No. 13-1009

IN THE

Supreme Court of the United States

JAMES RISEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF ABC, INC., ADVANCE PUBLICATIONS, INC., THE ASSOCIATED PRESS, BLOOMBERG L.P., CABLE NEWS NETWORK, INC., CBS CORPORATION, THE DAILY BEAST COMPANY LLC, DOW JONES & COMPANY, INC., THE E.W. SCRIPPS COMPANY, FIRST AMENDMENT COALITION, FOX NEWS NETWORK, L.L.C., GANNETT CO., INC., THE MCCLATCHY COMPANY, NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL PUBLIC RADIO, INC., NBCUNIVERSAL MEDIA, LLC, THE NEW YORK TIMES COMPANY, NEWS CORPORATION, NEWSPAPER ASSOCIATION OF AMERICA, RADIO TELEVISION DIGITAL NEWS ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, REUTERS AMERICA LLC, TRIBUNE COMPANY, THE WASHINGTON POST AND WNET AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are publishers, broadcasters, cable networks and associations of journalists and news media entities.[1] Their employees and members gather information about matters of public concern and report it to their fellow citizens. To perform these tasks effectively, *amici* are obliged from time to time to secure information from sources who will provide it only pursuant to a promise of confidentiality. The Fourth Circuit's decision – that neither the First Amendment nor federal common law protects that promise in a criminal proceeding absent evidence of government bad faith – will have tangible, adverse consequences for the ability of *amici* to keep their readers, viewers and listeners fully informed about the conduct of public affairs.[2]

SUMMARY OF ARGUMENT

The law governing the federal claim asserted by petitioner James Risen in this case – that the First Amendment and federal common law provide journalists like him a presumptive protection against

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[1] Written consent of all parties to the filing of this brief has been timely sought and filed with the Clerk as required by Sup. Ct. R. 37.2(a). No counsel for a party to this action authored any portion of this brief and no person or entity, other than *amici*, made a monetary contribution toward preparation or submission of this brief.

[2] A list of *amici* is contained in the Appendix to this brief. Citations to the Appendix to the petition for a writ of certiorari are designated "App."

the compelled disclosure of information about their confidential sources – is in disarray. The federal circuits, and federal judges within several circuits, are in open disagreement concerning whether such protection exists at all in a variety of contexts, whether any such protection properly resides in the First Amendment or at common law, and how it is calibrated in a given case. At the root of these conflicts is *Branzburg v. Hayes*, 408 U.S. 665 (1972), a decision rendered by a Court that was itself badly divided. Indeed, the disharmony in the lower courts centers on a dispute among them concerning both what Justice Powell actually meant in his concurring opinion in *Branzburg* and the extent to which his views limit the reach of Justice White's opinion for the five-justice majority of which Justice Powell was an indispensable part. And, much of it is the result of conflicting judicial pronouncements about whether the Court in *Branzburg* in fact held there is no protection available to a journalist at federal common law and whether, even if it so held, post-*Branzburg* revisions to the Federal Rules of Evidence, as well as this Court's decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), open the issue for reexamination.

In the more than four decades since *Branzburg*, this Court has not addressed these unresolved questions. The passage of time, unfortunately, has not seen a consensus form in the lower courts. To the contrary, as this case illustrates, courts continue to disagree about fundamental issues at the core of the dispute. Many judges have declared themselves precluded by *Branzburg* from even

considering the claims raised by journalists in these cases on their merits, emphasizing that any further guidance must come from this Court. Under these circumstances, and apart from the ultimate resolution of the issues that Risen seeks to raise, it cannot reasonably be disputed that all interested parties – including not only Risen, but also the Government, the criminal defendant in this case, the journalistic community, and the public – would benefit from this Court addressing these fundamental issues about the protections available to a free press in a democracy.

Finally, the decision reached by the panel majority in this case – that the public interest in fostering an informed citizenry plays no legitimate role in assessing the propriety of a subpoena seeking to compel a journalist to reveal information about his confidential sources – cannot be squared with either our nation's historical or contemporary conception of the freedom of the press. If, as *amici* believe, the Fourth Circuit's conclusion is based on an erroneous reading of *Branzburg*, the Court should take this opportunity to make that clear. If, however, *Branzburg* is properly read to preclude the kind of balancing undertaken by Judge Gregory in dissent, then *amici* respectfully submit that the time has come to revisit *Branzburg* in a manner that takes appropriate account of the competing interests at stake.

