No. 13-1009

IN THE

Supreme Court of the United States

OCTOBER TERM, 2013

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOEL KURTZBERG
Counsel of Record
DAVID N. KELLEY
CAHILL GORDON
& REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000
jkurtzberg@cahill.com

Attorneys for James Risen

May 9, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Regulations

Constitutional Provisions

Rules

Statutes

The Department of Justice has itself acknowledged that "the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." 28 C.F.R. § 50.10 (2013). This case tests that principle. The petition raises important questions about the existence and scope of a qualified reporter's privilege not to testify about the identity of confidential source(s) in a criminal trial.

The government does not dispute that the courts of appeals have struggled to interpret *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), this Court's only decision addressing the existence of a reporter's privilege, and have reached irreconcilably conflicting decisions about the existence and scope of such a privilege. Nor does the government dispute that the resulting uncertainty in federal law has raised a recurring issue that requires clarity and predictability.

In opposing certiorari, the government narrowly redefines the issue, arguing no circuit conflict exists because the lower courts have "uniformly rejected claims of a reporter's…privilege" where a reporter is asked to testify "about the criminal conduct of a source." Opp. 16-17. That assertion cannot withstand serious scrutiny. The courts of appeals and state courts of last resort have not adopted the government's overly-narrow view of the issue, and their holdings, under both the First Amendment and common law, are all framed broadly enough to cover the very scenario the government posits.

A pervasive conflict of law has developed among the federal courts of appeals as to the existence and scope of a qualified journalist's privilege under *Branzburg*, *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), and Federal Rule

of Evidence 501. The Court should grant certiorari to resolve that conflict and provide long-needed clarity on questions of undeniable national import.

ARGUMENT

1. Spurning the definitive holdings of no less than six other circuit courts (Pet. 17-18) and six state courts of last resort (*id.* at 18 n.14), the Fourth Circuit is now the first court of appeals to hold that no qualified First Amendment privilege exists for journalists subpoenaed to testify regarding confidential information in a criminal trial.

a. The government admits that a conflict exists, Opp. 16 ("courts of appeals have taken different approaches to the general question of the existence of a reporter's privilege post-*Branzburg*"), and then strains to avoid it, artificially narrowing the question to only those cases in which a reporter has witnessed an alleged crime. But no court to address the issue has narrowed its holdings in such a way, and the plain language of the holdings provides for a qualified reporter's privilege in criminal trials across-the-board. *See, e.g., United States* v. *Capers*, 708 F.3d 1286, 1303 (11th Cir. 2013) ("Our Circuit recognizes a qualified privilege for journalists...[that] shields reporters in both criminal and civil proceedings."); *United States* v. *Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) ("[J]ournalists possess a qualified privilege not to divulge confidential sources…in criminal cases."); *United States* v. *Pretzinger*, 542 F.2d 517, 520-21 (9th Cir. 1976) ("The [court] must balance the interest of confidentiality of news sources against the needs of the criminal justice system to know the identity of the source."); *see also United States* v. *LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *United States* v. *Burke*, 700 F.2d

70, 77 (2d Cir. 1983); *United States* v. *Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000).

The government's proposed narrowing makes little sense. Given that the privilege is qualified, there is no reason to believe that the lower courts would categorically exempt a particular fact pattern from the requisite balancing, rather than taking those facts into account in the balancing. The government's suggested approach is also directly at odds with Justice Powell's concurring opinion in *Branzburg*, which requires a case-by-case balancing of interests. 408 U.S. at 710.

