**No. 17-16221**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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GLASSDOOR, INC.
*Appellant*

v.

UNITED STATES OF AMERICA
*Appellee*

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On Appeal from the United States District Court for the District of Arizona, D.C. No. 2:17-mc-00036-DJH

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# BRIEF OF AMICI CURIAE CENTER FOR DEMOCRACY & TECHNOLOGY, COMMITTEE FOR JUSTICE, ELECTRONIC FRONTIER FOUNDATION, MEDIA ALLIANCE, AND PUBLIC PARTICIPATION PROJECT

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SOPHIA COPE
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
*Attorney for Amici Electronic Frontier Foundation and Media Alliance*

KURT WIMMER
COVINGTON & BURLING LLP
850 Tenth Street, N.W.
Washington, D.C. 20001
*Attorney for Amici Center for Democracy & Technology, Committee for Justice, and Public Participation Project*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae Center for Democracy & Technology, the Committee for Justice, Electronic Frontier Foundation, Media Alliance, and the Public Participation Project state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

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The Center for Democracy & Technology (CDT) is a nonprofit public interest organization working to ensure that the human rights we enjoy in the physical world are realized online, and that technology serves as an empowering force for people worldwide. Integral to this work is CDT's representation of the public interest in the creation of an open and innovative Internet that promotes the constitutional and democratic values of free expression, privacy, and individual liberty. For more than twenty years, CDT has advocated in support of laws and policies to expand access to information and promote the vibrant exchange of ideas. The case at hand has profound ramifications reaching far beyond the eight persons facing unmasking as a result of the grand jury subpoena. CDT respectfully submits this amicus brief on behalf of the individuals at home and abroad whose right to anonymous online speech will be chilled by an adverse ruling.

Founded in 2002, the Committee for Justice (CFJ) is a nonprofit, nonpartisan organization dedicated to promoting the rule of law, including the Constitution's limits on the power of government and its protections of individual liberty, including the First Amendment right to free expression. CFJ is particularly concerned with the threats to these protections posed by technological advances which both challenge and outpace developments in the law. The right to anonymous speech, which has long been a key component of free expression, has

grown increasingly vital in the Internet Age and will be weakened unless this court quashes the government subpoena at issue.

Electronic Frontier Foundation (EFF) is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has more than 36,000 dues-paying members. EFF represents the interests of technology users in both court cases and broader policy debates regarding the application of law to technology. EFF has repeatedly represented anonymous online speakers and appeared as amicus curiae in cases where First Amendment protections for anonymous speech are at issue. *See, e.g.*, *Signature Management Team, LLC v. Doe*, Case No. 13-cv-14005 (6th Cir.) (serving as amicus curiae in support of anonymous speaker); *USA Technologies, Inc. v. Doe, 713 F. Supp. 2d 901* (N.D. Cal. 2010) (serving as counsel to Doe); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440 (Va. Sup. Ct. 2015) (serving as amicus curiae in support of anonymous speaker); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (serving as counsel to Doe).

Media Alliance is a Bay Area democratic communications advocacy nonprofit founded in 1976. Our members include professional and citizen journalists and community-based media and communications professionals who work with the media. Many of our members work on hot-button issues and with sensitive materials, and their online privacy is a matter of great professional and

personal concern. Anonymous online expression is a key tenet for many civil rights pursuits such as labor organizing, artistic freedom and whistle-blowing and political dissent. Individuals should not have the fear the government will force the disclosure of their identities from the platform of their choice without their consent when they have committed no crime. Media Alliance supports Glassdoor in their appeal of a government order to disclose the identities of people who posted on their site anonymously about the practices of an employer. In order to breach First Amendment protections for free association and the unfettered exchange of ideas and opinions, the legal standard must be rigorous and use the highest possible bar. These are fundamental constitutional rights.

The Public Participation Project (PPP) is a non-profit organization working to pass federal anti-SLAPP legislation in Congress. Its coalition of supporters currently includes numerous organizations and businesses, as well as prominent individuals, each of whom is dedicated to protecting the right of free speech and petition. PPP also assists individuals and organizations working to pass anti-SLAPP legislation in the states. An important part of its work includes educating the public regarding SLAPPs and the consequences of these types of destructive lawsuits. As part of its nationwide educational efforts, PPP seeks to advance generally the principles of free speech and petition as embodied in the First Amendment.

