No. 13-1009

In the Supreme Court of the United States

JAMES RISEN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded, in reliance on this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), that no constitutional or common-law reporter's privilege entitles petitioner to refuse to comply with a good-faith government subpoena seeking testimony about a crime to which petitioner was the only direct witness.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-109a) is reported at 724 F.3d 482. The court of appeals' order denying rehearing en banc (Pet. App. 183a-191a) is reported at 732 F.3d 292. The opinion of the district court granting in part and denying in part petitioner's motion to quash the government's subpoena (Pet. App. 112a-143a) is reported at 818 F. Supp. 2d 945. The district court's order granting in part and denying in part the government's motion for clarification and reconsideration (Pet. App. 144a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2013. A petition for rehearing was denied on October 15, 2013 (Pet. App. 183a-191a). The petition for a writ of certiorari was filed on January 13,

2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the United States District Court for the Eastern District of Virginia indicted Jeffrey Sterling on six counts of unauthorized retention or disclosure of national defense information, in violation of 18 U.S.C. 793(d) and (e); one count of unlawful retention of national defense information, in violation of 18 U.S.C. 793(e); one count of mail fraud, in violation of 18 U.S.C. 1341; one count of unauthorized conveyance of government property, in violation of 18 U.S.C. 641; and one count of obstruction of justice, in violation of 18 U.S.C. 1512(c)(1). Pet. App. 10a-11a. The government issued a subpoena for petitioner to testify at Sterling's trial. *Id.* at 11a. The district court quashed the subpoena in part. *Id.* at 112a-143a; see *id.* at 144a. The court of appeals reversed. *Id.* at 1a-109a.

1. a. Jeffrey Sterling is a former employee of the Central Intelligence Agency (CIA). Pet. App. 5a. Beginning in 1998, Sterling worked on a classified program intended to impede Iran's ability to acquire or develop nuclear weapons (Classified Program No. 1) and was the case officer for a covert human asset assisting with that program. *Id.* at 6a.[1] In May 2000, the CIA reassigned Sterling to other matters. *Ibid.* The CIA subsequently informed Sterling that he had failed to meet certain performance requirements.

[1] In accordance with the Classified Information Procedures Act, § 8, 18 U.S.C. App. 3, at 862, the government provided the district court with *ex parte* classified declarations describing Classified Program No. 1 in detail. See Gov't *Ex Parte* Classified C.A. App. 4, 9-23, 140-150.

Ibid. In October 2001, the CIA effectively removed Sterling from service, and in January 2002, it terminated his employment. *Id.* at 7a.

Towards the end of his employment with the CIA and continuing thereafter, Sterling was involved with multiple overlapping disputes with the agency. First, he filed an unsuccessful administrative claim, followed by a lawsuit, alleging that the CIA's assignments were racially discriminatory. Pet. App. 7a. Second, after a CIA publications review board expressed concern about classified information contained in a book he proposed to publish, Sterling filed another lawsuit alleging that the CIA had unlawfully infringed his right to publish that book. *Id.* at 8a. During the course of these disputes, Sterling declared that he "would be coming at . . . the CIA with everything at his disposal." *Ibid.* (citation omitted).

In March 2003, one day after filing his second lawsuit, and three years after his last involvement with Classified Program No. 1, Sterling met with two staff members of the Senate Select Committee on Intelligence (SSCI) and for the first time expressed concerns about the CIA's handling of the program. Pet. App. 8a.[2] At this meeting, Sterling also "threatened to go to the press," although it was unclear to the staff members whether this threat referred to Sterling's

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[2] If a CIA employee has concerns about particular intelligence or activities, he may raise them, "without public disclosure and its accompanying consequences," by contacting the House and Senate Intelligence Committees or the CIA's Office of the Inspector General. Pet. App. 8a n.1 (citing Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, Tit. VII, 112 Stat. 2396).

lawsuit or Classified Program No. 1. *Id.* at 8a-9a (citation omitted).

b. While these matters were in progress, Sterling was in contact with petitioner, a journalist with the *New York Times*. Pet. App. 7a; see Pet. 2. About a month after the CIA terminated Sterling's employment, petitioner published an article about Sterling in the *Times,* entitled "Fired by C.I.A., He Says Agency Practiced Bias." *Id.* at 7a. Around the time of his meeting with the SSCI staff members, Sterling contacted petitioner multiple times, by both phone and e-mail. *Id.* at 9a. One of those e-mails mentioned the Iranian nuclear program. *Ibid.* Shortly thereafter, in April 2003, petitioner informed the CIA and the National Security Council that he had been provided with classified information about Classified Program No. 1 and intended to publish a story about that program in the *Times*. *Ibid.* After the CIA Director and the National Security Advisor personally informed petitioner and the *Times*'s Washington Bureau Chief that the story could compromise national security and place a CIA human asset in imminent danger, the *Times* decided not to publish it. *Ibid.*

Between August 2003 and August 2004, 19 phone calls were made between Sterling's residence and the *Times*'s Washington office. Pet. App. 9a, 118a. During that same period, petitioner and Sterling exchanged numerous e-mails, several of which indicate that Sterling and petitioner were meeting in person and exchanging information. *Id.* at 9a-10a. In September 2004, petitioner submitted a book proposal to a national publisher that contained information about Classified Program No. 1. C.A. App. 41-42. Between November 2004 and November 2005, petitioner and

Sterling exchanged another 16 telephone calls and met in person at least once. See *Id.* at 41-42, 727-728; Sealed C.A. App. 39-40.

