Alexis E. Danneman (#030478)
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, AZ 85012-2788
Telephone: 602.351.8000
Facsimile: 602.648.7000
ADanneman@perkinscoie.com

Todd M. Hinnen (WSBA No. 27176)
(pro hac vice application to be filed)
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
THinnen@perkinscoie.com

William J. Frimel (CA No. 160287)
Christopher R. Edger (CA No. 229771)
(pro hac vice applications to be filed)
SEUBERT FRENCH FRIMEL & WARNER LLP
1075 Curtis Street
Menlo Park, CA 94025
Tel: 650.322.3048
Fax: 650.322.2976
bill@sffwlaw.com

Attorneys for Nonparty Glassdoor, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

IN RE: GRAND JURY SUBPOENA ISSUED TO GLASSDOOR, INC.	Grand Jury Subpoena No. 16-03-217 (Assigned to Honorable Diane J. Humetewa, United States District Judge)

REPLY TO GOVERNMENT'S RESPONSE IN OPPOSITION TO MOVANT'S MOTION TO QUASH

(Filed Under Seal)

INTRODUCTION

This matter arises out of a grand jury subpoena that purports to compel Glassdoor to identify 125 anonymous speakers who associated on Glassdoor's platform to engage in and receive protected speech regarding labor conditions at, and potential mismanagement

of, a publicly-funded program [redacted] The government subsequently agreed to narrow the subpoena to seek the identities of only eight of the original 125 participants (the "Participants"). In light of the government's implicit admission that 117 of the 125 anonymous Participants whose identities the government sought to expose are not important to its investigation, Glassdoor moved to quash the subpoena to ensure that a court appropriately weighed the interest of effective grand jury investigations against the interest in protecting anonymous association and speech on matters of public concern.

In its response, the government seeks to minimize the protection to which the Participants' anonymous association and speech is entitled, misconstrues Glassdoor's claims, and misapplies Supreme Court and Ninth Circuit precedent. Participants' association and speech regarding issues of significant public concern is entitled to the protection of the First Amendment. Glassdoor does not assert a reporter's or scholar's privilege on its own behalf; it asserts the Participants' First Amendment rights anonymously to associate and exchange views regarding important public issues. *Branzburg* and the Ninth Circuit cases cited by the government (all of which address such assertions of privilege) permit, and applicable Ninth Circuit precedent requires, the Court to protect the First Amendment rights to anonymous association and speech by requiring a grand jury subpoena that intrudes upon those rights to further a compelling interest and seek Participants' identities only if they bear a sufficient nexus to that interest.

ARGUMENT

1. The First Amendment protects Participants' rights anonymously to associate and to share and receive information regarding the administration and labor conditions of a publicly-funded [redacted] program [redacted]

As Glassdoor established in its Motion to Quash and Memorandum of Points and Authorities, the First Amendment affords the highest level of protection to Participants' rights anonymously to associate and to share and receive information regarding the administration and labor conditions of a publicly-funded [redacted] program [redacted] *See* Mot. at 5-6. This proposition would seem beyond dispute--Glassdoor's

very purpose is to provide a platform where participants interested in a particular employer can form an anonymous community and safely share their views regarding its administration and employment practices. Here, the employer administers a publicly funded program [redacted].

Speech regarding such "public affairs" or "public issues" receives the First Amendment's highest level of protection. *See McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) ("[S]peech that concerns 'issues about which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government merits the highest degree of first amendment protection.") (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)). The government's attempt to minimize the First Amendment status of this association and speech by mischaracterizing it as "apolitical," Resp. at 5, 10, and "commercial," Resp. at 11,[1] and mischaracterizing the information sought by the subpoena merely as "business records," Resp. at 5, is therefore unavailing, as is the government's attempt to distinguish on this basis precedent cited by Glassdoor. *See* Resp. at 10 (arguing that the Eighth Circuit's decision in *In re Grand Jury Subpoena Duces Tecum*, 78 F.3d 1307 (8th Cir. 1996), is inapposite because the "political speech" at issue there was entitled to a "higher level of protection than the apolitical speech at issue in the instant case"); Resp. at 11 (arguing that the concerns regarding expressive activity at issue in the other cases cited by Glassdoor "are not present here").

