IN THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT

JASON O'GRADY, MONISH BHATIA, and KASPER JADE, Petitioners, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA, Respondent. APPLE COMPUTER, INC. Real Party in Interest.	Court of Appeal No. _____ Santa Clara County Superior Court Case No. 1-04-CV-032178 The Hon. James Kleinberg, Judge Department 14: (408) 882-2250

PETITIONERS AND NON-PARTY JOURNALISTS JASON O'GRADY, MONISH BHATIA, AND KASPER JADE'S PETITION FOR A WRIT OF MANDATE AND/OR PROHIBITION; MEMORANDUM OF POINTS AND AUTHORITIES [EXHIBITS SEPARATELY FILED]

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INTRODUCTION

Petitioners Jason O'Grady, Monish Bhatia, and Kasper Jade are journalists who regularly publish articles concerning real party in interest Apple Computer, Inc. They are not parties to the underlying trade secret misappropriation action brought by Apple. Apple alleges, however, that petitioners, as part of their regular reporting on Apple, published articles that included some of Apple's trade secrets, provided by confidential sources. In response to Apple's efforts to obtain unprecedented discovery compelling disclosure of the confidential sources and unpublished journalistic information of these non-party journalists, petitioners moved in the trial court for a protective order.

In a decision whose sweeping terms threaten every journalist, whether publishing in print, radio, television, or on the Internet, the trial court denied the protective order and held that a journalist's publication of information that a business deems a trade secret destroys the constitutional protections for the journalist's confidential sources and unpublished information. This Court should grant the writ to correct the trial court's manifest error and restore the previously well-settled constitutional protections for a journalist's confidential information, upon which the practice of journalism and the freedom of the press depend.

In the course of gathering news for publication, reporters frequently rely on confidential sources. Reporters must be able to promise confidentiality in order to obtain information on matters on which they report. Sources sometimes provide background information to the reporter on condition that it not be published. Compelled disclosure of a reporter's confidential sources and unpublished information causes sources to refuse to talk to reporters, resulting in a "chilling effect" on the free flow of information to the public.

For this reason, the California Supreme Court has long recognized that the freedom of the press guaranteed by the First Amendment to the federal Constitution and by the California Constitution's Liberty of Speech clause depends vitally on a news reporter's ability to protect confidences. In *Mitchell v. Superior Court*, 37 Cal. 3d 268, 279 (1984), the Court, in accord with many other jurisdictions, recognized that these constitutional provisions grant reporters a qualified privilege from compelled disclosure of their confidential sources and unpublished information in a civil action. Among other things, it requires that a party seeking discovery from a non-party journalist first exhaust all other possible sources.

California's citizens have also recognized the importance of maintaining the breathing space from compulsory disclosure on which a free press depends. Through the initiative process, the citizens have adopted an amendment to the California Constitution—the "reporter's shield"— which provides an absolute immunity to a newsperson from contempt for failing to disclose their confidential sources and unpublished information. Cal. Const., art. I, § 2(b).

The trial court below regrettably misapprehended the scope and importance of these fundamental constitutional protections. Instead, the trial court has authorized Apple to attempt to track down the alleged trade secret misappropriators by resorting at the outset of its case to broad discovery from non-party Petitioners.

Both the qualified constitutional reporter's privilege and the reporter's shield bar Apple from taking a shortcut through Petitioners' newsgathering in its quest for evidence to prove up the allegations of its case. At issue here is not the merits of Apple's trade secret claim nor even the potential liability of these non-party reporters should Apple ever sue them (it has not). Rather, the question is only whether Apple may ride

roughshod over the reporter's privilege and the reporter's shield in its eagerness to obtain evidence.

Although the trial court repeatedly suggested that if it were to honor the constitutional protections of the reporter's shield and the reporter's privilege in this case it would be granting immunity from liability to petitioner non-party journalists, it was mistaken. The constitutional protections at issue are only discovery limitations, not immunities from substantive civil or criminal liability. The constitutional protections are narrow ones that foreclose only a single avenue of discovery—discovery seeking confidential sources and unpublished information from reporters—while leaving open to Apple a universe of possibilities to explore. In the case of the constitutional reporter's privilege, it is a qualified one that forecloses Apple from resorting to a reporter's confidential information first before it has exhausted all other possible sources, something it has not yet begun to do.

There is an additional absolute barrier to Apple's stratagem of subpoenaing the email communication service provider used by petitioner and journalist O'Grady. The federal Stored Communications Act, 18 U.S.C. § 2701 et seq., prohibits any civil discovery of the content of electronic communications directly from communication service providers like O'Grady's email provider Nfox.com, Inc. The Stored Communications Act preempts any state law or discovery rule to the contrary and prevents providers like Nfox.com from disclosing any email messages or other communications stored on their systems, even in response to an otherwise-valid subpoena. Instead, any civil discovery of such communications must be sought from the owner of the communications account; here, Petitioner O'Grady.

Accordingly, this Court should issue the writ and direct the trial court to grant the protective order precluding Apple from seeking discovery of the confidential sources and unpublished information of Petitioner non-party journalists.

PETITION FOR A WRIT OF MANDATE AND/OR PROHIBITION

A. The Petitioners and Real Party in Interest

1. Petitioners Jason O'Grady, Monish Bhatia and Kasper Jade are not parties to *Apple Computer v. Doe No. 1, et al.*, Case No. 1-04-CV-032178 before respondent Superior Court of Santa Clara County.

2. Non-party Jason O'Grady is a journalist who owns and operates "O'Grady's PowerPage," an online news magazine that provides its readers with news and information about Apple Macintosh compatible software and hardware products. (O'Grady Decl., ¶ 1 (Ex. 18, 128:25-27.))

3. O'Grady has been working with Apple Macintosh computers since 1985, starting with the original 128k Apple Macintosh computer. (*Id.* at ¶ 2 (128:28-129:1-2.)) He co-founded the first dedicated Apple PowerBook User Group (PPUG) in the United States. (*Id.*)

4. O'Grady has contributed articles to print magazines MacWEEK, MacWorld, MacAddict, and MacPower (Japan). (*Id*. at ¶ 3 (Ex. 18, 129:3-9.)) O'Grady most recently had an article published in MacWorld magazine's February 2005 issue, and is currently writing an article for an upcoming edition. (*Id.*) These print magazines are exclusively dedicated to the same news beat as PowerPage, *i.e.*, news related to Apple Macintosh and Apple Macintosh-compatible products. (*Id*). He has also written chapters for *The Macintosh Bible* (8th Ed.) and *The Macintosh Bible*, (Panther Ed., Peachpit Press), two books that provide information on how to make the best use of Macintosh computers. (*Id.*)

5. Based in Abington, Pennsylvania, PowerPage began publishing daily news in December 1995. (*Id.* at ¶¶ 5-6(129:12-13.)) PowerPage is currently located at the web address www.powerpage.org and has published at that location since 2002. (*Id.* at ¶ 7 (129:14-16.)) Previously, PowerPage published under Go2mac.com and ogrady.org. (*Id.*)

During the last two years, PowerPage has averaged more than 300,000 unique visits per month. (*Id.* at ¶ 11 (129:26-27.)) By comparison, the leading print magazine for Macintosh-related news is MacWorld, which had an average monthly paid circulation of 253,241 for the first six months of 2004.[1] (Opsahl Decl., Ex. I (Ex. 20, 304-309.))

6. PowerPage includes news reports, feature stories and editorials, as well as how-to's, tips and other practical advice for Macintosh users. (O'Grady Decl., Ex. B (Ex. 18, 135-138.)) It publishes an average of 15-20 articles per week, with more than 60 articles published in the month of November 2004. (*Id.* at ¶ 10 (129:23-35.)) O'Grady functions as the publisher and one of nine editors and reporters for PowerPage. (*Id.* at ¶ 8 (129:17-19) and Ex. A (132-134.)) O'Grady has been credentialed as a media representative for the MacWorld Exposition, which is the premier trade show and conference dedicated to Macintosh computers and peripherals. (*Id.* at ¶ 12 (129:28-130:3) and Ex. C (Ex. 18, 139.)) Apple has provided O'Grady with free access to its ".Mac" service as a member of the media, and Apple CEO Steve Jobs has personally provided quotes for PowerPage in response to O'Grady's media inquiries. (*Id.* at ¶¶ 13-14 (Ex. 18, 130:4-8) and Ex. D (Ex. 18, 140-141.))

7. Non-party Monish Bhatia is the publisher of the "Mac News Network" (located at www.macnn.com), and provides hosting service to a number of different sites, including Apple Insider, an online news magazine that provides its readers with a collection of articles, editorials, stories, pictures, and other features about Apple Macintosh compatible software and hardware products. (Jade Decl., ¶¶ 2, 7 (Ex. 22, 341:27 to 342:1, 342:11-16.))

[1] In addition, MacWorld gave out an average of 132,826 non-paid copies to newly-registered users of Apple products.

8. Non-party Kasper Jade is a journalist who owns and operates Apple Insider and performs reporting and editorial functions under the pseudonym, "Kasper Jade." (*Id*. at ¶¶ 1-2, 7 (Ex. 22, 341:25 to 342:2, 342:11-16.)) Bhatia provides Apple Insider with systems administration, bandwidth allocation and other operational services. (*Id.* at ¶ 7 (342:11-16.))