In January 2006, petitioner published a book entitled *State of War: The Secret History of the CIA and the Bush Administration*. Pet. App. 10a. Chapter Nine of the book, entitled "A Rogue Operation," contains information about Classified Program No. 1. *Ibid.* Petitioner's book describes Classified Program No. 1 (which petitioner refers to as "Operation Merlin") as a "failed attempt by the CIA to have a former Russian scientist provide flawed nuclear weapon blueprints to Iran." *Ibid.* (citation omitted). Much of the chapter is told from the point of view of an unnamed CIA case officer responsible for handling the operation's human asset. *Ibid.*

2. A grand jury investigating the disclosure of information concerning Classified Program No. 1 indicted Sterling on multiple counts of retaining and disclosing national defense information, in violation of the Espionage Act, 18 U.S.C. 793(d) and (e), as well as separate counts of mail fraud, 18 U.S.C. 1341, unauthorized conveyance of government property, 18 U.S.C. 641, and obstruction of justice, 18 U.S.C. 1512(c)(1). Pet. App. 10a-11a. The grand jury specifically found probable cause to believe that Sterling disclosed information about Classified Program No. 1 and its covert human asset to petitioner and falsely and misleadingly characterized the results of the program in order to convince petitioner to publish the information. C.A. App. 39-42; cf. Classified C.A. App. 12-17.

The Attorney General authorized a trial subpoena seeking petitioner's testimony about the identity of his

source. Pet. App. 11a.[3] Petitioner moved to quash on the ground that the information was privileged under the First Amendment and federal common law. *Ibid.* The district court granted petitioner's motion in relevant part, allowing petitioner to refuse to testify about his source. *Id.* at 11a, 112a-143a.

The district court acknowledged that this Court had rejected a reporter's privilege in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). Pet. App. 122a-123a. But it found *Branzburg* not to be controlling because the Fourth Circuit had subsequently recognized a qualified First Amendment privilege for journalists in civil cases and had "not drawn any distinction between civil actions and criminal cases" in applying that privilege. *Id.* at 123a-127a. Under the test developed by the Fourth Circuit in the civil context, the identity of a source to whom a reporter has promised anonymity is privileged unless the party seeking the information demonstrates that (1) "the information is relevant," (2) the information cannot "be obtained by alternative means," and (3) the party has "a compelling interest in the information." *Id.* at 125a (quoting *LaRouche* v. *National Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir.), cert. denied, 479 U.S. 818 (1986)). Applying that test here, the district court acknowledged that petitioner's testimony was "clearly relevant," but believed that the

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[3] In light of the important freedom-of-the-press considerations involved, Department of Justice regulations require the express authorization of the Attorney General before issuing a subpoena to a journalist. 28 C.F.R. 50.10(c). Both the current Attorney General and his predecessor had previously authorized grand jury subpoenas seeking petitioner's testimony. Pet. App. 11a n.2. The district court had quashed those subpoenas in relevant part. *Ibid.*; see *id.* at 195a-225a.

circumstantial evidence against Sterling was strong enough that the government did not need petitioner's direct evidence. *Id.* at 12a, 133a-142a.

3. The court of appeals reversed. Pet. App. 1a-109a. The court reasoned that this Court's decision in *Branzburg* had "'in no uncertain terms rejected the existence of'" a "First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised confidentiality to his source." *Id.* at 15a (quoting *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1146 (D.C. Cir. 2006)). The court of appeals observed that both the majority and Justice Powell's concurring opinion in *Branzburg* had rejected a requirement that the government satisfy a compelling-interest test substantially identical to the one the district court adopted and had also rejected the policy arguments petitioner advanced in support of his claimed privilege. *Id.* at 17a-25a. The court reasoned that prior circuit law granting journalists a qualified testimonial privilege in civil cases "offers no authority for us to recognize a First Amendment reporter's privilege in this *criminal* proceeding," because "[n]ot only does *Branzburg* preclude this extension," but such an extension would disregard the "critical" distinction between civil and criminal proceedings. *Id.* at 27a-29a (citing *Cheney* v. *United States Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 384 (2004)).

