Case No. 11-5028

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JEFFREY ALEXANDER STERLING,

Defendant-Appellee,

and

JAMES RISEN,

Intervenor-Appellee.

On Appeal from the U.S. District Court for the
Eastern District of Virginia (Brinkema, J.)

PETITION FOR REHEARING EN BANC OF APPELLEE JAMES RISEN

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Appellee James Risen respectfully petitions for rehearing *en banc* of the Panel Opinion in this case (reproduced in the Addendum). As detailed below, two members of the divided Panel (Traxler, C.J. and Diaz, J.) concluded that Supreme Court and Fourth Circuit precedent mandated a finding that journalists had no qualified privilege under the First Amendment or federal common law to refuse to testify about the identity of confidential sources in a criminal prosecution. The remaining Panel member (Gregory, J.) concluded that the very same precedents mandated the opposite outcome. The majority's holding puts this Court squarely at odds with every other court of appeals to have decided these issues. Because the Panel Opinion conflicts with decisions of the Supreme Court, this Court, and several other courts of appeals on questions of exceptional importance, rehearing *en banc* is warranted.

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 35(B)(1)

The Panel Opinion's holding on the lack of a First Amendment reporter's privilege involves a question of exceptional importance and conflicts with the Supreme Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), four decisions of this Court,[1] and authoritative rulings of the First, Second, Ninth, Eleventh, and D.C. Circuits. Appellee seeks rehearing *en banc* pursuant to FRAP 35(b)(1)(A) and (B).

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[1] *See In re Shain*, 978 F.2d 850 (4th Cir. 1992); *United States* v. *Steelhammer*, 539 F.2d 373 (4th Cir. 1976) (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d 539 (4th Cir. 1977); *LaRouche* v. *National Broadcasting Co.*, 780 F.2d 1134 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986); *Ashcraft* v. *Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000).

The Panel Opinion's holding on the lack of a federal common law reporter's privilege involves a question of exceptional importance and conflicts with the Supreme Court's decision in *Jaffee* v. *Redmond*, 518 U.S. 1, 9 (1996), this Court's decision in *Steelhammer*, and authoritative rulings of the Third Circuit. Appellee seeks rehearing *en banc* pursuant to FRAP 35(b)(1)(A) and (B).

STATEMENT OF FACTS

This appeal by James Risen, a two-time Pulitzer Prize-winning *New York Times* investigative reporter and book author (JSA176 ¶1; JSA179, ¶10), stems from a government subpoena seeking to compel Mr. Risen to testify about the identity/ies of Mr. Risen's confidential source(s) from Chapter 9 of his book, *State of War*, at Jeffrey Sterling's criminal trial for leaking classified information. (JA170-71)

Chapter 9, which Mr. Risen could not have written without using confidential source(s), focuses primarily on "Operation Merlin," a reportedly botched attempt by the CIA to have a former Russian scientist pass on fake and intentionally flawed nuclear blueprints to Iran. (JSA181-82, ¶16; JSA219-32) The operation was intended to induce the Iranians to build a nuclear weapon based on the flawed blueprints and thus undermine Iran's nuclear program. But the flaws in the nuclear blueprints were so obvious that the Russian scientist noticed them immediately. (JSA182, ¶17; JSA224-28) Mr. Risen's reporting on the failed operation raised serious questions about the competence of the CIA's intelligence regarding Iran's WMD capabilities. (JSA186, ¶28)

As part of a criminal leak investigation concerning Chapter 9, in 2008 and 2010 the Government issued two separate grand jury subpoenas to Mr. Risen, both of which sought testimony about Mr. Risen's confidential source(s). (JSA199, ¶7; JSA200-01, ¶11) Mr. Risen moved to quash both grand jury subpoenas on the grounds, among other things, that the information sought was protected by the reporter's privilege under both the First Amendment and federal common law. The 2008 grand jury expired before final resolution of the reporter's privilege issue (JA533; *see also* JSA191, ¶46). The district court granted Mr. Risen's motion to quash the 2010 grand jury subpoena, holding that a reporter has a qualified privilege against testifying when there is "evidence that he obtained information under a confidentiality agreement or that a goal of the subpoena is to harass or intimidate the reporter." (JA542) Applying the three-part balancing test developed by this Court in *LaRouche*, 780 F.2d at 1139, the district court concluded that Mr. Risen's testimony would "simply amount to 'the icing on the cake'" and that the Government could secure an indictment without Mr. Risen's testimony. (JA532, JA557)