ARGUMENT

I. THE DECISION BELOW EXACERBATES ONGOING CIRCUIT CONFLICTS

Since this Court last addressed the subject in *Branzburg*, the lower courts have frequently been called upon to assess whether and to what extent federal law protects journalists from the compelled disclosure of information about their confidential sources. No consensus has emerged among the circuits on this question; to the contrary, each federal court of appeals to have addressed the issue has arrived at a decidedly different answer. As a result, this Court's ongoing declination to weigh in cannot be reconciled with Justice Story's admonition that there be "uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 347-48 (1816).

In this case, a divided panel asserted, unequivocally, that reporters "are entitled to no special privilege that would allow them to withhold relevant information about criminal conduct without a showing of [prosecutorial] bad faith or other such improper motive," even when the information sought is the identity of a confidential source. App.23a. The panel majority based this determination on its conclusion that, in *Branzburg*, this Court "in no uncertain terms rejected the existence of such a privilege," App.15a (citation omitted), and that the federal circuits are "not at liberty to conclude otherwise," App.25a. Thus, the majority asserted, "[i]f Risen is to be protected from being compelled to

testify and give what evidence of crime he possesses, . . . we believe that decision should rest with the Supreme Court." App.46a.

The panel majority acknowledged that, in *Branzburg*, Justice Powell's concurring opinion emphasized the "limited nature" of the opinion for the Court authored by Justice White for a five-justice majority (which included Justice Powell) and reflected his understanding that, following the Court's decision, the "asserted claim to privilege should be judged on its facts by striking the proper balance between freedom of the press and the obligation of all citizens to give relevant testimony" on a "case-by-case basis." 408 U.S. at 709-10 (Powell, J., concurring). *See* App.22a-23a. Nevertheless, the panel concluded that Justice Powell's "concurrence expresses no disagreement with the majority's determination that reporters are entitled to no special privilege that would allow them to withhold relevant information about criminal conduct." App.23a. To reach this conclusion, the panel effectively abandoned its own precedent – based on the same language in Justice Powell's concurring opinion – holding that the First Amendment *does* presumptively protect information about a journalist's confidential sources from compelled disclosure. App.25a-30a.[3]

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[3] As Judge Gregory recognized below, before this case, the "Fourth Circuit, like our sister circuits, ha[d] applied Justice Powell's balancing test in analyzing whether to apply a reporter's privilege to quash subpoenas seeking confidential source information from reporters" in both civil and criminal

In addition, the panel concluded that, in *Branzburg*, this Court both rejected the notion that protection from compelled disclosure of confidential sources might be afforded by federal common law, and foreclosed any further consideration of the issue by lower federal courts. Specifically, the panel construed Justice White's observation in *Branzburg* that "[a]t common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury," 408 U.S. at 685, as a holding rejecting a common law privilege, despite the fact that the issue was not even before the Court in that case. App.37a-38a ("'[t]he Supreme Court has rejected a common law privilege for reporters' and 'that rejection stands unless and until the Supreme Court itself overrules that part of *Branzburg*'") (citation omitted).[4] As a result, the panel dismissed Risen's contention that "Federal Rule of Evidence 501, as interpreted by the Supreme Court in *Jaffee v.*

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cases. App.87a (Gregory, J., dissenting) (citing cases). *See Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) (citing Justice Powell's opinion for proposition that "reporter's claim of privilege should be judged on [a] case-by-case basis"); *United States v. Sterling*, 818 F. Supp. 2d 945, 953 (E.D. Va. 2011) ("the only proper reading" of *In re Shain*, 978 F.2d 850 (4th Cir. 1992), "is that in criminal cases, as in civil actions," such balancing is required whenever there is "an agreement to keep sources confidential").

[4] The only question before the Court in *Branzburg* was whether "requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment." 408 U.S. at 679 n.16.

Redmond, 518 U.S. 1 (1996), grants us the authority to reconsider the question and now grant the privilege." App.33a.

As Judge Gregory explained below, these rulings each stand in direct conflict with the decisions of several other federal circuits in multiple ways. What is most striking, however, is that the courts and individual judges on opposite sides of this decisional divide not only ground their disparate holdings firmly in their own interpretations of *Branzburg*, they also uniformly emphasize that, until this Court revisits these issues, they have no latitude to reach a different result.

Thus, in the Fourth Circuit today, a journalist is protected by a qualified privilege grounded in the First Amendment, as construed by Justice Powell in *Branzburg*, when seeking to shield confidential sources and otherwise unpublished information in civil cases but enjoys no such protection, absent evidence of prosecutorial bad faith, in criminal proceedings. And based on that court's understanding of *Branzburg*, there is no common law protection at all afforded to journalists in such circumstances in either criminal or civil proceedings.

