NO. 06-17218

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE GRAND JURY INVESTIGATION	DC No. CR-05-90293-MISC-SI Northern District of California, San Francisco
NADIA WINSTEAD,	
Witness-Appellant	UNDER SEAL
v.	
UNITED STATES OF AMERICA,	
Appellee.	

Appeal from the United States District Court
for the Northern District of California
The Honorable Susan Illston, District Judge, Presiding

WITNESS-APPELLANT'S REPLY BRIEF [RECALCITRANT WITNESS APPEAL]

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ARGUMENT

I. Winstead's Preliminary Showing That She Was the Victim of Illegal Electronic Surveillance Was Strong, Requiring the Government to Make an Unequivocal Response

The government's argument that Winstead's claim of illegal electronic

surveillance was weak ignores Ninth Circuit precedent that a witness need only make a "mere assertion" of unlawful surveillance in order to trigger the government's obligation to provide an unequivocal response. *United States v. Vielguth*, 502 F.2d 1257, 1258 (9th Cir. 1974). *See also In re Evans*, 452 F.2d 1239, 1247-50 (D.C. Cir. 1971) ("[i]f we were to hold that a witness could make a 'claim' only when he has found an electronic bug in his home, heard mysterious beeps in his telephone, or rifled the files of the Justice Department, we would merely succeed in encouraging the government to improve its security as well as its technology"); *In re Grand Jury Proceedings (Hermann)*, 664 F.2d 423, 428-29 (5th Cir. 1981); *United States v. Nabors*, 707 F.2d 1294, 1301-02 (11th Cir. 1983).

In addition, the court in *Evans*, which involved surveillance of political activists like this case, recognized that the government's history of monitoring First Amendment-related activities can itself comprise part of the factual allegation that surveillance occurred:

> To be sure, appellants have merely asserted that wiretapping has been used against them. But this is not a case where a reasonable man would be startled to learn that electronic eavesdropping had, in fact, been used. On the contrary, in view of the government's well publicized anxiety about the anti-war activities planned for May, 1971, it would almost be more surprising if some telephones had not been tapped. We do not mean to suggest that a witness can invoke the procedures of § 3504(a) (1) only when an allegation of wiretapping seems plausible on its face. But it is important to avoid

> misconceptions about the nature of appellants' claim. Their allegations surely cannot be dismissed as patently frivolous; nor could we safely assert that they have been made in bad faith in order to obstruct the grand jury. The government, not appellants, has the information which can substantiate or dissolve their contentions, and for that reason Congress expected that the burden of going forward would shift to the government.

Id. at 1249-50. *Evans*'s reasoning applies with at least equal force in Winstead's case, wherein the government has been engaged in a multi-state, multi-year investigation of the animal rights movement involving wiretapping and all manner of other electronic and non-electronic surveillance of political activists. *See* EOR 8-12 (Declaration of Attorney Christine Garcia).

The government's reliance on *In re Grand Jury Proceedings (Garrett)*, 773 F.2d 1071 (9th Cir. 1985)(per curiam) is misplaced. *See* Government's Brief ("Gov. Br.") at 13. As the district court stated in its order here (EOR 60), *Garrett* does not stand for the proposition that allegations of unusual noises heard on telephones are insufficient to support a witness's claim of illegal electronic surveillance. Garrett's preliminary showing of illegal electronic surveillance, which was based on alleged problems with his telephones, was not found to be inadequate to trigger a government response. Rather, the court in *Garrett* affirmed the contempt order because the government unequivocally denied the use of electronic surveillance: the government's response included four affidavits from

case agents who affirmatively stated "that electronic surveillance has not been used in the investigation to gather evidence for use against any of the suspected coconspirators." *Id*. at 1073. *Garrett* thus supports Winstead's claim in this case that the government is obligated to make an unequivocal response and that the declarations it submitted do not meet that standard.

