ORAL ARGUMENT SCHEDULED FOR DECEMBER 8, 2004

Nos. 04-3138, 04-3139 & 04-3140

In The
United States Court of Appeals
for the District of Columbia Circuit

IN RE GRAND JURY SUBPOENAS TO JUDITH MILLER

IN RE GRAND JURY SUBPOENAS TO MATTHEW COOPER

IN RE GRAND JURY SUBPOENA TO TIME INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

Reid Alan Cox
Counsel of Record
Renee L. Giachino
CENTER FOR INDIVIDUAL FREEDOM
901 N. Washington Street
Suite 402
Alexandria, VA 22314
(703) 535-5836

Attorneys for Amicus Curiae Center for Individual Freedom

October 25, 2004

CORPORATE DISCLOSURE STATEMENT

The Center for Individual Freedom (the "Center") is a non-profit corporation that is tax exempt under Section 501(c)(4) of the Internal Revenue Code. The Center has no parent corporation and is not owned, wholly or in part, by any publicly-held company. The mission of the Center is to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Center certifies that the Certificate as to Parties, Rulings, and Related Cases provided by Appellants, Judith Miller, Matthew Cooper, and Time Inc., is correct.

CERTIFICATE AS TO CONSENT OF THE PARTIES AND RULE 29(d)

The Center certifies that all parties to this litigation have consented to filing of this *amicus curiae* brief. The Center also certifies that it was not practicable to join another *amicus curiae* brief because the interests of the Center are not the same as those of major media organizations. Specifically, the Center believes it is important for this Court to understand that the First Amendment provides protection for anyone engaged in gathering, publishing, or receiving news, information and commentary, including advocacy groups, new media (such as Internet websites and weblogs), and the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

TABLE OF AUTHORITIES (CONT.)

Pages

CASES (cont.)

TABLE OF AUTHORITIES (CONT.)

Pages

CASES (cont.)

CONSTITUTIONAL PROVISIONS

Nos. 04-3138, 04-3139 & 04-3140

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE GRAND JURY SUBPOENAS TO JUDITH MILLER

IN RE GRAND JURY SUBPOENAS TO MATTHEW COOPER

IN RE GRAND JURY SUBPOENA TO TIME INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom (the "Center") is a non-profit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including free speech rights, free press rights, privacy rights, and the freedom of association. Of particular

---

[1] This brief is filed pursuant to the consent of all 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. Given the expedited briefing schedule ordered for these cases, the parties agreed to allow *Amicus* to have up to and including Tuesday, October 26, 2004, or two business days after the submission of Appellants joint opening brief, for the filing of this brief. This schedule complies with both the Federal Rules of Appellate Procedure and the D.C. Circuit Rules as to the timely filing of *amicus curiae* briefs. *See* FED. R. APP. P. 29(e), D.C. CIR. R. 29(c).

importance to the Center in these cases is the need to vigilantly safeguard the First Amendment rights of all newsgatherers, publishers, and the public, who depend on the protection of confidential sources in gathering, publishing, and receiving news, information, and commentary.

The Center's interest in these cases stems not only from its principled commitment to protect and defend the constitutional rights of all newsgatherers, publishers, and the public, but also from the Center's practical experience as a newsgatherer, information source, and publisher, itself. As a vocal proponent of individual freedom, open government, and public accountability, the Center engages in direct-to-the-public advocacy by disseminating news, information, and commentary through a variety media, including its own Internet website <http://www.cfif.org>, which is updated weekly and visited by millions of readers each year. The Center's advocacy is dependent upon an ability to gather information from all types of sources, including those who require their identities to remain confidential, so that the Center is able to enlarge the public's knowledge and encourage the public's discourse on matters of importance.

ARGUMENT

It is always important to "start with first principles." *United States v. Lopez*, 514 U.S. 549, 552 (1995). With respect to the freedoms of speech and of the press guaranteed by the First Amendment, this means that governmental actions that interfere with the communication of truthful information and even controversial ideas raise constitutional concerns and are inherently suspect. *See generally Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Landmark Communications*, *Inc. v. Virginia*, 435 U.S. 829 (1978). The U.S. Supreme Court has noted that even when the government's authority is at its zenith, such as when the government is protecting and vindicating civil society's standards through a criminal prosecution, adverse impacts on the First Amendment rights of others cannot be disregarded or ignored. *See generally Richmond Newspapers*, *Inc. v. Virginia*, 448 U.S. 555 (1980). Instead, those constitutional concerns must be taken into account when courts review the challenged state action by properly weighing the First Amendment interests at stake as an important counterbalance to the interests asserted against openness and the public's right to receive information and ideas. *See generally Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Landmark Communications*, *Inc.*, 435 U.S. 829.

