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.)

MOTION OF APPELLEE JAMES RISEN FOR A STAY OF THE MANDATE

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

Attorneys for James Risen

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Appellee James Risen respectfully moves the Court for an order, under 28 U.S.C. § 2101(f), Federal Rule of Appellate Procedure 41, and Fourth Circuit Local Rule 41, staying issuance of the mandate through January 13, 2014,[1] to permit Mr. Risen to petition the United States Supreme Court for a writ of certiorari to review this Court's July 19, 2013 decision.[2]

STANDARDS FOR GRANTING A STAY

A stay of the mandate pending filing a petition for a writ of certiorari is warranted when the petition "would present a substantial question" and there is "good cause for a stay." Fed. R. App. P. 41; 4th Cir. App. R. 41. These standards are plainly met here.

I.
THERE IS GOOD CAUSE FOR THE ISSUANCE OF A STAY BECAUSE APPELLEE WILL SUFFER SUBSTANTIAL AND IRREPARABLE INJURY WITHOUT A STAY

Appellee will suffer substantial and irreparable harm absent a stay. Without a stay, the case will be remanded to the district court for trial and Mr. Risen will likely be forced either to breach the promises he made to his confidential source(s)

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1 If this Court grants the stay and Mr. Risen both files a petition with the Supreme Court on or before January 13, 2014 and notifies the circuit clerk that he has done so, the stay will automatically be extended until the Supreme Court's final disposition of the case. *See* Fed. R. App. P. 41(d)(2)(B).

2 Counsel for Mr. Risen contacted both the Government and the Defendant in this case to ask if they consent to the requested stay. The Government said that it takes no position on whether a stay should be granted. Defendant declined to consent and indicated that he wants to move forward with trial.

— thereby defeating the very claims he seeks to raise in the Supreme Court — or face a contempt finding with possible incarceration.

Stays have been granted in similar situations. In *In re Roche*, 448 U.S. 1312 (1980) (Brennan, J., in chambers), for example, a stay was granted in a case involving an investigative reporter for a Massachusetts television station, who had been held in civil contempt for declining to reveal the identity of confidential sources who provided him with information for a news report critical of a member of the Massachusetts judiciary. After the contempt order had been affirmed by the Supreme Judicial Court of Massachusetts, Roche sought a stay of enforcement pending the Supreme Court's consideration of his petition for a writ of certiorari. In his capacity as Circuit Justice, Justice Brennan granted the stay concluding that four members of the Court would likely vote to hear the case and that Roche would suffer irreparable harm because, "[w]ithout such a stay, applicant must either surrender his secrets (and moot his claim of right to protect them) or face commitment to jail." *In re Roche*, 448 U.S. at 1316.

Likewise, in *In re Grand Jury Subpoena, Judith Miller*, No. 04-3138 (D.C. Cir. Apr. 27, 2005), two reporters were found in contempt for failing to testify about the identity of their confidential sources in a grand jury investigation. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1144 (D.C. Cir. 2006). The reporters sought a stay of the mandate pending the filing of a petition for certiorari,

arguing that the issues presented about the existence of a reporter's privilege in the grand jury context presented a "substantial question" for the Supreme Court and that they would suffer substantial harm absent a stay by being forced to choose between divulging their sources and imprisonment. The D.C. Circuit granted the stay, which the Government did not even oppose. *In re Grand Jury Subpoena, Judith Miller*, No. 04-3138, Document #891201 (D.C. Cir. Apr. 27, 2005) (per curiam).

As in *Roche* and *Judith Miller*, if a stay is not entered to preserve the status quo, Mr. Risen will be forced either to "surrender his secrets,"[3] — and moot his substantial claims — or face imprisonment. The same reasons that led to granting a stay in *Roche* and *Judith Miller* should lead this Court to do so here.