Significantly, the government's claim that Winstead's showing of illegal electronic surveillance is weak includes no mention of this Court's recent opinion in *In re Grand Jury Investigation, 2003R01576, John Doe v. United States*, 437 F.3d 855 (9th Cir. 2006) (per curiam) (hereinafter "Doe"). In *Doe*, this Court upheld the sufficiency of the witness's showing which was based primarily on his having heard "clicks" during telephone conversations. *Id*. at 857.[1] As stated in the opening brief, Winstead's showing of illegal electronic surveillance was considerably stronger than that in *Doe*. AOB at 17. The government does not dispute this argument and makes no attempt to distinguish *Doe*, in which the witness's declarations were not found to be weak or speculative; rather, even on the showing in *Doe*, this Court "ha[d] serious doubts regarding the adequacy of the FBI agent declaration in rebutting Doe's claims." *Doe*, 437 F.3d at 857.

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[1]Doe also stated that legal mail he exchanged with an attorney had been intercepted twice. *Doe*, 437 F.3d at 857.

The government also is incorrect that law enforcement use of other investigation methods, such as non-electronic surveillance and search warrants, suggests that no electronic surveillance was used in the investigation. Gov. Br. at 13-14. Electronic surveillance often is used in conjunction with other techniques when the government is investigating criminal conduct. Indeed, in *Doe*, it was alleged that government agents also monitored the witness's mail and interviewed him about the subject of the investigation. The use of these investigation techniques did not deter this Court from finding an adequate preliminary showing of unlawful electronic surveillance, and a questionable government response. *Doe*, 437 F.3d at 857-58. Moreover, it is additionally critical that in this case it was not until a short time after Winstead had problems with her telephone that the government's visual surveillance began. This timing further suggests that law enforcement first became interested in Winstead from tapping her telephone line, and then expanded its investigation to include other techniques.

The government's attack on the sufficiency of attorney Christine Garcia's declaration is equally unavailing. *See* Gov. Br. at 14-15. Contrary to the government's argument, Garcia's declaration did not establish that only "one animal-rights activist" was wiretapped. She wrote that there were other "targets" of the wiretap in both New Jersey and Minnesota, which is consistent with a

common practice to use electronic surveillance in investigating animal rights activists. EOR 9, 11. Additionally, once the government overheard Garcia on the wiretap, they affirmatively named her as a target on a subsequent authorization regarding further wiretapping. EOR 9-10. Moreover, Garcia's declaration established that the electronic surveillance had continued through the time of her representation of Winstead. She continued to hear noises and clicks that interfered with her telephone reception as late as August 10, 2005, which was nine days before she filed her declaration (ER 11) and more than one month after she became Winstead's attorney (ER 74, 77).

The government cites *United States v. See*, 505 F.2d 845, 856 (9th Cir. 1974), claiming that the Court in *See* "rejected as 'vague to the point of being a fishing expedition' claims of electronic surveillance, based on an affidavit by *See*'s attorney, which claimed that the attorney's 'telephones had been tapped during the previous five years,'" and for the proposition that "Garcia's declaration is plainly insufficient to support Winstead's speculations about electronic surveillance here." Gov. Br. at 15, n.4. The government misreads and misapplies *See*. The government's cursory summary of the case fails to recognize that there were two claims of electronic surveillance made by the appellants: that unlawful electronic surveillance had been conducted of the appellants themselves; and of See's

attorney. *See*, 505 F.2d at 856.

With respect to the claim involving the appellants, the Ninth Circuit stated that the showing "was vague to the point of being a fishing expedition," but did not specify the precise nature of the record made by the appellants. *Id*. at 856. With respect to the claim involving See's attorney, the Ninth Circuit held that the attorney's declaration did not allege that any electronic surveillance of counsel's telephone had been conducted in connection with the attorney's representation of See, and therefore did not meet the standard set forth in *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973), which requires a different and more extensive showing before the government is required to respond to a claim that an attorney's telephone was monitored. *See Vielguth*, 502 F.2d at 1260. Thus, contrary to the government's assertion here, the affidavit submitted by See's attorney was not the basis of this Court's finding that the witnesses' claim that their own conversations had been electronically monitored was too vague. *See* is distinguishable because here Winstead is asking only that the government respond to the claim that her conversations were monitored, and her showing in support of that claim, which includes attorney Garcia's declaration, is not vague.