## INTRODUCTION

The First Amendment right to anonymous expression has played a critical role in ensuring the internet's success as a forum for vibrant speech and debate, the exchange of art, literature, and new ideas, and the association of people of all faiths, viewpoints, and nationalities. Involuntary unmasking of a person's online identity invades this constitutional right and creates a chilling effect on speakers across the web, interfering with people's ability to use the internet as a platform for culture, innovation, progress, and democratic participation.

In this case, the government has sought to compel Glassdoor to expose the identities of some of its anonymous users in pursuit of a contracting fraud investigation, with no indicia of a compelling need to involuntarily deprive such users of their right to anonymous expression. Moreover, it has asked this Court to only permit Glassdoor to quash its subpoena upon a showing of "bad faith," an extremely high standard developed in the *Branzburg* line of cases regarding newsgatherers' privilege to maintain the confidentiality of their sources. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Newsgatherers' privilege is not at issue in this case, and thus *amici* ask that this Court reject this inappropriate standard and instead adopt a standard that adequately will protect the First Amendment right to speak anonymously—a right that has been observed and recognized as critical to participation in public debate

since copies of Publius' *Federalist Papers* were distributed throughout town squares. The Ninth Circuit articulated such a standard in *Bursey v. United States*. *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972). When applied to this case, the *Bursey* standard demonstrates that although the government has a compelling interest in finding witnesses who may assist in the detection and prevention of contracting fraud, it has failed to establish that there is a "substantial connection" between the anonymous speakers' identities and its investigation, and that its subpoena is no more extensive than necessary to further the government's compelling interests. This case must therefore be sent back to the district court so that Glassdoor's motion to quash can be considered under the *Bursey* standard.

The outcome of this case will impact far more than the eight Glassdoor users identified for unmasking by the government's subpoena. It will affect a myriad of other users who will be chilled in their participation in online communities. Moreover, it will undermine the United States' ability to credibly condemn nations abroad that use the threat of unmasking as a weapon against their dissidents, and will serve as a concerning precedent about the importance of the right to anonymous speech in the U.S. and around the world. For these reasons, we urge the Court to reverse the district court's decision below.

## ARGUMENT

### I. COMPELLING DISCLOSURE OF THE IDENTITIES OF GLASSDOOR REVIEWERS UNDER SUCH A MINIMAL STANDARD OF REVIEW WILL HAVE AN IMMENSE CHILLING EFFECT ON INTERNET SPEECH.

Two decades ago, when the internet was just entering widespread use, the Supreme Court observed, "[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997). Given the internet's ability to provide an open forum for gathering and disseminating news, debating profound ideas, and associating with groups of similar or divergent viewpoints, the Court presciently concluded that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to online speech. *Id*. Today, the right to speak anonymously is one of the First Amendment's most important guarantees when it comes to fostering open dialogue and access to information, particularly online. Given the importance of anonymity to enabling freedom of speech, involuntary disclosure to the government of a user's identity, under any legal standard, results in a significant degree of harm to that user that the Court must consider seriously. More importantly, the possibility that the government easily can pierce the veil of

anonymity after meeting only a minimal standard will necessarily result in a chilling effect that reverberates throughout the internet.

### A. User Anonymity Is Critical to the Internet's Success as an Open Forum for Dialogue, Debate, and Thought.

The ability to speak anonymously can encourage speakers to engage more openly with one another. This is especially true with respect to online speech, given the internet's unique technical characteristics. Unlike in-person conversations, postings on public online fora are immediately accessible to a worldwide audience and may be indexed, copied, archived, and preserved in perpetuity. In addition, online communications necessarily depend on intermediaries, such as internet service providers and messaging platforms, to facilitate their carriage, accessibility, and storage.[1] As a result, internet users are particularly vulnerable to having their speech published, decontextualized, and examined in ways that they do not anticipate when initially posting a comment. If a person fears that statements she makes online will be forever linked to her professional or legal identity, she is likely to refrain from voicing at least some thoughts due to concerns about potential repercussions and reprisal.

