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 United States District Court For The
Eastern District of Virginia (Brinkema, J.)

RESPONSE TO PETITIONS FOR REHEARING EN BANC

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Defendant Jeffrey Sterling is awaiting trial on charges that he leaked classified information regarding Iran's nuclear weapons program to intervenor James Risen, a reporter for *The New York Times*. In his petition, Sterling challenges this Court's unanimous reversal of the district court's order striking two government witnesses as a sanction after the government provided potential *Giglio* material to Sterling's counsel the morning after the court's discovery deadline, but still several days prior to trial. In a separate petition, Risen—the only eyewitness to Sterling's alleged crime—challenges the panel's holding that he is not protected from testifying in this case by a qualified "reporter's privilege." Neither issue merits further review.

I. STERLING'S PETITION SHOULD BE DENIED.

Sterling's petition is based on a factual dispute that the panel unanimously resolved against him. *See United States v. Sterling*, No. 11-5028, slip op. 60-68 (July 19, 2013) (hereinafter "slip op."). That factbound holding creates no conflict with decisions of this Court or other circuits.

The parties agreed to a discovery order in this case under which the government was permitted to produce potential *Giglio* material to the defense up to five calendar days before trial. Slip op. 60. The government produced almost 20,000 pages of classified and unclassified discovery (including potential *Giglio*

material), four CD-ROMs, and a computer hard drive on a rolling basis between January and October 2011, well before the deadline. *Id.*; Gov't Opening Br. 47-48. Shortly before trial, the government identified additional potential *Giglio* information in the personnel files of several CIA employees whom the government intended to call as witnesses. Because this information was classified, the government was required to submit it to the CIA for a line-by-line classification review before it could be produced. Slip op. 61. The CIA completed its review expeditiously and the prosecutors satisfied themselves that they had proper clearance to disclose the information on the evening of October 12, 2011, the day the discovery deadline expired. *Id.* Prosecutors hand-delivered a letter to defense counsel the next morning disclosing the information. *Id.*

Although defense counsel did not initially object to this late disclosure, the district court raised the issue *sua sponte* and announced that it had decided to "even up the playing field" by striking two of the government's key witnesses as a sanction for violating the discovery order. Slip op. 61. The court acknowledged that the government had not acted in bad faith but refused to impose any lesser sanction. *Id.* at 61-62.

The panel concluded that, on the facts of this case, the district court's ruling was an abuse of discretion. Slip op. 64-68. This Court (like other courts of appeals) requires district courts to consider several factors before sanctioning the

government for a discovery violation, including "the reason for the government's delay, and whether the government acted intentionally or in bad faith; the degree of prejudice, if any, suffered by the defendant; and whether any less severe sanction will remedy the prejudice to the defendant and deter future wrongdoing by the government." *Id.* at 65 (citing *United States v. Hammoud*, 381 F.3d 316, 336 (4th Cir. 2004) (en banc)). "'A continuance is the preferred sanction'" for late disclosure; it "'would be a rare case where, absent bad faith, a district court should exclude evidence.'" *Id.* at 64-66 (quoting *Hammoud*, 381 F.3d at 336).

The panel agreed with the district court that there was no evidence of bad faith in this case; rather, "[i]t is clear that the sheer volume of materials, along with the inherent delays involved in classification review, was the genesis of the Government's error." Slip op. 66. Nor was there any substantial prejudice to Sterling. The information was disclosed mere hours after the deadline, four days prior to trial, and the panel found that any "prejudice from the brief delay in disclosure could plainly have been alleviated with a continuance," which the district court did not meaningfully consider. *Id.* at 67. Instead, the district court imposed a sanction that "was simply too severe a response to conduct that was not undertaken in bad faith, that can be remedied with a continuance, and that is unlikely to be repeated." *Id.* at 68.

