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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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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

INTEREST OF AMICI CURIAE 2

ARGUMENT..... 4

I. Requiring journalists to reveal confidential or unpublished materials undermines society’s interest in protecting the newsgathering process..... 4

II. Boal is entitled to the protections of the reporter’s privilege. 8

III. The Court should address these claims now to avoid irreparable harm to Boal. 15

CONCLUSION 20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
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27
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TABLE OF AUTHORITIES

CASES

Branzburg v. Hayes, 408 U.S. 665 (1972)..... *passim*

Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970)..... 5

California First Amendment Coalition v. Calderon, 150 F.3d 976 (9th Cir. 1998)..... 2

Chevron Corp. v. Berlinger, 629 F.3d 297 (2d Cir. 2011) 5, 10

Elrod v. Burns, 427 U.S. 347 (1976) 20

Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975)..... 1, 6

Grosjean v. American Press Co., 297 U.S. 233 (1936) 5

Herbert v. Lando, 441 U.S. 153 (1979) 6

In re Madden, 151 F.3d 125, 129 (3d Cir. 1998)..... 10, 11

Jaffee v. Redmond, 518 U.S. 1 (1996) 20

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 14

Klein v. City of San Clemente, 584 F.3d 1196 (9th Cir. 2009)..... 20

Lovell v. Griffin, 303 U.S. 444 (1938) 9

Minneapolis Star & Tribune Co. v. Minnesota Com’r of Revenue, 460 U.S. 575 (1983) 5

New York Times Co. v. Gonzales, 382 F.Supp.2d 457 (S.D.N.Y. 2005)..... 18

New York Times Co. v. Gonzales, 459 F.3d 160 (2d Cir. 2006)..... 18

Obsidian Finance Group, LLC v. Cox, 740 F.3d 1284 (9th Cir. 2014)..... 9

Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993) *passim*

United States v. Morison, 844 F.2d 1057 (4th Cir. 1988)..... 5

von Bulow v. von Bulow, 811 F.2d 136 (2d Cir. 1987)..... *passim*

STATUTES

10 U.S.C. § 847..... 18

RULES

28 C.F.R. § 50.10 7

1
2
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6
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10
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15
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OTHER AUTHORITIES

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>..... 19

Charlie Savage *Holder Hints Reporter May Be Snared Jail in Leak*, N.Y. Times (May 27, 2014), available at <http://nyti.ms/1jscnLA> 19

DOJ, *Report on Review of News Media Policies* (July 12, 2013), available at <http://bit.ly/1TTieSt>..... 7

Duane D. Morse & John W. Zucker, *The Journalist's Privilege in Testimonial Privileges* (Scott N. Stone & Ronald S. Liebman eds., 1983)..... 6

Edison Research, *The Infinite Dial 2016* (2016), available at <http://bit.ly/2amwFOW>..... 11

Ginger Thommpson, Susie Cagle, & Lena Groeger, *The Making of a Narco-Terrorist*, ProPublica (Dec. 15, 2015), available at <http://bit.ly/1Yy0sq1>..... 12

Human Rights Watch & American Civil Liberties Union, *With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law and American Democracy* (July 2014), available at <http://bit.ly/2amxaZh>..... 20

John Branch, *Snow Fall: The Avalanche at Tunnel Creek*, N.Y. Times, <http://nyti.ms/1dQ0jHo> (last visited July 24, 2016) 12

John Koblin, *'Serial' Podcast, Needing More Reporting Time, Goes Biweekly*, N.Y. Times (Jan. 12, 2016), available at <http://nyti.ms/1RkMvHE>..... 12

Jordan Michael Smith, *The Many Faces of Mark Boal*, The Nation (June 14, 2013), available at <https://perma.cc/M2KV-KSYQ> 14

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>..... 11

Josh Gerstein, *James Risen subpoena faces new review*, Politico (Oct. 10, 2014), available at <https://perma.cc/BF76-VZKX>..... 16

Matt Apuzzo, *Times Reporter Will Not Be Called to Testify*, N.Y. Times (Jan. 12, 2015), available at <http://nyti.ms/1z2niJk> 16

