No. 13-1009

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES RISEN,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*
Respondents.

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

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AMICUS CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Thomas E. Hogan
Baker Hostetler LLP
Suite 1100
1050 Connecticut Ave., NW
Washington, DC 20036
P: 202-861-1577
thogan@bakerlaw.com

J. Joshua Wheeler*
The Thomas Jefferson Center for the Protection of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
P: 434-295-4784
jjw@tjcenter.org

*Counsel of Record for *Amicus Curiae*

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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.

ARGUMENT

I. When experience, empirical evidence, or doctrinal development has elucidated the error of a prior First Amendment opinion, this Court has articulated a more speech-protective standard; consistent with this practice, the Court should now recognize a reporters' privilege.

The development of our modern First Amendment jurisprudence has been driven by the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represents that it entirely authored this brief and no party, its counsel, or any other entity but *amicus* and their counsel made a monetary contribution to fund the brief's preparation or submission. This *amicus curiae* brief is filed with the written consent of the parties, copies of which have been filed with the Clerk of Court for the Supreme Court of the United States.

Court's willingness to reject dubious precedent in favor of stronger protections for speech when prior decisions rested on exaggerated views of the potential harm from speech and an insufficient appreciation of its value to society. "This Court has not hesitated to overrule decisions offensive to the First Amendment . . . and to do so promptly where fundamental error was apparent." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part, concurring in judgment). In the areas of motion pictures, subversive advocacy, libel, corporate political speech (campaign finance), and commercial speech, the Court found that it had improperly excluded entire categories of speech from First Amendment protection. Eventually eschewing these prior crude categorical exclusions and their suspect foundational assumptions, the Court shored up free speech protection by requiring a more careful balancing of the interests at stake, compelling states to engage in a more precise assessment of the risks posed by speech and to tailor government action with correspondingly narrow precision. The Court recently reaffirmed a principle of stare decisis that accommodates further development of its First Amendment jurisprudence in *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (citations omitted), in which it described a factor-intensive inquiry into the legitimacy of a prior decision when, among other factors, experience and the reasoning of the prior decision "demonstrates that adherence to it puts us on a course that is sure error."

Continuing this historical trend, this Court should overrule its categorical denial of a First

Amendment reporters' privilege in *Branzburg v. Hayes*, 408 U.S. 665 (1972). The *Branzburg* decision was based on mistaken assumptions that the privilege would pose intolerable risk to the criminal justice system and that denial of the privilege would not significantly curtail valuable speech.

A. This Court should look to its motion pictures line of cases as an example of the importance of revisiting precedent that undervalued speech and overestimated its potential harm.

Thirty-seven years after declining to extend free speech protection to motion pictures in *Mutual Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230 (1915), this Court revisited the issue in *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), and found that the First Amendment required significant protection for motion pictures because of their tremendous expressive value and because the presumed social harms were exaggerated. The Court took account of empirical studies that revealed the *Mutual Film* decision to have overstated the risk of harm and understated the value of motion pictures to the public interest. Similarly, this Court should reconsider *Branzburg*'s erroneous assumptions of significant harm to the criminal justice system and insignificant harm to the news-reporting enterprise.

In the early part of the 20th Century, a regime of censorship arose in many states and municipalities to combat the presumed evils of

motion pictures. The *Mutual Film* Court held that motion pictures were a categorically unprotected medium of expression and were "not to be regarded . . . as part of the press of the country, or as organs of public opinion." 236 U.S. at 244. Echoing the reactionary and unsubstantiated fears of contemporary social reformers, the Court based its holding in large part on the idea that motion pictures were merely "spectacles" of low expressive value, and "capable of evil" particularly because of their "attractiveness and manner of exhibition." *Id.*

In the decades after *Mutual Film*, studies were published that confirmed the high value of film and debunked the myth of the medium's dangers to society. Communications studies on the effect of motion pictures on the public became widely publicized and undermined the basic assumptions of social reformers that the *Mutual Film* Court had embraced. Samantha Barbas, *How the Movies Became Speech*, 64 Rutgers L. Rev. 665, 722 (2012). Studies not only revealed that film was in fact a valuable and effective educational medium, but was also not the dangerous instrument of moral corruption that it was once believed to be.

