No. 12-627

IN THE
Supreme Court of the United States

ED MOLONEY; ANTHONY MCINTYRE,
Petitioners,
v.
ERIC H. HOLDER, ATTORNEY GENERAL;
JACK W. PIROZZOLO, COMMISSIONER,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the First Circuit

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press ("the Reporters Committee" or "*amicus*") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee has no parent corporation and issues no stock.

As advocates for the rights of the news media and others who seek to provide information to the public about important issues that affect them, *amicus* has a strong interest in ensuring that the First Amendment guarantee of a free press is protected to the fullest extent. The inability of journalists and academics to have their objections heard before a court regarding government-issued subpoenas seeking the compelled release of confidential information will certainly have a detrimental effect on their protected First Amendment interests. Regardless of whether they

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the *amicus curiae*, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Further, the parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

recognize a privilege preventing the compelled disclosure of such information, courts should have an obligation to review such claims of infringements on First Amendment rights on a case-by-case basis.

SUMMARY OF ARGUMENT

The case involving Petitioners Ed Moloney and Anthony McIntyre involves a question of exceptional importance to journalists, academics and anyone else involved in the practice of disseminating information to the public: whether First Amendment values allow individuals with Article III standing the right to be heard in court and present evidence in support of their objections to subpoenas seeking confidential information. *Amicus curiae* urges the Court to accept review of this case in order to clarify that, indeed, challenges to subpoenas seeking such confidential records necessitate judicial review when such information touches on First Amendment interests.

Journalists asserting privilege claims to shield sources of confidential information have overwhelming First Amendment interests necessitating judicial review should their records become subject to compelled disclosure through a government subpoena. Such interests are no less worthy of protection where, as in the case of Petitioners, the information is held by a third party.

The First Circuit's opinion determined that although the Petitioners had standing to challenge the subpoena requests, this Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972) nonetheless meant that Petitioners could not state a claim

for relief. The decision created a split among lower courts as to whether *Branzburg* foreclosed such challenges of third-party subpoenas.

The First Circuit decision goes against a significant body of precedent that interprets this Court's decision in *Branzburg* as providing the basis for a qualified privilege for not only journalists, but also academic researchers and anyone engaged in the process of gathering information for dissemination to the public. In many cases, even when a reporter's privilege is ultimately defeated, the courts nonetheless allow for a case-specific balancing of the constitutional interests sought to be protected by news gatherers and the law enforcement needs of government. As such, this Court should accept review to clarify for lower courts to what extent parties asserting their First Amendment interests in challenging government subpoenas of confidential information should – consistent with *Branzburg* – have a Constitutionally guaranteed right to present evidence before the court for review.

ARGUMENT

I. First Amendment interests are not diminished simply because possession of confidential material is held by a third party.

The academic researchers in this case were denied the opportunity to defend their interests solely because their research records were held by another party, thus requiring them to intervene in the subpoena contest between the government and the college, and when that was denied, to bring their own action. In declining to recognize any First Amendment-based interest in such third-party records, the First Circuit created a split among lower courts as to whether *Branzburg* forecloses the ability of parties such as the Petitioners from presenting their cases before a court to contest such government subpoenas.

The First Amendment interests at stake – the freedom to gather information for later dissemination to the public from confidential sources without government interference – is the same whether the government compels from Petitioners the production of their confidential information or instead compels production of that information from third parties entrusted with its safe keeping. Those constitutionally protected speech interests are not diminished because the confidential information is entrusted to an outside party and deserve the same level of judicial review through the balancing of competing interests.

As the Petitioners point out, the Second Circuit's decision in *New York Times v. Gonzales*, 459

F.3d 160 (2d Cir. 2006), makes clear that the speech interests at stake should not depend on who holds the reporter's confidential information. The *Gonzales* court rejected the government's argument that a plaintiff had no right under *Branzburg* to defeat a subpoena of third party records, concluding that "so long as a third-party plays an 'integral role' in reporters' work, the records of third parties detailing that work are, when sought by the government, covered by the same privileges afforded to the reporters themselves and their personal records." 459 F.3d at 168.