In the First Circuit, in contrast, a "constitutionally sensitized balancing process" derived from Justice Powell's opinion is applied to subpoenas seeking to compel the disclosure of even non-confidential information in both civil and adversarial criminal proceedings. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-96 & n.13 (1st Cir. 1980). *See United States v. LaRouche*

Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988). In requiring that such balancing take place in every case except non-adversarial proceedings akin to the grand jury investigations at issue in *Branzburg*, *see In re Request from United Kingdom (Price)*, 718 F.3d 13, 23 (1st Cir. 2013), the First Circuit has explained that "[w]hether or not the process of taking First Amendment concerns into consideration can be said to represent recognition by the Court of a 'conditional' or 'limited' privilege is . . . largely a question of semantics," *Bruno & Stillman, Inc.*, 633 F.2d at 595.

In the Second Circuit, reporters are similarly protected by a presumptive privilege in both civil and adversarial criminal proceedings, although that circuit – while also grounding its decision in Justice Powell's concurring opinion in *Branzburg* – has not decided whether the privilege is derived from the First Amendment or common law. *See United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983); *United States v. Treacy*, 639 F.3d 32, 42 (2d Cir. 2011); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 8 & n.9 (2d Cir. 1982) (because "Justice Powell cast the deciding vote" in *Branzburg*, his reservations about the court's opinion "are particularly important in understanding the decision"). The scope of the protection available in the Second Circuit varies depending on whether the information sought is the identity of a confidential source or unpublished, non-confidential journalistic work product. *See Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1993). Moreover, although the judges of that circuit "see no legally-principled reason for drawing a distinction

between civil and criminal cases when considering whether the reporter's interests in confidentiality should yield to the moving party's need for probative evidence," *Burke*, 700 F.2d at 77, they have not reached consensus as to whether such protection is available when the challenged subpoena is issued by a grand jury, *see New York Times Co. v. Gonzales*, 459 F.3d 160, 172-73 (2d Cir. 2006).

In the Third Circuit, reporters seeking to safeguard the identities of confidential sources and unpublished work product in both civil and criminal cases are protected by a privilege derived from federal common law and grounded in Rule 501. *See United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708, 714-15 (3d Cir. 1979) ("[t]he legislative history of Rule 501 manifests that its flexible language was designed to encompass, inter alia, a reporter's privilege not to disclose a source"). In the Third Circuit, *Branzburg* has not only posed no barrier to recognition of a common-law privilege, the necessity of such a privilege has been held to be the essential lesson of Justice Powell's opinion. *See Coughlin v. Westinghouse Broad. & Cable Inc.*, 780 F.2d 340, 350 & n.14 (3d Cir. 1985) (proceeding on "case-by-case basis, balancing the reporters' rights against the interests of those seeking information" is "precisely the course" Justice Powell indicated "that lower courts should take").

For its part, the D.C. Circuit has been unable to decide whether there is a common-law privilege, finding itself at loggerheads based on its judges'

conflicting views concerning whether such a privilege is foreclosed by *Branzburg*. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1154 (D.C. Cir. 2006) ("*Miller*") (Sentelle, J., concurring) (*Branzburg* is "as dispositive of the question of common law privilege as it is of a First Amendment privilege"); *id.* at 1160 (Henderson, J., concurring) (asserting circuit courts are "not bound by *Branzburg*'s commentary on the state of the common law in 1972" but declining to decide whether to recognize common law privilege); *id.* at 1170 (Tatel, J., concurring) (applying common law privilege in grand jury context). At the same time, based on its reading of Justice Powell's opinion, that circuit has embraced a privilege grounded in the First Amendment that applies in both civil and adversarial criminal proceedings. *See Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000). It has, however, considered itself bound by *Branzburg* to reject any such First Amendment-based privilege "protecting journalists from appearing before a grand jury or from testifying before a grand jury." *Miller*, 438 F.3d at 1147.

The remaining circuits are similarly all over the lot. The Fifth Circuit has recognized a privilege, grounded in the First Amendment, that presumptively protects both confidential sources and non-confidential journalistic work product in civil cases, but it has rejected any such privilege in criminal cases involving non-confidential information. *See Miller v. Transamerican Press, Inc.*, 621 F.2d 721, *modified*, 628 F.2d 932 (5th Cir. 1980);

United States v. Smith, 135 F.3d 963, 972 (5th Cir. 1998). It has, however, signaled that the outcome may be different in criminal cases in which the information sought is the identity of a confidential source. *Id.* ("[T]he existence of a confidential relationship that the law should foster is critical to the establishment of a privilege."). Since its creation as a court distinct from the Fifth, the Eleventh Circuit has gone its own way, holding that "[o]ur Circuit recognizes a qualified privilege for journalists, allowing them to resist compelled disclosure of their professional newsgathering efforts. This privilege shields reporters in both criminal and civil proceedings." *United States v. Capers*, 708 F.3d 1286, 1303 (11th Cir. 2013).