These "first principles" lead to the conclusion that constitutional protections for free speech and free press, in one way or another, limit the authority of special

counsel, prosecutors, criminal defendants, and civil litigants to compel newsgatherers and publishers to disclose confidential sources used in gathering and communicating news, information, and commentary to the public. If language in some cases might suggest otherwise, such language is wrong and *Amicus* offers suggestions as to how this Court should proceed in light of such error.

I. THE FIRST AMENDMENT PROVIDES A QUALIFIED PRIVILEGE FOR THE PROTECTION OF CONFIDENTIAL SOURCES.

The First Amendment commands that "Congress shall make no law . . . abridging the freedom of speech or of the press," U.S. CONST. amend. I, and its guarantees apply directly against the federal government. Both the U.S. Supreme Court and the vast majority of the federal courts of appeal, including this Court, have recognized the inherent constitutional problem that arises when a newsgatherer or publisher faces being held in contempt for refusing to reveal a confidential source of information. *See*, *e.g.*, *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)) ("a journalist is free to seek out sources of information not available to members of the general public, [and] he is entitled to some constitutional protection of the confidentiality of such sources"); *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981) ("Compelling a reporter to disclose the identity of a confidential source raises obvious First Amendment problems."). For that reason and because of the constitutional recognition that "news gathering is not without its First Amendment protections,"

Branzburg, 408 U.S. at 708, courts have long held that newsgatherers and publishers possess a qualified privilege ensuring they will not be forced to reveal their confidential sources pursuant to judicial proceedings, both civil and criminal, unless the societal interests in the litigation along with the necessity of the source outweigh the obvious First Amendment freedoms at stake. *See*, *e.g.*, *id.* at 710 (Powell, J., concurring); *Zerilli*, 656 F.2d at 711-12.

Nevertheless, despite these precedents, including those from this Court, establishing a qualified privilege under the First Amendment and instructing that judges must, at the very least, fully consider and carefully balance the constitutional and societal interests at issue before compelling the disclosure of confidential sources, the district judge below ruled directly to the contrary, explicitly rejecting the existence of the newsgatherer's qualified privilege while disregarding the First Amendment concerns raised by citing two reporters and a newsmagazine for contempt. *See generally In re Special Counsel Investigation*, Misc. Nos. 04-296 & 04-297, 2004 U.S. Dist. LEXIS 15360, 332 F. Supp. 2d 26 (D.D.C. July 20, 2004).[2] Specifically, the district judge "expressly refused to find

---

[2] This is the district court's primary opinion, which the judge incorporated by reference in all of his subsequent decisions involving Appellants. *See*, *e.g.*, *In re Special Counsel Investigation*, Misc. No. 04-407, 2004 U.S. Dist. LEXIS 18495, at *3 (D.D.C. Sept. 15, 2004) (primary opinion "is incorporated by reference to this case"). As a result, the district judge has held that the Appellants can assert no privilege, constitutional or otherwise, to protect their confidential sources of information. *See*, *e.g.*, *id.* at *3, *9.

that the press had any qualified privilege against testifying before a grand jury," *id.* at *8, because, in his view, "*Branzburg* ma[de] it clear that neither the First Amendment nor common law protect[s] reporters from their obligations shared by all citizens to testify before the grand jury when called to do so," *id.* at *6. According to the district judge, "the U.S. Supreme Court unequivocally rejected any reporter's privilege rooted in the First Amendment or common law in the context of a grand jury acting in good faith," *id.* at *1, and, as a result, "a reporter called to testify before a grand jury regarding confidential information enjoys no First Amendment protection," *id.* at *15. Such a holding is erroneous and must be reversed because it misconstrues the U.S. Supreme Court's holding in *Branzburg* and directly conflicts with long-established precedents of the federal courts of appeal, including those of this Court.

A. The Supreme Court Recognized a Qualified Privilege for the Protection of Confidential Sources in *Branzburg*.

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the U.S. Supreme Court recognized that the First Amendment ensures that newsgathering and publishing processes are entitled to constitutional protection. The Justices explicitly noted that "[w]e do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. Thus, while the *Branzburg*

majority rejected an absolute privilege in ruling that the reporters could be compelled to reveal their sources on the facts presented in those cases, that same majority also recognized a qualified privilege based upon constitutional protection for confidential sources in holding that "news gathering is not without its First Amendment protections" and instructing that "[w]e do not expect the courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Id.* at 707, 708.