The Participants are not engaged in apolitical, commercial association and speech. They have formed an online forum or community in which they can safely express their views and engage in advocacy regarding the administration of, and labor conditions at, an important publicly-funded program. The subpoena does not merely seek businsess

[1] Separate and apart from the fact that the reviews address issues of significant public concern, the government's characterization of them as commercial speech is clearly incorrect. They do not propose or relate to a commercial transaction. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (commercial speech is, at its core, "speech which does no more than propose a commercial transaction").

records, it seeks to deprive Participants engaged in protected association and speech of the anonymity to which they are entitled by the First Amendment.

2. Glassdoor asserts Participants' First Amendment Rights of Anonymous Association and Expression.

Glassdoor's Motion to Quash expressly rests not on assertion of its own reporter's privilege but rather on the Participants' First Amendment rights of anonymous association and expression. *See* Mot. at 9 n.1. The government therefore errs when it asserts that Glassdoor claims "a privilege in the same nature" as the reporters claimed in *Branzburg*. Resp. at 6. As a result of that error, the government misconstrues *Branzburg* and its progeny and misapplies them to the distinct claims Glassdoor makes on behalf of the Participants, which require a different analysis.

3. *Branzburg* and its Ninth Circuit progeny do not prevent the court from protecting Participants' First Amendment rights.

Branzburg addresses only whether a journalist can refuse to testify or produce evidence to a grand jury on the basis of a journalist's or newsman's privilege.[2] It does not establish the appropriate test to be applied when a grand jury subpoena conflicts with the First Amendment rights of anonymous association and expression.

In *Branzburg*, three newsmen asserted a "newsman's privilege" in light of which they could not be compelled to disclose the identities of their sources. *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972). They asserted their own privilege claims, not the First Amendment claims of their sources. *Id.* at 696 ("[T]he privilege claimed is that of the reporter, not the informant."). As noted above, Glassdoor seeks review of the subpoena not based on an assertion of its privilege as a publisher but rather based on the Participants' First Amendment rights. Glassdoor's claims on behalf of the Participants are thus distinct from those put forward by the reporters in *Branzburg*.[3]

---

[2] See James S. Liebman, Search and Seizure of the Media: A Statutory, Fourth Amendment, and First Amendment Analysis, 28 Stan. L. Rev. 957, 975 (1976) (discussing *Branzburg*'s narrow application to press claims of privilege).

[3] *Branzburg* is distinguished not only by the claims asserted, but also by the facts. In *Branzburg*, the identity of a single source involved in or possessing evidence of

The Participants also differ from the sources in *Branzburg*. The Court expressly relied on the fact that the sources were directly involved in the crime or its concealment, rejecting "the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it." *Id.* at 692; *id.* at 697 ("concealment of crime and agreements to do so are not looked upon with favor"). By contrast, the government does not here allege that the Participants engaged in or concealed criminal conduct; rather, the government targeted Participants solely because of their association and advocacy regarding the publicly funded program their employer administers. *See* Resp. at 3.

Branzburg's narrow holding--"requiring newsmen to appear and testify before state or federal grand juries [does not] abridge the freedom of speech and press guaranteed by the First Amendment"--does not apply to the facts of this case. *Id.* at 667.[4] Glassdoor is not a "newsman," it is a platform for anonymous association and expression regarding employment conditions, and it does not here assert a "newsman's privilege," it asserts its users' First Amendment rights to associate and speak anonymously about issues of significant public concern.

In determining whether a newsman enjoys an absolute privilege not to testify or produce evidence, the Court did not endorse a particular test.[5] In fact, the Court expressly

---

unlawful conduct was sought from each reporter. Here, the government sought the identity of 125 anonymous Participants on the basis of their protected association and speech before agreeing, after Glassdoor's objection, to limit the subpoena to the identities associated with only eight reviews. Resp. at 8. In the words of the *Branzburg* Court, the issued subpoena "attempt[-ed] to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether crime has been committed." *Branzburg*, 408 U.S. at 700.

[4] The government's characterizations of *Branzburg*'s holding frequently neither quote from nor cite to the opinion. *See* Resp. at 4 (asserting without citation that Branzburg "squarely rejected the compelling interest/nexus test"); Resp. at 5 (asserting without citation that courts have no role to play in balancing grand jury authority and First Amendment rights absent a showing of bad faith).