The Sixth Circuit has considered only the availability of a First Amendment-based privilege and only in the grand jury context, considering itself bound by *Branzburg* to reject it in that circumstance. *In re Grand Jury Proceedings*, 810 F.2d 580, 583-84 (6th Cir. 1987). The Seventh Circuit has similarly addressed the subject directly only once, holding that no First Amendment-based privilege protects a journalist from the compelled disclosure of non-confidential journalistic work product in criminal cases. *See McKevitt v. Pallasch*, 339 F.3d 530, 531-33 (7th Cir. 2003). That circuit has, however, indicated that its conclusion would likely be different "[w]hen the information in the reporter's possession" comes "from a confidential source" and it has expressed a preference for grounding the privilege in common law as opposed to the First Amendment. *Id.* at 533; *see id.* at 532 (emphasizing "important point"

that "Constitution is not the only source of evidentiary privileges").

Finally, the Ninth Circuit recognizes a qualified privilege, grounded in the First Amendment, that protects both the identities of confidential sources and unpublished, non-confidential materials in civil and adversarial criminal proceedings. *See Farr v. Pitchess*, 522 F.2d 464, 466, 469 (9th Cir. 1975); *Shoen v. Shoen*, 48 F.3d 412, 418 (9th Cir. 1995). Specifically, it has determined, based on Justice Powell's opinion, that "application of the *Branzburg* holding to non-grand jury cases seems to require that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest." *Farr*, 522 F.2d at 467-68. *See In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 401-02 (9th Cir. 1993) (finding no privilege in grand jury context).[5]

This lack of consensus among the circuits has obvious consequences. In this case, for example, Risen has been authoritatively informed by the Fourth Circuit that he has no lawful ability to protect the identities of his confidential sources in response to a subpoena issued by a federal court sitting in Virginia. If that same subpoena had been

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[5] The Eighth Circuit has not definitively addressed the issue, *see Cervantes v. Time, Inc.*, 464 F.2d 986, 992 n.9 (8th Cir. 1972), while the Tenth has asserted, in a civil case, that the privilege's existence is "no longer in doubt," *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977).

issued by a federal court in Delaware, less than 120 miles to the north, he would have enjoyed a presumptive privilege grounded in federal common law as construed by the Third Circuit. And, if the subpoena had been issued by a federal court in Georgia, some 300 miles to the south, he would have been presumptively protected by the First Amendment-based privilege recognized in the Eleventh Circuit.

It has been more than forty years since this Court last spoke to these issues. The absence of national uniformity on such important questions of federal constitutional and common law is a direct result of the difficulty the circuits have encountered in divining the meaning of Justice Powell's "enigmatic" opinion in *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting),[6] and its impact on a majority opinion, "the lessons" of which are "about as clear as mud." App. 87a (Gregory, J., dissenting). At this juncture, only further guidance from this Court can bring about the uniform application of federal law that prospective litigants are entitled to expect.

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[6] *See* Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 635 (1974-75) (describing *Branzburg* as having been decided "by a vote of four and a half to four and a half").

II. THIS COURT'S SILENCE HAS HAD TANGIBLE CONSEQUENCES

Since *Branzburg*, this Court has had multiple opportunities to assess the protections available to journalists against the compelled disclosure of information about their confidential sources.[7] It has, to date, chosen not take advantage of any of them. Initially, the Court's declination to do so allowed lower courts to grapple with these issues in the first instance and, hopefully, to reach a consensus that would obviate the need for further guidance. As the years have passed, however, no such consensus has emerged. Instead, this Court's silence in the face of the conflicts that have arisen among the circuits has had tangible consequences for journalists and for the public that depends on the information they gather and report.

In the most concrete terms, since 2000, several journalists subpoenaed in jurisdictions that have rejected their claims of privilege have elected to go to prison rather than break their promises to their confidential sources.[8] Others have been subjected to

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[7] *See, e.g.*, *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir.), *cert. denied*, 545 U.S. 1150 (2005); *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1187 (2006); *Scarce*, 5 F.3d 397 (9th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); *In re Grand Jury Subpoenas (Leggett)*, 29 Media L. Rep. (BNA) 2301 (5th Cir. 2001) (unpublished), *cert. denied*, 535 U.S. 1011 (2002).

