news to members of the public. In the course of gathering news for dissemination, *amici* or their members at times rely upon promises of confidentiality to sources regarding the sources' identities or certain portions of information provided by sources. Additionally, in disseminating news to the public, each of the

amici or their members select among all of the material gathered through their reporting and make choices regarding what portions of that material will be disseminated and what portions will remain unpublished. Without recognition and consistent application of a privilege grounded in the First Amendment to protect from disclosure confidential source information and unpublished materials gathered by *amici* in the course of reporting the news, *amici*'s ability to report on matters of public concern would be significantly impaired. Accordingly, *amici* have an interest in ensuring that Boal is not required to divulge confidential or unpublished material in contravention of the reporter's privilege as a result of a subpoena issued in connection with the court martial of Sgt. Bergdahl.

ARGUMENT

I. Requiring journalists to reveal confidential or unpublished materials undermines society's interest in protecting the newsgathering process.

"The First Amendment guarantees a free press primarily because of the important role it can play as 'a vital source of public information.'" *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981) (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)); *Caldwell v. United States*, 434 F.2d 1081, 1084 (9th Cir. 1970) (quoting *Grosjean*, 297 U.S. at 250), *rev'd on other grounds*, *Branzburg*, 408 U.S. at 708; *see also Shoen I*, 5 F.3d at 1292 (noting "society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public"). The Supreme Court has held that "an informed public is

the essence of working democracy." *Minneapolis Star & Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 585 (1983). As a country, "[w]e have placed our faith in knowledge, not in ignorance, and for most this means reliance on the press." *United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring).

Courts have recognized that "[f]orcing the press to breach a promise of confidentiality threatens its ability in the future to perform its public function by impairing its ability to acquire information for publication." *Chevron Corp. v. Berlinger*, 629 F.3d 297, 307 (2d Cir. 2011). A journalist who breaks his promise to keep certain material confidential will no longer be trusted by current or future sources who require confidentiality of their identities or certain information as a condition of their cooperation. *See, e.g.*, *Zerilli*, 656 F.2d at 711; *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979). Similarly, requiring a journalist to provide the government with his or her work product or unpublished material degrades the independent status of the press. Compelled disclosure of unpublished material "'convert[s] the press in the public's mind into an investigative arm of prosecutors and the courts'" and causes journalists to "'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.'" *Shoen I*, 5 F.3d at 1295 (quoting Duane D. Morse & John W. Zucker, *The Journalist's Privilege in Testimonial Privileges* 474–75 (Scott N. Stone & Ronald S. Liebman eds., 1983)). For these reasons, compelling a journalist to disclose confidential or unpublished material will negatively affect his or her ability to report future news stories, and the public's corresponding ability to receive information. *See Baker v. F&F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972).

Based on the negative impact of compelled disclosure of confidential or unpublished materials, the Ninth Circuit applies a qualified privilege grounded in the First Amendment in both civil and criminal judicial proceedings to protect information acquired by a journalist in the course of gathering the news:

> Rooted in the First Amendment, the privilege is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest "of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice."

Shoen I, 5 F.3d at 1292 (quoting *Herbert v. Lando*, 441 U.S. 153, 183 (1979) (Brennan, J., dissenting) (internal quotations omitted)); *see also Farr*, 522 F.2d at 467–68.

Moreover, given the news media's central role in our democracy as a critical source of information for the public, the executive branch, in addition to the judiciary, has recognized the strong public policy objectives behind news media independence and confidentiality of newsgathering materials. The U.S. Department of Justice

("DOJ") has identified "the essential role of a free press in fostering government accountability and an open society," Dep't of Justice, *Report on Review of News Media Policies* at 2 (July 12, 2013), available at http://bit.ly/1TTieSt ("DOJ Report"), and stated that "freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news," 28 C.F.R. § 50.10(a)(1).

In 1970, the DOJ adopted guidelines governing the issuance of subpoenas by federal law enforcement to members of the news media. *See* 28 C.F.R. § 50.10 (the "DOJ guidelines"). While the DOJ guidelines do not create legally enforceable rights, they reflect a powerful social contract between the government and the news media. These guidelines, most recently revised in 2015, demonstrate the government's understanding "of the importance of the constitutionally protected newsgathering process," and that issuance of subpoenas and other law enforcement tools now included in the policy to members of the news media will have a serious and negative impact on that process. DOJ Report at 2. In addition, the DOJ guidelines encapsulate the government's view that tools seeking evidence from the news media are "an extraordinary measure" and should be used "only as a last resort." *Id.*; *see also* 28 C.F.R. § 50.10(a)(3).

