No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2013

JAMES RISEN,

Petitioner,

— v.—

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do journalists have a qualified First Amendment privilege when subpoenaed to reveal the identity of confidential sources in a federal criminal trial?

2. Should a federal common law privilege be recognized under Federal Rule of Evidence 501 to provide protection to journalists who are subpoenaed to reveal the identity of their confidential sources in a federal criminal trial?

PARTIES TO THE PROCEEDING

The parties to the proceeding in *United States* v. *Sterling* (4th Cir. Case No. 11-5028) are the United States, Jeffrey Sterling, and James Risen.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the court of appeals is reported at 724 F.3d 482 and reprinted in the Appendix at App.1a.[1] The district court's opinion, granting and denying in part Petitioner's motion to quash the Government's trial subpoena, is reported at 818 F. Supp. 2d 945 and reprinted in the Appendix with the district court's unreported order, granting and denying in part that motion, at App.110a. The district court's unreported order, granting and denying in part the Government's motion for clarification and reconsideration of the district court's opinion is reprinted in the Appendix with the transcript it incorporates by reference at App.144a.

JURISDICTION

The court of appeals entered judgment on July 19, 2013. Petitioner's timely petition for rehearing *en banc* was denied on October 15, 2013. App.183a-191a. This petition is timely filed within 90 days of that decision. Jurisdiction exists under 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution, Fed. R. Crim. P. 17, and Fed. R. Evid. 501 are reproduced in the Appendix at App.192a, App.194a, and App.193a.

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[1] References to "App._" and "S-App._" are to the Appendix and proposed Supplemental Appendix to this petition. The petition does not reveal the contents of sealed information in the proposed Supplemental Appendix.

STATEMENT OF THE CASE

James Risen is a journalist employed by *The New York Times*. His book, *State of War: The Secret History of the CIA and the Bush Administration*, was published in 2006. The book exposes instances of excessive government secrecy, incompetence, and mismanagement in the U.S. intelligence apparatus, including details about the National Security Agency's warrantless wiretapping program. Risen and fellow Times journalist Eric Lichtbau had first made public the existence of the NSA program just months before; they were awarded a Pulitzer Prize for their reporting.

Chapter 9 of *State of War* focuses primarily on "Operation Merlin," a reportedly botched attempt by the CIA to have a former Russian scientist pass on fake and intentionally flawed nuclear blueprints to Iran. The idea behind the operation, as described in the book, was to induce the Iranians to build a nuclear weapon based on the flawed blueprints and ultimately undermine Iran's nuclear program. But the operation was mismanaged from the beginning. The flaws in the nuclear blueprints were so obvious that the Russian scientist noticed them within minutes of seeing the plans. When the scientist explained this to his CIA handlers, they refused to call off the operation and told him to proceed as planned. By reporting on the failed operation, Risen called into question the competence of the CIA's intelligence related to Iran's ability to produce weapons of mass destruction.

Grand Jury Proceedings

On January 24, 2008, a grand jury in the Eastern District of Virginia investigating unauthorized disclosures about Operation Merlin in Chapter 9 issued a subpoena to Risen that sought testimony and docu-

ments about his confidential source(s). S-App.2, 80. A target of the investigation was Jeffrey Sterling, a former CIA employee. Risen moved to quash the subpoena.

Following extensive briefing and oral argument, the district court granted Risen's motion in part, concluding that, given the Government's description of its own evidence, Risen's testimony was unnecessary, but was merely "the icing on the cake" for an indictment of Sterling. App.202a; *see also* S-App.15. The district court, however, also found a limited waiver of any privilege by Risen's purportedly having disclosed to a third party the identity of one alleged confidential source. S-App.54. The district court denied Risen's motion to quash to the limited extent it permitted the Government to question Risen about his communications with the third party about the alleged confidential source that Risen had purportedly disclosed to that party. S-App.6, 18.

Both Risen and the Government sought reconsideration of the district court's Order. App.202a; S-App.6, 14. To support his motion, Risen submitted two uncontradicted affidavits from the third party and himself that showed that there was no waiver because any statements made by Risen to the third party were made in strict confidence and in furtherance of Risen's reporting. S-App.58-64. While the motions for reconsideration were pending, however, the grand jury expired. The district court held that, in light of the expiration of the grand jury, the subpoena was "a nullity" (S-App.15) and stayed the motions for reconsideration, pending issuance of a new subpoena. S-App.16. In light of the affidavits submitted by Risen, neither the

Government nor the district court ever raised the waiver issue again.[2]

On January 19, 2010, Attorney General Holder authorized prosecutors to seek another grand jury subpoena for Risen, and the subpoena issued on April 26, 2010. This time the Government sought not the name(s) of Risen's confidential source(s), but instead extraordinarily detailed information regarding "the where, the what, the how, and the when" of all communications with sources for Chapter 9. App.115a; *see also* S-App.3, 9-12. If Risen's answers did not reveal the identity of his confidential source(s), the Government reserved the right to ask additional questions. S-App.5.

Risen moved to quash, and the district court granted the motion, finding that, under Fourth Circuit law, "[i]f a reporter presents some evidence that he obtained information under a confidentiality agreement or that a goal of the subpoena is to harass or intimidate the reporter, he may invoke a qualified privilege against having to testify in a criminal proceeding." App.211a. The court found Risen had "a confidentiality agreement with his source and that the agreement extended beyond merely revealing the source's name but to protect any information that might lead to the source's identity." App.214a.

The district court applied the three-part balancing test articulated by the Fourth Circuit in *LaRouche* v. *National Broadcasting Co*., 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986), and concluded that Risen's testimony would implicate confidential source relationships without a legitimate need of law

[2] The district court's later findings are inconsistent with a waiver. *See* App.138a-139a.

enforcement because the evidence sought from Risen would "simply amount to 'the icing on the cake'" and the Government had ample evidence without Risen's testimony to secure an indictment. App.202a, 224a.

The district court concluded that the Government's evidence showed that "very few people had access to the information in Chapter 9, and Sterling was the only one of those people who could have been Risen's source." App.218a. The court held that, "[t]o require a reporter to violate his confidentiality agreement with his source under these facts would essentially destroy the reporter's privilege." App.224a.