Nor is it an answer to say, as the government does, that this is a "strained" reading of Justice Powell's opinion.[1] Opp. 14. The six courts of appeals that have found a reporter's privilege to apply in criminal trials involving confidential source information have all agreed with petitioner's reading of Justice Powell's opinion and cited it as the basis for the privilege. There can be no doubt then, that those circuits would apply the balancing test to *all* subpoenas issued in criminal trials, and the Fourth Circuit's decision here conflicts with the law in those circuits.

b. In any event, even on the government's own terms, there is still a conflict. As the government concedes, Opp. 18, the Ninth Circuit has applied a privilege in the precise circumstance that the government claims is at issue here. *Farr* v. *Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975). In *Farr*, a journalist was held

[1] The government suggests that the privilege Justice Powell referred to applies only in instances of bad faith/harassment. Opp. 14-15. But that would amount to no First Amendment privilege at all, rendering Justice Powell's concurrence meaningless. Subpoenas issued in bad faith or to harass are facially invalid without regard to First Amendment principles.

in contempt for refusing to identify a confidential source who had allegedly disclosed information to the journalist in violation of a court order. The court balanced the "First Amendment privilege and the opposing need for disclosure...in light of the surrounding facts." *Id*. at 468. *Farr* illustrates how inapt the government's assertion is that "the courts of appeals have uniformly rejected claims of a reporter's…privilege" in cases requesting testimony "in a criminal proceeding about the criminal conduct of a source." Opp. 16-17.

Unable to dispute that the holding here directly conflicts with *Farr*, the government instead suggests that, because the balancing in *Farr* favored the government, the same result must follow here. But *Farr* differed from this case. In *Farr*, unlike here, there was no suggestion that the reporter's testimony "implicate[d] confidential source relationship[s] without a legitimate need of law enforcement," 408 U.S. at 710, because the government did not need the reporter's testimony to prove its case. Nor had an earlier subpoena to the reporter been quashed at the grand jury stage on those grounds—with hindsight showing the reporter's testimony was not needed to indict. Unlike here, neither the trial court nor any panel member in *Farr* concluded that the balancing favored the reporter. Finally, unlike here, the court in *Farr* held that disclosure was necessary to avoid violating the defendant's due process rights. *Farr*, 522 F.2d at 468-69. The government's speculation that Risen would lose, even if a balancing test were applied, is an insufficient basis for denying certiorari.

The government does not even address the conflict with *Tribune* v. *Huffstetler*, 489 So. 2d 722 (Fla. 1986), the Florida case applying a First Amendment privilege

even though the confidential disclosures to the reporter allegedly violated state law. There, the balancing favored the reporter, undermining the government's argument that, where the source is alleged to leak information illegally, the reporter always loses.

The government belittles the conflict between this case and numerous decisions of state courts of last resort on a First Amendment journalist's privilege because states may have alternative state sources for such protection. (Pet. 18 n.14; Opp. 20 n.8). But *Huffstetler* illustrates why these conflicts warrant this Court's attention. Although the Florida Shield law does not apply to eyewitness observations of crimes, Fla. Stat. Ann. § 90.5015(2), in *Huffstetler*, the Florida Supreme Court applied a First Amendment privilege based on *Branzburg* in a criminal investigation when the crime being investigated was the leak itself. *Huffstetler*, 489 So. 2d at 722-23.

3. Similarly unpersuasive are the government's arguments that recognition of a common law privilege is inconsistent with *Branzburg, Jaffee*, and Third Circuit law.

a. *Branzburg* does not preclude a finding of a common law privilege, because it made no holding and was not asked to make any ruling on that issue. The very first sentence of the majority opinion states that the sole issue before the Court 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 667. The Court did not consider whether recognition of a journalist's privilege abridged the common law, and, although it observed that "the common law recognized no such privilege," *id*. at 698, that passing observation

does not preclude recognition of a common law privilege today.

Branzburg acknowledged that "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned." 408 U.S. at 706. After *Branzburg* was decided, Congress delegated this power to the federal courts through Rule 501. Rule 501 "did not freeze the law" governing common law privileges but rather "directed federal courts to continue the evolutionary development of testimonial privileges." *Jaffee*, 518 U.S. at 8-9.

b. The government argues that "nothing has changed" since *Branzburg* (Opp. 22), but the opposite is true. Today, both federal and state courts overwhelmingly recognize some form of reporter's privilege. No such consensus existed when this Court decided *Branzburg* over 40 years ago. Today, the reporter's privilege meets the standard set forth by this Court in *Jaffee* for recognizing new common law privileges.