[8] *See, e.g., Leggett*, 29 Media L. Rep. (BNA) 2301; *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2005); *see*

monetary sanctions. In one such case, five journalists were ordered to pay daily fines when they declined to disclose the identities of confidential sources that provided information about a nuclear scientist charged with espionage. *See Lee v. Dep't of Justice*, 413 F.3d 53, 57 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1187 (2006). Enforcement of those fines was avoided only because the underlying case against several federal agencies was settled – a settlement that included payment of substantial sums by the journalists' respective news organizations. The news organizations contributed to the settlement, not because there was any suggestion that their reporting had been inaccurate or that it had not addressed matters of important public concern, but rather because it was the only way for their reporters to both honor their promises to their sources and to avoid disobeying the court's order. *See* Paul Farhi, *U.S., Media Settle With Wen Ho Lee*, Wash. Post, June 3, 2006, at A01.[9]

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also In re Grand Jury Subpoenas to Fainaru-Wada & Williams, No. CR 06-90225 (JSW), 2006 WL 2734273 (N.D. Cal. Sept. 25, 2006) (two *San Francisco Chronicle* reporters sentenced to 18 months in prison for declining to identify their confidential sources of information about steroid usage in professional sports; sentences ultimately vacated when government secured information by other means).

[9] *See also Hatfill v. Mukasey*, 539 F. Supp. 2d 96, 106-07 (D.D.C. 2008) (imposing escalating fines, which were ultimately vacated following settlement of underling case, on *USA Today* reporter who declined to identify confidential source of information about 2001 anthrax mailing and prohibiting her

The point here is not that there will never be circumstances in which, when striking the appropriate balance in a given case, a journalist's claim to privilege ought to yield. Rather, these cases demonstrate that (1) in order to fulfill their mission of informing the public, journalists (and their employers) have paid a significant price for honoring their commitments to their sources, and (2) court rulings requiring them to do so have invariably been based on a construction of governing constitutional and common law that has badly divided the lower courts and on which this Court has not spoken in 42 years. Of equal significance, the lack of uniformity across the federal courts – in and of itself – has an inhibiting effect on the gathering and reporting of news about matters of public concern precisely because neither sources nor reporters and editors can safely predict what law will apply in a manner that allows them to make informed decisions about what legal protection, if any, will be available to them.

In this case, Risen, a recipient of the Pulitzer Prize for his groundbreaking reporting on government surveillance,[10] faces a contempt citation if he honors a promise of confidentiality he made to a source in exchange for information about a matter of analogous public importance. If nothing else, before being put to this most difficult choice, he is entitled

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from accepting contributions, from her employer or otherwise, to pay them).

[10] *See* http://www.pulitzer.org/biography/2006-National-Reporting-Group1.

to an authoritative statement by this Court of the extent to which his ability to secure such information and share it with the American public is protected by federal law.

III. THE FOURTH CIRCUIT'S DECISION SHOULD BE REVERSED

The Fourth Circuit's conclusion in this case – that a journalist has no cognizable right to protection from compelled disclosure of confidential sources in a criminal proceeding absent evidence of government bad faith – cannot be squared either with our Nation's founding conception of the freedom of the press or with the role that promises of confidentiality have always played in contributing to an informed citizenry. There can be little question that, when the First Amendment was crafted, both the Framers and the broader citizenry reflexively understood the "freedom of the press" to include a journalist's or publisher's presumptive right to protect the identities of those who supplied them with information for dissemination to the public. Indeed, the incident credited with establishing uniquely American principles of freedom of the press – the prosecution of Jon Peter Zenger in 1735 – arose from Zenger's refusal to identify the source(s) of material he published in his newspaper. Even after Zenger was charged criminally as the publisher, he maintained his right to refuse to disclose his "sources." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring).

The then-common understanding that the law should protect the right that Zenger asserted was

unquestionably on the minds of the Framers when they included the freedom of the press in the First Amendment. In 1779, when some members of the Continental Congress sought to compel a newspaper publisher to identify the author of a column criticizing that body, arguments that "'[t]he liberty of the Press ought not to be restrained'" in that manner prevailed, and Congress declined to compel disclosure. *Id.* at 361-62 (citation omitted). As Justice Thomas concluded in *McIntyre*, based on these episodes and others, the Framers unanimously "believed that the freedom of the press included the right to publish without revealing the author's name." *Id.* at 367.

In short, the Framers understood the value of protecting such promises of confidentiality, especially when they were made in the cause of securing information for dissemination to the public about its government, and they did so even when the subpoenaed journalist or publisher possessed first-hand knowledge of an allegedly criminal act. Zenger, after all, was an "eyewitness" to the events that led directly to the allegedly criminal criticisms of government leveled by the authors he published – he personally acquired their purportedly seditious works from them.