9. Jade has been the primary publisher, editor and reporter for Apple Insider since the spring of 2003, and, previously, was a reporter for Apple Insider between September 1998 and April 2001. (*Id.* at ¶¶ 1, 6 (341:25-26, 342:9-10.))

10. With servers based in McLean, Virginia, Apple Insider has been publishing daily or near-daily technology news at the web address www.appleinsider.com since September 1998. (*Id.* at ¶¶ 3, 7 (342:3-4, 342:11-16.)) Apple Insider is a heavily trafficked site. For example, Apple Insider received more than 438,000 unique visitors in July 2004, the last month for which figures are currently available. (*Id.* at ¶ 5 (342:7-8.)) Apple Insider publishes an average of 7 to 15 articles per week. (*Id.* at ¶ 4 (342:5-6.)) Thirty-nine articles were published in November 2004. (*Id.*)

11. Non-party Nfox .com, Inc. is a Nevada corporation based in Las Vegas that provides an electronic communication service to the public, with its email servers physically located in Texas. (O'Grady Decl., ¶ 22 (Ex. 18, 131:6-7.)) Karl Kraft is the president of Nfox. (Opsahl Decl., ¶ 2 (Ex. 20, 234:27-28) and Ex. A (Ex. 20, 237-240.)) During November and December 2004, when the articles at issue were on PowerPage, Nfox provided email service to PowerPage and stored copies of email messages to several of O'Grady's email accounts. (O'Grady Decl., ¶ 24 (Ex. 18, 131:8-10.)) O'Grady used his Nfox email account to communicate with his legal counsel, among others. (*Id.* at ¶ 25 (Ex. 18, 131:11.))

12. Real party in interest Apple Computer, Inc. is the plaintiff in this case. Apple designs, manufactures and markets personal computers and related software, peripherals and other consumer electronics devices and advertises those products ubiquitously to the public. Apple's complaint alleges a cause of action for misappropriation of trade secrets alleged to exist in information about an Apple product called "Asteroid." (Complaint (Ex. 1, 4:19-22.)) Apple contends that unknown parties, designated as Doe defendants, disclosed trade secret information about this product. Apple's theory is that one of its own employees was the source of the original disclosure.

B. Authenticity of Exhibits

13. Exhibits 1 through 34 attached hereto are true and correct copies of documents on file with respondent Santa Clara County Superior Court in Case No. 1-04-CV-032178. Exhibit 33 is a true and correct copy of the original reporter's transcript of the hearing of March 4, 2005. The exhibits are paginated consecutively from page NPJ00001 to page NPJ00468 and page references in this petition are to the consecutive pagination (omitting the "NPJ" prefix and the leading zeros).

C. Factual And Procedural Background

14. On November 19, 2004, O'Grady wrote an article for PowerPage discussing a rumored new product from Apple called "Asteroid," with two follow-up articles on November 22 and 23. (O'Grady Decl., ¶¶ 15-16 (Ex. 18, 130:9-14, 142-144.)) The information in the article was obtained for the journalistic purpose of communicating information to the public. (*Id*. at ¶ 17-18 (Ex. 18, 130:15-18.))

15. The PowerPage articles reported that Apple was developing an add-on device that would let musicians plug their electric guitars and other instruments into a Macintosh computer. (O'Grady Decl., ¶¶ 15-16

(Ex. 18, 130:9-14) and Ex. E, F & G (Ex. 18, 142-144.)) The device was said to contain analog inputs for plugging in instruments or other audio sources, a FireWire connection to the Macintosh computer as well as audio jacks to output sound. (*Id.*) The articles included two artist's renderings of the rumored device. (*Id.*) The article and the renderings did not display any "Apple Confidential – Need to Know Only" indicia. (*Id.*)

16. One week later, on November 26, 2004, PowerPage published an article by an author writing under the pseudonym "Dr. Teeth and the Electric Mayhem." That article summarized some additional details about the device from an article on createdigitalmusic.com and discussed the various artists' renderings. (O'Grady Decl., ¶ 20 (Ex. 18, 130:24-26) and Ex. H (Ex. 18, 145.))

17. On December 7, 2004, Apple demanded that Powerpage remove the four articles. O'Grady complied shortly thereafter. (*Id.* at ¶¶ 21-22 (Ex. 18, pp. 130:27 to 131:5) and Ex. I (Ex. 18, pp. 146-147.))

18. On November 23, 2004, Apple Insider published an article written by Kasper Jade entitled "Apple developing FireWire audio interface for GarageBand." (Goldstein Decl., Ex. C (Ex. 21, 337-340.)) The article cited to unnamed sources to provide information about the "Asteroid" product, and contained an artist's rendering by non-party Paul Scates. (*Id.*)

19. Apple has not exhausted all alternative means of identifying the Does. Apple identified what it believes to be the documentary source of the leak, an allegedly secure document consisting of various electronic slides describing the Asteroid product, and alleged to have an "Apple Confidential – Need to Know Only" indicia. (Pl.'s Opp'n Br. at 2:10-12 (Ex. 24, 364:10-12.)) Electronic slides created by presentation programs like Microsoft's PowerPoint or Apple's own Keynote can easily be edited to alter or remove text they contain, including text such as the "Apple

Confidential – Need to Know Only" statement that Apple alleges was on the Asteroid product slides. Apple subsequently identified a group of about 30 employee suspects who had access to the document. Apple's security employees asked the suspected employees if they had any information about the leaks. Each denied knowledge of the leak. (Pl.'s Opp'n Br. at 8:5-10 (Ex. 24, 370:5-10.))

20. Apple has not taken statements under penalty of perjury, conducted depositions or requested the forensic analysis of personal digital assistants, home computers, laptops or other technology capable of transferring the slides or other relevant information outside of Apple.

21. Nor did Apple use independent investigators, who could pursue the investigation aggressively without fear of internal retaliation within Apple. Petitioner Journalists' articles also contained identified sources, whom Apple did not even attempt to contact.

22. On or around December 13, 2004, Apple filed an Ex Parte Application For An Order For Issuance Of Commission And Leave To Serve Subpoenas (Ex. 4, 23-27) seeking subpoenas to three online news sites: PowerPage, Apple Insider, and Think Secret (collectively, the "Apple News Sites"). For each Apple News Site, Apple sought to identify the sources used in the site's news articles and unpublished information used for preparing those articles.

23. Respondent trial court granted Apple's application on December 14, 2004, (Order Granting *Ex Parte* Application for Discovery and Issuance of Subpoenas ("Discovery Order 1"), Ex. 8, 71-72) authorizing Apple to serve subpoenas to "Powerpage.com, Appleinsider.com, and Thinksecret.com requiring each to produce all documents relating to any information posted on its site relating to an unreleased Apple product code named 'Asteroid' …" and to serve

subpoenas on each of the Apple News Sites for information leading to the identity of "any individual or individuals who have knowledge regarding the posts on its site disclosing information about the Product … and individuals who received and/or edited information related to the Product." Apple subsequently drafted and attempted to serve a subpoena on Apple Insider and Monish Bhatia.

24. On December 14, Apple also obtained a commission for a subpoena to Red Widget (Red Widget Commission, Ex. 9, 73-78), PowerPage's Texas-based Internet service provider, apparently believing incorrectly that Red Widget owned PowerPage.

25. No Texas subpoena was ever served on Red Widget. Nevertheless, Karl Kraft, who is affiliated with Red Widget and is also president of email service provider Nfox.com, Inc., informed Apple of his belief that certain email messages in O'Grady's PowerPage's email account contained the term "Asteroid." (Eberhart Decl., ¶ 6 (Ex. 11, 86:16-22.))

26. On February 4, 2005, Apple obtained an order authorizing subpoenas to Nfox and its principal, Karl Kraft. (Order Granting *Ex Parte* Application for an Order Granting Leave to Serve Expedited Disc. on Nfox.com and Karl Kraft ("Discovery Order 2"), Ex. 13, 97-98.)

27. Three California subpoenas were served the same day on Nfox and Karl Kraft, seeking discovery on February 24, 2005. (Opsahl Decl., Ex. E (Ex. 20, 253-282.))

28. On February 9, 2005, Apple filed a Request for Issuance of Foreign Deposition/Document Production Subpoenas in the Eighth Judicial District Court, Clark County, Nevada. The subpoenas were directed to Nfox.com, Karl Kraft, and Nfox.com's designated custodian of records. The three subpoenas issued the same day, with a return date of February 25, 2005. (Opsahl Decl., Ex. H (Ex. 20, 283-303.))

29. On February 11, 2005, Petitioners' counsel sent a letter by fax and by email to Karl Kraft, seeking confirmation that he would not respond to Apple's discovery requests until the respondent court had ruled on the motion for a protective order. Kraft did not respond to the letter, and, in a telephone conversation on February 14, 2005, refused to provide any assurance that he would not respond to Apple's subpoenas pending resolution of the motion for protective order.

30. On February 14, Petitioners filed a motion for protective order under Code of Civil Procedure Section 2017(c). (Notice of Motion and Movant's Opening Brief, Ex. 15-16, 104-124) The motion sought to protect the journalists' confidential sources and unpublished information on the grounds of the reporter's shield embodied in both Article I, Section 2(b) of the California Constitution and in California Evidence Code Section 1070, the constitutional reporter's privilege enunciated in *Mitchell v. Superior Court*, 37 Cal. 3d 268, 279-84 (1984) and the Stored Communications Act. The motion was supported by expert declarations from UC Berkeley journalism professor Thomas Goldstein (Goldstein Decl., Ex. 21, 316-340) and noted technology journalist Dan Gillmor. (Gillmor Decl., Ex. 19, 148-233.)