The New York Times – which filed a declaratory judgment action asking a federal district court judge to recognize a privilege of its reporters' telephone records from a potential grand jury subpoena – was given a full right to be heard in court on its First Amendment and common law claims. The district court weighed the interests of both the newspaper and the government, concluding that the telephone records were protected from disclosure by a qualified privilege, derived both from the First Amendment and the common law under Federal Rules of Evidence 501. *Id*. at 165. Ultimately, however, the Second Circuit held that the privilege claims were overcome on the facts of the case and vacated the lower court judgment. *Id*. at 174.

Judge Sack dissented because he found that the government had failed to meet its burden of establishing the "necessity" and "exhaustion" prongs needed to defeat a privilege claim. *Id*. at 178. He agreed with the majority's legal conclusions concerning the ability of newsgatherers to protect the identities of confidential sources held by third par-

ties and explained the importance of providing privilege protections for such information and the implications that arise should courts conclude otherwise:

> Without such protection, prosecutors, limited only by their own self-restraint, could obtain records that identify journalists' confidential sources in gross and virtually at will. Reporters might find themselves, as a matter of practical necessity, contacting sources the way I understand drug dealers reach theirs – by use of clandestine cell phones and meetings in darkened doorways. … It is difficult to see in whose best interests such a regime would operate.

Id. at 175. Judge Sack went on to note that the Justice Department had itself developed guidelines that are "strikingly similar" to the Second Circuit's formulation of the qualified privilege and framed the court's decision as "reaffirm[ing] the role of federal courts in mediating between the interests of law enforcement … and the interests of the press." *Id*.

Similarly, in two high-profile libel cases, federal district court judges rejected the attempts by plaintiffs to obtain third-party records that indirectly could have revealed the identity of confidential sources. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, the United States District Court for the Middle District of North Carolina granted a motion seeking a protective order prohibiting the supermarket chain Food Lion from proceeding with

a large number of third-party subpoenas directed to hotels, postal delivery services and telecommunications companies. 1996 WL 575946, 24 Media L. Rep. 2431 (M.D.N.C. Sept. 6, 1996). Although the subpoena requests were not directly targeted at ABC, but rather to third parties, the court nonetheless concluded that the discovery improperly infringed on ABC's First Amendment rights because the information sought could potentially reveal the identities of confidential sources. *Id*. at 2433. The court rejected a suggestion from Food Lion that ABC could "screen out" confidential sources, finding that it would be impractical in light of the breadth of the subpoenas. *Id*. The court also noted that Food Lion could not show that the information was either crucial to the outcome of the claim or that it could not be obtained through another source. *Id*.

In *Philip Morris Companies, Inc. v. ABC, Inc.*, tobacco company Philip Morris attempted to compel disclosure of receipts and records held by third party telephone, credit card, hotel and airline companies in an effort to trace an anonymous source interviewed on ABC's "Day One" program. 1995 WL 301428, 23 Med. L. Rptr. 1434 (Va. Cir. Ct. Jan. 26, 1995), *modified by*, 1995 WL 1055921, 23 Med. L. Rptr. 2438 (Va. Cir. Ct. July 11, 1995). In its motion to quash, ABC argued that the subpoena of third-party records in an effort to seek out the identity of a confidential source "is tantamount to asking the reporter himself to divulge the identity of his confidential sources," and would threaten the "constitutionally protected functions" of reporters "because reporters must travel and use the telephone in order to gather the news, and foster the free flow of information." 23 Med. L. Rptr. 1434,

1435. The circuit court rejected Philip Morris' argument that there was no privilege, fearing that "endorsing such a practice" of granting subpoenas for third-party records seeking the identity of confidential sources would open up a "Pandora's Box":

> If Philip Morris were allowed discovery of third party records in order to determine the identity of ABC's confidential sources, it would be an open invitation for every plaintiff in libel suits, not to mention the potential in other litigation contexts, to make a *pro forma* request for this type of discovery whenever a confidential source is known to exist. … The implications of allowing the subpoena of third party records in order to identify confidential sources are grave and strike at the fundamentals of a free press protected by the First Amendment. This type of discovery will deter sources from divulging information and deter reporters from gathering and publishing information.

Id. at 1437. Ultimately, the court recognized a qualified reporter's privilege in such cases and concluded that Philip Morris had not presented enough evidence to defeat ABC's assertion of that privilege. *Philip Morris*, 23 Med. L. Rptr. 2438, 2440.