In fact, all nine Justices in *Branzburg* agreed that the First Amendment provides newsgatherers and publishers with some degree of constitutional protection against the compelled disclosure of their confidential sources when sought through judicial proceedings, even when subpoenaed to testify before a grand jury. *See id.* at 707-08; *id.* at 709-10 (Powell, J. concurring); *id.* at 712-13, 721-22 (Douglas, J., dissenting); *id.* at 736-38, 743 (Stewart, Brennan, Marshall, JJ., dissenting). Most notably, in order to ensure that the existence and recognition of the qualified constitutional privilege was clear, Justice Powell, the necessary fifth vote for the *Branzburg* majority, expressly noted in his pivotal concurring opinion that the "Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Id.* at 709 (Powell, J., concurring). Rather, Justice Powell explained that that the majority's decision meant quite the opposite:

"In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." *Id.* at 710.

Specifically, Justice Powell noted that *Branzburg* stood for a qualified privilege under the First Amendment such that whenever a newsgatherer or publisher has some "reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be issued." *Id.* Justice Powell went on to clarify that any such "asserted claim to privilege should be judged on its facts by striking the proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct," and that 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.*

As the necessary fifth vote for the Court in *Branzburg*, Justice Powell's opinion cannot be dismissed as either a non-binding concurrence or as mere *obiter dicta*. Rather, Justice Powell's rationale, as stated through both the majority opinion *and his separate concurrence*, constitutes a binding clarification of and holding in *Branzburg* and establishes a qualified privilege under the First Amendment protecting newsgatherers and publishers against the compelled

disclosure of their confidential sources absent a careful judicial balancing of the constitutional interests at stake.

In fact, the result is the same regardless of whether this Court decides the holding in *Branzburg* can be found in the majority opinion as clarified by Justice Powell's concurrence or through the narrowest legal reasoning subscribed to by at least five Justices, whether in the majority, concurrence, or dissent. This is because Justice Powell's concurring opinion also constitutes the narrowest holding subscribed to by at least five Justices concerning the existence of and standard for the qualified constitutional privilege that protects confidential sources. *Compare id.* at 709-10 (Powell, J., concurring) ("claim to privilege should be judged . . . [by] balanc[ing] . . . these constitutional and societal interests on a case-by-case basis"); *with id.* at 713 (Douglas, J. dissenting) ("a newsman has an absolute right not to appear before a grand jury"); *and id.* at 739 (Stewart, Brennan, Marshall, JJ., dissenting) ("when an investigation impinges on First Amendment rights, the government must not only show that the inquiry is of 'compelling and overriding importance' but it also must 'convincingly' demonstrate that the investigation is 'substantially related' to the information sought").

Thus, given Justice Powell's pivotal concurring opinion and necessary fifth vote, the U.S. Supreme Court's *Branzburg* decision necessarily held and established that newsgatherers possess a qualified constitutional privilege not to be

compelled to disclose their confidential sources unless overcome by a considered judicial finding that the societal interests in and necessity of such testimony would outweigh the First Amendment freedoms at stake. Since the district court below expressly rejected such a qualified privilege, holding instead that *Branzburg* stands for the constitutional rule that "a reporter called to testify before a grand jury regarding confidential information enjoys *no First Amendment protection*," *In re Special Counsel Investigation*, 2004 U.S. Dist. LEXIS 15360, at *15 (emphasis added), that ruling is erroneous and must be reversed. *See*, *e.g.*, *In re Sealed Case*, 121 F.3d 729, 740 (D.C. Cir. 1997) ("No deference is given [a district court's ruling on a subpoena] if the ruling 'rests on a misapprehension of the relevant legal standard'"); *In re Sealed Case*, 148 F.3d 1073, 1075 (D.C. Cir. 1998) ("recognition of a testimonial privilege is a legal issue, . . . review is *de novo*").

B. This Court and a Majority of the Federal Courts of Appeal Recognize a Qualified Privilege for the Protection of Confidential Sources.

Not only did the district judge below misconstrue the constitutionally mandated rule from *Branzburg*, but he also disregarded binding precedent from this Court in addition to numerous persuasive opinions from other federal courts of appeal all holding that the First Amendment provides newsgatherers with a qualified privilege protecting their confidential sources from compulsory disclosure in judicial proceedings, both civil and criminal.

