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26 UNITED STATES DISTRICT COURT  
27 DISTRICT OF ARIZONA

28 IN RE: GRAND JURY SUBPOENA  
ISSUED TO GLASSDOOR, INC.

Case No.  
(Grand Jury Subpoena No. 16-03-217)

**MOTION TO QUASH GRAND JURY  
SUBPOENA PURSUANT TO FED. R.  
CRIM. P. 17(C)(2); MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

**DOCUMENT SUBMITTED UNDER SEAL**  
(Motion consists of 11 pages)

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OF POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

26 Pursuant to Fed. R. Crim. P. 17(c)(2), Nonparty Glassdoor, Inc. ("Glassdoor")  
27 respectfully moves to quash the grand jury subpoena served upon it dated March 6, 2017  
28 by the Assistant United States Attorney for the District of Arizona (the "Subpoena")

1 Glassdoor's motion is supported by the accompanying Memorandum of Points and  
2 Authorities, the Declaration of Thomas O'Brien, and such other materials as may be  
3 presented to the Court at or before the time of the hearing in this matter.

4 INTRODUCTION

5 The grand jury subpoena at issue demands the identities of 125 anonymous  
6 individuals who posted reviews of [REDACTED]  
7 [REDACTED] on glassdoor.com, a website on  
8 which employees provide information about, and share their experiences working at,  
9 employers. When it received the Subpoena, Glassdoor, which operates glassdoor.com,  
10 asked the government whether it would be possible for the government to obtain the  
11 information it seeks without learning the identities of Glassdoor's anonymous users. The  
12 government offered to narrow the scope of the subpoena to seek fewer user identities, but  
13 continued to request Glassdoor's users' information. With respect to the Subpoena's  
14 purpose, the government advised Glassdoor only that it seeks the identities of "third party  
15 witnesses to certain business practices relevant to our investigation." (Decl. of Thomas  
16 O'Brien, Apr. 3, 2017 ("O'Brien Decl."), Exh. E.)

17 While Glassdoor has no desire to interfere with the grand jury's investigation, "an  
18 author's decision to remain anonymous . . . is an aspect of the freedom of speech  
19 protected by the First Amendment," *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334,  
20 342 (1995), and compelling the identification of Glassdoor's anonymous users could have  
21 a chilling effect on both Glassdoor's reviewers' and readers' willingness to use  
22 glassdoor.com. This is particularly significant because the reviews concern the operations  
23 and labor conditions at an employer that administers publicly-funded [REDACTED] programs  
24 [REDACTED] See, e.g., *Gardetto v. Mason*, 100 F.3d 803, 813 (10th Cir. 1996)  
25 ("The objectives, purposes, and mission of a public university are undoubtedly matters of  
26 public concern" for First Amendment purposes).

27 As Glassdoor is committed to protecting its users' First Amendment right to  
28 anonymous expression, Glassdoor brings this motion to seek a judicial determination as to

1 whether the government is entitled to deprive the Reviews' authors of their First  
2 Amendment right to speak anonymously. Specifically, the government must demonstrate  
3 to the Court that (1) it has a compelling interest in obtaining the [REDACTED] reviewers'  
4 identities, and (2) there is a clear nexus between those persons' identities and the grand  
5 jury's investigation. *See In re Grand Jury Investigation of Possible Violation of 18 U.S.C.*  
6 *§ 1461 et seq.*, 706 F. Supp. 2d 11, 18 (D.D.C. 2009) (denying motion to compel  
7 compliance with grand jury subpoena "seek[ing] records of customer purchases of  
8 expressive materials, which are presumptively protected by the First Amendment,"  
9 because the government failed to "demonstrate[] a compelling need for them and a  
10 sufficient nexus between the records and the grand jury's investigation"). It is particularly  
11 important that the government be required to make such a showing given that, based on  
12 the government's statements, the apparent purpose of the Subpoena is solely to locate  
13 potential third-party witnesses. (*See O'Brien Decl. Exh. E*, at 1.) If the government  
14 cannot make the necessary showing, the Subpoena must be quashed.