The court of appeals additionally declined to recognize a reporter's privilege under federal common law. Pet. App. 31a-46a. The court reasoned that *Branzburg* had "plainly observed that the common law recognized no such testimonial privilege" and that Federal Rule of Evidence 501, which "effectively left [courts'] authority to recognize common-law privileges in *status quo*," did not "overrule[] *Branzburg* or undermine[] its reasoning." Pet. App. 32a-38a. The court also determined that, even if *Branzburg* had not settled the issue, a common-law reporter's privilege was unwarranted as a matter of first principles. *Id.* at 38a-46a. The court explained that such a privilege would be unlike existing privileges because it would protect only the identity of a speaker rather than the content of discussions, *id.* at 39a-40a; that the absence of such a privilege did not unduly chill newsgathering, *id.* at 40a-41a; that the public interest in enforcing criminal laws counseled strongly against such a privilege, *id.* at 41a-43a; and that such a privilege would be difficult to administer, *id.* at 45a. The court rejected the argument that state laws recognizing some form of reporter's privilege supported judicial creation of one, noting that state laws varied and that the existence of such laws reinforced the wisdom of leaving the privilege question to legislative judgment. *Id.* at 43a-44a.

Finally, and in the alternative, the court of appeals held that even if the qualified "reporter's privilege" that it had recognized in civil cases did apply to criminal proceedings, the privilege would be inapplicable on the facts of this case. Pet. App. 46a-57a. The court observed that petitioner "waived any privilege" when he voluntarily violated his "promise of confidentiality" by "disclosing * * * to a third party" that Sterling

was his source. *Id.* at 54a; see *id.* at 53a. Independent of waiver, the court of appeals separately rejected the district court's "premise that circumstantial evidence of guilt should serve as an adequate substitute for a direct, first-hand account of the crime." *Id.* at 47a. The court found that "the circumstantial evidence in this case does not possess the strength the district court ascribe[d] to it—particularly when one remembers the prosecution's high burden of proof." *Id.* at 50a; see *id.* at 50a-55a (reviewing pretrial evidentiary record). The court of appeals observed, in particular, that Sterling intended to focus his defense, at least in part, on the absence of direct evidence against him, the existence of other potential sources (such as the SSCI staffers), and the alleged practice by reporters of writing material in a way that disguises the actual source. *Id.* at 50a-53a.

Judge Gregory dissented. Pet. App. 80a-109a. Although he acknowledged that the "majority opinion" in *Branzburg* had "upheld * * * the compulsion of confidential source information from reporters," *id.* at 85a, he nevertheless would have recognized a qualified reporter's privilege under the First Amendment or, alternatively, under Rule 501, *id.* at 89a-109a. Applying the Fourth Circuit's preexisting balancing test from the civil context, in combination with two additional factors that Judge Gregory believed to be appropriate in national-security cases (the information's "newsworthiness" and the harm from disclosure), he would have affirmed the district court's order quashing the subpoena to petitioner. *Id.* at 92a-104a.

4. The court of appeals denied rehearing. Pet. App. 183a-191a; see *id.* at 186a-188a (opinions by Judges King and Keenan explaining why they did not

recuse themselves); *id.* at 188a-191a (Gregory, J., dissenting).

ARGUMENT

Petitioner contends (Pet. 15-21) that the First Amendment grants journalists a qualified privilege to protect the confidentiality of their sources in the context of a criminal trial. Petitioner alternatively contends (Pet. 21-30) that the Court should recognize such a privilege as a matter of federal common law. Those contentions cannot be squared with this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). This case does not implicate any circuit conflict, and the Court has denied certiorari in cases involving similar issues. See, *e.g.*, *Moloney* v. *United States*, 133 S. Ct. 1796 (2013) (No. 12-627). This case would, in any event, be an unsuitable vehicle for considering the existence of a qualified reporter's privilege, because, as the court of appeals found, even if such a privilege existed, it would not apply on the facts here. Further review is not warranted.

1. a. In *Branzburg*, this Court rejected claims of privilege by reporters who had been called to testify before a grand jury about criminal conduct involving confidential sources. 408 U.S. at 667-679, 708-709. The Court "decline[d]" to "interpret[] the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." *Id.* at 690. "[W]e cannot," the Court explained, "seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it." *Id.* at 692. "Insofar as any reporter in these cases undertook not to reveal or testify about the

crime he witnessed," the Court continued, "his claim of privilege under the First Amendment presents no substantial question." *Ibid.* The Court accordingly "insist[ed] that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial," even if doing so would require revealing the identity of a confidential source. *Id.* at 690-691. The Court expressly rejected any requirement that the government "demonstrate[] some 'compelling need' for a newsman's testimony" as a prerequisite to obtaining it. *Id.* at 708; see *id.* at 680, 705-706.

The Court recognized that "[f]air and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government," *Branzburg*, 408 U.S. at 690, and found that none of the constitutional and policy concerns advanced in support of a reporter's privilege justified allowing reporters to refuse to testify in criminal proceedings, *id.* at 679-708. In particular, the Court rejected the argument that if reporters are "forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future." *Id.* at 682. The Court found no indication that "a large number or percentage of *all* confidential news sources" were "implicated in crime or possess information relevant to" a criminal investigation. *Id.* at 691. The Court additionally reasoned that the "preference for anonymity" of informants who "desire to escape criminal prosecution" is "hardly deserving of constitutional protection." *Ibid.* And the Court explained that "[t]he crimes of news sources are no less reprehensible and threatening to

the public interest when witnessed by a reporter than when they are not." *Id.* at 692.