There is now wide recognition by a substantial majority of the federal courts of appeal, including from this Court, that both newsgatherers and publishers possess a qualified constitutional privilege against compelled disclosure of their newsgathering activities.[3] Indeed, the First, Second, Third, Fourth, Ninth, and Tenth Circuits have all interpreted *Branzburg* as holding that such a qualified privilege is required by the First Amendment and protects at least some unpublished work product gathered or produced in the editorial process.[4] More importantly, eight federal circuits, including this Court, have held that the qualified constitutional privilege applies to newsgatherers and publishers when faced with a subpoena seeking the discovery of confidential sources.[5]

---

[3] *See*, *e.g.*, *Bruno & Stillman*, *Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-96 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70, 76-78 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson*, 630 F.2d 139, 146-47 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *Miller v. Transamerican Press*, *Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Cervantes v. Time*, *Inc*., 464 F.2d 986, 992-93 & n.9 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705, 710-14 (D.C. Cir. 1981).

[4] *See*, *e.g.*, *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *United States v. Burke*, 700 F.2d 70, 76-78 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Church of Scientology International v. Daniels*, 992 F.2d 1329, 1135 (4th Cir.), *cert. denied*, 510 U.S. 869 (1983); *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993); *Silkwood v. Kerr-McGee Corp*., 563 F.2d 433, 436-37 (10th Cir. 1977).

[5] *See*, *e.g.*, *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004); *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson*, 630 F.2d 139, 146-47 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *Miller v. Transamerican Press*, *Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*,

In fact, the leading case[6] from this Court firmly establishes that "[c]ompelling a reporter to disclose the identity of a confidential source raises obvious First Amendment problems." *Zerilli*, 656 F.2d at 710. In that case, this Court went on to explicitly note the paramount importance of constitutional protections for newsgathering, stating that "[w]ithout an unfettered press, citizens would be far less able to make informed political, social, and economic choices." *Id.* at 711. Moreover, this Court recognized that "the press' function as a vital

---

450 U.S. 1041 (1981); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977); *Clyburn v. News World Communications, Inc.*, 903 F.2d 29, 35 (D.C. Cir. 1990).

[6] The district judge below and, presumably, the Special Counsel cited to *In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567 (D.C. Cir. 1977), and *Reporters Comm. for Freedom of the Press v. Am. Tel. & Tel. Co.*, 593 F.3d 1030 (D.C. Cir. 1978), for the proposition that this Court rejected the qualified constitutional privilege in the grand jury context unless a court found bad faith. *See In re Special Counsel Investigation*, 2004 U.S. Dist. LEXIS 15360, at *10-*11. However, this Court did not so hold in either of those decisions, and neither case even raised the issue as to whether newsgatherers and publishers are entitled to a qualified privilege protecting their confidential news sources from compelled disclosure when subpoenaed to testify before a grand jury. Instead, *In re Possible Violations of 18 U.S.C. 371, 641, 1503* concerned whether a church official could claim a privilege, similar to the one articulated in *Branzburg*, to refuse to testify based upon "the First Amendment requir[ing] similar protection for religious officials and workers." 564 F.2d at 569-70. And, *Reporters Comm. for Freedom of the Press* concerned whether "the First and Fourteenth Amendments require[d] that prior notice be given to [journalists] before [AT&T] turn[ed] over their long distance billing records to Government law enforcement officials." 593 F.2d at 1036. As this Court noted, the issue raised by the journalists in *Reporters Comm. for Freedom of the Press* was quite "unlike *Branzburg*" because the disclosure of telephone billing records involves "non-confidential third-party information." *Id.* at 1050. Likewise, the privilege asserted in the case of *In re Possible Violations of 18 U.S.C. 371, 641, 1503* could not have been more different than the qualified privilege for newsgathering established by *Branzburg* and recognized by this Court in *Zerilli*. Most notably, the privilege claimed in *In re Possible Violations of 18 U.S.C. 371, 641, 1503* was not even asserted by a person engaged in the newsgathering, editorial, or publishing process. Rather it was claimed by a church official in order to prevent the government from forcing a minister to testify. *See* 564 F.2d at 570.

source of information is weakened whenever the ability of journalists to gather news is impaired," and that "[c]ompelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability [because] journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with the informant." *Id.* For these reasons, this Court has held not only that the "Supreme Court explicitly acknowledged the existence of First Amendment protection for news gathering in *Branzburg*," *id.* at 711 n.39, but also that "the *Branzburg* result appears to have been controlled by the vote of Justice Powell," *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974).