Matt Zapposky, *Former CIA officer Jeffrey Sterling convicted in leak case*, The Washington Post (Jan. 26, 2015), available at <https://perma.cc/58KE-X9QY> 16

Maureen Dowd, *Where's the Justice at Justice?*, N.Y. Times (Aug. 16, 2014), available at <http://nyti.ms/1oR38qH>..... 17

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> 11

1 Norman Solomon and Marcy Wheeler, *The Government War Against Reporter James*
Risen, *The Nation* (Oct. 27, 2014), available at <http://bit.ly/2a6rdQS> 17

2
3 Serial, About Serial, available at <https://serialpodcast.org/about> (last visited July 21,
4 2016) 12

5 *Viewing the Future? Virtual Reality in Journalism*, Knight Foundation (March 13,
6 2016), <http://kng.ht/2a9xXuu> 12

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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.

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

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21 **INTEREST OF AMICI CURIAE¹**

22 The Reporters Committee for Freedom of the Press (“Reporters Committee”),
23 ABC, Inc., American Society of News Editors, AOL Inc. – The Huffington Post, The
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26 ¹ No counsel for a party authored this brief in whole or in part, nor did any person or
27 entity, other than *amici* or their counsel, make a monetary contribution to the
28 preparation or submission of this brief.

1 Associated Press, Association of Alternative Newsmedia, Association of American
2 Publishers, Inc., The Boston Globe, LLC, Cable News Network, Inc., California
3 Newspaper Publishers Association, CBS Broadcasting Inc., The Center for
4 Investigative Reporting, The E.W. Scripps Company, First Amendment Coalition,
5 First Look Media Works, Inc., Fox News Network LLC, Freedom of the Press
6 Foundation, International Documentary Assn., Investigative Reporting Workshop at
7 American University, Jigsaw Productions, The McClatchy Company, The Media
8 Consortium, MPA – The Association of Magazine Media, The National Press Club,
9 National Press Photographers Association, National Public Radio, Inc.,
10 NBCUniversal Media, LLC, New England First Amendment Coalition, The News
11 Guild – CWA, Newspaper Association of America, Radio Television Digital News
12 Association, Reporters Without Borders, Serial Podcast, LLC, Society of
13 Professional Journalists, Student Press Law Center, Tully Center for Free Speech, and
14 The Washington Post submit this brief in support of Boal in this matter.
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20 *Amici* are media entities and organizations representing professional journalists
21 and media entities. Each of the *amici*, or their members, are engaged in the
22 dissemination of news to members of the public. In the course of gathering news for
23 dissemination, *amici* or their members at times rely upon promises of confidentiality
24 to sources regarding the sources’ identities or certain portions of information
25 provided by sources. Additionally, in disseminating news to the public, each of the
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1 *amici* or their members select among all of the material gathered through their
2 reporting and make choices regarding what portions of that material will be
3 disseminated and what portions will remain unpublished. Without recognition and
4 consistent application of a privilege grounded in the First Amendment to protect from
5 disclosure confidential source information and unpublished materials gathered by
6 *amici* in the course of reporting the news, *amici*'s ability to report on matters of
7 public concern would be significantly impaired. Accordingly, *amici* have an interest
8 in ensuring that Boal is not required to divulge confidential or unpublished material
9 in contravention of the reporter's privilege as a result of a subpoena issued in
10 connection with the court martial of Sgt. Bergdahl.
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14 ARGUMENT

15 **I. Requiring journalists to reveal confidential or unpublished materials** 16 **undermines society's interest in protecting the newsgathering process.**