The panel's holding does not conflict with decisions of this Court or any other court of appeals. The panel cited and applied the proper standard of review and afforded appropriate deference to the district court. *See* slip op. 64-65 (quoting relevant standards). It simply concluded that, in light of the specific information disclosed in this case and the circumstances surrounding that disclosure, the district court's decision to strike witnesses rather than grant a continuance was disproportionate and an abuse of discretion. Sterling cites several cases in which courts affirmed the exclusion of evidence as a discovery sanction, but each involved very different circumstances than those here.[1] There is no practical or legal reason to review the panel's holding.

[1] *See United States v. Barile*, 286 F.3d 749, 758-59 (4th Cir. 2002) (excluding expert testimony after defendant failed to submit expert report); *United States v. Wicker*, 848 F.2d 1059, 1061-62 (10th Cir. 1988) (same where government's expert report was submitted several weeks after discovery deadline and continuance would interfere with other trials); *United States v. Young*, 248 F.3d 260, 269-70 (4th Cir. 2001) (defense counsel waited "until literally moments before the close of the government's case-in-chief" to disclose evidence in an apparent bad-faith attempt "to circumvent the court's unambiguous discovery order"); *United States v. Davis*, 244 F.3d 666, 670-73 (8th Cir. 2001) (government's late disclosure of DNA evidence, a month after discovery deadline had passed, was due to "reckless misconduct" that could not be remedied by a continuance); *United States v. Campagnuolo*, 592 F.2d 852, 858 (5th Cir. 1979) (government disclosed defendant's prior statements on the day before trial, two-and-a-half years after discovery deadline; court concluded that the magnitude of this violation warranted suppression "for prophylactic purposes").

II. RISEN'S PETITION SHOULD BE DENIED.

Risen, supported by *amici*, argues that the panel erred in holding that no constitutional or common law "reporter's privilege" exempts a journalist from having to identify the perpetrator of a crime he witnessed. That claim does not merit further review. First, the panel correctly held that the majority opinion in *Branzburg v. Hayes*, 408 U.S. 665 (1972), controls this case and unequivocally rejects Risen's claim of privilege. The panel's straightforward application of this precedent in not in conflict with decisions of this Court and "every other court of appeals," Risen Reh'g Pet. 5: none of the decisions Risen cites holds that a reporter who witnesses a crime and promises not to identify the perpetrator—which was the situation in *Branzburg* and in this case—has a privilege not to testify in a criminal proceeding. Indeed, every court of appeals to confront that situation has agreed with the panel.

Second, the panel held that, even if there were merit to Risen's legal arguments, he still would not be entitled to relief because he may have waived his claim of privilege and, even if he did not, the qualified privilege he asserts would be overcome in light of the specific evidence at issue in this case. That alternative holding—which receives only a passing reference in Risen's petition and goes completely unmentioned by his *amici*—provides an independent factual basis for the panel's decision.

A. There Is No Constitutional "Reporter's Privilege" In Criminal Cases Of This Sort.

The panel correctly held that Risen's claim of privilege is foreclosed by Supreme Court precedent. Slip op. 15-25. Risen is the only eyewitness to the crimes charged in the indictment, and his claim of privilege rests entirely on his assertion that he promised not to identify the perpetrator. *Branzburg* considered the same situation and held that, in such circumstances, "reporters, like other citizens, [must] respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial," even if it would require them to reveal the identity of a confidential source. 408 U.S. at 690-91. The Court refused "to grant newsmen a testimonial privilege that other citizens do not enjoy" and rejected the same balancing test (requiring the government to prove relevance, necessity, and a compelling interest in the reporter's testimony) that Risen advances in this case. *Id.* at 680, 690, 703-06, 708. Put simply, when a reporter "undert[akes] not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question." *Id.* at 692.