The Court relied on the results of these communications studies when in *Burstyn* it unanimously overturned *Mutual Film* and declared the protected status of motion pictures under the First Amendment. Explicitly rejecting the holding in *Mutual Film*, the Court held that motion pictures are a protected form of speech because they have

tremendous value as a "medium for the communication of ideas" and as an "organ of public opinion." *Burstyn*, 343 U.S. at 501. Elaborating further on the value of film, the Court stated that motion pictures "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression," and it cited studies by communications researchers and a law journal note that praised the expressive value of film and rejected the myth of the medium's potential for social harm. *Id.*

At the same time, the Court acknowledged that there may be occasions where the risk of social harm does outweigh expressive interests. For example, if certain motion picture content had a greater "capacity for evil," the Court stated that this factor "may be relevant in determining the permissible scope of community control." *Id.* at 502. But upon a balancing of interests, circumstances where government interests in public moral welfare outweighed free speech interests were to be the exception and freedom of expression was to be the rule. *Id.* at 503.

Likewise, this Court should give due consideration to studies revealing that newsgathering and reporting have been chilled in the wake of *Branzburg*. *See infra* Section II (discussing recent studies). The assumption that denial of a reporters' privilege would not impinge on the free

flow of information no longer holds true.[2] While there may be circumstances where the government's prosecutorial interests outweigh the public's interest in a free press, these ought to be the rare exceptions to the rule favoring a reporters' privilege.

B. This Court should look to the development of its subversive advocacy jurisprudence as another example of its willingness to revisit doctrine where it significantly undervalued speech and significantly overestimated the threat of harm.

Prior to *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the standard of review this Court applied to criminal convictions for a speaker's advocacy of anarchic ideas was a deferential "bad tendency" standard. *Whitney v. California*, 247 U.S. 357 (1927) marked the zenith of this Court's deference to a state's determination that a speaker's mere endorsement of or affiliation with a "dangerous" idea posed a significant risk to public safety and merited criminal prosecution. *Brandenburg*'s rejection of the *Whitney* standard in favor of a powerful, speech-

[2] *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 201 (1990) ("In *Branzburg* . . . [w]e indicated a reluctance to recognize a constitutional privilege where it was unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. We were unwilling then, as we are today, to embark the judiciary on a long and difficult journey to . . . an uncertain destination.") (citations omitted).

protective balancing test is instructive as to how this Court should reevaluate *Branzburg*.

In *Whitney*, the Court held that a state was free to prohibit speech that was "inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government." 247 U.S. at 371. There was no effort to assess the degree of risk to public safety posed by an organization's advocacy. Rather, the theoretical risk of revolt, no matter how remotely or tenuously related to the defendant or her organization, sufficed to criminalize an entire category of speech. Although *Whitney* represented a significant triumph of overblown government fears over the First Amendment, the winds of free speech jurisprudence were beginning to shift; *Brandenburg* was the crystallization of these doctrinal changes.

In the years leading up to *Brandenburg*, a newly fortified and robust free speech doctrine coalesced out of the powerful language in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and from significant concurring and dissenting opinions in prior subversive advocacy cases. *Whitney*'s bad tendency holding, which both presumed and exaggerated the threat of societal harm, could not withstand the powerful First Amendment scrutiny that had developed by 1969. By this time, the value of free speech to inform and edify the public was recognized as being paramount and, correspondingly, the government's interest in prohibiting speech had

to be much more powerful and particularized than a vague fear of some detrimental result.

Concurring and dissenting opinions in the line of subversive advocacy cases preceding *Brandenburg* foreshadowed and laid the groundwork for *Brandenburg* by articulating the importance of free speech as a fundamental constitutional right and the high burden on the government to curtail speech. Justice Holmes penned a significant dissent in *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting), the effect of which has been reverberating through free speech jurisprudence ever since. In his dissent, Holmes expounded on the importance of free speech as "the best test of truth" and declared that "the ultimate good desired is better reached by free trade in ideas." *Id.* at 630. Because freedom of expression is so crucial to the welfare of society, Holmes argued that any attempt to curtail speech should be rebuffed "unless [the words] so imminently threaten interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Id.*