17 "The First Amendment guarantees a free press primarily because of the
18 important role it can play as 'a vital source of public information.'" *Zerilli v. Smith*,
19 656 F.2d 705, 710 (D.C. Cir. 1981) (quoting *Grosjean v. American Press Co.*, 297
20 U.S. 233, 250 (1936)); *Caldwell v. United States*, 434 F.2d 1081, 1084 (9th Cir.
21 1970) (quoting *Grosjean*, 297 U.S. at 250), *rev'd on other grounds*, *Branzburg*, 408
22 U.S. at 708; *see also Shoen I*, 5 F.3d at 1292 (noting "society's interest in protecting
23 the integrity of the newsgathering process, and in ensuring the free flow of
24 information to the public"). The Supreme Court has held that "an informed public is
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1 the essence of working democracy.” *Minneapolis Star & Tribune Co. v. Minnesota*
2 *Com’r of Revenue*, 460 U.S. 575, 585 (1983). As a country, “[w]e have placed our
3 faith in knowledge, not in ignorance, and for most this means reliance on the press.”
4 *United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J.,
5 concurring).
6

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8 Courts have recognized that “[f]orcing the press to breach a promise of
9 confidentiality threatens its ability in the future to perform its public function by
10 impairing its ability to acquire information for publication.” *Chevron Corp. v.*
11 *Berlinger*, 629 F.3d 297, 307 (2d Cir. 2011). A journalist who breaks his promise to
12 keep certain material confidential will no longer be trusted by current or future
13 sources who require confidentiality of their identities or certain information as a
14 condition of their cooperation. *See, e.g., Zerilli*, 656 F.2d at 711; *Riley v. City of*
15 *Chester*, 612 F.2d 708, 714 (3d Cir. 1979). Similarly, requiring a journalist to
16 provide the government with his or her work product or unpublished material
17 degrades the independent status of the press. Compelled disclosure of unpublished
18 material ““convert[s] the press in the public’s mind into an investigative arm of
19 prosecutors and the courts”” and causes journalists to ““be shunned by persons who
20 might otherwise give them information without a promise of confidentiality, barred
21 from meetings which they would otherwise be free to attend and to describe, or even
22 physically harassed if, for example, observed taking notes or photographs at a public
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1 rally.” *Shoen I*, 5 F.3d at 1295 (quoting Duane D. Morse & John W. Zucker, *The*
2 *Journalist’s Privilege in Testimonial Privileges* 474–75 (Scott N. Stone & Ronald S.
3 Liebman eds., 1983)). For these reasons, compelling a journalist to disclose
4 confidential or unpublished material will negatively affect his or her ability to report
5 future news stories, and the public’s corresponding ability to receive information.
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8 *See Baker v. F&F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972).

9 Based on the negative impact of compelled disclosure of confidential or
10 unpublished materials, the Ninth Circuit applies a qualified privilege grounded in the
11 First Amendment in both civil and criminal judicial proceedings to protect
12 information acquired by a journalist in the course of gathering the news:
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14 Rooted in the First Amendment, the privilege is a
15 recognition that society’s interest in protecting the
16 integrity of the newsgathering process, and in
17 ensuring the free flow of information to the public, is
18 an interest “of sufficient social importance to justify
19 some incidental sacrifice of sources of facts needed
20 in the administration of justice.”

21 *Shoen I*, 5 F.3d at 1292 (quoting *Herbert v. Lando*, 441 U.S. 153, 183 (1979)
22 (Brennan, J., dissenting) (internal quotations omitted)); *see also Farr*, 522 F.2d at
23 467–68.