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[1] COMMENTS OF THE CENTER FOR DEMOCRACY & TECHNOLOGY ON THE USE OF ENCRYPTION AND ANONYMITY IN DIGITAL COMMUNICATIONS at 2 (Feb. 13, 2015), https://cdt.org/files/2015/02/CDT-comments-on-the-use-of-encryption-and-anonymity-in-digital-communcations.pdf.

Anonymity protects internet users and provides them with freedom to speak online in a variety everyday contexts, from the mundane to the essential. A recent empirical study from New York University found that pseudonymous Twitter accounts were more likely to follow more people, tweet, and delve into sensitive subjects.[2] A similar study from online commenting platform Disqus found that commenters who used pseudonyms commented 6.5 times more frequently than commenters using a real name.[3] It is therefore unsurprising that some of the world's largest online forums have backed away from previous attempts to enforce strict real-name policies.[4]

The Supreme Court has recognized that the choice to remain anonymous can be motivated by a variety of factors—it "may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre v. Ohio Elections*

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[2] *See* Sai Teja Peddinti et al., *'On the Internet No One Knows You're a Dog': A Twitter Case Study of Anonymity in Social Networks*, COSN 2014 - PROCEEDINGS OF THE 2014 ACM CONFERENCE ON ONLINE SOCIAL NETWORKS 83 (2014), http://cosn.acm.org/2014/files/cosn025f-peddintiA.pdf.

[3] *See* Disqus, *Pseudonyms Drive Communities!*, DISQUS, https://disqus.com/research/pseudonyms/.

[4] *See* Dave Lee, *Facebook Amends 'Real Name' Policy After Protests*, BBC NEWS (Dec. 15, 2015), http://www.bbc.com/news/technology-35109045; Rebecca Mackinnon & Hae-in Lim, *Google Plus Finally Gives Up on Its Ineffective, Dangerous Real-Name Policy*, SLATE (July 17, 2014), http://www.slate.com/blogs/future_tense/2014/07/17/google_plus_finally_ditches_its_ineffective_dangerous_real_name_policy.html.

*Com'n*, 514 U.S. 334, 341-42 (1995). For example, a man seeking advice from others about engagement rings may elect to remain anonymous to preserve the element of surprise. A teenager in a strict household may chat with fellow fans of a band that her parents dislike. A patient may browse an online forum and ask questions about a highly sensitive medical condition that she does not wish to disclose to her friends. An LGBTQ youth in a conservative community may use the internet to explore their identity and seek advice for how to come out to their parents. Perhaps most seriously, a user may choose to remain anonymous in order to protect their identity as a survivor of harassment, stalking, domestic violence, or persecution. Such justifications for remaining anonymous are neither "pernicious" nor "fraudulent." *Id*. at 357. Rather, they are typical reasons why ordinary people routinely or periodically choose to exercise control over disclosure of their identity online.

The success of a website like Glassdoor depends on the ability of its more than 41 million unique monthly users to write and view company reviews, salary reports, interview tips, benefits reviews, office photos, and other information anonymously.[5] In the internet era, job seekers heavily rely on websites like

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[5] *See Site Stats*, GLASSDOOR PRESS CTR. (last visited July 10, 2017), https://www.glassdoor.com/press/facts. Upon joining Glassdoor.com, users provide an email address (or sign in via Facebook or Google), and may upload
(continued…)

Glassdoor to conduct their searches. Between 2013 and 2015, 79 percent of Americans who searched for jobs reported using the internet, and more than one-third said the internet was the most important resource they used throughout their search.[6] Moreover, employees rely on the honest, unbiased feedback of their peers to determine whether they are being fairly compensated, how to ask for a promotion, or whether they are part of a pattern of sexual or racial discrimination from a particular employee. Even high-level executives benefit: concerned supervisors can look to their company's reviews for honest assessments of what could improve their employees' experiences, and positive feedback can indicate which programs or practices are working. However, none of these features would be possible without users who are willing to provide candid evaluations of their employers and experiences. Anonymity enables this candor and is thus an essential component of the success of sites like Glassdoor that serve as platforms for informed discussion.

### B. Involuntary Unmasking of Users' Identities is Harmful and Can Chill Speech.

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their resumes to help Glassdoor identify employment opportunities that may be of interest to them. However, reviews are posted anonymously for the public to view, and the website assures users that their reviews will remain anonymous.