Thus, both judicial precedents and public policy imperatives have long acknowledged the importance of protecting the integrity of the newsgathering process and the corrosive impact that compelled disclosure of confidential or unpublished

materials can have on these activities. The nation relies on the press for information about the performance of the government, the military, and other institutions of significant public concern. For the reasons explained above, requiring journalists to reveal confidential or unpublished materials threatens their autonomy to gather information and report it to the public. The reporter's privilege is essential to preserving the free flow of information through the press to the public and the resulting benefits to American democracy.

II. Boal is entitled to the protections of the reporter's privilege.

In determining whether the reporter's privilege applies to shield information in a particular case, the Court must first consider the threshold legal question of whether the individual who seeks to invoke this privilege qualifies for protection as a journalist. *Shoen I*, 5 F.3d at 1293. In *Shoen I*, the Ninth Circuit adopted the reasoning of the Second Circuit as stated in *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987), *cert denied*, 481 U.S. 1015 (1987), to decide this threshold legal question. *Id.* at 1293–94.

In *Shoen I*, the Court held that "[t]he test . . . is whether the person seeking to invoke the privilege had 'the intent to use the material—sought, gathered or received—to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process.'" *Id.* at 1293–94 (quoting *von Bulow*, 811 F.2d at 144). Thus, the Court concluded that "the medium used to report the

news to the public" is not important to determining the applicability of the reporter's privilege; rather, "[w]hat makes journalism journalism is not its format but its content." *Id.* at 1293; *see also Branzburg,* 408 U.S. at 705 ("Liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods."); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."); *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014) (stating that "[t]he protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities" and that "a First Amendment distinction between the institutional press and other speakers is unworkable"). Accordingly, in *Schoen I* the Ninth Circuit held that an investigative book author is a "journalist" for purposes of claiming the reporter's privilege. *Shoen I*, 5 F.3d at 1294.

Other federal circuit courts have similarly rejected the contention that one must be a member of the traditional print or broadcast media or that a specific method of dissemination must be employed in order to claim the reporter's privilege. For example, even before *von Bulow* and *Shoen I*, the Tenth Circuit applied a similar test to determine that a documentary filmmaker—though not "a regular newsman"—was a journalist entitled to invoke the reporter's privilege. *Silkwood v. Kerr-McGee*

Corp., 563 F.2d 433, 436 (10th Cir. 1977). In reaching this holding, the Court noted that the filmmaker's "mission in this case was to carry out investigative reporting for use in the preparation of a documentary film," that he "spent considerable time and effort in obtaining facts and information" and that "it cannot be disputed that his intention, at least, was to make use of this in preparation of the film." *Id.* at 143–37.

Additionally, as noted above, the Second Circuit has held that the intent to use material to disseminate information to the public is paramount, and that "[t]he intended manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill or the like." *von Bulow*, 811 F.2d at 144. Noting that "'[t]he informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists,'" *id.* at 145 (quoting *Branzburg*, 408 U.S. at 705), the Court stated that the journalist's privilege "may be sought by one not traditionally associated with the institutionalized press." *Id.* at 144–45; *see also Berlinger*, 629 F.3d at 307 ("A person need not be a credentialed reporter working for an established press entity to establish entitlement to the privilege.").

Similarly, in *In re Madden*, the Third Circuit adopted the reasoning of *von Bulow* and *Shoen I* to hold that the privilege "requires an intent at the inception of the newsgathering process to disseminate investigative news to the public." 151 F.3d 125, 129 (3d Cir. 1998). The outcomes in *von Bulow* and *In re Madden* demonstrate

that applying the privilege is no mere formality. In both cases, courts found the privilege was inapplicable to the individuals seeking its protection, because although the information at issue was to be publicly disseminated, it was initially gathered as part of a criminal defense effort (*von Bulow*, 811 F.2d at 146) or was to be used in corporate promotions (*In re Madden*, 151 F.3d at 130).

Adherence to the test articulated in *Shoen I* is especially important in light of continued and rapid changes to the nature of the news media. In recent years, journalists have developed novel forms of disseminating information to the public that would have been unthinkable only a few years before. For example, media outlets now use Facebook to share news with "friends," "tweet" news stories to followers in 140 characters or less, and make "snaps" of photos and videos available to subscribers via Snapchat. *See* Michael Barthel, Elisa Shearer, Jeffrey Gottfried, and Amy Mitchell, *The Evolving Role of News on Twitter and Facebook*, Pew Research Center (July 14, 2015), available at https://perma.cc/YNP3-73TP; Joseph Lichterman, *Snapchat stories: Here's how 6 news orgs are thinking about the chat app*, NiemanLab (Feb. 23, 2015), available at http://bit.ly/1zbdnLP.