The District Court Proceedings

As the trial court had predicted, Sterling was indicted without Risen's testimony. On May 23, 2011, the Government served a trial subpoena on Risen and simultaneously filed a motion *in limine* to compel Risen to testify about his confidential source(s). S-App.65; App.312a-313a. The Government wanted to ask Risen to "directly identify Sterling" as his source, "establish venue for certain of the charged counts," "authenticate his book and lay the necessary foundation to admit" *State of War* and certain statements alleged to have been made by Sterling, and "identify the defendant as someone with whom he had a preexisting source relationship that pre-dated the charged disclosures." JA128.[3]

The Government submitted nothing to the district court (or Risen) about the evidence it expected to introduce at trial so a determination could be made about the necessity of Risen's testimony. With no summary

[3] References to "JA_" are to the Joint Appendix in the court of appeals.

of the Government's evidence, the district court judge was forced to examine the evidence put before her in connection with the motions to quash the grand jury subpoenas. App.116a n.2.

The district court, exercising jurisdiction under 18 U.S.C. § 3231, granted and denied in part both the Government's motion *in limine* and Risen's motion to quash, holding that a qualified First Amendment privilege extended to all information that might indirectly reveal a confidential source(s)' identity.[4] App.123a, 129a. Testimony about Risen's sources was protected by the qualified reporter's privilege and subject to a balancing analysis. App.132a. Applying the three-part balancing test set forth in *LaRouche*, the district court found that the Government had failed to meet its burden to show it had exhausted reasonable alternative sources or had a compelling need for the information. App.133a-141a.

As for the second prong of *LaRouche*—availability of the information by alternative means—the district court noted that the Government had failed to "proffer[]…the circumstantial evidence it has developed," finding that the Government's "mere allegation that Risen provides the only direct testimony about the source of the classified information in Chapter 9" was "insufficient" to satisfy its burden. App.135a, 140a. The district court further noted that the Government's argument that it had exhausted other sources "clearly misstates the evidence in the record" (App.135a), which the court said included the following:

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[4] The district court did not decide if a privilege also existed under federal common law. App.123a n.3.

- Testimony of a "former intelligence official with whom Risen consulted on his stories" that Sterling was a source of Risen's about the classified operation in Chapter 9. App.135a.
- Testimony from a witness that Sterling told her about his plans to meet with someone named 'Jim,' who had written an article about Sterling's discrimination case and was working on a book about the CIA. The witness testified she understood 'Jim' to be Risen and that, when she saw *State of War* in a bookstore, Sterling told her, without looking at the book, that Chapter 9 was about work he had done at the CIA. App.139a.
- Evidence that Sterling was an on-the-record source for Risen for a March 2, 2002 article. App.116a.
- Testimony of numerous phone calls between Risen and Sterling's home in Herndon, Virginia in February/March 2003, immediately before Risen informed the CIA he had information about "Operation Merlin." App.117a-118a, 135a.
- Testimony from former Senate Select Committee on Intelligence staffers that they met with Sterling on March 5, 2003 to discuss a classified operation and his discrimination suit against the CIA. One of the staffers recounted that, during the meeting, Sterling threatened to go to the press. App.117a.
- Testimony from the CIA Director of the Office of Public Affairs that Risen called him in April 2003 seeking comment about Operation Merlin, shortly after the alleged calls between Sterling and Risen. App.117a; JA37-40, ¶¶39-43.

- Phone records and emails reflecting dozens of communications between Sterling and Risen. App.117a-118a, 135a.

As for the third prong of *LaRouche*—whether the Government has a compelling interest in the information—the district court found that the Government had failed to show that the information sought was "necessary or, at the very least, critical to the litigation at issue." App.141a. The district court noted that the Government did not even claim Risen's testimony was necessary to establish guilt, but rather only that it would "'simplify the trial and clarify matters for the jury' and 'allow for an efficient presentation of the Government's case." *Id*.

Having held that the Government failed to meet its burden for the bulk of the information sought, the district court identified a few topics on which Risen would be required to testify, all regarding the authentication and accuracy of his reporting. App.143a. When the Government sought reconsideration/clarification of the district court's order to the extent it quashed the subpoena, the district court granted the motion only to clarify and expand these topics. App.163a-173a.

On the eve of trial, the Government noticed its appeal of the district court's orders regarding Risen's testimony, along with two unrelated evidentiary rulings.

The Court of Appeals' Decision

On July 19, 2013, the court of appeals issued a split opinion reversing the district court's ruling on Risen's testimony. Chief Judge Traxler authored the court's opinion on the reporter's privilege question, joined by

Judge Diaz. Judge Gregory dissented as to that portion of the opinion.

Departing from rulings of six other federal circuits, the court held that reporters had no First Amendment or common law reporter's privilege when responding to a subpoena seeking testimony about confidential sources in a criminal trial. The court relied on *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), in reaching this conclusion, denying that Justice Powell's concurrence in that case established any privilege at all. App.17a-25a. Turning to its own precedent, the court distinguished *LaRouche* because it was a civil proceeding and relied on *In re Shain*, 978 F.2d 850 (4th Cir. 1992)—a case that did not involve confidential information—to deny any reporter's privilege in the criminal trial context. App.25a-30a.

The court also held that *Branzburg* forecloses a reporter's privilege under federal common law, and that, even if it were at liberty to recognize a common-law privilege under Federal Rule of Evidence 501 and *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), it would not. App.33a-46a. To support its conclusions, the court rejected the public and private interests advanced by the privilege, and—despite the recognition by 49 states of such a privilege—found that "there is still no 'uniform judgment of the States' on the issue of a reporter's privilege." App.44a. The court also added, in dicta, that, even if there were a qualified privilege, the balancing favored the Government and Risen had waived any privilege. App.46a-53a, 54a.

Judge Gregory examined the same cases as the majority and reached the exact opposite conclusions. Unlike the majority, he acknowledged the significant confusion in the appellate courts regarding the meaning of

Branzburg, especially given "Justice Powell's 'enigmatic concurring opinion.'" App.85a (quoting *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting)). Noting that "[t]he Fourth Circuit, like our sister circuits, has applied Justice Powell's balancing test" where confidential source information was sought from reporters, Judge Gregory concluded that such a balancing test should apply in both civil and criminal contexts, with an additional balancing of newsworthiness against the harm caused by disclosure in national security cases. App.86a-91a.