In the modern era, the common understanding of what we mean by the "freedom of the press" similarly includes the presumptive right to protect confidential sources from compelled disclosure. With the exception of those courts that, like the Fourth Circuit below, feel constrained by *Branzburg* to hold

otherwise, federal judges have consistently recognized the obvious – there is a significant public interest in protecting reporters from compelled disclosure of their confidential sources regardless of whether that interest is grounded in the First Amendment or in federal common law.[11] From the perspective of the reasonably informed citizen, there has never been any real question that such "protection exists. It is palpable; it is ubiquitous; it is widely relied upon; it is an integral part of the way in which the American public is kept informed and therefore of the American democratic process." *Gonzales*, 459 F.3d at 181 (Sack, J., dissenting).

Indeed, putting aside its position in this case, the Department of Justice itself has consistently acknowledged that compelled disclosure of confidential sources threatens the freedom of the press. Its own guidelines for issuing subpoenas to the media reflect the express intent to "provide protection to members of the news media from certain law enforcement tools, whether criminal or civil, that might unreasonably impair ordinary

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[11] *See, e.g.*, *Riley*, 612 F.2d at 714 ("The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring."); *Burke*, 700 F.2d at 77 (protection against compelled disclosure of confidential sources reflects "a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment"); *Zerilli*, 656 F.2d at 710-11 ("Compelling a reporter to disclose the identity of a confidential source raises obvious First Amendment problems.").

newsgathering activities" 28 C.F.R. § 50.10 (2014). As the Department has recently reaffirmed, there must be substantive limits on the Government's ability to compel reporters to disclose their confidential sources "because freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news." *Id*.

The states similarly understand that the "freedom of the press" encompasses a presumptive right to protect confidential sources. Forty-nine states and the District of Columbia recognize some form of reporters' privilege. App.106a-108a (Gregory, J., dissenting). Of those jurisdictions, thirty-nine have now enacted "shield laws" affording such protection in statutory form. App.106a. Although these statutes vary in scope, they reflect a clear national consensus that freedom of the press necessarily encompasses at least some protection against compelled disclosure of journalists' confidential sources.[12]

Against this backdrop, it is difficult to understand how the law can be construed, as the Fourth Circuit now has, to foreclose *any* consideration of the press's and public's interests in assessing whether a subpoena issued in a criminal

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[12] This understanding is shared by democracies around the world. Ironically, those nations, which generally have adopted less robust views of press freedom than the United States, have declared in their law that the presumptive right to protect confidential sources is an inherent aspect of the freedom of the press. *See, e.g.*, *Goodwin v. United Kingdom*, 22 EHRR 123, 143 (1996).

proceeding and seeking the identity of a confidential source can lawfully be enforced. Simply put, whether rooted in the First Amendment or in the common law, our national commitment to a free press and to the democratic values it serves dictates that those interests must, at a minimum, be weighed in every case. Because the Fourth Circuit determined that *Branzburg* precluded it from undertaking any such balancing, under either the First Amendment or at common law, its decision is inconsistent with our historical conception of freedom of the press.

The panel majority's conclusion cannot be justified, as the Government argued it could below, on the ground that the Court in *Branzburg* relied, in part, on the fact that the reporters there were "eyewitnesses" to the criminal conduct of their sources. *See* Dkt. 94, *United States v. Sterling*, No. 11-5028, at 11 (4th Cir. Aug. 26, 2013). There is a material distinction between the eyewitness observations at issue in *Branzburg* and what is before the Court in this case. In *Branzburg*, reporters were alleged to have witnessed their "sources" engaging in criminal conduct wholly separate from the communication of newsworthy information about the operations of government, namely "synthesizing hashish from marijuana" and the "use and sale of drugs." 408 U.S. at 667-76. In this case, in contrast, the only allegedly criminal act to which Risen allegedly was an eyewitness was the conduct of his confidential source(s) in providing information to him about a matter of unquestioned public concern for ultimate dissemination to the public. In such circumstances, where the crime alleged is the

disclosure of information, and that information involves accounts of apparent government malfeasance or other matters of public concern, a journalist's "eyewitness" knowledge of his source's allegedly criminal conduct, standing alone, cannot be enough to divest the journalist of *any* right to protect his newsgathering activities from government compulsion. *See McIntyre*, 514 U.S. at 367 (Thomas, J., concurring).[13]

There are, to be sure, several competing considerations, including whether the underlying proceeding is civil or criminal and whether the journalist is putatively an eyewitness to a crime. These, however, are only two of several potentially relevant factors; they are not, as the Government contended below, grounds on which to reject a qualified privilege entirely. Any reasonable balance also must include consideration of the public interest in the journalism made possible by the promise of confidentiality and whether the source's identity is either ascertainable by other means or is not otherwise critical to a successful prosecution.