#### 15 STATEMENT OF FACTS

16 Glassdoor operates glassdoor.com, which provides a forum for current and former  
17 employees of companies to anonymously voice opinions regarding those businesses.  
18 (O'Brien Decl. ¶ 2.) Glassdoor.com users also discuss federal, state and local government  
19 employers on the site. (*Id.*) An employee can anonymously express an opinion about an  
20 employer on glassdoor.com by posting a "review," in which the employee assigns the  
21 employer between one and five stars in a number of categories, and discusses the  
22 employer's "pros and cons." (*Id.* ¶ 3.) Employees can also share information regarding  
23 employers' labor conditions, salaries and job interviewing practices. (*Id.*) In order to post  
24 reviews or other information to glassdoor.com, users need to provide e-mail addresses to  
25 Glassdoor, but those addresses are not publicly displayed on the site. (*Id.* ¶ 4.) Glassdoor  
26 does not compose or edit the employer reviews appearing on the site. (*Id.*)

27 Over a nine-year period, between September 2008 and March 2017, numerous  
28 Glassdoor users posted 125 employee reviews of [REDACTED] on glassdoor.com. (*Id.* Exb

1 & ¶ 6.) [REDACTED]

2 [REDACTED]  
3 [REDACTED] The  
4 Subpoena, which is dated March 6, 2017, requests, “[f]or the time period September 1,  
5 2008 to present,” the following:

6 All “Company Reviews” for [REDACTED]  
7 including all reviewer information. Reviewer information requested includes, but  
8 is not limited to, internet protocol addresses and logs associated with all reviews  
9 including date and time of post, username, email address, resume, billing  
10 information such as first name, last name, credit card information, billing address,  
11 payment history and any additional contact information available.

12 (O’Brien Decl. Exh. C, Att.) The Subpoena reproduces eight of the Reviews, which date  
13 from between November 2015 and January 2017, under the heading “[REDACTED] Company  
14 Review Examples,” but does not explain why those particular reviews are listed. (*Id.*)

15 Glassdoor contacted the Assistant United States Attorney in charge of this matter  
16 (“AUSA”), and advised the AUSA that providing the information sought in the Subpoena  
17 would infringe the reviewers’ First Amendment right to anonymous expression, and have  
18 a chilling effect on reviewers’ and readers’ willingness to use glassdoor.com for protected  
19 First Amendment activities. (*Id.* Exh. D.) The AUSA offered to narrow the Subpoena to  
20 seek only the identities of the authors of the eight Reviews listed as “examples” in the  
21 Subpoena, but asserted that the AUSA was not required to show a compelling interest in  
22 obtaining the reviewers’ identities or a substantial nexus between those identities and the  
23 investigation. (*Id.* Exh. E, at 2.) The AUSA further stated that the purpose of the  
24 Subpoena is to locate “third-party witnesses to certain business practices relevant to our  
25 investigation.” (*Id.* Exh. E, at 1.)

26 Glassdoor is expressly committed to protecting its users’ First Amendment right to  
27 anonymous expression. (*Id.* Exh. F, ¶ 6(D) (provision of glassdoor.com Terms of Use  
28 stating that “we reserve the right, to the fullest extent permitted by applicable law, to take  
appropriate action to protect the anonymity of our users against the enforcement of

1 subpoenas or other information requests that seek a user's electronic address or  
2 identifying information").) To seek pre-enforcement judicial review of a subpoena that  
3 seeks to deprive the [REDACTED] reviewers of their First Amendment right to speak  
4 anonymously, and that may have a broader chilling effect on protected expression,  
5 Glassdoor brings this motion. (*Id.* ¶ 5.)

## 6 ARGUMENT

### 7 **I. THE SUBPOENA INFRINGES GLASSDOOR'S USERS' FIRST** 8 **AMENDMENT RIGHTS**

#### 9 **A. The Reviewers Have a First Amendment Right to Speak Anonymously,** 10 **and Glassdoor's Readers have a Right to Receive Information from the** 11 **Site**

12 "[A]n author's decision to remain anonymous . . . is an aspect of the freedom of  
13 speech protected by the First Amendment." *McIntyre*, 514 U.S. at 342; *see also Berger v.*  
14 *City of Seattle*, 569 F.3d 1029, 1038 (9th Cir. 2009) ("Registration requirements . . .  
15 dissuade potential speakers by eliminating the possibility of anonymous speech," and may  
16 thus contravene First Amendment); *Awtry v. Glassdoor, Inc.*, No. 16-mc-80028-JCS, 2016  
17 WL 1275566, \*11 (N.D. Cal. Apr. 1, 2016) ("[I]t is well-established that anonymous  
18 speech on the Internet, like other types of anonymous speech, enjoys First Amendment  
19 protection."). Moreover, glassdoor.com's readers have a First Amendment right to  
20 receive information, as "[t]he First Amendment 'embraces the right to distribute literature,  
21 and necessarily protects the right to receive it.' . . . It protects material disseminated over  
22 the internet as well as by the means of communication devices used prior to the high-tech  
23 era." *Clement v. Cal. Dept. of Corr.*, 364 F.3d 1148, 1151 (9th Cir. 2004) (quoting *Martin*  
24 *v. City of Struthers*, 319 U.S. 141, 143 (1943)); *see also Stanley v. Georgia*, 394 U.S. 557,  
25 564 (1969) ("It is now well-established that the Constitution protects the right to receive  
26 information and ideas.").

