

No. 11-5028

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JEFFREY ALEXANDER STERLING,

Defendant-Appellee,

and

JAMES RISEN,

Intervenor-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia

Brief of ABC, Inc., Advance Publications, Inc., ALM Media, LLC, The Associated Press, Bloomberg L.P., Cable News Network, Inc., CBS Corporation, Cox Media Group, Inc., Daily News, L.P., Dow Jones & Company, Inc., The E.W. Scripps Company, First Amendment Coalition, Fox News Network, L.L.C., Gannett Co., Inc., The Hearst Corporation, The McClatchy Company, National Association of Broadcasters, National Public Radio, Inc., NBCUniversal Media, LLC, The New York Times Company, Newspaper Association of America, The Newsweek/Daily Beast Company LLC, Radio Television Digital News Association, Reporters Committee for Freedom of the Press, Reuters America LLC, Time Inc., Tribune Company, The Washington Post and WNET as Amici Curiae in Support of Intervenor-Appellee James Risen and in Support of Affirmance of Decision Below

LEE LEVINE

JEANETTE MELENDEZ BEAD

LEVINE SULLIVAN KOCH & SCHULZ, LLP

1050 Seventeenth Street, NW, Suite 800

Washington, DC 20036

(202) 508-1100

Counsel for Amici Curiae

[Additional counsel listed inside]

Additional amici counsel:

JOHN W. ZUCKER
INDIRA SATYENDRA
ABC, INC.
77 West 66th Street
New York, NY 10023
Counsel for ABC, Inc.

RICHARD A. BERNSTEIN
SABIN, BERMANT & GOULD LLP
Four Times Square, 23rd Floor
New York, NY 10036
*Counsel for Advance Publications,
Inc.*

ALLISON C. HOFFMAN
FABIO B. BERTONI
ALM MEDIA, LLC
120 Broadway, 5th Floor
New York, NY 10271
Counsel for ALM Media, LLC

KAREN KAISER
THE ASSOCIATED PRESS
450 West 33rd St.
New York, NY 10001
Counsel for The Associated Press

CHARLES J. GLASSER, JR.
BLOOMBERG L.P.
731 Lexington Avenue
New York, NY 10022
Counsel for Bloomberg L.P.

DAVID C. VIGILANTE
JOHNITA P. DUE
CABLE NEWS NETWORK, INC.
One CNN Center
Atlanta, GA 30303
Counsel for Cable News Network, Inc.

ANTHONY M. BONGIORNO
CBS CORPORATION
51 West 52nd Street
New York, NY 10019
Counsel for CBS Corporation

LANCE LOVELL
COX MEDIA GROUP, INC.
6205 Peachtree Dunwoody Road
Atlanta, GA 30328
Counsel for Cox Media Group, Inc.

ANNE B. CARROLL
DAILY NEWS, L.P.
450 W. 33rd St., 3rd Floor
New York, NY 10001
Counsel for Daily News, L.P.

MARK H. JACKSON
JASON P. CONTI
GAIL C. GOVE
DOW JONES & COMPANY, INC.
One World Financial Center
200 Liberty Street
New York, NY 10036
*Counsel for Dow Jones & Company,
Inc.*

DAVID M. GILES
THE E.W. SCRIPPS COMPANY
312 Walnut Street, Suite 2800
Cincinnati, OH 45202
*Counsel for The E.W. Scripps
Company*

PETER SCHEER
FIRST AMENDMENT COALITION
534 4th Street, Suite B
San Rafael, CA 94901
*Counsel for First Amendment
Coalition*

DIANNE BRANDI
CHRISTOPHER SILVESTRI
FOX NEWS NETWORK, L.L.C.
1211 Avenue of the Americas
2nd Floor
New York, NY 10036
*Counsel for Fox News Network,
L.L.C.*

BARBARA W. WALL
GANNETT CO., INC.
7950 Jones Branch Drive
McLean, VA 22107
Counsel for Gannett Co., Inc.

EVE BURTON
JONATHAN DONNELLAN
THE HEARST CORPORATION
300 West 57th Street
New York, NY 10019
Counsel for The Hearst Corporation

KAROLE MORGAN-PRAGER
STEPHEN J. BURNS
THE MCCLATCHY COMPANY
2100 Q Street
Sacramento, CA 95816
Counsel for The McClatchy Company

JANE E. MAGO
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, NW
Washington, DC 20036
*Counsel for National Association of
Broadcasters*

DENISE LEARY
ASHLEY MESSENGER
NATIONAL PUBLIC RADIO, INC.
635 Massachusetts Ave., NW
Washington, DC 20001
*Counsel for National Public Radio,
Inc.*

SUSAN E. WEINER
NBCUNIVERSAL MEDIA, LLC
30 Rockefeller Plaza
New York, NY 10112
*Counsel for NBCUniversal Media,
LLC*

GEORGE FREEMAN
THE NEW YORK TIMES COMPANY
620 Eighth Ave., 18th Floor
New York, NY 10018
*Counsel for The New York Times
Company*

KURT WIMMER
COVINGTON & BURLING, LP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
*Counsel for Newspaper Association of
America*

RANDY L. SHAPIRO
THE NEWSWEEK/DAILY BEAST
COMPANY LLC
251 West 57th Street
New York, NY 10019
*Counsel for The Newsweek/Daily
Beast Company LLC*

KATHLEEN A. KIRBY
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006
*Counsel for Radio Television Digital
News Association*

LUCY A. DALGLISH
GREGG P. LESLIE
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1101 Wilson Boulevard
Suite 1100
Arlington, VA 22209
*Counsel for Reporters Committee for
Freedom of the Press*

SHMUEL R. BULKA
REUTERS AMERICA LLC
3 Times Square, 20th Floor
New York, NY 10036
Counsel for Reuters America LLC

ANDREW B. LACHOW
TIME INC.
1271 Avenue of the Americas
New York, NY 10020
Counsel for Time Inc.

DAVID S. BRALOW
KAREN H. FLAX
KARLENE W. GOLLER
TRIBUNE COMPANY
435 North Michigan Avenue
Chicago, IL 60611
Counsel for Tribune Company

ERIC N. LIEBERMAN
JAMES A. McLAUGHLIN
THE WASHINGTON POST
1150 15th Street, NW
Washington, DC 20071
Counsel for The Washington Post

ROBERT A. FEINBERG
WNET
825 8th Avenue
New York, NY 10019
Counsel for WNET

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
IDENTITIES AND INTEREST OF <i>AMICI CURIAE</i>	1
SOURCE OF AUTHORITY TO FILE	1
FED. R. APP. P. 29(C)(5) STATEMENT.....	1
ARGUMENT	2
I. NO CIRCUIT HAS EVER ENDORSED THE GOVERNMENT’S CONTENTION THAT THE REPORTER’S PRIVILEGE DOES NOT PROTECT AGAINST THE COMPELLED DISCLOSURE OF CONFIDENTIAL SOURCES IN CRIMINAL TRIALS IN FEDERAL COURTS.....	2
II. THE GOVERNMENT’S POSITION IS FUNDAMENTALLY FLAWED IN OTHER MATERIAL RESPECTS.....	14
III. PROTECTING CONFIDENTIAL SOURCES IS VITAL TO ENSURING THE FREE FLOW OF INFORMATION TO THE PUBLIC.....	23
CONCLUSION.....	28