The government attempts to sidestep the clear public interests served by the reporter's privilege by arguing that the privilege should not apply where the leak to the reporter is allegedly a crime. According to the government, applying a privilege on those facts would undermine the public interest and should be considered an exception analogous to crime-fraud for the attorney-client privilege. Opp. 24.

But applying a qualified reporter's privilege in cases involving unauthorized leaks of classified information is very different than the crime-fraud scenario. The crime-fraud exception exists because the principal reason for the privilege "ceas[es] to operate" in

those circumstances. *United States* v. *Zolin*, 491 U.S. 554, 562 (1989). In contrast, the interests underlying the reporter's privilege *are* sometimes served by protecting unauthorized leaks of classified information, necessitating a balancing of interests in such cases. As Judge Tatel explained in *Judith Miller*, "although suppression of some leaks is surely desirable…the public harm that would flow from undermining all source relationships would be immense." *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1169 (D.C. Cir. 2006) (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005). That is because sometimes the value of the leak to society far outweighs any damage caused:

> [Some] leaks, the design for a top secret nuclear weapon, for example, or plans for an imminent military strike…caus[e] harm far in excess of their news value. In such cases, the reporter privilege must give way…[j]ust as attorney-client communications made for the purpose of getting advice for the commission of a fraud or crime serve no public interest and receive no privilege….
>
> Of course, in some cases a leak's value may far exceed its harm….For example, assuming Miller's prize-winning Osama bin Laden series caused no significant harm, I find it difficult to see how one could justify compelling her to disclose her sources, given the obvious benefit of alerting the public to then-underappreciated threats from al Qaeda. News reports about a recent budget controversy regarding a super-secret satellite program inspire another example….In contrast to the nuclear weapon and military strike examples mentioned above, cases like these appear to involve a balance of harm and news value that strongly favors protecting newsgathering methods.

Id. at 1173-74. Exposés such as Watergate (App.254a), the abuse of prisoners in Abu Ghraib, Iraq (App.275a), the CIA's waterboarding of terrorist suspects (S-App.70, 81), the CIA's use of secret prisons in Eastern Europe (App.275a), and the NSA's secret use of warrantless wiretaps on U.S. citizens (S-App.70, 81) illustrate that the public is often well-served by protecting sources of newsworthy information—even with unauthorized leaks of classified information.

The government's additional attempts to reconcile the court of appeals' common law decision with *Jaffee* also fail. The government argues against recognizing a reporter's privilege because it was not among nine privileges recommended by the Advisory Committee in an early draft of the Federal Rules of Evidence. Opp. 22. But as *Jaffee* noted, "Congress rejected this recommendation in favor of Rule 501's general mandate." *Jaffee*, 518 U.S. at 8 n.7. If only the nine original privileges could be recognized, Rule 501 would be a nullity.

The government also argues against recognizing a reporter's privilege because it is not based on a "special relationship." There is, however, no "special relationship" requirement for privileges, and, even if there were, it would be satisfied here. The relationship between a journalist and his source is "rooted in the imperative need for confidence and trust," *id*. at 10, and without the ability to make and keep promises of confidentiality, stories of tremendous significance would be "unlikely to come into being." *Id.* at 12. And even if there were no "special relationship" between journalists and their sources, such a relationship exists between journalists and the public. *See Judith Miller*, 438 F.3d at 1177 (Tatel, J., concurring) (privilege be-

longs to the reporter, whose interests align with the public's).

The government acknowledges *Jaffee*'s holding that the "policy decisions of the States bear on the question whether federal courts should recognize a new privilege," *Jaffee*, 518 U.S. at 12-13, but dismisses the near-unanimity of the states in support of a reporter's privilege because of differing views as to its applicability and scope. Opp. 24-25. Under *Jaffee*, however, this type of unanimity is not required. Faced with similar variations in the scope of state protections for psychotherapists and their patients, this Court found such divergences "too limited to undermine the force of the States' unanimous judgment that some form of psychotherapist privilege is appropriate." *Jaffee*, 518 U.S. at 14 n.13.[2]

c. The government also argues there is no conflict on the common law question, half-heartedly suggesting that "it is not clear that the Third Circuit would recognize a federal common-law right for a reporter" where a journalist witnesses a crime. Opp. 26. As the government is forced to admit, however, the Third Circuit's holding in *Cuthbertson* is broad enough to cover *all* subpoenas in criminal trials. *See Cuthbertson*, 630 F.2d at 147 ("journalists possess a qualified privilege not to divulge confidential sources...in criminal cases").