[6] *See* Aaron Smith, *Searching for Work in the Digital Era*, PEW RES. CTR. (Nov. 19, 2015), http://www.pewinternet.org/2015/11/19/searching-for-work-in-the-digital-era.

The right to anonymous speech is a critical component of the First Amendment, and it is afforded the same protection as any other type of speech. *McIntyre* at 342; *Talley v. California*, 362 U.S. 60, 64 (1960). Such protection has been upheld and reinforced repeatedly by the Ninth Circuit. *See, e.g.*, *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (noting that "[a]lthough the internet is the latest platform for anonymous speech, online speech stands on the same footing as other speech"); *Wasson v. Sonoma Cty. Junior Coll.*, 203 F.3d 659, 663 (9th Cir. 2000) (acknowledging that the plaintiff was "certainly correct to point out that an author's anonymity is an aspect of free speech protected by the First Amendment"). The Ninth Circuit has further opined that "[d]epriving individuals of this anonymity is . . . a broad intrusion, discouraging truthful, accurate speech by those unwilling to [disclose their identities]." *Am. Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 988 (9th Cir. 2004) (quoting *Wash. Initiatives Now! v. Rippie*, 213 F.3d 1132, 1138 (9th Cir. 2000)).

Given the importance of the right to control one's identity online, the compelled, involuntary disclosure of a user's identity poses significant consequences to that user. First, involuntary unmasking can detract from the substance of a user's speech. In *Highfields Capital Management, L.P. v. Doe*, the Northern District of California granted a motion to quash a civil subpoena to disclose the identity of an anonymous speaker on a message board, citing the fact

that the speaker "[had] a real First Amendment interest in having his sardonic messages reach as many people as possible . . . being free to use a screen name . . . carries the promise that more people will attend to the substance of his views." *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 980 (N.D. Cal. 2005). Similarly, the Supreme Court in *McIntyre* acknowledged that "[a]nonymity . . . provides a way to ensure that readers will not prejudge [an advocate's] message simply because they do not like its proponent." *McIntyre* at 342-43. In addition, unmasking an anonymous speaker may result in retaliation, ostracism, and harassment of the speaker or the speaker's family, a consequence of particular importance when the speech involved is a matter of public concern. *Art of Living Found. v. Does 1-10*, 2011 WL 5444622 at *6 (N.D. Cal. Nov. 9, 2011) (granting a motion to quash a civil subpoena demanding the identities of anonymous internet users who criticized the Art of Living Foundation). In the context of freedom of association, the Supreme Court has recognized that such concerns are prevalent whether a speaker's identity is to be revealed to the world or to the government officials involved in an investigation. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (reversing court order compelling NAACP to produce members list to state officials); *Shelton v. Tucker*, 364 U.S. 479 (1960) (invalidating requirements that public school teachers and principals submit affidavits of past membership to their board of trustees); *Gibson v. Florida*

*Legislative Comm.*, 372 U.S. 539 (1963) (invalidating requirement that organizations respond to membership inquiries from a legislative investigatory committee).

However, the effects of involuntary unmasking extend beyond the specific speakers involved—they reverberate across the internet and discourage users from using online communities to debate, share information, exchange new ideas, and associate with one another. The Ninth Circuit previously has suggested that where substantial First Amendment concerns are presented, the court should consider whether a request for information will result in a chilling effect on protected activity. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1160, 1165 (9th Cir. 2010); *Anonymous Online Speakers v. United States Dist. Court (In re Anonymous Online Speakers)*, 2011 WL 61635, at *4 (9th Cir. Jan. 7, 2011) (noting that *Perry* is "instructive" with regards to discovery disputes involving anonymous speech). Courts have repeatedly recognized the danger that compelled unmasking will result in a chilling effect across the internet. *See, e.g., U.S.A. Technologies, Inc. v. Doe*, 713 F. Supp. 2d 901, 906 (N.D.Cal. 2010) (noting the "chilling effect that subpoenas . . . have on lawful commentary and protest"); *Music Grp. Macao Commercial Offshore Ltd. v. Does*, 82 F. Supp. 3d 979, 986 (N.D. Cal. 2015) (expressing concern that "breaching the defendant's anonymity . . . would unduly

chill speech and 'deter other critics from exercising their First Amendment rights.'") (internal citation omitted).