[5] *See In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, 706 F.Supp.2d 11, 18-19 (D.D.C. 2009) (because the reporters' assertion of privilege in *Branzburg* did not implicate a First Amendment right, the Court "did not consider[]

acknowledged that some courts impose a compelling interest test and found that "[t]he requirements of those cases . . . which hold that a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights, are also met here." *Id.* at 700. The Court concluded its opinion by expressly acknowledging that First Amendment rights circumscribe grand jury investigative authority and reserving to other courts before which parties raised a direct conflict between grand jury authority and core First Amendment rights the appropriate standard to apply: "Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment." *Id.* at 708.[6]

Branzburg thus holds only that a newsman subpoenaed by a grand jury to identify a source cannot refuse to do so on the basis of an absolute privilege. Courts must rather strike a balance between the newsman's First Amendment interest and the interest in effective grand jury investigations to ensure that grand juries "operate within the limits of the First Amendment." *Branzburg*, 408 U.S. at 708. In striking that balance, courts should "on a case-by-case basis" inquire as to the "needs of law enforcement" and the "relationship" between those needs and the information sought. The Court acknowledged the existence of, and expressly found that the cases before it met, the "compelling interest" test. *See id.* at 700. As other courts have recognized, even in the narrow context of assessing a newsman's right to resist a grand jury subpoena, the Supreme Court did not

---

whether the substantial relationship would be the appropriate standard of review for a subpoena implicating First Amendment interests").

[6] Justice Powell, concurring, emphasized "the limited nature of the Court's holding," noting that "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 relationship 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." *Id.* at 709-10. (The "need of law enforcement"/more than "tenuous relationship" test articulated by Justice Powell even in a case involving a journalists' privilege, not the core rights of the speakers themselves, bears a striking resemblance to the compelling interest/substantial nexus test.) The Court's holding, he continued, required "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.

in *Branzburg* and has not since dictated to lower courts the "appropriate standard for reviewing grand jury subpoenas that implicate First Amendment concerns." *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, 706 F.Supp.2d 11, 18 (D.D.C. 2009) ("despite its admonition in *Branzburg* [that courts must remember grand jury's must comply with the First Amendment], the Supreme Court has yet to define the appropriate standard for reviewing grand jury subpoenas that implicate First Amendment concerns"); *In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. 570, 572 (W.D.Wis. 2007) (finding *Branzburg* consistent with holding that "although a grand jury subpoena is presumed valide and enforceable, if the witness demonstrates a legitimate First Amendment concern raised by the subpoena, then the government must make an additional showing that the grand jury actually needs the disputed information") .

The Ninth Circuit cases cited by the government are similarly narrow in focus. In *Lewis I*, a reporter claimed "a privilege based upon the station's right to protect the sources of news information." *In re Matter of the Grand Jury Proceeding re Will Lewis*, 501 F.2d 418, 420 (9th Cir. 1974). In *Lewis II*, the same reporter asserted the same claim of privilege with the same narrow result. *See In the Matter of the Proceedings of Witness Before Grand Jury re Will Lewis,* 517 F.2d 236 (9th Cir. 1975). In *Scarce*, the court rejected an academic's claim that a "scholar's privilege" "akin to that of a reporter" vested him with the right to resist a grand jury subpoena requiring testimony about his personal knowledge of criminal conduct within his area of study. *In re Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993). Finally, in *Wolf*, the court confined its consideration to a reporter's claim of privilege not to disclose evidence or provide testimony regarding illegal conduct during a protest. *See In re: Grand Jury Subpoena*, 2006 WL 2631398 (9th Cir. 2006). None of these cases addresses the question *Branzburg* left open, *i.e.*, the appropriate balance between a grand jury's interest in effective investigation and the core First Amendment rights of association and expression. None of them, therefore, addresses the claims raised by Glassdoor on behalf of the Participants in its Motion.

That is not to say that the Ninth Circuit has not addressed the question. In *Bursey*

v. United States, two staff members of *The Black Panther* newspaper refused to provide testimony to a grand jury not only on the basis of a newsman's privilege but also on the basis that doing so would violate their, their colleagues', and the political advocates who spoke through their newspaper's, core First Amendment rights of association and free expression. 466 F.2d 1059, 1082 (9th Cir. 1972) ("[t]he First Amendment interests in this case are not confined to the personal rights of Bursey and Presley," they include the broader rights of association and free expression), partially superseded on other grounds by statute, *Organized Crime Control Act of 1970,* Pub. L. No. 91-452 at § 301(a), *as recognized by In re Grand Jury Proceedings*, 863 F.2d 667, 669-70 (9th Cir. 1988).

