Case No. 06-16403

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA WOLF,
Subpoenaed Party-Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from a Judgment of the
United States District Court for the Northern District of California

Hon. William Alsup, United States District Judge
No. CR 06-90064 MISC MMC

BRIEF OF *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, WIW FREEDOM TO WRITE FUND, AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF APPELLANT JOSHUA WOLF URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Ninth Circuit Rule 26.1, *amici curiae* the Reporters Committee For Freedom of the Press, the WIW Freedom to Write Fund, and the Society of Professional Journalists hereby certify that no corporation or other public entity owns 10% or more of any *amici curiae*.

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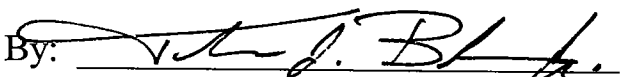
By: 
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INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The WIW Freedom to Write Fund is a non-profit charitable organization dedicated to public advocacy on behalf of the community of independent writers on policy issues of importance to them, including copyright law, access to government information, the exposure of writers to prosecution for informing the public of secret governmental activity, and libel and slander law. The Fund is dedicated to protecting the rights of independent writers such as Mr. Wolf to ensure that they can publish freely and without government interference.

The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, the Society promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects the First Amendment guarantees of freedom of speech and press.

This case could have a significant impact on *Amici*'s respective members. In issuing its contempt order, the district court assumed that Mr. Wolf was functioning as a journalist when he videotaped a July 8, 2005 demonstration on the streets of San Francisco, portions of which he sold to television networks and posted on his Internet website. The court, however, rejected Mr. Wolf's argument that either the First Amendment or federal common law establishes a reporter's privilege or provides protection from compelled disclosure of unpublished material that Wolf obtained during newsgathering—undisclosed portions of the videotape sought by federal prosecutors in their investigation of "the potential attempted arson" of a San Francisco city police car. EOR 136 (Aug. 1, 2006 Tr. at 6:10); *see also* EOR 150 (Aug. 1, 2006 Tr. at 74:5-6). In making this decision, the court relied principally on *Branzburg v. Hayes*, 408 U.S. 665 (1972), and cases interpreting it.

This ruling poses obvious and severe dangers for journalists. It comes at a time when an unprecedented number of reporters face subpoenas seeking to compel them to disclose sources or other materials obtained during newsgathering under penalty of fines or imprisonment, and three journalists (including Mr. Wolf) recently have been imprisoned for refusing to disclose information to a federal grand jury. *See Reporters & Federal Subpoenas*, Reporters Committee for Freedom of the Press, *at* http://www.rcfp.org/shields_and_subpoenas.html (June

21, 2006); *see also* R. Smolkin, *Under Fire*, 27 Am. Journalism Review 18 (2005). Moreover, this Court has recognized that a reporter's privilege is vital to ensuring that the press can effectively play its role in society and that "ensuring the free flow of information to the public . . . is an interest of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) ("*Shoen* I") (civil case) (internal citations omitted). "[T]he compelled disclosure of non-confidential information harms the press' ability to gather information . . . by converting the press in the public's mind into an investigative arm of prosecutors and the courts." *Id.* at 1295.

Accordingly, *Amici* have a very real stake in this case and believe they are well-situated to assist the Court in resolving the important issues presented.

SUMMARY OF ARGUMENT

Amici agree with Appellant's argument that the First Amendment requires recognition of a reporter's privilege. In this brief, however, *Amici* will focus on the following question: whether the Supreme Court's decision and reasoning in *Jaffee v. Redmond*, 518 U.S. 1 (1996), compels recognition of a *common-law* reporter's privilege under Rule 501 of the Federal Rules of Evidence ("Rule 501"). The answer is yes. *See In re Grand Jury Subpoena to Judith Miller* ("*Miller*"), 438 F.3d 1141 (D.C. Cir. 2005), *cert. denied*, 125 S. Ct. 2977 (2005); *id.* at 1170-

72 (Tatel, J., concurring) (applying *Jaffee* to find the existence of a common-law reporters' privilege); *see also New York Times Co. v. Gonzales*, 2006 U.S. App. LEXIS 19436 at *59 (2d Cir. Aug. 1, 2006) (Sack, J., dissenting) ("I have no doubt that there has been developed in [the last] thirty-four years federal common-law protection for journalists' sources under [Rule 501] as interpreted by Jaffee.").