31. The parties stipulated to an expedited schedule for the motion (Stipulation, Ex. 23, 348-358) and an extensions of the date of Nfox's production (*Id*. at 349:18-21). The hearing date was set for March 4, 2005.

32. On March 4, 2005, respondent court heard oral argument and took the matter under submission. (Reporter's Transcript, Ex. 33, 432-454.) On March 11, 2005, respondent court issued a written order denying the Petitioner's motion for protective order. (Order after Hearing ("Order"), Ex. 34, 455-468.)

33. On March 19, 2005, the parties agreed to a stipulation for an extension of the dates of production in response to the Nfox subpoenas until after this Court rules on this petition.

33. On March 22, 2005, the Petitioner Journalists filed their petition for review with this Court.

D. Basis for Relief

34. Respondent trial court's decision is in error because it contravenes the First Amendment of the federal Constitution, the Liberty of Speech Clause of the California Constitution, the reporter's shield of the California Constitution, and California law and policy favoring the freedom of the press.

35. Respondent trial court's decision is also error because the Stored Communications Act, 18 U.S.C. § 2702, bars the currently pending subpoenas to Nfox.

E. Inadequacy of Remedy at Law

36. The Petitioner Journalists have no adequate remedy at law for respondent trial court's error and the resulting irreparable harm. Respondent trial court's discovery order is not appealable, and privileged documents, once produced, cannot be un-produced.

37. Absent writ relief, Petitioner Journalists' rights under the First Amendment to the United States Constitution and article I, section 2(a) of the California Constitution, under the reporter's shield and under the federal Stored Communications Act will be violated and irreparably harmed.

F. Prayer

Wherefore, Petitioners pray this honorable Court to:

39. Issue a writ of mandate and/or prohibition directing respondent Superior Court of Santa Clara County to set aside and vacate its

March 11, 2005 order denying the Petitioner Journalists' motion for protective order and directing the trial court to grant a protective order that the Petitioners cannot be compelled to disclose the source of any information procured in connection with their journalistic endeavors, nor any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public (whether or not such information is held by them or by a third party on their behalf);

40. Grant Petitioners their costs on appeal; and

41. Grant such other or further relief as this Court may deem just and proper.

DATED: March 22, 2005 Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

_____

Kurt B. Opsahl
Attorneys for Petitioners JASON O'GRADY, MONISH BHATIA, and KASPER JADE

VERIFICATION

I, Kurt B. Opsahl, declare:

I am one of the attorneys for the Petitioner Journalists, petitioners herein. I have read the foregoing petition for a writ of mandate and/or prohibition and know its contents. The facts alleged in the petition are within my own knowledge and I know these facts to be true, or are based upon declarations signed under penalty of perjury as noted above, and I believe them to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than petitioner, verify this petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on March 22, 2005 in San Francisco, CA.

_____

Kurt B. Opsahl

MEMORANDUM OF POINTS AND AUTHORITIES

I. Writ Review Is The Only Appropriate And Adequate Remedy For Correcting The Trial Court's Disregard Of The Stored Communications Act And Its Erroneous Invasion Of The Constitutional Reporter's Privilege And The Reporter's Shield

On the record before the trial court:

- The federal Stored Communications Act prohibits Petitioner O'Grady's email service provider Nfox and its president Karl Kraft from disclosing to Apple information that they hold on his behalf, and that prohibition should be enforced by a protective order;
- Petitioners are journalists, with the right to assert the state Constitution's reporter's shield and the federal Constitution's qualified privilege against discovery of confidential source information or other unpublished information. To prevent Apple from circumventing these protections, a protective order must prohibit discovery of such information from third parties who hold it on the petitioning journalists' behalf; and
- Because Apple's evidentiary showing did not overcome the constitutional reporter's privilege, a protective order must also prohibit any direct discovery by Apple against Petitioners for the protected information.

The trial court's order denying the Petitioner Journalists' motion for a protective order missed these essential points. The order confused the protection from discovery afforded by evidentiary privileges with an immunity from substantive liability, exalted statutory trade secret protection over constitutional rights, misapplied the test for when the constitutional reporter's privilege may be overcome, and ignored the Stored Communications Act altogether. The Petitioner Journalists now face

unrestricted discovery from Apple seeking their unpublished information and the identities of their confidential sources.

Writ "review is appropriate when petitioner seeks extraordinary relief from a discovery order that may undermine a privilege." *Venture Law Group v. Superior Court*, 118 Cal. App. 4th 96, 101 (2004). "Interlocutory review by writ is the only adequate remedy where a court orders production of documents which may be subject to a privilege, 'since once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure.'" *People ex rel. Lockyer v. Superior Court*, 122 Cal. App. 4th 1060, 1071 (2004). "As with privileged information, disclosure of secret information cannot be remedied on appeal once the information has been disclosed." *People v. Superior Court (Mouchaourab)*, 78 Cal. App. 4th 403, 413 (2000); *accord California Highway Patrol v. Superior Court*, 84 Cal. App. 4th 1010, 1018 (2000) ("Writ review is appropriate when the petitioner seeks relief from a discovery order which may undermine a privilege or a right of privacy, because appellate remedies are not adequate to remedy the erroneous disclosure of information."); *Roberts v. Superior Court*, 9 Cal. 3d 330, 336 (1973) (writ review permitted to protect psychotherapist-patient privilege from improper discovery). Here, the confidential source and unpublished information that Apple seeks to discover is both privileged and protected by federal law.

The Petitioner Journalists have no other adequate remedy in the ordinary course of law. They have no further remedies with the respondent court, and the court's discovery order is not directly appealable. *See* Eisenberg, Horvitz & Wiener, CAL. PRAC. GUIDE: CIVIL APPEALS & WRITS (The Rutter Group 2004) 2:250, p. 2-109.

The Petitioner Journalists' injuries are irreparable. Apple's discovery of the Petitioner Journalists' confidential information cannot be undone once produced, and a later-issued protective order cannot remedy an erroneous disclosure. Furthermore, Petitioners are already suffering irreparable harm from the trial court's refusal to grant a protective order, as now fewer confidential sources are willing to provide them with information. (*See* O'Grady Supp. Decl., ¶¶ 2-4 (Ex. 31, 429:1-14); Jade Supp. Decl., ¶¶ 2-6 (Ex. 32, 431:1-21)). The expert declaration of Professor Thomas Goldstein, former Dean of the Columbia University Graduate School of Journalism and of the University of California at Berkeley Graduate School of Journalism, highlights the reliance of a free press on such confidential sources**:**

> Oftentimes, however, the most knowledgeable and credible sources are, for very good personal reasons, unwilling to talk on the record and therefore seek a promise of confidentiality as a precondition to disclosing information to a journalist. … Protecting confidential sources is the glue that holds together the journalistic enterprise. It is an essential newsgathering technique for reporting on government affairs. It is equally essential in reporting on corporations.

(Goldstein Decl., ¶ 18-19 (Ex. 21, 319:20-27)); *see also New York Times Co. v. Gonzales*, No. 04 Civ. 7677(RWS), 2005 WL 427911, at *46 n.48 (S.D.N.Y. Feb. 24, 2005) (quoting from six detailed reporter affidavits regarding the chilling effect on their sources of threatened subpoenas to journalists).

The harm to Petitioners is irreparable because these lost opportunities for information-gathering may never recur:

> It's rare for a reporter to encounter a source who says, 'I'm not going to share this with you because my name may come out in court.' The real loss is the source who never calls, the

> tips and stories that go unnoticed because the originator of the lead got scared off.

Osborne, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 75 (1985) (quoting a *San Francisco Examiner* editor); *accord*, Kuhns, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 334 n.67 (1970) ("Reporters … cannot determine the number of potential informants who have refrained from contacting newsmen because of the absence of a right of nondisclosure…")

Finally, writ review is also necessary and appropriate because the issue tendered in this petition is of widespread interest and presents a significant issue of first impression. *See* Order at 3:20-22 (Ex. 34, 457:20-22) (case involves "issues … of great significance."); *Brandt v. Superior Court*, 37 Cal. 3d 813, 816 (1985) (writ review appropriate where "issue is of widespread interest"); *Marron v. Superior Court*, 108 Cal. App. 4th 1049, 1056 (2003) (writ review appropriate where "the petition presents a significant issue of first impression").

Writ review is appropriate here, and as explained below, this Court should grant this petition and issue a writ directing the trial court to issue the requested protective order. Section II of this memorandum addresses the appropriate standard of review, explaining that the constitutional issues presented in this petition require *de novo* review of the law and facts. Section III shows how the federal Stored Communications Act prohibits Apple's discovery of the contents of Petitioner O'Grady's email communications from his email provider. Section IV shows how Apple's subpoenas to a third-party email service provider improperly subvert the California reporter's shield. Section V addresses the constitutional reporter's privilege, showing how Apple has failed to meet its burden to overcome the privilege under the *Mitchell* test. Section VI examines the

trial court's opinion, and addresses its fundamental errors. Finally, Section VII explains how the protective order sought from the trial court was ripe for relief as to each Petitioner.