TABLE OF AUTHORITIES

CASES

<i>Ashcraft v. Conoco</i> , 218 F.3d 282 (4th Cir. 2000)	<i>passim</i>
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972).....	<i>passim</i>
<i>Bruno & Stillman, Inc. v. Globe Newspaper Co.</i> , 633 F.2d 583 (1st Cir. 1980).....	10, 15
<i>Carey v. Hume</i> , 492 F.2d 631 (D.C. Cir. 1974).....	15
<i>Church of Scientology International v. Daniels</i> , 992 F.2d 1329 (4th Cir. 1993)	20
<i>Coughlin v. Westinghouse Broadcasting & Cable Inc.</i> , 780 F.2d 340 (3d Cir. 1985)	15
<i>Farr v. Pitchess</i> , 522 F.2d 464 (9th Cir. 1975)	5, 6, 8, 13
<i>In re Grand Jury Proceedings</i> , 810 F.2d 580 (6th Cir. 1987)	5
<i>In re Grand Jury Proceedings (Scarce)</i> , 5 F.3d 397 (9th Cir. 1993)	12
<i>In re Grand Jury Subpoena, Judith Miller</i> , 438 F.3d 1141 (D.C. Cir. 2006).....	<i>passim</i>
<i>Jaffee v. Redmond</i> , 518 U.S. 1 (1996).....	17, 18, 19
<i>Landmark Communications, Inc. v. Virginia</i> , 435 U.S. 829 (1978).....	22
<i>LaRouche v. NBC</i> , 780 F.2d 1134 (4th Cir. 1986)	3, 15, 20

McIntyre v. Ohio Elections Commission,
 514 U.S. 334 (1995).....28

McKevitt v. Pallasch,
 339 F.3d 530 (7th Cir. 2003)11, 12, 18

In re National Security Telecommunication Records Litigation,
 700 F. Supp. 2d 1182 (N.D. Cal. 2010).....26

New York Times Co. v. Gonzales,
 382 F. Supp. 2d 457 (S.D.N.Y. 2005)20

New York Times Co. v. Gonzales,
 459 F.3d 160 (2d Cir. 2006)12, 18, 20

New York Times Co. v. United States,
 403 U.S. 713 (1971).....24

In re Petroleum Products Antitrust Litigation,
 680 F.2d 5 (2d Cir. 1982)15

Richmond Newspapers, Inc. v. Virginia,
 488 U.S. 555 (1980).....7

Riley v. City of Chester,
 612 F.2d 708 (3d Cir. 1979)17, 20

Saxbe v. Washington Post Co.,
 417 U.S. 843 (1974)..... 15-16

In re Shain,
 978 F.2d 850 (4th Cir. 1992)4, 14

Shoen v. Shoen,
 48 F.3d 412 (9th Cir. 1995)10

In re Special Proceedings,
 373 F.3d 37 (1st Cir. 2004).....12, 13

United States v. Ahn,
 231 F.3d 26 (D.C. Cir. 2000).....9, 10

United States v. Burke,
 700 F.2d 70 (2d Cir. 1983)8, 9

United States v. Caporale,
 806 F.2d 1487 (11th Cir. 1986)9

United States v. Criden,
 633 F.2d 346 (3d Cir. 1980)7, 8, 13, 15

United States v. Cuthbertson,
 630 F.2d 139 (3d Cir. 1980)6, 7, 8, 10

United States v. Cutler,
 6 F.3d 67 (2d Cir. 1993)9

United States v. LaRouche Campaign,
 841 F.2d 1176 (1st Cir. 1988).....10

United States v. Libby,
 432 F. Supp. 2d 26 (D.D.C. 2006)..... 9-10

United States v. McHan,
 386 F.3d 620 (4th Cir. 2004)16

United States v. Smith,
 135 F.3d 963 (5th Cir. 1998)11, 12

United States v. Smith,
 395 F.3d 516 (4th Cir. 2005)16

United States v. Steelhammer,
 539 F.2d 373 (4th Cir. 1976)3, 18

United States v. Sterling,
 ---F. Supp. 2d---, 2011 WL 4852226 (E.D. Va. July 29, 2011).....3, 4, 21

United States v. Treacy,
 639 F.3d 32 (2d Cir. 2011)8

Zurcher v. Stanford Daily,
 436 U.S. 547 (1978).....16

STATUTES, EXECUTIVE ORDERS AND RULES

Detainee Treatment Act of 2005, Pub. L. No. 109-148 § 1001-1006,
 119 Stat. 268027

Executive Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009).....27

50 U.S.C. §§ 1801-71.....26

Fed. R. App. P. 29 1

Fed. R. Evid. 50117, 18

OTHER AUTHORITIES

Henry Cohen, *Journalists’ Privilege To Withhold Information In
 Judicial And Other Proceedings: State Shield Statutes* (Cong.
 Research Serv. 2007)..... 19

James C. Goodale, et al., *Reporters Privilege, Communications Law
 in the Digital Age* 239 (Practicing Law Institute 2011) 19

Erin N. Griswold, *Secrets Not Worth Keeping; The Courts and
 Classified Information*, Wash. Post, Feb. 15, 1989, at A2524

Seymour M. Hersh, *Torture at Abu Ghraib*, The New Yorker, May
 10, 2004, at 4225

Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites ’77 Post
 Articles*, Wash. Post, Oct. 23, 1984, at A1225

Walter Pincus, *Carter Is Weighing Radiation Warhead*, Wash. Post,
 June 7, 1977, at A525

Walter Pincus, *Pentagon Wanted Secrecy On Neutron Bomb
 Production; Pentagon Hoped To Keep Neutron Bomb A Secret*,
 Wash. Post, June 25, 1977, at A125

Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash.
 Post, Nov. 2, 2005, at A126

Todd Richissin, *Soldiers’ Warnings Ignored*, Balt. Sun, May 9, 2004,
 at A126

James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, N.Y.
 Times, Aug. 6, 2007, at A126

James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without
 Courts*, N.Y. Times, Dec. 16, 2005, at A126

Andy Rosenblatt, *No Proof Found in Juror-Bribery Probe, FBI Says*,
Miami Herald, April 13, 1983, at 4D9

Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement
of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, at A1 26-27

Sanford J. Ungar, *Federal Conduct Cited As Offending ‘Sense of
Justice’; Charges Dismissed in ‘Papers’ Trial*, Wash. Post,
May 12, 1973, at A124

IDENTITIES AND INTEREST OF *AMICI CURIAE*

Amici curiae are media entities and non-profit associations representing professional journalists and media entities, each of which is described more fully in the Addendum. All *amici* are engaged in or support the dissemination of news and information to the public, at times through the use of confidential sources. *Amici* are concerned that if this Court adopts the Government's unprecedented position—that journalists do not possess a qualified privilege that protects them against the compelled disclosure of confidential sources in criminal trials—their ability to report on matters of substantial public concern will be significantly impaired. Accordingly, *amici* urge this Court to affirm the decision below.

SOURCE OF AUTHORITY TO FILE

All parties have consented to the filing of this brief as contemplated by Fed. R. App. P. 29(a).

FED. R. APP. P. 29(C)(5) STATEMENT

Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party's counsel authored this brief; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici*, their members or their counsel—contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

I. **NO CIRCUIT HAS EVER ENDORSED THE GOVERNMENT’S CONTENTION THAT THE REPORTER’S PRIVILEGE DOES NOT PROTECT AGAINST THE COMPELLED DISCLOSURE OF CONFIDENTIAL SOURCES IN CRIMINAL TRIALS IN FEDERAL COURTS.**

The Government’s submission to this Court is premised on its contention that “this and other courts of appeals have repeatedly . . . refused ‘to grant newsmen a testimonial privilege’” to protect their confidential sources “in criminal cases so long as the proceedings are brought in good faith.” Gov’t Br. at 26 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972)). This representation is simply incorrect—as *amici* demonstrate below, *every* federal circuit to consider the question, including this one, has recognized such a privilege and *no* circuit has held otherwise. Simply put, outside the grand jury context, the federal appellate courts that have considered the matter have uniformly applied a qualified reporter’s privilege, grounded in the First Amendment and/or federal common law, that protects journalists from the compelled disclosure of their confidential sources in the context of adversarial criminal proceedings.