The Court did not limit its holding to news sources who themselves have committed crimes, but extended it also to cover confidential sources with information about illegal conduct by others. *Branzburg*, 408 U.S. at 693-695. Even accepting *arguendo* "that an undetermined number of informants not themselves implicated in crime" would refuse to talk to reporters in the absence of a reporter's privilege, the Court rejected "the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future." *Id.* at 695. "[I]t is obvious," the Court explained, "that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy." *Id.* at 696.

b. This Court has consistently adhered to the holding and reasoning of *Branzburg*. See, *e.g.*, *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669 (1991) (explaining that "the 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) (explaining that *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"). And, as the

court of appeals correctly recognized, *Branzburg* directly controls this case, in which petitioner, the only direct witness to the criminal conduct at issue (the disclosure of classified information), claims a privilege not to testify about that conduct. Indeed, in a passage that closely parallels the disclosure of classified information at issue in this case, the Court in *Branzburg* reasoned that "[a]lthough stealing documents or private wiretapping could provide newsworthy information," a confidential source is not "immune from conviction for such conduct, whatever the impact on the flow of news," nor is a reporter to whom the source disclosed the information "immune, on First Amendment grounds, from testifying against the [source], before the grand jury or at a criminal trial." 408 U.S. at 691.

Petitioner's arguments for disregarding, limiting, or overruling *Branzburg* lack merit. First, petitioner suggests (Pet. 18-20) that the holding of *Branzburg* should be limited to grand-jury subpoenas. As an initial matter, petitioner has waived that claim by arguing (successfully) in the district court that the inquiry is the same in both contexts. Sealed C.A. App. 129, 144-145. In any event, *Branzburg* expressly framed its holding to encompass testimony both before a grand jury and at a "criminal trial." 408 U.S. at 690-691 (concluding that reporters must "respond to relevant questions put to them in the course of a valid grand jury investigation *or criminal trial*") (emphasis added); *id.* at 690 (concluding that a source involved in illegal information-gathering is not immune from

testifying "before the grand jury *or at a criminal trial*") (emphasis added).[4]

Second, petitioner suggests (Pet. 16-17) that, notwithstanding the majority opinion's categorical rejection of a reporter's privilege, Justice Powell's concurring opinion in *Branzburg* should be read to require "case-by-case balancing" to determine the necessity of a reporter's testimony in each individual criminal proceeding. The court of appeals correctly rejected that "strained reading of Justice Powell's opinion." Pet. App. 22a. Justice Powell joined the *Branzburg* majority opinion in full. 408 U.S. at 665; see *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1148 (D.C. Cir. 2006) (*Judith Miller*) ("Justice Powell[] * * * joined the majority by its terms, rejecting none of Justice White's reasoning on behalf of the majority."). Furthermore, while Justice Stewart's dissent in *Branzburg* would have required the government to satisfy a three-part test (effectively equivalent to the qualified privilege petitioner seeks, see Pet. 30-34) in order to obtain a reporter's testimony about confidential sources, 408 U.S. at 743, Justice Powell specifically rejected "the constitutional preconditions that * * * [the] dissenting opinion would impose as heavy burdens of proof to be carried by the State." *Id.* at 710 n.* (Powell, J., concurring).

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[4] Petitioner's assertion (Pet. 19-20) that the government has previously conceded that *Branzburg* applies only to grand juries and not to criminal trials is incorrect. The cited statements discuss why court of appeals cases recognizing a reporter's privilege in a *civil* context have no bearing on recognition of such a privilege in the grand-jury context. See U.S. Br. in Opp. at 26-28, *Miller* v. *United States*, No. 04-1507 (June 27, 2005) (citing cases).

Justice Powell wrote separately not to create the very privilege rejected by the majority opinion he had joined, but instead to stress that "no harassment of newsmen will be tolerated." *Branzburg*, 408 U.S. at 709-710. The *Branzburg* majority had briefly suggested that a motion to quash might be warranted if the prosecution were to engage in "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources." *Id.* at 707-708. Justice Powell expanded on that suggestion by emphasizing that if a criminal proceeding "is not being conducted in good faith"—if, 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 710 (Powell, J., concurring); see *Reporters Comm. for Freedom of the Press* v. *American Tel. & Tel. Co.*, 593 F.2d 1030, 1061 n.107 (D.C. Cir. 1978) ("Although Justice Powell refers to case-by-case 'balancing,' it is clear that he is actually referring to the availability of judicial case-by-case screening out of *bad faith* 'improper and prejudicial' interrogation.") (citation omitted), cert. denied, 440 U.S. 949 (1979).

Third, petitioner suggests (Pet. 12-13) that this Court should reconsider *Branzburg* because in recent years, subpoenas to journalists seeking the identity of confidential sources have "become commonplace."