II.
THE QUESTIONS TO BE PRESENTED TO THE SUPREME COURT ARE IMPORTANT AND SUBSTANTIAL

This case presents important legal and constitutional questions that have divided the lower courts for over forty years and warrant Supreme Court review. Since its fractured decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), the Supreme Court has not considered whether journalists have any right not to reveal the identities of confidential sources in the face of governmental compulsory process. During that extended period, the courts of appeals have wrestled with

[3] *In re Roche*, 448 U.S. at 1316.

whether there is any constitutional or common law privilege at all, with the meaning and impact of Justice Powell's "enigmatic concurring opinion,"[4] and with the application of the privilege in varying contexts. The Panel in this case was divided about the meaning of *Branzburg*,[5] as have the courts of appeals for the past forty-plus years. Judge Gregory correctly highlighted the confusion in his dissenting opinion:

> The full import of Justice Powell's concurrence continues to be debated. Some analogize the *Branzburg* majority opinion to a plurality opinion, and therefore assert Justice Powell's concurrence as the narrowest opinion is controlling. . . . Others . . . treat Justice Powell's concurrence as ancillary . . . and simply rejoin that the meaning of the majority opinion is to be found within the opinion itself. . . . *In short, Justice Powell's concurrence and the subsequent appellate history have made the lessons of Branzburg about as clear as mud.*

Sterling, 724 F.3d at 523 (Gregory, J., dissenting) (emphasis added) (internal quotation marks and citations omitted).

The intervening four decades have witnessed significant changes in the legal landscape. In 1975, Congress adopted Federal Rule of Evidence 501, empowering federal courts to recognize new privileges in light of reason and experience. And in 1996, the Supreme Court decided *Jaffee* v. *Redmond*, in which it provided a legal framework for deciding whether new common law privileges should be recognized under the rule. 518 U.S. 1, 11-12.

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4 *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

5 *Compare United States* v. *Sterling*, 724 F.3d 482 (4th Cir. 2013), with *id.* at 523 (Gregory, J., dissenting).

The disagreements among the lower courts, and the many changes in the law over the last 40 years regarding reporter's privilege, have resulted in inconsistent and conflicting legal standards throughout the country. This Court's decision directly conflicts with those of other federal courts of appeal and of state courts of last resort on whether a qualified reporter's privilege exists under either the First Amendment or federal common law to protect confidential source information in a criminal prosecution. *See* Sections I.A and I.B below.

The situation faced by Mr. Risen here is not unique and is likely to recur. Federal and state subpoenas seeking confidential information from reporters have recently become more widespread.[6] In the past few years alone, numerous journalists have been subpoenaed to testify about the identity of their confidential source(s), in what appears to be a growing trend.[7] As has frequently been pointed out, this administration has initiated more prosecutions for allegedly improper

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6 Kevin Rector, *A Flurry of Subpoenas*, Am. Journalism R., April/May 2008, *available at* http://www.ajr.org/Article.asp?id=4511.

7 *See, e.g.*, Lilly Chapa, *Detroit Paper Must Provide Documents and a Witness Regarding Confidential Source, Judge Rules*, Reporter's Committee for Freedom of the Press, Jan. 18, 2013, *available at* http://www.rcfp.org/browse-media-law-resources/news/detroit-paper-must-provide-documents-and-witness-regarding-confident; *Keefe* v. *City of Minneapolis*, 2012 WL 7766299, at *3 (D. Minn. May 25, 2012) (applying qualified reporter's privilege under the First Amendment); *Durand* v. *Massachusetts Department of Health*, 2013 WL 2325168, at *1 (D. Mass. May 28, 2013) (same); *Smith* v. *Borough of Dunmore*, 2011 WL 2115841, at *3-*4 (M.D. Pa. May 27, 2011) (applying qualified reporter's privilege under federal common law), *aff'd*, 516 F. App'x 194 (3d Cir. 2013).

leaks than all past administrations combined.[8] There is no indication that these practices are likely to wane.

