

1 ELIZABETH A. STRANGE
Acting United States Attorney
District of Arizona
2
3 GARY M. RESTAINO
Arizona State Bar No. 017450
Gary.Restaino@usdoj.gov
4 ANDREW C. STONE
Arizona State Bar No. 026543
5 Andrew.Stone@usdoj.gov
Assistant U.S. Attorneys
6 40 N. Central Ave., Suite 1200
Phoenix, Arizona 85004
7 Telephone: 602-514-7500
Attorneys for the United States
8

9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF ARIZONA

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12 In re: Grand Jury Subpoena
Issued to Glassdoor, Inc.
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GJ Subpoena No. 16-03-217
(Assigned to Honorable Diane J. Humetewa
United States District Judge)

**GOVERNMENT'S SUR-REPLY
IN OPPOSITION TO
MOVANT'S MOTION TO QUASH**

(Filed Under Seal)

17 In Glassdoor's reply in support of its motion to quash, Glassdoor makes two
18 erroneous arguments: (1) Glassdoor argues that *Branzburg* doesn't apply, rather the Ninth
19 Circuit's decision in *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972) provides the
20 applicable standard, and (2) even beyond *Branzburg*'s applicability, Glassdoor argues its
21 situation is distinguishable from those the journalists faced in *Branzburg*. Both of these
22 arguments are unavailing.

23 Glassdoor, for the first time in its reply brief, argues that *Bursey* controls the
24 outcome of this case. Yet *Bursey*'s applicability is not supported by the facts of this case,
25 or by subsequent Ninth Circuit case law or by Glassdoor's decision to omit the *Bursey*
26 analysis from its original motion. In the instant case Glassdoor seeks to protect the
27 anonymous speech of current and former [REDACTED] employees, not their rights to
28 association. The Ninth Circuit has had numerous opportunities to follow *Bursey* and has

1 instead chosen to follow the *Branzburg* decision when faced with factually similar
2 situations involving the identification of sources of information. See, e.g., *Lewis v. United*
3 *States*, 501 F.2d 418 (9th Cir. 1974) (“*Lewis I*”); *Lewis v. United States*, 517 F.2d 236 (9th
4 Cir. 1975) (“*Lewis II*”); *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397 (9th Cir. 1993);
5 *In re Grand Jury Subpoena (Wolf)*, 2006 WL 2631398, *1 (9th Cir. 2006). None of the
6 above cases in any way contained the unique associational privacy and political interests
7 implicated by Bursey’s membership in the Black Panther Party, and the instant case does
8 not contain those unique interests either.

9 *Bursey’s* balancing test is inapposite here. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED] see also *Glassdoor, Inc. v. Superior Court*,
13 2017 WL 944227, at *4 n.3 (Cal. Ct. App. March 10, 2017) (“[Glassdoor’s] interests
14 resemble those of a news outlet resisting disclosure of the identity of a confidential
15 source.”). This Court should apply *Branzburg* to resolve Glassdoor’s motion.
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17 **I. The Court Should Reject Glassdoor’s Narrow Interpretation of *Branzburg* and**
18 **Expansive View of *Bursey***

19 Glassdoor makes the argument in its reply brief that *Branzburg’s* holding must be
20 construed narrowly. So narrowly, in fact, that Glassdoor argues the case’s “only” holding
21 is that a “newsman subpoenaed by a grand jury to identify a source cannot refuse to do so
22 on the basis of an absolute privilege.” Reply at 6. The Ninth Circuit disagreed with that
23 interpretation in the *Lewis I*, *Lewis II*, *Scarce*, and *Wolf* cases noted above and discussed
24 in the government’s response. Resp. at 7-8. All of these cases relied on *Branzburg* to reach
25 the conclusion that when analyzing a party’s First Amendment interests in responding to a
26 grand jury subpoena, a limited balancing test may be conducted, *only* “where a grand jury
27 inquiry is not conducted in good faith, or where the inquiry does not involve a legitimate
28 need of law enforcement, or has only a remote and tenuous relationship to the subject of

1 the investigation.” See *Wolf*, 2006 WL 2631398, at *1 (citing *Scarce*, 5 F.3d at 401). This
2 is *Branzburg*’s holding as interpreted by the Ninth Circuit and thus the appropriate standard
3 for the Court to apply to Glassdoor’s motion to quash. As discussed in the government’s
4 response, Glassdoor has not met, nor can it meet, its burden to show the government has
5 acted in bad faith. Resp. at 9.