The *Abrams* dissent reflected a seismic shift in Holmes's views on free speech. While only months earlier Holmes had upheld prosecution for a pamphleteer advocating hindrance of the war effort, *see Schenk v. United States*, 249 U.S. 47 (1919), the *Abrams* dissent evinced a much deeper understanding of the importance of unburdened expression to the welfare of a free, vibrant, and democratic society. The shift in Holmes's

understanding of the free speech framework was due in part to the experience of a friend who was being persecuted at the time for expressing unpopular political views at Harvard University. *See* Thomas Healy, *The Great Dissent* 184–86, 195 (2013). Although the logic of criminalizing subversive speech was clear to Holmes in the abstract, the reality of weak free speech protections was that controversial or counter-majoritarian views could be more easily silenced much to the detriment of democratic ideals. *See id.* at 195-96. It became apparent to Holmes that existing free speech doctrine was unsustainable and in need of dramatic revision. *See id.*

Justice Brandeis wrote a narrow concurrence to the *Whitney* decision that also laid some of the groundwork for the *Brandenburg* decision. Brandeis's opinion, though concurring in the majority's judgment, was functionally a rejection of the majority's reasoning and was arguably the strongest pronouncement of free speech protection until *Brandenburg*. *See* David M. Rabban, *The Emergence of First Amendment Doctrine*, U. Chi. L. Rev. 1205, 1331 (1983). Expanding on Justice Holmes's clear and present danger test, Brandeis said that the government must establish reasonable ground to fear "imminent" and "serious evil" before a speaker could be punished for subversive advocacy. *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring). Conversely, "[f]ear of serious injury cannot alone justify suppression of free speech and assembly." *Id.* The vast majority of the time, the remedy for bad speech should be more speech and "[o]nly an emergency can justify repression." *Id.* at 377. Essentially, Brandeis

advocated a general rule forbidding restrictions on subversive speech with a narrow exception for speech that presented an imminent and particularly grave risk of harm. *Id.*

Justice Frankfurter was another voice supporting stronger free speech protection for subversive advocacy. Concurring in *Dennis v. United States*, 341 U.S. 494 (1951), Frankfurter called for a more particularized assessment of the risk of societal harm before speech could be prohibited. He advocated a deliberative balancing test that would enable courts to assess a free speech challenge "by candid and informed weighing of the competing interests." *Id.* at 525 (Frankfurter, J., concurring).

Finally, *New York Times v. Sullivan*, discussed *infra* Section I.C, decided five years before *Brandenburg*, significantly elevated the power of First Amendment protection through the exposition of the core meaning of free speech. Though not cited by *Brandenburg*, *Sullivan* set the stage for the *Brandenburg* Court to declare protection for subversive advocacy by articulating the importance of free speech protection for radical criticism in the form of defamation. *See* Harry Kalven, *A Worthy Tradition* 231 (1988). Implicitly drawing on *Sullivan* and the prescient free speech theories advanced by Brandeis, Holmes, and Frankfurter, the Court in *Brandenburg*, explicitly overruled the general advocacy standard endorsed by *Whitney* in favor of a more stringent and deliberative test that weighed the value of the speech against its likelihood of

inciting imminent and intended lawless action. Contrary to the holding in *Whitney*, the expression of the idea itself was now fully protected speech under the First Amendment and as such, could no longer be prohibited without an additional showing of intent to cause immediate and likely harm.

Likewise, a reporter's protection of his or her sources should give way only under circumstances wherein the risk of societal harm is severe, clear, and particularized.[3] As with the inchoate threat of violent lawlessness in *Brandenburg*, the supposed threat of a reporters' privilege to a full and fair criminal trial identified in *Branzburg* is vague and imprecise. The First Amendment demands a more stringent standard for government action targeting speech.

C. This Court should look to its development of the modern defamation doctrine as an example of the appropriateness of jettisoning categorical limits on speech protection in favor of more balanced standards.

[3] Guidelines issued by the Department of Justice acknowledge and indeed extol the compelling interest in safeguarding newsgathering activities against unnecessary federal subpoenas in both civil and criminal law enforcement activities. 28 C.F.R. § 50.10(a)(2) (2014). The government, therefore, concedes that appropriate law enforcement interests can accommodate a balancing of the public interest in a free press.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), set the stage for a profound doctrinal shift in First Amendment jurisprudence. Despite obstacles in the form of unfavorable prior case law and common law history, this Court declared that libelous statements were subject to First Amendment scrutiny. *Id.* at 269.