II. Because This Petition Involves Issues Of Constitutional Free Press Rights, This Court Must Review The Entire Record *De Novo* And Then Independently Apply The Law To The Facts It Has Found

The rights that Petitioners have asserted are established by the federal and state constitutional guaranties of a free press. Therefore, "any factual findings subsumed" in the trial court's order "are subject to constitutional fact review." *DVD Copy Control Ass'n, Inc. v. Bunner*, 31 Cal. 4th 864, 889 (2003) (internal citations omitted). "'[F]acts that are germane to' the *First Amendment* analysis 'must be sorted out and reviewed de novo, independently of any previous determinations by the trier of fact.'" *Id.* at 889 (emphasis in original; internal citations omitted). This Court "must therefore 'make an independent examination of the entire record' . . . and determine whether the evidence in the record supports the factual findings necessary" to support the trial court's order. *Id*. at 890 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)); *see also DVD Copy Control Ass'n., Inc. v. Bunner*, 116 Cal. App. 4th 241, 250 (2004) ("The reviewing court must independently review the record to determine whether it supports the requisite factual findings with convincing clarity.")

Once it has determined the relevant facts, this Court then must independently apply the relevant legal standard to the facts it has found. *See DVD Copy Control Ass'n., Inc. v. Bunner*, 116 Cal. App. 4th at 252-56 (independently determining in trade secret case that movant had no likelihood of success on the merits and the balance of harms did not weigh

in movant's favor, and therefore trial court's grant of preliminary injunction was improper).

Under the controlling legal standard established by *Mitchell*, 37 Cal. 3d at 279-84, Apple has failed to carry its burden to overcome the constitutional reporter's privilege. In particular, independent review of the record will show only the most rudimentary investigative efforts on Apple's part before it resorted to subpoenaing privileged information, rather than the complete exhaustion of all alternative sources that is required by the Supreme Court but was erroneously found by the trial court.

III. The Writ Must Issue Because Apple's Subpoenas To Nfox And Karl Kraft Are Unlawful Under The Federal Stored Communications Act

Apple has no right to subpoena emails stored on Nfox's servers in the first place. The federal Stored Communications Act, 18 U.S.C. § 2701 *et seq*., (the "SCA") forbids an electronic communication service ("ECS") provider like Nfox or Kraft from disclosing the contents of a customer's emails and other electronic communications to private parties. [2] By force

[2] Subdivision (b) of Section 2702 sets forth seven limited exceptions to this general rule, none of which apply to Apple's proposed discovery:

> (b) Exceptions for disclosure of communications.— A provider described in subsection (a) may divulge the contents of a communication—
>
> (1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;
>
> (2) as otherwise authorized in section 2517, 2511 (2)(a), or 2703 of this title [these sections authorize law enforcement and other governmental access under certain conditions];
>
> (3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;
>
> (4) to a person employed or authorized or whose facilities are used to forward such communication to its destination;

of the Supremacy Clause of the federal Constitution, the SCA preempts any state law to the contrary, including discovery statutes. Under the SCA, Apple's subpoenas directing Nfox and Kraft to produce Petitioner O'Grady's emails are unlawful.

The SCA provides that any "person or entity providing an electronic communication service to the public *shall not* knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1) (emphasis added). Under the SCA, "'contents', when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8). The SCA "protects users whose electronic communications are in electronic storage with an ISP or other electronic communications facility." *Theofel v. Farey-Jones*, 341 F.3d 978, 982 (9th Cir. 2003).

> (5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;
> (6) to a law enforcement agency—
> (A) if the contents—
> (i) were inadvertently obtained by the service provider; and
> (ii) appear to pertain to the commission of a crime; or
> (B) if required by section 227 of the Crime Control Act of 1990; or
> (7) to a Federal, State, or local governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency.

18 U.S.C. § 2702, subd. (b). None of 18 U.S.C. § 2702's limited exceptions authorize any disclosure by Nfox or Kraft of the contents of O'Grady's stored communications to non-governmental entities like Apple absent O'Grady's consent, whether in response to a discovery subpoena or otherwise.

Congress passed the SCA to prohibit a provider of an electronic communication service "from knowingly divulging the contents of any communication while in electronic storage by that service to any person other then the addressee or intended recipient." S.Rep. No. 99-541, 97th Cong. 2nd Sess. 37, *reprinted in* 1986 U.S.C.C.A.N. 3555, 3591. As the Ninth Circuit has explained, the SCA "reflects Congress's judgment that users have a legitimate interest in the confidentiality of communications in electronic storage at a communications facility." *Theofel*, 341 F.3d at 982.

Accordingly, the SCA flatly prohibits Nfox and Kraft, as "person[s] or entit[ies] providing an electronic communication service to the public," from disclosing the contents of O'Grady's communications. If Apple wants O'Grady's emails, its only legal option is to subpoena him directly; the SCA offers no exception allowing disclosure by a communication service provider in response to civil subpoenas from private litigants. 18 U.S.C. § 2702 (a)(1); *see also The U.S. Internet Service Provider Association, Electronic Evidence Compliance—A Guide for Internet Service Providers*, 18 BERKELEY TECH. L. J. 945, 965 (2003) (no Stored Communications Act provision "permits disclosure pursuant to a civil discovery order unless the order is obtained by a government entity…. [T]he federal prohibition against divulging email contents remains stark, and there is no obvious exception for a civil discovery order on behalf of a private party"). [3] Under the SCA's plain language, Apple cannot legally discover the contents of electronic communications from the service

[3] While the SCA's Section 2707(e)(1) provides a safe harbor for an ECS provider's "good faith reliance" on a court order, this is neither an independent source of authorization for disclosure nor a license for an ECS to respond to a subpoena despite knowing that the statute prohibits disclosure.

provider that stores them. Apple can only subpoena the account holder who uses the service, Petitioner O'Grady.[4]

The trial court simply ignored the SCA and its prohibitions, failing to even mention the statute in its order despite briefing by both sides. (*See* Movants' Opening Br. at 15:16-20 (Ex. 16, 124:16-20); Pl.'s Opp'n Br. at 10, n.3 (Ex. 24, 372:26-28); and Movants' Reply Br. at 8:19 to 9:15 (Ex. 30, 425:19 to 426:15.)) Despite the trial court's unjustified disregard for it, the SCA absolutely prohibits Apple from seeking discovery from Nfox, Kraft, or any other ECS provider used by Petitioners, and requires issuance of a protective order prohibiting such discovery.

IV. The Writ Must Issue Because Apple's Subpoenas To Nfox And Karl Kraft Subvert The Reporter's Shield That Protects The Petitioner Journalists

Absent its illegal subpoenas to Nfox and Kraft, Apple would have been forced to seek Petitioner and journalist O'Grady's emails directly from O'Grady. This would have given O'Grady the opportunity to assert the constitutional reporter's shield and to refuse to disclose the information.

The California Constitution's absolute reporter's shield permits journalists like Petitioners to withhold confidential sources and unpublished information without fear of being punished by contempt. Cal. Const., art. I, § 2(b); *accord* Evid. Code § 1070.

> The shield law, article I, section 2(b), enacted in its constitutional form in 1980, provides that a newsperson 'shall not be adjudged in contempt . . . for refusing to disclose the source of any information procured while so connected or employed [as a newsperson] . . . or for refusing to disclose any unpublished information obtained or prepared in

[4] Congress's policy of requiring subpoenas to the owner of the account rather than the ECS provider is quite sensible: unlike the account holder, the ECS provider cannot determine which of its customer's stored email messages are subject to the attorney-client privilege, the martial privilege, the psychotherapist-patient privilege, etc.

> gathering, receiving or processing of information for communication to the public.' 'Stated more simply, article I, section 2(b) protects a newsperson from being adjudged in contempt for refusing to disclose either: (1) unpublished information, or (2) the source of information, whether published or unpublished.'

Miller v. Superior Court, 21 Cal. 4th 883, 890 (1999) (alteration original, internal citations omitted). The shield "extends not only to the identity of the source but to the disclosure of any information, in whatever form, which may tend to reveal the source of the information." *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 218 (1975).

This constitutional reporter's shield provides "absolute protection to nonparty journalists in civil litigation from being compelled to disclose unpublished information." *New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 457 (1990). As the California Supreme Court explained:

> The shield law is, by its own terms, *absolute* rather than qualified in immunizing a newsperson from contempt for revealing unpublished information obtained in the newsgathering process. As we have explained: "Since contempt is generally the only effective remedy against a nonparty witness, the California enactments [article I, section 2(b) and Evidence Code section 1070] grant such witnesses *virtually absolute protection* against compelled disclosure."

Miller, 21 Cal. 4th at 890-891 (alteration original) (internal citations omitted).

Even in criminal cases, the shield provides absolute protection against a prosecutor's attempts to subpoena unpublished information or the identities of confidential sources. *Id.* at 887, 898 ("The threat to the autonomy of the press is posed as much by a criminal prosecutor as by other litigants."). Likewise, California's trade secret statutes cannot trump the absolute bar of the shield, notwithstanding the trial court's assertion to the contrary (Order at 11:4 (Ex. 34, 465:4)). "Nor . . . is there any question that that protection, by the terms of article I, section 2(b), is absolute, and

may be overcome only by a countervailing federal constitutional right…." *Miller*, 21 Cal. 4th at 897.

