No. 01-983

IN THE
Supreme Court of the United States

VANESSA LEGGETT,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF *AMICUS CURIAE* THE CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom is a nonpartisan, non-profit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including, but not limited to, free speech rights, property rights, privacy rights, freedom of association,

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[1] This brief is filed with the written consent of both parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

and religious freedoms. Of particular importance to the Center in this case is the need to establish judicial clarity to protect the free flow of information to the public through constitutional protections for news gathering.

SUMMARY OF ARGUMENT

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court recognized that clearly articulated First Amendment protections often are necessary to secure the public's right to know. In *Sullivan*, the threat to the First Amendment was government officials' use of the common law of defamation to inhibit robust and wide-open public debate. The Court neutralized that threat by adopting the actual malice standard, which significantly limits the ability of public officials to abuse defamation actions. In doing so, the Court's message was unmistakable: When existing law fails to adequately safeguard the free flow of information, it must give way to a higher standard.

This case highlights a similar threat to the public's right to know and demonstrates the need for the Court to clearly articulate the limits of the government's power to interfere in news gathering. Author Vanessa Leggett recently spent 168 days in jail for refusing to disclose confidential sources and other unpublished material to a grand jury that was so far afield that even the prosecutor could not explain why some of the information had been demanded. Equally alarming was the fact that Ms. Leggett received her first subpoena immediately after she refused the government's offer to become a paid confidential informant. The Court of Appeals for the Fifth Circuit, however, rejected the qualified news gatherer's privilege asserted by Ms. Leggett, even though that privilege was recognized by this Court in

Branzburg v. Hayes, 408 U.S. 665 (1972), and since has been adopted by a majority of the Courts of Appeal that have considered the issue.[2]

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[2] The issue in this case is not whether a book author, like Ms. Leggett, can assert a privilege more often claimed by news reporters. The Fifth Circuit, while holding the privilege did not apply in criminal cases, assumed authors and freelance writers could assert the privilege in other cases. *In re Grand Jury Subpoenas*, No. 01-20745, slip op. at 5 (5th Cir. Aug. 17, 2001), which is included in the Appendix to the Petition for Writ of Certiorari. To be eligible to claim the privilege, the Fifth Circuit said, a writer must show she "(1) is engaged in investigative reporting; (2) is gathering the news; and (3) possesses the intent at the inception of the news gathering process to disseminate the news to the public." *Id*. at 5, n.4. The Second Circuit, recognizing that "'[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion,'" has held the privilege applies to all investigative writers. *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir.) (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)), *cert. denied*, 481 U.S. 1015 (1987). In reaching the same conclusion, the Ninth Circuit cited the books of Lincoln Steffens, Upton Sinclair, Rachel Carson, Ralph Nader, and Jessica Mitford. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). A more recent example is Mark Fuhrman, the police detective-turned-author whose book, *Murder in Greenwich: Who Killed Martha Moxley?*, contributed to the arrest and pending trial of a suspect accused of murdering a 15-year-old girl in 1975. As the court said in *Shoen*, "What makes journalism journalism is not its format but its content." *Id*.

In *Branzburg*, the members of this Court unanimously agreed that news gathering is entitled to First Amendment protection. While a majority of the Court held the facts of the cases at issue did not support the four reporters' refusal to testify (two had witnessed crimes and two had refused to even appear before grand juries), the Court fractured over how much protection news gatherers generally should receive. The legacy of *Branzburg* thus has become the qualified privilege described in Justice Powell's concurrence, which bridges the majority and dissenting opinions. A court may compel a news gatherer's testimony, Justice Powell wrote, only after striking, on a case-by-case basis, a "proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

Unfortunately, not all courts have recognized this legacy. As a result, news gatherers throughout the country are subject to the whim of aggressive prosecutors and unaccountable grand juries. This attack on the free flow of information requires the Court, as it did in *Sullivan*, to establish a definitive threshold of protection. In doing so, however, the Court need not create a new standard. Rather, it need only approve the qualified privilege already recognized by many federal courts, which provides that news gatherers can be required to testify if (1) the information sought is highly material and relevant, (2) a compelling need exists for the information, and (3) the information cannot be obtained by other means. Only by clearly establishing such a threshold can the Court ensure that the public's right to know is not jeopardized by governmental attempts to improperly interfere in news gathering.

ARGUMENT

I. THE FIFTH CIRCUIT'S REFUSAL TO RECOGNIZE THE QUALIFIED NEWS GATHERER'S PRIVILEGE IS INCONSISTENT WITH THIS COURT'S RECOGNITION OF THE PRIVILEGE IN *BRANZBURG* AND CONFLICTS WITH HOLDINGS OF OTHER COURTS OF APPEAL.