If this Court were to adopt the rule urged by the Government—that there is no such protection in the absence of a showing of governmental bad faith—it would not only be obliged to reject its own precedent, but it would stand as the *only* federal court of appeals to so hold. As the district court correctly explained:

[T]he Fourth Circuit recognizes a qualified First Amendment reporter's privilege that may be invoked when a subpoena either seeks information about confidential sources *or* is issued to harass or intimidate the journalist.

United States v. Sterling, --- F. Supp. 2d ---, 2011 WL 4852226, at *5 (E.D. Va. July 29, 2011) (emphasis added). This Court first recognized such a privilege in *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976) (Winter, J., dissenting), *adopted en banc*, 561 F.2d 539, 540 (4th Cir. 1977), a civil contempt proceeding. Thereafter, in *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986), a civil defamation action, the Court established a three-part balancing test to determine when the qualified privilege must yield in a given case.¹ And, in *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000), the Court emphasized that, if reporters were routinely compelled to disclose 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.”

This Court has expressly recognized that these same considerations are at play, and the same privilege applies, when a litigant in an adversarial criminal proceeding seeks to compel a journalist to reveal the identity of a confidential

¹ The balancing test articulated in *LaRouche* requires courts to consider (1) whether the source identity at issue is relevant; (2) whether it is obtainable by other means; and (3) whether there is a compelling interest in its compelled disclosure. *LaRouche*, 780 F.2d at 1139.

source. In *In re Shain*, 978 F.2d 850 (4th Cir. 1992), the Court affirmed the denial of motions to quash brought by four reporters, each of whom had conducted an on-the-record interview with the defendant before he was indicted. The reporters enjoyed no privilege to decline to testify about the content of their interviews, not – as the Government would have it – because they were subpoenaed to do so in the context of a criminal trial, but because “the absence of confidentiality or vindictiveness in the facts of this case fatally undermine[d] the[ir] claim to a First Amendment privilege.” *Id.* at 853. As the district court correctly observed here, “the only proper reading of *In re Shain* is that in criminal cases, as in civil actions, the *LaRouche* test is triggered by either an agreement to keep sources confidential or evidence of harassment.” *Sterling*, 2011 WL 4852226, at *7.

Neither this Court’s analysis in *Shain*, nor the district court’s description of it in this case, is in any sense remarkable. It is in accord with the precedent of every other circuit to consider the issue and in conflict with not a single decision of any other federal appellate court. In all, eight of the eleven other federal circuits have also considered whether there is a qualified privilege available to journalists in the context of an adversarial criminal proceeding. Four of them (the Second, Ninth, Eleventh and District of Columbia Circuits) have determined that the privilege protects the kind of confidential source information at issue here. Two others (the First and Third) have *extended* the protection afforded in the context of

a criminal trial *beyond* the identities of confidential sources to include non-confidential, albeit unpublished journalistic work product as well. The two remaining circuits (the Fifth and Seventh) have declined only to recognize a privilege protecting *non-confidential* information in the context of contested criminal proceedings, and have both expressly recognized that very different considerations would govern the resolution of the issue before this Court – *i.e.*, protection against the compelled disclosure of the identities of confidential sources.²

This body of precedent is neither ambiguous nor equivocal. In *Farr v. Pitchess*, 522 F.2d 464, 466 (9th Cir. 1975), for example, the Ninth Circuit first considered “the extent of protection afforded by the First Amendment ‘free press’ provision to a newspaper reporter who resists judicially ordered disclosure of his news sources” in connection with a criminal trial. There, a reporter was jailed after being adjudged in contempt for failing to disclose the identities of his confidential sources. The court squarely rejected the contention that the Supreme Court’s decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), foreclosed application of

² Neither the Eighth nor the Tenth Circuits has addressed the applicability of the privilege in criminal cases. The Sixth Circuit has only considered the reporter’s privilege in the context of a grand jury proceeding. *See In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987) (refusing to recognize privilege in context of grand jury proceedings).

such a privilege to protect a journalist's confidential sources in the context of a criminal trial:

The precise holding of *Branzburg* subordinated the right of the newsmen to keep secret a source of information in face of the more compelling requirement that a grand jury be able to secure factual data relating to its investigation of serious criminal conduct.

The application of the *Branzburg* holding to non-grand jury cases seems to require that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest.

Farr, 522 F.2d at 467-68. In the case before it, the court concluded that the district court had properly struck the appropriate balance and affirmed the district court's order. *Id.* at 469. There can be no question, however, that the Ninth Circuit both held that the journalist was presumptively protected by a qualified "First Amendment privilege" and that the court was therefore "require[d]" to strike the appropriate balance. *Id.* at 468-69.

Similarly, in *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), the Third Circuit held unequivocally that "journalists possess a qualified privilege not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases." Recognizing the same overarching interest supporting "the unfettered communication to the public of information and opinion" articulated by this Court in *Ashcraft*, the Third Circuit grounded the qualified privilege in federal common law. *Id.* at 146. Regardless of its source,

however, the court emphasized that the privilege is presumptively available in *all* cases outside the grand jury context, both criminal and civil, and regardless of the countervailing interest asserted. Even in a criminal case like the one before the court in *Cuthbertson*, where the trial subpoena at issue was served not, as here, by the Government, but by a criminal defendant asserting his own constitutional right to a fair trial, the Third Circuit concluded that the qualified privilege must be applied according to its terms: “[R]ather than affecting the existence of the qualified privilege, we think that these rights are important factors that must be considered in deciding whether, in the circumstances of an individual case, the privilege must yield to the defendant’s need for the information.” *Id.* at 147.

The Third Circuit again applied the qualified privilege in the context of a criminal trial in *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980). There, the Court reaffirmed its holding in *Cuthbertson*, explaining that the privilege is not justified because of “the journalist’s role as a private citizen employed by a private enterprise, but because reporters are viewed ‘as surrogates for the public.’” *Id.* at 355 (quoting *Richmond Newspapers, Inc. v. Virginia*, 488 U.S. 555 (1980)). In that capacity, the journalist serves the public’s interest when she invokes the privilege to protect sources who risk retribution by disclosing unlawful or otherwise improper practices within an industry or agency of government:

These extremely impressive pragmatic reasons, as well as conceptually abstract a priori principles, underlie the precept that a

journalist does in fact possess a privilege that is deeply rooted in the first amendment. When no countervailing constitutional concerns are at stake, it can be said that the privilege is absolute; when constitutional precepts collide, the absolute gives way to the qualified and a balancing process comes into play to determine its limits.

Id. at 356.

Following the decisions in *Farr*, *Cuthbertson* and *Criden*, the Second Circuit also recognized the qualified privilege in criminal cases in *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983). In so doing, the court explained:

We see no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence. To be sure, a criminal defendant has more at stake than a civil litigant and the evidentiary needs of a criminal defendant may weigh more heavily in the balance. Nevertheless, the standard of review should remain the same. Indeed, the important social interests in the free flow of information that are protected by the reporter's qualified privilege are particularly compelling in criminal cases.