California's reporter's shield was intended to be broad in its reach, and protects all persons "connected with … a newspaper, magazines, or other periodical publication," without limitation. Cal. Const., art. I, § 2(b). As detailed in their undisputed declarations, O'Grady and Jade each publishes an online news periodical, edits submission by others and writes news articles. (O'Grady Decl., ¶ 8 (Ex. 18, 129:17-19); Jade Decl., ¶ 1 (Ex. 22, 341:25-26.)) Bhatia, by virtue of performing technical and administrative functions, is "connected with" the Apple Insider news organization. (Jade Decl., ¶ 7 (Ex. 22, 342:11-16.))

Nor is there any doubt that Petitioners obtained their unpublished information in the process of "gathering, receiving or processing … information for communication to the public." Cal. Const., art. I, § 2(b); *see also Rancho Publ'ns. v. Superior Court*, 68 Cal. App. 4th 1538, 1546 (1999) (reporter's shield applies to information gathered "for the journalistic purpose of communicating information to the public.") The publishers, editors and authors connected with Power Page and Apple Insider communicate their news to hundreds of thousands of readers per month. (Goldstein Decl., ¶¶ 31-32 (Ex. 21, 322:12 to 323:3); Gillmor Decl., ¶ 4 (Ex. 19, 149:11-15); O'Grady Decl., ¶¶ 5-20 (Ex. 18, 129:12 to 130:26); Jade Decl., ¶¶ 2-8 (Ex. 22, 341:27 to 342:4.)) Accordingly, each of the Petitioners is protected by the reporter's shield.

The trial court erroneously permitted Apple to circumvent the protections of the reporter's shield by allowing subpoenas to third parties for the Petitioner Journalists' confidential sources and unpublished information. The trial court failed to recognize that the continued autonomy of the press could turn on its error:

> 'A comprehensive reporter's immunity provision, in addition to protecting confidential or sensitive sources, has the effect of safeguarding'[t]he autonomy of the press'. . . The threat to press autonomy is particularly clear in light of the press's unique role in society. As the institution that gathers and disseminates information, journalists often serve as the eyes and ears of the public. Because journalists not only gather a great deal of information, but publicly identify themselves as possessing it, they are especially prone to be called upon by litigants seeking to minimize the costs of obtaining needed information.'

Miller, 21 Cal. 4th at 898 (quoting *Delaney v. Superior Court*, 50 Cal. 3d 785, 820- 821 (1990) (conc. opn. of Mosk, J.) (internal citations and parenthetical information omitted.))

The trial court, to protect the constitutional rights of the Petitioner Journalists and avoid the subversion of the reporter's shield by Apple's discovery stratagems, should have prohibited Apple from subpoenaing these third parties. Requiring direct discovery would ensure an opportunity for the Petitioner Journalists to timely assert their constitutional rights. Doing so would also prevent the reporter's shield from becoming a dead letter in an age when reporters and everyone else depend on third parties to store information on their behalf. Courts cannot permit the reporter's shield and other privileges and discovery protections to be evaded by the simple artifice of subpoenaing the custodian of the information, rather than its owner.[5]

[5] As noted by *Rancho Publications*, "'Third-party discovery poses an unmistakable threat to source confidentiality. If a litigant subpoenas the proper documents [from a third party other than the reporter], it can easily discover the identity of a source.'" *Rancho Publ'ns.*, 68 Cal. App. 4th. at 1548, n.6 (quoting Note, *The Big Chill: Third-Party Documents and the Reporter's Privilege*, 29 U. MICH. J.L. REF. 613, 626 (1996); see also *New York Times v. Gonzales*, No. 04 Civ. 7677(RWS), 2005 WL 427911, at *45 (S.D.N.Y. Feb. 24, 2005) (a reporter's "First Amendment interest in records held by third parties is well supported").

V. The Writ Must Issue Because The Constitutional Reporter's Privilege Protects The Confidential Sources And Unpublished Information Of The Petitioner Journalists From Disclosure

The importance of the constitutional values underlying the protection of a free press cannot be overemphasized. As James Madison eloquently put it, "[a] popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both." 9 James Madison, WRITINGS OF JAMES MADISON, 103 (G. Hunt ed., 1910).

The use of confidential sources and unpublished information are essential means by which journalists acquire Madison's "popular information" for communication to the public. (Goldstein Decl., ¶ 19 (Ex. 21, 319:25-27). Compelled disclosure of a journalist's sources and unpublished information endangers the freedom of the press because many sources will be chilled into silence if they cannot rely on the credible and certain promise of confidentiality. Protecting a reporter's ability to promise confidentiality is therefore essential for insuring a robust free press:

> The First Amendment … guarantees a free press primarily because of the important role it can play as 'a vital source of public information.' … Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.

Mitchell, 37 Cal. 3d at 274-75 (quoting *Zerilli v. Smith*, 656 F.2d 705, 710-11 (D.C. Cir. 1981) (internal citations omitted)).[6]

[6] *Mitchell* also noted the "dramatic illustrations of the value of the reporter's privilege" in *Democratic National Committee v. McCord*, 356 F.Supp. 1394, 1397 (D.D.C. 1973) (denying a subpoena seeking the

Thus, "[d]iscovery which seeks disclosure of confidential sources, and information supplied by such sources, is not ordinary discovery. . . . [E]ven a limited, narrowly drawn request may impinge upon First Amendment considerations." *Mitchell*, 37 Cal. 3d at 279. For this reason, independent of the state Constitution's reporter's shield discussed in the preceding section, the free press guaranties of the federal and state Constitutions provide that "in a civil action a reporter, editor, or publisher has a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by such sources." *Id*. This constitutional reporter's privilege, recognized by the California Supreme Court in *Mitchell* as a necessary consequence of the freedom of the press, protects the Petitioner Journalists against Apple's discovery.

A. Petitioners Are Journalists Protected by the Constitutional Reporter's Privilege.

The undisputed evidence in the record shows that Petitioners are journalists engaged in newsgathering that is protected by the constitutional reporter's privilege. (Goldstein Decl., ¶¶ 31-32 (Ex. 21, 322:12 to 323:3); Gillmor Decl., ¶ 4 (Ex. 19, 149:11-15); O'Grady Decl., ¶¶ 5-18 (Ex. 18, 129:12 to 130:18); Jade Decl., ¶¶ 2-8 (Ex. 22, 341:27 to 342:20.)) In the words of Professor Thomas Goldstein, "[w]hat O'Grady and Jade do is journalism—seeking out accurate information, and presenting it to their

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identities of sources who supplied media with information regarding the 1972 Watergate burglary, court "cannot blind itself to the possible 'chilling effect' the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public") and *Gilbert v. Allied Chemical Corp*. 411 F.Supp. 505, 508 (E.D. Va. 1976) ("[I]f a news station or newspaper is forced to reveal the confidences of their reporters, the sources so disclosed, other confidential sources of other reporters, and potential confidential sources will be significantly deterred from furnishing further information to the press"). *Mitchell*, 37 Cal. 3d at 275 n.4.

audiences." (Goldstein Decl., ¶ 31 (Ex. 21, 322:13-14)). The trial court assumed that Petitioners were journalists for the purposes of its analysis, but found that the reporter's privilege did not apply for other reasons. Although Apple contended that Petitioners were not journalists, Apple submitted no contrary evidence, expert or otherwise.

Courts considering the constitutional reporter's privilege have employed a functional analysis, asking whether the person asserting the privilege has acted with the intent of disseminating news. As the Ninth Circuit and Second Circuit federal Courts of Appeals have held:

> The test … is whether the person seeking to invoke the privilege had "the intent to use material – sought, gathered or received – to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process." If both conditions are satisfied, then the privilege may be invoked.

Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993) (*Shoen I*) (quoting test of *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2nd Cir. 1987), *cert denied*, 481 U.S. 1015 (1987) and applying the reporter's privilege to a book author.) In this case, the Petitioner Journalists intended to use the material received from confidential sources to disseminate information about Apple to an interested public, and in fact did so when the articles were published. (O'Grady Decl., ¶¶ 15-18 (Ex. 18, 130:9-18); Jade Decl., ¶ 8 (Ex. 22, 342:17-20.)) As such, they may invoke the reporter's privilege.

Nor can application of the privilege be limited based on the Petitioner Journalists' choice of medium for communicating the news they gather. *Shoen I* explained that there was no difference whether "'[t]he intended manner of dissemination [was] by newspaper, magazine, book, public or private broadcast medium, [or] handbill' because "[t]he press in its historic connotation comprehends every sort of publication which

affords a vehicle of information and opinion.'" *Id.* (quoting *von Bulow*, 811 F.2d at 144).

Reporters for both print and online publications serve the same journalistic function—they gather accurate news and present it to the public. (Goldstein Decl., ¶ 13-17, 29 (Ex. 21, 318:17 to 319:19, 321:25 to 322:4) (expert opinion concluding that "O'Grady's PowerPage and Apple Insider are online publications that are the electronic equivalent of print publications like newspapers or magazines.") In fact, increasing number of news publications, such as Slate, Salon, and C|Net News, are exclusively online, and many print publications now publish online versions as well. (Gillmor Decl., ¶ 7-8 (Ex. 19, 150:1-11) and Ex. F-K (Ex. 19, 162-182.)) Today, online publications are often the place where news first breaks, before traditional print publications get the story, and news first published online has made important contributions to public knowledge and debate. (Gillmor Decl., ¶¶ 9-10 (Ex. 19, 150:12 to 151:1) and Ex. L-O (Ex. 19, 183-201.)) The constitutional guaranties of a free press do not discriminate based on medium, and any holding otherwise would significantly hinder the flow of accurate information on matters of public interest. Accordingly, as with the California reporter's shield discussed above, Petitioners are journalists entitled to the protections of the constitutional reporter's privilege, regardless of the medium they use to disseminate the news.