Only twelve years prior to *Sullivan*, the Court in *Beauharnais v. Illinois*, 343 U.S. 250, 256–57 (1952), assigned no First Amendment value to libelous statements in a criminal or civil context, explicitly stating that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Like many other states in the mid-twentieth century, Illinois was "the scene of exacerbated tension between races, often flaring into violence and destruction," the root of which had been linked to inflammatory statements. *Id.* at 259 (footnote omitted). The Court found that "[i]n the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places" and carried out with the intention of making an emotional impact on the receiver. *Id.* at 261. But while the Court in *Beauharnais* found compelling the link between hateful speech and social unrest, the Court in *Sullivan* was faced with a situation where these

restrictions on speech were inhibiting the flow of information regarding the same type of racially charged social unrest the Court faced in *Beauharnais*. *See* Andrew Lewis, *Make No Law: The Sullivan Case and The First Amendment* 34–45 (1991).

Historically, libel fell within the purview of the common law, which was more concerned with protections against the reputational harms of those subjected to the libelous statements than with protecting the free speech interests at stake. William K. Jones, *Insult to Injury: Libel, Slander, and Invasions of Privacy* 16 (2003). Encouraged by decisions like *Beauharnais*, officials successfully used state libel laws grounded in the common law to silence criticism in the media. *See* Lewis, *supra,* at 35. Libel suits became an in-vogue vehicle for the chilling of Northern news media outlets' coverage of the Civil Rights movement and Southern states' discriminatory practices. *Id.* at 36 ("By the time the Supreme Court decided the *Sullivan* case, in 1964, Southern Officials had brought nearly $300 million in libel actions against the press.").

Sullivan changed the precedential and historical tide by moving libel from solely a concern of the common law to one under the purview of the Constitution. *Sullivan*, 376 U.S. at 279–80 (setting forth the "actual malice" standard for public official libel cases). To get to this highly speech-protective standard, Justice Brennan first argued that in the past the Supreme Court had been willing to look past

"mere labels" and find First Amendment protection when the interests justified such a finding: "[l]ike insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *Id.* at 269 (citations and footnotes omitted).

Having removed precedent as an obstacle, Justice Brennan next focused on value-based justifications for the protection of libelous statements. Reconsidering the lack of value assigned to libel in *Beauharnais*, Justice Brennan then considered libel "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270 (citation omitted). From this premise, the Court declined to find that factually erroneous and defamatory statements against public officials should lose protection because speech needed "breathing space" and because such speech was far more socially beneficial than the purported reputational harm to officials. *Id.* at 272–73 (citation omitted).

The Court in *Sullivan* found that the underlying defamatory speech had been undervalued, that the chilling effect of libel suits had been underestimated, and that the harm to public officials from such speech had been overstated.

Similarly, on this 50th anniversary of *Sullivan*, the Court should recognize a reporters' privilege and thaw the chill that is pervading newsrooms and preventing the sort of speech Justice Brennan recognized is key to a robust and wide-open public debate.

D. This Court's recent doctrinal shift concerning corporate political speech (campaign finance) supports revisiting *Branzburg*.

The recent shift in this Court's willingness to protect corporate political speech in *Citizens United v. FEC*, 558 U.S. 310 (2010), is instructive as to why this Court should reconsider *Branzburg*. In 1991, the Court upheld federal restrictions on direct expenditures for political speech made by corporate entities. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990). Thirteen years later in *McConnell v. FEC*, 540 U.S. 93, 103–109 (2003), the Court extended such restrictions from funds expressly used to advocate support or defeat of a candidate to funds directed towards all "electioneering communication." In *Citizens United*, however, the Court recognized that *Austin* and *McConnell* represented a break from well-reasoned precedent that disfavored limiting speech based on speaker identity and they relied on a "flawed" historical account of campaign finance law. *Citizens United*, 558 U.S. at 363–64 (citations omitted). The Court also considered empirical evidence in recognizing the exaggerated claims of harm to the election process: twenty-six states do not

limit independent expenditures by for-profit corporations and yet there was no evidence presented that expenditures in those states had led to corruption. *Id.* at 357.