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[13] *See also Miller*, 438 F.3d at 1175 (Tatel, J., concurring) (in so-called "leak cases" in which the journalist is the only witness with direct evidence of his source's conduct, courts must "weigh the public interest in compelling disclosure . . . against the public interest in newsgathering"). *Cf. Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (when assessing a journalist's potential liability, the unlawful conduct of a third party from whom he acquired information "does not suffice to remove the First Amendment shield from speech about a matter of public concern").

Judge Gregory advocated just such balancing below, as have other circuit courts and judges throughout the country. *See* App. 90a (Gregory, J., dissenting) (balancing multiple factors, including "the harm caused by the public dissemination of the information, and the newsworthiness of the information conveyed"); *LaRouche Campaign*, 841 F.2d at 1177 (recognizing "duty to weigh the competing First Amendment interests . . . and the fair trial/confrontation interests of defendants not only generically but as they exist in the instant case"); *Miller*, 438 F.3d at 1175 (Tatel, J., concurring) (courts should properly "weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value"). Whether grounded in the Constitution itself or in federal common law, such an approach strikes "a reasonable balance" between the competing claims, one that recognizes there is an important First Amendment interest at stake, *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring), and that reflects the kind of weighing of the competing interests that Justice Powell contemplated in *Branzburg*, *see Saxbe v. Washington Post Co.*, 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting) ("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").

In the last analysis, if *Branzburg* in fact contemplates the balancing of the competing interests on a case-by-case basis that Justice Powell envisioned, then the Fourth Circuit majority erred when it concluded that it was bound by that decision to reject *any* claim for protection from the compelled disclosure of confidential sources in a criminal case such as this one absent evidence of prosecutorial bad faith. If, however, that is in fact what this Court held in *Branzburg*, and that case is properly read to preclude the kind of balancing undertaken by Judge Gregory in his dissent below, then *amici* respectfully submit that the time has come to revisit that decision in a manner that takes appropriate account of all of the competing interests at stake.[14]

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[14] In this case, the trial judge weighed the competing interests based on her extensive review of and familiarity with the record evidence and reasonably concluded that the balance tipped in favor of Risen. Although that decision is properly reviewed only for an abuse of discretion, *see Ashcraft*, 218 F.3d at 287, the panel majority undertook its own *de novo* review of the record evidence and, without paying so much as lip service to the "abuse of discretion" standard, asserted that, even if Risen did shelter under a qualified privilege, that privilege had been overcome. Had the panel majority asked the right question – *i.e.*, did the trial judge abuse her discretion in reaching a contrary conclusion? – it would have been obliged to answer it differently. As a result, the fact that the panel purported to offer an alternative basis for its decision, based on the assumption that Risen was entitled to the presumptive protection he sought, should not deter this Court from considering the important federal issues raised by this case.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

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ABC, Inc., alone or through its subsidiaries, owns and operates, *inter alia*, ABC News, abcnews.com, and local broadcast television stations which regularly gather and report news to the public. Programs produced and disseminated by ABC News include *World News with Diane Sawyer*, *20/20*, *Nightline*, *Good Morning America* and *This Week*.

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, newspapers in over 20 cities and weekly business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Bloomberg L.P. operates Bloomberg News, a 24-hour global news service based in New York with more than 2,400 journalists in more than 150 bureaus around the world. Bloomberg supplies real-time business, financial, and legal news to the more than 319,000 subscribers to the Bloomberg Professional service world-wide and is syndicated to

more than 1000 media outlets across more than 60 countries. Bloomberg television is available in more than 340 million homes worldwide and Bloomberg radio is syndicated to 200 radio affiliates nationally. In addition, Bloomberg publishes Bloomberg Businessweek, Bloomberg Markets and Bloomberg Pursuits magazines with a combined circulation of 1.4 million readers and Bloomberg.com and Businessweek.com receive more than 24 million visitors each month. In total, Bloomberg distributes news, information, and commentary to millions of readers and listeners each day, and has published more than one hundred million stories.

Cable News Network, Inc. (CNN) is a subsidiary of Turner Broadcasting System, Inc., a Time Warner Inc. company. CNN is a portfolio of two dozen news and information services across cable, satellite, radio, wireless devices and the Internet in more than 200 countries and territories worldwide. Domestically, CNN reaches more individuals on television, the web and mobile devices than any other cable TV news organization in the United States; internationally, CNN is the most widely distributed news channel reaching more than 271 million households abroad; and CNN Digital is a top network for online news, mobile news and social media. Additionally, CNN Newsource is the world's most extensively utilized news service partnering with hundreds of local and international news organizations around the world.