Id. at 77. Just last year, the Second Circuit reaffirmed that, when a party in a criminal case seeks to compel a journalist to disclose *confidential sources or information*, the journalist is "entitled to invoke the stronger privilege that protects confidential materials," which requires a "clear and specific showing" that the material is highly material and relevant; is necessary and critical to the maintenance of the claim; and is not obtainable from other sources. *United States v. Treacy*, 639 F.3d 32, 42 (2d Cir. 2011) (citation omitted).

In the face of this consistent body of precedent, the D.C. and Eleventh Circuits proceeded to follow it as well in *United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000), and *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986), respectively. In *Ahn*, where a convicted criminal defendant sought disclosure of the identities of confidential sources on which several television reporters relied to write about the defendant's case, the D.C. Circuit affirmed the trial judge's determination that the defendant had failed to demonstrate that "the reporters' qualified privilege should be overcome," holding the defendant had "failed to carry his burden" of demonstrating that the reporter's testimony was "essential and crucial" to his case. 231 F.3d at 37.³ In *Caporale*, the Eleventh Circuit held that the trial court had correctly determined that the criminal defendants there had failed to proffer sufficient facts to overcome the privilege. 806 F.2d at 1504.⁴

³ Although one district court sitting in the D.C. Circuit has asserted that the court of appeals did not embrace the privilege in *Ahn*, see *United States v. Libby*, 432 F. Supp. 2d 26, 45 (D.D.C. 2006), that contention cannot reasonably be squared with the language of the court's opinion in *Ahn* itself.

⁴ Although the subject matter of the subpoenas at issue in *Caporale* is not expressly identified, the court noted that the defendants there sought "information on the source of the jury tampering matter" and upheld the assertion of privilege on the ground that other witnesses already had testified "as to the origination of the rumor." 806 F.2d at 1503-04. In addition, the article about which the reporter was subpoenaed to testify was based on information obtained from confidential sources. See Andy Rosenblatt, *No Proof Found in Juror-Bribery Probe, FBI Says*, Miami Herald, Apr. 13, 1983, at 4D.

Moreover, like the Third Circuit in *Cuthbertson*, the First Circuit has held that the law protects journalists from the compelled disclosure of even *non-confidential information* in criminal proceedings. See *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988) (weighing television network’s First Amendment interest in non-disclosure of non-confidential information against defendants’ fair trial rights).⁵ Although the First Circuit has not had an opportunity to address the scope of that protection in the face of an attempt to compel disclosure of the identity of a confidential source, there can be no serious contention that the *broader* holding in *LaRouche Campaign* would yield a different result in that context. See *id.* at 1181 (“[w]hen there is no confidential source or information at stake, the identification of First Amendment interests is a more elusive task”); see also *Shoen v. Shoen*, 48 F.3d 412, 419 (9th Cir. 1995) (“the absence of confidentiality may be considered in the balancing of competing interests as a factor that diminishes both the journalist’s and the public’s interest in nondisclosure”).

Indeed, the heightened journalistic and First Amendment interest in

⁵ The First Circuit has elsewhere asserted that “[w]hether or not the process of taking First Amendment concerns into consideration can be said to represent recognition by the Court of a ‘conditional’ or ‘limited’ privilege is . . . largely a question of semantics.” *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595 (1st Cir. 1980). Nevertheless, courts in the First Circuit are obliged, in each case, to “balance the potential harm to the free flow of information that might result” from compelled disclosure “against the asserted need for the requested information.” *Id.* at 595-96.

protecting against the compelled disclosure of confidential information was not at issue when the Fifth and Seventh Circuits declined to recognize a qualified privilege in criminal cases that extends to unpublished but non-confidential journalistic work product, as opposed to the identities of confidential sources. *See McKevitt v. Pallasch*, 339 F.3d 530, 531-32 (7th Cir. 2003); *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998). In *McKevitt*, for example, journalists appealed a district court's order compelling them to produce to a defendant in a foreign criminal prosecution non-confidential recordings of interviews they had conducted with the prosecution's key witness. Declining to recognize the asserted privilege, the court explained that, where the journalist's source is *not* confidential and, indeed, "*wants* the information disclosed," the interest in non-disclosure is greatly reduced. 339 F.3d at 533. *See id.* (indicating analysis would be different "[w]hen the information in the reporter's possession" comes "from a confidential source"). Similarly, in *Smith*, the Fifth Circuit reversed a trial court decision quashing subpoenas seeking untelevised portions of an interview with an arson defendant, holding only that "news reporters enjoy no qualified privilege not to disclose non-confidential information in criminal cases." 135 F.3d at 972. Like the Seventh Circuit in *McKevitt*, the Fifth Circuit emphasized both that the case did not present any question regarding confidentiality and that, in its view, "the existence of a confidential relationship that the law should foster is critical to the establishment of

a privilege.” *Id.*

In the face of this consistent body of precedent, it is not surprising that the authorities relied upon by the Government, *see* Gov’t Br. at 27, do not arise in the context of a criminal trial, but in the distinct context of the grand jury, the *sui generis* species of non-adversarial criminal proceeding that was before the Supreme Court in *Branzburg*. *See, e.g., New York Times Co. v. Gonzales*, 459 F.3d 160, 172-73 (2d Cir. 2006) (rejecting assertion of privilege in grand jury context where journalists had observed criminal conduct, but declining to revisit earlier Second Circuit cases recognizing the privilege because “none involved a grand jury subpoena”); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1149 (D.C. Cir. 2006) (“*Miller*”) (declining to apply the privilege to a grand jury subpoena because “there is no factual difference between *Branzburg* and the present case”); *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 401-02 (9th Cir. 1993) (finding no privilege in the grand jury context); *see also In re Special Proceedings*, 373 F.3d 37, 47 (1st Cir. 2004) (holding that the privilege did not apply in the context of an investigation by a special prosecutor where “[w]hat the special prosecutor is currently doing is sufficiently like what a grand jury would do”).⁶

⁶ Even in that case, however, the First Circuit has emphasized that the “three leading cases in this circuit require ‘heightened sensitivity’ to First Amendment concerns and invite a ‘balancing’ of considerations (at least in situations distinct

These cases represent no more than the logical application of the distinction between grand jury and other criminal proceedings first drawn by the Ninth Circuit in *Farr* – *i.e.*, that “[t]he precise holding of *Branzburg* subordinated the right of the newsmen to keep secret a source of information in face of the more compelling requirement that a grand jury be able to secure factual data relating to its investigation of serious criminal conduct.” 522 F.2d at 468-69. As the Third Circuit has explained, however, and as *every* other circuit to consider the issue outside the grand jury context has recognized thereafter, “the communications media not only serve as the vehicle that widely disperses information but also constitute an important instrument of democracy Without the protection of the source, the cutting edge of this valuable societal instrument would be severely dulled and public participation in decision-making severely restricted.” *Criden*, 633 F.2d at 356.

from *Branzburg*).” *In re Special Proceedings*, 373 F.3d at 45 (citations omitted). And, as discussed *infra*, there are compelling reasons to recognize a journalist’s privilege in the grand jury context today.

II. THE GOVERNMENT’S POSITION IS FUNDAMENTALLY FLAWED IN OTHER MATERIAL RESPECTS.

The Government’s failure to acknowledge the import of *Shain*, coupled with the blind eye it turns to the analogous decisions of other circuits, ought to be sufficient to cause this Court to reject the unprecedented rule it advocates. All apart from the sheer novelty of its position, however, the Government’s arguments are deeply flawed in several other material respects as well.