Judge Gregory also recognized a federal common law reporter's privilege under Rule 501. Noting that through Rule 501, Congress "directed federal courts to continue the evolutionary development of testimonial privileges" and that *Branzburg* was expressly deferential to the future guidance of Congress regarding the reporter's privilege, he found that the reporter's privilege "meets [the] high bar" set by previously recognized common-law privileges. App.106a. Citing that 49 states and the District of Columbia now recognize a reporter's privilege, Judge Gregory concluded that "Rule 501 calls for a reporter's privilege." App.108a.

Finally, Judge Gregory found that the balancing test protected Risen from disclosure here. As to the availability of the information sought by other means, Judge Gregory summarized the trove of circumstantial evidence regarding the identity of Risen's source (expanding upon that on pages 7-8) and concluded that "the Government's case is not as weak as it or the majority claims, limiting the need for Risen's testimony." App.94a. As to the Government's compelling interest in the information sought, Judge Gregory found that the Government had "failed to demonstrate a suffi-

ciently compelling need for Risen's testimony," as "the prosecution's body of evidence without [it] is strong." App.97a-98a. Balancing the newsworthiness of the leaked information against the harm caused by its disclosure, Judge Gregory found that while "it is hard to imagine many subjects more deserving of public scrutiny and debate" than the subjects of Risen's reporting, the Government had not "clearly articulated the nature, extent, and severity of the harm resulting from the leak." App.102a.

REASONS FOR GRANTING THE WRIT

Every day in newsrooms across this country, reporters gather information of enormous import to the public from sources who only agree to disclose that information if the reporters will keep their identities confidentiality. As the record reveals, countless stories of tremendous historical significance—the Watergate break-in and cover up (App.254a), the abuse of prisoners in Abu Ghraib, Iraq (App.275a), the CIA's waterboarding of terrorism suspects (S-App.70, 81), the existence of secret CIA prisons in Eastern Europe (App.274a), the NSA's use of warrantless wiretaps on U.S. citizens (S-App.70, 81), and the systematic lack of adequate care for veterans at Walter Reed Army Medical Center (App.277a-278a) to name just a few—would never have been written without the reporter's ability to promise sources confidentiality and keep those promises.

It is not surprising then, that the overwhelming majority of journalists today consider the use of confidential sources essential to their ability to report news to the public.[5] For investigative journalists like Risen,

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[5] *See Reporters and Confidential News Sources Survey — 2004*,

who cover national security and intelligence issues of the utmost importance, their jobs would be impossible without the ability to promise confidentiality to sources. S-App.81-82. This is not just a matter of journalistic necessity—it is also a matter of professional ethics. The ethics codes of every major national organization of journalists insist that journalists keep promises of confidentiality to their sources.[6]

The situation faced by Risen here is not unique and is likely to recur. As the Senate Judiciary Committee has recently acknowledged, federal and state subpoenas seeking confidential information from reporters have recently become more widespread. S. Rep. No. 113-118, at 4 (2013).[7] In 2006 alone, newsrooms received 67 federal subpoenas for confidential information, 41 of which sought the identity of confidential sources. *Id.* at 5. All indications are that this trend has continued and is not likely to wane. In the past

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at http://www.firstamendmentcenter.org/reporters-and-confidential-news-sources-survey-%C2%97-2004 (86% of journalists agreed that "[t]he use of confidential sources [was] essential to [their] ability to report some news stories to the public").

[6] *See, e.g.*, American Society of Newspaper Editors Statement of Principles, Art. VI ("Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly."), *at* http://asne.org/content.asp?pl=24&sl=171&contentid=171; Radio Television News Digital News Ass'n Code of Ethics ("Journalists should keep all commitments to protect a confidential source."), *at* http://www.rtdna.org/content/rtdna_code_of_ethics; Society of Professional Journalists Code of Ethics ("Keep promises."), *at* http://www.spj.org./ethicscode.asp.

[7] *See also* Kevin Rector, *A Flurry of Subpoenas*, Am. Journalism Rev., April/May 2008, *at* http://www.ajr.org/Article.asp?id=4511.

few years, it has become commonplace to subpoena journalists to reveal their confidential sources.[8]

Unfortunately, as the number of subpoenaed reporters has soared, the law governing the relationship between reporters and their sources has become increasingly less clear. This Court has not considered whether journalists have any right not to reveal the identity of confidential sources since *Branzburg* was decided over 40 years ago. That decision has been described by both courts and commentators as "confusing,"[9] "enigmatic,"[10] and filled with "internal contradiction."[11] As one commentator has put it, "[t]he lower courts have struggled to interpret the conflicting principles of *Branzburg*, and the level of constitutional protection extended to newsgathering remains unsettled."[12] In an area of law where predictability is of paramount importance, the current state of the law is confused.

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[8] *See, e.g.*, Lilly Chapa, *Detroit Paper Must Provide Documents and a Witness Regarding Confidential Source, Judge Rules*, Jan. 18, 2013, *at* http://www.rcfp.org/browse-media-law-resources/news/detroit-paper-must-provide-documents-and-witness-regarding-confident; *Keefe* v. *City of Minneapolis*, 2012 WL 7766299, at *3 (D. Minn. May 25, 2012); *Durand* v. *Massachusetts Department of Health*, 2013 WL 2325168, at *1 (D. Mass. May 28, 2013); *Smith* v. *Borough of Dunmore*, 2011 WL 2115841, at *3-*4 (M.D. Pa. May 27, 2011), *aff'd*, 516 Fed. Appx. 194 (3d Cir. 2013).

[9] *See* Adam Liptak, *The Hidden Federal Shield Law: On the Justice Department's Regulations Governing Subpoenas to the Press*, 1999 Ann. Surv. Am. L. 227, 231 (1999).

[10] *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting) (characterizing Justice Powell's concurring opinion as "enigmatic"); Robert D. Sack, Sack on Defamation § 14.3.2, at 14-14 - 14-15 (4th ed. 2013) (describing Justice White's opinion as "rather enigmatic.").

[11] Jennifer L. Marmon, Note, *Intrusion and the Media: An Old Tort Learns New Tricks*, 34 Ind. L. Rev. 155, 158 (2000).