Moreover, numerous studies have quantified and documented the effects of government invasion into the privacy of one's internet activity on expressive activities online. One study found that visits to certain Wikipedia pages dropped nearly 30 percent upon Edward Snowden's revelations of the National Security Agency's widespread monitoring of the internet.[7] A more recent study found that once participants were made aware of government surveillance, they were less likely to write certain posts, share certain content, engage with social media, and even conduct certain searches via search engines.[8] The chilling effect had the greatest impact on women and younger participants, who may be more vulnerable censure and retaliation for expressing their views.[9]

Here, if the Ninth Circuit holds that websites such as Glassdoor only can protect their users' right to anonymity by meeting the inappropriately burdensome "bad faith standard," other users will think twice before engaging in discourse

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[7] Reuters, *Wikipedia Terrorism Entries Traffic Fell After Snowden's NSA Reveal*, NEWSWEEK (Apr. 27, 2016), http://www.newsweek.com/wikipedia-terrorism-entries-traffic-edward-snowden-nsa-reveal-453124.

[8] Jonathon W. Penney, *Whose Speech is Chilled by Surveillance?* SLATE (Jul. 7, 2017), http://www.slate.com/articles/technology/future_tense/2017/07/women_young_people_experience_the_chilling_effects_of_surveillance_at_higher.html.

[9] *Id.*

about any topic (or with anyone) that may result in embarrassment, condemnation, retribution, or, as in this case, unanticipated interactions with the legal system. In this case in particular, there appears to be no evidence that the Glassdoor reviewers the government wishes to identify ever participated in any wrongdoing or even knew about any wrongdoing. *In re Grand Jury Subpoena Issued to Glassdoor, Inc., No. 16-03-217*, Stipulated Motion to Unseal, Exhibit H at 62-64 (D. Ariz. June 7, 2017). Should grand jury subpoenas under the government's proposed, highly deferential standard become the norm, users understandably would rethink even their mundane, noncontroversial posts—be it on Glassdoor, Twitter, Facebook, Pinterest, Reddit, or the comment section of an online news article—due to the risk that they could be dragged unexpectedly through an invasive investigation or legal process.

Compounding the chilling effect of involuntary unmasking is the fact that users necessarily depend on their online services to defend them from such disclosure—the user will be the last to know that the government is seeking his identity, which puts them in an incredibly vulnerable position. If an internet user unwittingly becomes a subject of a grand jury subpoena, there is no guarantee that websites would, or even could, attempt to fight future subpoenas like the one at issue. Combatting a subpoena could cost website operators and other online services thousands of dollars per day in legal fees and penalties—costs that would

be too high for many providers to bear. Moreover, less sophisticated platforms may not even be aware that grand jury subpoenas can be challenged, and therefore may hand over users' identities without question. Other services, sophisticated or not, simply may choose to comply with a government request for information because doing so is convenient and poses few consequences to their bottom line. Given the substantial amount and sensitivity of the personally identifying information that website operators may control, the standard for allowing government officials to compel the disclosure of that information must be sufficiently high to make such requests rare and limited to the most compelling of circumstances. Failure to require a high standard would inevitably result in the government using its subpoena power as a shortcut rather than as a matter of last resort, thereby discouraging users from participating in online speech and information gathering.

## II. THIS COURT SHOULD APPLY A ROBUST BALANCING TEST FOR UNMASKING ANONYMOUS INTERNET USERS.

### A. Applying the *Bursey* Considerations to This Case Establishes that Glassdoor's Motion to Quash Should be Granted

In the four decades since *Branzburg*, courts consistently have recognized the severity of circumstances in which an anonymous speaker's identity is revealed against his or her will, and therefore have imposed a variety of evidentiary requirements and multi-part balancing tests in civil cases to ensure speakers' rights

are adequately protected. *See, e.g.*, *Highfields Capital Mgmt., LP.*, 385 F. Supp. 2d 969; *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001). *See also In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 573 (W.D.Wis. 2007) (holding that the government must show a compelling need to obtain book purchasers' personal identities and the titles of books purchased through Amazon from a seller suspected of tax evasion); *See In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1312 (8th Cir. 1996) (noting that the government must demonstrate a "compelling interest in and a sufficient nexus between the information sought and the subject matter of its investigation"); *In re Grand Jury Investigation*, 706 F. Supp. 2d 11, 18 (D.D.C. 2009) (acknowledging *Branzburg*, but also noting that the Court had adopted a two-part test (compelling interest plus sufficient nexus) for determining whether to enforce a subpoena that may infringe on First Amendment rights).