Likewise, the *Branzburg* decision was preoccupied with an overstated fear that criminal prosecutions depend on the disclosure of reporters' sources, while it understated the value of and burden on vital speech. In addition, just as "[p]olitical speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws," *Citizens United*, 558 U.S. at 364, so too is newsgathering engrained our culture that members of the press will have to find ways to circumvent compelled testimony for disclosure of sources. As this Court recognized in *Citizens United*, "informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights." *Id.* at 364.

E. This Court's nuanced approach to broadening protection of commercial speech supports jettisoning *Branzburg*'s categorical rejection of a reporters' privilege.

This Court's protection of commercial speech demonstrates a willingness to reconsider categorical exclusions from First Amendment protection. The Court's early commercial speech doctrine was suspicious of the underlying value commercial speech had for society, much in the same way that the *Branzburg* decision is suspicious of the role

confidentiality plays in reporting on issues of public interest. *See*, *e.g.*, *Valentine v. Christensen*, 316 U.S. 52, 54–55 (1942) (holding that because the government generally had an interest in the "full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated" the legislature was free to regulate commercial speech in this context without requiring a showing of a particularized interest in a specific instance).

By the 1970s, however, the Court began to acknowledge the value of advertising in a free market and, in turn, the speech and press interests of consumers. *See* Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection For Commercial Speech: Lessons From Greater New Orleans Broadcasting*, 37 Am. Bus. L.J. 587, 595–602 (2000). The change was evident in *Bigelow v. Virginia*, 421 U.S. 809 (1975), where the Court began to balance the interests at stake in commercial speech cases. Relying on an earlier doctrine set forth in *Sullivan*, 376 U.S. at 266 and *Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations*, 413 U.S. 376, 384 (1973), the Court found that commercial speech should not lose its protection "merely because it appears in that form." *Bigelow*, 421 U.S. at 818 (citation omitted). In *Bigelow*, the statute at issue made it a misdemeanor to sell or circulate a publication that encouraged or prompted abortions. *Id.* at 811–12. The advertisement at issue was circulated at the University of Virginia and advertised to women "legal" abortions in New York City. *Id.*

To resolve the issue, the Court fashioned a balancing standard: "Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest." *Id.* at 826 (citations omitted). The Court analyzed the text of the abortion advertisement finding that although the advertisement was commercial in nature, it also contained material of public interest. *Id.* at 822. In assessing the government's interest in maintaining quality medical care, the Court noted that while the interest is legitimate, no claim has been made that this advertisement actually effected care. *Id.* at 827. Since this restriction applied to a publisher, the Court examined the chilling effect that such statutes could have on news publications, predicting the detrimental and far-reaching consequences for the press if the statute were to be upheld. *Id.* at 828–29.

The next step in the commercial speech evolution came in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), where the Court explicitly rejected the categorical ban of pure commercial speech from the protection of the First Amendment. In *Virginia Board of Pharmacy*, the statute at issue banned prescription drug advertising. *Id.* at 752. The ban arose from a generalized fear that advertisements would lead to unprofessional conduct by pharmacists, namely in the form of safety and quality sacrificed for lower prices. *Id.* at 767–68. However, the Court rejected such a "highly paternalistic" approach to consumer protection. *Id.* at 770. More informative for

the Court on the question of whether advertising speech should be protected was whether pure commercial speech was so removed from the "exposition of ideas," and from "truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government." *Id.* at 762 (citations omitted). The Court held, in that regard, that advertising served to inform consumers about various products and services in the free enterprise system and was essential to "the formation of intelligent opinions as to how that system ought to be regulated or altered." *Id.* at 765. Whereas early commercial speech cases undervalued the potential speech interest, the Court in *Virginia Board of Pharmacy* assigned value to speech in the form of advertising by linking the functioning of a free enterprise market to the functioning of a robust public debate about government regulation.

