No. 11-4271

In The
United States Court Of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JEFFREY ALEXANDER STERLING,
Defendant-Appellee,

and

JAMES RISEN
Intervenor-Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

AMICUS CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION IN SUPPORT OF INTERVENOR-APPELLEE

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

SUMMARY OF ARGUMENT

This Court should adopt a common law reporter's privilege pursuant to the authority provided under Federal Rule of Evidence 501. Other federal courts of appeal have adopted on similar grounds a privilege to protect journalists from being ordered to reveal the identities of sources to whom the reporters promised confidentiality. The Supreme Court has used Rule 501 to adopt or expand similar privileges, and the strong public interest in the free flow of information to the public supports the need for recognition of a reporter's privilege in this case. Finally, the adoption of a common law

[1] Pursuant to Fed. R. App. Proc. 29, all the parties have consented to the filing of this *amicus* brief. This brief was authored in whole by counsel for *amicus curiae*. No party or any person other than *amicus* contributed money to fund the preparation and submission of this brief.

privilege would satisfy the need for consistent recognition of protections among federal and state courts for reporters and their sources, without which the public policy goals of other jurisdictions that have adopted such a privilege would be frustrated.

ARGUMENT

I. The Court Should Recognize a Common Law Reporter's Privilege Pursuant To Federal Rule of Evidence 501

The Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), narrowly rejected a First Amendment claim of privilege for a reporter and his source but left the door open for recognition of a reporter's privilege in other contexts. *Id.* at 706-707. The 5-4 majority included a concurring opinion by Justice Lewis F. Powell, Jr., which emphasized that an "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." *Id.* at 710 (Powell, J., concurring). He continued: "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.* Several federal appellate courts have used Justice Powell's concurring opinion in *Branzburg* in recognizing a qualified reporter's privilege. *See, e.g.*, *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d

Cir. 1987) (finding that the Supreme Court in *Branzburg* "rejected the claim of privilege" but "recognized . . . that a qualified privilege may be appropriate in some circumstances because newsgathering was not without First Amendment protection.").

Three years after the Supreme Court's decision in *Branzburg*, Congress promulgated Rule 501 of the Federal Rules of Evidence directing that "common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege." FED. R. EVID. 501. The federal courts have interpreted Rule 501 as an explicit instruction to continue to develop the common law of privilege. *See, e.g., United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.25 (1984) ("Congress has enacted Federal Rule of Evidence 501. . . precisely because [it] wished to leave privilege questions to the courts rather than attempt to codify them.").

Since Rule 501 was enacted, one federal appellate court has interpreted the "flexible language" of the rule as "encompass[ing] . . . a reporter's privilege not to disclose a source." *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979) (reversing order holding reporter in civil contempt because the identity of the source had only marginal relevance to the underlying case and because the party seeking the information failed to exhaust other means of obtaining the

information). Indeed, the adoption of an evidentiary privilege for reporters and their sources may have been Justice Powell's intent in *Branzburg*, as revealed in his personal notes written after oral argument. In those notes, Justice Powell wrote that the Court "should not establish a *constitutional* privilege," but that "there is a privilege analogous to an *evidentiary* one . . . which courts should recognize and apply" on a case-by-case basis "to protect confidential information." *See* Adam Liptak, "A Justice's Scribbles on Journalists' Rights," N.Y. TIMES, October 7, 2007 (emphases added).

The Federal Rules of Evidence thus provide a proper basis on which federal courts should recognize a common law reporter's privilege in individual cases.

II. Supreme Court Precedent Establishing Evidentiary Privileges Under Rule 501 and Fourth Circuit Authority Further Support the Recognition of a Privilege

This Court should follow Supreme Court precedent recognizing privileges under Rule 501 in other contexts as well as its own precedent in *United States v. Steelhammer*, 539 F.2d 373, 377 (4th Cir. 1976), *rehearing en banc*, 561 F.2d 539, 540 (4th Cir. 1977), to adopt a common law reporter's privilege in these proceedings.

In *Steelhammer*, this Court recognized a reporter's privilege in a case involving a civil contempt citation against two reporters whose testimony was sought after they were eyewitnesses to purported illegal conduct at a union rally. 539 F.2d at 377. In its holding, the three-judge panel attempted "an accommodation of the two conflicting persuasions" and vacated the contempt citations on grounds that the information sought could be obtained by means other than ordering the testimony of the reporters. *Id.* at 375. A dissenting opinion from Judge Winter, which would later be adopted by the Court *en banc*, concluded that the reporters should be held in contempt because the balance of interests did not fall in their favor. But, more importantly, Judge Winter also opined that "the prerequisites to the establishment of a privilege against disclosure of communications . . . should apply to reporters" and that "[u]nder Federal Rule of Evidence 501, they should be afforded a common law privilege not to testify in civil litigation." *Id.* at 377 n* (Winter, J., dissenting).