First, the Government minimizes the significance of Justice Powell’s concurring opinion in *Branzburg*, asserting that, although Justice Powell “used the term ‘privilege’ (rather than ‘protection’) to describe the protections referenced in the majority opinion, it is clear that the majority’s rejection of a reporter’s privilege—which Justice Powell joined—is binding.” Gov’t Br. at 26 n.10. In fact, Justice Powell, whose vote was necessary to the 5-4 majority, wrote separately to emphasize “the limited nature” of the Court’s holding, and to make clear that, even in the grand jury context, prosecutors are not “free to ‘annex’ the news media as an ‘investigative arm of government.’” *Branzburg*, 408 U.S. at 709 (Powell, J., concurring). Accordingly, Justice Powell stressed that, in future cases, each claim of privilege “should be judged on its facts by striking a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.” *Id.* at 710.

The interest balancing described by Justice Powell in *Branzburg* has been construed by virtually every federal Circuit to consider the issue, including this one, as mandating recognition of a qualified reporter's privilege.⁷ Indeed, in later cases, Justice Powell left no doubt that his opinion in *Branzburg* means what it plainly says – that fundamental principles undergirding the First Amendment obligate courts to balance the freedom of the press against the interest in compelled disclosure on the facts of each case. In *Saxbe v. Washington Post Co.*, 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting), for example, Justice Powell revisited the Court's decision in *Branzburg*:

I emphasized the limited nature of the *Branzburg* holding in my concurring opinion: “The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional

⁷ See, e.g., *Ashcraft*, 218 F.3d at 287 (citing Justice Powell's opinion for proposition that “reporter's claim of privilege should be judged on a case-by-case basis”); *LaRouche*, 780 F.2d at 1139 (citing Justice Powell's opinion in holding that, “[i]n determining whether the journalist's privilege will protect the source in a given situation, it is necessary for the district court to balance the interests involved”); *Coughlin v. Westinghouse Broad. & Cable Inc.*, 780 F.2d 340, 350 & n.14 (3d Cir. 1985) (noting that Justice Powell indicated that proceeding on a “case-by-case basis, balancing the reporters' rights against the interests of those seeking information” was “precisely the course that lower courts should take”); *Bruno & Stillman*, 633 F.2d at 595-96 & n.13 (applying the “constitutionally sensitized balancing process stressed by Mr. Justice Powell” in *Branzburg*); *Criden*, 633 F.2d at 357 (adopting “the formulation in the concurring opinion of Justice Powell in *Branzburg*”); cf. *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 8 & n.9 (2d Cir. 1982) (because “Justice Powell cast the deciding vote” in *Branzburg*, his reservations about the court's opinion “are particularly important in understanding the decision”); *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974) (*Branzburg* result was “controlled by the vote of Justice Powell”) (citation omitted).

rights with respect to the gathering of news or in safeguarding their sources.” In addition to these explicit statements, 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.

Id. (quoting *Branzburg*, 408 U.S. at 709); *see also Zurcher v. Stanford Daily*, 436 U.S. 547, 570 n.3 (1978) (Powell, J., concurring) (as noted in *Branzburg*, “in 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”).

Second, the Government sidesteps any serious consideration of whether the privilege is properly grounded in federal common law, separate and apart from the First Amendment, stating in a footnote only that (1) Risen did not cross-appeal the district court’s decision that it was unnecessary to consider such a basis for the privilege in the face of this Court’s binding precedent and (2) “*Branzburg* flatly rejected the notion [sic] a common law ‘reporter’s privilege’” in any event. Gov’t Br. at 37 n.13. It is of course well-settled that an appellate court is “not limited to evaluation of the grounds offered by the district court to support its decision, but may affirm on any grounds apparent from the record,” *United States v. Smith*, 395 F.3d 516, 519 (4th Cir. 2005), including “theories not relied upon or rejected by the district court,” *United States v. McHan*, 386 F.3d 620, 623 (4th Cir. 2004). More importantly, this Court is “not bound by *Branzburg*’s commentary on the

state of the common law in 1972,” *Miller*, 438 F.3d at 1160 (Henderson, J., concurring), precisely because *Branzburg* was decided three years *before* Rule 501 of the Federal Rules of Evidence first “authorize[d] federal courts to define new privileges by interpreting ‘common law principles . . . in the light of reason and experience,’” *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) (recognizing common law privilege protecting communications between psychotherapists and their patients) (citation omitted). “The Rule thus did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to ‘continue the evolutionary development of testimonial privileges.’” *Id.* at 8-9 (citation omitted).

As noted *supra*, the Third Circuit has grounded its recognition of the reporter’s privilege in the common law. In *Riley v. City of Chester*, 612 F.2d 708, 714-15 (3d Cir. 1979), that court determined both that “[t]he legislative history of Rule 501 manifests that its flexible language was designed to encompass, inter alia, a reporter’s privilege not to disclose a source,” and that, given “[t]he strong public policy which supports the unfettered communication to the public of information, comment and opinion and the constitutional dimension of that policy, . . . journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources.” To date, no federal appellate court has rejected the common law as a basis for the privilege and distinguished judges of this Court, as

well as in the Second, Seventh and D.C. Circuits, have all written in favor of it. *See, e.g., United States v. Steelhammer*, 539 F.2d 373, 377 (4th Cir. 1976) (Winter, J., dissenting), *adopted en banc*, 561 F.2d 539, 540 (4th Cir. 1977) (advocating recognition of common law privilege pursuant to Fed. R. Evid. 501); *McKevitt*, 339 F.3d at 532 (Posner, J.) (emphasizing the “important point” that the “Constitution is not the only source of evidentiary privileges” and applauding those courts that had endeavored to “cut the reporter’s privilege free from the First Amendment” and to recognize instead a “federal common law privilege for journalists”); *Gonzales*, 459 F.3d at 181 (Sack, J., dissenting) (“A qualified journalists’ privilege seems to me easily-even obviously-to meet each of [the *Jaffee*] qualifications. The protection exists. It is palpable; it is ubiquitous; it is widely relied upon; it is an integral part of the way in which the American public is kept informed and therefore of the American democratic process.”); *Miller*, 438 F.3d at 1170 (Tatel, J., concurring) (advocating recognition of common law privilege even in grand jury context and asserting that “the case for a privilege” is “even stronger than in *Jaffee*”).

In *Jaffee*, the Supreme Court held that federal judges should determine whether a proffered common law privilege should be recognized by considering several factors, including (1) whether the asserted privilege would serve private interests; (2) whether it would serve significant public interests; (3) whether those

interests outweigh any evidentiary benefit that would result from rejection of the privilege; and (4) whether the privilege has been widely recognized by the states.

518 U.S. at 10-13. As one district court sitting in the Second Circuit has concluded following that circuit's first "extended analysis of the existence of a reporter's privilege as to confidential sources under the analytic structure established by

Jaffee":

- (1) "recognition of a reporter's privilege would serve significant private interests by permitting investigative reporters to continue to secure information from confidential sources with assurance that they would not be compelled to reveal the information obtained or the source of that information;"
- (2) "Insofar as the full and unhampered reporting of the news depends, at least in part . . . , upon the ability of reporters to offer confidential protection to would-be sources, the reporter's privilege . . . does serve such [public] interests;"
- (3) A qualified reporter's privilege properly balances the competing interests on the facts of each case; and
- (4) "[R]ecognition of a qualified reporter's privilege with respect to confidential sources is consonant with the conclusions reached by the courts or legislatures of forty-eight states as well as the District of Columbia on the issue of a reporter's privilege against compelled disclosure."⁸

⁸ See also Henry Cohen, *Journalists' Privilege To Withhold Information In Judicial And Other Proceedings: State Shield Statutes* (Cong. Research Serv. 2007) (noting that, as of 2007, 33 states and the District of Columbia had enacted journalists' shield statutes, and courts in 16 other states had recognized some form of the privilege); James C. Goodale, et al., *Reporter's Privilege*, in *Communications Law in the Digital Age* 239, 248 (Practicing Law Institute 2011) (noting that, as of 2011, 40 states and the District of Columbia have enacted "shield laws").