[12] *Id.*

The courts of appeals have failed to bring much-needed clarity to this area of law. In the years since *Branzburg*, the courts have been divided over the existence and scope of any privilege, the meaning and impact of Justice Powell's concurring opinion, and the application of the privilege in varying contexts. The divided panel in this case is, in many ways, typical in that numerous judges examined *Branzburg* and its progeny and reached completely contrary conclusions about what that body of case law requires. As Judge Gregory plainly put it, "Justice Powell's concurrence and the subsequent appellate history have made the lessons of *Branzburg* about as clear as mud." App.87a.

All this conflict arises about a journalistic practice that has had the most direct impact on the ability of our citizens to be informed. As Judge Gregory correctly recognized, "guarantees of confidentiality enable sources to discuss 'sensitive matters….' [and] [e]ven in ordinary daily reporting, confidential sources are critical."[13] App.83a. "If reporters are compelled to divulge their confidential sources, the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic." *Id*.

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[13] *See also* S-App.85-86 ("[I]t has become more clear than ever to me how important promises of confidentiality are to my sources….[N]umerous sources of confidential information have told me that they are comfortable speaking to me in confidence specifically because I have shown that I will honor my word and maintain their confidence even in the face of Government efforts to force me to reveal their identities or information.").

A. Review Is Warranted to Resolve the Conflict Among the Lower Courts About the Existence and Scope of a Qualified Journalist's Privilege in Criminal Trials Under the First Amendment

As confused as the law of reporter's privilege has been, before the court of appeals' decision, one thing had been clear: every court of appeals to have addressed the issue had found that reporters subpoenaed to testify about the identity of their confidential sources in a criminal trial have a qualified reporter's privilege that requires a case-by-case balancing of the competing interests. Granting certiorari would allow the Court to resolve the conflict that now exists concerning this important question.

In *Branzburg*, this Court was presented with journalists held in contempt for failure to testify before grand juries investigating criminal conduct that the reporters had learned about while preparing stories for publication. The Court upheld the contempt convictions in a 5-4 decision that turned on the unique and vital role of the grand jury in our criminal justice system. The Court emphasized that the "sole issue" before it was "the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." 408 U.S. at 682. In analyzing that question, the Court performed a constitutional analysis it said was "very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Id*. at 686-87. The Court highlighted the grand jury's "constitutionally mandat-

ed role," noting that "[t]he adoption of the grand jury 'in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice.'" *Id.* at 687. The Court distinguished the grand jury setting from others, stating "the longstanding principle that 'the public...has a right to every man's evidence,'...is particularly applicable to grand jury proceedings.'" *Id.* at 688. Examining the interests underlying both the grand jury investigation and the First Amendment, the majority concluded that the reporters had to testify. *Id.* at 709.

Justice Powell, who joined the majority with his deciding vote, wrote a separate concurring opinion plainly crafted to set forth the limited scope of the Court's ruling—or, at the least, the limited nature of any opinion Justice Powell was prepared to join. Justice Powell observed that the ruling did not mean that "newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Id*. at 709. In clarifying these "constitutional rights," Justice Powell explained that:

> [I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. *The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give*

> *relevant testimony with respect to criminal conduct*. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 710 (emphasis added).

Justice Powell repeatedly clarified in later opinions that he intended his *Branzburg* concurrence to limit the scope of the majority opinion and require case-by-case balancing. *See Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting) ("I emphasized the limited nature of the *Branzburg* holding in my concurring opinion….[A] fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated."); *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 570 n.3 (1978) (Powell, J., concurring) (noting Justice Powell's *Branzburg* concurrence clarified that "[i]n considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime.").

The court of appeals' decision is the first ever to read *Branzburg* as precluding the assertion of a qualified reporter's privilege to protect confidential sources in criminal prosecutions. All four other federal circuits that have confronted this question directly—the Second, Ninth, Eleventh, and D.C. Circuits—have read *Branzburg* as mandating application of a qualified privilege. *See United States* v. *Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *United States* v. *Cutler*, 6 F.3d 67,

70-71 (2d Cir. 1993); *Farr* v. *Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *United States* v. *Pretzinger*, 542 F.2d 517, 520-21 (9th Cir. 1976); *United States* v. *Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (applying privilege at evidentiary hearing), *cert. denied*, 483 U.S. 1021 (1987); *United States* v. *Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000) (applying privilege to motion to withdraw plea), *cert. denied*, 532 U.S. 924 (2001). Two additional federal circuits—the First and Third—have applied the privilege in criminal prosecutions, even when nonconfidential information is at issue. *See United States* v. *LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (applying privilege to nonconfidential newsgathering material); *United States* v. *Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (applying common law privilege "not to divulge confidential sources and not to disclose unpublished information…in criminal cases"), *cert. denied*, 449 U.S. 1126 (1981). The Fourth Circuit's sweeping holding thus directly conflicts with no less than six other courts of appeal.[14]

In applying a First Amendment reporter's privi-

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[14] The court of appeals' decision also conflicts with no less than six state courts of last resort, all of which have recognized a qualified reporter's privilege under *Branzburg* when confidential source information is requested in a criminal trial. *In re Contempt of Wright*, 700 P.2d 40, 41, 44-45 (Idaho 1985); *State* v. *Sandstrom*, 581 P.2d 812, 814 (Kan. 1978), *cert. denied*, 440 U.S. 929 (1979); *State* v. *Siel*, 444 A.2d 499, 503 (N.H. 1982); *State* v. *St. Peter*, 315 A.2d 254, 271 (Vt. 1974); *Brown* v. *Commonwealth*, 204 S.E.2d 429, 431 (Va.), *cert. denied*, 419 U.S. 966 (1974); *Zelenka* v. *State,* 266 N.W.2d 279, 287 (Wis. 1978); *cf. State ex rel. Charleston Mail Ass'n* v. *Ranson*, 488 S.E.2d 5, 13 (W. Va. 1997) (applying privilege to "unpublished, nonconfidential information requested from a news source" in criminal trial).