Podcasting, the medium by which Boal disseminated his reporting about Sgt. Bergdahl, is also a relatively new form of journalism. Yet, according to one research study, an estimated 98 million Americans have listened to a podcast at least once, and more than one in five Americans report listening to a podcast within the past month.

Edison Research, *The Infinite Dial 2016* (2016), available at http://bit.ly/2amwFOW. The podcast at issue in this case, *Serial*, has been downloaded by millions of listeners and won numerous journalism awards. *See* John Koblin, *'Serial' Podcast, Needing More Reporting Time, Goes Biweekly*, N.Y. Times (Jan. 12, 2016), available at http://nyti.ms/1RkMvHE; Serial, About Serial, available at https://perma.cc/K3CW-KPFK (last visited July 25, 2016).

Use of visual storytelling and interactive graphics in online media has also transformed the way in which the public consumes news. *See, e.g.*, Ginger Thommpson, Susie Cagle, & Lena Groeger, *The Making of a Narco-Terrorist*, ProPublica (Dec. 15, 2015), available at http://bit.ly/1Yy0sq1 (using original illustrations and an interactive website designed to feel like a card game to report about sting operations carried out by the U.S. Drug Enforcement Administration); John Branch, *Snow Fall: The Avalanche at Tunnel Creek*, N.Y. Times, http://nyti.ms/1dQ0jHo (last visited July 24, 2016) (combining text, historic photographs, video, and informative graphics to create an interactive story about an avalanche). Some media organizations have even begun using virtual reality to report the news. *See Viewing the Future? Virtual Reality in Journalism*, Knight Foundation (March 13, 2016), http://kng.ht/2a9xXuu.

As news organizations and individuals are using new forms to distribute works of journalism, it is essential that the legal standard for defining who is entitled to

claim the reporter's privilege keeps pace. Application of the *Shoen I* test, which focuses not on the medium of distribution, but on the intent to disseminate information to the public when the information is gathered, ensures that reporters will be entitled to the privilege even when using novel formats.

Under the test articulated in *Shoen I*, it is indisputable that Boal is a journalist entitled to seek the protections of the reporter's privilege.[2] First, and most critically, the evidence shows that he recorded the interviews with the intent to disseminate to the public information on a subject that was topical, controversial, and a matter of significant public interest, namely, Sgt. Bergdahl's disappearance from an Army outpost in Afghanistan. Declaration of Mark Boal in Support of *Ex Parte* Application for Temporary Restraining Order and for Order to Show Cause, *Mark Boal, et al. v. United States of America et al.*, 2:16-cv-05407-GHK-GJS at ¶ 6 (filed July 21, 2016), ECF No. 9-2 ("Boal Decl."). Although Boal may not have known the precise medium in which he would disseminate the information he gathered at the time the interviews were conducted, the reporter's privilege attaches to the interviews based not on the medium used to report the news to the public, but rather on Boal's intent. *Shoen I*, 5 F.3d at 1293. Accordingly, the fact that Boal was considering various

[2] Plaintiff Flakjacket LLC, d/b/a Page 1, is a company founded by Plaintiff Boal for the sole purpose of producing his work, described as a combination of "reporting and entertainment." *See* Complaint for Declaratory and/or Injunctive Relief, or, In the Alternative, Petition for a Writ of Mandamus and/or Prohibition, *Mark Boal, et al. v. United States of America et al.*, 2:16-cv-05407 at ¶ 9 (filed July 20, 2016), ECF No. 1 ("Complaint"). Accordingly, the following analysis discussing Plaintiff Boal's intent and work experience applies equally to both plaintiffs.

options regarding the format via which he intended to distribute information regarding Sgt. Bergdahl to the public—whether via a documentary, feature film, news articles, or non-fiction book, *see* Boal Decl. at ¶ 6—is irrelevant. *Shoen I*, 5 F.3d at 1293 ("What makes journalism journalism is not its format but its content.").

Second, Boal's prior experience as a professional journalist can act as "persuasive evidence of present intent to gather for the purpose of dissemination." *von Bulow*, 811 F.2d at 144. Boal's career as a professional journalist is extensive; he has published numerous investigative news articles in traditional print media and produced a forthcoming documentary film. *See* Boal Decl. at ¶¶ 2–5; Jordan Michael Smith, *The Many Faces of Mark Boal*, The Nation (June 14, 2013), available at http://bit.ly/2a8pgxN (discussing Boal's reporting for *The Village Voice*, *Mother Jones*, *Rolling Stone*, and *Playboy*).

