Case 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,

Intervener-Appellee.

On Appeal from the U.S. District Court for the
Eastern District of Virginia (Brinkema, J.)

BRIEF OF APPELLEE JAMES RISEN

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STATEMENT OF JURISDICTION

This Court lacks jurisdiction over the portion of this interlocutory government appeal dealing with James Risen because the orders pertaining to Mr. Risen (JA721-52 and JA953-94[1]) provide only tentative limitations on Mr. Risen's testimony that the district court agreed, at the Government's urging, to revisit multiple times later during the trial. As such, those orders do not have the effect of suppressing or excluding evidence within the meaning of 18 U.S.C. § 3731.

STATEMENT OF ISSUES

1) Whether the district court's orders tentatively limiting Mr. Risen's testimony and expressly providing for a procedure requested by the Government, whereby the district court will later reconsider those limitations multiple times based on the evidence presented at trial, have the effect of suppressing or excluding evidence within the meaning of 18 U.S.C. § 3731.

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[1] Record citations are to the Joint Appendix ("JA") and the Joint Sealed Appendix ("JSA"). Neither Mr. Risen nor his counsel has been provided with copies of the Joint Classified Appendix or the Government's *Ex Parte* Classified Appendix.

2) Whether the district court abused its discretion in tentatively limiting testimony from journalist James Risen about the identity of his confidential sources pursuant to the reporter's privilege under the First Amendment.

3) Whether, in the alternative, the reporter's privilege arising under federal common law requires the same tentative limitations on Mr. Risen's testimony.

STATEMENT OF THE CASE

Appellee James Risen is a two-time Pulitzer Prize-winning investigative reporter for *The New York Times* ("*The Times*") and the author of three books of investigative journalism. (JSA176, ¶1; JSA179, ¶10) The Government subpoenaed Mr. Risen in an effort to compel him to testify at the criminal trial of Jeffrey Sterling about the identity/ies of Mr. Risen's confidential source(s) from Chapter 9 of his book, *State of War: The Secret History of the CIA and the Bush Administration* ("*State of War*"). The Government moved *in limine* for a court order compelling Mr. Risen to testify about his confidential source(s), and Mr. Risen cross-moved to quash the subpoena and/or for a protective order on the ground that the testimony sought by the Government was barred by the qualified reporter's privilege under both the First Amendment and federal common law. The district court

largely found in Mr. Risen's favor, concluding that the Fourth Circuit recognizes a qualified reporter's privilege under the First Amendment in criminal trials involving confidential source information. After balancing the relevant interests, the district court concluded that the Government had failed to show at this stage of the proceeding that, as to most of the information the Government sought from Mr. Risen: (1) there were no reasonable alternative sources of the information and (2) the Government had a compelling interest in Mr. Risen's testimony. (JA751-52) The district court entered an order permitting certain authentication testimony from Mr. Risen, but precluding testimony concerning the identity of his confidential source(s) unless the Government could make the requisite showing later at trial. (JA751)

The Government moved for reconsideration/clarification, which the district court granted in part. Specifically, the court ruled that Mr. Risen would be required to provide certain additional testimony about (1) his authentication of a purported book proposal, (2) when he received confidential information from his confidential source(s), and (3) his writing style. (JA973-74, JA976-77, JA981-82)

As part of the motion for reconsideration/clarification, the district court also agreed, at the Government's suggestion, to a procedure that made clear

that the rulings made about Mr. Risen's testimony were merely preliminary, and that the court would re-do the balancing of interests involved on more than one occasion as the trial progressed. Under this procedure, the Government and the defendant would question Mr. Risen in the absence of the jury toward the end of the Government's case, and the district court would then make rulings on what would be admissible in front of the jury based on the evidence that actually unfolded in the Government's case at trial. (JA984-87) The district court also agreed, at the Government's request, to keep Mr. Risen under subpoena even after he testified, in case the balancing of interests changed as the defense case unfolded. (JA987) In light of these rulings, it was clear that by the end of the hearing on the Government's motion for reconsideration/clarification, the district court had not definitively determined to any degree the scope of Mr. Risen's testimony at trial.

On the eve of trial, the Government noticed this appeal of the district court's orders with respect to Mr. Risen's testimony and to other discovery orders not relevant to Mr. Risen. Mr. Sterling's trial has been continued pending resolution of this appeal.

The Government's appeal should be dismissed because this Court lacks jurisdiction over the district court's interim orders, which, because they were

preliminary in nature, did not suppress or exclude any evidence within the meaning of 18 U.S.C. § 3731. In any event, this Court should affirm the district court's orders on the merits because the district court was correct to recognize the qualified reporter's privilege against disclosing confidential source information and did not abuse its discretion in concluding that, on the current record, the testimony sought by the Government from Mr. Risen about his confidential source(s) is privileged.

STATEMENT OF FACTS

Background

James Risen has been a journalist for more than thirty years. He has worked as a reporter at the *Fort Wayne (Indiana) Journal Gazette*, the *Miami Herald*, the *Detroit Free Press*, the *Los Angeles Times*, and, since May 1998, *The Times*. (JSA177, ¶5) He currently writes primarily about intelligence matters, national security issues, and terrorism. (JSA177, ¶5) In addition to his newspaper reporting, Mr. Risen has also written three books as an investigative journalist. (JSA179, ¶10)

Mr. Risen has long written — and won awards for writing — major stories that disclose excessive government secrecy, incompetence, and mismanagement, regardless of what administration has been in power. (JSA180, ¶14). On

December 16, 2005, Mr. Risen co-wrote a Pulitzer-Prize winning article in *The Times* with fellow *Times* reporter Eric Lichtblau entitled "Bush Lets U.S. Spy on Callers Without Courts." (JSA181, ¶15; JA190) Shortly thereafter, in early January 2006, Free Press, an imprint of Simon & Schuster, published Mr. Risen's latest book, *State of War*.

In *The Times* article and then in Chapter 2 of the book, Mr. Risen revealed that the National Security Agency had spent years secretly listening in on international phone calls and intercepting international email messages originating or terminating in the United States, without first securing warrants (the "NSA Warrantless Eavesdropping Program"). (JSA181, ¶15; JA191-99) The NSA Warrantless Eavesdropping Program was, in all likelihood, illegal,[2] and by writing about it, Mr. Risen permitted the public, the Congress, and, eventually, the courts to debate and evaluate the legality of the previously secret program for the first time. (JSA179-179, ¶9) In addition to reporting about the NSA Warrantless Eavesdrop-

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2 *See ACLU* v. *National Security Agency*, 438 F. Supp. 2d 754, 778 (E.D. Mich. 2006) (program violated First and Fourth Amendments, separation of powers doctrine, and FISA), *rev'd on other grounds by*, 493 F.3d 644 (6th Cir. 2007) (plaintiffs lacked standing), *cert. denied*, 552 U.S. 1179 (2008); *In re National Security Agency Telecommunications Records Litigation*, 700 F. Supp. 2d 1182, 1184 (N.D. Cal. 2010) ("plaintiffs were subjected to unlawful electronic surveillance" in violation of FISA).

ping Program, *State of War* also exposed additional instances of excessive government secrecy, incompetence, and/or mismanagement in the Bush Administration that had previously been unreported. (JSA176, 179-80, ¶¶1, 11 and Ex. 2 at 11-37; 85-107, 109-124, 173-191, and 193-218)

Chapter 9 of *State of War* — the chapter at issue in this case — 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. (JSA181-82, ¶16; JA172 at 193-218) 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 thus ultimately undermine Iran's nuclear program. But the operation was deeply flawed and 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. (JSA182, ¶17; JA172 at 203, 210-11) When the scientist explained this to his CIA handlers, they inexplicably refused to call off the operation and simply told him to proceed as planned by delivering the blueprints to the Iranians. (JSA182 ¶17; JA172 at 203-04, 210-11) Thus, notwithstanding that it came to the CIA's attention that the flaws in the nuclear blueprints could be very easily spotted, the CIA pushed ahead anyway. (JSA182, ¶17; JA172 at 203-04, 210-11) Mr. Risen's reporting on the failed operation raised

serious questions about the competence of the CIA's intelligence regarding Iran's WMD capabilities. (JSA186, ¶28)

Mr. Risen knew about most of the information reported in Chapter 9, including Operation Merlin, as early as 2003, but held the story for three years, until it became clear to him that the competence of intelligence operations concerning Iran's nuclear capabilities was something that the public needed to examine, particularly in the wake of intelligence shortcomings in Iraq and the failure of the press to expose them. (JSA182, ¶19) Mr. Risen ultimately concluded that U.S. intelligence on Iran's supposed nuclear program was so flawed, and the information in Chapter 9 so important, that the public needed to know about this story before another war was launched based on faulty intelligence. (JSA178, ¶7)

State of War — including Chapter 9 — was critically well received. (JSA179-180, ¶11) Mr. Risen and Mr. Lichtblau received the Pulitzer Prize and other prestigious awards for their reporting on the NSA Warrantless Eavesdropping Program. (JSA177, ¶6) They both also received the Goldsmith Prize for Investigative Reporting, which is awarded to journalism that "promotes more effective and ethical conduct of government by disclosing excessive government secrecy, impropriety, and mismanagement." (JSA178, ¶7)

Top government officials, however, were not pleased. President Bush called the disclosure of the NSA Warrantless Eavesdropping Program a "shameful act," and the administration and its supporters thereafter publicly spoke about potentially prosecuting Mr. Risen for espionage. (JSA186, ¶29; JSA187 ¶31, JA235) Several groups with publicly acknowledged ties to the White House organized a campaign of both criticism and intimidation of Mr. Risen, including organized hate mail, personal threats, and in-person picketing of Mr. Risen's office. (JSA187, ¶31) In addition, members of the Bush Administration and its allies made repeated and specific calls for the Justice Department to either prosecute Mr. Risen for espionage or put him in jail by making him the target of a subpoena in a leak investigation concerning the identity of his confidential source(s). (JSA186-88, 191 at ¶¶30-33, 35, 45; JA241-42; JA47; JA270-71; JA318-19)

In June 2006, Mr. Risen reported on another government surveillance program of uncertain legality that provided counterterrorism officials with access to money transfer records in the SWIFT database. (JSA190, ¶41) Soon thereafter, the threats and expressions of outrage from the government intensified. Even though other newspapers published similar articles about the same program on the same day as Mr. Risen, the government directed its outrage exclusively at Mr. Risen and *The Times*. (JSA190-191, ¶¶41-44; JA292-293, JA296-302). Mr. Risen

heard from one of his sources that Vice President Dick Cheney was so angered by Mr. Risen's reporting generally that he had pressured the Justice Department to target Mr. Risen personally and wanted to see Mr. Risen in jail. (JSA186-87, ¶30)

The Grand Jury Subpoenas

Amidst this atmosphere of threats of selective prosecution and imprisonment, on January 24, 2008, the Government issued a grand jury subpoena to Mr. Risen. The 2008 grand jury subpoena sought testimony and documents about the identity of Mr. Risen's confidential source(s) for Chapter 9 of *State of War* and about Mr. Risen's communications with his confidential source(s). (JSA191, ¶46; JSA199, ¶7) Mr. Risen moved to quash the 2008 grand jury subpoena because the matters the Government sought to inquire about went to the heart of the reporter's privilege under both the First Amendment and federal common law and because the subpoena seemed part of an effort by the Government to retaliate against Mr. Risen for reporting about potential governmental misconduct.