The Court has repeatedly reaffirmed *Branzburg*'s holding. *See, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 660 (1991) ("[T]he First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source.");

University of Pa. v. EEOC, 493 U.S. 182, 201 (1990) (*Branzburg* "rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary"); *cf. New York Times Co. v. Jascalevich*, 439 U.S. 1301, 1302 (1978) (White, J., in chambers) ("[t]here is no present authority" for the view "that the obligation to obey an otherwise valid subpoena served on a newsman" in a criminal trial "is conditioned upon the showing of special circumstances"). Every court of appeals to have considered the issue in this case (where a reporter witnessed criminal conduct) has held likewise.[2]

Risen contends that Justice Powell's brief concurring opinion in *Branzburg* recognizes a "reporter's privilege" that the opinion of the Court does not. This "strained reading" is untenable. *See* slip op. 22-24. Justice Powell joined the *Branzburg* majority opinion in full and rejected "the constitutional preconditions * * * that [the] dissenting opinion would impose as heavy burdens of proof to be

[2] *See, e.g., In re Grand Jury Subpoena (Judith Miller)*, 438 F.3d 1141, 1147-49 (D.C. Cir. 2006) (rejecting claim of privilege by reporter who received illegal disclosure of classified information by confidential source); *In re Special Proceedings*, 373 F.3d 37, 44-45 (1st Cir. 2004) (same where reporter received illegal disclosure of sealed materials); *United States v. Cutler*, 6 F.3d 67, 73 (2d Cir. 1993) (courts "must certainly follow *Branzburg*" in criminal trials where reporters "observed and wrote about" a defendant's criminal conduct); *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 400-01 (9th Cir. 1993) (same in grand jury context); *In re Grand Jury Proceedings (Storer Commc'ns)*, 810 F.2d 580, 583-86 (6th Cir. 1987) (same).

carried by the State"—the same preconditions Risen advocates in this case. *Branzburg*, 408 U.S. at 710 n.*. He wrote separately merely to emphasize that "no harassment of newsmen will be tolerated," and thus if a criminal proceeding "is not being conducted in good faith" (where, for example, the government seeks "information bearing only a remote and tenuous relationship to the subject of the investigation" or lacks "a legitimate need of law enforcement") a court may strike "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct" by issuing a protective order. *Id.* at 709-10.[3] The panel found that "[t]he subpoena for Risen's testimony [in this case] was not issued in bad faith or for the purposes of harassment," and Risen does not claim otherwise in his petition. Slip op. 31.

Justice Powell did not suggest that a promise of confidentiality triggers a privilege, much less in good-faith prosecutions like this one. The panel's decision is fully consistent with Justice Powell's views and with precedent from this and other courts. *See, e.g.*, *In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992) ("Justice Powell, *who joined in the Court's opinion*, wrote a separate concurring opinion to emphasize *the Court's* admonishment against official harassment of the press.")

[3] The majority opinion in *Branzburg* made the same point, noting that investigations "instituted or conducted other than in good faith" in order to "harass[ ] the press" would present "wholly different issues for resolution under the First Amendment." 408 U.S. at 707.

(emphases added); *Judith Miller*, 438 F.3d at 1148 (*Branzburg* "is not a plurality opinion[;] * * * it is the opinion of the majority of the Court. As such it is authoritative precedent. It says what it says. It rejects the privilege asserted by appellants."); slip op. at 24-25 & n.6 (same, citing cases).

2. Risen argues that decisions of this and other courts have recognized a "reporter's privilege" in analogous contexts, but that is incorrect. He cites civil cases[4] and cases involving requests for information from reporters who did not personally witness any crime (often in an attempt to find impeachment material),[5] neither of which involve the circumstances of *Branzburg* or this case. *See* slip op. 26-30; *United States v. Moloney (In re Price)*, 685 F.3d 1, 16-19 (1st Cir. 2012) (distinguishing the types of cases Risen cites, and noting that, under *Branzburg*, "the fact that disclosure of the materials sought by a subpoena in criminal

[4] *See LaRouche v. Nat'l Broadcasting Co.*, 780 F.2d 1134 (4th Cir. 1986); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000); *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976) (Winter, J., dissenting), *adopted en banc*, 561 F.2d 539 (1977).