New York Times Co. v. Gonzales, 382 F. Supp. 2d 457, 496-502 (S.D.N.Y. 2005), *rev'd on other grounds*, 459 F.3d 160 (2d Cir. 2006).⁹ *Amici* respectfully submit that the reasoning of the courts in *Gonzales* and *Riley* is sound and that this Court would likewise be well served to recognize a reporter's privilege grounded in the common law in addition to the First Amendment itself.

Third, the Government asserts that the finding below that it did not carry its burden to overcome the qualified privilege on the facts of this case constitutes a mixed question of law and fact requiring *de novo* review. Gov't Br. at 17. The law of this Circuit is unequivocally to the contrary. *See Church of Scientology Int'l v. Daniels*, 992 F.2d 1329, 1334 (4th Cir. 1993) (lower court finding that reporter's privilege had not been overcome is reviewed for an abuse of discretion); *see also Ashcraft*, 218 F.3d at 287 ("On a motion to compel disclosure of confidential news sources, [the] balancing of the reporter's interests and society's interests is committed to the sound discretion of the district court."); *LaRouche*, 780 F.2d at 1139 (same). Under the circumstances of this case, it cannot

⁹ On appeal, the Second Circuit determined that it was unnecessary to decide whether there is a federal common law privilege in the grand jury context because, even if such a privilege were recognized, it would be qualified and the district court had erred in holding that it had not been overcome on the facts of the case at bar. *Gonzales*, 459 F.3d at 168-72. For essentially the same reasons, the D.C. Circuit has similarly not decided whether to recognize a common law privilege in the grand jury context. *See Miller*, 438 F.3d at 1150 (panel "not of one mind on the existence of a common law privilege").

reasonably be contended – and the Government does not even attempt to do so – that the district court abused its discretion in finding that, while the confidential source information the Government seeks is relevant, it is available by alternative means and the Government lacks the requisite compelling interest in obtaining it. *See Sterling*, 2011 WL 4852226, at *9 (finding that Government has “direct evidence of Risen’s contacts with Sterling”); *id.* at *10 (finding that the Government has documentary evidence of Risen’s contacts with Sterling).

Fourth, the Government repeatedly warns that recognition of a reporter’s privilege in criminal cases would be inconsistent with *Branzburg* because the Supreme Court there remarked that a reporter could not agree to conceal the criminal conduct of his source ““on the theory that it is better to write about crime than to do something about it.”” Gov’t Br. at 36 (quoting *Branzburg*, 408 U.S. at 692); *see also* Gov’t Br. at 24, 37 (same). There is, however, a material and dispositive distinction between the kinds of eyewitness observations of criminal conduct at issue in *Branzburg* and what the Government describes as “eyewitness testimony” here. In *Branzburg*, reporters were alleged to have witnessed their third-party “sources” engaging in criminal conduct such as “synthesizing of hashish from marijuana,” the “use and sale of drugs,” the barricading of streets and related civil disorders, and the issuance of threats to the President’s life. *Branzburg*, 408 U.S. at 668-76. Here, in contrast, the conduct of Risen’s

confidential source in providing information to him in his role as a journalist is the only allegedly criminal act to which Risen is described by the Government as an “eyewitness.” Under such circumstances, it cannot reasonably be contended that Risen chose to write about a crime rather than do something about it. Rather, as *amici* demonstrate in the section that follows, Risen acted in the finest traditions of his profession by making those promises necessary to allow him to inform the public about the previously unknown, improper and quite possibly unlawful conduct of government officials. *See, e.g., Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978) (holding that information leaked to the press by a confidential source “lies near the core of the First Amendment” because it concerned the “public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect”); *Miller*, 438 F.3d at 1175 (Tatel, J., concurring) (courts “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”).

III. PROTECTING CONFIDENTIAL SOURCES IS VITAL TO ENSURING THE FREE FLOW OF INFORMATION TO THE PUBLIC.

This nation's historical practice of respecting the confidentiality of journalists' communications with their sources has been vital to ensuring that the press effectively performs its constitutionally protected role of disseminating information to the public, including information about the conduct of our government in the name of protecting the national security.¹⁰

As Pulitzer Prize winning reporter Dana Priest, who has written “hundreds of news articles on national security,” has testified in this very case, because “the U.S. government has made secret nearly every aspect of its counterterrorism programs, it would have been impossible to report even on the basic contours of [the government's] decisions, operations and programs without the help of confidential sources.” Declaration of Dana Priest ¶¶ 4, 5 (JA379). For this very reason, some of the most distinguished and honored news reporting in our history

¹⁰ The Court need look no further than the record in this case to confirm this proposition. *See, e.g.*, Declaration of Carl Bernstein ¶¶ 3-5 (JA361-62) (stating that Mark Felt “would not have agreed to be a source for our Watergate reporting had Mr. Woodward and I not been able to assure him total and absolute confidentiality”); Declaration of Scott Armstrong ¶ 14 (JA353) (explaining that, in the context of national security reporting, most accurate information often is available only from confidential sources); Affidavit of Jack Nelson ¶ 6 (JA373-74) (stating that, without confidential sources, the *Los Angeles Times* would not have been able to report “numerous [] stories involving corruption or governmental abuses in at least six [presidential] administrations”).

has both addressed the government's conduct in the national security context and been based on information provided by confidential sources.

The Pentagon's secret history of America's involvement in Vietnam, which eventually became known as the "Pentagon Papers," was, of course, provided to the press by a confidential source. *See New York Times Co. v. United States*, 403 U.S. 713 (1971). In refusing to enjoin publication of that information, several Justices suggested that the newspapers' sources may well have broken the law, *id.* at 754 (Harlan, J., dissenting), and they were in fact prosecuted, albeit unsuccessfully, after later coming forward, *see* Sanford J. Ungar, *Federal Conduct Cited As Offending 'Sense of Justice'; Charges Dismissed in 'Papers' Trial*, Wash. Post, May 12, 1973, at A1. Nonetheless, "[i]n revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders had hoped and trusted they would do," *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring), and there is now a broad consensus that no legitimate reason existed to conceal the Pentagon Papers from the public in the first place.¹¹

¹¹ Solicitor General Erwin N. Griswold, who argued the government's case in the Supreme Court, wrote some twenty years later that he had not "seen any trace of a threat to the national security from the publication." Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, Wash. Post, Feb. 15, 1989, at A25.

Similarly, journalist Walter Pincus relied on confidential sources in reporting that President Carter planned to move forward with the development of a so-called “neutron bomb,” a weapon that could inflict massive casualties through radiation without extensive destruction of property.¹² While the information disclosed to Pincus by his sources was likely classified, the public outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon and no administration has since attempted to revive it.¹³

More recently, CBS News and Seymour Hersh, writing for *The New Yorker*, first reported accounts of abuse of detainees at Abu Ghraib prison in Iraq. Relying on photographs graphically depicting such abuse in the possession of Army officials and a classified report that was “not meant for public release,” CBS and Hersh documented the conditions of abuse in the Iraqi prison.¹⁴ After these incidents became public, other military sources who had witnessed abuse stepped

¹² See, e.g., Walter Pincus, *Carter Is Weighing Radiation Warhead*, Wash. Post, June 7, 1977, at A5; Walter Pincus, *Pentagon Wanted Secrecy On Neutron Bomb Production; Pentagon Hoped To Keep Neutron Bomb A Secret*, Wash. Post, June 25, 1977, at A1.