Even if that empirical assertion were correct,[5] it would provide no cause to revisit *Branzburg*. The Court in that case declined to recognize a reporter's privilege notwithstanding claims that "press subpoenas have multiplied, that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources." 408 U.S. at 699 (footnote omitted). The Court cited (*id.* at 699 n.38) an amicus brief listing 111 subpoenas received by two television networks between January 1969 and July 1971. See New York Times Amicus Br., No. 70-57, 1971 WL 133333 (Sept. 18, 1971). The Court nevertheless concluded that "[t]hese developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere." 408 U.S. at 699.

c. This case does not implicate any conflict in the circuits. Although some other courts of appeals have taken different approaches to the general question of the existence of a reporter's privilege post-*Branzburg*, the courts of appeals have uniformly rejected claims of a reporter's (or academic's) privilege in the circumstance at issue in both this case and *Branzburg* itself—namely, a good-faith request to testify in a crim-

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[5] Petitioner relies (Pet. 12) on statistics that do not distinguish between subpoenas in civil and criminal cases or between requests from prosecutors and private litigants. See S. Rep. No. 118, 113th Cong., 1st Sess. 5 (2013). And as petitioner acknowledges, confidential sources have continued to provide information to the press even in the absence of a federal privilege. See Pet. 11 (citing recent instances in which confidential sources shared information with press).

inal proceeding about the criminal conduct of a source. See, *e.g.*, *Judith Miller*, 438 F.3d at 1142-1143, 1147-1149 (reporter received illegal disclosure of classified information); *In re Special Proceedings*, 373 F.3d 37, 40-41, 44-45 (1st Cir. 2004) (reporter received criminally contemptuous disclosure of sealed materials); *In re Grand Jury Proceedings*, 5 F.3d 397, 399-401 (9th Cir. 1993) (scholar received information about the commission of a crime), cert. denied, 510 U.S. 1041 (1994); see also *United States* v. *Smith*, 135 F.3d 963, 969, 971 (5th Cir. 1998) (observing that "a privilege against disclosing confidential source information * * * [was] rejected in *Branzburg*" and similarly rejecting a claim of privilege for nonconfidential work product); *United States* v. *Cutler*, 6 F.3d 67, 69, 73 (2d Cir. 1993) (reasoning that "we must certainly follow *Branzburg* when fact patterns parallel to *Branzburg* are presented for our decision"); *In re Grand Jury Proceedings*, 810 F.2d 580, 583-586 (6th Cir. 1987) (permitting contempt proceedings against reporter who refused to produce footage that would help to identify perpetrators of a crime).

The circuit decisions cited by petitioner (Pet. 17-18) do not demonstrate that another court of appeals would have reached a different result in this case. In all but one of the decisions on which petitioner relies, a court quashed a request (by a criminal defendant, not the government) seeking information on collateral or impeachment-related matters, rather than a request seeking direct evidence of a criminal defendant's guilt or innocence. See *United States* v. *LaRouche Campaign*, 841 F.2d 1176, 1180-1182 (1st Cir. 1988) (defense request for possible impeachment evidence in criminal case); *United States* v. *Pretzinger*,

542 F.2d 517, 520-521 (9th Cir. 1976) (per curiam) (defense request for evidence potentially relating to whether government could have sought a warrant); *United States* v. *Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000) (defense request for information related to possible breach of plea agreement), cert. denied, 532 U.S. 924 (2001); *Cutler*, 6 F.3d at 73-75 (defense request for potential impeachment evidence); *United States* v. *Caporale*, 806 F.2d 1487, 1503-1504 (11th Cir. 1986) (defense request for evidence related to possible jury tampering), cert. denied, 482 U.S. 917, and 483 U.S. 1021 (1987); *United States* v. *Burke*, 700 F.2d 70, 76-77 (2d Cir.) (same), cert. denied, 464 U.S. 816 (1983); *United States* v. *Cuthbertson*, 630 F.2d 139, 146-147 (3d Cir. 1980) (defense request for potential impeachment evidence), cert. denied, 449 U.S. 1126 (1981).

The one case not involving a defense request for impeachment or other collateral evidence is *Farr* v. *Pitchess*, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976), which involved a state judge's order that a reporter reveal the identity of the person or persons who had disclosed materials in violation of a court order. *Id.* at 466. The Ninth Circuit asserted without citation that the then-recent decision in *Branzburg* supported a "limited or conditional" privilege in civil and criminal cases, *id.* at 467, but nevertheless concluded that the public's interest in knowing the identity of the violator would overcome any privilege. *Id.* at 469. The Ninth Circuit's rejection of a privilege claim in that case indicates that it would also reject a privilege claim in this case, where the public

interest (in the confidentiality of classified national-defense information) is substantially greater.[6]

To the extent that the decisions cited by petitioner apply a qualified reporter's privilege in certain criminal contexts that are distinguishable from this case, they offer no assistance to petitioner.[7] None of the decisions cited by petitioner demonstrates that those courts would feel free to reexamine *Branzburg*'s balancing of interests where, as in both *Branzburg* and this case, a reporter witnesses his source's criminal conduct and is called upon to testify in good-faith criminal proceedings. Indeed, as noted above (pp. 16-17, *supra*), some of the same courts have expressly rejected a privilege in similar circumstances. See also, *e.g.*, *In re Dolours Price*, 685 F.3d 1, 16-19 (1st Cir. 2012) (reasoning that *Branzburg* is controlling in the context of a law-enforcement request for evidence of a crime), cert. denied, 133 S. Ct. 1796 (2013).