Similarly, Boal's previous work as a filmmaker, having written the screenplays for the films *The Hurt Locker* and *Zero Dark Thirty*, among others, *see* Boal Decl. at ¶¶ 2–3, is persuasive evidence of his intent to disseminate information about Sgt. Bergdahl. Though fictional, both *The Hurt Locker* and *Zero Dark Thirty* have been described as having journalistic qualities. *See* Smith, *supra* at http://bit.ly/2a8pgxN. In addition, both films communicated information on matters of public concern to viewers. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 502 (1952) (recognizing that fictional films are "a significant medium for the communication of

ideas" that are entitled to protection under the First Amendment); *Shoen I*, 5 F.3d at 1293 n.7 (citing Upton Sinclair's 1906 novel *The Jungle* as a prime example of muckraking reporting exposing newsworthy facts on controversial matters of public opinions).

Finally, the fact that portions of Boal's interviews and other reporting were ultimately broadcast to the public through the podcast *Serial* lends credibility to his claim that he conducted the interviews with the intent to gather news for dissemination to the public. By choosing to broadcast portions of the interviews with Sgt. Bergdahl through *Serial*, Boal fulfilled his original intent to disseminate news about Sgt. Bergdahl's disappearance to a public audience. Because it is clear that Boal had the intent, at the inception of the newsgathering process, to disseminate information about Sgt. Bergdahl's disappearance, that Boal is a member of the news media, and that Boal ultimately did distribute information to the public based on the interviews he conducted, Boal is squarely entitled under *Shoen I* to claim the protection of the reporter's privilege to shield from compelled disclosure the confidential and nonconfidential but unpublished portions of the interviews.

III. The Court should address these claims now to avoid irreparable harm to Boal.

Boal seeks a declaration, injunction, or writ from this Court preventing the issuance or enforcement of a subpoena by the military prosecutor in Sgt. Bergdahl's court martial. *See* Complaint at ¶ 2. This Court should provide Boal, who is a

civilian, with the relief he seeks at this juncture, before he is subjected to protracted proceedings beginning with a military tribunal, in attempting to protect his confidential and unpublished materials under the reporter's privilege.

Subpoenas to members of the news media seeking confidential or unpublished materials can result in lengthy legal battles that negatively affect the news media's ability to cultivate and maintain relationships with sources and thereby report on matters of public concern. For example, in 2008, *New York Times* reporter James Risen was subpoenaed to testify before a grand jury about the source of information in one of his books. *See* Matt Apuzzo, *Times Reporter Will Not Be Called to Testify*, N.Y. Times (Jan. 12, 2015), available at http://nyti.ms/1z2niJk. The subpoena was renewed in 2011, when the government sought Risen's testimony in the trial of former CIA officer Jeffery Sterling. *See id.* It was not until seven years after the first subpoena was issued that the DOJ determined—after applying updated DOJ guidelines—that it would not require Risen to testify about his confidential sources. *Id.*; Josh Gerstein, *James Risen subpoena faces new review*, Politico (Oct. 10, 2014), available at https://perma.cc/BF76-VZKX. Following Sterling's conviction, then-Attorney General Eric Holder noted that the guilty verdict proved "it is possible to fully prosecute unauthorized disclosures that inflict harm upon our national security without interfering with journalists' ability to do their jobs." Matt Zapotosky, *Former CIA officer Jeffrey Sterling convicted in leak case*, The Washington Post

(Jan. 26, 2015), available at https://perma.cc/58KE-X9QY.

Yet, during the seven years that Risen was subject to a subpoena, he worked with "the sword of Damocles over his head" and with the constant threat that defiance of the subpoena "could end with him behind bars." Maureen Dowd, *Where's the Justice at Justice?*, N.Y. Times (Aug. 16, 2014), available at http://nyti.ms/1oR38qH. In addition, the subpoena and lengthy legal process required to fight it created a chilling effect on Risen and other reporters. Pulitzer-prize winning reporter Dana Priest described the Risen subpoena as allowing officials "to hold a hammer over the head of a deeply sourced reporter, and others like him." Norman Solomon and Marcy Wheeler, *The Government War Against Reporter James Risen*, The Nation (Oct. 27, 2014), available at http://bit.ly/2a6rdQS. Similarly, David Barstow, another Pulitzer-prize winning reporter, stated that, as a result of the Risen subpoena, he had "felt the chill firsthand. Trusted sources in Washington are scared to talk by telephone, or by email, or even to meet for coffee, regardless of whether the subject touches on national security or not." *Id.*