24 Moreover, given the news media’s central role in our democracy as a critical
25 source of information for the public, the executive branch, in addition to the judiciary,
26 has recognized the strong public policy objectives behind news media independence
27 and confidentiality of newsgathering materials. The U.S. Department of Justice
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1 (“DOJ”) has identified “the essential role of a free press in fostering government
2 accountability and an open society,” Dep’t of Justice, *Report on Review of News*
3 *Media Policies* at 2 (July 12, 2013), available at <http://bit.ly/1TTieSt> (“DOJ Report”),
4 and stated that “freedom of the press can be no broader than the freedom of members
5 of the news media to investigate and report the news,” 28 C.F.R. § 50.10(a)(1).
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8 In 1970, the DOJ adopted guidelines governing the issuance of subpoenas by
9 federal law enforcement to members of the news media. *See* 28 C.F.R. § 50.10 (the
10 “DOJ guidelines”). While the DOJ guidelines do not create legally enforceable
11 rights, they reflect a powerful social contract between the government and the news
12 media. These guidelines, most recently revised in 2015, demonstrate the
13 government’s understanding “of the importance of the constitutionally protected
14 newsgathering process,” and that issuance of subpoenas and other law enforcement
15 tools now included in the policy to members of the news media will have a serious
16 and negative impact on that process. DOJ Report at 2. In addition, the DOJ
17 guidelines encapsulate the government’s view that tools seeking evidence from the
18 news media are “an extraordinary measure” and should be used “only as a last
19 resort.” *Id.*; *see also* 28 C.F.R. § 50.10(a)(3).
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24 Thus, both judicial precedents and public policy imperatives have long
25 acknowledged the importance of protecting the integrity of the newsgathering process
26 and the corrosive impact that compelled disclosure of confidential or unpublished
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1 materials can have on these activities. The nation relies on the press for information
2 about the performance of the government, the military, and other institutions of
3 significant public concern. For the reasons explained above, requiring journalists to
4 reveal confidential or unpublished materials threatens their autonomy to gather
5 information and report it to the public. The reporter’s privilege is essential to
6 preserving the free flow of information through the press to the public and the
7 resulting benefits to American democracy.

10 **II. Boal is entitled to the protections of the reporter’s privilege.**

11 In determining whether the reporter’s privilege applies to shield information in
12 a particular case, the Court must first consider the threshold legal question of whether
13 the individual who seeks to invoke this privilege qualifies for protection as a
14 journalist. *Shoen I*, 5 F.3d at 1293. In *Shoen I*, the Ninth Circuit adopted the
15 reasoning of the Second Circuit as stated in *von Bulow v. von Bulow*, 811 F.2d 136
16 (2d Cir. 1987), *cert denied*, 481 U.S. 1015 (1987), to decide this threshold legal
17 question. *Id.* at 1293–94.

18 In *Shoen I*, the Court held that “[t]he test . . . is whether the person seeking to
19 invoke the privilege had ‘the intent to use the material—sought, gathered or
20 received—to disseminate information to the public and [whether] such intent existed
21 at the inception of the newsgathering process.’” *Id.* at 1293–94 (quoting *von Bulow*,
22 811 F.2d at 144). Thus, the Court concluded that “the medium used to report the
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1 news to the public” is not important to determining the applicability of the reporter’s
2 privilege; rather, “[w]hat makes journalism journalism is not its format but its
3 content.” *Id.* at 1293; *see also Branzburg*, 408 U.S. at 705 (“Liberty of the press is
4 the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as
5 much as of the large metropolitan publisher who utilizes the latest photocomposition
6 methods.”); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (“The press in its historic
7 connotation comprehends every sort of publication which affords a vehicle of
8 information and opinion.”); *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284,
9 1291 (9th Cir. 2014) (stating that “[t]he protections of the First Amendment do not
10 turn on whether the defendant was a trained journalist, formally affiliated with
11 traditional news entities” and that “a First Amendment distinction between the
12 institutional press and other speakers is unworkable”). Accordingly, in *Schoen I* the
13 Ninth Circuit held that an investigative book author is a “journalist” for purposes of
14 claiming the reporter’s privilege. *Schoen I*, 5 F.3d at 1294.