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[6] The observation by amici that some courts have recognized some form of reporter's privilege in the civil context, ABC Amicus Br. 7-12, does not establish that those courts would recognize petitioner's particular claim of privilege in this criminal case. Indeed, the Fourth Circuit itself recognizes a reporter's privilege in the civil context. See *LaRouche* v. *National Broad. Co.*, 780 F.2d 1134, 1139, cert. denied, 479 U.S. 818 (1986)).

[7] Those decisions themselves find no grounding in *Branzburg*, but that issue is not properly raised by petitioner here. See, *e.g.*, *New York Times Co.* v. *Jascalevich*, 439 U.S. 1301, 1302 (1978) (White, J., denying stay) (finding "no present authority in this Court that a newsman need not produce documents material to the prosecution or defense of a criminal case," where defendant sought possible impeachment information); *McKevitt* v. *Pallasch*, 339 F.3d 530, 532-533 (7th Cir. 2003) (reasoning that many of these cases are "skating on thin ice" because they "essentially ignore *Branzburg*" or "audaciously declare that *Branzburg* actually created a reporter's privilege").

Petitioner's contention (Pet. 18-20) that other circuits apply *Branzburg* only in the grand-jury context lacks merit. As noted above (pp. 13-14, *supra*), the argument that *Branzburg* is limited to grand juries has been waived by petitioner and is not supported by *Branzburg* itself. And petitioner cites no decision that expressly construes *Branzburg* to be so limited. He instead attempts to infer that courts of appeals have implicitly limited *Branzburg* in that fashion by comparing the results of certain grand-jury cases to certain criminal-trial cases involving defense requests for collateral or impeachment evidence. The cited cases do not support the inference petitioner would draw. See *Smith*, 135 F.3d at 971 (applying *Branzburg*'s reasoning to a criminal trial, because *Branzburg* "gave no indication that it meant to limit its holding to grand jury subpoenas").[8]

Nor would such a holding make sense. The grand jury's power to investigate criminal activity and serve "the public interest in law enforcement," *Branzburg*,

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[8] Petitioner asserts (Pet. 18 n.14), that the decision below is in conflict with "six state courts of last resort." But any potential conflict between state and federal decisions on this particular issue does not warrant this Court's review. *Branzburg* expressly recognized that state courts could "construe their own constitutions so as to recognize a newsman's privilege," 408 U.S. at 706, and many States have statutory protections for reporters, see Pet. 24 n.18. It is thus of little practical significance that a handful of state decisions have purported to locate a form of reporter's privilege in the First Amendment (often in conjunction with recognizing a similar privilege under state law, see, *e.g.*, *In re Contempt of Wright*, 700 P.2d 40, 44-45 (Idaho 1985); *State* v. *Siel*, 444 A.2d 499, 503 (N.H. 1982); *Zelenka* v. *State*, 266 N.W.2d 279, 286-287 (Wis. 1978)).

408 U.S. at 690, would be to little end if the courts were denied the ability to secure probative evidence to ascertain the truth of the grand jury's accusation. "Without access to specific facts a criminal prosecution may be totally frustrated." *United States* v. *Nixon*, 418 U.S. 683, 713 (1974). And *Branzburg* left no doubt that it rejected any First Amendment claim in the criminal context in order to ensure that society's interest in law enforcement could be vindicated: "The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection." 408 U.S. at 691.

2. a. Petitioner alternatively contends (Pet. 21-30) that this Court should recognize a qualified reporter's privilege as a matter of federal common law. That contention cannot be squared with *Branzburg*. The Court observed in *Branzburg* that "the common law recognized no such privilege," 408 U.S. at 698; it expressly discussed and rejected the various policy arguments that would support such a privilege, *id.* at 679-708; and it recognized that its holding would serve to "reaffirm[] the prior common-law *and* constitutional rule regarding the testimonial obligations of newsmen," *id.* at 693 (emphasis added). See *Swidler & Berlin* v. *United States*, 524 U.S. 399, 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 general-purpose reporter's privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege.").

Contrary to petitioner's suggestion (Pet. 21-29), nothing has changed since *Branzburg* that would justify revising the longstanding common-law rule that reporters have no privilege to refuse to provide direct evidence of criminal wrongdoing by confidential sources. Although Federal Rule of Evidence 501, which permits federal courts to apply common-law privileges "in the light of reason and experience," post-dates *Branzburg*, that rule simply "left the law of privileges in its present state," to "be developed by the courts" in a manner consistent with precedent. Fed. R. Evid. 501 advisory committee's note (1974); see *Jaffee* v. *Redmond*, 518 U.S. 1, 8-9 (1996) (discussing origin of Rule 501's standard). *Branzburg* remains the controlling precedent on this common-law issue.