¹³ See Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77 Post Articles*, Wash. Post, Oct. 23, 1984, at A12 (quoting former Defense Secretary Harold Brown as stating that “[w]ithout the [*Post*] articles, neutron warheads would have been deployed”).

¹⁴ Seymour M. Hersh, *Torture at Abu Ghraib*, *The New Yorker*, May 10, 2004, at 42.

forward, but often only “on the condition that they not be identified because of concern that their military careers would be ruined.”¹⁵

Similarly relying on confidential sources, the *New York Times* – in an article co-authored by Risen – informed an unsuspecting public that the National Security Agency had been monitoring phone calls and emails into and out of the United States involving suspected al-Qaida operatives, without seeking approval from federal courts. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.¹⁶ *The Washington Post* also relied on confidential sources inside and outside the U.S. government to report on the CIA’s network of secret prisons – known as “black sites” – for terrorism suspects. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005, at A1. And, relying in part on information provided by confidential sources, the *Times* and other news organizations reported on the use of harsh interrogation tactics against terrorism suspects in U.S. custody. *See, e.g.*, Scott

¹⁵ *See, e.g.*, Todd Richissin, *Soldiers’ Warnings Ignored*, Balt. Sun, May 9, 2004, at 1A (interviewing anonymous soldiers who had witnessed abuse at Abu Ghraib); Miles Moffeit, *Brutal Interrogation in Iraq*, Denver Post, May 19, 2004, at A1 (relying on confidential “Pentagon documents” and interview with a “Pentagon source with knowledge of internal investigations into prisoner abuses”).

¹⁶ Following congressional hearings, the Executive branch undertook to seek warrants for wiretaps under the program and Congress enacted legislation to address the issue. *See, e.g.*, James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, N.Y. Times, Aug. 6, 2007, at A1. A federal court later held that the warrantless surveillance program violated the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-71. *In re Nat’l Sec. Agency Telecomm. Records Litig.*, 700 F. Supp. 2d 1182, 1184 (N.D. Cal. 2010).

Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, at A1. Such news coverage precipitated a wide-ranging public debate that prompted Congress to prohibit certain interrogation tactics entirely and led to the promulgation of an executive order repudiating many of them. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148 §§ 1001-1006, 119 Stat. 2680; *Ensuring Lawful Interrogations*, Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

These stories are illustrative of the kinds of information about government conduct that would never have reached the public if a journalist had not been able credibly to promise confidentiality to a source. In many of these instances, although the source may arguably have violated a legal duty by providing such information to a journalist in the first instance, the subsequent reporting inevitably led to the discovery and prosecution of much more serious crimes. *Amici* respectfully submit that an inventory of those crimes that have gone unpunished because a journalist was permitted to protect a source would be a very short list indeed, and would pale in comparison to the number of significant criminal prosecutions made possible directly as a result of news reports containing information gleaned from confidential sources. As the Supreme Court has observed, although “[t]he right to remain anonymous may be abused when it shields fraudulent conduct,” it remains the case that, “in general, our society

accords greater weight to the value of free speech than to the dangers of its misuse.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

CONCLUSION

For all of these reasons, this Court should affirm the decision below.

February 21, 2012

Respectfully submitted,

By: s/ Lee Levine
Lee Levine
Jeanette Melendez Bead
Levine Sullivan Koch & Schulz, LLP
1050 Seventeenth Street, NW
Suite 800
Washington, DC 20036
(202) 508-1100

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that:

- (1) this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
- (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it was prepared in a proportionally spaced, 14-point typeface (Times New Roman) using Microsoft Word 2010.

s/ Lee Levine
Lee Levine

ADDENDUM

DESCRIPTION OF AMICI

ABC, Inc.: ABC, Inc. owns and operates, inter alia, ABC News, abcnews.com, the ABC Television Network and local broadcast television stations that regularly gather and report news to the public. Programs produced and disseminated by ABC News include World News Tonight, 20/20, Nightline, Good Morning America and This Week.

Advance Publications, Inc.: Advance Publications, Inc., directly and through its subsidiaries, publishes over 20 magazines with nationwide circulation, newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns many internet sites and has interests in cable systems serving over 2.3 million subscribers.

ALM Media, LLC: ALM Media, LLC is a national media organization that publishes more than a dozen leading legal and business publications, including *The American Lawyer*, *The National Law Journal*, *Corporate Counsel*, *The New York Law Journal* and the *Connecticut Law Tribune*. It also publishes newsletters and treatises and operates internet sites.

The Associated Press: The Associated Press is a mutual news cooperative organized under the Not-for-Profit Corporation Law of New York. AP gathers and distributes news of local, national and international importance to its member newspapers and broadcast stations and to thousands of other customers in all media formats across the United States and throughout the world.

Bloomberg LP d/b/a Bloomberg News: Bloomberg News is one of the world's largest newsgathering organizations, comprised of more than 2,500 journalists around the world in more than 120 bureaus. Bloomberg provides business, legal and financial news through the Bloomberg Professional Service, Bloomberg's website and Bloomberg Television.

Cable News Network, Inc.: Cable News Network, Inc. ("CNN") is a subsidiary of Turner Broadcasting System, Inc., a Time Warner company. CNN is one of the world's largest news organizations with over a dozen television and radio news networks and websites available worldwide, as well as several news programming services, which are provided to affiliates domestically and worldwide. CNN employs more than 3,000 news professionals, who gather news throughout the

world.

CBS Corporation: CBS Corporation is a mass media company with operations in virtually every field of media and entertainment, including but not limited to broadcast television (CBS and The CW – a joint venture between CBS Corporation and Warner Bros. Entertainment), cable television (Showtime Networks, Smithsonian Networks and CBS Sports Network), local television (CBS Television Stations), radio (CBS Radio) and publishing (Simon & Schuster).

Cox Media Group, Inc.: Cox Media Group, Inc. is an integrated broadcasting, publishing, direct marketing and digital media company. Its operations include 15 broadcast television stations, a local cable channel, a leading direct marketing company, 85 radio stations, eight daily newspapers and more than a dozen non-daily print publications, and more than 100 digital services.

Daily News, L.P.: The Daily News Publishing Company publishes the *New York Daily News*, a daily newspaper that serves primarily the New York metropolitan area and is the sixth-largest paper in the country by circulation. The Daily News' web site, nydailynews.com, receives approximately 22 million unique visitors each month.

Dow Jones & Company, Inc.: Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million; WSJ.com, a news website with more than one million paid subscribers; Barron's, a weekly business and finance magazine; and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The E.W. Scripps Company: The E.W. Scripps Company (www.scripps.com) is a diverse, 132-year-old media enterprise with interests in newspaper publishing, online publishing, local broadcast television stations, and licensing and syndication. The company's portfolio of locally focused media properties includes: daily and community newspapers in 15 markets; 10 broadcast TV stations, with six ABC-affiliated stations, three NBC affiliates and one independent; and the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service.

First Amendment Coalition: The First Amendment Coalition is a non-profit public interest organization dedicated to advancing free speech and open-government rights. A membership organization, the Coalition's activities include educational and informational programs, strategic litigation to enhance First Amendment and access rights for the largest number of citizens, legal information and consultation services, and legislative oversight of bills affecting free speech. The Coalition's members are newspapers and other news organizations, bloggers, libraries, civic organizations, academics, freelance journalists, community activists and ordinary individuals seeking help in asserting rights of citizenship. The Coalition's offices are in San Rafael, California.