Following extensive briefing and oral argument, the district court granted in part and denied in part Mr. Risen's motion to quash, concluding that, given the Government's description of its own evidence, Mr. Risen's testimony was not necessary, but was merely "the icing on the cake" for indictment. (JA532

(quoting from earlier opinion); *see also* JSA273) The district court, however, also found a limited waiver of any applicable privilege by virtue of Mr. Risen's purportedly having disclosed to a third party the identity of one alleged confidential source. (JSA319) Accordingly, the district court denied Mr. Risen's motion to quash to the limited extent that it permitted the Government to question Mr. Risen only about his communications with the third party about the alleged confidential source that Mr. Risen had purportedly disclosed to that party. (JSA203, ¶23; JSA281)

Both Mr. Risen and the Government sought reconsideration of the district court's Order. (JA533; *see also* JSA203, ¶20; JSA271). The grand jury expired while the motions for reconsideration were pending and on August 5, 2009, the district court issued an order requiring the new Attorney General to evaluate the wisdom of authorizing a new subpoena. (JA533; *see also* JSA271-74) The district court concluded that the Government already had more than enough evidence to indict Mr. Sterling, and reiterated its view that Mr. Risen's testimony would merely provide "icing on the cake." (JA532 (quoting from earlier opinion); *see also* JSA273)

Despite the court's admonition that the Government likely already had sufficient evidence to obtain an indictment without Mr. Risen's testimony, on April 26, 2010, the Government issued yet another grand jury subpoena to Mr. Risen. This time the Government sought extraordinarily detailed information regarding all communications with primary and corroborating sources for Chapter 9 of *State of War*. (JA738-740, *see also* JSA200, ¶10; JSA214-17) More specifically, the Government planned to ask Mr. Risen to identify his source(s) by pseudonym, identify them as primary or corroborating sources, and give information about what the sources told him, as well as when, where, and how the information was communicated. (JA739-740, *see also* JSA201-02, ¶13) If Mr. Risen's answers to these exhaustive questions did not reveal the identity of his confidential source(s), the Government expressly reserved the right to ask additional questions. (JSA202, ¶14)

Mr. Risen moved to quash the 2010 grand jury subpoena, concluding that, even though it did not ask for the name of his confidential source(s), it called for information that would likely indirectly reveal his source(s) by process of elimination. (JSA194-95, ¶59; JSA196, ¶63) The district court granted Mr. Risen's motion to quash the 2010 grand jury subpoena, finding that, under the law of this Circuit, "[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." (JA542) In the case of Mr. Risen, the court found he "did have 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." (JA545)

Having found that a confidential agreement existed between Mr. Risen and his source(s), the district court applied the three-part balancing test developed in *LaRouche* v. *National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986), and again concluded that the evidence sought from Mr. Risen would "simply amount to 'the icing on the cake'" and that the Government had ample evidence without Mr. Risen's testimony to secure an indictment. (JA532, JA557) In reaching this conclusion, the district court noted that the Government had admitted in its *ex parte* filing — which was not provided to Mr. Risen's counsel — that "[t]he evidence gathered to date clearly establishes that there is at least probable cause to believe that Jeffrey Sterling is responsible for the unauthorized disclosure of classified information regarding the [REDACTED] Operation to James Risen, and three federal judges have also made a similar finding by authorizing the search warrants described above." (JA531 and n.2) The court

also highlighted numerous facts that led it to the conclusion that Mr. Risen's testimony was unnecessary, including that:

- A grand jury witness testified that Mr. Risen had told him that Mr. Sterling was his source for information about the confidential program. (JA530-531)
- Another grand jury witness testified that, at some time between October 2004 and January 2006, Mr. Sterling told her about his plans to meet with someone named "Jim," who had written an article about Mr. Sterling's discrimination case and was working on a book about the CIA. The witness testified that she understood "Jim" to be Mr. Risen, and that, when she saw *State of War* in a bookstore, Mr. Sterling told her, without looking at the book first, that Chapter 9 was about work he had done at the CIA. (JA530)
- A former CIA case officer testified that Mr. Sterling told her that he had served as a source for a 2001 article by Mr. Risen. (JA526)
- Former Senate Select Committee on Intelligence staffers told the Government that they met with Mr. Sterling on March 5, 2003 to discuss a classified operation and his discrimination suit. One of the staffers recounted that, during the meeting, Mr. Sterling threatened to go to the press — although the staffer could not recall if the threat related to Mr. Sterling's discrimination lawsuit or the classified operation. (JA527)
- The Government had phone records for Mr. Sterling's cellular and work phones, as well as from a home where he temporarily resided, and emails reflecting dozens of communications between Mr. Sterling and Mr. Risen and/or between locations where Mr. Sterling was and Mr. Risen's home and office. (JA528-530)

The 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." (JA549) Under the circumstances, 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." (JA557)

The Trial Subpoena

As the trial court had predicted, the Government secured an indictment of Jeffrey Sterling without Mr. Risen's testimony, and on May 23, 2011, the Government served the trial subpoena at issue here on Mr. Risen. (JSA176, ¶1; JA170-171) The Government has advised that it wants to ask Mr. Risen at trial 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 Mr. Sterling, and "identify the defendant as someone with whom he had a preexisting source relationship that pre-dated the charged disclosures." (JA128)

To this day, the district court (let alone Mr. Risen) has not been advised of the trial evidence the Government intends to introduce so that a determination can be made of the supposed necessity of Mr. Risen's testimony beyond that already ordered. Rather than submit an *ex parte* declaration outlining the evidence

that it expected to set forth at trial — as it had at the grand jury level — the Government made a strategic decision not to put *any* evidence in the record that would demonstrate its need for Mr. Risen's testimony. The Government instead simply referred to its allegations in the Indictment.[3] Without any summary of the Government's evidence, the district court judge was forced to examine the evidence that the Government had put before her in connection with the motions to quash the grand jury subpoena. (JA725 n.5)

The district court granted in part and denied in part both the Government's motion *in limine* and Mr. Risen's motion to quash the trial subpoena, holding that the "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."[4] (JA731-

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[3] The Government has put certain documents in the Joint Appendix and Joint Sealed Appendix — e.g., the Declaration of Eric Bruce (JSA1-74) — that were not before the district court in connection with the Government's motion *in limine* or Mr. Risen's motion to quash. There may also be additional information in the Joint Classified Appendix or the Government's *Ex Parte* Classified Appendix that was not before the district court in connection with the trial subpoena. Having made a strategic choice *not* to put this information before the district court in connection with these motions, the Government should not be permitted to rely on it now.

[4] Given its ruling on the First Amendment privilege, the district court did not decide if a privilege also existed under federal common law (JA732 n.3) or

32, 737) The court found that Mr. Risen had shown that he had a confidential relationship with his source(s) that extended to information that might indirectly reveal the source(s)' identity, and rejected "[t]he government's narrow view of the scope of Risen's confidentiality agreement." (JA739 ("Courts have long held that the reporter's privilege is not narrowly limited to protecting the reporter from disclosing the names of confidential sources, but also extends to information that could lead to the discovery of a source's identity.")) Accordingly, testimony about Mr. Risen's sources as well as about his reporting, "including the time and location of his contacts with his confidential source(s)," was also protected by the qualified reporter's privilege and subject to a balancing analysis by the district court. (JA740).

The district court applied the three-part test for balancing the competing interests developed in *LaRouche*, 780 F.2d at 1139, and found that the Government had failed to meet its burden under that test to show that it had exhausted reasonable alternative sources or that it had a compelling need for the information. (JA742-49, 749-51)

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if there was sufficient evidence of harassment to quash the subpoena (JA737-738 n.5).

As for the second prong of *LaRouche* — availability of the information by alternative means — the district court noted that the Government had failed entirely to "proffer[] the circumstantial evidence it has developed":

> Had the government provided the court with a summary of its trial evidence, and that summary contained holes that could only be filled with Risen's testimony, the Court would have had a basis upon which to enforce the subpoena. The government has not provided such summary, relying instead on the mere allegation that Risen provides the only direct testimony about the source of the classified information in Chapter 9. That allegation is insufficient . . . . (JA748)

The district court noted that the Government's argument that it had exhausted other sources "clearly misstates the evidence in the record, which as described in Section I-C [JA725-28] includes numerous telephone records, email messages, computer files, and testimony that strongly indicates that Sterling was Risen's source." (JA743)

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 a compelling interest, which, it noted, required that the information sought "be necessary or, at the very least, critical to the litigation at issue." (JA750) The district court noted that the Government's claim that "Risen's testimony will 'simplify the trial and clarify matters for the jury' and 'allow for an

efficient presentation of the Government's case" made clear that the testimony was "neither necessary nor critical to demonstrating Sterling's guilt." *Id.*

The district court took note of the fact that the Government's failure to carry its burden under *LaRouche* was the product of a strategic choice on its part:

> Rather than explaining why the government's need for Risen's testimony outweighs the qualified reporter's privilege, the government devotes most of its energy to arguing that the reporter's privilege does not exist in criminal proceedings that are brought in good faith. Fourth Circuit precedent does not support that position. Moreover, the government has not summarized the extensive evidence that it already has collected through alternative means. Nor has the government established that Risen's testimony is necessary or critical to proving Sterling's guilt beyond a reasonable doubt. . . . Under the specific facts of this case . . . the government has evidence equivalent to Risen's testimony. (JA751-52)

Last, the district court noted that Mr. Risen's agreement to authenticate his newspaper articles and book "provides significant evidence to the government," including testimony about a March 2, 2002 article for which Mr. Risen interviewed Mr. Sterling, observing that this testimony would provide direct evidence of Mr. Risen's contacts with Mr. Sterling. (JA741) The district court then identified a limited number of topics on which Mr. Risen would be required to testify: (1) that Mr. Risen wrote a particular newspaper article or chapter of a book; (2) that a particular newspaper article or book chapter that Risen wrote is accurate;

(3) that statements referred to in Mr. Risen's newspaper article or book chapter as being made by an unnamed source were in fact made to Mr. Risen by an unnamed source; and (4) that statements referred to in Mr. Risen's newspaper article or book chapter as being made by an identified source were in fact made by that identified source. (JA752)

The Government sought reconsideration/clarification of the district court's order to the extent it quashed the subpoena. The district court denied the motion to the extent it challenged the existence of the reporter's privilege but granted the motion to clarify and expand certain topics to be covered in Mr. Risen's testimony, including the authentication of a purported book proposal, the general timing of disclosures from Mr. Risen's confidential source(s), and general testimony about Mr. Risen's writing style. (JA973-84)

Toward the end of the hearing on the motion for reconsideration/clarification, the Government suggested that the district court engage in a procedure whereby Mr. Risen would take the stand at the end of the Government's case. The Government suggested that, before testifying in front of the jury, "the Court [should] take an hour or so without the jury" to vet the specific questions to and answers from Mr. Risen. (JA984) The Government specifically noted that

under its proposed procedure, "It's no longer a motion *in limine*. It's you've heard the proof at that point, and you can make rulings based upon the evidence as it has unfolded." (JA987) The district court agreed to the proposed procedure, remarking that it would effectively address the primary problem that the correct outcome for motions *in limine* "often depend[s] upon how the trial evolves." (*Id.*; *see also* JA957-58) Under the adopted procedure, the admissibility of Mr. Risen's testimony as to all subjects would not be definitively determined until the "voir dire" took place near or at the close of the Government's case.