As the trial court had predicted, Mr. Sterling was indicted without Mr. Risen's testimony. Nonetheless, on May 23, 2011, the Government subpoenaed Mr. Risen for his trial testimony (JSA176, ¶1; JA170-171) and made a motion *in limine* to admit Mr. Risen's testimony about his source(s). Mr. Risen moved to quash the subpoena on both First Amendment and common law grounds. The district court largely granted Mr. Risen's motion and denied the Government's, based on its reading of the Supreme

Court's decision in *Branzburg* and this Court's reporter's privilege decisions. The court concluded that "a qualified First Amendment reporter's privilege" applies in this Circuit "when a subpoena either seeks information about confidential sources or is issued to harass or intimidate the journalist."[2] (JA731-32, 737) Once again applying this Court's *LaRouche* balancing test, the district court concluded that, with a few minor exceptions, the Government failed to show that there were no reasonable alternatives to or that it had a compelling need for Mr. Risen's testimony. (JA742-49; 749-51)

The Panel's Decision

On July 19, 2013, the Panel issued its decision reversing the district court on the reporter's privilege question. Chief Judge Traxler wrote for the Court and was joined by Judge Diaz in finding that *Branzburg* and this Court's decision in *Shain* foreclosed a finding of any First Amendment or federal common law privilege that protects a reporter from being compelled to testify in a criminal prosecution about the identity of confidential sources. Slip. Op. at 15-16. In so holding, the majority cited reporter's privilege decisions from other courts of appeals that arose exclusively in the grand jury context — failing to address the fact that every other court of appeals to have considered the question in the *criminal prosecution* context has recognized a reporter's privilege when confidential source information is implicated. *Id.* at 24-25, 25 n.6, 30. Judge Gregory disagreed with the majority, concluding that both

[2] The district court did not rule on the common law privilege (JA732 n.3).

Branzburg and this Court's precedents led to the exact opposite conclusion on both the First Amendment and common law questions and noting that other courts of appeals had disagreed with the majority's holding. Slip Op. 97-98.

The Panel Opinion conflicts with every other court of appeals to have decided these issues. Thus, investigative reporters in this Circuit are now the only ones without any protection at all in criminal prosecutions, and consequently, prosecutors will have unfettered access to information about their confidential informants.

I. THE PANEL'S FIRST AMENDMENT PRIVILEGE RULING CONFLICTS WITH *BRANZBURG* V. *HAYES*, PRIOR CIRCUIT PRECEDENT, AND EVERY OTHER COURT OF APPEALS TO HAVE DECIDED THIS ISSUE OF EXCEPTIONAL IMPORTANCE

The district court, panel members, and all parties to these appeals agreed that the starting point for analysis in this case is the Supreme Court's decision in *Branzburg* v. *Hayes*. We respectfully submit that the Panel Opinion cannot be reconciled with *Branzburg* and with this Court's prior reading of that case.

In *Branzburg*, several journalists had been held in contempt for failing either to appear or testify before grand juries that were investigating criminal conduct that the reporters had learned about in the course of preparing stories for publication. The Supreme Court upheld the contempt convictions in a 5-4 decision that turned, in large part, on the unique and vital role of the grand jury in our criminal justice system. *See Branzburg*, 408 U.S. at 686-87 ("The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committeed

and of protecting citizens against unfounded criminal prosecutions"); *id.* at 689 (emphasizing the "constitutionally mandated role" of the grand jury); *id.* at 688 (stating that the "longstanding principle that 'the public...has a right to every man's evidence'" is "particularly applicable to grand jury proceedings"). But Justice Powell, who joined the majority with his deciding vote, wrote a separate concurring opinion that was plainly crafted to set forth the limited scope of the Court's ruling. In so doing, Justice Powell observed that the ruling did not mean 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. In clarifying the nature of these "constitutional rights," Justice Powell explained that:

> [I]f 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 on a motion to quash and an appropriate protective order may be entered. *The 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.* 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.* at 710 (emphasis added).