1. Rule 501 expressly empowers the federal courts to recognize and elucidate privileges "in the light of reason and experience." Fed. R. Evid. 501. The Supreme Court's analysis in *Jaffee* interpreting Rule 501 translates directly to this case and mandates recognition of a reporter's privilege. In *Jaffee*, the Court applied Rule 501 to recognize a psychotherapist-patient privilege, articulating three closely interrelated factors to decide whether particular privileges should be recognized: (1) whether such a privilege is widely recognized by the states, (2) whether the proposed privilege serves significant public and private interests, and (3) whether recognition of those interests outweighs the burden on truth-seeking that might be imposed by the privilege. Each of these factors, plus additional factors, strongly supports recognition of a common-law reporter's privilege.

The district court erred in rejecting a federal common-law privilege, in reliance on *Branzburg v. Hayes*, 408 U.S. 665 (1972), and two pre-*Jaffee* decisions of this Court interpreting it. *Branzburg* pre-dated Rule 501 and dealt exclusively

with First Amendment issues, which are analytically distinct from the Rule 501 analysis. As *Jaffee* makes clear, Rule 501 directs the courts to consider, among other things, the manner in which the states have dealt with the asserted privilege at issue. Since *Branzburg*, an overwhelming majority of jurisdictions now have adopted a reporter's privilege through statute or judicial decision (or both). Thus, the legal landscape has changed completely since *Branzburg* was decided, and the district court erred by relying on *Branzburg*'s discussion of law and state practice as it existed in 1972 and ignoring the legal developments of the past three decades.

2. The Court should recognize a common-law reporter's privilege and apply it here. In doing so, the Court need decide no more than is necessary to resolve this case, as the Supreme Court directed in *Jaffee*. Thus, the Court should hold that the privilege: (1) applies in grand jury proceedings, *see* Fed. R. Evid. 1101(c); (2) applies to Mr. Wolf, as a freelance journalist engaged in newsgathering, *see Shoen* I, 5 F.3d at 1293; and (3) requires courts to find that the requesting party has exhausted alternative sources for the information before compelling disclosure of unpublished non-confidential information and that the information is non-cumulative and actually relevant to an important issue. *Id.* at 1295. This approach, which is consistent with state shield laws, the Department of Justice Guidelines and prior decisions of this Court, requires reversal of the

contempt order in this case because the government has not even attempted to show that it has exhausted the many available alternative sources.

ARGUMENT

I. *JAFFEE* COMPELS RECOGNITION OF A REPORTER'S PRIVILEGE UNDER RULE 501

A. *Jaffee* Establishes The Governing Standards For Developing Privileges Under Rule 501

Rule 501 provides, in relevant part, that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the court of the United States in the light of reason and experience." Fed. R. Evid. 501. As the Advisory Committee Notes make clear, Rule 501 thereby "provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases." Fed. R. Evid. 501, Adv. Comm. Note (1974).

In its landmark decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Supreme Court established a new framework for deciding whether federal common law recognizes a privilege under Rule 501. In doing so, the Court observed that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Id.* at 8 (internal quotations omitted). The Court also recognized that 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 8-9 (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)).

In its 7-2 decision in *Jaffee*, the Court for the first time recognized a federal common-law psychotherapist-patient privilege. *Id.* at 15. Noting that the development of a privilege under Rule 501 "may be justified . . . by a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth," *id.* at 9 (internal quotations omitted), the Court held that the privilege applied not just to psychiatrists and psychologists, but also to licensed social workers who provide psychotherapy. *Id.* at 16-17.

The Court began its analysis by emphasizing that, "[l]ike the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust.'" *Id.* at 9-10 (quoting *Trammel*, 445 U.S. at 50-51). "Effective psychotherapy," the Court continued, "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Id.* at 10. The Court pointed out that "disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace" and reasoned that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Id.*

The Court emphasized that a confidential psychotherapist-patient relationship serves important private and public interests and that these interests outweigh the need for probative evidence that might be produced absent the privilege. The Court found that "the likely evidentiary benefit that would result from the denial of the privilege is modest" because in the absence of a privilege there likely would be fewer confidential communications and thus less of the very evidence at issue. *Id.* at 11-12.