B. Under The *Mitchell* Factors, Apple Has Not Met Its Burden Of Overcoming The Constitutional Reporter's Privilege

In *Mitchell*, the California Supreme Court recognized the constitutional reporter's privilege from discovery in a civil action. There, plaintiff Synanon Church, a controversial drug rehabilitation organization, alleged that the defendant reporters had furnished libelous information to

the Reader's Digest, which, in turn, published the libel to a national audience. Synanon's broad-ranging discovery requests sought to gain information from the defendant reporters about their confidential sources and the information obtained from those sources. The trial court granted the discovery, and the newspaper appealed.

The California Supreme Court held that the protections for the freedom of the press enshrined in the First Amendment to the United States Constitution and in article I, section 2 of the California Constitution each provided a qualified privilege to reporters against disclosure of their confidential sources and unpublished information. *Mitchell*, 37 Cal. 3d at 279; *see also Rancho Publ'ns.*, 68 Cal. App. 4th at 1547-50 (1999) (listing cases in which California courts have applied "the qualified constitutional privilege to block civil discovery that impinges upon free speech or privacy concerns of the recipients of discovery demands and innocent third parties as well"); *see also Shoen I*, 5 F.3d at 1293-97 (applying First Amendment reporter's privilege).

The *Mitchell* Court set forth a five-factor balancing test for deciding the applicability of the constitutional reporter's privilege in civil cases: (1) whether the reporter is a party to the litigation; (2) the extent to which the information sought "goes to the heart of the plaintiff's claim"; (3) whether the party seeking the information has exhausted all alternative sources; (4) the importance of protecting confidentiality, including whether the information "relates to matters of great public importance" and whether the risk of harm to the source is "substantial"; and (5) whether the party seeking disclosure has made a prima facie showing on its underlying claim. *Mitchell*, 37 Cal. 3d at 279-84.

The party seeking discovery from a journalist bears the burden of showing that these factors weigh sufficiently in its favor to overcome the

constitutional reporter's privilege. *See id.* at 279-84; *Rancho Pub'ns.*, 68 Cal. App. 4th at 1550 (issuing writ of mandate requiring court to enter an order granting motion to quash because subpoenaing party "has failed to meet its burden to defeat the qualified constitutional privilege"). As set forth in detail below, on the undisputed record here, Petitioners are entitled to the full protection of the constitutional reporter's privilege recognized in *Mitchell*.

1. The Petitioner Journalists Are Not Parties

The first *Mitchell* factor—whether the reporter is a party to the litigation—is a key factor that weighs heavily against disclosure in this case. Under *Mitchell*, disclosure is more appropriate when the reporter is a party, but exceedingly less appropriate when the reporter is not a party. *Mitchell*, 37 Cal. 3d at 279. Petitioners are not parties to this action, and, indeed, Apple conceded that it does not possess evidence sufficient to establish a case against them (Pl.'s Opp'n Br. at 7:5-6 (Ex. 24, 369:5-6.))

2. The "Heart" Of Apple's Case Encompasses Wrongful Conduct Internal To Apple Itself.

The second *Mitchell* factor, whether the information sought "goes 'to the heart of the plaintiff's claim,'" also counsels against disclosure. Mitchell, Cal. 3d. at 280 (internal citations omitted). Apple's claim at its heart arises out of the failure of its own mechanisms for preventing leaks to the news media by Apple's own employees, as the facts that it has alleged point to no other suspects. (*See* Complaint ¶¶ 9-12 (Ex. 1, 3:15 to 4:11.)) There is no indication of industrial espionage, a profit motive, or even malice. Apple should deal with its problems with its employees internally, with as little impact on the news media as possible.

Furthermore, "mere relevance is insufficient to compel discovery." *Mitchell*, 37 Cal. 3d at 280. Instead, *actual* relevance is required: "even if

the information sought 'may well contain' evidence relevant to a claim, if the evidence would not, without more, establish the claim, actual relevance does not exist." *Wright v. Fred Hutchinson Cancer Research Ctr.*, 206 F.R.D. 679, 682 (W.D. Wash. 2002); *see also Shoen v. Shoen, 48 F.3d 412*, 416 (9th Cir. 1995) (*Shoen II*) (holding that the party seeking disclosure must show actual relevance; "a showing of potential relevance will not suffice.").

Much of Apple's proposed discovery goes beyond its core trade secret claim. For example, Apple seeks to obtain information identifying the pseudonymous reporter "Dr. Teeth," who merely summarized publicly available information and commented on already existing artists' renderings. (Disc. Order 1 (Ex. 8, 72:1-5); O'Grady Decl., ¶20 (Ex. 18, 130:24-26) and Exhibit H (Ex. 18, 145.)) Apple also seeks identity information for Bob Borries and Paul Scates, two artists who created renderings of what the "Asteroid" product might look like, without any showing that these renderings were based on the actual disclosure of trade secret information to them. (Disc. Order 1 (Ex. 8, 72:1-10.))

Worse yet, the subpoenas served on Nfox, O'Grady's email service provider, seek the identity and communications of "any individual ... who provided information related to the Product [Asteroid]," a broad category which would include people who provided non-trade secret information. (Disc. Order 2 (Ex. 13, 97:27-28.)) Apple offers no evidence, for there is none, that the Petitioner Journalists' *direct* source(s) were Apple employees or otherwise owed a duty of confidentiality to Apple; indeed they may have been many steps removed from those who originally leaked the information. Without more, the discovery Apple seeks would not establish a claim against the original source of the disclosure, which Apple alleges to

be one of approximately twenty-five employees it has identified. (Pl.'s Opp'n Br. at 8:5-10 (Ex. 24, 370:5-10.))

3. Apple's Limited Internal Investigation Was Rudimentary, Not Exhaustive

Apple has most obviously failed to satisfy the crucial third *Mitchell* factor, which the Supreme Court has held requires denial of discovery unless Apple "has exhausted all alternative sources of obtaining the needed information." *Mitchell*, 37 Cal. 3d 268 at 282. This "exhaustion" factor requires that a civil litigant pursue all alternative avenues of discovery until reaching an "irreducible core of information" that cannot be discovered except through the reporters. *Id.* at 282. Compelled disclosure from a journalist must be a "'last resort' permissible only when the party seeking disclosure has no other practical means of obtaining the information." *Id.* (citations omitted); *accord Shoen I*, 5 F.3d at 1297 (compelled disclosure a "last resort after pursuit of other opportunities has failed") (internal citations omitted).

Thus, to overcome the constitutional reporter's privilege, Apple must first investigate its own house before seeking to disturb the freedom of the press. *Mitchell*, 37 Cal. 3d at 282 (denying discovery where "plaintiffs made no showing that they have exhausted alternative sources of information"). However, despite having identified the fewer than thirty employees who had original access to the alleged trade secret information about "Asteroid," Apple has yet to depose any of them. Apple has similarly failed to review laptops, home computers or other devices that could have been used by the suspect employees to communicate the information, or even to seek statements from them signed under penalty of perjury. (*See* Zonic Decl., ¶17-22 (Ex. 28, 402:28 to –404:8); Ortiz Decl.,

¶ 4-9 (Ex. 27, 390:23 to 392:4); Reporter's Transcript, at p. 11:10-19 (Ex. 33, 443:10-19.))

Courts routinely require litigants to use extensive depositions of known witnesses before the litigant can meet the exhaustion test. The *Mitchell* Court, in finding that the plaintiffs had not exhausted all alternative sources of obtaining the needed information, noted that the plaintiffs had failed to depose those persons known to have provided information to the reporter. *See Mitchell*, 37 Cal. 3d at 282. In *Rancho Publications*, the plaintiff hospital argued, like Apple, that its Doe defendant must be one of an identified group of people, all of whom had denied being the source. *Rancho Publ'ns.*, 68 Cal. App. 4th at 1551. Unlike Apple, however, which has deposed *none* of its suspects, the hospital had already deposed each of its eleven identified suspects. Yet the plaintiff hospital still did not pass the *Mitchell* test.

Federal cases applying the constitutional reporter's privilege further bolster the *Mitchell* Court's holding that depositions are a necessary prerequisite to meeting the exhaustion test. *See Shoen I*, 5 F.3d at 1296-98 (holding that failure to take a deposition meant plaintiff "failed to exhaust the most patently available other source"); *In re Stratosphere Corp. Securities Litigation*, 183 F.R.D. 684, 686-87 (D. Nev. 1999) (exhaustion test not met where plaintiffs had not deposed all of the defendants and had not asked any defendant specifically about the article in question); *Wright*, 206 F.R.D. at 682 (no exhaustion where defendants failed to first depose non-journalists about their correspondence with the journalists).