The Supreme Court has consistently reaffirmed the authority of the federal courts to create common law privileges under Rule 501. For example, in *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Supreme Court created a psychotherapist-patient privilege on the basis of the "public good transcending the normally predominant principle of utilizing all rational means for

ascertaining truth." *Id.* at 9 (citing *Trammel v. United States*, 445 U.S. 40, 50 (1980); *Elkins v. United States*, 364 U.S. 206, 234 (1960)). The Court framed the issue as a balancing test between the interest in the public good to be achieved by the emerging privilege, and the interest in having the evidence at trial. *Id.* at 9-10. It then determined that mental health was "a public good of transcendent importance" which could be chilled without the privilege. *Id.* at 11-12. By the same token, the interest in using the evidence at trial was found to be "modest" precisely because of the same potential chilling effect, which would reduce the available evidence if there were no privilege. *Id.*

Jaffee is just one of several cases in which the Supreme Court has conducted a balancing test to determine whether to recognize a Rule 501 privilege. In *Trammel*, 445 U.S. 40, the Supreme Court made a major modification to the marital confidences spousal testimony privilege that protects spouses from taking the stand against one another. Prior to that case, the privilege had been held only by the defendant-spouse and was that individual's privilege to waive. *Id.* at 46. In shifting the privilege to vest in the witness-spouse, the Court weighed the interest in marital harmony and the sanctity of the home against the interest in presenting the evidence of a willing witness to the court. *Id.* at 51-53. The Court found that "a rule of evidence that permits an

accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace." *Id.* at 52.

Similarly, in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court used its Rule 501 authority to expand the attorney-client privilege within corporations. The *Upjohn* Court found that the prior law limiting beneficiaries of the corporate attorney-client privilege to members of a "control group" comprised of top-level corporate officers had a chilling effect that discouraged corporate employees outside that select group from seeking valuable legal advice. *Id.* at 392. The public interest in providing corporate employees outside of the "control group" access to counsel in order to prevent wrongdoing and encourage compliance with the law was the most important factor in extending the privilege to those employees. *Id.* at 393. The fact that widening the group of employees entitled to the privilege could create "burdens on discovery and create a broad 'zone of silence' over corporate affairs" was, the Court held, a minor burden outweighed by the countervailing interests. *Id.* at 395.

A similar balancing of interests in this case clearly favors recognizing a reporter's privilege under Rule 501. The Supreme Court has repeatedly acknowledged the value of an active and informative press to the public. *See*,

e.g., *Branzburg*, 408 U.S. at 726 ("We have often described the process of informing the public as the core purpose of the constitutional guarantee of free speech and a free press."); *United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring) ("We have placed our faith in knowledge, not in ignorance, and for most, this means reliance on the press."); *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1978) ("Our society depends heavily on the press for . . . enlightenment. Though not without its lapses, the press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . ." (internal citations omitted)); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) ("The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times." (citing Journal of the Continental Congress, 1904 Ed., vol. I, pp. 104, 108)); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) ("[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave

concern."). *See also F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 381-82 (1984) (reviewing cases on the public importance of a vibrant press).

Here, the public interest in a reporter's privilege is as at least as strong as prior cases in which the Court has extended the privilege. Numerous federal appellate courts have acknowledged a "strong public policy which supports the unfettered communication to the public of information, comment and opinion" and determined that "journalists have a federal common law privilege, albeit qualified, to divulge their sources." *Riley*, 612 F.2d at 715. *See also Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980) (determination of privilege must be made "with a heightened sensitivity to any First Amendment implication that might result from the compelled disclosure of sources"); *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("Compelling a reporter to disclose the identity of a source may significantly interfere with news gathering ability").

Moreover, just as the fear of incurring liability in future litigation would deter frank conversation with a psychotherapist in *Jaffee*, 518 U.S. at 1, the fear of legal liability or reputational damage here will prevent reporters' sources from coming forward with matters of grave public import. For these reasons,

only a genuine belief in confidentiality is likely to induce a source to come forward and disclose information that the public has a strong interest in knowing. Furthermore, the source does not derive any other benefit from speaking to a reporter (such as speaking to a therapist would have in *Jaffee*) that would mitigate the damage that his exposure would cause. The adoption of a reporter's privilege in this case would thus prevent the inevitable "chilling effect" on the free flow of information to the public.