[5] *See United States v. Capers*, 708 F.3d 1286, 1303-04 (11th Cir. 2013); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *United States v. Burke*, 700 F.2d 70, 78 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139, 146-47 (3d Cir. 1980); *United States v. Pretzinger*, 542 F.2d 517, 520-21 (9th Cir. 1976). *But see Jascalevich*, 439 U.S. at 1302 (finding no authority for claim of privilege in such circumstances); *McKevitt v. Pallasch*, 339 F.3d 530, 532-33 (7th Cir. 2003) (noting that these cases are "skating on thin ice" because they "essentially ignore *Branzburg*" or "audaciously declare that *Branzburg* actually created a reporter's privilege," which it did not).

proceedings would result in the breaking of a promise of confidentiality by reporters is not by itself a legally cognizable First Amendment or common law injury"). This Court's precedent is fully consistent with these principles. *See* slip op. 27-30; *Shain*, 978 F.2d at 852 ("absent evidence of governmental harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution"); *Ashcraft*, 218 F.3d at 287 (under *Branzburg*, a "reporter, like [an] ordinary citizen, must respond to grand jury subpoenas and answer questions related to criminal conduct he personally observed and wrote about, regardless of any promises of confidentiality he gave to [the] subjects of stories").

Other decisions are even less helpful to Risen. In *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998), the court observed that "a privilege against disclosing confidential source information [was] rejected in *Branzburg*" and similarly rejected a privilege for non-confidential information because, "[s]hort of * * * harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen." *Id.* at 969, 971. In *Cutler*, the Second Circuit explained that reporters who witness crimes have no privilege and limited the decision in *Burke* (which involved a defendant's request for possible impeachment material that was "merely cumulative" of other evidence in the record) to its facts. 6 F.3d at 71-73. And in *United States v. Ahn*, 231 F.3d 26

(D.C. Cir. 2000), the court of appeals summarily affirmed a district court ruling that a defendant had "failed to carry his burden" when faced with a "reporter's privilege" claim but expressed no opinion on the merits of the privilege. *Id.* at 37. Six years later, the court unanimously rejected such a constitutional privilege for reporters who witness crimes (including the same crime Sterling is alleged to have committed in this case). *See Judith Miller*, 438 F.3d at 1147-49.

The closest Risen gets to citing a case like this one is *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), which asserted that the then-recent decision in *Branzburg* supported a "limited or conditional" privilege in civil and criminal cases. *Id.* at 467. *Farr* failed to cite any language from *Branzburg* to support that conclusion, however, and regardless, the case involved a reporter who witnessed conduct (a violation of a court order) that was not a crime. Even in that circumstance, the court concluded that the public's interest in knowing the identity of the violator would overcome any privilege. *Id.* at 469. The panel correctly held that Risen (the only eyewitness to a serious federal crime) must likewise testify in this case.

3. Finally, there is no merit to Risen's assertion that *Branzburg* applies to grand juries but not criminal trials. As an initial matter, Risen has waived this claim by arguing (successfully) in the district court that the same qualified privilege should apply in both contexts "for the same fundamental reasons." JSA 129; *see also id.* at 144 (arguing that the same rules should apply "where an issue

has been decided in the grand jury context and later resurfaces at a criminal trial," and thus, "[a]lthough [the court's] prior rulings [recognizing a 'reporter's privilege'] were made in the grand jury context," they should be equally applicable to the subpoena seeking Risen's trial testimony).

In any event, Risen's argument is incorrect. *Branzburg* itself rejects it. *See* 408 U.S. at 690-91 ("reporters, like other citizens, [must] respond to relevant questions put to them in the course of a valid grand jury investigation *or criminal trial*"); *id.* at 691 ("Neither [reporter nor source] is immune, on First Amendment grounds, from testifying against the other, before the grand jury *or at a criminal trial*."); *id.* at 698 (informers must testify "when desired by grand juries *or at criminal trials*") (emphasis added in each); *see also Jascalevich*, 439 U.S. at 1301-02 (applying *Branzburg* to claim of privilege arising out of "an ongoing criminal trial"). Other courts agree, including in several of the decisions Risen cites. *See, e.g.*, *Smith*, 135 F.3d at 971 ("[T]he *Branzburg* Court gave no indication that it meant to limit its holding to grand jury subpoenas."); *Cutler*, 6 F.3d at 73 (courts "must certainly follow *Branzburg*" in criminal trials where reporters "observed and wrote about" a defendant's criminal conduct).