lege in criminal trials, these other courts of appeals routinely distinguish between grand jury and criminal trial settings, noting the Court's focus in *Branzburg* on the unique function performed by the grand jury. The D.C., Second, and Ninth Circuits all read *Branzburg* as permitting a qualified reporter's privilege in criminal proceedings, while precluding such protection in grand jury cases. *Compare Farr*, 522 F.2d at 467-68 (applying privilege in criminal trial), *with In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 401-02 (9th Cir. 1993) (finding no privilege in grand jury case and emphasizing that "[*Farr*]—unlike *Branzburg* or the present case—did not involve testimony before a grand jury), *cert denied*, 510 U.S. 1041 (1994); *compare Ahn*, 231 F.3d at 37 (applying privilege in criminal proceeding and describing *Branzburg* as "requiring reporters to testify before grand juries"), *with In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1147 (D.C. Cir. 2006) (no privilege in grand jury case), *cert. denied*, 545 U.S. 1150 (2005); *compare Burke*, 700 F.2d at 77 (applying privilege in criminal trial), *with New York Times Co*. v. *Gonzales*, 459 F.3d 160, 173 (2d Cir. 2006) (in grand jury case, distinguishing cases applying privilege because "[n]one involved a grand jury subpoena" and "*Branzburg* itself involved a grand jury subpoena").

Outside of this case, the Government itself has acknowledged the critical distinction between the grand jury and other contexts as regards the reporter's privilege. In its opposition to the petition for certiorari in *Judith Miller* (a grand jury case), the Government argued that the grand jury context matters: "In applying a reporter's privilege in contexts *other*

than a grand jury investigation, the courts of appeals have distinguished *Branzburg*," because they have "correctly recognize[d] [that]…*Branzburg* turned on the unique and vital role of the grand jury in our criminal justice system." Government Brief in Opp., *Miller* v. *United States*, 545 U.S. 1150 (2005) (No. 04-1507), 2005 WL 1317521, at *26-*27 (emphasis in original). "By distinguishing the grand jury from other legal contexts," the Government argued that "the courts of appeals have consistently, and correctly, followed *Branzburg*'s teaching." *Id.* at *28.

These conflicts are not resolved, as the Government has suggested below,[15] if one reads the court of appeals' decision narrowly, as holding only that reporters have no qualified privilege when they allegedly witness a crime. The lower courts are equally conflicted about whether and how an "eyewitness observation of a crime" bears on application of the reporter's privilege. This is especially true in cases, such as this one, where the alleged crime is the leak itself.[16]

In *Farr*, for example, a journalist was held in contempt for failing to disclose the identity of confidential sources who allegedly committed a crime by disclosing information to the journalist in violation of a court order. 522 F.2d at 466. Citing *Branzburg*, the Ninth Circuit applied a First Amendment reporter's privilege and balanced the competing interests. *Id*.

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[15] *See* Response to Petition for Rehearing En Banc at 9-11, *United States* v. *Sterling*, 732 F.3d 292 (4th Cir. 2013) (No. 11-5028).

[16] In *Branzburg*, the reporters observed crimes such as "synthesizing hashish from marihuana," 408 U.S. at 667, which is qualitatively different than the alleged crime here, which was the communication of newsworthy information.

at 467-68. Similarly, in *Tribune Co.* v. *Huffstetler*, 489 So. 2d 722 (Fla. 1986), a journalist was held in contempt for refusing to disclose the identity of a confidential source who allegedly told the journalist about a state ethics commission complaint in violation of a Florida statute. The Supreme Court of Florida reversed, applying a qualified reporter's privilege under *Branzburg*. *Id*. at 723-24. By contrast, the D.C. Circuit, like the court of appeals here, has refused to apply a reporter's privilege on similar facts. *See Judith Miller*, 438 F.3d at 1146-47 (no privilege in grand jury case when source tells reporters information in violation of law); *cf. Cutler*, 6 F.3d at 73 (privilege overcome when source told reporter information in violation of court order).

The existence and scope of a reporter's privilege in criminal trials is a matter of the highest importance as to which there is ongoing and irreconcilable disagreement in the lower courts that is well worthy of plenary review by this Court.

B. Review is Warranted to Resolve the Circuit Conflict About the Existence and Scope of a Qualified Journalist's Privilege in Criminal Trials Under Federal Common Law

The court of appeals held that, because the Court noted in *Branzburg* in 1972 that "[a]t common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury," 408 U.S. at 685, the court of appeals was precluded from finding a common law privilege in the criminal trial context today. App.33a-38a. But that holding cannot be reconciled with this Court's ruling in *Jaffee*, Fed. R. Evid.

501, and definitive rulings of the Third Circuit. This Court should grant certiorari to resolve the resulting conflict over a federal common law reporter's privilege.

Much has changed since 1972, when this Court decided *Branzburg*. In 1975, Congress enacted the Federal Rules of Evidence, which, rather than enumerate several specific federal privileges, provided that privileges in federal civil and criminal cases would be governed by federal common law as "interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501 (1975).[17] Originally, the proposed Rules of Evidence defined nine specific testimonial privileges and indicated that, absent constitutional mandate, Act of Congress, or revision of the Rules, no other privileges would be recognized. *See* 56 F.R.D. 183, 230-61 (1972) (Proposed Rules 501-513). Congress rejected the rigid framework of the original proposal in favor of Rule 501's flexible mandate. *See Jaffee*, 518 U.S. at 8 n.7.

In interpreting Rule 501, this Court has noted Congress' intent to keep the federal law of privilege fluid. "In rejecting the proposed Rules and enacting Rule 501," the Court has held, "Congress manifested an affirmative intention not to freeze the law of privilege," but rather to "leave the door open to change," and to "continue the evolutionary development of testimonial privileges." *Trammel* v. *United States*, 445 U.S. 40, 47 (1980).

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[17] Rule 501 today provides that "The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court."

The legislative history makes clear that, in approving this flexible approach, Congress expected the federal courts to determine whether a reporter's privilege exists under federal common law. As Congressman Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, stated when presenting the Conference Report to the House, Rule 501 "permits the courts to develop a privilege for newspaperpeople on a case-by-case basis." H.R. Conf. Rep. No. 93-1597 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7110. *See also* 23 Charles A. Wright & Kenneth W. Graham, Federal Practice and Procedure § 5426 (1980 & Supp. 2013) ("The legislative history suggests that Congress expected that Rule 501 would be used to create a privilege for newsmen.").