27 Courts have recognized that government investigations seeking the identities of  
28 anonymous internet speakers, or readers of the content they provide, may reduce

1 individuals' willingness to speak anonymously, and to exercise their right to receive  
2 information. See *In re Grand Jury Subpoena to Amazon.com* dated Aug. 7, 2006, 246  
3 F.R.D. 570, 573 (W.D. Wis. 2007) (recognizing that, "if word were to spread over the Net  
4 — and it would — that the FBI and the IRS had demanded and received Amazon's list of  
5 customers and their personal purchases, the chilling effect on expressive e-commerce  
6 would frost keyboards across America"); *In re Grand Jury Investigation*, 706 F. Supp. 2d  
7 at 17-18 ("[I]f the subpoenaed customer records" sought by grand jury, which could be  
8 used to identify purchasers of allegedly obscene content, "are given to the Government, it  
9 could have a chilling effect on the exercise of Company X's customers' First Amendment  
10 right[]" to receive information); see also *Rich v. City of Jacksonville*, No. 3:09-cv-454,  
11 2010 WL 4403095, \*8, 11 (M.D. Fla. Mar. 31, 2010) (prosecutor's alleged "conduct in  
12 investigating, discovering and disclosing the author of the anonymous blog violated  
13 [plaintiff's] First Amendment rights by destroying his ability to speak anonymously," and  
14 "deterred him from . . . 'perfectly peaceful discussions of public matters of importance'"  
15 (quoting *Talley v. Cal.*, 362 U.S. 60, 65 (1960)).

16 **B. The Government Must Show a Compelling Interest in Obtaining the**  
17 **Reviewers' Identities, and a Substantial Nexus between those Identities**  
18 **and the Grand Jury's Investigation**

19 Although there is a public interest in investigating possible violations of law, "the  
20 grand jury's 'power is not unlimited.'" *In re Grand Jury Investigation*, 706 F. Supp. 2d at  
21 13 (quoting *United States v. Calandra*, 414 U.S. 338, 346 (1974)). "Its powers are  
22 constrained by any valid privilege, whether established by the Constitution, statute, or the  
23 common law." *Id.* Thus, like other criminal subpoenas, a grand jury subpoena may be  
24 quashed pursuant to Fed. R. Crim. P. 17(c)(2), which provides that, "[o]n motion made  
25 promptly, the court may quash or modify [a] subpoena if compliance would be  
26 unreasonable or oppressive." See, e.g., *In re Grand Jury, John Doe No. G.J. 2005-2*, 478  
27 F.3d 581, 585 (4th Cir. 2007) ("Rule 17(c) offers a vehicle for a subpoenaed party to  
28 assert a constitutional, statutory, or common-law privilege" in response to grand jury

1 subpoena). “While what is reasonable” under Rule 17(c)(2) “depends on the context, it is  
2 clear that a subpoena may be quashed if it cannot withstand constitutional scrutiny.” *In re*  
3 *Grand Jury Investigation*, 706 F. Supp. 2d at 14 (citing *United States v. R. Enters.*, 498  
4 U.S. 292, 299 (1991)).