In these cases, the courts analyzed the subpoena challenges from each of the respective media defendants by weighing the competing interests of the news media and the parties seeking discovery material. The courts conducted this analysis in

spite of the fact that the locations of these records were in the possession of third parties. Each court recognized that compelling First Amendment values were at stake, even though they ultimately reached different conclusions as to whether the media defendants met their respective burdens in invoking the privilege.

The lack of any serious inquiry in this case into the Petitioners' First Amendment interests highlights the split among lower courts concerning the ability to challenge third-party subpoenas. This case is particularly alarming because such interests go well beyond the typical case of a scholar seeking to resist a subpoena to protect either the reputation or privacy rights of interview subjects. The Petitioners needed the opportunity to present evidence that turning over the interview tapes to police authorities in the United Kingdom would pose a threat to the lives of not only the interview subjects who agreed to tell their stories, but also to the Petitioners themselves. But they never had that chance.

II. The divergent body of lower court precedent interpreting *Branzburg* and analyzing newsgatherer's privilege claims necessitates this Court's review.

The First Circuit concluded that the compelled disclosure of confidential information held by third parties "is not by itself a legally cognizable First Amendment or common law injury." *In re Request from U.K. Pursuant to Treaty Between the Gov't of U.S. & Gov't of U.K. on Mutual Assistance in Criminal Matters in the Matter of Dolours Price,* 685 F.3d 1, 16 (1st Cir. 2012). Thus,

the Petitioners had no opportunity to have their concerns even addressed by a court. As Petitioners point out, this position is in conflict with the Second Circuit. But it also misapplies existing law in such a way as to warrant review by this Court solely to clarify how such issues of privilege and standing to intervene should be resolved.

The First Circuit decision goes against a significant body of precedent that interprets this Court's decision in *Branzburg* as providing the basis for a qualified privilege for not only journalists, but also academic researchers and anyone engaged in the process of gathering information for dissemination to the public.[2] While not all agree on the scope or recognition of such a privilege, the cases do follow Justice Powell's call in *Branzburg* that "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." *Branzburg*, 408 U.S. at 710 (Powell, J., concurring). Justice Powell's concurrence, especially, makes clear the importance of a "case-by-case" balancing of the First Amendment concerns of those seeking to rely on a claim of privilege:

> If a newsman believes that the grand jury investigation is not being conducted in good faith, he is not without remedy. Indeed, if the newsman is called upon to give information bear-

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[2] *See, e.g., von Bulow by Auersperg v. von Bulow*, 811 F.2d 136 (2d Cir. 1987); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

> ing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash, and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id.

The First Circuit gave short shrift to these interests by failing to allow Petitioners to present evidence of how this subpoena would chill their speech rights and why the information sought was not relevant to an actual prosecution or investigation. It is this lack of recognition of the case-specific balancing of interests that separates the First Circuit's decision from other circuits, thus warranting review by this Court.

A. Even courts that either do not recognize or involve a privilege against disclosure of confidential information often engage in a case-specific balancing of interests.

Courts of Appeal that have declined to ultimately uphold a claim of privilege – such as the First Circuit in *In re Special Proceedings* and the Second Circuit in *Gonzales* – nonetheless often analyze the facts using the balancing test from Powell's concurrence to weigh the First Amendment interests at stake before reaching their conclusions. In particular, the First Circuit in this case cites in its opinion *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004), where the circuit court upheld a district court's order finding a reporter in contempt for refusing to reveal to a special prosecutor the identity of a person who leaked a videotape of an undercover investigation of government corruption in violation of a protective order. The reporter in *In re Proceedings* was granted expedited review to challenge compelled disclosure of information sought via the subpoena. *Id.* at 41. While the First Circuit ultimately declined to recognize a reporter's privilege, the reporter was afforded an opportunity to present the speech interests at stake in his case. In contrast, the Petitioners in this case had no such opportunity to present evidence in support of their objection to the subpoena.

As the Petitioner's brief makes clear, this Court has recognized a right to be heard even in the absence of a reporter's or academic's privilege and based instead on a more general First Amend-

ment right.[3] Lower courts have also recognized and weighed similar competing interests absent an established privilege. In *In re Grand Jury Subpoena to Kramerbooks & Afterwards Inc.*, for instance, the both the owner of a Washington, D.C. bookstore and one of its customers, former White House intern Monica Lewinsky, sought to quash subpoenas from the Office of Investigative Counsel seeking Lewinsky's book purchase records. 26 Med. L. Rptr. 1599 (D.D.C. 1998). Both the owner and Lewinsky claimed release of such records would have a chilling effect on not only their First Amendment rights, but that of future customers. *Id*. at 1600. The court, concluding that the subpoenas implicated First Amendment concerns, ordered the Office of Independent Counsel to submit documents explaining the need for the information sought and the connection such information had to its criminal investigation. *Id*. at 1601.