A. This Court in *Branzburg* Recognized a Qualified News Gatherer's Privilege.

This Court should review the Fifth Circuit's rejection of the qualified news gatherer's privilege in criminal cases because that rejection is inconsistent with this Court's recognition of the privilege in *Branzburg* and conflicts with holdings of other Courts of Appeal. In *Branzburg*, the Court heard three consolidated cases to determine whether requiring news reporters to testify before grand juries violated the First Amendment. *Id*. at 667. Five of the Justices – Powell, Douglas, Stewart, Brennan, and Marshall – recognized a news gathering privilege. Justice Douglas interpreted the First Amendment most strongly, declaring that reporters possessed an absolute privilege against revealing confidential information. *Id*. at 712 (Douglas, J., dissenting). Justices Stewart, Brennan, and Marshall did not recognize an absolute privilege but said the First Amendment entitled news gatherers to protect confidential information unless the government could

> (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

Id. at 743 (Stewart, Brennan, and Marshall, JJ., dissenting)

(footnotes omitted). Justice Powell also recognized a qualified news gatherer's privilege, emphasizing that the majority's decision to require the reporters in *Branzburg* to testify did not deprive news gatherers of First Amendment protection:

> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court . . . . In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

Id. at 710 (Powell, J., concurring).

The language in Justice White's opinion rejecting a news gathering privilege was supported by Chief Justice Burger and Justices Blackmun and Rehnquist and cannot be construed as part of a majority opinion. Even these Justices, however, recognized that "news gathering is not without First Amendment protections" and that reporters must be protected if grand juries attempt to improperly disrupt relationships between reporters and sources. *Id*. at 707-08. While the opinions in *Branzburg* have been fodder for much interpretation, it is indisputable that a majority of the Court recognized at least a qualified news gatherer's privilege.

B. The Fifth Circuit's Decision Conflicts with Holdings of Other Courts of Appeal.

As detailed in the Petition for Writ of Certiorari, the Courts of Appeal do not agree about the existence or extent of

the news gatherer's qualified privilege. *See* Petition for Writ of Certiorari, filed herein, at 12-21. The majority of federal appellate courts that have considered the issue has interpreted *Branzburg* to establish a qualified privilege in at least some circumstances.[3] A minority of the courts, however, including the Fifth Circuit, refuses to recognize a qualified privilege for news gatherers in criminal cases.[4]

The majority and minority views stem from conflicting interpretations of *Branzburg* and cannot be reconciled. In adopting the majority view, for example, the Ninth Circuit stated, "It is clear that *Branzburg* recognizes some First Amendment protection of news sources. The

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[3] *See, e.g., United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (qualified privilege protects disclosure of unpublished information in criminal cases); *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir.) (same), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (qualified privilege protects confidential sources and unpublished information in criminal cases), *cert. denied*, 449 U.S. 1126 (1981); *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975) (qualified privilege protects confidential sources in criminal cases), *cert. denied*, 427 U.S. 912 (1976); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (qualified privilege protects unpublished information in criminal cases), *cert. denied*, 483 U.S. 1021 (1987).

[4] *See, e.g., Reporters Committee for Freedom of the Press v. American Tel. & Tel. Co.*, 593 F.2d 1030, 1049-50 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979); *In re Shain*, 978 F.2d 850, 853-54 (4th Cir. 1992); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *Storer Communications, Inc. v. Giovan*, 810 F.2d 580, 584-85 (6th Cir. 1987).

language of the case likewise indicates that the privilege is a limited or conditional one." *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). In adopting the minority view, however, the Sixth Circuit also cited *Branzburg*, holding that Justice Powell's concurring opinion "certainly does not warrant the rewriting of the majority opinion to grant a first amendment testimonial privilege to news reporters . . . ." *Storer Communications, Inc. v. Giovan*, 810 F.2d 580, 585 (6th Cir. 1987). This clear conflict among the circuits, especially considering the importance of the constitutional issue involved, warrants this Court's review. *See* U.S. Sup. Ct. R. 10(a), 10(c).

II. THIS COURT SHOULD CLEARLY ARTICULATE THE QUALIFIED NEWS GATHERER'S PRIVILEGE BECAUSE THE FREE FLOW OF INFORMATION IS VITAL TO THE PUBLIC'S RIGHT TO KNOW.