Additional cases demonstrate how the taking of dozens or even hundreds of depositions can fail to satisfy the exhaustion requirement. For example, in *Zerilli v. Smith*, the plaintiffs sued the government for allegedly leaking to a newspaper the transcripts of conversations in which the

plaintiffs discussed illegal activities. *Zerilli,* 656 F.2d at 706. Plaintiffs had a log of government employees who had been given access to the transcripts. Plaintiffs contended that an unsuccessful internal Department of Justice investigation fulfilled the exhaustion requirement, but the plaintiffs themselves had "made no attempt to *depose* any of these individuals." *Id*. at 708, 715-16 (emphasis added). The D.C. Circuit concluded that "[plaintiffs] cannot escape their obligation to exhaust alternative sources simply because they feared that deposing Justice Department employees would be time-consuming, costly, and unproductive." *Id* at 716. Indeed, the Court noted that "an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure" from journalists. *Id.* at 714; *see also In re Petroleum Products Antitrust Litig*., 680 F.2d 5, 8-9 (2d Cir. 1982) (hundreds of depositions insufficient to show exhaustion); *Carushka, Inc. v. Premiere Prods., Inc*., 17 Med. L. Rep. 2001 at *8 (C.D. Cal. 1998) (denying the motion to compel unpublished information and refused leave to depose the editor because defendants had not exhausted all other means of obtaining the information). Like the plaintiffs in *Zerilli,* Apple must first depose its own employees before exhaustion can be found, even if it does not believe that doing so will be fruitful.

An independent examination of the record further shows that Apple has not fully used computer forensic techniques to examine its own computer systems or attempted to subpoena information from or about the identified employees—e.g., their home computers and personal electronic devices, or other records and correspondence they possess—before seeking discovery from journalists. Apple has similarly failed to exhaust other simple alternatives such as directly contacting or conducting discovery against Bob Borries and Paul Scates, the artists credited with the renderings

of "Asteroid" published by Petitioners. (Apple's Supp. To *Ex Parte* Application at 3:9-12,4:24-28 (Ex. 7, 66:9-12, 67:24-28)). In finding a failure to exhaust, the *Mitchell* Court noted that "[m]any of the Mitchells' sources are known." *Mitchell*, 37 Cal. 3d at 282. Likewise, Mr. Scates and Mr. Borries are known sources of information published by Petitioners, yet Apple has offered no indication that it even attempted to contact them.

As one federal district court has noted, a party that "has not even worked up a sweat, much less exhausted itself" cannot defeat the privilege. *In re Pan Am Corp*., 161 B.R. 577, 585 (S.D.N.Y. 1993). There is no sweat on Apple's brow, and the discovery it seeks is not a "'last resort,'" *Mitchell*, 37 Cal. 3d at 282, but rather a premature first strike made before it has conducted any other discovery against non-journalists.

4. The Fourth Factor Does Not Favor Disclosure

In the fourth *Mitchell* factor, the Supreme Court provided a safety valve against disclosure even where the party seeking discovery has exhausted all alternative sources and has no other means of obtaining the information. The Court held that "when the information relates to matters of great public importance, and when the risk of harm to the source is a substantial one, the court may refuse to require disclosure *even though* the plaintiff has no other way of obtaining essential information." *Id.* at 283 (emphasis added). Thus, even if a litigant seeking discovery from a journalist were to meet the other *Mitchell* factors, a court could nevertheless bar discovery based on the "importance of protecting confidentiality in the case at hand." *Id.* at 282.

The fourth factor can therefore only weigh against, and not in favor of, discovery. While the *special* importance in particular situations of preserving confidentiality can bar discovery even when all other avenues are exhausted and the litigant has no other means of obtaining evidence

going to the heart of its claim, the absence of a heightened, extraordinary need for confidentiality never weighs in favor of discovery. This is because all journalists have a basic and inescapable need to preserve the confidentiality of their sources and unpublished information, and the California Supreme Court's recognition of this underlying need for confidentiality is the foundation of the reporter's privilege in the first place.

5. Apple Has Failed to Establish a *Prima Facie* Case Against The Petitioner Journalists.

The *Mitchell* Court provided another safeguard in the fifth factor, by requiring a plaintiff to establish a *prima facie* case before seeking discovery of defendant reporters' confidential information. *Id.* at 283. The idea was that, even if other factors favored disclosure, unsubstantiated allegations of liability were insufficient to overcome the constitutional reporter's privilege. A *prima facie* case does not provide a reason to disclose, but its absence in this case, where the Petitioners are not even named defendants, compels protection against discovery.

6. The *Mitchell* Factors Weigh Conclusively Against Disclosure

In the ordinary civil case where, as here, the journalist is not a party, the litigant's "interest in disclosure should yield to the journalist's privilege." *Shoen II*, 48 F.3d at 416 (quoting *Zerilli*, 656 F.2d at 712). Although the trial court thought otherwise, this is, in fact, an ordinary civil case. Petitioners are not parties to Apple's lawsuit, the discovery Apple seeks does not go the heart of its claims, Apple has manifestly not exhausted all alternative sources of information, and it has failed to establish a *prima facie* case against Petitioners.

VI. The Trial Court Misstated and Misapplied The Reporter's Shield And The Reporter's Privilege

The trial court grossly misstated and misapplied both the reporter's shield and the reporter's privilege. As explained below, the trial court's cursory examination of the *Mitchell* factors was rife with error. Furthermore, the trial court unnecessarily conflated the reporter's privilege against providing evidence with the issue of substantive liability (which was not before the court). Moreover, the trial court mistakenly relied upon criminal standards in an indisputably civil case. Together, these fundamental errors drew the trial court to an incorrect conclusion that threatens the freedom of the press.

A. The Trial Court Misstated And Misapplied The *Mitchell* Factors

The trial court's cursory treatment of the *Mitchell* factors was rife with error (Order, 9:8 to 10:8 (Ex. 34, 463:8 to 464:8.)) Under the first factor—are the reporters parties?—the trial court erroneously treated Petitioners as though they were parties (Order, 9:14-15 (Ex. 34, 463:14-15)), although they most assuredly were not. Under the second factor—does the discovery sought by Apple go to the heart of its claims?—the trial court ignored the broad scope of discovery it authorized against Petitioners, and Apple's own implication that the trade secret misappropriation was likely committed by one of its own employees. Under the third factor—has Apple exhausted all possible alternative methods of discovering the information it seeks?—the trial court's finding of exhaustion is insupportable both in its legal conclusion (the degree of effort required to meet *Mitchell's* exhaustion requirement) and its factual conclusion (that Apple's efforts met this requirement).

With respect to the fourth factor—"the importance of protecting confidentiality in the case at hand" (*Mitchell*, 37 Cal. 3d at 282)—the trial

court took it upon itself to rewrite *Mitchell* and substitute language from Apple's brief: "What is the public good served by protecting the misappropriation of trade secrets?" (Order at 9:24 (Ex. 34, 463:24); Pl.'s Opp'n Br. at 8:12-13 (Ex. 24, 370:12-13.)) The trial court's misstatement of controlling law is contrary to *Mitchell* and the principles of freedom of the press that animate it. Whenever the constitutional reporter's privilege is invoked to bar access to evidence, its effect may be to incidentally "protect" one avenue of obtaining evidence to prove some civil or criminal wrong. But such is the very nature of evidentiary privileges.

Finally, the trial court erroneously concluded that Apple had satisfied the fifth factor by showing that it has a *prima facie* trade secret misappropriation case against *somebody* (Order at 10:7-8 (Ex. 34, 464:7-8.)), even though Apple conceded that it did not actually have a *prima facie* trade secret misappropriation case against Petitioners themselves (Pl.'s Opp'n Br. at 7:5-6 (Ex. 24, 369:5-6.))

The record shows that Apple has not established a *prima facie* case against *Petitioners*, and, indeed, Apple has not joined the Petitioners as parties. Assuming that the disclosures originated with Apple employees acting in breach of a legal duty, there is absolutely no evidence that the *immediate* source(s) who provided information to Petitioners was such an employee. Furthermore, even if those immediate source(s) were in breach of a duty, there is absolutely no evidence that Petitioners were aware of that breach or aware that the information was a trade secret.

In addition to misapplying the *Mitchell* factors, the trial court created out of whole cloth an additional threshold test for the constitutional reporter's privilege that it grafted onto the *Mitchell* factors. According to the trial court, a reporter must show a "true public benefit" (Order at 10:2 (Ex. 34, 464:2)) from the information he or she publishes before the

confidential sources and unpublished information relating to that news story will be protected by the reporter's privilege. Nothing in *Mitchell*, however, either requires or permits a court to give or withhold the constitutional reporter's privilege based on its own assessment of whether the information published by a reporter serves "the public interest" (Order at 12:17 (Ex. 34, 466:17)) or is just "gossip" (Order at 12:14 (Ex. 34, 466:14)). To the contrary, the state and federal Constitutions forbid courts from setting themselves up as censors to judge the merits of protected speech according to their personal values and award or withhold benefits--including constitutional evidentiary privileges-- based on their assessment of the social desirability of publication.

B. The Trial Court Was Fundamentally Confused About The Difference Between An Evidentiary Privilege And Immunity From Substantive Liability

The trial court was obviously concerned that respecting the reporter's qualified privilege against discovery would somehow confer substantive immunity from civil and criminal trade secret liability. This concern colors the trial court's entire ruling but fundamentally misses the point – the issue before the court was whether Apple could use discovery on journalists to make its case against the person who allegedly leaked news about an upcoming product to the media. Apple has not sued the journalists, and recognizing the constitutional evidentiary privileges to which they are entitled does not confer immunity on the leaker.