5 “A grand jury subpoena will be enforced despite a First Amendment challenge if  
6 the government can demonstrate a compelling interest in and a sufficient nexus between  
7 the information sought and the subject matter of its investigation.” *In re Grand Jury*  
8 *Subpoena Duces Tecum*, 78 F.3d 1307, 1312 (8th Cir. 1996); *see also In re Grand Jury*  
9 *Investigation*, 706 F. Supp. 2d at 18 (“In order to survive a First Amendment challenge the  
10 government must show that they have a compelling interest in obtaining the sought-after  
11 material and that there is a sufficient nexus between the subject matter of the investigation  
12 and the information they seek.”); *In re Grand Jury Subpoena to Amazon.com* dated Aug.  
13 7, 2006, 246 F.R.D. at 572 (“If the witness demonstrates a legitimate First Amendment  
14 concern raised by the subpoena, then the government must make an additional showing  
15 that the grand jury actually needs the disputed information.”); *United States v. C.E. Hobbs*  
16 *Found. for Religious Training & Educ., Inc.*, 7 F.3d 169, 173 (9th Cir. 1993) (to quash  
17 summons by IRS seeking religious foundation’s financial documents, “the Foundation  
18 must make a showing that the . . . summons burdens” foundation’s First Amendment  
19 rights, and “[i]f the Foundation succeeds in making this prima facie showing, the IRS  
20 action will be upheld ‘only upon demonstration that a compelling governmental interest  
21 warrants the burden, and that less restrictive means to achieve the government’s ends are  
22 not available’”) (quoting *St. German of Alaska Eastern Orthodox Catholic Church v. U.S.*,  
23 840 F.2d 1087, 1093 (2d Cir. 1988)).

24 As numerous courts have recognized, this heightened standard is required because  
25 government investigative activities may have a chilling effect on the exercise of the  
26 above-mentioned First Amendment rights. *See, e.g., White v. Lee*, 227 F.3d 1214, 1228  
27 (9th Cir. 2000) (“The investigation by the HUD officials unquestionably chilled the  
28 plaintiffs’ exercise of their First Amendment right[]” to publicly oppose housing project);



1 *Donahoe v. Arpaio*, 986 F. Supp. 2d 1091, 1136 (D. Ariz. 2013) (holding that allegedly  
2 retaliatory police investigation “would chill a person of ordinary firmness from engaging  
3 in future First Amendment activity”) (quoting *Ford v. City of Yakima*, 706 F.3d 1188,  
4 1193 (9th Cir. 2013)); *Denney v. Drug Enf. Admin.*, 508 F. Supp. 2d 815, 830 (E.D. Cal.  
5 2007) (“[A] physician of ordinary firmness who was only engaging in lawful speech  
6 concerning medical marijuana could, in fact, be chilled” in that exercise of First  
7 Amendment rights “by a federal investigation”). These concerns are particularly  
8 pronounced where, as here, the speech involves labor conditions at an entity involved in  
9 administering publicly-funded programs [REDACTED] (See O’Brien Decl.  
10 Exh. B; see also *Gardetto*, 100 F.3d at 813 (“The objectives, purposes, and mission of a  
11 public university are undoubtedly matters of public concern” for First Amendment  
12 purposes); *Kincade v. City of Blue Springs*, 64 F.3d 389, 396 (8th Cir. 1995) (plaintiff’s  
13 “state[ment] that the City had paid local developers a substantial amount of money for  
14 work on the dam that had not been done” was protected from First Amendment liability,  
15 because “[w]e generally have held that speech about the use of public funds touches upon  
16 a matter of public concern”).)

17 Relatedly, in the civil litigation context, numerous courts have held that, where a  
18 plaintiff seeks the identities of anonymous internet speakers whose speech the plaintiff  
19 alleges to have been defamatory, the plaintiff must submit evidence making a prima facie  
20 case of liability on the speakers’ part to compel production of their identities. See, e.g.,  
21 *Music Group Macao Comm. Offshore Ltd. v. Does*, 82 F. Supp. 3d 979, 985 (N.D. Cal.  
22 2015) (denying motion to enforce subpoena seeking anonymous speakers’ identities  
23 because plaintiff “has not shown a ‘real evidentiary basis’ for its defamation claim  
24 against” defendant); *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 975, 977  
25 (N.D. Cal. 2005) (because “[a]llegation and speculation are insufficient” to provide  
26 evidentiary basis for, and “[p]laintiff has pointed to no evidence of actual confusion” to  
27 support, trademark infringement claim, plaintiff not entitled to anonymous, alleged  
28 infringers’ identities); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1097 (W.D.