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

1 *Corp.*, 563 F.2d 433, 436 (10th Cir. 1977). In reaching this holding, the Court noted
2 that the filmmaker’s “mission in this case was to carry out investigative reporting for
3 use in the preparation of a documentary film,” that he “spent considerable time and
4 effort in obtaining facts and information” and that “it cannot be disputed that his
5 intention, at least, was to make use of this in preparation of the film.” *Id.* at 143–37.
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8 Additionally, as noted above, the Second Circuit has held that the intent to use
9 material to disseminate information to the public is paramount, and that “[t]he
10 intended manner of dissemination may be by newspaper, magazine, book, public or
11 private broadcast medium, handbill or the like.” *von Bulow*, 811 F.2d at 144. Noting
12 that “[t]he informative function asserted by representatives of the organized press . . .
13 is also performed by lecturers, political pollsters, novelists, academic researchers, and
14 dramatists,” *id.* at 145 (quoting *Branzburg*, 408 U.S. at 705), the Court stated that the
15 journalist’s privilege “may be sought by one not traditionally associated with the
16 institutionalized press.” *Id.* at 144–45; *see also Berlinger*, 629 F.3d at 307 (“A
17 person need not be a credentialed reporter working for an established press entity to
18 establish entitlement to the privilege.”).
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22 Similarly, in *In re Madden*, the Third Circuit adopted the reasoning of *von*
23 *Bulow* and *Shoen I* to hold that the privilege “requires an intent at the inception of the
24 newsgathering process to disseminate investigative news to the public.” 151 F.3d
25 125, 129 (3d Cir. 1998). The outcomes in *von Bulow* and *In re Madden* demonstrate
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1 that applying the privilege is no mere formality. In both cases, courts found the
2 privilege was inapplicable to the individuals seeking its protection, because although
3 the information at issue was to be publicly disseminated, it was initially gathered as
4 part of a criminal defense effort (*von Bulow*, 811 F.2d at 146) or was to be used in
5 corporate promotions (*In re Madden*, 151 F.3d at 130).
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8 Adherence to the test articulated in *Shoen I* is especially important in light of
9 continued and rapid changes to the nature of the news media. In recent years,
10 journalists have developed novel forms of disseminating information to the public
11 that would have been unthinkable only a few years before. For example, media
12 outlets now use Facebook to share news with “friends,” “tweet” news stories to
13 followers in 140 characters or less, and make “snaps” of photos and videos available
14 to subscribers via Snapchat. See Michael Barthel, Elisa Shearer, Jeffrey Gottfried,
15 and Amy Mitchell, *The Evolving Role of News on Twitter and Facebook*, Pew
16 Research Center (July 14, 2015), available at <https://perma.cc/YNP3-73TP>; Joseph
17 Lichterman, *Snapchat stories: Here’s how 6 news orgs are thinking about the chat*
18 *app*, NiemanLab (Feb. 23, 2015), available at <http://bit.ly/1zbdnLP>.
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23 Podcasting, the medium by which Boal disseminated his reporting about Sgt.
24 Bergdahl, is also a relatively new form of journalism. Yet, according to one research
25 study, an estimated 98 million Americans have listened to a podcast at least once, and
26 more than one in five Americans report listening to a podcast within the past month.
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1 Edison Research, *The Infinite Dial 2016* (2016), available at <http://bit.ly/2amwFOW>.
2 The podcast at issue in this case, *Serial*, has been downloaded by millions of listeners
3 and won numerous journalism awards. See John Koblin, ‘*Serial*’ Podcast, *Needing*
4 *More Reporting Time, Goes Biweekly*, N.Y. Times (Jan. 12, 2016), available at
5 <http://nyti.ms/1RkMvHE>; Serial, About Serial, available at [https://perma.cc/K3CW-](https://perma.cc/K3CW-KPFK)
6 [KPFK](https://perma.cc/K3CW-KPFK) (last visited July 25, 2016).
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9 Use of visual storytelling and interactive graphics in online media has also
10 transformed the way in which the public consumes news. See, e.g., Ginger
11 Thommpson, Susie Cagle, & Lena Groeger, *The Making of a Narco-Terrorist*,
12 ProPublica (Dec. 15, 2015), available at <http://bit.ly/1Yy0sq1> (using original
13 illustrations and an interactive website designed to feel like a card game to report
14 about sting operations carried out by the U.S. Drug Enforcement Administration);
15
16 John Branch, *Snow Fall: The Avalanche at Tunnel Creek*, N.Y. Times,
17 <http://nyti.ms/1dQ0jHo> (last visited July 24, 2016) (combining text, historic
18 photographs, video, and informative graphics to create an interactive story about an
19 avalanche). Some media organizations have even begun using virtual reality to report
20 the news. See *Viewing the Future? Virtual Reality in Journalism*, Knight Foundation
21 (March 13, 2016), <http://kng.ht/2a9xXuu>.
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25 As news organizations and individuals are using new forms to distribute works
26 of journalism, it is essential that the legal standard for defining who is entitled to
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1 claim the reporter’s privilege keeps pace. Application of the *Shoen I* test, which
2 focuses not on the medium of distribution, but on the intent to disseminate
3 information to the public when the information is gathered, ensures that reporters will
4 be entitled to the privilege even when using novel formats.
5