6 Glassdoor couples its narrow view of *Branzburg* with an expansive view of *Burse*
7 -- a case that Glassdoor did not discuss in its 11-page motion, which cited nearly 30 other
8 cases. Glassdoor cited numerous out-of-district cases for the proposition that the
9 government must show a compelling interest and substantial nexus before receiving the
10 information requested in the grand jury subpoena. Resp. at 6-9. *Burse* was not mentioned.
11 Now, in its reply, Glassdoor argues for the first time that *Burse* is “binding on this Court.”
12 Reply at 9. That *Burse* “endorsed the compelling interest/substantial connection test.” *Id.*
13 That this Court must follow *Burse*. *Id.* at 9-10. If Glassdoor actually believed in *Burse*
14 with this level of conviction, one would expect it to have been cited with the dozens of
15 other cases in its motion.¹

16 The reality is that the Ninth Circuit has rejected movant’s reading of *Burse*. In
17 *Scarce*, the recipient of the grand jury subpoena argued he did not need to comply with the
18 subpoena because of *Burse*. 5 F.3d at 402. The *Scarce* court held that *Burse*, an opinion
19 issued one day after *Branzburg*, did not support *Scarce*’s position. *Id.* The court also noted
20 that *Burse* was decided before the *Lewis* cases and suggested the subpoena in *Burse* was
21 improper only due to “the lack of a substantial connection between the information sought
22 and the criminal conduct the Government was investigating.” *Id.* The *Scarce* court viewed
23 *Burse* as a narrow, fact-specific decision rather than a seminal opinion that filled gaps in
24 *Branzburg*. In fact, the Ninth Circuit has never applied *Burse* to strike down a grand jury
25 subpoena on First Amendment grounds. *Burse*’s treatment by subsequent Ninth Circuit
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1 panels confirms it doesn't establish the broad First Amendment defense posited by
2 Glassdoor in its reply brief.

3
4 **II. Glassdoor's Situation is Analogous to the Journalists Involved in the *Branzburg***
5 **Decision**

6 Glassdoor unsuccessfully attempts to distinguish its relationship with the users of
7 its website from the journalists' relationships with their confidential sources in *Branzburg*.
8 Reply at 4. First, as noted above, [REDACTED] other courts have found that there is no
9 distinction between Glassdoor and the *Branzburg* journalists. [REDACTED]

10 [REDACTED] ts
11 [REDACTED] see also *Glassdoor, Inc.*, 2017 WL 944227, at *4 n.3 (“[Glassdoor’s]
12 interests resemble those of a news outlet resisting disclosure of the identity of a confidential
13 source.”).

14
15 Second, as discussed in the government's response, *Branzburg* does not make any
16 distinction between anonymous potential criminals and anonymous witnesses to potential
17 crimes. Resp. at 8 (citing *Branzburg*, 408 U.S. at 693). Accordingly, Glassdoor's attempt
18 to distinguish its users in this manner is unavailing.

19 Finally, Glassdoor makes the conclusory statement that because the company seeks
20 review of the subpoena based on the users' First Amendment rights, rather than its own
21 First Amendment rights, this somehow places this case in a category outside the scope of
22 *Branzburg*. As an initial matter, Glassdoor provides no legal support for this position. See
23 Reply at 4. In addition, it is incongruous for the law to force a newspaper reporter to
24 divulge her confidential informants who may have witnessed a crime, but to permit a for-
25 profit company not to divulge the same information simply because the potential witness
26 posted information on the company's website. Glassdoor should not be permitted to
27 sidestep what a newspaper may not.

1 **III. Conclusion**

2 For the foregoing reasons, this Court should deny the request for relief and instead
3 order Glassdoor to comply with subpoena number 16-03-217.

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5 Respectfully submitted this 4th day of May, 2017.

6 ELIZABETH A. STRANGE
7 Acting United States Attorney
8 District of Arizona

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10 GARY M. RESTAINO
11 ANDREW C. STONE
12 Assistant U.S. Attorneys

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on May 4th, 2017, I hand-delivered this document for filing under
15 seal by the Clerk's Office, and I arranged for a copy to be sent to movant's counsel.
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