In *Jaffee*, the Court outlined a framework for recognizing new privileges under Rule 501 in finding a psychotherapist/patient and social worker/client privilege. In so doing, the Court noted that protecting such communications serves important private and public interests. 518 U.S. at 11. The same is true here. As the Third Circuit observed in recognizing a reporter's privilege under Rule 501:

> The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information…to the public.

Riley v. *City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979); *accord Cuthbertson*, 630 F.2d at 146 (common

law privilege applies in criminal cases because of "strong public policy supporting the unfettered communication to the public of information and opinion").

Like the privilege recognized in *Jaffee*, the important interests served by the reporter's privilege also outweigh the likely evidentiary costs because, as Judge Tatel observed in his concurring opinion in *Judith Miller*, without a privilege, sources will be far less likely to make statements to the press that prosecutors and/or litigants will be interested in discovering. 438 F.3d at 1168 (Tatel, J., concurring).

In *Jaffee*, this Court also looked at the fact "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege," 518 U.S. at 12, in determining that a similar privilege should be recognized under Rule 501. Although only 17 states recognized a statutory reporter's privilege in 1972 when this Court decided *Branzburg*, 408 U.S. at 689 n.27, today, forty-nine of the fifty states and the District of Columbia have enacted into law a reporter's privilege. *See* App.106a. 38 states (plus the District of Columbia) have "shield laws,"[18] and of the 12 states

[18] *See* Ala. Code § 12-21-142; Alaska Stat. Ann. §§ 09.25.300-.390; Ariz. Rev. Stat. Ann. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Evid. Code Ann. § 1070; Colo. Rev. Stat. Ann. § 13-90-119; Conn. Gen. Stat. Ann. § 52-146t; Del. Code Ann. tit. 10, §§ 4320-26; D.C. Code Ann. §§ 16-4702-4704; Fla. Stat. Ann. § 90.5015; Ga. Code Ann. § 24-5-508; 735 Ill. Comp. Stat. Ann. 5/8-901 to 8-909; Ind. Code Ann. §§ 34-46-4-1, 34-46-4-2; Kan. Stat. Ann. §§ 60-480-485; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-1459; Me. Rev. Stat. Ann. tit. 16, §61; Md. Code. Ann., Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws Ann.§§ 767.5a, 767A.6; Minn. Stat. Ann. §§ 595.021-.025; Mont. Code Ann. §§ 26-1-902, 26-1-903; Neb. Rev. Stat. Ann. §§ 20-144 to 20-147; Nev. Rev. Stat. Ann. 49.275, 49.385; N.J. Stat. Ann. §§ 2A:84A-21.1 to 21.5; N.M. Stat. Ann. § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.C.

without statutory shield laws, courts in all but one—Wyoming, which has not passed on the issue—have recognized a reporter's privilege in one context or another.[19] Significantly, in 48 states and the District of

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Gen. Stat. Ann. § 8-53.11; N.D. Cent. Code Ann. § 31-01-06.2; Ohio Rev. Code Ann. §§ 2739.04, 2739.12; Okla. Stat. Ann. tit. 12, § 2506; Or. Rev. Stat. Ann. §§ 44.510-.540; 42 Pa. Cons. Stat. Ann. § 5942(a); R.I. Gen. Laws Ann. §§ 9-19.1-1 to 9-19.1-3; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208; Tex. Civ. Prac. & Rem. Code Ann. § 22.022-22.027; Tex. Code Crim. Proc. Ann. art. 38.11; Utah R. Evid. 509; Wash. Rev. Code Ann. § 5.68.010; Wis. Stat. Ann. § 885.14. Hawaii's shield law expired in June 2013—after the court of appeals ruled. *See* 2008 Haw. Sess. Laws, ch. 210, § 3, as amended by Laws 2011, ch. 113, § 2. Under Hawaii common law, however, a privilege still applies. *See* footnote 19 below.

[19] *See Belanger* v. *City and County of Honolulu*, Civ. No. 93-4047-10 (Haw. 1st Cir. Ct. May 4, 1994) (unpublished) (civil); *State* v. *Salsbury*, 924 P.2d 208 (Idaho 1996) (criminal); *In re Contempt of Wright*, 700 P.2d 40 (Idaho 1985) (criminal); *Winegard* v. *Oxberger*, 258 N.W.2d 847 (Iowa 1977) (civil), *cert. denied*, 436 U.S. 905 (1978); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991) (grand jury); *Sinnott* v. *Boston Retirement Board*, 524 N.E.2d 100 (Mass.) (civil), *cert. denied*, 488 U.S. 980 (1988); *Ayash* v. *Dana-Farber Cancer Institute*, 822 N.E.2d 667 (Mass. 2005) (civil); *State ex rel. Classic III, Inc.*, 954 S.W.2d 650 (Mo. Ct. App. 1997) (civil); *State* v. *Siel*, 444 A.2d 499 (N.H. 1982) (criminal); *Opinion of the Justices*, 373 A.2d 644 (N.H. 1977) (civil statutory proceeding); *Hopewell* v. *Midcontinent Broadcasting Corp.*, 538 N.W.2d 780 (S.D. 1995) (civil), *cert. denied*, 519 U.S. 817 (1996); *State* v. *St. Peter*, 315 A.2d 254 (Vt. 1974) (criminal); *Brown* v. *Commonwealth*, 204 S.E.2d 429 (Va.) (criminal), *cert. denied*, 419 U.S. 966 (1974); *Clemente* v. *Clemente*, 56 Va. Cir. 530 (2001) (civil); *Philip Morris Cos.* v. *ABC, Inc.*, 36 Va. Cir. 1 (1995) (civil); *State ex rel. Charleston Mail Ass'n* v. *Ranson*, 488 S.E.2d 5 (W. Va. 1997) (criminal); *State ex rel. Hudok* v. *Henry*, 389 S.E.2d 188 (W. Va. 1989) (civil). In Mississippi, a trial court has concluded that a qualified reporter's privilege applies under the state constitution, *Hawkins* v. *Williams*, No. 29,054 (Miss. Cir. Ct. Hinds Co. Mar. 16, 1983) (unpublished), and trial courts have applied the

Columbia, the privilege applies to the circumstances at issue here—namely, a criminal trial where information is sought about confidential sources.[20]

As the Senate Committee on the Judiciary has recently recognized, "[c]ollectively, these States have recognized that the press plays a legally enshrined role in maintaining an informed citizenry, and Government intrusion upon the media must be balanced against the values inherent in the unfettered operation of the press." S. Rep. No. 113-118, at 4. The near-unanimous consensus regarding a reporter's privilege is greater than that which led the Court to recognize a privilege for licensed social workers in *Jaffee,* 518 U.S. at 17 n.17 (45 states) or to conclude that it violated the Eighth Amendment to impose the death penalty in cases involving the mentally retarded and minors. *Atkins* v. *Virginia*, 536 U.S. 304, 313-15 (2002) (30 states); *Roper* v. *Simmons*, 543 U.S. 551, 564 (2005) (same); *Kennedy* v. *Louisiana*, 554 U.S. 407 (2008) (45 states).