Similarly, in *Bursey v. United States*, which dealt with a grand jury subpoena in a criminal case, the Ninth Circuit established that a heightened test is required when a grand jury subpoena implicates First Amendment rights (in that case, the rights at issue were associational privacy and freedom of the press). *Bursey*, 466 F.2d 1059. The court stated, "[w]hen governmental activity collides with First Amendment rights," the government's burden is not met unless it establishes that (1) its interest in the subject matter of the investigation is "immediate, substantial

and subordinating," (2) that there is a "substantial connection" between the information it seeks from the witness and the government interest in the investigation, and (3) that the means of obtaining the information are "not more drastic than necessary" to forward the asserted government interest. *Id*. at 1083.

With respect to the first element, the government has indicated that the subject matter of this investigation involves contracting fraud, which the government undoubtedly has a compelling interest in detecting and preventing. However, "[t]he fact alone that the Government has a compelling interest in the subject matter of a grand jury investigation does not establish that it has any compelling need for the answers to any specific questions." *Id*. at 1086.

With respect to the second element, the government has failed to demonstrate a substantial connection between the anonymous users' identities and its investigation such that their role as potential witnesses would be indispensable to the indictment and prosecution of the federal contractor. When the government began its investigation, it initially sought the identities of all 125 reviewers of the company at issue (the name of which has been redacted). *In re Grand Jury Subpoena Issued to Glassdoor, Inc.*, Exhibit A at 7. After Glassdoor expressed concern that the government's subpoena would infringe on those users' First Amendment right to anonymous expression and would result in a chilling effect on other users' willingness to use Glassdoor.com, the Assistant U.S. Attorney agreed

to narrow the scope of the subpoena to just the eight reviewers listed as "examples" in the subpoena, but never explained why those particular reviews were listed and asserted that there was no requirement to show a "substantial nexus" between those specific identities and the investigation at hand. *In re Grand Jury Subpoena Issued to Glassdoor, Inc.*, Exhibit A at 9. It therefore appears that the government's selection of which reviewers it would like to be identified was made on an arbitrary basis—detracting from the government's argument that it has a "compelling need" for the identities of these particular eight users. Moreover, the government admits that the reviews in question played "no role" in its decision to open the investigation. *In re Grand Jury Subpoena Issued to Glassdoor, Inc.*, Exhibit H at 63.

With respect to the third element, the government has not demonstrated that its subpoena is "no more drastic than necessary" to further its interests. In fact, the government's attempt to unmask Glassdoor users – who chose to speak publicly online *precisely because* they could do so anonymously – is a drastic maneuver that severely infringes on the users' First Amendment rights. It is unclear why the posted reviews that the government already has access to cannot, alone, satisfy its need to gain relevant employee insights into the company and its administration of federal contracts. Moreover, as a practical matter, it is unclear why the government cannot contact the anonymous reviewers, or ask Glassdoor to do so on

its behalf, to see if any of them would be willing to voluntarily identify themselves and testify. Further, it is unclear why, once the connection is made between the government and the reviewers, the reviewers' identities need to be revealed at all, particularly given the government's indication that it is interested not in who the reviewers are, but what they have to say about specific issues relevant to the investigation. *Id*.

The government therefore has failed to demonstrate that it has a compelling reason to involuntarily strip the Glassdoor reviewers in question of their constitutional right to anonymous speech.

### B. The *Branzburg* "Bad Faith" Standard Does Not Apply to this Case

The circumstances of this case call for the rejection of the "bad faith" standard enumerated in the splintered majority opinion in *Branzburg v. Hayes*, in favor of the standard enumerated by this Court in *Bursey*.