The Government further requested, and the district court agreed, that "Mr. Risen remain under subpoena until the close of the case, because there is the possibility that the defense case would change the balancing test . . . and he would be needed as a potential witness if that occurs." (JA987) Thereafter, the Government raised one last substantive area for Mr. Risen's testimony, directed at establishing venue. In light of the Government's proposal for vetting Mr. Risen's testimony the morning before he testifies, the court "withh[e]ld ruling on that issue until we do our little voir dire of Mr. Risen. By then, a week of the trial has passed. I'll be able to see more clearly whether there is such a critical venue issue that it might change the balance under *LaRouche*, all right?" (JA989)

On the eve of trial, the Government noticed its appeal of the district court's orders with regard to Mr. Risen's testimony, together with other evidentiary rulings having no bearing on Mr. Risen's testimony.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to hear this interlocutory appeal because the district court's orders concerning Mr. Risen's testimony were preliminary determinations that do not have the effect of suppressing or excluding evidence and therefore fall outside of the scope of the jurisdictional grant under 18 U.S.C. § 3731, the only basis for jurisdiction asserted by the Government.

At the hearing on the Government's motion for reconsideration, the district court adopted the voir dire procedure requested by the Government to review the particular questions that would be asked of Mr. Risen on the day he would be called to testify and to "make rulings based upon the evidence as it has unfolded" at that time. The court further agreed to maintain the subpoena throughout the trial because of "the possibility that the defense case would change the balancing test . . . and he would be needed as a potential witness if that occurs." Having adopted the Government's suggested protocol for reconsidering the scope of

Mr. Risen's testimony at trial, it is plain that no evidence has been excluded or suppressed at this time.

The district court's decision not to order broader testimony from Mr. Risen is the natural consequence of the Government's strategic refusal to make any evidentiary showing in support of its motion *in limine*, leaving the district court no choice but to postpone ordering or suppressing further testimony until the availability of alternative evidence has been established at trial. The district court's adoption of the Government's proposed voir dire process is thus akin to the procedural order found insufficient for Section 3731 jurisdiction in *United States* v. *Stipe*, 653 F.2d 446 (10th Cir. 1981), and does not have the patina of finality that provided jurisdiction in *United States* v. *Siegel*, 536 F.3d 306, 315 (4th Cir. 2008) ("The district court's decision, though couched in preliminary terms, therefore *effectively and finally* suppressed a large portion of the evidence the government intended to present at trial." (emphasis added)).

If the Court entertains this appeal, the district court's orders concerning the scope of Mr. Risen's testimony should be affirmed because:

- the district court did not err in recognizing a qualified reporter's privilege arising under the First Amendment that protects against disclosure of confidential source information in a criminal context;

- in the alternative, a qualified reporter's privilege exists under federal common law that would dictate the same result; and
- the district court did not abuse its discretion in conducting a careful balancing of the factual record available to it to limit Mr. Risen's testimony to certain enumerated topics for which the record established a need.

The district court correctly concluded that the Fourth Circuit recognizes a qualified reporter's privilege rooted in the First Amendment in criminal trials. This privilege, articulated in Justice Powell's decisive concurring opinion in *Branzburg* v. *Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring), has been expressly recognized by this Court in civil cases, *see, e.g.*, *LaRouche* v. *National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986) (citing Justice Powell's concurring opinion as support for the reporter's privilege in civil cases involving confidential sources), and in every reporter's privilege case involving confidential information. *Id.*; *Ashcraft* v. *Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000). Moreover, every court of appeals to have addressed the issue has concluded that a reporter's privilege applies in criminal trials where confidential source information is sought from journalists. (*See* Section II.B., *infra*.)

This Court has repeatedly held that the district court's application of the test set forth in *LaRouche* to balance the particular facts before it is reviewed

for abuse of discretion. *See LaRouche*, 780 F.2d at 1139 ("A motion to compel discovery is addressed to the sound discretion of the district court. This remains true even when the object of that discovery is a journalist's confidential source."); *Church of Scientology International v. Daniels*, 992 F.2d 1329, 1334 (4th Cir. 1993) (reviewing lower court finding that reporter's privilege had not been overcome for abuse of discretion); *see also Ashcraft* v. *Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) ("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."). There is no basis for finding an abuse of discretion here. The Court considered the alternative evidence and the Government failed to make any contrary showing and itself indicated that it seeks Mr. Risen's testimony not because it is necessary or critical, but in order to "simplify the trial and clarify matters for the jury" and to "allow for an efficient presentation of the Government's case." (JA750) Moreover, the district court concluded that Mr. Risen's testimony is unnecessary in light of the Government's other evidence. Under those circumstances, the Court's decision to order testimony on certain topics, to adopt the Government's requested vetting process, and to maintain the subpoena throughout the trial to enable rebalancing as the case unfolded is hardly an abuse of discretion.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION UNDER 18 U.S.C. § 3731 TO REVIEW THE DISTRICT COURT'S PRELIMINARY RULINGS REGARDING THE SCOPE OF MR. RISEN'S TESTIMONY

This Court lacks jurisdiction over the orders concerning Mr. Risen's testimony because 18 U.S.C. § 3731 — the only purported basis for appellate jurisdiction — only provides jurisdiction over orders that have the practical effect of excluding or suppressing evidence. The district court's rulings regarding to Mr. Risen do not have the practical effect of excluding evidence since the court explicitly granted the Government's request to rebalance the relevant interests multiple times at trial before reaching a determination.

18 U.S.C. § 3731 provides that:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence . . . , not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

Section 3731 has been found to apply only when an interlocutory order has the "practical effect of excluding evidence." *United States* v. *Kane*, 646

F.2d 4, 7 (1st Cir. 1981); *see also Watson*, 386 F.3d at 311. This standard requires that the trial court's order "make[] exclusion, practically speaking, inevitable." *Kane*, 646 F.2d at 8; *see also Watson*, 386 F.3d at 311 ("an interlocutory appeal will lie only when . . . the order has the direct effect of denying the government the right to use evidence"). A trial court's order does not become appealable simply on the basis that it may "require a future ruling that will exclude evidence." *See United States* v. *Camisa*, 969 F.2d 1428, 1429 (2d Cir. 1992).

The district court's orders here fail to satisfy that standard because they are preliminary in nature. Based on the Government's failure to present the district court with any evidence of its need for Mr. Risen's testimony, the court preliminarily held that it would not permit questioning about his confidential source(s). But the court also made clear that it would redo the balancing of interests required under *LaRouche* later — and on more than one occasion. First, at the Government's suggestion, the court agreed to reconsider the appropriate scope of Mr. Risen's testimony again at a voir dire session that would be held outside the presence of the jury right before he was scheduled to testify. (JA984-85) Under that procedure, the district court would revisit its earlier analysis based on the evidence actually adduced at trial up to the point of Mr. Risen's testimony. As the Government recognized, under the new procedure, "[i]t's no longer a motion *in*

limine. It's you've heard the proof at that point, and you can make rulings based upon the evidence as it has unfolded." (JA987) The district court also agreed — at the Government's suggestion — to keep Mr. Risen under subpoena even after he testified, in case something raised by the defense required the court to rebalance the interests again. (JA987) Given the court's express willingness to redo the balancing several times throughout the trial, it is clear that the court's orders pertaining to Mr. Risen amount to nothing more than a preliminary ruling about what might be admitted at trial based on the Government's showing of its evidence to date.[5] The orders do not actually definitively suppress or exclude *any* of his testimony at trial, as they call for a re-examination of the issue repeatedly throughout the trial.

That the scope of Mr. Risen's testimony remains open-ended is clear from the district court's response to the Government's most recent request for testimony concerning Mr. Risen's physical location when he received confidential in-

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[5] As the district court noted, its ruling was largely based on the Government's strategic refusal to offer any evidentiary showing to facilitate the necessary balancing in advance of trial. *See* JA748 ("Had the government provided the court with a summary of its trial evidence, and that summary contained holes that could only be filled with Risen's testimony, the Court would have had a basis upon which to enforce the subpoena. The government has not provided such a summary.").

formation. That was the only substantive issue raised with Judge Brinkema after she agreed to adopt the Government's proposed voir dire process. What had been implicit in the court's adoption of the voir dire process for other topics was made explicit then:

> I'm going to withhold ruling on that issue until we do our little voir dire of Mr. Risen. By then, a week of the trial has passed. I'll be able to see more clearly whether there is such a critical venue issue that it might change the balance under *LaRouche*, all right?"

(JA989) Accordingly, as to questions relating to venue, there is not even a *preliminary* ruling as to admissibility at this point, let alone a ruling suppressing or excluding evidence.

The court's adoption of the voir dire procedure suggested by the Government renders the orders at issue in this appeal most analogous to the order in *United States* v. *Stipe*, 653 F.2d 446 (10th Cir. 1981). There, the trial court denied the government's motion *in limine* to introduce hearsay evidence prior to the introduction of independent evidence demonstrating a conspiracy, as is necessary to qualify for the co-conspirator hearsay exception under Fed. R. Evid. 801. *Id.* at 447. The Tenth Circuit found that it did not have jurisdiction under Section 3731 to hear an appeal because the trial court did not rule on the admissibility or non-admissibility of the hearsay testimony, but only on the government's efforts to

"expedite the prosecution of the case at hand" by seeking to have that testimony admitted before establishing the factual prerequisites. *Id.* at 348-50.

Similarly, here, the court has ruled only on the Government's effort to expedite its presentation by seeking to admit Mr. Risen's testimony before it has made any factual showing to establish the requisite need for such testimony. Indeed, the district court repeatedly lamented the Government's steadfast insistence on seeking Mr. Risen's testimony while refusing to make any showing in support of its motion — i.e., by summarizing the evidence it would introduce at trial. (JA743, JA748, JA752)

At most, the district court's application of the reporter's qualified privilege has the potential to result in a future ruling that would exclude evidence should the Government ultimately prove unable to demonstrate a need for Mr. Risen's testimony at trial. But that potential future exclusion is not enough to give rise to jurisdiction under Section 3731. The Second Circuit addressed a similar scenario in *United States* v. *Camisa*, 969 F.2d 1428 (2d Cir. 1992), where the court denied a motion to disqualify counsel, even though the ruling would almost surely result in the exclusion of testimony from one jointly represented witness. The court held that the trial court's order was not appealable even though the "practical

implication" of the trial judge's order was that certain evidence was "almost certainly not going to be available at trial." *Id.* at 1429.