The protection of confidential sources has now even been recognized in countries around the world that typically afford far less protection to journalists than the United States. *See*, *e.g.*, *Goodwin* v. *United Kingdom*, [1996] 22 E.H.R.R. 123, 143 (European Ct. of Human Rights) (Article 10 of the European Convention on Human Rights provides protection against disclosing confidential sources because "[p]rotection of journal-

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privilege in both civil and criminal contexts. *See Pope* v. *Village Apartments, Ltd.*, No. 92-71-436 CV (Miss. 1st Cir. Ct. Jan. 23, 1995) (unpublished) (civil); *Mississippi* v. *Hand*, No. CR89-49-C(T-2) (Miss. 2d Cir. Ct. July 31, 1990) (unpublished) (criminal); *In re Grand Jury Subpoena*, No. 38664 (Miss. 1st Cir. Ct. Oct. 4, 1989) (unpublished) (grand jury).

[20] Hawaii courts have not yet ruled on the existence of the privilege in criminal trials.

istic sources is one of the basic conditions for press freedom"); *Roemen and Schmit* v. *Luxembourg*, Applic. No. 51772/99 (European Ct. of Human Rights 2003) (same); *R*. v. *National Post*, [2004] 236 D.L.R. (4th) 551 (privilege applies in criminal investigations because the "eroding of the ability of the press to perform its role in society cannot be outweighed by the Crown's investigation" and compelling a reporter to "break a promise of confidentiality would do serious harm to the constitutionally entrenched right of the media to gather and disseminate information").[21]

The Department of Justice has itself had to acknowledge the national consensus concerning the need to protect confidential sources on more than one occasion. In 1972, DOJ voluntarily adopted guidelines that require the Government (but not a court) to perform the type of balancing test Risen seeks here before journalists may be subpoenaed. 28 C.F.R. § 50.10. Just this past year, DOJ further strengthened those Guidelines, reaffirming that its "policy is to utilize [subpoenas directed at journalists] only as a last resort, after all reasonable alternative investigative steps have been taken, and when the information sought is essential to a successful investigation or prosecu-

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[21] *See also European Pacific Banking Corp*. v. *Television New Zealand Ltd*., [1994] 3 N.Z.L.R. 43 (Ct. App. Wellington) (New Zealand) (confidential sources protected in all cases); *Oyegbemi* v. *Attorney-General of the Federation & Ors*, [1982] F.N.L.R. 192 (Fed. of Nigeria LR) (Nigeria); *Prosecutor* v. *Brdjanin and Talic*, Case No. IT-99-36-AR73.9 (International Criminal Tribunal for former Yugoslavia 2002) (qualified privilege for war correspondents even for nonconfidential information); Freedom of Press Act, Chapter 3, Article 1 (Sweden); Code of Criminal Procedure, Article 109 (France); Media Act of 1981, Article 31 (Austria); Criminal Procedure Code, Section 53 (Germany).

tion."[22] The Guidelines, which apply equally to civil and criminal cases, further provide that subpoenas to journalists should not issue "to obtain peripheral, non-essential, or speculative information," *id*. at § 50.10(f)(1), and that, absent "exigent circumstances," should be "limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information." *Id*. at § 50.10(f)(4).

Unfortunately, as this case demonstrates, the self-governing regime put into place by the Guidelines provides no recourse to the courts, *id*. at § 50.10(n), and has proven to be totally inadequate, since in this very case DOJ has not claimed—nor could it—that the information sought was "essential" or that "exigent circumstances" existed that would justify a subpoena directly seeking the identity of confidential source(s).

The court of appeals' opinion rejecting the common law privilege cannot be reconciled with *Jaffee*. By taking *Branzburg*'s characterization of historical common law as foreclosing any privilege under Rule 501, the majority ignored this Court's admonition that Rule 501 "did not freeze the law governing privileges at a particular point in history, but rather directed courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee*, 518 U.S. at 2. And by concluding that only this Court or Congress could appropriately consider whether a reporter's privilege should be recognized, (App.46a), the majority rejected Congress' express instruction embodied in Rule 501 that it is the

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[22] DOJ Report on Review of News Media Policies (July 12, 2013), *available at* http://www.justice.gov/iso/opa/resources/2202013712162851796893.pdf, at 1.

duty of the federal courts to develop testimonial privileges on the basis of "reason and experience." Finally, the court of appeals' claim that a consensus of 48 states plus the District of Columbia should be discarded because "there is still no 'uniform judgment of the States' on the issue of a reporter's privilege," (App.44a), fails to take seriously this Court's holding in *Jaffee* that the "policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." *Jaffee*, 518 U.S. at 12-13.

The court of appeals' opinion also adds to the growing morass in the lower courts concerning the existence and scope of a reporter's privilege under federal common law. The Fourth Circuit (with the Ninth)[23] is now in direct conflict with the Third Circuit, which has recognized a qualified reporter's privilege under federal common law in both civil and criminal proceedings. *See Riley*, 612 F.2d at 715 (civil cases); *Cuthbertson*, 630 F.2d at 146 (criminal trials).

Exacerbating the confusion, the Second and D.C. Circuits have failed even to decide whether a common law reporter's privilege exists when directly presented with the issue because they cannot reach a consensus on what *Branzburg*, *Jaffee*, and Rule 501 require. In *Judith Miller*, the court was so divided it issued three separate opinions on the subject.[24] In the Second Circuit, a district court held in a grand jury case that a

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[23] *See In re Grand Jury Proceedings*, 5 F.3d at 402-03 (rejecting Third Circuit precedent in a grand jury case).