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

The Daily Beast Company LLC publishes thedailybeast.com, which was founded in 2008 as the vision of Tina Brown and IAC Chairman Barry Diller. Curated to avoid information overload, the site is dedicated to breaking news and sharp commentary. The Daily Beast is the winner of two consecutive Webby awards for "Best News" site and regularly attracts more than 15 million unique online visitors a month.

Dow Jones & Company, Inc., a global provider of news and business information, is the publisher of *The Wall Street Journal*, *Barron's*, *MarketWatch*, *Dow Jones Newswires*, and other publications. Dow Jones maintains one of the world's largest newsgathering operations, with more than 1,800 journalists in more than fifty countries publishing news in several different languages. Dow Jones also provides information services, including Dow Jones Factiva, Dow Jones Risk & Compliance, and Dow Jones VentureSource. Dow Jones is a News Corporation company.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information websites and licensing and syndication. The company's portfolio of locally focused media properties includes: 19 TV stations (ten ABC affiliates, three NBC affiliates, one independent and five Spanish-language stations); daily and community newspapers in 13 markets; and the Washington-based Scripps Media Center, home of the Scripps Howard News Service.

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

Fox News Network, L.L.C. owns and operates the national cable news network, the Fox News Channel, which reaches approximately 98 million subscribers in the United States. It also owns and operates the Fox Business Network, the Fox News Edge, the Sunday morning political talk program Fox

News Sunday, the websites FoxNews.com and FoxBusiness.com, and the national Fox News Radio Network.

Gannett Co., Inc. is an international news and information company that publishes more than 80 daily newspapers in the United States – including USA TODAY – which reach 11.6 million readers daily. The company's broadcasting portfolio includes more than 40 TV stations, reaching approximately one-third of all television households in America. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

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

National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated association of radio and television broadcast stations and networks. NAB membership includes more than 6,300 radio stations, 1,300 television stations, and the major commercial broadcast networks.

National Public Radio, Inc. is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 members' stations that are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org provides news and cultural programming including audio archives of past programming.

NBCUniversal Media, LLC is one of the world's leading media entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the *Today* show, *NBC Nightly News with Brian Williams*, *Dateline NBC* and *Meet the Press*.

The New York Times Company is the owner of *The New York Times* and the *International New York Times*, formerly the *International Herald Tribune*.

News Corporation is a global, diversified media and information services company focused on creating and distributing authoritative and engaging content to consumers throughout the world. The company comprises leading businesses across a range of media, including: news and information services, digital real estate services, book publishing, digital education, and sports programming and pay-TV distribution.

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

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

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information

interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. As advocates for the rights of the news media and others who gather and disseminate information to the public, the Reporters Committee has a strong interest in ensuring that journalists' ability to credibly promise confidentiality to sources remains uninhibited.

Reuters America LLC (Reuters) is the world's largest independent international news agency, reaching more than a billion people every day. Through text, video and pictures wires, as well as online and mobile platforms, it provides real-time news and information to newspapers, television and cable networks, radio stations and websites around the world. Its coverage includes international politics, business, sports and entertainment; Reuters also publishes market data and intelligence to global business and finance consumers.

Tribune Company operates broadcasting, publishing and interactive businesses engaging in the coverage and dissemination of news and entertainment programming. On the broadcasting side, it owns 42 television stations, a radio station, a 24-hour regional cable news network and "Superstation" WGN America. On the publishing side, Tribune publishes eight daily newspapers – *Chicago Tribune*, *Hartford* (Conn.) *Courant*, *Los Angeles Times*, *Orlando Sentinel* (Central Florida), *The* (Baltimore) *Sun*, *The* (Allentown, Pa.) *Morning*

Call, (Hampton Roads, Va.) *Daily Press* and *Sun-Sentinel* (South Florida).

WP Company LLC (d/b/a The Washington Post) publishes *The Washington Post*, one of the nation's leading newspapers, as well as a news website, www.washingtonpost.com, that is visited by more than 20 million readers per month.

WNET is a major producer of broadcast and online media for local, national and international audiences, creating award-winning content in the areas of arts and culture, news and public affairs, science and natural history, documentaries, and children's programming. WNET is the parent company of THIRTEEN, New York's flagship public media provider, and also produces and presents such acclaimed series as PBS NewsHour Weekend and NATURE.