The order in *Camisa* did not constitute a ruling to exclude because "not until the case is well developed at trial will the district judge be in a position to determine whether or not [the witnesses'] testimony, if proffered, would be admissible." *Id.* at 1429-30. The district court here similarly has stated its intention to reconsider the issues at trial when it can make a ruling based upon the evidence as it has unfolded, and it is unclear whether the Government's alternative evidence, once proffered, will demonstrate a need for Mr. Risen's testimony and overcome the reporter's qualified privilege. (JA987, JA989) Accordingly, the district court's ruling here does not fit within the confines of Section 3731, and there is no basis for jurisdiction.

II. THE DISTRICT COURT DID NOT ERR IN RECOGNIZING A REPORTER'S PRIVILEGE UNDER THE FIRST AMENDMENT

A. Fourth Circuit Precedent Recognizes A Qualified Reporter's Privilege That Protects Against The Disclosure Of Confidential Source Information In Criminal Trials

The district court correctly held that, in the context of a criminal trial, "the 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." (JA731-32) The district court was correct to apply that privilege here because the case involves both confidential sources and indicia of government harassment or intimidation.

The reporter's privilege is rooted in Justice Powell's decisive concurring opinion in *Branzburg* v. *Hayes*, 408 U.S. at 709 (Powell, J., concurring), which, as the district court correctly noted, the Fourth Circuit "first applied . . . to recognize a qualified First Amendment reporter's privilege in *United States* v. *Steelhammer*, 539 F.2d 373 (4th Cir. 1976)." (JA732-33)

In *Branzburg*, the Supreme Court reviewed contempt convictions for journalists based on their failure to testify before grand juries that were investigat-

ing criminal conduct that the reporters learned of while preparing articles. The Supreme Court upheld the contempt convictions in a 5-4 decision. But Justice Powell, who joined the majority with his deciding vote, wrote separately in a concurring opinion to illustrate the narrow scope of the majority opinion. In so doing, Justice Powell clarified that the Court's holding 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." *Branzburg*, 408 U.S. at 709 (Powell, J., concurring). In clarifying the nature of these "constitutional rights," Justice Powell explained, in an oft-quoted passage, 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 relationship without 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's concurring opinion — which was intended to "emphasize" the narrow basis on which he provided the fifth and deciding vote for the majority opinion — makes clear that the majority's decision in *Branzburg* did not

in any way preclude journalists from asserting in any case, civil or criminal, a "claim to privilege" that is rooted in "constitutional rights with respect to the gathering of news or in safeguarding [reporters'] sources." *Id.* at 709. The opinion further clarifies that courts are required to judge such assertions of privilege "on [their] facts" and on "a case-by-case basis," by balancing the "vital constitutional and societal interests" of freedom of the press, on the one hand, and the obligation of citizens to give relevant testimony concerning criminal conduct on the other. *Id.* at 724.

The Government attempts to play down the significance of Justice Powell's concurrence, arguing that it provided for no "privilege" — even though that was the term Justice Powell used — but only certain "protections" from subpoenas issued in bad faith. Gov't Br. at 25-26, 26n. That interpretation, however, is inconsistent with both the language of Justice Powell's opinion and several later cases in which Justice Powell remarked further about what that opinion meant. For example, in *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting), Justice Powell clarified the significance of the *Branzburg* holding as follows:

> 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 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) (Justice Powell's concurrence in *Branzburg* made clear that, "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").[6]

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[6] The Government also argues that recognizing a reporter's privilege in criminal cases would be inconsistent with *Branzburg* because the Court in *Branzburg* rejected the notion of First Amendment protection for confidential sources "on the theory that it is better to write about crime than to do something about it." Gov't Br. 24, 36 (quoting *Branzburg*, 408 U.S. at 692). This argument, however, overlooks an important distinction between the kinds of eyewitness observations of criminal activity at issue in *Branzburg* — e.g., using, manufacturing, or selling drugs or threatening the life of the U.S. President, *Branzburg*, 408 U.S. at 672-76 — and the types of observations here. The only alleged criminal activity that Mr. Risen allegedly observed is the conveying of newsworthy information to Mr. Risen. As such, it cannot be said that Mr. Risen chose "to write about crime [rather] than do something about it." In writing about that information, Mr. Risen was doing what reporters are supposed to do and was subject to core First Amendment protection. *See Landmark Communications Inc.* v. *Virginia*, 435 U.S. 829, 838-39 (1978) (striking down law making it illegal to publish information concerning "public scrutiny and discussion of governmental affairs" that was confidentially conveyed to reporter in violation of the law); *Bartnicki* v.

The Government's reading of Justice Powell's concurrence in *Branzburg* is also inconsistent with this Court's reading, which provides journalists qualified protection in cases involving either confidential sources or bad faith, intimidation, or harassment of journalists. *See, e.g.*, *LaRouche*, 780 F.2d at 1139 (recognizing qualified reporter's privilege in civil case); *In re Shain*, 978 F.2d 850, 852-53 (4th Cir. 1992) (acknowledging qualified reporter's privilege in criminal cases involving claims of confidentiality, harassment, or bad faith) (citing *United States* v. *Steelhammer*, 539 F.2d 373, 376 (4th Cir. 1976) (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d 539 (4th Cir. 1977).

In doing so, this Court has unequivocally held, time and again, that Justice Powell's concurring opinion is the controlling decision in *Branzburg* and has read that opinion as supporting the existence of a qualified reporter's privilege for confidential sources in both civil and criminal cases. *See, e.g.*, *In re Shain*, 978 F.2d at 852-53 (citing Justice Powell's opinion in support of reporter's privilege in criminal cases involving either confidential sources or bad faith); *see also Ashcraft*

Vopper, 532 U.S. 514 (2001) (striking down application of statute making it illegal to publish information of public concern that was obtained unlawfully by journalists' sources). First Amendment jurisprudence has always treated these types of criminal "observations" differently than those at issue in *Branzburg*.

v. *Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000); *Steelhammer*, 539 F.2d at 376 (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540; *LaRouche*, 780 F.2d at 1139 (citing Justice Powell's concurring opinion as support for the reporter's privilege in civil cases involving confidential sources).[7]

This Court found the reporter's privilege to protect against disclosure in the only two cases it has decided implicating the reporter's privilege with respect to confidential source information: *LaRouche* and *Ashcraft*. As the Court

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[7] Supreme Court authority further supports a reading of *Branzburg* in which Justice Powell's opinion is controlling, notwithstanding that he joined the five-person majority opinion. The concurring opinion of a Justice who joins a 5-4 majority but also issues a separate opinion that "clarifies" the meaning of the majority opinion represents the holding of the Court, since the majority opinion is not a true majority except to the extent that it accords with the views of the concurrence. *Cf. Marks* v. *United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)), *superseded in part by statute on unrelated grounds as stated in Armstrong* v. *Bertrand*, 336 F.3d 620 (7th Cir. 2003); *see also McKoy* v. *North Carolina*, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., joined by Rehnquist, C.J. and O'Connor, J., dissenting) (in situations where the "individual Justice" is needed for the majority, what that Justice writes in a concurring opinion is "not a 'gloss,' but the least common denominator," and while "separate writing cannot add to what the majority opinion holds . . . it can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority").

explained in *Ashcraft*, constitutional protection for confidential sources is both mandated by Supreme Court precedent and viewed as essential to a free and open society:

> News reporters are "entitled to some constitutional protection of the confidentiality of [their] sources." *Pell* v. *Procunier*, 417 U.S. 817, 834, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974) (citing *Branzburg* v. *Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 66 (1972)); *see also Branzburg*, 408 U.S. at 707, 92 S. Ct. 2646 ("news gathering is not without its First Amendment protections"). Such protection is necessary to ensure a free and vital press, without which an open and democratic society would be impossible to maintain. *See Time, Inc.* v. *Hill*, 385 U.S. 374, 389, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967) ("A broadly defined freedom of the press assures the maintenance of our political system and an open society"). If reporters were routinely required to divulge the identities of their 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.

Ashcraft, 218 F.3d at 287 (citations omitted). In the 40 years since *Branzburg* was decided, the Fourth Circuit has never ordered a journalist to testify about his or her confidential sources. *See also United States* v. *Lindh*, 210 F. Supp. 2d 780, 783 (E.D. Va. 2002) (recognizing a First Amendment reporter's privilege in a criminal case "where the journalist produces some evidence of confidentiality or governmental harassment"); *United States* v. *Regan*, Criminal No. 01-405A (E.D. Va. Aug. 20, 2002) (JA519) (holding that, in applying the reporter's privilege in criminal cases involving confidential source information, "the fact that [the reporter]

claims privilege with respect to a confidential source(s) places the thumb on the scale of protecting First Amendment interests at the onset").

The relevant test in applying the privilege in this Circuit was first set forth in *LaRouche*. There, following Justice Powell's opinion in *Branzburg*, the Court "balance[d] the interests involved" to determine whether the privilege applied. *LaRouche*, 780 F.2d at 1139 (citing *Branzburg*, 408 U.S. at 710 (Powell, J., concurring)). The Court instructed that three factors must be considered in evaluating the privilege — "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information"[8] — but did not rule out consideration of other factors in the balancing. *See LaRouche*, 780 F.2d at 1139 (three-factor test is described as an "aid" to district courts in balancing the relevant interests). Applying this test in both *LaRouche* and *Ashcraft*, the Court quashed the subpoenas in both cases after performing the necessary balancing. *See LaRouche*, 780 F.2d at 1139; *Ashcraft*, 218 F.3d at 287. Both *LaRouche* and *Ashcraft* were civil cases; *see also Church of Scientology International* v. *Daniels*, 992 F.2d 1329, 1335 (4th Cir.),

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[8] *LaRouche*, 780 F.2d at 1139 (citing *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721, *modified*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981)).

cert. denied, 510 U.S. 869 (1993) (applying *LaRouche* test in civil case involving request for newsgathering materials).

In the criminal context, this Court has declined to apply the *LaRouche* balancing test in cases that do not involve confidential sources but has also made clear that a balancing of the interests is required whenever confidential sources are involved. *See In re Shain*, 978 F.2d at 853. In *In re Shain*, four South Carolina journalists separately conducted "on the record" interviews of a United States Senator without witnesses. *Id.* at 851. The trial court ordered the journalists to testify in response to narrowly drawn subpoenas for them to "testify for no more than five minutes each to confirm that Senator Long had in fact made the statements they had reported." *Id.* at 852. The Court affirmed, emphasizing the significance that the lack of confidential sources played in reaching its result. In cases that do not involve confidential sources, the Court concluded that the requisite balancing of interests under the reporter's privilege does not apply without evidence of governmental harassment or bad faith. *Id.* at 852-53. Because there was no evidence of confidentiality or governmental harassment, the Court concluded that no balancing needed to be done under the facts of that case:

> In this case the reporters concede that neither Senator Long's identity nor his statements during interviews with him were confidential. Nor

> do they contend that the government seeks their testimony to harass them or otherwise seeks it in bad faith. . . . The reporters do not . . . assert that their testimony would be irrelevant or duplicative. . . . We conclude, therefore, that the absence of confidentiality or vindictiveness in the facts of this case fatally undermines the reporters' claim to a First Amendment privilege.