A. The Qualified News Gatherer's Privilege Protects the Free Flow of Information to the Public.

The Court's clear articulation of the qualified news gatherer's privilege is necessary to ensure the free flow of information to the public and "to protect the important interests of reporters and the public in preserving the confidentiality of journalist's sources." *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir. 1982). The qualified news gathering privilege is rooted in the First Amendment and based "on the strong public policy supporting the unfettered communication to the public of information and opinion . . . ." *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981). Compelling a news gatherer to disclose confidential sources "unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis . . . ." *Baker v. F & F Investment*, 470 F.2d 778, 782 (2d Cir. 1972). "The deterrent effect such disclosure

is likely to have upon future 'undercover' investigative reporting . . . threatens freedom of the press and the public's need to be informed . . . [and] undermines values which traditionally have been protected by federal courts applying federal public policy." *Id*.

This deterrent effect is not limited to instances in which news gatherers are compelled to disclose confidential sources. Requiring an author or reporter to produce other unpublished information also "can constitute a significant intrusion into the newsgathering and editorial processes." *Cuthbertson*, 630 F.2d at 147. "Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege." *Id*. As the First Circuit has observed,

> . . . a lurking and subtle threat to journalists and their employers [exists] if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled. To the extent that compelled disclosure becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding disclosure requests or compliance therewith rather than to the basic function of providing news and comment. In addition, frequency of subpoenas would not only preempt the otherwise productive time of journalists and other employees but measurably increase expenditures for legal fees.

United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988).

The test used by the Fifth Circuit in rejecting the privilege – grand jury testimony will be compelled "absent evidence of governmental harassment or oppression"[5] – ignores these threats to the public's right to know. Indeed, the Fifth Circuit's test offers news gatherers no more protection than that afforded all other grand jury witnesses. *See* Fed. R. Crim. P. 17(c) ("The court . . . may quash or modify the subpoena if compliance would be unreasonable or oppressive."). As the courts in the majority have recognized, only a qualified news gatherer's privilege sufficiently safeguards the free flow of information to the public.

B. To Adequately Protect the Public's Right to Know, the Qualified News Gatherer's Privilege Must Be Clearly Articulated by This Court.

The Fifth Circuit's decision in this case and the current conflict among the circuits demonstrate the need for this Court to clearly articulate the qualified news gatherer's privilege. As the law presently exists, reporters are subject to different and contradictory standards depending upon where they gather and publish news. These different standards are especially troubling in an era in which many reporters work on a national stage, whether for coast-to-coast television, books, or the Internet. Does a news gatherer working in the First Circuit, for example, lose her qualified privilege when she travels to Texas to interview a source? Can a Texas grand jury break the seal of a confidential reporter-source relationship created in the First Circuit? Is an e-mail privileged if it is sent from a confidential source in Texas to a reporter in the First Circuit? If sent from a source in the First

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[5] *In re Grand Jury Subpoenas*, slip op. at 6.

Circuit to a reporter in Texas? These and scores of equally disturbing questions demonstrate the need for a clear national standard.[6]

Almost 40 years ago, in *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court faced a similar challenge. Defamation actions brought by governmental officials endangered the free flow of information to the public, as the liability faced by the media under the common law encouraged self-censorship and chilled criticism. *Id*. at 279. The Court responded boldly, holding that a common law that jeopardized robust and wide-open debate could not survive First Amendment scrutiny. *Id*. The Court accordingly jettisoned the common law rules of liability and damages and replaced them with the actual malice standard, a standard the Court created to ensure the free flow of information to the public. *Id*. at 279-80.

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[6] In a related context, Congress has established a national standard protecting news gatherers from searches and seizures made by federal, state, and local governmental officials during criminal investigations and prosecutions. *See* 42 U.S.C. § 2000aa *et seq*. This legislation, which expressly includes book authors among those protected, provides in part that unpublished materials created by a news gatherer can be searched or seized only if the news gatherer is committing a crime or if a seizure is necessary to prevent death or serious injury. *Id*. at § 2000aa(a). Significantly, the law further provides that officials cannot search or seize unpublished materials collected by a news gatherer merely because the materials have been subpoenaed. Rather, search or seizure of these materials is permitted only after a final court order has been entered compelling compliance with the subpoena. *Id*. at § 2000aa(b).

The conflict among the circuits over the qualified news gatherer's privilege requires a similar response. Like the common law of defamation, this conflict encourages self-censorship and threatens robust and wide-open debate. This threat is unfortunately even more real today, as our country's war footing inevitably will escalate the tension between the government's desire for secrecy and the public's need to know. The Court should take this opportunity to finally and clearly articulate the qualified news gatherer's privilege necessary to protect the free flow of information.