This Court's resolution of Boal's claims would be the most efficient approach in terms of judicial economy and would eliminate an unnecessary and potentially lengthy legal process in the military courts that would ultimately end up in federal district court anyway. As Boal notes, *see* Memorandum of Points and Authorities in Support of Plaintiffs' *Ex Parte* Application, *Boal et al. v. United States of America et*

al., 2:16-cv-05407-GHK-GJS at 5 (filed July 21, 2016), ECF No. 9-1, government enforcement of any military subpoena issued against Boal, a civilian, must take place in federal district court. *See* 10 U.S.C. § 847. Accordingly, the federal courts will necessarily be called upon to rule on the enforceability of the subpoena if issued. Rather than delay granting Boal the relief he seeks until after the subpoena has been served and the government seeks to enforce it, this Court should issue the declaration, injunction, or writ Boal seeks. *See New York Times Co. v. Gonzales*, 459 F.3d 160, 167 (2d Cir. 2006) ("*Gonzales*") (holding that the district court properly exercised jurisdiction over a newspaper's request for declaratory judgment, in the face of a threatened subpoena, that the reporter's privilege extends to records held by third party telephone providers); *id.* at 174 (Sack, J., dissenting) (agreeing with the majority that declaratory judgment can be "a salutary procedural device for testing the propriety of a government attempt to compel disclosure of information from journalists").[3]

In addition, this Court should grant Boal the relief he seeks now because DOJ would inevitably see that enforcement of this subpoena would be inconsistent with

[3] In *Gonzales*, the threatened subpoena arose out of a grand jury investigation conducted in the Northern District of Illinois into the "leak" of information to the newspaper. *Gonzales*, 459 F.3d at 163–64. The newspaper filed suit in the Southern District of New York, where the newspaper was located and the newsgathering at issue occurred. *New York Times Co. v. Gonzales*, 382 F.Supp.2d 457, 479 n.14 (S.D.N.Y. 2005). Both the Southern District of New York and the Second Circuit applied the law of the Second Circuit—not the law of the location of the grand jury investigation—in determining whether declaratory judgment was available to the newspaper and whether the reporter's privilege applied.

DOJ policy. In 2014, in response to questions about the Risen subpoena, then-Attorney General Holder stated, "As long as I'm attorney general, no reporter who is doing his job is going to go to jail. As long as I'm attorney general, someone who is doing their job is not going to get prosecuted." Charlie Savage, *Holder Hints Reporter May Be Spared Jail in Leak*, N.Y. Times (May 27, 2014), available at http://nyti.ms/1jscnLA. In 2015, current Attorney General Loretta Lynch adopted Holder's pledge, stating that she agreed with Holder's position and would continue to uphold it. Associated Press, *Attorney General Lynch says Justice Dept. won't send reporters to jail for doing their job*, U.S. News & World Report (Oct. 9, 2015), available at https://perma.cc/99SA-R7LP. Yet, if the government seeks to enforce a subpoena to compel Boal to reveal confidential and unpublished material through contempt proceedings, it will be attempting to send a journalist to jail simply for "doing his job."

Finally, the Court should protect Boal today because the enforcement of a subpoena that, on its face, fails to overcome the reporter's privilege infringes Boal's First Amendment rights and thereby causes irreparable harm. As noted above, "[c]ompelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis," *Baker*, 470 F.2d at 782, as does the forced disclosure of unpublished materials, *Shoen I*, 5 F.3d at 1295. This is especially true when the

reporter is attempting to cover the military and national security, Boal's areas of sustained journalistic and creative focus. *See* Boal Decl., ¶ 2; Human Rights Watch & American Civil Liberties Union, *With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law and American Democracy* at 28 (July 2014), available at http://bit.ly/2amxaZh (stating that journalists on a "military and national security beat" have "skittish sources") ("HRW & ACLU Report"). In short, Boal "depends upon an atmosphere of confidentiality and trust" to carry out his newsgathering activities. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (recognizing a psychotherapist-patient privilege under Fed. R. Evid. 501).

For these reasons, enforcement of the subpoena in the federal courts would impinge on Boal's First Amendment right to engage in newsgathering. Both the Ninth Circuit and the Supreme Court "have repeatedly held that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Accordingly, this Court should grant Boal relief both to ensure judicial efficiency and in order to avoid the irreparable injury that would otherwise result.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to grant Boal's *ex parte* application for a temporary restraining order and order to show cause.

Dated: July 29, 2016

Respectfully submitted,

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