In re Shain, 978 F.2d at 853. *In re Shain* also relied heavily on Justice Powell's concurring decision in *Branzburg* and on *United States* v. *Steelhammer*, 539 F.2d 373, 376 (4th Cir. 1976) (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540. *See In re Shain*, 978 F.2d at 852.

Steelhammer, the Court's first application of *Branzburg*, also involved an attempt to compel journalists' testimony as witnesses in a contempt trial about nonconfidential information. The trial court found the reporters in contempt for refusing to testify and rejected their argument that the subpoenas should be quashed because they violated the reporter's privilege. The Court reversed and vacated the contempt finding, with Judge Winter issuing a dissenting opinion. *Steelhammer*, 539 F.2d 373 (4th Cir. 1976); *id.* at 376 (Winter, J., dissenting). An *en banc* Court reversed the panel, upholding the contempt finding for the reasons set forth in Judge Winter's dissenting panel opinion. *Steelhammer*, 561 F.2d at 540. Indeed, as the district court in this case noted, the Fourth Circuit "adopt[ed] Judge

Winter's dissent" for its delineation of the "contours of the reporter's privilege." (JA733)

The *en banc* Court in *Steelhammer*, like the Court in *In re Shain*, found that the balancing of interests required by the reporter's privilege was not necessary in cases that involved neither confidential sources nor allegations of bad faith or harassment. *Steelhammer*, 539 F.2d at 376 (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540. The central significance of a source's confidentiality in the Court's holding is evident in the opinion's opening lines:

> In the instant case it is conceded that the reporters did not acquire the information sought to be elicited from them on a confidential basis; one of them (Steelhammer) so testified in the District Court. My study of the record fails to turn up even a scintilla of evidence that the reporters were subpoenaed to harass them or to embarrass their newsgathering abilities at any future public meetings that the miners might hold. It therefore seems to me that, in the balancing of interests suggested by Mr. Justice Powell in his concurring opinion in *Branzburg* . . . , the absence of a claim of confidentiality and the lack of evidence of vindictiveness tip the scale to the conclusion that the district court was correct in requiring the reporters to testify.

539 F.2d at 376; *see also In re Shain*, 978 F.2d at 853 (quoting part of this quote from *Steelhammer*).

The decisions in *In re Shain* and *Steelhammer* — neither of which involved confidential information and both of which stressed that the missing ele-

ment of confidentiality would have changed the analysis — coupled with this Court's rigorous application of the privilege in *LaRouche* and *Ashcraft* (the only cases that did involve confidential information), demonstrate that this Circuit affords journalists a qualified First Amendment privilege in both civil and criminal cases whenever there is evidence of confidentiality, bad faith, or harassment.

B. No Circuit Has Ever Found That The Reporter's Privilege Does Not Protect Against The Compelled Disclosure Of Confidential Source Information In Criminal Trials

The Government contends that this and other courts of appeals have repeatedly refused to acknowledge the existence of a reporter's privilege in criminal cases "so long as the proceedings are brought in good faith." Gov't Br. at 26. But that is demonstrably false. In fact, every federal court of appeals to consider the existence of the reporter's privilege in the criminal trial context has recognized the privilege. No court of appeals has ever held otherwise.

The Government confuses the issue by relying exclusively on cases decided in the grand jury context. *See* Gov't Br. at 26-27. But in reporter's privilege cases, courts have routinely distinguished between grand jury cases and criminal trials. *Compare*, *e.g.*, *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 401-02 (9th Cir. 1993) (finding no privilege in grand jury context) *with United*

States v. *Pretzinger*, 542 F.2d 517, 520-21 (9th Cir. 1976) (applying privilege in criminal trial context). And outside of the grand jury context, the courts of appeals have uniformly applied a reporter's privilege, arising under the First Amendment and/or federal common law, in cases seeking to compel disclosure of confidential source information. This Court should not accept the Government's invitation to become the first court of appeals to hold otherwise.

Eight of the other eleven federal circuits have considered whether a qualified reporter's privilege exists in the context of a criminal trial. Of those, the Second, Ninth, Eleventh, and D.C. Circuits have applied the privilege in cases, such as this one, that involved confidential source information. *See United States* v. *Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983) (quashing subpoena seeking confidential source information); *United States* v. *Cutler*, 6 F.3d 67 (2d Cir. 1993) (applying privilege and partly quashing request for reporter's testimony); *Farr* v. *Pitchess*, 522 F.2d 464 (9th Cir. 1975) (applying privilege in criminal case); *Pretzinger*, 542 F.2d at 520-21 (applying privilege and affirming district court's refusal to order reporter to reveal his confidential source); *United States* v. *Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (finding that appellants failed to overcome privilege after journalist refused to testify at evidentiary hear-

ing);[9] *United States* v. *Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000) (finding that criminal defendant failed to overcome privilege in connection with motion to withdraw plea), *cert. denied*, 532 U.S. 924 (2001). Two other circuits — the First and Third — have applied the privilege in criminal trials even when nonconfidential information is at issue. *See United States* v. *LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988) (applying reporter's privilege in case seeking newsgathering material and denying motion to quash); *United States* v. *Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (finding qualified common law reporter's privilege "not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases."), *cert. denied*, 449 U.S. 1126 (1981). The remaining two — the Fifth and Seventh — have declined to recognize the privilege in criminal trials in which *nonconfidential* information was at issue, while expressly recognizing that, if confidential source information were at issue, it might necessitate a different result. *McKevitt* v. *Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (affirming district court finding that privilege had been overcome where "the information in the reporter's possession does not come from a confidential source"); *United States* v.

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9 Although the *Caporale* decision does not make clear one way or the other whether confidential source information was at issue, the article the reporter was asked to testify about involved the use of confidential sources. *See* Andy Rosenblatt, *No Proof Found in Juror-Bribery Probe, FBI Says*, Miami Herald (Apr. 13, 1983), 1983 WL NR190181.

Smith, 135 F.3d 963, 972 (5th Cir. 1998) (upholding subpoena for non-confidential information in a criminal case because confidentiality is "critical to the establishment of a privilege"). *See also United States* v. *Treacy*, 639 F.3d 32, 42 (2d Cir. 2011) (denying motion to quash subpoena for nonconfidential information in criminal trial setting, noting that reporter "is not entitled to invoke the stronger privilege that protects confidential materials").

Moreover, the *LaRouche* test set forth by this Court in the civil context and used by the district court in applying the reporter's privilege in the criminal context is consistent with the test used by other circuits in the criminal context. For instance, in *Cuthbertson,* the Third Circuit held that "before a reporter may be compelled to disclose confidential information" in a criminal trial setting, the movant must (1) "demonstrate that he has made an effort to obtain the information from other sources," (2) "demonstrate that the only access to the information sought is through the journalist and her sources," and (3) "persuade the Court that the information sought is crucial to the claim." *United States* v. *Cuthbertson*, 651 F.2d 189, 195-96 (3d Cir. 1981) [*Cuthbertson II*]; *see also Caporale*, 806 F.2d at 1504 (following test promulgated in *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721, 725-26 (5th Cir. 1980), and holding that in a criminal setting the privilege is overcome only if "the party requesting the information can show that it is highly

relevant, necessary to the proper presentation of the case, and unavailable from other sources").

This Court should not depart from well-established precedent by being the first court of appeals ever to deny the existence of a reporter's privilege with respect to confidential source information in the criminal trial context.

III. THE INFORMATION SOUGHT TO BE COMPELLED IS ALTERNATIVELY PROTECTED BY THE REPORTER'S PRIVILEGE UNDER FEDERAL COMMON LAW

Finding a First Amendment privilege, the district court did not reach the question of whether reporters have a privilege under federal common law. (JA732 at n.3) This Court may, however, "affirm on any grounds apparent from the record," *United States* v. *Smith*, 395 F.3d 516, 519 (4th Cir. 2005), even on grounds not relied upon or rejected by the district court. *See Scott* v. *United States*, 328 F.3d 132, 137 (4th Cir. 2003). If for some reason the Court were to hold that there is no First Amendment reporter's privilege that applies here, then the existence of a federal common law privilege provides an alternative basis for affirmance.

This Court was the first court of appeals to recognize the existence of a common law reporter's privilege for civil cases in *Steelhammer*. *See Steelham-*

mer, 539 F.2d at 377 n.* (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540. Supreme Court case law since that ruling also supports application of a common law privilege.

In *Steelhammer*, an *en banc* panel adopted Judge Winter's dissenting panel opinion that affirmed an order finding journalists in contempt for refusing to testify about *nonconfidential* newsgathering information in a civil contempt trial. *See Steelhammer*, 539 F.2d at 377-78 (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540. The journalists had argued that the reporter's privilege under the First Amendment shielded their testimony from disclosure, but Judge Winter and the *en banc* Court rejected that argument in the absence of evidence of confidentiality or bad faith/harassment and ordered the journalists to testify. *Id.* In that same opinion, however, Judge Winter (and later, the *en banc* Court) found that reporters should be afforded a common law privilege under Federal Rule of Evidence 501 not to testify in civil cases:

> In my view the prerequisites to the establishment of a privilege against disclosure of communications set forth in VIII J. Wigmore, Evidence, § 2285 at 527 (1961) should apply to reporters. *Under Federal Rules of Evidence 501, they should be afforded a common law privilege not to testify in civil litigation between private parties.* I do not prolong this opinion by developing this point.

Steelhammer, 539 F.2d at 377 n.* (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540 (emphasis added). Since *Steelhammer* was a civil case, it is not surprising that Judge Winter limited his finding to civil litigation. But in light of the criminal precedents outlined above — which uniformly provide for a reporter's privilege in criminal trials involving confidential sources — there is no reasoned basis for limiting the common law privilege to the civil context. *See also Cuthbertson*, 630 F.2d at 147 ("[T]he interests of the press that form the foundation for the privilege are not diminished because the nature of the underlying proceeding out of which the request for information arises is a criminal trial.").

The post-*Steelhammer* caselaw provides additional support for a common law reporter's privilege. In *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), the Supreme Court recognized the existence of a psychotherapist/patient privilege under Fed. R. Evid. 501, which provides that privileges in federal criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." In *Jaffe*, the test outlined for recognizing a privilege under the common law — which is similar to the Wigmore test cited by Judge Winter in the *Steelhammer* footnote quoted above — leads to no other conclusion but that a common law reporter's privilege exists under Fed. R. Evid. 501.

In *Jaffee*, the Supreme Court held that, although the general rule is that "the public . . . has a right to every man's evidence," "[e]xceptions from the general rule . . . may be justified by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Jaffee*, 518 U.S. at 9 (citations omitted). The development of a privilege under Rule 501 is justified if protecting confidential communications of a particular sort "'promotes sufficiently important interests to outweigh the need for probative evidence . . . .'" *Jaffee*, 518 U.S. at 9-10 (citation omitted). The weight of the private and public interest in the reporter's privilege that we urge this Court to apply are surely as great as the significant public interest at stake in patient and psychotherapist communication, which justified that privilege.