Similarly, in *Tattered Cover, Inc. v. City of Thornton*, the Colorado Supreme Court relied on the same balancing approach relied on by the court in *Kramerbooks* to conclude that consumers had a First Amendment right to purchase books anonymously. 44 P.3d 1044, 1047 (Colo. 2002). In doing so, the state court afforded the bookseller subject to government subpoena in a criminal investigation the right to an adversarial hearing prior to the execution of search records seeking a customer's purchase history to determine whether the need for the warrant outweighs the harm to constitutional in-

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[3] *See, e.g. McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003); *NAACP v. Alabama*, 357 U.S. 449 (1958); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

terests. *Id*. The court ultimately held that the city failed to demonstrate its need for the customer purchase records were sufficiently compelling to outweigh the First Amendment interests. *Id*. at 1048. Even in the case of newsletter subscriber lists, the Court of Appeals of Maryland concluded that the Maryland Securities Commissioner was not able to establish a compelling interest in subpoena requests sufficient to overcome the First Amendment protections afforded to the purchaser information. *Lubin v. Agora, Inc.*, 882 A.2d 833, 849 (Md. 2005).

However, not every circuit is clear as to whether or how precisely a lower court weighs the First Amendment interests in a subpoena challenge. In *McKevitt v. Pallash*, for instance, the Seventh Circuit evaluated a district court's decision to order three Chicago newspaper reporters to produce tape recordings of interviews with a non-confidential FBI informant, the main witness in an Irish terrorism prosecution. 339 F.3d 530 (7th Cir. 2003). The district court found that the privilege had been overcome, and the Seventh Circuit denied a stay of the court's order. In articulating a standard to apply in evaluating whether to quash a subpoena, Judge Posner concluded, "[i]t seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas." *Id*. at 533. Judge Posner also went on to criticize "the large number of cases" that had concluded, "rather surprisingly in light of *Branzburg* that there is a reporter's privilege." *Id*. at 532. In considering the respective interests of

government and the press, Judge Posner acknowledged the government's interest in cooperating "in a criminal proceedings with friendly foreign nations." *Id.* As for the First Amendment interests of reporters, however, Judge Posner would only say, "the interest of the press in maintaining the confidentiality of sources is not absolute. There is no conceivable interest in confidentiality in the present case." *Id.*

By denying the Petitioners a right to be heard, the First Circuit skewed the balance of interests too far in favor of the government. While the First Circuit may have ultimately reached the same conclusion through a case-specific weighing of competing interests, as it claimed it would have in its opinion, the court most certainly took the wrong approach in getting there. The First Amendment must afford some protection against attempts by prosecutors or other government officials to ignore the Petitioners' rights. Given the balancing and recognition of First Amendment interests by lower courts in information as seemingly minor as book purchase histories and subscriber lists, courts should similarly be able to find compelling constitutional interests worthy of protection in a scholar's confidential research material.

B. Lower courts often rely on a growing body of related legal precedent in assessing privilege claims in addition to this Court's lone decision concerning reporter's privilege.

Justice White's opinion for the Court in *Branzburg* noted that its holding does not "threaten

the vast bulk of confidential relationships between reporters and their sources. … Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas." 408 U.S. at 691. Many lower courts have interpreted this limiting language, coupled with Justice Powell's concurrence, in order to recognize some form of reporter's privilege.[4] Many state courts have also generally found that the First Amendment provides a qualified privilege.[5]

While the Court in *Branzburg* did not create a privilege for reporters, many lower cases interpret the case as not foreclosing the ability of journalists, academics and other newsgatherers to assert a privilege claim. In addition to the opinion in *Branzburg*, courts generally have several alternate legal avenues at their disposal to guide them in evaluating a claim of privilege, including common law, state law and court rules such as the Federal Rules of Evidence and Federal Rules of Criminal Procedure. Given this growing body of legal precedent – and in order to best protect the valuable constitutional interests at stake – this Court should accept review to clarify for lower courts that prom-