[24] *See* 438 F.3d at 1154 (Sentelle, J., concurring) (no common law privilege); *id*. at 1159 (Henderson, J., concurring) (court should not rule on common law privilege); *id*. at 1166 (Tatel, J., concurring) (finding common law privilege).

federal common law privilege exists,[25] but a divided Second Circuit reversed, declining to decide the issue because, if such a privilege existed, it had been overcome.[26]

The reasoning in the opinions that come to conclusion on the issue falls into two sharply conflicting camps. Those who reject the common law privilege have, like the court of appeals, concluded that such a finding is foreclosed by *Branzburg* and that, even if it were not, *Jaffee* and Rule 501 afford no such privilege.[27] Those who recognize the common law privilege have concluded exactly the opposite: that *Branzburg* left the door open for a finding of common law privilege and that *Jaffee* and/or Rule 501 support such a finding.[28]

This Court has yet to consider whether a reporter's privilege should be recognized under Rule 501. Given the increasing confusion on this issue in the lower courts, this case presents a timely opportunity to resolve this important question.

C. This Case is an Appropriate Vehicle for Exercise of this Court's Certiorari Jurisdiction

The Government has conceded below that the issues raised in this petition present a "substantial question" but argued that granting certiorari would

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[25] *New York Times Co.* v. *Gonzales*, 382 F. Supp. 2d 457, 508 (S.D.N.Y. 2005).

[26] *Gonzales*, 459 F.3d at 163; *id.* at 181 (Sack, J., dissenting) (finding common law privilege had not been overcome).

[27] App.33a-46a; *Judith Miller*, 438 F.3d at 1154-56 (Sentelle, J., concurring).

[28] *Cuthbertson*, 630 F.2d at 146-47; App.104a-108a; *Judith Miller*, 438 F.3d at 1171 (Tatel, J., concurring); *Gonzales*, 459 F.3d at 181 (Sack, J., dissenting).

be inappropriate "in light of the panel's factual determination that the government's law-enforcement interests would overcome [the qualified reporter's] privilege in the circumstances of this case." Response to Intervenor's Motion to Stay the Mandate at 2, *United States* v. *Sterling*, No. 11-5028 (4th Cir. Nov. 6, 2013). This argument rests on the court of appeals' findings, in dicta, that the Government had "met all three prongs" of the *LaRouche* test and that Risen had "waived any privilege" by his alleged disclosure of his source to a third party. App.46a, 54a. But this case *is* an appropriate vehicle for deciding these issues, notwithstanding the court of appeals' dicta.

First, as Judge Gregory noted, the panel majority's dicta applying the *LaRouche* test failed to apply the "deferential abuse-of-discretion standard" required in such cases under well-established law. App.80a (citing *Church of Scientology International* v. *Daniels*, 992 F.2d 1329, 1334 (4th Cir. 1993)); *see also LaRouche*, 780 F.2d at 1139; *Ashcraft* v. *Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000). The court of appeals' dicta was based on a *de novo* review of the evidence. *See* App.46a ("[I]f we were to…apply the three-part *LaRouche* test to the inquiry, as the district court did, we would still reverse."). It is at best unclear, then, if Risen would prevail if this Court were to recognize a qualified reporter's privilege.

In any event, the court of appeals' dicta merely begs the question at issue in this case. This petition puts both the existence and scope of the reporter's privilege before this Court. The splits of authority outlined above reflect disagreement in the lower courts about both subjects, and certiorari should be

granted to provide much-needed clarity from this Court on both issues.

Finally, the court of appeals was wrong to conclude that the balancing favors the Government. The Government provided the court with *no* information about its planned evidence at trial and failed to meet its burden of demonstrating that any qualified privilege had been overcome. As the district court concluded, the Government's circumstantial evidence, which is summarized above on pp. 7-8, showed that "very few people had access to the information in Chapter 9, and Sterling was the only one of those people who could have been Risen's source." App.218a. As Judge Gregory put it, "[a]n analysis of the circumstantial evidence shows the Government's case is not as weak as it or the majority claims," demonstrating that the information sought is indeed "available by other means." App.93a. Under the circumstances, Risen's testimony "implicates confidential source relationships without a legitimate need of law enforcement." 408 U.S. at 710 (Powell, J., concurring).

The court of appeals' response to this evidence is to suggest that Risen's testimony is essential because it is the only *direct* evidence of the alleged crime. App.48a. But if, as the court of appeals suggests, no circumstantial evidence can *ever* be as probative as a reporter's direct testimony about the identity of a leaker (*id.*), then, in leak cases, there will be no balancing at all; the reporter's testimony will *always* be "essential" and there will be no need to exhaust reasonable alternatives because there will be none. Such a balancing test would provide no protection to reporters in leak cases, regardless of the importance of the information report-

ed. *See Judith Miller*, 438 F.3d at 1175 (Tatel, J., concurring) (concluding that, to avoid such an outcome, in leak cases, "the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value"); *Gonzales*, 459 F.3d at 186 (Sack, J., dissenting) (same). In any event, as Judge Gregory correctly noted, even if "circumstantial evidence is not always as effective as direct evidence…in *this* case the circumstantial evidence proffered by the Government appears *strong enough* for the jury to draw a conclusion regarding the identity of Risen's source." App.98a n.8 (emphasis in original).

The Government has also suggested that review is not warranted here because of dicta from the court of appeals suggesting that Risen waived any privilege he may have had. Response to Petition for Rehearing En Banc at 5; *see also* App.54a. But the waiver issue is a red herring. The Government did not even raise the waiver issue below—and with good reason. After the district court issued its August 29, 2008 Order finding a limited waiver of the privilege (S-App.18-19), Risen submitted two uncontradicted affidavits that unequivocally demonstrated that any conversations between Risen and the third party were not a waiver because they were made in strict confidence and in furtherance of Risen's investigatory reporting. *See* S-App.58-64. The Government then abandoned the waiver argument, which was never even raised in connection with the trial subpoena at issue here. *See* JA124-51. The court of appeals' dicta fails even to address the affidavits submitted by Risen. App.54a. It is erroneous and does not present a sufficient basis for this Court to defer ruling on the fundamental, pressing questions

raised by this case about the role of the press in a democratic society under the Constitution and common law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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