In discussing the constitutional reporter's shield, the trial court jumped from a quotation of the shield's statutory embodiment in Evidence Code Section 1070 (Order at 10:16-26 (Ex. 34, 464:16-26)) to the conclusion that the shield did not apply because "there is no license conferred on anyone to violate valid criminal laws." (Order at 11:4 (Ex. 34, 465:4.)) Similar statements run throughout the trial court's order:

"Reporters and their sources do not have a license to violate criminal laws such as Penal Code § 499c." (Order at 8:9-10 (Ex. 34, 462:9-10.)) "[E]ven if the [petitioners] are journalists, this is not the equivalent of a free pass." (Order at 8:16 to 9:1 (Ex. 34, 462:16 to 463:1.)) "The bottom line is there is no exception or exemption in either the U[niform]T[rade]S[ecrets]A[ct] or the Penal Code for journalists—however defined—or anyone else." (Order at 12:3-5 (Ex. 34, 466:3-5.))

Respecting the limitations on discovery established by the constitutional reporter's privilege does not require any exception to trade secret liability; it merely limits one method of obtaining evidence while leaving a universe of alternative sources available to Apple. The constitutional reporter's privilege bars only the discovery of certain kinds of information from a reporter. It does not create any kind of immunity for otherwise illegal acts, it does not bar discovery from other sources, and it does not disrupt the regulatory purposes of the trade secrets statutes. The constitutional reporter's privilege might make proving a trade secrets case more difficult, but that is the trade-off inherent in all evidentiary privileges that are supported by public polices. *See* B. Witkin, CALIFORNIA EVIDENCE, WITNESSES, § 60 p. 308 (4th ed. 2000) ("The rules of privilege are designed to protect personal relationships or other interests where the protection of confidentiality is considered more important than the need for the evidence.") Evidentiary privileges supported by public policies include the attorney-client privilege, the physician-patient privilege, the husband-wife privilege, etc. Evid. Code §§ 956, 981, 997, 999. These familiar privileges also do not create any kind of immunity, bar discovery from other sources or disrupt the regulatory purposes of the trade secrets statutes. The reporter's privilege, although different in having its source in the

federal and state Constitutions rather than in statutory law, is no different from these familiar privileges in its lack of effect on substantive liability.

For the same reason, the trial court was mistaken in its reliance on *DVD Copy Control Ass'n, Inc. v. Bunner*, 31 Cal. 4th 864 (2003), *later opn., DVD Copy Control Ass'n Inc. v. Bunner*, 116 Cal. App. 4th 241 (2004) and on *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *Bunner* dealt only with whether a defendant could be held liable for publishing a trade secret, not whether the constitutional reporter's privilege applies in such cases. That case held that trade secrets were speech and that an injunction against disclosure must be reviewed under First Amendment principles. *See Bunner*, 31 Cal. 4th at 876-77. This Court did exactly that on remand and ruled that the preliminary injunction before it amounted to a prior restraint.

Bartnicki is similarly inapposite. *Bartnicki* addressed liability for publication of illegally intercepted communications involving a public controversy. The *Bartnicki* Court held that the First Amendment precluded liability for such publication under the facts before it. *See Bartnicki*, 532 U.S. at 535. Neither *Bunner* nor *Bartnicki* has anything to do with the reporter's shield, the reporter's privilege, or any other evidentiary privilege against discovery of a reporter's confidential sources and unpublished information.

C. The Trial Court Also Erred By Applying The Constitutional Reporter's Privilege As Though This Civil Case Were A Criminal Case

The trial court's ruling on the constitutional reporter's privilege was also seriously distorted by its mistaken reliance on criminal cases like *Branzburg v. Hayes*, 408 U.S. 665 (1972) (Order, 8:12 to 9:7 (Ex. 34, 462:12 to 463:7)), in which the constitutional reporter's privilege has a narrower scope. This is not a criminal prosecution under Penal Code Section 499c but a private civil case, and Apple is not the public prosecutor

but a private civil litigant. *See People v. Eubanks*, 14 Cal. 4th 580, 590, 596 (1996) (discussing the conflicting interests between the public prosecutor and the victim of a trade secret theft); *see also Bischoff v. U.S.*, 1996 WL 807391, 25 Media L. Rep. 1286 (E.D. Va. 1996) (rejecting claim that "there is no qualified privilege where private parties are seeking redress for an alleged civil wrong that also coincidentally constitutes a crime.").

The *Mitchell* Court expressly distinguished its test for the application of the reporter's privilege in civil cases from the privilege's application in criminal cases: "We agree with those courts which have distinguished *Branzburg* and *Herbert* [*v Lando*, 441 U.S. 153 (1979)], from the issue of discovery of sources in civil litigation." *Mitchell*, 37 Cal. 3d at 278 ("Neither [*Branzburg* or *Herbert*] involved the assertion of a reporter's privilege in a civil case and, as we shall explain, nothing in the reasoning of those cases precludes recognition of a qualified privilege.…"); *see also New York Times v. Gonzales*, No. 04 Civ. 7677(RWS), 2005 WL 427911, at *24-33 (S.D.N.Y. Feb. 24, 2005) (extensive discussion of cases interpreting *Branzburg*).[7] The trial court ignored *Mitchell* entirely on this point.

VII. Protective Relief For The Petitioner Journalists Is Ripe For Determination

Finally, the trial court held that only the propriety of Apple's subpoenas to Nfox is ripe for decision. To the contrary, the protective

[7] Furthermore, the trial court's implication that Petitioners are criminally liable opens a whole new can of constitutional and statutory worms. Both the constitutional privilege against self-incrimination and Evidence Code Section 940 specifically exclude from discovery self-incriminating information, and this right may be asserted "in any proceeding, civil or criminal…." *Pacers, Inc. v. Superior Court*, 162 Cal. App. 3d 686, 688-689 (1984) (quoting *Kastigar v. United States*, 406 U.S. 441, 444 (1972)); *see also* U.S. Const., Fifth Amend.; Cal. Const., art. I, § 15.

order as a whole is ripe: Apple has created a live controversy as to the propriety of all discovery seeking confidential source and unpublished information from any of the Petitioners by obtaining broad *ex parte* orders authorizing such discovery from Apple Insider and PowerPage without further action by the court, by serving six subpoenas to Nfox, PowerPage's email service provider, and by drafting and attempting to serve a subpoena on Apple Insider and Monish Bhatia.

Any "affected person" is authorized to move for a protective order. Cal. Code Civ. Proc. § 2017(c). Each of the Petitioners is affected by Apple's threats of subpoenas and the *ex parte* discovery orders it has obtained which authorize discovery against each of them. Without a protective order, Apple will continue to chill speech by intimidating the Petitioner Journalists' confidential sources with the prospect of future subpoenas. (O'Grady Supp. Decl., ¶ 3 (Ex. 31, 429:4-10); Jade Supp. Decl., -¶¶ 3-5 (Ex. 32, 431:5-17.)) Furthermore, as the California Supreme Court has explained: "When a reporter's privilege has been defined by the courts, the limitations on that privilege described, and the relevant considerations set out, Code of Civil Procedure section 2019 provides the statutory basis for the issuance of protective orders safeguarding against harassment." *Mitchell*, 37 Cal. 3d at 279.

Ripeness involves a two-pronged inquiry: (1) whether the dispute is sufficiently concrete; and (2) whether the parties will suffer hardship if judicial consideration is withheld. *Pacific Legal Foundation v. Calif. Coastal Com.*, 33 Cal. 3d 158, 171-73 (1982). Both factors are satisfied here. First, Petitioner Journalists' motion presented a concrete and definite issue for final adjudication. No further factual development is required to decide the question of whether the constitutional reporter's privilege and reporter's shield protect the Petitioners against the discovery that has been

authorized against them. This is a real and substantial controversy "admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." *Id.* at 171 (citations omitted); *see also New York Times v. Gonzales*, No. 04 Civ. 7677(RWS), 2005 WL 427911, at *15 (newspaper stated actual controversy over threatened DOJ subpoenas despite subpoenas not being issued and government's characterization of case "as concerning 'hypothetical subpoenas issued in hypothetical circumstances' … and no actual dispute."); *Doe v. Harris,* 696 F.2d 109, 114 (D.C.Cir.1982) (holding that an individual whose records were subpoenaed from a third-party in a grand jury investigation had the right to seek declaratory relief concerning those subpoenas and the issuance of future subpoenas).

Second, Petitioners are facing significant hardship in their newsgathering activities as a result of the continued uncertainty in this controversy. (*See* O'Grady Supp. Decl., ¶¶ 2-4 (Ex. 31, 429:1-14); Jade Supp. Decl., ¶¶ 2-6 (Ex. 32, 431:1-21)); *see also New York Times Co. v. Gonzales*, No. 04 Civ. 7677(RWS), 2005 WL 427911 at *46, n.48 (quoting from six detailed affidavits regarding the chilling effect of threatened subpoenas to journalists). In addition, it would be burdensome in the extreme on the courts and the parties to litigate seriatim each new subpoena that Apple chooses to issue. And because of Apple's strategy of subpoenaing information held on reporters' behalf by third parties, there is a real risk that the Petitioners could not timely object to disclosure before it occurs. This hardship will not be alleviated unless this Court grants the writ and directs the trial court to issue a protective order conclusively assuring that Petitioner Journalists' confidential sources and unpublished information will be protected from discovery.

VIII. CONCLUSION

For the reasons stated above, Petitioners respectfully request this Court grant this petition and issue a writ of mandate and/or prohibition directing the trial court to vacate its order denying petitioners' motion for a protective order and issue a new and different order granting the motion for a protective order.

DATED: March 22, 2005 Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 14(c), I certify that this petition contains 13,131 words.

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Kurt B. Opsahl