III. THE QUALIFIED NEWS GATHERER'S PRIVILEGE ARTICULATED IN THE COURTS OF APPEAL APPROPRIATELY BALANCES THE PUBLIC'S RIGHT TO KNOW AND THE DUTY OF ALL CITIZENS TO TESTIFY.

Unlike *Sullivan*, this case does not require the Court to create a new standard to protect the First Amendment freedoms at stake. The Courts of Appeal, recognizing the qualified news gatherer's privilege, already have spent considerable time crafting a test that appropriately balances the public's right to know and the needs of the criminal and civil justice systems. Guided by the opinions of Justices Powell and Stewart in *Branzburg*, these courts have held that a news gatherer can be required to testify if (1) the information sought is highly material and relevant, (2) a compelling need exists for the information, and (3) the information cannot be obtained by other means. *See, e.g., Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir. 1993); *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983). This test, as applied to confidential and other unpublished information, fairly balances the competing interests involved and ensures that no interest is unjustly sacrificed to another. By adopting and clearly articulating this test, the Court would sufficiently safeguard the free flow of information to the public.

Ms. Leggett's case demonstrates why the Court should take this opportunity to clearly articulate the qualified news gatherer's privilege. While Justice Powell was confident that the decision in *Branzburg* would protect news gatherers from being annexed as investigative arms of government, *see Branzburg*, 408 U.S. at 709 (Powell, J., concurring), Ms. Leggett did not enjoy such protection. After conducting four years of tape-recorded interviews in six states for her book on the murder of socialite Doris Angleton, Ms. Leggett was rewarded with a visit from FBI agents. Aware of her interviews, the agents tried to recruit Ms. Leggett to join the investigative team as a paid confidential informant. When she refused, she was immediately served with her first grand jury subpoena.[7]

After providing non-confidential information to the grand jury in December 2000, Ms. Leggett was subpoenaed again six months later, this time to surrender all of her original tape recordings, all copies of those recordings, and all transcripts prepared from those recordings. Even though she resisted this overly broad subpoena, the Justice Department failed to offer any evidence that it complied with 28 C.F.R. § 50.10, which requires the Department to, among other things, obtain the approval of the U.S. Attorney General before subpoenaing a reporter. The prosecutor admitted at Ms. Leggett's contempt hearing that the subpoena was "unspecific" and that he could not explain why some of the information had been demanded. Nevertheless, the government was not required to justify the subpoena in any

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[7] The facts set forth herein are summarized from those contained in the Petition for Writ of Certiorari and in the Petition for Rehearing En Banc filed in the Fifth Circuit.

way, and Ms. Leggett was found in contempt.[8] Unwilling to break her promises of confidentiality, Ms. Leggett spent the next 168 days in jail, not being released until the grand jury expired.[9]

The issues presented in this case are of the highest constitutional significance. As this Court observed more than 70 years ago, the free flow of information to the public is necessary to sustain a vigorous democracy: "The maintenance of the opportunity for free political discussion to the end

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[8] During the contempt proceedings, the district court judge was candid about her lack of experience in this area of the law, saying at one point that, "[b]eing unfamiliar with this process, having never done this before and needing to rely upon the experience of all the attorneys here . . . ." On appeal, the Fifth Circuit did not review the district court's decision with the scrutiny normally applied in cases affecting First Amendment freedoms. *See, e.g., Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (court has duty to independently examine record when First Amendment rights are at stake). Instead, it considered only whether the district court judge abused her discretion. *In re Grand Jury Subpoenas*, slip op. at 4.

[9] Although the grand jury that subpoenaed Ms. Leggett has expired, the prosecutor has not ruled out subpoenaing Ms. Leggett again when a new grand jury is impaneled. *Freed writer plans to stand her ground; Government may pursue case with a new grand jury*, Dallas Morning News, Jan. 5, 2002, at 27A (2d ed.). Even if Ms. Leggett is not subpoenaed again, the conflict among the circuits regarding the news gatherer's privilege almost ensures the issues in this case will be raised again. Because these issues are capable of repetition, the Court should grant the Petition for Writ of Certiorari to prevent them from escaping review in this case.

that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

Our ability to govern ourselves is threatened every time a party, prosecutor, or grand jury merely fishing for information compels a news gatherer to reveal a confidential source or other unpublished information. A clearly articulated, universally applied, qualified news gatherer's privilege is the strongest shield against this threat. The Court should take the opportunity presented by this case to definitively recognize such a privilege and thus ensure the public's right to know.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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