Acknowledging the important interest in thorough, independent grand jury investigations, the court nevertheless held that "the existence of theses interests does not automatically override First Amendment rights, and their invocation does not alone carry the Government's burden with respect to any question that the grand jury seeks to force a witness to answer over his First Amendment protest. The fact alone that the Government has a compelling interest in the subject matter of a grand jury investigation does not establish that it has any compelling need for the answers to any specific questions." *Id.* at 1086. The court set forth the Ninth Circuit standard applicable when grand jury investigative authority conflicts directly with the First Amendment rights to associate and express views anonymously regarding issues of public importance:

> When governmental activity collides with First Amendment rights, the Government has the burden of establishing that its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights is not greater than is essential to vindicate its subordinating interests . . . When the collision occurs in the context of a grand jury investigation, the Government's burden is not met unless it establishes that the Government's interest in the subject matter of the investigation is 'immediate, substantial, and subordinating,' that there is a 'substantial connection' between the information it seeks to have the witness compelled to supply and the overriding governmental interest in the subject matter of the investigation, and that the means of obtaining the

> information is not more drastic than necessary to forward the asserted governmental interest.

Id. at 1083. In his Opinion on Petition for Rehearing, Judge Hufstedler noted that the *Bursey* Court "required the grand jury to establish that there was a 'substantial connection' between the information sought and the criminal conduct which the Government was investigating before the witnesses could be held in contempt for refusing to answer questions that cut deeply into First Amendment rights" and noted that "we have concluded that the balance we struck is not impaired by *Branzburg*." *Id.* at 1091. The court thus endorsed the compelling interest/substantial connection test and held that it was consistent with *Branzburg*. Although a separate holding by the *Bursey* Court was subsequently superseded by statute, neither any statute nor any subsequent decision has disturbed *Bursey*'s holding that courts confronted by a conflict between grand jury authority and core First Amendment rights must apply the compelling interest/substantial connection test. Regarding this issue, *Bursey* remains good law binding on this Court.

The Ninth Circuit is not alone or anomalous in requiring that the government demonstrate a compelling interest and substantial connection. *See e.g., In re Grand Jury Proceedings*, 776 F.2d 1099 (2d Cir. 1985); *In re Grand Jury Subpoena for Appearance of Faltico*, 561 F.2d 109, 111 (8th Cir. 1977) (for a grand jury subpoena to be enforced despite a First Amendment challenge the government must sustain "its burden of showing a compelling state interest in the subject matter of the investigation and a sufficient nexus between the information sought and the subject matter of the investigation."); *In re Grand Jury Subpoena No. 11116275*, 846 F.Supp.2d 1, 4 (D.D.C. 2012) (The First Amendment right "to post on the Internet . . . anonymously" cannot be overridden "unless the government can show 'a compelling interest in the sought after material' and 'a sufficient nexus between the subject matter of the investigation and the information'" sought.).

CONCLUSION

Under controlling Ninth Circuit authority, where, as here, a grand jury subpoena seeks to compel identification of anonymous advocates because of their association and

advocacy regarding labor conditions and potential mismanagement of a publicly-funded program providing [redacted] a party may request that a court review the subpoena to ensure that the identities sought bear a substantial relation to the furtherance of a compelling government interest. Glassdoor respectfully requests that this Court conduct such a review, and quash the subpoena to the extent that it does not meet this standard.[7]

Dated: April 28, 2017

PERKINS COIE LLP

By: _____

Alexis E. Danneman (#030478)
2901 North Central Avenue, Suite 2000
Phoenix, AZ 85012-2788

Todd M. Hinnen (WSBA No. 27176)
(pro hac vice application to be filed)
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099

William J. Frimel (CA No. 160287)
Christopher R. Edger (CA No. 229771)
(pro hac vice applications to be filed)
SEUBERT FRENCH FRIMEL & WARNER LLP
1075 Curtis Street
Menlo Park, CA 94025

Attorneys for Nonparty Glassdoor, Inc.

[7] In *In re Grand Jury Subpoena to Amazon.com*, the court fashioned "a solution that accommodates the legitimate needs of both the grand jury and the protesting witness," directing Amazon to solicit witnesses with relevant knowledge from among its anonymous users and to disclose the identities of only those who replied. 246 F.R.D. at 572. Glassdoor respectfully submits that a similar solution would appropriately balance the grand jury's interest and Participants' First Amendment interests here. This solution is, as *Bursey* requires, "no more drastic than necessary to forward the asserted government interest." 466 F.2d at 1083. Glassdoor offered to proceed in this manner, but the government declined.