Additionally, the fact that Winstead declined to answer questions asked by a grand juror and did not differentiate among the questions asked by the government

is of no relevance with respect to whether she has made an adequate preliminary showing of electronic surveillance. The claims made by Winstead in her declaration include that unlawful electronic surveillance resulted in the government's very decision to subpoena her before the grand jury. ER 4. If that is true, any answers given by Winstead before the grand jury would be derived from the government's illegal conduct. Moreover, the government cites no authority (and there appears to be none) to support its far-fetched argument that Winstead must answer some of the questions asked before the grand jury in order to require an unequivocal response from the government concerning the use of electronic surveillance.

II. The Government's Response Is Inadequate Because it Does Not Unequivocally Deny the Use of Electronic Surveillance

The government asserts that it is required only to make a general response because Winstead's showing of electronic surveillance is "weak and speculative." Gov. Br. at 16. The government's analysis is flawed because again, *inter alia*, it ignores any discussion of the most recent and relevant Ninth Circuit precedent, *Doe*, 437 F.3d 855. Doe's declarations, which were not even equal to the showing made by Winstead, were found sufficient to require an unequivocal government response affirming or denying electronic surveillance. *Id*. at 857. Moreover, as

noted by the district court below, at least one of the shortcomings in the government's response in *Doe* is present in the instant case. In *Doe*, the government's "declaration addresse[d] the possibility that . . . other agencies may have been surveilling Doe only with the statement that the FBI agent is 'unaware of any electronic surveillance involving Mr. Doe conducted by any other law enforcement agency.' This falls short of an unequivocal denial." *Id*. at 858. Here, the government relies on the very same response, found equivocal in *Doe*, in its attempt to address the possibility that non-FBI law enforcement agencies surveilled Winstead.

Rather than acknowledge *Doe*'s application to the instant case, the government attempts to find support in an earlier Ninth Circuit decision and two decisions from other circuits. Gov. Br. at 20-22 (citing and discussing *United States v. Wylie*, 625 F.2d 1371 (9th Cir. 1980), *DeMonte v. United States*, 667 F.2d 590 (7th Cir. 1981) and *In re Grand Jury Matter (Backiel)*, 906 F.2d 78 (3rd Cir. 1990)). These cases provide no such support, and the government's arguments regarding these cases distort and misrepresent their bases and holdings.

In discussing *Wylie*, the government distorts the case's facts and holdings. The government posits that *Wylie* "held [that] the attorney who filed [the] affidavit [had] 'unequivocally denied any electronic surveillance'" based on the attorney's

affidavit stating "that he was unaware of any electronic surveillance" (other than a body recorder worn by undercover agents that had already been disclosed). Gov. Br. at 20. However, the prosecutor's affidavit in *Wylie*, said much more: the prosecutor "[i]ncorporated into the affidavit [] the summary of the Justice Department's search of the surveillance records from the [nine] different government agencies." *Wylie*, 625 F.2d at 1376. These agencies included the FBI, ATF, United States Customs Service, DEA, United States Postal Service, United States Secret Service, IRS, CIA and National Security Agency. *Id*. at 1376, n. 6. The search "disclosed no evidence" that the defendant or his attorney were subjected to electronic surveillance on the date that the electronic monitoring was claimed to have occurred. Furthermore, the government in *Wylie* also submitted a declaration from the agent in charge of the investigation, in which "[t]he agent stated unequivocally that at no time was any type of wiretap or area bug ever used during the investigation of the case." *Id*. at 1376.