The government's speculation is also inconsistent with both Justice Powell's concurring opinion in

[2] In any event, of the 48 states that recognize a journalist's privilege in criminal trials, 46 would apply it to the circumstances here. *See* Pet. 24-26, nn.18-20; *Huffstetler*, 489 So. 2d at 722-23; *but see* Colo. Rev. Stat. Ann. § 13-90-119(2)(c)-(d) (excluding circumstances where journalist witnesses crime); N.C. Gen. Stat. Ann. § 8-53.11(d) (same).

Branzburg, which called for balancing interests on a case-by-case basis, 408 U.S. at 710, and *Cuthbertson* itself, which based its privilege on Justice Powell's concurrence. *Cuthbertson*, 630 F.2d at 146. It completely ignores the *Cuthbertson* court's rejection of the government's argument that the interests supporting disclosure always overcome free-speech interests in criminal trials. The court explained that, when faced with competing constitutional interests, "rather than affecting the existence of the qualified privilege, we think that these rights are important factors that must be considered in deciding whether, in the circumstances of an individual case, the privilege must yield." *Id*. at 147. The government's suggestion that the Third Circuit might adopt a categorical exception to this balancing thus contravenes *Cuthbertson*'s reasoning.[3]

4. Finally, the government contends this case is not a good vehicle for certiorari because the court of appeals suggested in dicta that, even if there were a privilege, it was waived and overcome. Neither provides a sufficient basis for denying certiorari.

The government concedes the waiver issue was not argued or briefed below and was abandoned by the government. Opp. 28 n.11. The appellate court's suggestion of waiver was made without a fully-developed record and without even addressing two uncontradicted affidavits submitted in the grand jury matter demonstrating that any conversations Risen had with a third party were made in strict confidence and in fur-

[3] The government does not dispute that the common law privilege question has so divided the Second and D.C. Circuits that neither has been able to rule on the question, even though it has been squarely presented. *See* Pet. 29-30 (citing conflicting opinions on common law privilege in *Judith Miller* and *Gonzales*).

therance of his investigatory reporting. Pet. 33-34. The government submits this is irrelevant, Opp. 27, but a confidential communication that *furthers* the purpose of the privilege can hardly be said to waive it.

The government's suggestion that, even if there were a privilege, it would be overcome on these facts is not a sufficient basis for denying review either. In finding that the balancing of interests favored the government, the Fourth Circuit improperly applied a *de novo* standard of review. The government warns against "presuming" that the court of appeals failed to apply the proper standard, Opp. 30, but here there is no need for any "presumption," as the Fourth Circuit did not defer to the district court's findings at all. *See* App.46a ("[I]f we were to…apply the three-part *LaRouche* test to the inquiry, as the district court did, we would still reverse.").

In any event, the balancing favors Risen. As Justice Powell clarified in *Branzburg*, the privilege prevails if the reporter's testimony "implicates confidential source relationships without a legitimate need of law enforcement." 408 U.S. at 710. That is precisely why the government's case fails here. *See* Pet. 6-8; App.97a-98a; App.218a-19a.

In the end, the government's suggestion that it would win the balancing really begs the question presented by this petition, which puts both the existence and scope of the privilege before this Court. This is not a case, like *Judith Miller*, where the court of appeals unanimously concluded that the balancing favored the government. Both the district court and Judge Gregory concluded otherwise. This Court can and should use this case to clarify both the existence and scope of the privilege.

CONCLUSION

The petition should be granted.

Respectfully submitted,

JOEL KURTZBERG
Counsel of Record
DAVID N. KELLEY
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for James Risen

May 9, 2014