The questions of law in this case are not only unsettled, but also vitally important to our democracy. Throughout our nation's history, much critical reporting about serious national issues would have been impossible but for information provided by sources who insisted that their identities remain confidential. As the record reveals, some of the nation's most important stories could never have been published without confidential sources, including stories about "the existence and treatment of military prisoners at Guantanamo Bay, Cuba; the abuse of prisoners in Abu Ghraib, Iraq; the existence of secret CIA prisons in Eastern Europe; . . . the 'systematic lack of adequate care' for veterans at Walter Reed Army Medical Center . . . . [and] the investigation into the Watergate scandal." *Sterling*, 724 F.3d at 522 (Gregory, J., dissenting) (citing affidavits of Dana Priest and Carl Bernstein). As Judge Gregory correctly recognized, "guarantees of confidentiality enable sources to discuss 'sensitive matters . . .' [and] [e]ven in ordinary daily reporting, confidential sources are critical."[9] *Sterling*, 724 F.3d at 521 (Gregory, J., dissenting). "If reporters are

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[8] *See, e.g.*, Leonard Downie Jr. and Sara Rafsky, *The Obama Administration and the Press*, Committee to Protect Journalists, Oct. 10, 2013, *available at* http://www.cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php

[9] *See also* JSA (June 21, 2011 Affidavit of James Risen ¶ 64 ("[I]t has become more clear than ever to me how important promises of confidentiality are to

compelled to divulge their confidential 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.'" [10] *Id.* (internal citation omitted).

Given the conflicts in the lower courts and the importance of the issue, this Court should stay its mandate to allow the Supreme Court to decide whether to grant plenary review of this important and substantial matter.

A. The Conflict in the Lower Courts Concerning the Existence and Scope of a Reporter's Privilege Under the First Amendment Presents a Substantial Question Warranting Supreme Court Review

As noted above, the courts of appeal are deeply divided about the meaning and significance of *Branzburg*. But until this Court's decision in this case, the courts of appeal were *not* divided about the existence of a qualified First

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my sources. In my ongoing reporting and newsgathering, numerous sources of confidential information have told me that they are comfortable speaking to me in confidence specifically because I have shown that I will honor my word and maintain their confidence even in the face of Government efforts to force me to reveal their identities or information.")).

10 *See also* JSA (June 21, 2011 Affidavit of James Risen ¶ 53 ("Compelling journalists to testify about their conversations with confidential sources . . . would seriously compromise journalists' integrity and independence, qualities that are essential to our ability to gain the trust of potential news sources and to effectively investigate and report on newsworthy events.")); Brief of ABC, Inc. *et al.* as Amici Curiae in Support of Intervenor-Appellee James Risen and in Support of Affirmance of Decision Below at 23, *United States* v. *Sterling*, 724 F.3d 482 (4th Cir. 2013) (No. 11-5028), Dkt. 45-1 ("This nation's historical practice of respecting the confidentiality of journalists' communications with their sources has been vital to ensuring that the press effectively performs its constitutionally protected role of disseminating information to the public, including information about the conduct of our government in the name of protecting the national security.").

Amendment reporter's privilege in criminal prosecutions where confidential source information is implicated. All of those courts have applied a balancing test in such cases that weighs the First Amendment interests against those of the government and/or defendant in having a fair criminal trial. Because of this Court's decision, however, investigative reporters in this Circuit are now the only ones with no protection at all for their confidential sources in criminal prosecutions. This conflict alone warrants Supreme Court review.

Of the eight other federal circuits that have considered whether a qualified reporter's privilege exists in a criminal prosecution involving confidential source information, the Second, Ninth, Eleventh, and D.C. Circuits have all read *Branzburg* as mandating application of a privilege. *See United States* v. *Burke*, 700 F.2d 70, 77 (2d Cir.) (applying privilege in criminal prosecution), , *cert. denied*, 464 U.S. 816 (1983); *United States* v. *Cutler*, 6 F.3d 67, 70-71 (2d Cir. 1993) (same); *Farr* v. *Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975) (same) , *cert. denied*, 96 S. Ct. 3200 (1976); *United States* v. *Pretzinger*, 542 F.2d 517, 520-21 (9th Cir. 1976) (same); *United States* v. *Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (applying privilege at evidentiary hearing), *cert. denied*, 483 U.S. 1021 (1987); *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, 1182 (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 strongly suggesting that, if confidential source information were at issue, it might necessitate 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).