Fox News Network, L.L.C.: Fox News Network, L.L.C. owns and operates the national cable news network, the Fox News Channel, which reaches approximately 85 million subscribers in the United States. It also owns and operates the Fox Business Network, the Fox News Edge, the Sunday morning political talk program Fox News Sunday, the websites FoxNews.com and FoxBusiness.com, and the national Fox News Radio Network.

Gannett Co., Inc.: Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including *USA TODAY*, as well as hundreds of non-daily publications. Gannett also owns 23 television stations. Each of Gannett's daily newspapers and TV stations operate Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

The Hearst Corporation: The Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include ownership of 15 daily and 38 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany Times Union*; as well as interests in an additional 43 daily and 74 non-daily newspapers owned by MediaNews Group, which include the *Denver Post* and *Salt Lake Tribune*; nearly 200 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E, History and ESPN; as well as business publishing, including a minority joint venture interest in Fitch Ratings; Internet businesses, television production, newspaper features distribution and real estate.

The McClatchy Company: The McClatchy Company owns 30 daily newspapers in 29 U.S. markets, including *The Sacramento Bee*, *The Fresno Bee*, and *The Merced Sun-Star*, as well as *The Miami Herald*, *The Star-Telegram* of Fort Worth, *The Charlotte Observer*, and 45 non-daily papers. In each of its daily newspaper markets, McClatchy operates the leading local website, offering readers information, comprehensive news, advertising, e-commerce and other services.

National Association of Broadcasters: The National Association of Broadcasters (“NAB”), organized in 1922, is a non-profit incorporated association of radio and television broadcast stations and networks. NAB membership includes more than 6300 radio stations, 1200 television stations, and the major commercial broadcast networks.

National Public Radio, Inc.: National Public Radio, Inc. (“NPR”) is a District of Columbia non-profit membership corporation. It produces and distributes its radio programming through, and provides trade association services to, nearly 800 public radio member stations located throughout the United States and in many U.S. territories. NPR’s award-winning programs include Morning Edition, All Things Considered, and Talk of the Nation and serve a growing broadcast audience of over 23 million Americans weekly. NPR also distributes its broadcast programming online (adding additional reporting and features), to foreign countries through satellite and cable systems worldwide, and to U.S. Military installations via the American Forces Radio and Television Service.

NBCUniversal Media, LLC: NBCUniversal Media, LLC is one of the world’s leading media and entertainment companies. NBCUniversal owns and operates the NBC television network, a Spanish-language network (Telemundo), NBC News, NBC Sports, and several news and entertainment networks including MSNBC and CNBC. NBC News produces the Today show, NBC Nightly News, Rock Center with Brian Williams, Dateline and Meet the Press. NBCUniversal also owns and operates 25 television stations.

New York Times Company: The New York Times Company is the owner of *The New York Times*, *The Boston Globe*, *The International Herald Tribune*, 15 other newspapers, and more than 50 websites, including NYTimes.com, About.com, and Boston.com.

Newspaper Association of America: The Newspaper Association of America (“NAA”) is a non-profit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA’s key strategic priorities is to advance newspapers’ First Amendment interests, including the ability to gather and report the news.

The Newsweek/Daily Beast Company LLC: The Newsweek/Daily Beast Company LLC operates the website thedailybeast.com and publishes Newsweek magazine. Thedailybeast.com attracts over 10 million unique online visitors a month and Newsweek reaches 14 million readers across America, and millions more through its international editions.

Radio Television Digital News Association: The Radio Television Digital News Association (“RTDNA”), is based in Washington, D.C., and is the world’s largest professional organization devoted exclusively to electronic journalism. RTDNA represents local and network news directors and executives, news associates, educators and students in broadcasting, cable and other electronic media in over 30 countries. RTDNA is committed to encouraging excellence in electronic journalism and upholding First Amendment freedoms.

Reporters Committee For Freedom of the Press: The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee provides representation, guidance, and research in First Amendment litigation. The Reporters Committee was founded in 1970 in response to a wave of government subpoenas directed at journalists.

Reuters America LLC: Reuters America LLC serves the financial markets and news media with real-time, high-impact, multimedia news and information services and is part of Reuters, the world's largest international news agency. Through Reuters.com and affiliated websites around the world and via multiple platforms including online, mobile, video and outdoor electronic displays, Reuters provides trusted, unbiased, professional-grade business news, financial information, market data and national and international news directly to an audience of business professionals around the world. In addition, Reuters publishes a portfolio of market-leading titles and online services, providing authoritative and unbiased market intelligence to investment banking and private equity

professionals.

Time Inc.: Time Inc. is the largest magazine publisher in the United States. It publishes over 90 titles, including Time, Fortune, Sports Illustrated, People, Entertainment Weekly, InStyle and Real Simple. Time Inc. publications reach over 100 million adults and its Web sites serve close to 2 billion page views each month. Time Inc. also owns IPC Group Limited, the UK's top magazine publisher.

Tribune Company: Tribune is one of the country's leading multimedia companies, operating businesses in publishing, digital and broadcasting. In publishing, Tribune's leading daily newspapers include the Los Angeles Times, Chicago Tribune, The Baltimore Sun, Sun Sentinel (South Florida), Orlando Sentinel, Hartford Courant, The Morning Call and Daily Press. The company's broadcasting group operates 23 television stations, WGN America on national cable and Chicago's WGN-AM. Popular news and information websites complement Tribune's print and broadcast properties and extend the company's nationwide audience.

The Washington Post: The Washington Post publishes one of the nation's most prominent daily newspapers, as well as a website (www.washingtonpost.com) that attracts an average of more than 17 million unique visitors per month.

WNET: WNET is the premier public media provider of the New York City metropolitan area and parent company of public television stations THIRTEEN and WLIW21. WNET also hosts the digital services THIRTEEN HD, KidsTHIRTEEN, WLIW Create, WLIW World, THIRTEEN on Demand, THIRTEEN Kids on Demand, and V-me; as well as an ever-expanding range of websites, including thirteen.org, wliw21.org, and Thirteen EdOnline. The WNET family of companies is a major producer of broadcast and online media for local, national and international audiences, creating award-winning content in the areas of arts and culture, news and public affairs, science and natural history, documentaries, and children's programming.

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2012, I filed the foregoing Brief of Amici Curiae with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to the following registered users:

Robert A. Parker
Criminal Division, Appellate Section
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Counsel for the United States

Barry J. Pollack
Miller & Chevalier
655 15th Street, NW
Suite 900
Washington, DC 20005

Edward B. McMahon
107 E. Washington Street
Middleburg, VA 20118

Counsel for Jeffrey Alexander Sterling

David N. Kelley
Joel Kurtzberg
Cahill, Gordon & Reindel LLP
80 Pine Street
New York, NY 10005

Counsel for James Risen

s/ Lee Levine
Lee Levine

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an [Application for Admission](#) before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at www.ca4.uscourts.gov/cmecftop.htm.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 11-5028 as

Retained Court-appointed(CJA) Court-assigned(non-CJA) Federal Defender Pro Bono Government

COUNSEL FOR: _____

_____ as the
(party name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s)

s/ Lee Levine
(signature)

Lee Levine
Name (printed or typed)

202-508-1110
Voice Phone

Levine Sullivan Koch & Schulz, LLP
Firm Name (if applicable)

202-861-9888
Fax Number

1050 Seventeenth Street, NW, Suite 800

Washington, DC 20036
Address

llevine@lskslaw.com
E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on 2/21/2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Lee Levine
Signature

2/21/2012
Date