Here, the government's response falls short of that proffered in *Wylie* in two ways. First, no search was conducted of records maintained by any agency other than the FBI, despite clear evidence that other agencies were involved in this

investigation.[2] In addition, unlike in *Wylie*, none of the government's declarations in this case directly denied the existence of electronic surveillance, and instead, all of them simply disclaimed awareness or knowledge of its existence.

The government also distorts and misrepresents *DeMonte*, which is readily distinguishable from the instant case. In *DeMonte*, the Seventh Circuit found that the government's affidavit, which was submitted "as a response to the appellant's initial general allegation of illegal electronic surveillance," was adequate only because of the minimal showing made by the appellant. *DeMonte*, 667 F.2d at 595. The Court found that DeMonte's claim "fail[ed] to make a 'concrete and specific showing' of probable electronic surveillance outside of the scope of that admitted by the government." *Id*. When before the grand jury, DeMonte merely objected to the questions on the ground that they were the product of unlawful electronic surveillance and then repeated that claim at the immunity hearing. Unlike the instant case, DeMonte did not submit an affidavit that detailed the factual basis for his claim of unlawful electronic surveillance. *Id.* Later, when on the stand at the contempt hearing, DeMonte sought to bolster his claim by stating

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[2]The involvement of other agencies is demonstrated by the case agent's admission in this case and in the related case, *Doe*, and by the searches conducted at Winstead's residence just shortly before the subpoena was served on her. See AOB at 6 (noting the involvement of the FBI, Joint Terrorism Task Force, Coast Guard, ATF, and local police).

that he had received notices from the telephone company, and that he heard clicks on his line. *Id*. at 595, n.11. By then, however, the district court had "the benefit of both the government's affidavit and the supporting materials" explaining the scope of the electronic surveillance. *Id*. DeMonte's additional testimony was found not to necessitate a further government response. *Id*. at 595. Thus, only because of the lack of specificity of DeMonte's claim was the government's response adequate, and only because of this was it unnecessary for the government to conduct a general search of all investigative agencies. *Id*. at 595 ("Although, in other contexts, these concerns might dictate the need for a more extensive government response, on the facts of this case, we find that the affidavit was a sufficient denial under section 3504(a)(1).")

The government's discussion of *Backiel* likewise is off-base. The government claims that the declarations in the present case are "indistinguishable" from the government declarations in *Backiel*. Gov. Br. at 21, 22. The government is wrong for several reasons. First, in *Backiel*, the government declarations were found to be adequate only because the witness's "allegations fail[ed] to raise even a suspicion of illegal electronic surveillance in connection with [her] appearance before the grand jury." *Backiel*, 906 F.2d at 93 (noting that "[w]here the allegations of surveillance are specific enough to raise a legitimate inference that

the proceedings at issue have been tainted or where the nature of the case is such that the likelihood of illegal surveillance is strong, a more detailed and more specific section 3504 denial will be required"). This is in marked contrast to the declarations submitted by Winstead in the instant case. Second, the government's declaration in *Backiel* stated expressly that "[t]his investigation is being conducted solely by the Federal Bureau of Investigation." *Id*. at 89; *see also id*. at 92 ("[N]either motion for disclosure sets forth any allegation indicating that any agency other than the FBI had any reason or occasion to place [the witness] under surveillance."). This contrasts sharply with the multiple-agency investigation at issue in the present case. Additionally, the court in *Backiel* made clear that case-by-case analysis is necessary to proper consideration of this issue. *Id*. at 92 ("We believe that, *in the context of this case*, the government's section 3504 denial was adequate.") (emphasis added), 93 ("We conclude that at this proceeding ....") (emphasis added; quotation marks and citation omitted). *Backiel*, like *Wylie* and *DeMonte*, does not provide the government the support it seeks here.[3]

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[3]At another point in its brief, *see* Gov. Br. at 13-14, the government overstates another point made in *Backiel*. The government posits that *Backiel* stands for proposition that the "fact that [a] witness was served with [a] subpoena at home *does not constitute evidence* that she was subject to electronic surveillance." (Emphasis added). The actual statement in *Backiel* on this point addressed Backiel's contention that service of the subpoena at her residence "is proof of the fact of surveillance," which the court found meritless. *Backiel*, 906