The Supreme Court has recognized that a grand jury subpoena is not "some talisman that dissolves all constitutional protections." *United States v. Dionisio*, 410 U.S. 1, 11 (1973). The Ninth Circuit has agreed—acknowledging in *Bursey* that "[n]o government door can be closed against the [First] Amendment. No government activity is immune from its force." *Bursey*, 466 F.2d at 1082. The degree of scrutiny involved when determining whether the right to speak, anonymously or otherwise, may be curtailed "varies depending on the

circumstances." *In re Anonymous Online Speakers*, 661 F.3d at 1173. *Bursey* is not in conflict with *Branzburg*, but is rather a compliment to it, as an alternative set of considerations that should be applied when the circumstances of *Branzburg* do not apply. The government's attempt to dismiss the applicability of *Bursey* because, in part, the Ninth Circuit has chosen to apply *Branzburg* in some of its subsequent cases is therefore a shortsighted misinterpretation of the ways in which courts historically have evaluated whether an individual's constitutional rights should give way to the need to obtain information via a subpoena. In fact, in responding to the government's petition for an en banc rehearing of *Bursey v. United States*, the Ninth Circuit made key distinctions between the facts of *Bursey* and *Branzburg*, all of which are applicable to this case. *See Bursey*, 466 F.2d at 1090-92.

First, the Ninth Circuit pointed out that the "central issue" in *Branzburg* was whether "the First Amendment protects a newsman from enforced disclosure to a grand jury of his confidential sources of information." *See id.* at 1090. As in *Bursey*, newsgathering is not the crux of this case, in which the government seeks to compel Glassdoor to unmask the identities of its anonymous posters. Because *Branzburg*'s focus on newsgatherer's privilege is not applicable here, it is appropriate for the court to use a different set of considerations, given that courts repeatedly have acknowledged and protected the constitutional right to anonymous

speech. *Compare Talley*, 362 U.S. 60, *and McIntyre*, 514 U.S. 334, *with Branzburg*, 408 U.S. at 698-99.

The government's rebuttal of the argument that *Branzburg's* bad faith test only applies to cases involving a newsgatherer's privilege is unconvincing, given that every Ninth Circuit case cited by the government in support of the applicability of *Branzburg* involved a speaker, or speakers, asserting such privilege, coupled with a lengthy discussion by this Court about the limits of the legal protections of newsgatherers when faced with a grand jury subpoena. *See Lewis v. U.S.*, 501 F.2d 418 (9th Cir. 1974) ("*Lewis I*") (observing that "news gathering is not without its First Amendment protections" in the context of a radio station manager held in contempt for refusing to produce information based on the station's right to protect its sources); *Lewis v. United States*, 517 F.2d 236, 238 (9th Cir. 1975) ("*Lewis II*") (affirming *Lewis I*, and noting that "the holding of [*Branzburg*] is that the First Amendment does not afford a reporter a privilege to refuse to testify before a federal grand jury as to information received in confidence"); *In re Grand Jury Proceedings*, 5 F.3d 397, 400 (9th Cir. 1993) (*"Scarce"*) (applying *Branzburg* to a case involving a Ph.D. student claiming "scholar's privilege" not to answer certain questions on the ground that doing so would require him to disclose information from confidential sources); *In re Grand*

*Jury Subpoena*, 2006 WL 2631398 (9th Cir. Sep. 8, 2006) (rejecting a videographer's assertion of newsgatherer's privilege).

Second, the sources that the defendants refused to disclose in *Branzburg* were themselves criminal suspects (two alleged hashish makers). The *Bursey* Court took this into consideration when refusing to "issue a carte blanche . . . to override First Amendment rights" in the context of a grand jury subpoena that sought to compel two staffers of a Black Panther newspaper to disclose the names of other newspaper staffers who were responsible for certain editorial content and the distribution of a newspaper and pamphlets—conduct that was not criminal. *Bursey*, 466 F.2d at 1091. This Court observed that nothing in its *Bursey* opinion permits a witness to "refuse on First Amendment grounds to identify a person whom he has seen committing a crime," and no part of Glassdoor's motion to quash asks for such permission given that the government itself has said that it wants Glassdoor's reviewers as potential witnesses—not suspects. *Id*. at 1090-91.

Moreover, based on the information available to *amici*, the government's belief that the reviewers at issue were witnesses to the crime of contracting fraud is speculative at best, and the identities of the anonymous reviewers have only a tangential relationship with the investigation at hand. *In re Grand Jury Subpoena Issued to Glassdoor, Inc.*, Exhibit H at 63. At best, the identities of the Glassdoor reviewers only may have "something vaguely to do with conduct that might have

criminal consequences," *Bursey*, 466 F.2d at 1091, making the government's subpoena requesting compelled disclosure of their identities resemble the "unduly broad means having an unnecessary impact on protected rights of speech" that even the *Branzburg* Court rejected. *Branzburg*, 408 U.S. at 680-81.