Risen's argument is also contrary to the rule that privileges in criminal cases are subject to the same strict limits whether they "shield information from a grand jury proceeding or a criminal trial." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 384

(2004). The public's interest in accurately investigating and prosecuting crime applies with at least as much force in criminal trials as it does before grand juries, *see Alderman v. United States*, 394 U.S. 165, 175 (1969); *Smith*, 135 F.3d at 971, and Risen notably fails to identify any other evidentiary privilege that would apply at the grand jury stage but not at trial.[6] The panel did not err in concluding that Risen lacks a First Amendment privilege in this case.

B. The Panel Correctly Declined To Recognize A Common Law "Reporter's Privilege" In This Case.

Risen and his *amici* contend that, even if no First Amendment privilege applies to reporters who witness crimes committed by their confidential sources, this Court should become the first to recognize such a privilege under the common law. The panel properly declined to do so.

As the panel recognized (slip op. 32-33), Risen's argument is foreclosed by *Branzburg*. *See* 408 U.S. 685 ("At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury."); *id.* at 698 ("the common law recognized no such privilege"); *Swidler & Berlin v. United States*, 524 U.S. 399,

[6] Risen's assertion (Reh'g Pet. 9-10) that the government has previously conceded that *Branzburg* applies only to grand juries and not to criminal trials is incorrect: the brief he cites clearly states that the grand jury proceedings at issue in *Branzburg* are distinguishable from *civil* proceedings, where "the paramount public interest in law enforcement" is absent. *See* U.S. Br. in Opp., *Miller v. United States*, 2005 WL 1317521, at *26-28 (2005) (citing cases).

410 (1998) (the privilege asserted in *Branzburg* was "not recognized by the common law"); *Special Proceedings*, 373 F.3d at 44 (*Branzburg* "flatly rejected any notion of a * * * common-law privilege").

Neither Federal Rule of Evidence 501 (which permits courts to recognize privileges) nor *Jaffee v. Redmond*, 518 U.S. 1 (1996) (which recognized a psychotherapist-patient privilege) is to the contrary. Nothing in Rule 501 or *Jaffee* "overrules *Branzburg* or undermines its reasoning." Slip op. 36. There are also several significant differences between the privilege Risen claims and other privileges that have been recognized under the common law. *Id.* at 39-44. Moreover, unlike a privilege for psychotherapists, a "reporter's privilege" was not among those originally proposed for inclusion in Rule 501 and is thus presumptively excluded from the scope of the rule. *See United States v. Gillock*, 445 U.S. 360, 367-68 (1980); slip op. 34-35.[7]

[7] The panel's holding is not contrary to this Court's decision in *Steelhammer* or the Third Circuit's decision in *Cuthbertson*. As the panel recognized, Judge Winter's "undeveloped dicta" in *Steelhammer* states only that the common law may support a privilege "in civil litigation between private parties," and thus has no bearing on this case. Slip op. 37 n.9. *Cuthbertson* merely applied an existing civil privilege to a criminal defendant's request for a reporter's notes and interview outtakes. 630 F.2d at 142, 146-47. The civil case on which the court relied expressly distinguished cases where "the reporter witnessed events which are the subject of grand jury investigations into criminal conduct." *Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979).

Nor is there an "overwhelming consensus" among the states favoring a privilege for reporters. Risen Reh'g Pet. 14. The panel reviewed the state laws Risen cites and concluded that they reflect no "uniform judgment" on the desirability of a privilege in cases such as this. Slip op. 45. Indeed, "[i]f anything, the varying actions of the states in this area only reinforces *Branzburg*'s observation that judicially created privileges in this area 'would present practical and conceptual difficulties of a high order' * * * that are best dealt with instead by legislatures of the state and federal governments." *Id.* (quoting *Branzburg*, 408 U.S. at 704, 706); *University of Pa.*, 493 U.S. at 189 ("The balancing of conflicting interests of this type is particularly a legislative function."). With the Administration's support, Congress is currently considering such legislation to address the unique concerns raised in cases like this one, involving the criminal disclosure of national defense information. *See* S. 987, 113th Cong. (introduced May 16, 2013). The panel rightly declined to intrude upon this legislative process.[8]