This Court's decision in *Jaffee*, which recognized a psychotherapist-patient privilege under Rule 501, 518 U.S. at 15, provides no support for recognizing a reporter's privilege under that rule. Among other things, the Court in *Jaffee* noted that "a psychotherapist privilege was among the nine specific privileges recommended by the Advisory Committee" in an earlier draft of the Federal Rules. *Id.* at 14. As such, it was "thought to be either indelibly ensconced in our common law or an imperative of federalism." *United States* v. *Gillock*, 445 U.S. 360, 367-368 (1980). A reporter's privilege, in contrast, was not among those nine privileges, see Proposed Rules, 56 F.R.D. 183, 230-258 (1973), and thus lacks a similar pedigree, see *Gillock*, 445 U.S. at 367-368 (relying, in part, on the absence of a privilege from the list of nine to deny recognition of it under Rule 501). Indeed, the longstanding common-law rule, recognized in *Branzburg*, is that reporters have the same testimonial obligations

as other citizens in the context of criminal proceedings.

b. A common-law reporter's privilege, if fashioned by the courts to protect sources who are engaged in criminal conduct, lacks merit as a matter of first principles. Pet. App. 38a-46a. Judicially-created privileges in criminal cases may be recognized or expanded "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel* v. *United States*, 445 U.S. 40, 50 (1980) (citation omitted). A reporter's privilege broad enough to cover persons in petitioner's situation would not meet that standard.

As *Branzburg* explained, "the public interest in law enforcement and in ensuring effective grand jury proceedings * * * override[s] the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." 408 U.S. at 690-691; see also *id.* at 695 ("[W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future."). That is particularly true where, as here, government employees commit crimes by illegally disclosing national defense information. See, *e.g.*, *Judith Miller*, 438 F.3d at 1183 (Tatel, J., concurring) ("While requiring [a reporter] to testify may discour-

age future leaks, discouraging leaks of this kind is precisely what the public interest requires.").

Furthermore, as the court of appeals explained (Pet. App. 39a-43a), a common-law reporter's privilege would have little in common with other privileges recognized under Rule 501. Other privileges (*e.g.*, the spousal privilege, the attorney-client privilege) protect the substance of communications between known parties who have a special relationship. But even those privileges often "yield[] where the communication furthers or shields ongoing criminal activity." *Id.* at 42a; see *United States* v. *Zolin*, 491 U.S. 554, 562-563 (1989) (crime-fraud exception to attorney-client privilege). A judicially-created reporter's privilege that protects communications that are themselves in violation of federal criminal law, such as the unauthorized disclosure of classified national-defense information at issue here, would be inconsistent with that basic precept.

Nor is there any merit to petitioner's assertion (Pet. 24-26) that a federal common-law privilege should be recognized based on a "near-unanimous consensus" among the States favoring such a privilege. Although many States recognize a reporter's privilege of some sort in some circumstances, no "consensus" exists about who qualifies for such a privilege, what types of communications are covered, and the circumstances in which it may be invoked. See Pet. App. 43a-44a; *Judith Miller*, 438 F.3d at 1157-1158 (Sentelle, J., concurring).[9] Importantly, none of the

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[9] For example, several of the statutory shield laws petitioner identifies (Pet. 24 n.18) expressly exclude circumstances where a journalist witnesses a crime. See Colo. Rev. Stat. § 13-90-119(2)(c)-(d) (2013); Fla. Stat. Ann. § 90.5015(2) (West 2011); N.C.

state laws or decisions petitioner cites addresses the uniquely federal interest in preventing the unlawful disclosure of classified national-defense information.

As the court of appeals explained, "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." Pet. App. 44a (quoting *Branzburg*, 408 U.S. at 704). *Branzburg* expressly left the door open for "Congress * * * to determine whether a [federal] statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned." 408 U.S. at 706. It also left "state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas." *Ibid.*; see *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 legislation to address the unique concerns raised in cases like this one, involving the disclosure of national defense information to journalists. See S. 987, 113th Cong., 1st Sess. (introduced

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Gen. Stat. § 8-53.11(d) (2013). Petitioner also cites a number of state judicial decisions recognizing some form of privilege for journalists, but over half relate only to civil cases, and several are from intermediate or trial courts that do not definitively establish state law. See Pet. 25 n.19.