The courts of appeal have treated grand jury cases differently, noting both that *Branzburg* was a grand jury case and that it emphasized 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 proceeding), *cert. denied*, 510 U.S. 1041 (1994), *with Pretzinger*, 542 F.2d at 520-21 (applying privilege in criminal prosecution). The Government has made this

distinction as well. Indeed, in its opposition to the petition for certiorari in *Judith Miller* (a grand jury case), the Government argued that the grand jury context matters: "In applying a reporter's privilege in contexts *other* than a grand jury investigation, the courts of appeals have distinguished *Branzburg*," because they have "correctly recognize[d] [that] . . . *Branzburg* turned on the unique and vital role of the grand jury in our criminal justice system." *Id.* at *26-*27 (emphasis added). Government Brief for the U.S. in Opp., *Miller* v. *United States*, 545 U.S. 1150 (2005) (No. 04-1507), 2005 WL 1317521, at *27-*28 (emphasis in original). "By distinguishing the grand jury from other legal contexts," — such as criminal trials — the Government argued that "the courts of appeals have consistently, and correctly, followed *Branzburg*'s teaching." *Id.*

This Court's decision is also at odds with with numerous decisions from state courts of last resort, which, like the federal courts of appeals, have recognized a qualified reporter's privilege under the First Amendment in criminal cases involving confidential sources.[11] These cases read *Branzburg* as compelling the exact type of balancing test that the Panel rejected in this case. *See, e.g.*, *New*

[11] *In re Contempt of Wright*, 700 P.2d 40, 43 (Idaho 1985); *In re Pennington*, 581 P.2d 812, 814 (Kan. 1978), *cert. denied*, 440 U.S. 929 (1979); *New Hampshire* v. *Siel*, 444 A.2d 499, 503 (N.H. 1982); *Vermont* v. *St. Peter*, 315 A.2d 254, 271 (Vt. 1974); *Brown* v. *Virginia*, 204 S.E.2d 429, 431 (Va.), *cert. denied*, 419 U.S. 966 (1974); *Zelenka* v. *State*, 266 N.W.2d 279, 287 (Wisc. 1978); *cf. State ex rel. Charleston Mail Association* v. *Ranson*, 488 S.E.2d 5, 13 (W. Va. 1997) (applying qualified privilege under First Amendment to "unpublished, nonconfidential information requested from a news source" in criminal trial).

Hampshire v. *Siel*, 444 A.2d 499, 502 (N.H. 1982) ("Our review of *Branzburg* . . . convinces us that a majority of the justices on the United States Supreme Court recognized that a reporter had a qualified first amendment privilege to protect confidential sources."); *In re Pennington*, 581 P.2d 812, 815 (Kan. 1978), *cert. denied*, 440 U.S. 929 (1979) ("Courts applying *Branzburg* to criminal cases have generally concluded that the proper test for determining the existence of a reporter's privilege in a particular criminal case depends upon a balancing of the need of a defendant for a fair trial against the reporter's need for confidentiality."); *id.* ("While courts recognize that a news reporter's privilege is more tenuous in a criminal proceeding than in a civil case, that fact in and of itself does not automatically require disclosure in a criminal case."); *In re Contempt of Wright*, 700 P.2d 40, 43 (Idaho 1985) (Under *Branzburg*, "a case-by-case analysis must be used in balancing freedom of the press against a compelling and overriding public interest in the information sought.") (internal quotation marks and citation omitted).

Nor are these conflicts resolved, as the Government has suggested in its opposition to Mr. Risen's petition for rehearing en banc,[12] if one looks solely at reporter's privilege cases where the reporter has allegedly witnessed a crime. The courts have been divided about the existence of a reporter's privilege in that

[12] Response to Petitions for Rehearing En Banc at 9-11, *United States* v. *Sterling*, 2013 WL 5645320 (4th Cir. Oct. 15, 2013) (No. 11-5028), Dkt. 94.

context as well. The Ninth Circuit's decision in *Farr*, which required a balancing of interests even when the leak in question was alleged to violate the law, directly conflicts with that of this Court. In *Farr*, a journalist was held in contempt for failing to disclose the identity of confidential sources who allegedly committed a crime by disclosing to the journalist, in violation of a court order, evidence deemed inadmissible in a high profile trial. *Farr*, 522 F.3d at 466. Citing *Branzburg*, the court applied a First Amendment reporter's privilege and balanced the competing interests. *Id.* at 467-68.

