

CAHILL GORDON & REINDEL LLP
 EIGHTY PINE STREET
 NEW YORK, NY 10005-1702

FLOYD ABRAMS
 L. HOWARD ADAMS
 ROBERT A. ALESSI
 HELENE R. BANKS
 ANIRUDH BANSAL
 LANDIS C. BEST
 SUSAN BUCKLEY
 KEVIN J. BURKE
 JAMES J. CLARK
 BENJAMIN J. COHEN
 STUART G. DOWNING
 ADAM M. DWORKIN
 JENNIFER B. EZRING
 PATRICIA FARREN
 JOAN MURTAGH FRANKEL
 JONATHAN J. FRANKEL
 BART FRIEDMAN
 CIRO A. GAMBONI

WILLIAM B. GANNETT
 CHARLES A. GILMAN
 STEPHEN A. GREENE
 WILLIAM M. HARTNETT
 CRAIG M. HOROWITZ
 DOUGLAS S. HOROWITZ
 TIMOTHY B. HOWELL
 DAVID G. JANUSZEWSKI
 ELAI KATZ
 THOMAS J. KAVALER
 BRIAN S. KELLEHER
 DAVID N. KELLEY
 CHÉRIE R. KISER*
 EDWARD P. KRUGMAN
 JOEL KURTZBERG
 ALIZA R. LEVINE
 JOEL H. LEVITIN
 GEOFFREY E. LIEBMANN

TELEPHONE: (212) 701-3000
 FACSIMILE: (212) 269-5420

1990 K STREET, N.W.
 WASHINGTON, DC 20006-1181
 (202) 862-8900
 FAX: (202) 862-8958

AUGUSTINE HOUSE
 6A AUSTIN FRIARS
 LONDON, ENGLAND EC2N 2HA
 (011) 44.20.7920.9800
 FAX: (011) 44.20.7920.9825

WRITER'S DIRECT NUMBER

(212) 701-3120

ANN S. MAKICH
 JONATHAN I. MARK
 BRIAN T. MARKLEY
 GERARD M. MEISTRELL
 WILLIAM J. MILLER
 NOAH B. NEWITZ
 MICHAEL J. OHLER
 ATHY A. O'KEEFFE
 DAVID R. OWEN
 JOHN PAPACHRISTOS
 LUIS R. PENALVER
 DEAN RINGEL
 JAMES ROBINSON
 THORN ROSENTHAL
 TAMMY L. ROY
 JONATHAN A. SCHAFFZIN
 JOHN SCHUSTER
 MICHAEL A. SHERMAN

DARREN SILVER
 HOWARD G. SLOANE
 JOSIAH M. SLOTNICK
 RICHARD A. STIEGLITZ JR.
 SUSANNA M. SUH
 ANTHONY K. TAMA
 JONATHAN D. THIER
 JOHN A. TRIPODORO
 GLENN J. WALDRIP, JR.
 HERBERT S. WASHER
 MICHAEL B. WEISS
 S. PENNY WINDLE
 COREY WRIGHT
 DANIEL J. ZUBKOFF
 ADAM ZUROFSKY

*ADMITTED IN DC ONLY

September 24, 2012

Re: *United States v. Sterling*, No. 11-5028

Dear Ms. Connor:

Pursuant to Rule 28(j), we write in response to the Government's letter of September 17, 2012, which cites *In re Request from the United Kingdom*, 685 F.3d 1 (1st Cir. 2012) as further support for "the government's argument that James Risen does not have a 'reporter's privilege' to refuse to identify his source in this case." (Letter 2) Nothing could be further from the truth.

As we made clear in both our briefs and at oral argument, because every court of appeals to have examined the issue has concluded that there is a federal reporter's privilege in the context of a criminal trial, the Government mistakenly relies on cases holding that there is no such privilege in the context of a criminal investigation. *See* Risen Br. 43-47; Gov't Br. 26-27; Gov't Reply Br. 10-13. In citing *In re Request*, the Government compounds this error.

In *In re Request*—which does not even involve a claim of reporter's privilege—the First Circuit held that the district court did not abuse its discretion when compelling testimony after

CAHILL GORDON & REINDEL LLP

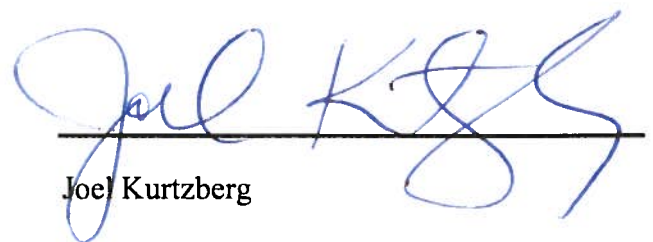
- 2 -

performing a balancing test in the face of an assertion of “an academic privilege.” *In re Request*, 685 F.3d at 15, 19. The court emphasized that the case involved an even stronger governmental interest than that at issue in *Branzburg* because it sought testimony for a governmental investigation initiated “by a foreign sovereign” that had a treaty with our country. *Id.* at 18 (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

Notably, the court acknowledged that it has already held that *Branzburg* does give rise to a reporter’s privilege in certain contexts. *Id.* at 17 n.23. In support of that proposition, the court cited *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988), a decision unequivocally holding that a reporter’s privilege applies in federal criminal trials, even in cases involving nonconfidential information. *See Risen* Br. 45.

In this case, the Government seeks confidential source information *for a criminal trial*. *In re Request* thus reaffirms that a reporter’s privilege applies in such cases in the First Circuit.

Respectfully submitted,



Joel Kurtzberg

Attorney for James Risen

CAHILL GORDON & REINDEL LLP

- 3 -

Patricia S. Connor
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2012, I filed the foregoing letter with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to the following registered users:

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

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

Counsel for Jeffrey Alexander Sterling

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

Counsel for United States of America

s/ Joel Kurtzberg
Joel Kurtzberg