III. Adopting A Common Law Reporter's Privilege Under Rule 501 Would Avoid Inconsistent Application Of The Privilege In Federal And State Courts

The Court also should adopt a common law reporter's privilege under the authority of Rule 501 in order to avoid inconsistent application of privileges in federal and state courts. In *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980), the Supreme Court expressly asserted that "[t]his Court has taken note of the state privilege laws in determining whether to retain them in the federal system." Indeed, there are strong reasons to acknowledge state law and embrace consistent standards. The courts should be particularly careful to maintain a uniform standard not only *within* the respective federal and state court systems, but also *between* the two whenever the policy incentives behind

a certain line of jurisprudence would be defeated if it were applied inconsistently.

One of these areas demanding consistency is the existence of a reporter's privilege. As Judge Tatel recognized in his concurrence in the Judith Miller case, "undisputed evidence that forty-nine states plus the District of Columbia offer at least some qualified protection to reporter's sources confirms that 'reason and experience support recognition of the privilege.'" *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1170 (D.C. Cir. 2006) (Tatel, J., concurring) (quoting *Jaffee*, 518 U.S. at 13). Forty of these states and the District of Columbia have statutory shield laws, while the other nine have recognized the privilege in other forms. *See* Brief for Intervenor-Appellee at 55-56 n.12 & 13. The remaining state, Wyoming, has not adopted a shield statute and has not had the opportunity to determine whether the common law applies. The broad adoption of this privilege thus demonstrates the importance that both the people through their state governments and the judiciary have placed on protecting the free flow of information.

The policy objectives of these 49 states will be defeated if the federal courts fail to recognize a privilege under Rule 501. Although a reporter's source may be well-protected by state statute or common law, a reporter could

not promise his source that the source's identity will not be disclosed if that information would not be kept confidential in the federal court system as well. The federal system would thus become a back door for prosecutors who seek to bypass state protections. As a result, reporters will be forced to either compromise their integrity or cease making any promises of confidentiality, both of which would have devastating effects on the free flow of information to the public. Indeed, as Judge Tatel recognized in the *Miller* case, "'denial of the federal privilege . . . would frustrate the purpose of the state legislation' by exposing confidences protected under state law to discovery in federal courts." (Tatel, J., concurring) (quoting *Jaffee*, 518 U.S. at 13).

The Supreme Court and numerous circuit courts have also looked to state law as a factor in determining the existence of other privileges. For example, the Supreme Court in *Trammel* looked to state spousal privileges for guidance when deciding to shift ownership of the marital privilege from the defendant-spouse to the witness-spouse. *See* 445 U.S. at 48-50 (citing a "trend in state law toward divesting the accused of the privilege to bar adverse spousal testimony"). The Ninth Circuit in *United States v. Montgomery*, 384 F.3d 1050, 1058 (9th Cir. 2004), considered "the practice of the majority of the states" in holding that the common law martial communications privilege may be asserted

by either spouse. Similarly, the First Circuit in *In re Hampers*, 651 F.2d 19, 20, 23 (1st Cir. 1981), used a Massachusetts state nondisclosure statute as the basis for its decision to find a qualified privilege under Rule 501 that protects tax return information from disclosure, noting that it saw "a positive virtue in avoiding . . . inconsistency in rules of access to federal and state tax information."

The incentives of consistency have been recognized in other areas of the law as well, such as in Fourth Amendment jurisprudence. Prior to the Supreme Court's landmark decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), the exclusionary rule applied only in federal courts, not in state courts. The Court recognized in *Mapp* that the deterrent function of the exclusionary rule was not being properly served when evidence that would be excluded in federal court could be taken to state court and used for prosecution. *Id.* The Court stated: "In nonexclusionary States, federal officers, being human, were . . . invited to and did, as our cases indicate, step across to the State's attorney with their unconstitutionally seized evidence." *Id.* at 658. The Court then noted that such an "ignoble shortcut . . . tends to destroy the entire system of constitutional restraints on which the liberties of the people rest." *Id.* at 660.

Although *Mapp* involved applying federal practice to the states, the same logic warrants the application of state jurisprudence in federal court. The consistent application of the Fourth Amendment exclusionary rule and a common law reporter's privilege serves public policy purposes beyond the litigation at hand. In the former, it was the deterrence of improper searches and seizures, while in the latter it is the encouragement of the free flow of information to the public. Just as the Supreme Court did in *Mapp*, this Court should recognize a reporter's privilege pursuant to Rule 501 in order to avoid undermining the statutory and common law protection afforded by the states.

CONCLUSION

For these reasons, the Court should recognize a common law reporter's privilege under Rule 501.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2012, I filed the foregoing *Amicus Curiae* Brief of the Thomas Jefferson Center for the Protection of Free Expression in Support of Intervenor-Appellee 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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CERTIFICATE OF COMPLIANCE

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 2,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 2003 in the Times New Roman font. All text and footnotes are in 14-point type.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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