Likewise, the Supreme Court of Florida has also applied a qualified reporter's privilege in a case, like both *Farr* and this one, in which the alleged crime observed by the reporter was the leak itself. In *Tribune Co.* v. *Huffstetler*, 489 So. 2d 722 (Fla. 1986), a confidential source disclosed to a reporter the existence of a state ethics commission complaint in violation of a Florida statute imposing criminal penalties for such disclosures. After the reporter published his article, the state attorney's office opened an investigation into the leak and subpoenaed the reporter; when the reporter refused to divulge his source, he was held in contempt. The Supreme Court of Florida reversed the contempt order, applying a qualified reporter's privilege based on *Branzburg*. *Id.* at 723-24.

To add to the confusion, the Second and D.C. Circuits, like this Court, have reached the exact opposite conclusion on similar facts. *See Cutler*, 6 F.3d at 73

(citing *Branzburg* as dispositive in compelling a reporter to testify about the identity of his confidential source, whose disclosures to the reporter allegedly violated a court gag order during a criminal trial); *Judith Miller*, 438 F.3d at 1146-47 (citing *Branzburg* as dispositive in compelling reporters to testify about the identity of confidential sources who disclosed information concerning the identity of a covert operative of the United States in violation of the law).

In light of *Branzburg*'s legendary lack of clarity, the conflict between this Court's decision and the decisions cited above, and the importance of the issue, there is a reasonable likelihood that the Supreme Court will grant Mr. Risen's petition for a writ of certiorari.

B. The Conflict in the Lower Courts Concerning the Existence and Scope of a Reporter's Privilege Under Federal Common Law Presents a Substantial Question Warranting Supreme Court Review

There is equal conflict in the lower courts concerning the existence and scope of a reporter's privilege under federal common law, and this conflict further demonstrates the need for Supreme Court review. The Panel in this case was divided over the issue. *Compare Sterling*, 724 F.3d at 502 ("Even if we were at liberty to reconsider the existence of a common-law reporter's privilege under Rule 501, we would decline to do so.") *with id.* at 531 (Gregory, J., dissenting) ("I would recognize a common law privilege protecting a reporter's sources pursuant

to Federal Rule of Evidence 501 . . . The Rule . . . directed federal courts to continue the evolutionary development of testimonial privileges.") (internal citations and quotation marks omitted). This is not the first (or even second) time that the issue has divided a federal court of appeals. When the issue was presented to the D.C. Circuit in *Judith Miller* in the grand jury context, the court was so divided that it issued three separate opinions on the subject. *See Judith Miller*, 438 F.3d at 1154 (Sentelle, J., concurring) (finding no common law privilege); *id.* at 1159 (Henderson, J., concurring) (finding that the court should not yet rule on the existence and scope of any common law privilege); *id.* at 1166 (Tatel, J., concurring) (finding a common law privilege). The Second Circuit has recognized a privilege in both the civil and criminal trial contexts, but it has expressly declined to indicate whether the privilege is grounded in the First Amendment, common law, or both. *See United States* v. *Treacy*, 639 F.3d 32, 43 (2d Cir. 2011). In the grand jury context, a district court in the Second Circuit held that a federal common law privilege exists, *New York Times Company* v. *Gonzales*, 382 F. Supp. 2d 457, 508 (S.D.N.Y. 2005), but a divided Second Circuit reversed, expressly declining to decide the issue on the ground that, if common law privilege existed, it had been overcome on the facts of the case. *New York Times Company* v. *Gonzales*, 459 F.3d 160, 163 (2d Cir. 2006); *id.* at 181 (Sack, J., dissenting) (finding a common law privilege and concluding it was not overcome on the facts

of the case). The only other court of appeals to have directly addressed the issue is the Third Circuit, which reached the opposite conclusion of this Court by recognizing a qualified reporter's privilege under federal common law in both civil and criminal proceedings. *See Riley* v. *City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) (recognizing federal common law privilege for reporters in civil cases); *Cuthbertson*, 630 F.2d at 146 (criminal cases); *see also In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358, 368-69 (W.D. Pa. 1991) (recognizing common law privilege in grand jury proceedings), *affirmed by an equally divided en banc court*, 963 F.2d 567 (3d. Cir. 1992). A stay is warranted in this case based on the conflicting views of the courts of appeals on this issue.