Much of the government's defense of its response rests on Anaylst Ferrari's declaration describing her ELSUR search. Gov. Br. at 25-26. The government states that "this database plainly was the correct database for the FBI to search," and cites the Federal Register which describes the purpose of ELSUR as allowing the government to respond to judicial inquiries concerning electronic surveillance, and to certify whether or not such surveillance has occurred. Gov. Br. at 25-26 (citing 70 Fed. Reg. 7513, 7515).

ELSUR is not a single database, as the Government suggests, but a wide set of databases, maintained in both electronic and paper form, at numerous FBI facilities, including its headquarters, academy, laboratory, technology centers, and satellite field offices. 70 Fed. Reg. 7515, 7516. The Federal Register discusses ELSUR as a set of "indices," plural, and it specifies that separate requests for ELSUR information must be made separately to each of these facilities. *Id*. at 7516. While most records are maintained electronically, "[s]ome records are maintained in hard-copy (paper) format or other form." 70 Fed. Reg. 7514

In the present case, the Government has not stated which ELSUR databases it searched. And it has not stated whether it looked for non-electronically stored records. The affidavit by Rose Ferrari states that she works for the Operations

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F.2d at 92

Unit of the FBI's Records Management Division. She states: "I conducted a field-wide search of the ERS for all records of the name Nadia Verna Winstead. My search of the ERS disclosed no records for Nadia Verna Winstead." EOR at 53. Ferrari does not state where the Records Management Division is located, or whether the FBI has more than one such Division. She does not state whether a "field-wide" search includes a search of all field offices, and whether or not it also includes a search of the FBI's national headquarters or technology centers.

In describing the procedures for requesting ELSUR searches, the Federal Register explains that requests for information "maintained at FBI Headquarters must be directed to the Record/Information Dissemination Section," and "[r]equests for information maintained at FBI field offices, information technology centers, or other locations *must be made separately* and addressed to the specific field office, information technology center, or other location…" 70 Fed. Reg. 7516 (emphasis added). No procedure is delineated for making a so-called full-field search request to a Records Management Division, as Ferrari purports to have done. Finally, the Government has not stated whether it looked for non-electronically stored records at any location.

In addition, Ferrari states that she searched "for all records of the name Nadia Verna Winstead," before stating that her search disclosed no records. EOR

at 53. In so stating, her declaration begs the question whether she constructed the search in an overly restrictive way. For example, if one were to search Westlaw for "Nadia Verna Winstead" in quotes, but her name only appeared in cases as "Nadia Winstead" or "Nadia V. Winstead," Westlaw would return zero results. Ferrari thus has not even made it unequivocally clear whether the ELSUR search she did perform, such as it was, was in fact negative.

III. At this Stage of the Proceedings, the Government May Not Avoid its Obligation to Properly Deny or Disclose Any Electronic Monitoring by Claiming That the Relevant Test Is Whether the Questions Asked Were the Product of Unlawful Electronic Surveillance

The shortcomings of the government's response, in this case, read in conjunction with the showing made via Winstead's declarations, are spelled out in Winstead's opening brief (*see* AOB at 19-230) as well as *supra* at 8-13. The government attempts to deflect attention from its inadequate response by repeatedly proposing that "the relevant test" is whether the questions asked of Winstead were derived from illegal electronic surveillance. Gov. Br. at 19, 20, 23. The government's argument, however, puts the cart before the horse and attempts to derogate and short-circuit the process established by years of precedent. At this stage of the proceedings, Winstead is not required to prove that the questions asked were the product of unlawful electronic surveillance. *Doe*, 437 F.3d at 858.

That ultimate issue is not to be addressed until the government has properly disclosed any electronic monitoring that was utilized in its investigation. The parties could then litigate the legality of the wiretapping. If the surveillance is found to be illegal, the information obtained from the electronic monitoring could be compared to the questions asked before the grand jury to determine if there is a causal connection.