1 Wash. 2001) (although defendant “speculates that the users of the . . . website” at issue  
2 “may have been engaged in stock manipulation,” defendant’s “innuendos of stock  
3 manipulation do not suffice to overcome the First Amendment rights of the Internet  
4 users,” and thus subpoena seeking users’ identities quashed).<sup>1</sup>

5 **C. The Government Has Not Shown a Compelling Interest in Obtaining**  
6 **the Reviewers’ Identities, or a Substantial Nexus between the**  
7 **Reviewers’ Identities and the Government’s Investigation**

8 As noted above, the Subpoena contains no information regarding the purpose of the  
9 grand jury’s investigation (O’Brien Decl. Exh. C, Att.), and the government stated that  
10 Fed. R. Crim. P. 6(e) precluded it from providing information to Glassdoor regarding the  
11 purpose of the investigation, saying only that the Subpoena was intended to help locate  
12 “third party witnesses to certain business practices relevant to our investigation.” (*Id.*  
13 Exh. E, at 1-2.) Nor does the content of the Reviews themselves reveal anything  
14 significant about the purpose of the investigation. There are no obvious commonalities  
15 among the eight Reviews the government offered to narrow its subpoena to seek, save for  
16 the reviewers’ disapproval of [REDACTED]. For instance, one of the eight Reviews, dated  
17 November 30, 2015, offers only the general criticism that “[REDACTED]  
18 [REDACTED] all they care about is numbers” (O’Brien Decl. Exh. C,  
19 Att., at 5), while another review [REDACTED]

20  
21 <sup>1</sup> As Glassdoor’s business model is based on employees’ anonymous  
22 provision of information regarding employers, Glassdoor has a sufficient interest in  
23 preserving its users’ right to speak anonymously to give it standing to assert those users’  
24 rights. *See Glassdoor, Inc. v. Super. Ct.*, No. H042824, 2017 WL 944227, \*6 (Cal. Ct.  
25 App. Mar. 10, 2007) (“Glassdoor has standing to assert [anonymous defendant’s] interest  
26 in maintaining his anonymity as against [plaintiff’s] . . . efforts to compel Glassdoor to  
27 identify him”); *McVicker v. King*, 266 F.R.D. 92, 95-96 (W.D. Pa. 2010) (website “clearly  
28 has third-party standing to assert the First Amendment rights of individuals anonymously  
posting to its . . . website,” as “[t]he trend among courts which have been presented with  
this question is to hold that entities such as newspapers, internet service providers, and  
website hosts may, under the principle of *ius tertii* standing, assert the rights of their  
readers and subscribers”); *Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d 782, 785-87  
(M.D. Pa. 2008) (newspaper could “assert the legal rights and interests of third party  
individuals who posted anonymously on [its] . . . website,” because “preventing the  
[newspaper] from asserting the First Amendment rights of anonymous commentators will  
compromise the vitality of the newspaper’s online forums”).



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Accordingly, Glassdoor is unaware of the reason for the government's request, or why, if at all, the government claims to have a compelling interest in obtaining the identities of Glassdoor's users. Glassdoor likewise does not know whether there is a substantial nexus between the information sought in the Subpoena and the grand jury's investigation. However, the government's suggestion that the Subpoena is meant to locate third-party witnesses raises the concern that the Subpoena is not founded on any suspicion of unlawful activity by the Reviewers, and instead on mere speculation that the Subpoena may locate witnesses to testify on the government's behalf.

Thus, absent the presentation of evidence by the government to the contrary, the Subpoena does not appear to meet the constitutional requirements that must be fulfilled to obtain anonymous speakers' identities. See *In re Grand Jury Investigation*, 706 F. Supp. 2d at 18 (denying motion to compel compliance with grand jury subpoena "seek[ing] records of customer purchases of expressive materials" identifying such customers, "which are presumptively protected by the First Amendment," because the government failed to "demonstrate[] a compelling need for them and a sufficient nexus between the records and the grand jury's investigation"); *In re Grand Jury Subpoena*, 246 F.R.D. at 572-74 (where grand jury subpoena sought identities of Amazon book purchasers as "potential witnesses to [prospective defendant's] alleged fraud and tax evasion schemes by virtue of having completed financial transactions with him," prohibiting the government from learning those purchasers' identities based on the First Amendment, unless they specifically chose to reveal their identities); see also *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154, 1167-69 (W.D. Wash. Oct. 25, 2010) (because "[t]he First Amendment protects a buyer from having the expressive content of her purchase of books, music, and audiovisual materials disclosed to the government," and state government's subpoena sought the identities of North Carolina-based customers who made purchases from Amazon.com, government was required, but failed, to show that "a compelling

1 governmental interest warrants the burden, and that less restrictive means to achieve the  
2 government's ends are not available") (quoting *C.E. Hobbs Found.*, 7 F.3d at 173).

3 **CONCLUSION**

4 For the foregoing reasons, the Subpoena should be quashed.

5  
6 Dated: April 4, 2017

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