The Supreme Court's application of these principles in *Jaffee* is instructive. In recognizing a psychotherapist-patient privilege, the Court noted that protecting communications between psychotherapists and patients serves important private and public interests. "Effective psychotherapy," the Court noted, "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. . . . For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. . . . By protecting confi-

dential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests." *Jaffee*, 518 U.S. at 10-11. The Court concluded that the privilege also serves the public interest by "facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id.* at 11.

The Court also held that the costs of recognizing the psychotherapist-patient privilege — in terms of losing potentially relevant evidence — were modest. The Court reasoned that, without a privilege, there would likely be a considerable chill on the very type of evidence sought; for example, parties would be unlikely to make statements against their interest to a therapist if they knew in advance that any statements could later be disclosed to governmental authorities or adversarial litigants. *Id.* at 11-12.

Finally, the Court relied upon the fact that "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege." *Id.* at 12. "[T]he policy decisions of the States," the Court held, "bear on the question whether federal courts should recognize a new privilege or amend the cover-

age of an existing one." *Id.* at 12-13. Given the general consensus in favor of the privilege, the Court concluded that "[d]enial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id.* at 13.

Applying the *Jaffee* standards demonstrates that a reporter's privilege should be recognized in the criminal trial context under federal common law. That the reporter's privilege serves important private and public interests is clear from the Fourth Circuit's decision in *Ashcraft*. As the Court observed there, protections for the press serve the private end of encouraging individuals to provide journalists with truthful, newsworthy information anonymously;[10] in addition, they serve the important public function of keeping the public informed, and providing essential information for making governing decisions in a democracy. *See Ashcraft*, 218 F.3d at 287 (protection of confidential sources "is necessary to ensure a free and vital press, without which an open and democratic society would be impossible to maintain. . . . If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the pub-

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[10] Significantly, the Supreme Court has held that the freedom to publish anonymously is protected by the First Amendment. *See McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334 (1995).

lic's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic.") (citations omitted) In short, confidentiality is essential for journalists to sustain their relationships with sources and to obtain sensitive information from them. Without it, the press cannot effectively serve the public by keeping it informed. As noted above, other federal courts of appeal have unanimously emphasized these strong public and private interests in finding the existence of the reporter's privilege in the criminal trial context. Thus, just as the Supreme Court concluded that the psychotherapist-patient privilege serves "the mental health of our citizenry," an interest that the Court found to be "a public good of transcendent importance," there is a clear consensus today among federal courts that the reporter's privilege enhances the political, economic, and social health of our citizenry by allowing the public to make informed decisions.

The important interests served by the reporter's privilege also outweigh the likely evidentiary costs. That is because, without a privilege, sources will be much less likely to make statements to the press that prosecutors would want to pursue. (JA358, JA363, JA374, JA382; JSA196-97, ¶64 ("[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.") (citations omitted)) The *Jaffee* Court's analysis of the psychotherapist-patient privilege in this regard is similarly applicable here:

> If the [psychotherapist-patient] privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled. . . . Without a privilege, much of the desirable evidence to which litigants such as petitioners seek access — for example, admissions against interest by a party — is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged. *Jaffee*, 518 U.S. at 11-12.

When the Court recognized a privilege under Rule 501 in *Jaffee*, it cited the recognition of the privilege by "all 50 States" and noted that "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." Given the national consensus on the psychotherapist privilege, the Court noted that denying a federal version of that privilege "would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id.* at 12-13.

A similar, overwhelming consensus exists now about the reporter's privilege. Today, journalists in 49 states may invoke some version of a reporter's

privilege. There are statutes in 40 states, as well as the District of Columbia.[11] In the 10 states without statutory shield laws, all but one — Wyoming, which has simply remained silent on the issue to date — have recognized a reporter's privilege in one context or another.[12] The protection of confidential sources has even

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11 *See* Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300-.390; Ariz. Rev. Stat. Ann. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Evid. Code § 1070; Colo. Rev. Stat. Ann. § 13-90-119; Conn. Gen. Stat. Ann. § 52-146t; Del. Code Ann. tit. 10, §§ 4320-26; Fla. Stat. Ann. § 90.5015; Ga. Code Ann. § 24-9-30; Haw. Rev. Stat. § 621, as amended by 2011 Haw. Sess. Laws ch. 113 (signed into law June 14, 2011); 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 - 60-485; 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-21.1-21.5; N.M. Stat. Ann. § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat. Ann. § 8-53.11; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code Ann. §§ 2739.04, 2739.12; Okla. Stat. Ann. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510-.540; 42 Pa. Cons. Stat. Ann. § 5942(a); R.I. Gen. Laws §§ 9-19.1-1 - 9-19.1-3; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208; Tex. Civ. Prac. & Rem. Code Ann. §§ 22.021-.027; Utah Order 08-04 [Utah R. Evid. 509]; Wash. Rev. Code Ann. § 5.68.010; 2011 W. Va. Acts 78 (to be codified at W. Va. Code § 57-3-10); Wis. Stat. Am. § 885.14; D.C. Code §§ 16-4701 - 16-4704.

12 *See Idaho* v. *Salsbury,* 924 P.2d 208 (Idaho 1996) (criminal); *In re 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. 1988) (civil), *cert. denied*, 488 U.S. 980 (1988); *Ayash* v. *Dana-Farber Cancer Institute*, 706 N.E.2d 316 (Mass. App. Ct. 1999) (civil); *Missouri ex rel. Classic III,*

been recognized in countries around the world that typically afford far less protection to journalists than the United States.[13]

Apart from these precedents, the Department of Justice has also promulgated guidelines that, if properly applied, effectively provides for a quali-

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Inc. v. *Ely*, 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); *Vermont* v. *St. Peter*, 315 A.2d 254 (Vt. 1974) (criminal); *Brown* v. *Virginia*, 204 S.E.2d 429 (Va. 1974) (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). In Mississippi, a trial court has concluded that the state constitution provides a basis for a qualified reporter's privilege. *Hawkins* v. *Williams*, Hinds County Circuit Court, No. 29,054 (Mar. 16, 1983) (unpublished opinion, *see* Addendum, 1).

[13] *See, e.g., R.* v. *National Post*, 2010 S.C.C. 16 (2010) (Canada) (courts should protect confidential sources when such protection is in the public interest); *Goodwin* v. *United Kingdom*, [1996] 22 E.H.R.R. 123, 143 (European Court of Human Rights) (Article 10 of the European Convention on Human Rights provides protection against the disclosure of confidential sources because "[p]rotection of journalistic sources is one of the basic conditions for press freedom"); *Financial Times Ltd.* v. *United Kingdom*, (2010) 50 E.H.R.R. 46 (same); *European Pacific Banking Corp.* v. *Television New Zealand Ltd.*, [1994] 3 N.Z.L.R. 43 (Ct. App. Wellington) (New Zealand) (establishing general rule protecting confidential sources in all cases, both in discovery and at trial); *Prosecutor* v. *Radoslav Brdjanin and Momir Talic*, Case No. IT-99-36-AR 73.9, 2002 WL 32730155 (International Criminal Tribunal for former Yugoslavia 2002) (establishing qualified privilege for war correspondents, even when no confidential sources are involved); Freedom of Press Act, Chapter 3, Article 1 (Sweden); Code of Criminal Procedure, Article 109(2) (France); Media Act of 1981, Article 31 (Austria); Criminal Procedure Code, Section 53 (Germany).

fied privilege in all federal cases by requiring the DOJ to refrain from issuing subpoenas to members of the press unless the standard factors of the qualified privilege are first met. *See* 28 C.F.R. §§ 50.10(b), (c), and (f)(1) (subpoenas may not issue to journalists in criminal cases unless (1) all reasonable alternative sources have been exhausted; (2) good faith negotiations with the media have been pursued; and (3) the Attorney General has authorized the subpoena after considering, among other things, whether there are reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation of that crime — particularly with respect to guilt or innocence). The guidelines, which are not enforceable by third parties and apply in all criminal matters, further support a finding of a common law privilege.

Therefore, in addition to this Court's holding in *Steelhammer* that a reporter's privilege exists under federal common law in civil cases, all of these factors demonstrate the existence of a strong public policy in favor of protecting journalists from making compelled disclosures, including in criminal cases. Should the Court decline to recognize a reporter's privilege under the First Amendment, the district court's orders concerning Mr. Risen's testimony should nevertheless be af-

firmed on the alternative ground of a reporter's privilege under federal common law.

IV. THE DISTRICT COURT CORRECTLY BALANCED THE INTERESTS IN THIS CASE

Whether the reporter's privilege is grounded in the First Amendment, federal common law, or both, it should be applied to the facts of this case. The district court did just that, carefully balancing the interests involved to reach its tentative ruling about the scope of Mr. Risen's testimony. Notwithstanding the Government's assertion to the contrary (Gov't Br. at 17), in this Court, that determination is reviewed under an abuse of discretion standard. *See LaRouche*, 780 F.2d at 1139; *Church of Scientology*, 992 F.2d at 1334; *Ashcraft*, 218 F.3d at 287. The Government does not even contend that the district court abused its discretion in finding that the Government failed to demonstrate that the confidential source information it seeks from Mr. Risen is unavailable by alternative means and that the Government has a compelling interest in obtaining it.

A. The District Court Correctly Concluded That The Qualified Reporter's Privilege Applies To Information That Indirectly Reveals Confidential Source Information

The district court found that the reporter's privilege "applies to this subpoena because it seeks confidential source information." (JA737) Indeed, as the district court observed, "[t]he government does not dispute that Risen had a confidentiality agreement with the source(s) of information for Chapter 9." (JA737-738). The Government attacks the notion and definition of confidentiality, however, from a different angle.

The Government claims that the information it seeks, such as the time and location of disclosures, is somehow not contemplated within and is separate from the confidentially agreement — and thus is not protected. The district court considered and rejected this reading:

> The government's narrow view of the scope of Risen's confidentiality agreement is incorrect. Courts have long held that the reporter's privilege is not narrowly limited to protecting the reporter from disclosing the names of confidential sources, but also extends to information that could lead to the discovery of a source's identity. *Id.* at 19-20 (citing *Miller* v. *Mecklenburg Cnty*, 602 F. Supp. 675, 679 (W.D.N.C. 1985); *Los Angeles Memorial Coliseum Comm'n* v. *Nat'l Football League*, 80 F.R.D. 489, 491 (C.D. Cal. 1981); *Loadholtz* v. *Fields*, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975)).