Consistent with these statements, it is not surprising that this Court has held that "a qualified privilege would be available in some circumstances even where a reporter is called to testify before a grand jury," *Zerilli*, 656 F.2d at 711, instructing the district courts, at the very least, to consider and weigh the First Amendment interests at stake. After all, if Justice Powell's "deciding vote in *Branzburg*" controls, then the federal courts of appeal, including this one, are bound and must "determine whether a privilege applies by using [the] balancing test" Justice Powell set forth in his concurring opinion. *Id.* Accordingly, this Court has in multiple cases, including *Zerilli*, quoted Justice Powell's concurrence as establishing that a newsgatherer's

> "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, [and that] 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. (quoting *Branzburg*, 408 U.S. at 710 (Powell, J., concurring)).

In short, just as in the vast majority of the other federal circuits, it has been long established by this Court that newsgatherers possess a qualified constitutional privilege not to be compelled to disclose their confidential sources unless that privilege is overcome by a considered judicial finding that the societal interests in and necessity of the testimony outweigh the First Amendment interests at stake. And, because the decisions of district judge below "rest[ ] on a misapprehension of th[at] relevant legal standard" in holding directly to the contrary, they are erroneous and must be reversed. *See*, *e.g.*, *In re Sealed Case*, 121 F.3d at 740.

II. THE DISTRICT COURT'S ALTERNATIVE RATIONALE PIERCING THE QUALIFIED PRIVILEGE IS LEGALLY AND CONSTITUTIONALLY DEFICIENT.

In an apparent last ditch effort to protect his decisions against reversal on appeal, the district judge below included an alternative basis for his rulings. The district judge concluded that, even "assuming *arguendo* that this Court were to determine that the journalists did possess a qualified privilege — a holding which this Court has explained is simply not supported by case law — the [Special Counsel's] *ex parte* affidavit has also established that Special Counsel would be

able to meet the most stringent of balancing tests." *In re Special Counsel Investigation*, 2004 U.S. Dist. LEXIS 15360, at *18-*19. The district judge's decision went on to baldly assert that the "information requested from [Appellants] is very limited, all available alternative means of obtaining the information have been exhausted, the testimony sought is necessary for the completion of the investigation, and the testimony sought is expected to constitute direct evidence of innocence or guilt" without even a single citation to the record. *Id.* at *19.

Nevertheless, while such findings attempt to address the elements identified by the various federal courts of appeal that have fashioned the standard generally employed in determining whether a party can overcome the newsgatherer's qualified constitutional privilege, such conclusory assertions, with absolutely no reference to any factual or circumstantial support, cannot meet the requirements of either the First Amendment, *see Bose Corp. v. Consumers Union*, 466 U.S. 485, 498-511 (1984), or even this Circuit's requirement that a district court's ruling on a subpoena be supported by the record, *see In re Sealed Case*, 121 F.3d at 740. Indeed, given its submission *ex parte*, reliance upon the affidavit only raises additional constitutional concerns. Thus, because the district court neither cited nor referred to any facts or circumstances supporting its alternative conclusion that the qualified privilege under the First Amendment could be pierced, the district judge's rulings are both legally and constitutionally deficient and must be reversed.

CONCLUSION

The decisions and contempt orders issued by the U.S. District Court for the District of Columbia should be reversed.

Respectfully Submitted,

Reid Alan Cox
Counsel of Record
Renee L. Giachino
CENTER FOR INDIVIDUAL FREEDOM
901 N. Washington Street
Suite 402
Alexandria, VA 22314
(703) 535-5836

Attorneys for Amicus Curiae Center for Individual Freedom

October 25, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of October, 2004, I caused two copies of the foregoing Brief of *Amicus Curiae* Center for Individual Freedom to be served by facsimile, with the consent of the parties, and by Federal Express Overnight Service, postage pre-paid, on:

Patrick Fitzgerald
Jim Fleissner
U.S. Attorney for the
Northern District of Illinois
219 S. Dearborn Street
Suite 5000
Chicago, IL 60604
Special Counsel &
Attorneys for
Appellee

Floyd Abrams
Joel Kurtzberg
Cahill, Gordon & Reindel, LLP
80 Pine Street
New York, NY 10005
Attorneys for
Appellants

_____
Reid Alan Cox

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amicus Curiae* Center for Individual Freedom complies with the word type-volume and page limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7) and D.C. Circuit Rule 32(a)(4) in that the brief contains 4,791 words on 15 pages, excluding the captions, corporate disclosure statement, table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word count function of Microsoft Word. Counsel agrees to furnish to the Court with an electronic version of this brief upon request.

_____
Reid Alan Cox