When a grand jury witness makes a claim under § 3504, only a slight showing of a causal connection is required. As stated by this Court, all that is required is "*some arguable* causal connection, apparent on the face of the witness's allegation, between the questions being posed to the grand jury witness and the alleged unlawful surveillance." *Doe*, 437 F.3d at 858 (emphasis added). If the questions asked "suggest *any* reliance on surveillance *of any sort*," the government must make a response that complies with 18 U.S.C. § 3504(a)(1). *Id*. (emphasis added). That section requires the government to "affirm or deny *the occurrence* of the alleged unlawful fact." (Emphasis added.) To accept the argument made here by the government would effectively nullify this obligation placed on the government by § 3504(a)(1).

In the AOB, Winstead discussed the well-reasoned decision of the Fourth Circuit in *United States v. Apple*, 915 F.2d 899, 911 (4th Cir. 1990), which

disapproved the district court's ruling on the causal connection issue before the government had adequately denied the occurrence of the alleged illegal surveillance. *See* AOB at 29. The government's brief fails to even mention *Apple* or rebut its reasoning.

Here, Winstead has made a strong preliminary showing of unlawful electronic surveillance. The government, however, has not made an unequivocal denial of the alleged unlawful activity in conformity with the case law. For that reason, the district court abused its discretion in finding Winstead in civil contempt.

IV. The Declaration Submitted as Exhibit B to Appellee's Opposition to the Motion for Bail Pending Appeal Should Not Be Considered Because it Was Not Part of the Record Before the District Court at the Time Winstead's Renewed Motion for Disclosure of Electronic Surveillance Was Denied

The government's argument that this Court should consider the Exhibit B declaration flies in the face of the relevant legal principle set forth in *United States v. Walker*, 601 F.2d 1051, 1055 (9th Cir. 1979) and the other cases discussed in the AOB at 36. In addition, when reviewing a district court's decision for an abuse of discretion this Court looks for "plain error, discretion exercised to an end not justified by *the evidence*, a judgment that is clearly against the logic and effect of *the facts* as are found." *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819,

822 (9th Cir.1993) (citation omitted) (emphasis added). It necessarily follows that appellate review of a district court's exercise of discretion is thus limited to the record before the district court at the time the decision was made. Here, the record before the district court when it denied Winstead's motion for renewed electronic surveillance did not include the Exhibit B declaration.

The fact that the declaration is part of the appellate record because it was filed after the denial of Winstead's motion, but before the contempt finding, is of no significance. The district court's contempt order was based on its finding that there was no just cause for Winstead to not answer questions before the grand jury, which in turn was predicated on the district court's prior denial of Winstead's renewed motion for disclosure of electronic surveillance. Winstead had not moved for reconsideration of that decision, and the litigation with respect to that issue was already completed. The Exhibit B declaration was a nullity; because the denial of Winstead's motion had already been issued, the district court had no need to consider the declaration and Winstead had no incentive to confront it.

The government's additional argument that Winstead had yet another opportunity to rebut the declaration in her opening brief is vexatious and without authority. S*ee* Gov. Br. at 32. Clearly, the opening brief does not provide an opportunity to cross-examine and confront declarants or to test the facts of the

record in any way.

Additionally, the government's contention that Winstead's intent is to delay the proceedings is completely salacious and unwarranted. For this proposition the government cites *Backiel*, 906 F.2d 78, but unlike *Backiel*, Winstead's case raises a substantial claim of unlawful illegal surveillance. *See supra* at 12-13. Moreover, while noting the potential for a witness to misuse a § 3540 motion to cause delay, *Backiel* "recognize[d] the importance of the mechanism provided in [that] section." *Id*. at 91.