(JA739) Drawing on these precedents and the logical purpose of a confidentiality agreement, the district court correctly held that "Risen's testimony about his reporting, *including the time and location of his contacts with his confidential source(s)*, is protected by the qualified reporter's privilege because that testimony could help the government establish the identity of Risen's source(s) by adding or eliminating suspects" (emphasis added). (JA740) For his part, Mr. Risen has affirmed that providing the Government with this information would indirectly reveal the identity/ies of his confidential source(s). (JSA196, ¶63)

Apart from an individual journalist's view of which questions would reveal confidential sources, courts have long held that any questions that might implicitly reveal source identities fit squarely within the protected zone of the reporter's privilege. *See, e.g., Continental Cablevision, Inc.* v. *Storer Broadcasting Co.*, 583 F. Supp. 427, 436 (E.D. Mo. 1984) (noting that to determine whether privilege applies to questions about the circumstances of an interview, the court must consider whether the answer sought might "implicitly reveal the identity of a confidential source"). That is consistent with common sense. As Mr. Risen made clear in his affidavit in this case, "I have never heard of any confidentiality agreement made by a journalist that merely requires the journalist not to name his or her source. Such an agreement would be of little value to a source or potential source.

If a journalist were to withhold a source's name but provide enough information to authorities to identify the source, the promise of confidentiality would provide little meaningful protection to a source or potential source." (JSA193, ¶55; JA739)[14]

For this same reason, courts have long acknowledged that subpoenas directed at information that might indirectly reveal confidential source information — such as a journalist's phone records —implicate the reporter's privilege. When the Government sought the telephone records of a reporter in *New York Times* v. *Gonzales*, 459 F.3d 160 (2d Cir. 2006), for example, the Second Circuit required the Government to demonstrate the compelling interest for the materials under a *Branzburg* balancing analysis. The court noted that the reporter's privilege applied even though telephone records, by themselves, do not automatically reveal confidential information or directly tie a particular source to particular information. "Although a record of a phone call does not disclose anything about the reason for the call, the topics discussed, or other meetings between the parties to the calls, it is a first step of an inquiry into the identity of the reporters' source(s) of information .

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[14] In the context of other evidentiary privileges, this Court has taken a similarly broad, logical approach to ensure the information at issue is actually protected. *See, e.g., In re Grand Jury Subpoena*, 204 F.3d 516, 520 (4th Cir. 2000) (noting that, under attorney-client privilege, a client's identity could remain privileged if its disclosure "would in essence reveal a confidential communication").

. . ." *Id.* at 168. *See also* 28 C.F.R. §§ 50.10(a), (e), and (g) (recognizing that the First Amendment interests implicating the reporter's privilege are triggered by the subpoena of telephone records of journalists).

The district court made no legal error in drawing on the clear precedent (and inherent logic) that confidentiality encompasses and protects more than simply the name of a source. The court's finding that the subpoena in question is directed at information that will tend to reveal confidential source information within the scope of Mr. Risen's confidentiality agreement is correct and should be affirmed.

B. The District Court Correctly Concluded That The Government Did Not Meet Its Heavy Burden of Overcoming The *LaRouche* Factors

The burden is on the Government to demonstrate that the three factors set forth in *LaRouche* — relevance, alternative means test, and compelling interest — have been satisfied. As the district court found, the Government did not meet this burden at all. (JA751-52) Indeed, in many significant respects, the Government did not even *attempt* to meet its burden. As the district court noted, although the Government did cite to the Indictment concerning what it expected the evidence to be at trial, it provided neither the district court nor counsel for the defend-

ant or Mr. Risen with any evidence — through declaration or otherwise — demonstrating the need for Mr. Risen's testimony. (JA748) Under the circumstances, the district court cannot be said to have abused its discretion in finding that the Government failed to satisfy its burden.

Since the first *LaRouche* prong of relevance was "undisputed," as the district court found, the Government's burden was tested on the second and third prongs. (JA742)

1. The District Court Correctly Concluded That The Government Failed to Prove That It Could Not Obtain The Information It Seeks From Alternative Means

The Government made a strategic decision not to summarize the evidence that it expected to present at trial in order to demonstrate that the information it seeks from Mr. Risen could not be obtained by alternative means. As the district court noted:

> The government has not stated whether it has nontestimonial direct evidence, such as email messages or recordings of telephone calls in which Sterling discloses classified information to Risen; nor has it proffered in this proceeding the circumstantial evidence it has developed. (JA743)

Indeed, the Government repeatedly offered broad allegations in areas where the *LaRouche* test requires particular evidence, which led the district court to find that there was simply very little basis to rule in the Government's favor:

> Had the government provided the Court with a summary of its trial evidence, and that summary contained holes that could only be filled with Risen's testimony, the Court would have had a basis upon which to enforce the subpoena. The government has not provided such a summary, relying instead on the mere allegation that Risen provides the only direct testimony about the source of classified information in Chapter 9. That allegation is insufficient to establish that compelling evidence of the source for Chapter 9 is unavailable from means other than Risen's testimony. (JA748)

Rather than come forward with affirmative evidence that alternative means were unavailable, the Government merely repeatedly asserted that Mr. Risen was the only one who could "provide eyewitness testimony that directly, as opposed to circumstantially" clarifies who Mr. Risen's source(s) were. (JA742) The district court correctly rejected this argument, noting that, "[a]s the standard jury instructions and case law establish, 'circumstantial evidence is no less probative than direct evidence.'" (JA743 (quoting *Stamper* v. *Muncie*, 944 F.2d 170, 174 (4th Cir. 1991)))

The district court also correctly rejected the Government's argument that it was "self-evident" that, "in a leak case such as this one, Risen is the only

source for the information the Government seeks." (JA743) Forced to examine the evidence provided to the court at the grand jury level (because the Government provided none to the court in connection with the motion) (JA725 n.2), the district court found that "[t]his argument clearly misstates the evidence in the record, which . . . includes numerous telephone records, email messages, computer files, and testimony that strongly indicates that Sterling was Risen's source." (JA743) According to the district court, that evidence includes:

- Testimony of "a former intelligence official with whom Risen consulted on his stories" that the defendant was a source of Mr. Risen's for information about the classified operation in Chapter 9. (JA743)[15]
- Testimony from a witness who says that the defendant told her about his plans to meet with someone named 'Jim,' who had written an article about the defendant's discrimination case and was working on a book about the CIA. That same witness testified that she understood 'Jim' to be Mr. Risen and that, when she saw *State of War* in a bookstore, the defendant told her, without looking at the book first, that Chapter 9 was about work he had done at the CIA."[16] (JA747-48)

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15 While the Government argued in its motion for reconsideration that this witness was likely to change his testimony, the Government offered no proof of that. Accordingly, it was not an abuse of discretion for the district court to conclude that there was "no way of truly evaluating whether or not his testimony has changed in any material degree," and that his sworn grand jury testimony was "a much more reliable indicator of what he's going to say than some proffer that may have happened after the fact." (JA957).

16 The Government argued that this witness would be unavailable to testify at trial because she was married to the defendant. But again, it offered no proof of that. Nor did the Government demonstrate that, even if the witness

- Evidence that the defendant was an on-the-record source for Mr. Risen for a March 2, 2002 article. (JA725)

- Testimony of numerous phone calls between Mr. Risen and the defendant's home in Herndon, Virginia in February and March 2003, immediately before Mr. Risen disclosed to the CIA that he had information about "Operation Merlin." (JA726-27, 743)

- Testimony from former Senate Select Committee on Intelligence staffers that they met with the defendant on March 5, 2003 to discuss a classified operation and his discrimination suit. One of the staffers recounted that, during the meeting, the defendant threatened to go to the press — although the staffer could not recall if the threat related to the defendant's discrimination lawsuit or the classified operation. (JA725-26)

- Testimony from the CIA Director of the Office of Public Affairs that Mr. Risen had called him in April 2003 seeking comment on classified information he intended to write about, roughly coinciding with alleged contacts between the defendant and Mr. Risen. (JA726; JA37-40, ¶¶39-43)

- Phone records from the defendant's cellular and work phones, as well as from a home where he temporarily resided, and emails reflecting dozens of communications between the defendant and Mr. Risen, and/or between locations where the defendant was and Mr. Risen's home and office. (JA726-27, 743)

The district court thus found that, "[u]nder the specific facts of this case . . . the government has evidence equivalent to Risen's testimony." (JA752).

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was now married to the defendant, that she had informed the Government that she intended to assert the marital privilege. (JA748). On these facts, it was not an abuse of discretion for the district court to find that the Government had failed to satisfy its burden of showing that this testimony would be unavailable to it at trial.

Given the evidence outlined above and the Government's decision not to provide the district court with any information about its expected evidence at trial, that ruling was not an abuse of the court's discretion.

2. The District Court Correctly Concluded That The Government Had Not Shown A Compelling Interest In Mr. Risen's Testimony

Under the third prong of *LaRouche*, to overcome the qualified privilege the Government must show that it has a compelling interest in the information sought. *LaRouche*, 780 F.2d at 1139. Though this Court has only applied the *LaRouche* balancing test on a few occasions, those cases support the district court's finding that, to satisfy the third prong of *LaRouche*, the Government must show that the information it seeks is either "necessary" or "critical" to its case. (JA749-50)

In adopting the three-part balancing test, the *LaRouche* Court directly relied on *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721, *modified*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), which clearly found that the compelling interest prong required a showing of "necessity" before it could be satisfied. *See LaRouche*, 780 F.2d at 1139. Specifically, in a paragraph added to the original opinion in response to a request for rehearing *en banc*, the *Miller* court

clarified that, to succeed under the three-part test, a party seeking confidential source information from a reporter must show, among other things, "that knowledge of the identity of the informant is *necessary to proper preparation and presentation of the case*." 628 F.2d 932 (emphasis added).

This Court's opinion in *Church of Scientology* further supports such a reading. In that case, the Court affirmed denial of discovery from *USA Today* in a civil case involving a subpoena seeking nonconfidential information. Relying on *LaRouche*, the Court made clear that the *LaRouche* balancing test requires that information sought from a reporter be "critical to the case" of the party seeking it. Specifically, the Court held that:

> Nothing in the record shows that there was an abuse of discretion in the denial of discovery of the materials. In fact, the consideration that Daniels [the reporter] offered to stipulate to the accuracy of the quotation that appeared in *USA Today* makes the relevance of the materials [Plaintiff] seeks questionable, *rather than critical to the case, as the law requires*. *See [LaRouche]*, 780 F.2d at 1139 (the fact that the plaintiff already knew the names of sources made need for information less than compelling).

Church of Scientology, 992 F.2d at 1335 (emphasis added.). Other circuits have imposed a similar requirement. *See, e.g., In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir. 1982) (holding that disclosure of confidential source information could be compelled only upon a "clear and specific" showing that the

information is "highly material and relevant, *necessary or critical to the maintenance of the claim*, and not obtainable from other available sources") (emphasis added). Whether characterized as "necessary" or "critical" to the case, the bottom line is clear: *LaRouche* imposes a stringent test on those who seek discovery of confidential sources to demonstrate that the material sought is more than just relevant to their case. Thus, to the extent that the information sought is peripheral, nonessential, speculative, or cumulative of other evidence, the Government fails to satisfy its burden that the information is relevant and that there is a compelling interest in obtaining it. *LaRouche*, 780 F.2d at 1139; *In re Petroleum Products Antitrust Litigation*, 680 F.2d at 7. Without such a showing, the subpoena must be quashed.