Continuing down this path, four years later the Court established a factor intensive four-part test for commercial speech cases in *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). The first factor considered was whether the commercial speech was unlawful or misleading, and if not, the Court went on to consider the rest of the factors: whether the governmental interest is substantial, whether the regulation directly advances the substantial governmental interest asserted and whether it is not more extensive than is necessary to serve that interest. *Id* at 566. Under this four-part test, the Court struck down the New York Public Service Commission's ban on promotional advertising

by an electrical utility. *Id.* at 566–72. *Central Hudson's* nuanced test represented yet another major shift from *Valentine*. Yet some justices argued for father divergence from *Valentine*'s early categorical ban on commercial speech. Writing for the three-judge concurrence in *Central Hudson*, Justice Brennan stated the principle that the "State may *not* [pursue its goals] by keeping the public in ignorance." *Id.* at 576.

After *Central Hudson*, decisions like *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), gave credence to the concern articulated by Justice Brennan that the four-part test would not adequately protect commercial speech. *See* Langvardt, *supra*, at 602–04. In *Posadas,* the Court upheld Puerto Rico's ban on gambling advertising. 478 U.S. at 340–42. More problematically for speech protection, Chief Justice Rehnquist reasoned that since Puerto Rico could ban gambling outright it necessarily could ban advertisements related to gambling. *Id.* at 345–46. Subsequent cases, however, eroded *Posadas*' holding, particularly the idea that because the government could ban a product or service, the lesser subset of regulation on speech was necessarily allowed. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 182–83 (1995); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509–10 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n.2 (1995); *see also* Langvardt, *supra*, at 589. The definitive disposal of the *Posadas* paradigm came in *44 Liquormart,* where the Court found that Rhode Island's ban on advertising retail liquor prices violated the First Amendment. 517 U.S. at 509–10. Presenting a far

different picture than the categorical ban in *Valentine*, the Court spoke of the historical importance of commercial speech. The Court wrote of advertising's great historical importance, placing the practice in its American colonial context and describing its "vital" role. *Id.* at 495. The Court went on to state that "the entire Court apparently now agrees [that] the statements in the *Posadas*' opinion are no longer persuasive." *Id.* at 513. *Greater New Orleans Broad. Ass'n,* decided one year after *44 Liquormart*, sealed *Posadas*' fate, "confirm[ing] the *Coors* and *44 Liquormart* signals that the gap between the intermediate and full levels of First Amendment protection is smaller than some decisions from the 1980s and early 1990s seemed to indicate." Langvardt, *supra*, at 592 (footnote omitted).

The historical discussion by the Court in *44 Liquormart* regarding the vital role of advertising highlights what is too quickly disregarded in the *Branzburg* opinion: the unparalleled vital role that a free press has played in the country's development. Just as the Court came to reject the logical syllogism of *Posadas* in favor of the more nuanced approach of *Central Hudson* and *44 Liquormart,* this Court should replace its holding in *Branzburg* with a more nuanced approach that requires the government to exhaust less speech restrictive means of achieving its prosecutorial goals before invading reporters' confidences.

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In sum, the recognition of a reporters' privilege neatly fits this well-established trend toward replacing earlier categorical rejections of speech-protective doctrines with nuanced approaches that appropriately balance the interests at stake.

II. The prevalence of media subpoenas and divergent protections for reporters pose significant threats to the free press.

The real-world harms that motivated this Court to revisit past First Amendment precedent should lead this Court to recognize a reporters' privilege. Since *Branzburg*, subpoenas directed to reporters—a problem that historically had been "a matter of only occasional and local significance"—began to occur with much more regularity, "in such numbers and circumstances as to generate consternation in virtually all quarters of the journalism profession." RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 Wash. L. Rev. 317, 319 (2009). From 2001 to 2006, the number of federal subpoenas directed to news organizations nearly doubled.[4]

[4] A 2001 study by The Reporters Committee for Freedom of the Press found 0.23 federal subpoenas per respondent. Lucy A. Dalglish, et al., The Reporters Committee for Freedom of the Press, *A Report on the Incidence of Subpoenas Served on the News Media in 2001*, at 1 (2003), *available at* http://www.rcfp.org/rcfp/orders/docs/AGENTS.pdf.
Five years later, a study by Professor RonNell Andersen Jones found 0.44 federal subpoenas per respondent. RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical*

Given the reality of heightened national security concerns since 2001, there is reason to expect this trend will continue. Indeed, Professor Jones's study "strongly suggest[s] that newsrooms are being made instruments for the collection of publicly available material in ways that other subpoena recipients are not," and in a post-9/11 world, there is little evidence to suggest these practices are not here to stay. *Id.*