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[4] *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Corp.,* 633 F.2d 583 (1st Cir. 1980); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Cervantes v. Time, Inc.,* 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

[5] *See, e.g., Mitchell v. Superior Court*, 690 P.2d 625 (Cal. 1984); *Brown v. Commonwealth*, 204 S.E.2d 429 (Va. 1974), *cert. denied*, 419 U.S. 966 (1974).

ises of confidentiality in newsgathering must be protected, consistent with *Branzburg*, through a case-specific balance of interests before there can be any compelled disclosure of confidential information. Courts should not cut short the opportunity for parties to be heard before such balancing even occurs.

Some courts have recognized a reporter's privilege under common law, which should apply in federal court under Federal Rule of Evidence 501,[6] following the logic for recognizing privileges from *Jaffe v. Redmond,* 518 U.S. 1 (1996). The Court's analysis provides a foundation for arguing that a privilege should also be created for journalists.

In *Riley v. City of Chester*, for instance, the Third Circuit reversed a finding of contempt against a reporter who had refused to identify the source of her information. 612 F.2d 708 (3d Cir. 1979). Expressly relying on *Branzburg*, the Court of Appeals cited Rule 501 and the First Amendment as the sources of, respectively, its authority to recognize the privilege and the privilege's contours, although it also described the privilege as arising under "federal common law." *Id.* at 714-15. The Supreme Court of Washington also relied on the common law in recognizing a qualified reporter's

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[6] Rule 501 states: "The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."

privilege in *Senear v. Daily Journal-American*, 641 P.2d 1180 (Wash. 1980).

The district court in *Gonzales* similarly relied on the analysis in *Jaffee* to conclude that a qualified privilege existed for a reporter seeking to prevent the compelled disclosure of information held by a third party. 459 F.3d at 169. While the Second Circuit agreed that any such common law privilege would be qualified, it refused to decide whether a common law privilege exists, stating that whatever qualified privilege standard is used, "would be overcome as a matter of law on the facts before us." *Id.*

Whether or not lower courts recognize a qualified First Amendment privilege in criminal cases, subpoenas directed at the press and other third parties must also meet the requirements of Rule 17(c) of the Federal Rules of Criminal Procedure. In *United States v. Cuthbertson*, the Third Circuit analyzed two sets of subpoenas sought by criminal defendants in a conspiracy and fraud trial against CBS concerning a 60 Minutes program under Rule 17(c). 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981). The first subpoena sought all statements made to CBS by any person on the witness list, which the court upheld. *Id.* at 145. The second subpoena seeking statements of non-witnesses, however, was found to be overbroad by the court under Rule 17(c). The court concluded that a "mere hope" that these statements would contain some exculpatory evidence was not sufficient to show the statements were evidentiary. *Id.* at 146.

The *Branzburg* court noted that there was "merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards" with respect to a journalist's privilege, including the relations between law enforcement and the press, adding that "[i]t goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." 408 U.S. at 706. When *Branzburg* was decided, just 17 states had enacted "shield laws" to provide journalists with protections for their sources and information. *Id*. at 691, n.27. Today, 40 states and the District of Columbia have such laws.[7]

In at least two federal Circuits – the Second and Third – judges have looked to the policies expressed in state shield laws as a guide in formulating the contours of federal common-law privilege. In *Riley*, for instance, the Third Circuit said although it was not bound to follow the Pennsylvania state law in evaluating a claim of privilege, "neither should we ignore Pennsylvania's public policy giving newspaper reporters protection from divulging their sources." 612 F.2d at 715. The Second Circuit in *von Bulow by Auersperg v. von Bulow* relied on the same rationale in recognizing New York's state shield law, indicating that the law could provide useful in evaluating the boundaries of

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[7] Kristen Rasmussen, *West Virginia acting governor signs reporter shield law*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, April 6, 2011, http://www.rcfp.org/browse-media-law-resources/news/west-virginia-acting-governor-signs-reporter-shield-law.

the reporter's privilege. 811 F.2d 136, 144 (2d Cir. 1987).

These alternate avenues of asserting a privilege against compelled testimony are all meaningful in determining the contours of such a privilege. This Court should accept review to bring clarity to the law that a newsgatherer's First Amendment interests are best protected only through a case-specific judicial review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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December 19, 2012