The district court found that the Government failed to demonstrate that there is a compelling interest in Mr. Risen's testimony (JA749-51), and discussed the third *LaRouche* prong at only a general level — e.g., that a compelling interest existed because the information would be used in a criminal prosecution. (JA750, JA148-50) The Government never even attempted to explain why, *given the specific evidence available in this case*, its need for Mr. Risen's testimony was compelling. The district court was correct in concluding that such generalities are insufficient to satisfy *LaRouche*.

As the district court observed, the Government "has not pleaded that Risen's testimony is necessary or critical to proving Sterling's guilt beyond a reasonable doubt; instead, it argued that Risen's testimony would 'simplify the trial and clarify matters for the jury' and 'allow for an efficient presentation of the Government's case.'" (JA750) The district court found that such objectives were "neither necessary nor critical to demonstrating Sterling's guilt" and that "if making the trial more efficient or simpler were sufficient to satisfy the *LaRouche* compelling interest factor, there would hardly be a qualified reporter's privilege." (*Id.*) That finding was not in error.

C. The Public Interest Value And Newsworthiness Of These Particular Leaks Outweigh Their Alleged Harm

LaRouche itself made clear that its three-part test was merely "an aid" in balancing the relevant interests, as opposed to an exclusive list of the factors to be considered. *LaRouche*, 780 F.2d at 1139. In addition to the *LaRouche* factors, we respectfully submit that leak cases should also include a weighing of the competing interests as they manifest themselves in the case at hand — that is, by "weigh[ing] 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." *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141,

1175 (D.C. Cir. 2005) (Tatel, J., concurring in the judgment); *see also Gonzales*, 459 F.3d at 186 (Sack, J., dissenting) (in leak cases courts should look at whether "nondisclosure of the information would be contrary to the public interest, taking into account both the public interest . . . in newsgathering and maintaining a free flow of information to citizens") (citation and internal quotation marks omitted). Put simply, incorporating this public interest analysis is the most direct way to protect journalism based on leaks that cause more good than harm. It also provides a basis to force the privilege to yield for leaks that cause more harm than good. As Judge Tatel explained in his concurring opinion in *Judith Miller*:

> [Some] leaks — the design for a top secret nuclear weapon, for example, or plans for an imminent military strike — could be . . . damaging, causing harm far in excess of their news value. In such cases, the reporter privilege must give way. . . . Of course, in some cases a leak's value may far exceed its harm, thus calling into question the law enforcement rationale for disrupting reporter-source relationships . . . .

Judith Miller, 438 F.3d at 1173-74 (Tatel, J., concurring in the judgment) (citations omitted). The district court did not apply this approach to weighing public interest value, finding that the approach was not required by *LaRouche* and would put courts in the awkward position of having to weigh the newsworthiness of various stories. (JA737) As noted above, however, this approach is consistent with *LaRouche*, which expressly stated that the three-prong test was merely an "aid" to the

balancing analysis. 780 F.2d at 1139. Moreover, it is consistent with Justice Powell's controlling opinion in *Branzburg*, which required a "case-by-case" balancing of the interests involved. 408 U.S. at 710. Finally, courts already evaluate the newsworthiness of stories in other contexts all the time. *See, e.g., City of San Diego* v. *Roe*, 543 U.S. 77, 84 (2004) (per curiam) (requiring courts to evaluate the "legitimate news interest," meaning the "value and concern to the public at the time of publication," in assessing restrictions on government employee speech).

Applying this approach to the facts of this case, it is clear that the newsworthiness of the information contained in Chapter 9 of *State of War* outweighs any alleged harm that was caused by its publication. As outlined above, the chapter deals with the apparent incompetence and mismanagement of certain intelligence efforts concerning Iran's nuclear ambitions. Its main focus — Operation Merlin, the now twelve-year-old intelligence operation that was intended to stall but which may have actually helped Iran in its efforts to develop a nuclear program — is undoubtedly newsworthy.[17] As Mr. Risen himself explains in his

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[17] *See* JA369, ¶9 ("Mr. Risen's reporting in Chapter 9 of *State of War* deals with an issue that almost certainly will be the subject of countless historical analyses: the incompetence and mismanagement of certain intelligence efforts in Iran."); *see also* JA381 (Mr. Risen's reporting in Chapter 9 deals with the "important and newsworthy subject" of "potential incompetence and mismanagement of certain intelligence efforts concerning Iran's WMD

affidavit, at a time when the press has been taken to task for failing to scrutinize our intelligence in evaluating Iraq's WMD capabilities during the time leading up to the most recent war in Iraq, reporting about our intelligence in evaluating Iran's nuclear program is essential. (JSA184, ¶23) Moreover, given the about-face in the National Intelligence Estimate concerning our intelligence agencies' views about whether Iran halted its nuclear program in Fall 2003[18] and subsequent reports indicating that U.S. government officials have overstated the threat of the Iranian nuclear program, it is all the more important to understand why our intelligence efforts in evaluating Iran's nuclear threat have been limited. In Mr. Risen's own words:

> I believe my decision to report about the matters discussed in Chapter 9 of *State of War* has been vindicated, particularly given subsequent reports about the unreliability of our intelligence about Iran's nuclear capabilities and about our government's tendency to overstate the threat in a way that is not entirely consistent with the intelligence actually gathered. For example, in December 2007, the United States intelligence community published a National Intelligence Estimate ("2007 NIE") on Iran, in which the U.S. government acknowledged that virtually everything it had been saying about Iran's nuclear pro-

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capabilities"); JA358 ("Regardless of whether one agrees with all [of Chapter 9's] assertions and analysis, it is by simple definition 'newsworthy'").

[18] National Intelligence Council, *National Intelligence Estimate, Iran: Nuclear Intentions and Capabilities* (Nov. 2007), *available at* http://www.odni.gov/press_releases/20071203_release.pdf (last visited February 13, 2012).

gram for the last four years had been wrong. The 2007 NIE stated that Iran had abandoned its nuclear weapons program in 2003, a complete reversal from previous intelligence assessments. . . .

Since then, U.S. intelligence assessments of Iran's nuclear program have swung back and forth. Ever since the 2007 NIE was published, U.S. intelligence analysts have been under pressure to disavow it and issue a new one that concludes that Iran is racing to build a nuclear weapon. But while there is substantial evidence of Iran's ongoing uranium enrichment program, the intelligence about the status of Iran's efforts to actually build a nuclear bomb has been far less conclusive. In an article that was quickly attacked by the Obama Administration, Seymour M. Hersh, wrote recently in *The New Yorker* that a new 2011 NIE from the United States intelligence community reaffirms that there is no conclusive evidence that Iran has made any effort to build a nuclear bomb since 2003. . . . "There's a large body of evidence," wrote Mr. Hersh, "including some of America's most highly classified intelligence assessments, suggesting that the U.S. could be in danger of repeating a mistake similar to the one made with Saddam Hussein's Iraq eight years ago — allowing anxieties about the policies of tyrannical regime to distort our estimates of the state's military capacities and intentions." . . .

Whether one agrees with Mr. Hersh's article or not, it is clear that, five years after I wrote *State of War*, there is still a serious national debate about Iran's nuclear ambitions and about whether the current administration has incentives to exaggerate intelligence related to this topic.

The point of Chapter 9 of *State of War* was that the CIA was just as blind and just as reckless in the way it dealt with intelligence on Iran's weapons of mass destruction as it had been on Iraq. . . . Given the CIA's own disavowal of its past work on Iran's nuclear program, it is that much more important to understand *why* our intelligence efforts in evaluating Iran's nuclear threat have failed in the past. Chapter 9 of *State of War* is one of the few sources of information covering this important subject.

(JSA184-86, ¶¶25-28; *see also* JA369, ¶9) These types of considerations played a large role in Mr. Risen's decision to publish Chapter 9 in the first place. (JSA182-83, ¶19)

As for the potential harm caused by the leak, although the Government has publicly criticized the reporting as harming national security, it has never been able to articulate why. Operation Merlin is now approximately twelve years old, and it has been over six years since *State of War* was published. At the time of publication, these stories were old enough that they were not likely to cause any tangible harm to national security. (JSA183-84, ¶21)

Some Government officials may not personally favor the scrutiny that Mr. Risen's reporting — in Chapter 9 and elsewhere — has subjected them to. There is little doubt, however, that this reporting presents exactly the kind of public interest value that animates reporter's privilege jurisprudence.

CONCLUSION

This Court lacks jurisdiction over this appeal because the orders at issue do not suppress or exclude any evidence at this time. Rather, they merely require the Court to make a determination later about the admissibility of Mr. Risen's testimony. As such, the appeal should be dismissed.

If the Court does decide the merits, then it should find that the district court was correct in concluding, as this Court and every other court of appeals has, that a qualified reporter's privilege protects confidential source information in a criminal trial. Finally, the district court correctly concluded that the Government had failed to demonstrate that it had no reasonable alternatives to Mr. Risen's testimony about his confidential source(s) and that it had a compelling need for that testimony. The district court's orders, largely quashing the Government's subpoena to Mr. Risen and requiring that Mr. Risen provide testimony on the limited topics identified by the district court, should be affirmed.

February 14, 2012

Respectfully submitted,

s/Joel Kurtzberg

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2012, I filed the foregoing Brief for James Risen with the Clerk of the Court using the CM/ECF system, which will send a notice of Electronic Filing to the following registered users:

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Dated: February 14, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by this Court's Order of November 28, 2011, because this brief contains 17,715 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportional typeface using Microsoft Word for Microsoft Office 2010 in the Times New Roman font. All text and footnotes are in 14-point type.

/s Joel Kurtzberg
Joel Kurtzberg
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Dated: February 14, 2012

ADDENDUM MATERIAL

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

WYDETT HAWKINS — PLAINTIFF

VS. — NO. 29,034

BEN WILLIAMS — DEFENDANT

ORDER

This case came on for hearing on the Motion to Quash Subpoena filed by Dianne Laakso. The Court, having considered the Motion, the supporting Affidavit of Dianne Laakso, the proffer of counsel for Wydett Hawkins, and the arguments and briefs of the parties to the motion, is of the opinion and so finds that Dianne Laakso is a professional journalist who works as a photographer for the Jackson Daily News whose testimony the plaintiff seeks concerning an incident which she witnessed in her capacity as a photo journalist, the plaintiff has subpoenaed her to testify in the trial of this cause, the plaintiff has other sources for the information sought, the plaintiff's proffer concerning her testimony is purely cumulative of the testimony of other witnesses in this case, there is no compelling necessity for her testimony and the subpoena issued for her therefore abridges her rights under the First and Fourteenth Amendments to the United States Constitution and Section 13 of the Mississippi Constitution.

IT IS THEREFORE ORDERED AND ADJUDGED that the subpoena of Dianne Laakso is quashed and she is not required to testify in this cause.

SO ORDERED this the 16 day of March, 1983.

L. BRELAND [illegible]
CIRCUIT JUDGE