May 16, 2013). The court of appeals properly declined to intrude upon this legislative process.[10]

c. Contrary to petitioner's contention (Pet. 23-24, 29), it is not clear that the Third Circuit would recognize a federal common-law right for a reporter in petitioner's situation to refuse to comply with a valid testimonial subpoena. In *Riley* v. *City of Chester*, 612 F.2d 708 (1979), the Third Circuit recognized a qualified common-law privilege for reporters in civil cases. *Id.* at 715-716. *Riley* "did not consider the existence of a qualified privilege in a criminal case," *Cuthbertson*, 630 F.2d at 146, and, citing *Branzburg*, it expressly distinguished cases where "the reporter witnessed events which are the subject of grand jury

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[10] Petitioner cites (Pet. 27-28) the Department of Justice's policy on issuing subpoenas to members of the media, which exceeds constitutional requirements by providing, in part, that information should only be sought from a journalist if it is "essential" and "after all reasonable alternative attempts have been made to obtain the information from alternative sources." 28 C.F.R. 50.10(a)(3). As the Court explained in *Branzburg*, this policy (which was followed in this case) counsels against judicial recognition of a privilege. 408 U.S. at 706-707. Indeed, the Department recently completed a comprehensive review of this policy and made several changes to ensure that in determining whether to seek information from, or records of, members of the news media, the Department strikes the proper balance between the interests in protecting national security and public safety and the safeguarding of the essential role of the free press. The revisions included provisions that strengthened the presumption of notice and negotiation with the news media and enhanced and centralized the oversight by senior Department officials. See *Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media*, 79 Fed. Reg. 10,989-10,994 (Feb. 27, 2014).

investigations into criminal conduct." *Riley*, 612 F.2d at 716.

In *United States* v. *Cuthbertson*, *supra*, the Third Circuit found *Riley* "to be persuasive authority" in a case where a defendant sought potential impeachment evidence from a media organization. 630 F.2d at 146. Although *Cuthbertson* described its holding as recognizing that "journalists possess a qualified privilege not to divulge confidential sources * * * in criminal cases," *id.* at 147, it did not consider the particular circumstance in *Branzburg* and this case, where a journalist is an eyewitness to a crime and his testimony at a criminal proceeding is sought in good faith. It therefore does not establish that the Third Circuit would in fact apply that "qualified privilege" to bar a good-faith subpoena like the one in this case.

3. While the question presented does not warrant this Court's review, this case is a particularly unsuitable vehicle. In addition to holding that no reporter's privilege exists, the court of appeals alternatively concluded that petitioner would not have a valid privilege claim even under the qualified-privilege framework he advocates. Pet. App. 46a-57a. To begin with, the court of appeals correctly concluded that petitioner waived any privilege by disclosing the name of his source to a third party. *Id.* at 54a. Petitioner contends (Pet. 33) that he did not, in fact, waive any privilege because his disclosures "were made in strict confidence and in furtherance of [petitioner's] investigative reporting." But that is irrelevant. The third party was not petitioner's agent (or Sterling's); he was not obliged to maintain any confidence; and he did not, in fact, do so. Cf. *Weatherford* v. *Bursey*, 429 U.S. 545, 554 n.4 (1977) (recognizing that "attorney-client

communications in the presence of a third party not the agent of either are generally not protected by the privilege").[11]

In any event, the court of appeals separately, and correctly, determined that the substance of petitioner's testimony was unavailable from other sources and that the government had a compelling need for the testimony on the facts of this case. Pet. App. 47a-57a. The court noted that petitioner "is the only eyewitness to the crime" and was "inextricably involved in it." *Id.* at 49a. The court also thoroughly reviewed the extensive pretrial record and concluded that the government's circumstantial evidence alone may not be enough to prove Sterling's guilt beyond a reasonable doubt. *Id.* at 50a. The court observed, for example, that although the government could establish through telephone records and recovered e-mails that petitioner and Sterling were communicating, "none of the records contain classified information, and the contents of the conversations and communications are otherwise largely unknown." *Id.* at 51a-52a. The court also observed that possible hearsay testimony from other witnesses (even if admissible) was not conclusive and "pales in comparison to [petitioner's] first-hand testimony." *Id.* at 52a-53a. And the court observed that Sterling himself had highlighted the absence of direct evidence against him, *id.* at 56a; intended to argue at trial that other people (such as

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[11] Petitioner contends (Pet. 33) that the government "abandoned" a waiver argument below by focusing instead on the lack of a privilege. Regardless, the court of appeals could and did reach the issue, Pet. App. 54a, and this Court may affirm "on any ground which the law and the record permit," *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982).

SSCI staffers or other CIA employees) could have been petitioner's source, *id.* at 50a; and planned to refute the circumstantial evidence against him by pointing out that reporters often use subterfuge to disguise their sources, *id.* at 53a. "By depriving the jury of the only direct testimony that can link Sterling to the charged crimes," the court of appeals explained, "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," thereby "open[ing] the door for Sterling to mislead the jury and distort the truth-seeking function of the trial." *Id.* at 51a.

Petitioner errs (Pet. 31) in characterizing the court of appeals' application of the qualified-privilege test as "dicta," rather than an alternative holding. See *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*."); *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924). Nor is it proper to presume, as petitioner does (Pet. 31), that the court of appeals failed to apply the correct standard of review. Cf. *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 385-386 & n.2 (2008) (cautioning against the assumption that a lower court applied an incorrect legal rule). Finally, petitioner's fact-bound disagreement with the court of appeals' assessment of the evidence, see Pet. 32-33, does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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