[8] Risen asserts that the Justice Department's recent revisions to its internal guidelines concerning investigations involving members of the press support a common law privilege. *See* Risen Reh'g Pet. 14-15. That is incorrect. Although the Department has made significant changes to parts of its internal guidelines—in particular, to the guidelines governing the notice that must be given to reporters before the government may obtain their business records through legal process—the basic requirements Risen cites (that the information is essential, unavailable from another source, and sought as a last resort) have been in place for decades and have not changed. *See* 28 C.F.R. § 50.10.

C. The Panel's Alternative Holding—That Risen Would Not Qualify For A Privilege On The Facts Of This Case Even If One Existed—Is An Independent Reason To Deny The Petition.

The panel also held that, even if a qualified "reporter's privilege" did exist, it would be overcome on the facts of this case. Slip op. 47-59. In light of that alternative factual holding—which Risen barely mentions in his petition—Risen would lose even if his legal claims were correct.

First, Risen has argued that his testimony is unnecessary because there is evidence that he disclosed the name of his source to a third party who could testify in his place. Slip op. 55-56. The panel correctly concluded that, if this were true, "Risen has waived any privilege by violating the promise of confidentiality and disclosing the information to a third party." *Id.* at 56.

Second, even if Risen had not waived his hypothetical privilege (the panel found, for example, that his characterization of the third party's hearsay testimony "is much more generous than warranted," slip op. 55), the panel held that the privilege would be overcome on the unique facts of this case. Applying the balancing test applicable to civil cases (which the district court had adopted at Risen's urging), the panel thoroughly reviewed the circumstantial evidence presented to the grand jury and concluded that Risen's eyewitness testimony is essential proof of the disputed identity of the perpetrator that cannot be duplicated or replaced by other evidence in the case. *Id.* at 48-57.

The panel further held that Risen's testimony is crucial in this case given the defense Sterling intends to present at trial. Sterling has stated repeatedly that he intends to argue that (1) other individuals with knowledge of the classified program at issue could have been Risen's source, slip op. 51-52 & n.12; (2) the veracity of any circumstantial or hearsay evidence against him is questionable because journalists like Risen use subterfuge and misdirection to disguise the identities of their sources, *id.* at 55; and (3) without Risen's testimony, the government will be unable to establish venue in the Eastern District of Virginia for at least some of the counts charged in the indictment, *id.* at 59. Sterling has also "seized upon the government's unsuccessful attempts to compel Risen's testimony" to repeatedly claim that there is, in fact, no direct evidence of his guilt at all. *Id.* at 58-59. "By depriving the jury of the only direct testimony that can link Sterling to the charged crimes, * * * the district court would allow seeds of doubt to be placed with the jurors while denying the government a fair opportunity to dispel these doubts," thus "open[ing] the door for Sterling to mislead the jury and distort the truth-seeking function of the trial." *Id.* at 53.

Risen largely ignores these issues in his petition, conclusorily stating in a footnote that the balancing test should favor him because there is "'a reasonably strong [circumstantial] case'" against Sterling. Risen Reh'g Pet. 11 n.4 (quoting slip op. 106 (Gregory, J., dissenting)). Risen's bare disagreement with one of

several factual grounds on which the panel majority reached its alternative holding does not warrant consideration by the full court. The presence of an independent factual basis for the panel's decision is a further reason to deny the petition.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the panel's decision and the government's briefs on appeal, the petitions for rehearing en banc should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to this Court's order dated August 20, 2013, I hereby certify that that this brief contains 18 pages (excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii)) and has been prepared in a proportionally spaced, 14-point typeface using Microsoft Word 2010.

s/ Robert A. Parker
Robert A. Parker

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2013, I filed the foregoing Response to Petitions for Rehearing En Banc with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to the following registered users:

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