The careful language used by Justice Powell — which was intended to "emphasize" the narrow basis on which he provided the fifth and deciding vote for the majority opinion — means that *Branzburg* may not properly be read to preclude journalists from asserting a "claim to privilege" that is rooted in "constitutional rights with respect to the gathering of news or in safeguarding [reporters'] sources." *Id.* at 709-10. The opinion expressly emphasizes that courts must judge such assertions of

privilege "on [their] facts" and on "a case-by-case basis" by balancing the "vital constitutional and societal interests" of freedom of the press against the obligation of citizens to give relevant testimony concerning criminal conduct. *Id.* at 710.[3]

The concurring opinion of a Justice who joins a 5-4 majority but "clarifies" the meaning of the majority opinion, represents the holding of the Court because the majority opinion is not a true majority except to the extent that it accords with the views of the concurrence. As Justice Scalia has observed, such a concurring opinion

> is not a "gloss," but the least common denominator. To be sure, the separate writing cannot add to what the majority opinion holds, binding the other four Justices to say what they have not said; but it can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority.... I have never heard it asserted that four Justices of the Court have the power to fabricate a majority by binding a fifth to their interpretation of what they say, even though he writes separately to explain his own more narrow understanding. *McKoy* v. *North Carolina*, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., dissenting).

Indeed, this Court has unequivocally held, time and again, that Justice Powell's concurring opinion is the controlling decision in *Branzburg* and has read that opinion as supporting the existence of a qualified reporter's privilege for confidential sources. This Court has twice ruled in reporter's privilege cases involving confidential sources — and twice applied the privilege to prevent disclosure. *LaRouche*, 780 F.2d at 1139; *Ashcraft*,

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[3] In later decisions, Justice Powell further clarified that *Branzburg* required a balancing of First Amendment interests. *See, e.g.*, *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting) ("[A] fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated."); *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 570 n.3 (1978) (Powell, J., concurring) (under *Branzburg*, "in considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime").

218 F.3d at 287. Both *LaRouche* and *Ashcraft* were civil cases.

In the criminal context, in *In re Shain*, 978 F.2d at 853, this Court declined to apply the *LaRouche* balancing test in a case that did not involve confidential sources but also made clear that a balancing of the interests would be required whenever confidential sources were involved. In ordering the journalists in *Shain* to testify about non-confidential information, the Court emphasized that the absence of confidential sources played a significant role in its decision. Because there was no evidence of confidentiality or bad faith/harassment, the Court concluded that no balancing needed to be done under the facts of that case. *Id.*, 978 F.2d at 853 ("We conclude, therefore, that the absence of confidentiality or vindictiveness in the facts of this case fatally undermines the reporters' claim to a First Amendment privilege."). *In re Shain* relied heavily on both Justice Powell's opinion in *Branzburg* and this Court's decision in *Steelhammer*. *Id.* at 852.

In *Steelhammer*, the *en banc* Court found, like the Court in *In re Shain*, that the balancing of interests required by the reporter's privilege was not necessary in a case that involved neither confidential sources nor allegations of bad faith/harassment. *Steelhammer*, 539 F.2d at 376. That the Court considered a lack of confidentiality significant is evident in the opinion's opening lines:

> In the instant case it is conceded that the reporters did not acquire the information sought to be elicited from them on a confidential basis .... It therefore seems to me that, in the balancing of interests suggested by Mr. Justice Powell in his concurring opinion in *Branzburg* ..., the absence of a claim of confidentiality and the lack of evidence of vindictiveness tip the scale to the conclusion that the district court was correct in requiring

the reporters to testify." *Id.* at 376.

See also In re Shain, 978 F.2d at 853 (quoting part of this passage). The decisions in *In re Shain* and *Steelhammer* — neither of which involved confidential information and both of which stressed that confidential information would have changed the analysis — coupled with this Court's rigorous application of the privilege in *LaRouche* and *Ashcraft* (the only cases that did involve confidential information), demonstrate that this Circuit affords journalists a qualified First Amendment privilege in both civil cases and criminal prosecutions whenever there is evidence of confidentiality ***or*** bad faith.

The Panel's decision rejecting any First Amendment protection here is also inconsistent with authoritative rulings of other courts of appeals. In finding no First Amendment privilege, the Panel Opinion relies exclusively on decisions from other courts of appeals that considered reporter's privilege claims in the grand jury context. Slip Op. at 24-25, 25 n.6, 30. But other courts of appeals — and even the Government — have routinely distinguished between grand jury cases and criminal prosecutions in reporter's privilege cases, noting the Court's focus in *Branzburg* on the unique function performed by the grand jury. *Compare, e.g., In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 401-02 (9th Cir. 1993) (finding no privilege in grand jury case and distinguishing grand jury cases from criminal trials) *with Farr* v. *Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975) (applying privilege in criminal trial); *see also Miller* v. *United States*, 2005 WL 1317521 at *27-28 (2005) (noting, in Government's opposition to petition for certiorari in Judy Miller case, that courts finding a reporter's privilege in the criminal trial con-

text "correctly recognize[d] [that] ... *Branzburg* turned on the unique and vital role of the grand jury in our criminal justice system" and that "[b]y distinguishing the grand jury from other legal contexts, the courts of appeals have consistently, and correctly, followed *Branzburg*'s teaching"). Indeed, outside the grand jury context, the courts of appeals have *uniformly* recognized a reporter's privilege in cases involving confidential sources. The Panel Opinion glosses over this reality by citing only to grand jury cases and treating them as applying in all "criminal proceedings," Slip Op. 24-25, 25 n.6, 30, rather than separately examining "criminal prosecution" and "grand jury" cases, as other courts have.