This period has also ushered in "an unprecedented wave of exceptionally high-profile cases in which subpoenaed reporters asserted a privilege, lost their arguments, and then either relented or testified or were jailed for contempt." RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 Minn. L. Rev. 585, 615 (2008). For example, reporter James Taricani was convicted of criminal contempt and sentenced to six months of home confinement for refusing to reveal the name of the person who gave him an FBI videotape showing a government official accepting a bribe. *See In re Special Proceedings*, 291 F. Supp. 2d 44, 47 (D.R.I. 2003) (granting the special prosecutor's motion to compel Taricani to reveal the source of the videotape); *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (affirming civil contempt order against Taricani). New York Times reporter Judith

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Study of Subpoenas Received by the News Media, 93 Minn. L. Rev. 585, n.240 (2008). In 2006, federal subpoenas were issued to media organizations in thirty-two states and the District of Columbia and to newspapers and television news outlets in every circulation and market size. *See id.* at 638.

Miller spent eighty-five days in jail in 2005 for refusing to reveal the "senior [Bush] administration officials" who had outed covert CIA agent Valerie Plame to her and to other reporters from national news organizations. *See In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 966 (2005) (quoting Robert Novak, *The Mission to Niger*, Chi. Sun-Times, July 14, 2003, at 31); *In re Special Counsel Investigation*, 338 F. Supp. 2d 16, 17 (D.D.C. 2004). As a result of the Taricani and Miller cases, and others alike, journalists have come to believe that "the conventional wisdom holds that attorneys who would not have subpoenaed the press five years ago now view a media subpoena as both more socially acceptable and more likely to be legally permissible." *See* Jones, *Avalanche or Undue Alarm?*, *supra*, at 618.

This prevalence of media subpoenas poses a significant threat to a secure and vibrant free press. From the perspective of news organizations, subpoenas divert time and energy from newsgathering. *See* Jones, *Impact, Perception*, *supra*, at 360–74 ("News organizations now are worried about being nibbled to death in depositions and spending all of their time dealing with subpoenas rather than with the work of newsgathering . . . ."); *id.* at 397 ("[E]conomic realities lead newsroom leaders to make the calculation that they simply cannot afford the risk of the protracted legal costs that are significantly more likely to arise out of that style of reporting than out of other forms."). Additionally, potential sources are becoming increasingly unwilling to speak with journalists for

fear that promises of confidentiality cannot be kept, thus hampering the press' ability to uncover important stories in the public interest. *See* Jones, *Avalanche or Undue Alarm?*, *supra*, at 619–20. In Professor Jones's study, less than 10% of respondents reported that sources were more willing to speak on condition of confidentiality than in the prior period. Jones, *Impact, Perception*, *supra*, at 368.

Most critically, from the perspective of the journalist, the threats of imprisonment and substantial fines have a particularly chilling effect on his or her work. *See* Jones, *Avalanche or Undue Alarm?*, *supra*, at 618–20 ("[R]eporters who feel threatened by subpoena and the real possibility of jail time or substantial individual fines for noncompliance will shy away from stories that might give rise to subpoenas – especially those involving confidential sources, who will expect them to go to jail or pay the fines rather that revealing their identities."); Ken Paulson, *The Real Cost of Fining a Reporter*, USA Today, Mar. 12, 2008, at 11A (reporting that USA Today reporter Toni Locy was ordered to pay fines of up to $500 a day for a week, then $1,000 a day for a week and then $5,000 a day for a week). While most states recognize some form of reporters' privilege as a statutory, constitutional or common-law matter, until there is "uniformity of protection on a state and federal level" reporters will not feel "safe to engage in this enterprise." Jones, *Impact, Perception*, *supra*, at 397.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ J. Joshua Wheeler

Thomas E. Hogan
Baker Hostetler LLP
Suite 1100
1050 Connecticut Ave., NW
Washington, DC 20036
P: 202-861-1577
thogan@bakerlaw.com

J. Joshua Wheeler*
The Thomas Jefferson
Center for the Protection
of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
P: 434-295-4784
jjw@tjcenter.org

*Counsel of Record for *Amicus Curiae*