6 Under the test articulated in *Shoen I*, it is indisputable that Boal is a journalist
7 entitled to seek the protections of the reporter’s privilege.² First, and most critically,
8 the evidence shows that he recorded the interviews with the intent to disseminate to
9 the public information on a subject that was topical, controversial, and a matter of
10 significant public interest, namely, Sgt. Bergdahl’s disappearance from an Army
11 outpost in Afghanistan. Declaration of Mark Boal in Support of *Ex Parte* Application
12 for Temporary Restraining Order and for Order to Show Cause, *Mark Boal, et al. v.*
13 *United States of America et al.*, 2:16-cv-05407-GHK-GJS at ¶ 6 (filed July 21, 2016),
14 ECF No. 9-2 (“Boal Decl.”). Although Boal may not have known the precise
15 medium in which he would disseminate the information he gathered at the time the
16 interviews were conducted, the reporter’s privilege attaches to the interviews based
17 not on the medium used to report the news to the public, but rather on Boal’s intent.
18 *Shoen I*, 5 F.3d at 1293. Accordingly, the fact that Boal was considering various
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25 ² Plaintiff Flakjacket LLC, d/b/a Page 1, is a company founded by Plaintiff Boal for
26 the sole purpose of producing his work, described as a combination of “reporting and
27 entertainment.” See Complaint for Declaratory and/or Injunctive Relief, or, In the
28 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.

1 options regarding the format via which he intended to distribute information
2 regarding Sgt. Bergdahl to the public—whether via a documentary, feature film, news
3 articles, or non-fiction book, *see* Boal Decl. at ¶ 6—is irrelevant. *Shoen I*, 5 F.3d at
4 1293 (“What makes journalism journalism is not its format but its content.”).

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

17 Similarly, Boal’s previous work as a filmmaker, having written the screenplays
18 for the films *The Hurt Locker* and *Zero Dark Thirty*, among others, *see* Boal Decl. at
19 ¶¶ 2–3, is persuasive evidence of his intent to disseminate information about Sgt.
20 Bergdahl. Though fictional, both *The Hurt Locker* and *Zero Dark Thirty* have been
21 described as having journalistic qualities. *See* Smith, *supra* at <http://bit.ly/2a8pgxN>.
22 In addition, both films communicated information on matters of public concern to
23 viewers. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 502 (1952)
24 (recognizing that fictional films are “a significant medium for the communication of
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1 ideas” that are entitled to protection under the First Amendment); *Shoen I*, 5 F.3d at
2 1293 n.7 (citing Upton Sinclair’s 1906 novel *The Jungle* as a prime example of
3 muckraking reporting exposing newsworthy facts on controversial matters of public
4 opinions).

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6 Finally, the fact that portions of Boal’s interviews and other reporting were
7 ultimately broadcast to the public through the podcast *Serial* lends credibility to his
8 claim that he conducted the interviews with the intent to gather news for
9 dissemination to the public. By choosing to broadcast portions of the interviews with
10 Sgt. Bergdahl through *Serial*, Boal fulfilled his original intent to disseminate news
11 about Sgt. Bergdahl’s disappearance to a public audience. Because it is clear that
12 Boal had the intent, at the inception of the newsgathering process, to disseminate
13 information about Sgt. Bergdahl’s disappearance, that Boal is a member of the news
14 media, and that Boal ultimately did distribute information to the public based on the
15 interviews he conducted, Boal is squarely entitled under *Shoen I* to claim the
16 protection of the reporter’s privilege to shield from compelled disclosure the
17 confidential and nonconfidential but unpublished portions of the interviews.
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22 **III. The Court should address these claims now to avoid irreparable harm**
23 **to Boal.**