Eight of the other eleven federal circuits have considered whether a qualified reporter's privilege exists in the context of a criminal prosecution. Of those, the Second, Ninth, Eleventh, and D.C. Circuits have applied the privilege in cases, such as this one, that involved information obtained from confidential sources. *See United States* v. *Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983) (applying privilege in criminal prosecution); *United States* v. *Cutler*, 6 F.3d 67 (2d Cir. 1993) (same); *Farr*, 522 F.2d at 467-68 (same); *United States* v. *Pretzinger*, 542 F.2d 517, 520-21 (9th Cir. 1976) (same); *United States* v. *Capers*, 708 F.3d 1286 (11th Cir. 2013) (same); *United States* v. *Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (same); *United States* v. *Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000) (applying privilege to motion to withdraw plea), *cert. denied*, 532 U.S. 924 (2001). Two other circuits — the First and Third — have applied the privilege in criminal prosecutions even when nonconfidential information is at issue. *See United*

States v. *LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988) (applying reporter's privilege to nonconfidential newsgathering material); *United States* v. *Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (finding qualified common law reporter's privilege "not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases"), *cert. denied*, 449 U.S. 1126 (1981). The remaining two — the Fifth and Seventh — have declined to recognize the privilege in criminal prosecutions in which *nonconfidential* information was at issue, while expressly recognizing that, if confidential source information were at issue, it might require a different result. *McKevitt* v. *Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (finding privilege overcome in case where "the information in the reporter's possession does not come from a confidential source"); *United States* v. *Smith*, 135 F.3d 963, 972 (5th Cir. 1998) (finding that confidentiality is "critical to the establishment of a privilege" in case involving non-confidential information).[4]

The Court should grant rehearing *en banc* to consider this important issue.

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[4] The balancing would favor Mr. Risen in this case. Although the Panel Opinion held to the contrary (Slip Op. 47-59), as Judge Gregory correctly pointed out, the Panel failed to apply the requisite abuse-of-discretion standard of review in so holding. *Id.* at 86-87 (citing cases). In any event, as Judge Gregory correctly found:

> "[T]he balancing test cannot mean that the privilege yields simply because 'no circumstantial evidence, or combination thereof, is as probative as Risen's testimony or as certain to foreclose the possibility of reasonable doubt.' The specificity of the information contained in chapter nine of Risen's book, coupled with the limited universe of individuals who had access to the information, the circumstantial evidence, and proof by negative implication, compose a reasonably strong case for the Government....[T]he Government has [therefore] failed to demonstrate a sufficiently compelling need for Risen's testimony." *Id.* at 106-07.

II. THE PANEL'S DECISION ON THE FEDERAL COMMON PRIVILEGE IS IN CONFLICT WITH AUTHORITY OF THE SUPREME COURT, THIS COURT, AND OTHER COURTS OF APPEALS ON AN ISSUE OF EXCEPTIONAL IMPORTANCE

The Panel's decision not to recognize the existence of a reporter's privilege under federal common law conflicts with the Supreme Court's decision in *Jaffee* v. *Redmond*, 518 U.S. 1, 9 (1996), this Court's decision in *Steelhammer*, and Third Circuit authority on an issue of exceptional importance that justifies *en banc* rehearing.

This Court was the first court of appeals to recognize the existence of a common law reporter's privilege for civil cases in *Steelhammer*. In that case, Judge Winter (and later, the *en banc* Court) found that reporters should be afforded a common law privilege under Fed. R. Evid. 501 not to testify in civil cases:

> In my view the prerequisites to the establishment of a privilege against disclosure of communications set forth in VIII J. Wigmore, Evidence, § 2285 at 527 (1961) should apply to reporters. Under Federal Rules of Evidence 501, they should be afforded a common law privilege not to testify in civil litigation between private parties. I do not prolong this opinion by developing this point. *Steelhammer*, 539 F.2d at 377 n.*.

Since *Steelhammer* was a civil case, it is not surprising that Judge Winter limited his finding to civil litigation. But in light of the criminal precedents outlined above — that uniformly find a reporter's privilege in criminal prosecutions involving confidential sources — there is no reasoned basis for limiting the common law privilege to civil cases.