Finally, the *Bursey* Court pointed out that nothing in Justice White's opinion in *Branzburg* "purport[ed] to disavow the balancing standards enunciated in [other] cases" that examined the factors that should be considered in the context of government attempts to infringe upon associational privacy rights, a close cousin to the right of anonymity under the First Amendment at issue for Glassdoor users. *Bursey*, 466 F.2d at 1901. This Court therefore has acknowledged that different circumstances call for different considerations when it comes to qualifying the rights and freedoms protected by the Constitution. Moreover, it has concluded that the standard spelled out in *Bursey* does not conflict with *Branzburg*. *Id.*

## III. COMPELLING DISCLOSURE OF GLASSDOOR'S USERS' IDENTITIES WOULD SET A DANGEROUS EXAMPLE FOR OTHER COUNTRIES WITH RESPECT TO THE IMPORTANCE OF PROTECTING FREEDOM OF SPEECH AND PRIVACY.

The First Amendment is one of the strongest constitutional protections for the right to freedom of expression in the world. U.S. courts have held that the First Amendment applies even in the most controversial of circumstances, including when Westboro Baptist Church members picket the funeral of a marine killed in Iraq, *Snyder v. Phelps*, 562 U.S. 433 (2011), when registered sex offenders seek

to participate in online discussion fora, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), and when members of the press criticize government officials, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The United States is thus a leader among nations of the world in the protection from government intrusion of individuals' right to freedom of expression.

However, if the United States falls into the habit of allowing the identities of anonymous internet users to be revealed with a mere grand jury subpoena and provides little to no recourse for the recipient of such subpoena, it will create a dangerous precedent for governments around the world and will inadvertently legitimize regimes that use unmasking and intimidation to silence potential dissidents. In Russia, for example, bloggers with more than 3,000 daily readers must register their real names with the government.[10] In China, officials detained and questioned families of dissidents in their quest to find the author of an anonymous online letter that called for President Xi Jinping to step down.[11] In Ecuador, official government documents that revealed the name, address, and

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[10] *See Russia Enacts 'Draconian' Law for Bloggers and Online Media*, BBC NEWS (Aug. 1, 2014), http://www.bbc.com/news/technology-28583669.

[11] *See* Anthony Kuhn, *China Hunts for Author of Anonymous Letter Critical of Xi Jinping*, NPR (Mar. 28, 2016), http://www.npr.org/sections/thetwo-way/2016/03/28/472156087/china-hunts-for-author-of-anonymous-letter-critical-of-xi-jinping.

(continued…)

phone number of a man who ran a satirical website were circulated in retaliation after he posted negative comments about the Ecuadorian president.[12]

These examples go far beyond the type of government unmasking sought here, but the government's advocacy for a low standard in this case sends a clear message all the same. If the government is permitted to sidestep the critical protections for anonymous speech based upon weak reasons, it will signal to the rest of the world that even the United States, the purported beacon of free expression, believes that the right to anonymous speech online is one that ought not to be taken too seriously, particularly when it poses an inconvenience to the government.

## CONCLUSION

The right to anonymous expression is a critical component of a flourishing, open internet. The ability of the government to revoke that right must therefore be an exception, not the rule. For the foregoing reasons, the Court should grant Glassdoor's motion to quash the government's subpoena for the identities of eight Glassdoor.com reviewers, and hold that the government must demonstrate not only a compelling interest in its investigation, but also a substantial connection between

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[12] *See What Happened When I Joked About the President of Ecuador*, N.Y. TIMES MAG. (May 1, 2015), https://www.nytimes.com/2015/05/03/magazine/what-happened-when-i-joked-about-the-president-of-ecuador.html.

the information it seeks and its interest, as well as demonstrate that its means of obtaining the information are no more drastic than necessary.

Dated: July 19, 2017 By: /s/_____

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amici Curiae in Support of Defendant-Appellant complies with the type-volume limitation, because this brief contains 5,970 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, the word processing system used to prepare the brief, in 14-point Times New Roman font.

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