24 Boal seeks a declaration, injunction, or writ from this Court preventing the
25 issuance or enforcement of a subpoena by the military prosecutor in Sgt. Bergdahl’s
26 court martial. *See* Complaint at ¶ 2. This Court should provide Boal, who is a
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1 civilian, with the relief he seeks at this juncture, before he is subjected to protracted
2 proceedings beginning with a military tribunal, in attempting to protect his
3 confidential and unpublished materials under the reporter’s privilege.
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5 Subpoenas to members of the news media seeking confidential or unpublished
6 materials can result in lengthy legal battles that negatively affect the news media’s
7 ability to cultivate and maintain relationships with sources and thereby report on
8 matters of public concern. For example, in 2008, *New York Times* reporter James
9 Risen was subpoenaed to testify before a grand jury about the source of information
10 in one of his books. See Matt Apuzzo, *Times Reporter Will Not Be Called to Testify*,
11 N.Y. Times (Jan. 12, 2015), available at <http://nyti.ms/1z2niJk>. The subpoena was
12 renewed in 2011, when the government sought Risen’s testimony in the trial of
13 former CIA officer Jeffery Sterling. See *id.* It was not until seven years after the first
14 subpoena was issued that the DOJ determined—after applying updated DOJ
15 guidelines—that it would not require Risen to testify about his confidential sources.
16 *Id.*; Josh Gerstein, *James Risen subpoena faces new review*, Politico (Oct. 10, 2014),
17 available at <https://perma.cc/BF76-VZKX>. Following Sterling’s conviction, then-
18 Attorney General Eric Holder noted that the guilty verdict proved “it is possible to
19 fully prosecute unauthorized disclosures that inflict harm upon our national security
20 without interfering with journalists’ ability to do their jobs.” Matt Zapposky,
21 *Former CIA officer Jeffrey Sterling convicted in leak case*, The Washington Post
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1 (Jan. 26, 2015), available at <https://perma.cc/58KE-X9QY>.

2 Yet, during the seven years that Risen was subject to a subpoena, he worked
3 with “the sword of Damocles over his head” and with the constant threat that defiance
4 of the subpoena “could end with him behind bars.” Maureen Dowd, *Where’s the*
5 *Justice at Justice?*, N.Y. Times (Aug. 16, 2014), available at <http://nyti.ms/1oR38qH>.

6
7 In addition, the subpoena and lengthy legal process required to fight it created a
8 chilling effect on Risen and other reporters. Pulitzer-prize winning reporter Dana
9 Priest described the Risen subpoena as allowing officials “to hold a hammer over the
10 head of a deeply sourced reporter, and others like him.” Norman Solomon and Marcy
11 Wheeler, *The Government War Against Reporter James Risen*, *The Nation* (Oct. 27,
12 2014), available at <http://bit.ly/2a6rdQS>. Similarly, David Barstow, another Pulitzer-
13 prize winning reporter, stated that, as a result of the Risen subpoena, he had “felt the
14 chill firsthand. Trusted sources in Washington are scared to talk by telephone, or by
15 email, or even to meet for coffee, regardless of whether the subject touches on
16 national security or not.” *Id.*

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21 This Court’s resolution of Boal’s claims would be the most efficient approach
22 in terms of judicial economy and would eliminate an unnecessary and potentially
23 lengthy legal process in the military courts that would ultimately end up in federal
24 district court anyway. As Boal notes, *see* Memorandum of Points and Authorities in
25 Support of Plaintiffs’ *Ex Parte* Application, *Boal et al. v. United States of America et*
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1 *al.*, 2:16-cv-05407-GHK-GJS at 5 (filed July 21, 2016), ECF No. 9-1, government
2 enforcement of any military subpoena issued against Boal, a civilian, must take place
3 in federal district court. *See* 10 U.S.C. § 847. Accordingly, the federal courts will
4 necessarily be called upon to rule on the enforceability of the subpoena if issued.
5 Rather than delay granting Boal the relief he seeks until after the subpoena has been
6 served and the government seeks to enforce it, this Court should issue the declaration,
7 injunction, or writ Boal seeks. *See New York Times Co. v. Gonzales*, 459 F.3d 160,
8 167 (2d Cir. 2006) (“*Gonzales*”) (holding that the district court properly exercised
9 jurisdiction over a newspaper’s request for declaratory judgment, in the face of a
10 threatened subpoena, that the reporter’s privilege extends to records held by third
11 party telephone providers); *id.* at 174 (Sack, J., dissenting) (agreeing with the
12 majority that declaratory judgment can be “a salutary procedural device for testing
13 the propriety of a government attempt to compel disclosure of information from
14 journalists”).³