> In enacting the wiretap legislation embodied in 18 U.S.C. §§ 2515 and 3504, Congress intended to provide safeguards against invasion of the privacy interest secured by the fourth amendment. Section 3504 was drafted to provide procedures by which a witness may attempt to demonstrate that the questions posed to him fail to comply with the mandate of section 2515 which proscribes the use in any official proceeding of evidence tainted by illegal surveillance.

Backiel, 906 F.2d at 91 (citations omitted).

By filing her motion and through this appeal, Winstead seeks only to be free from illegal surveillance and to exercise her right not to answer questions based on such surveillance. *Garrett*, 773 F.2d at 1072 (citing 18 U.S.C. § 3504 and *Gelbard v. United States*, 408 U.S. 41, 52 (1972)). She seeks a fair opportunity to litigate that issue before being incarcerated on the basis of questions with more than an arguable connection to surveillance.

Moreover, if the government is truly concerned about delay, it could easily expedite the case by providing an unequivocal response to Winstead's claim of electronic surveillance, thereby allowing the court to determine if the questions asked of Winstead were based on unlawful acts. Clearly, the government does not want to disclose this information, and as argued in the AOB at 19-23, has gone through pains to avoid directly responding to Winstead's claim.. Winstead is therefore put in the position of having to vigorously litigate the issue.

The Government is also wrong that, if considered by this Court, the Exhibit B declaration will eliminate the sole ground asserted by Winstead for distinguishing her case from *Doe*. Gov. Br. at 29. The declaration merely alleges an explanation for how Winstead became a person of interest for the government. In *Doe*, the government not only had a prior reason for wanting to question the witness before the grand jury, but in fact had already interviewed him. Thus, the witness had "cooperated with the FBI . . . and provided them with substantially all of the information the government sought to elicit from him under oath before the grand jury." *Id*. at 858. This critical difference between *Doe* and Winstead's case would remain even if the Exhibit B declaration is considered by this Court. Moreover, as noted in the AOB at 36, the declaration actually supports the inference that illegal electronic surveillance occurred in this case. If the Court is

to consider the declaration, it provides additional weight to Winstead's claim and calls even more for a remand to the district court so that that court may consider the declaration's impact in the first instance.[4]

CONCLUSION

For all of the forgoing reasons as well as the reasons stated in Winstead's opening brief, the district court's order holding Winstead in civil contempt should be reversed, and the government should be precluded from compelling her testimony before the grand jury.

DATED: December 18, 2006

Respectfully submitted,

MARK GOLDROSEN
Attorney for Witness-Appellant
NADIA WINSTEAD

[4]Furthermore, the candid admission in the declaration that Winstead is of interest because of her presence at public protests, raises a host of First Amendment infirmities which Winstead should be permitted to address after a remand to the district court. The First Amendment may be invoked against the infringement of protected freedoms by law or lawmaking, including government investigations. *Watkins v. United States*, 354 U.S. 178, 197 (1957) (reversing a conviction contempt of Congress before the House Un-American Activities Committee). The Supreme Court has recognized limits on investigative and contempt powers where the government interest was too remote and conjectural to warrant intrusion into the political and associational privacy protected by the First Amendment. *De Gregory v. Attorney Gen. Of New Hampshire*, 383 U.S. 825 (1963) (reversing a state court finding of contempt on First Amendment grounds).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 4,938 words.

DATED: December 18, 2006

MARK GOLDROSEN
Attorney for Witness-Appellant
NADIA WINSTEAD

CERTIFICATE OF SERVICE

I declare that:

I am a citizen of the United States and am employed in the County of San Francisco, State of California; I am over the age of 18 years and am not a party to the within action; my business address is 255 Kansas Street, Suite 340, San Francisco, California 94103.

That on December 6, 2006, I caused a true copy of: Witness-Appellant's Reply Brief [Recalcitrant Witness Appeal] to be served by hand to the parties below.

Elise Becker
Assistant United States Attorney
Northern District of California
11th Floor, Federal Building
450 Golden Gate Avenue, Box 36055
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 18, 2006, at San Francisco, California.

_____
Mark Goldrosen