Those who reject the common law privilege have, like the Panel in this case, concluded that such a finding is foreclosed by *Branzburg* and that even if it were not, Federal Rule of Evidence 501 and the Supreme Court's decision in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), afford no such privilege. *Sterling*, 724 F.3d at 499-502; *Judith Miller*, 438 F.3d at 1154-56 (Sentelle, J., concurring). Others have concluded exactly the opposite: that *Branzburg* left the door open for a finding of common law privilege and that Rule 501 and/or *Jaffee* support such a finding. *Sterling* 724 F.3d at 530-32 (Gregory, J., dissenting); *Judith Miller*, 438 F.3d at 1171 (Tatel, J., concurring) ("[T]he view that *Branzburg* disposed of the common law privilege gets it backwards."); *Gonzales*, 459 F.3d at 181 (Sack, J., dissenting)

(agreeing with Judge Tatel's concurrence in *Judith Miller*); *Cuthbertson*, 630 F.2d at 146-47 (3d Cir. 1980).

Although *Branzburg* noted that, in 1972, there was no reporter's privilege traditionally recognized under federal common law, 408 U.S. at 685, the legal landscape has changed significantly since *Branzburg* was decided in 1972. In 1975, Congress enacted the Federal Rules of Evidence, including Rule 501, which governs evidentiary privileges. Rather than enacting specific federal privileges that could only be expanded or contracted by further legislation, Congress vested the judicial branch with the responsibility of developing federal privileges. Fed. R. Evid. 501. Rule 501 "authorizes federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'" *Jaffee*, 518 U.S. at 8. As the Supreme Court has explained, "'the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.'" *Id.* (quoting *Funk* v. *United States*, 290 U.S. 371, 383 (1933)). Congress, in promulgating Rule 501, "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Id.* at 9 (quoting *Trammel* v. *United States*, 445 U.S. 40, 47 (1980)).

This Court's conclusion that a reporters have no common law privilege not to testify about the identity of their confidential sources in criminal trials conflicts with *Jaffee*, which instructed courts to look to state practice in determining whether to recognize a privilege. *See* 518 U.S. at 12 (recognizing psychotherapist privilege where "all 50 States and the District of Columbia have enacted into law some form of [the] privilege"). A similar state-by-state consensus exists today regarding the reporter's privilege. Forty-nine of the fifty states, plus the District of Columbia, have enacted "shield laws" or recognized a reporter's privilege at common law. *See Sterling*, 724 F.3d at 531 (Gregory, J., dissenting). The Panel's decision cannot be reconciled with *Jaffee*, which recognized that "'[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation' by exposing confidences protected under state law to discovery in federal courts." *Judith Miller*, 438 F.3d at 1170 (Tatel, J., concurring) (quoting *Jaffee*, 518 U.S. at 13).

Whether a reporter's privilege should be recognized under federal common law is an important one deserving of resolution by the Supreme Court in its own right but particularly in light of the Supreme Court's authoritative ruling in *Jaffee*. Given the conflict with decisions of the Third Circuit (and other lower courts) on the point — and the significant changes in the law since *Branzburg* was decided in 1972 — there is a substantial probability that the Supreme Court will grant review to decide whether there is a federal common law reporter's privilege and, if so,

whether it shields Mr. Risen from being forced to disclose his confidential source(s).

A stay is warranted to permit the Supreme Court to consider these important questions.

CONCLUSION

This Court should stay the issuance of the mandate through January 13, 2014 to maintain the status quo pending the filing and disposition of Appellee's petition for a writ of certiorari.

Dated: October 22, 2013

Respectfully submitted,

By: _____

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

Attorneys for James Risen