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20 In addition, this Court should grant Boal the relief he seeks now because DOJ
21 would inevitably see that enforcement of this subpoena would be inconsistent with
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24 ³ In *Gonzales*, the threatened subpoena arose out of a grand jury investigation
25 conducted in the Northern District of Illinois into the “leak” of information to the
26 newspaper. *Gonzales*, 459 F.3d at 163–64. The newspaper filed suit in the Southern
27 District of New York, where the newspaper was located and the newsgathering at
28 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.

1 DOJ policy. In 2014, in response to questions about the Risen subpoena, then-
2 Attorney General Holder stated, “As long as I’m attorney general, no reporter who is
3 doing his job is going to go to jail. As long as I’m attorney general, someone who is
4 doing their job is not going to get prosecuted.” Charlie Savage, *Holder Hints*
5 *Reporter May Be Spared Jail in Leak*, N.Y. Times (May 27, 2014), available at
6 <http://nyti.ms/1jscnLA>. In 2015, current Attorney General Loretta Lynch adopted
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8 Holder’s pledge, stating that she agreed with Holder’s position and would continue to
9 uphold it. Associated Press, *Attorney General Lynch says Justice Dept. won’t send*
10 *reporters to jail for doing their job*, U.S. News & World Report (Oct. 9, 2015),
11
12 available at <https://perma.cc/99SA-R7LP>. Yet, if the government seeks to enforce a
13 subpoena to compel Boal to reveal confidential and unpublished material through
14 contempt proceedings, it will be attempting to send a journalist to jail simply for
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16 “doing his job.”
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19 Finally, the Court should protect Boal today because the enforcement of a
20 subpoena that, on its face, fails to overcome the reporter’s privilege infringes Boal’s
21 First Amendment rights and thereby causes irreparable harm. As noted above,
22 “[c]ompelled disclosure of confidential sources unquestionably threatens a
23 journalist’s ability to secure information that is made available to him only on a
24 confidential basis,” *Baker*, 470 F.2d at 782, as does the forced disclosure of
25 unpublished materials, *Shoen I*, 5 F.3d at 1295. This is especially true when the
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1 reporter is attempting to cover the military and national security, Boal’s areas of
2 sustained journalistic and creative focus. *See* Boal Decl., ¶ 2; Human Rights Watch
3 & American Civil Liberties Union, *With Liberty to Monitor All: How Large-Scale*
4 *US Surveillance is Harming Journalism, Law and American Democracy* at 28 (July
5 2014), available at <http://bit.ly/2amxaZh> (stating that journalists on a “military and
6 national security beat” have “skittish sources”) (“HRW & ACLU Report”). In short,
7 Boal “depends upon an atmosphere of confidentiality and trust” to carry out his
8 newsgathering activities. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (recognizing a
9 psychotherapist-patient privilege under Fed. R. Evid. 501).

13 For these reasons, enforcement of the subpoena in the federal courts would
14 impinge on Boal’s First Amendment right to engage in newsgathering. Both the
15 Ninth Circuit and the Supreme Court “have repeatedly held that ‘[t]he loss of First
16 Amendment freedoms, for even minimal periods of time, unquestionably constitutes
17 irreparable injury.’” *Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir.
18 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Accordingly, this Court
19 should grant Boal relief both to ensure judicial efficiency and in order to avoid the
20 irreparable injury that would otherwise result.

24 CONCLUSION

25 For the foregoing reasons, *amici curiae* respectfully urge this Court to grant
26 Boal’s *ex parte* application for a temporary restraining order and order to show cause.
27

1 Dated: July 29, 2016

Respectfully submitted,

2 /s/ Katie Townsend

3 Katie Townsend

4 SBN 254321

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