The law post-*Steelhammer* further supports a common law reporter's privilege. Three years after *Branzburg* was decided, Congress enacted Fed. R. Evid. 501, which, rather than enumerating specific privileges, provides that claims of privilege in feder-

al court are governed by "[t]he common law — as interpreted by United States courts in the light of reason and experience." Fed. R. Evid. 501. By "leav[ing] the door open to change," Congress allowed for "'the evolutionary development of testimonial privileges.'" *Trammel* v. *United States*, 445 U.S. 40, 47 (1980).

The Panel's decision cannot be reconciled with the Supreme Court's decision in *Jaffee*, which recognized a psychotherapist and social worker-patient client privilege under Rule 501. In *Jaffee*, the Court noted that protecting such communications serves important private and public interests and that the costs of recognizing such a privilege, in terms of a loss of potentially relevant evidence, were modest. As Judge Gregory found, the same is true in this case — the reporter's privilege represents a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Slip Op. 115 (quoting *Jaffee*, 518 U.S. at 9).

Just as there was in *Jaffee* with respect to the privilege for psychotherapists and social workers, there is a clear consensus today that the reporter's privilege serves the political, economic, and social health of our citizenry by allowing the public to make informed decisions. As Judge Gregory explained, this Court made this very point in *Ashcraft*, holding that, "[i]f reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic." *Ashcraft*, 218 F.3d at 287; Slip Op. 88.

In *Jaffee*, the Court recognized a privilege under Rule 501 in good part because "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege." 518 U.S. at 12. A similar state-by-state consensus exists now regarding the reporter's privilege. Today, 39 states (plus the District of Columbia) have "shield laws." Of the remaining states without statutory shield laws, all but one (Wyoming — which has remained silent on the issue) have recognized a reporter's privilege in one context or another. *See* Slip Op. 115-17. Such an overwhelming consensus among the states[5] cannot be ignored in light of the Supreme Court's specific admonition in *Jaffee* that courts must consider whether "[d]enial of the federal privilege ... would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Jaffee*, 518 U.S. at 13.

The DOJ's recent decision to strengthen its already-strict, voluntarily guidelines for subpoenaing members of the media provides further evidence of the near-unanimous consensus that journalists should have a qualified privilege not to reveal their confidential sources and further support a finding of a common law privilege. *See DOJ Report on Review of News Media Policies*, July 12, 2013, strengthening 28

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[5] Indeed, the near-unanimous consensus here is greater than that which led the Supreme Court to recognize a privilege for licensed social workers in *Jaffee,* 518 U.S. at 17 n. 17 (citing 45 states that had recognized such a privilege), and is greater than the consensus of States concluding that it was no longer consistent with the Eighth Amendment to impose the death penalty in cases involving the mentally retarded and minors. *See Atkins* v. *Virginia*, 536 U.S. 304, 313-15 (2002) (consensus of 30 states sufficient); *Roper* v. *Simmons*, 543 U.S. 551, 564 (2005) (same).

C.F.R. § 50.10. Under the newly strengthened Guidelines — issued while this appeal was pending — the DOJ's "policy is to utilize [subpoenas directed at journalists] *only as a last resort*, after all reasonable alternative investigative steps have been taken, and when the information sought is *essential* to a successful investigation or prosecution." The new policy applies equally to both civil and criminal matters. In short, the DOJ has acknowledged that the consensus about reporters' need to protect their sources has led the DOJ to voluntarily apply — internally — the very type of balancing test Mr. Risen urges here.

Finally, the existence of a reporter's privilege under federal common law has been explicitly recognized by the Third Circuit in the context of criminal prosecutions. *Cuthbertson*, 630 F.2d at 146. Judge Gregory recognized this authority, Slip Op. 102, but the Panel Opinion failed even to address it. There can be no serious dispute that the factors that motivated the Third Circuit to recognize a privilege under federal common law are even more forceful today.

In light of the Supreme Court's decision in *Jaffee*, this Court's decision in *Steelhammer*, and Third Circuit authority directly contradicting the Panel's Opinion, as well as the grave consequences faced by Mr. Risen, other reporters, their sources, and the public at large, the Court should grant rehearing *en banc* to consider the existence of a reporter's privilege under federal common law.

CONCLUSION

This Court should grant Appellee's petition for rehearing *en banc.*

Dated: August 2, 2013

Respectfully submitted,

By: /s Joel Kurtzberg

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