Finally, the Court emphasized that the consensus among the states and the District of Columbia regarding recognition of a psychotherapist-patient privilege in one form or another "indicates that 'reason and experience' support recognition of the privilege." *Id.* at 13. Furthermore, the Court concluded, the federal courts' failure to recognize a privilege would "frustrate the purposes of the state legislation that was enacted" to meet the goals of the privilege. *Id.*

B. The *Jaffee* Approach Requires Recognition Of A Common-Law Reporter's Privilege

The *Jaffee* Court's analysis can be distilled down to three closely interrelated factors for deciding whether a particular privilege should be recognized under Rule 501: (1) whether such a privilege is widely recognized by the states; (2) whether the proposed privilege serves significant public and private interests; and (3) whether recognition of those interests outweighs the burden on truth-

seeking that might be imposed by the privilege. 518 U.S. at 11-15. Application of these factors requires recognition of a federal common-law reporter's privilege. *See Gonzales*, 2006 U.S. App. LEXIS 19436, at *59-60 (Sack, J., dissenting) ("A qualified journalists' privilege seems to me easily – even obviously – to meet each of [*Jaffee*'s] qualifications. The protection exists. It is palpable; it is ubiquitous; it is widely relied upon; it is an integral part of the way in which the American public is kept informed and therefore of the American democratic process.").

1. The Existence Of A Reporter's Privilege Is Widely Recognized Across The Country

a. The Vast Majority Of States And The District Of Columbia Recognize A Reporter's Privilege.

Rule 501 requires an assessment of the competing interests *at the time the privilege is sought*, and federal courts must look to the policy decisions of the states to see how they have chosen to address the issue. *Jaffee*, 518 U.S. at 12-13 ("[T]he policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one."). "Because state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Id.* at 9.

Forty-nine states, as well as the District of Columbia, now recognize a reporter's privilege. Thirty-two states and the District of Columbia have done so by enacting statutes, commonly referred to as "shield laws."[1] For purposes of Rule 501, it is of "no consequence" that these states have recognized the privilege through "legislative action rather than judicial decision." *See Jaffee*, 518 U.S. at 13 ("Although common-law rulings may once have been the primary source of new developments in federal privilege law, that is no longer the case."). Moreover, of the states that do not have shield laws on their books, all but one have established the privilege via judicial decision. *See Miller*, 438 F.3d at 1170

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[1] *See* Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300 *et seq.*; Ariz. Rev. Stat. Ann. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Const. art. I, § 2(b); Cal. Evid. Code § 1070; Colo. Rev. Stat. §§ 13-90-119, 24-72.5-101 *et seq.*; Del. Code. Ann. tit. 10, §§ 4320, *et seq.*; D.C. Code Ann. §§ 16-4701 *et seq.*; Fla. Stat. Ann. § 90.5015; Ga. Code Ann. § 24-9-30; 735 Ill. Comp. Stat. 5/8-901 *et seq.*; Ind. Code § 34-46-4-1, 34-46-4-2; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-55; Md. Code Ann. Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws § 767.5a; Minn. Stat. §§ 595.021 *et seq.*; Mont. Code Ann. §§ 26-1-901 *et seq.*; Neb. Rev. Stat. §§ 20-144 *et seq.*; Nev. Rev. Stat. Ann. § 49.275; N.C. Gen. Stat. § 8-53.11; N.J. Stat. Ann. §§ 2A:84A-21 *et seq.*; N.M. Stat. Ann. § 38-6-7; N.M. R. Evid. 11-514; N.Y. Civ. Rights Law § 79-h; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code. Ann. §§ 2739.04, 2739.12; Okla. Stat. Ann. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510 *et seq.*; 42 Pa. Cons. Stat. Ann. § 5942; R.I. Gen. Laws §§ 9-19.1-1 *et seq.*; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208. Connecticut also passed a shield law in June of this year. *See* H.B. 5212, "An Act Concerning Freedom of the Press," Gen. Assem., Reg. Sess. (Conn. 2006), *available at* http://cga.ct.gov/2006/ACT/PA/2006PA-00140-R00HB-05212-PA.htm.

(Tatel, J., concurring) (citing "undisputed evidence that forty-nine states plus the District of Columbia offer at least qualified protection to reporters' sources").

The precise scope of the reporter's privilege differs from state to state. But *Jaffee* held that these variations cannot be determinative for purposes of Rule 501. 518 U.S. at 14 n.13 ("These variations in the scope of the protection are too limited to undermine the force of the States' unanimous judgment that some form of psychotherapist privilege is appropriate."). The Supreme Court even extended the psychotherapist's privilege to licensed social workers notwithstanding that, as Justice Scalia urged in dissent, no state had adopted such a privilege without restriction; that the restrictions varied from one state to another; and that 10 states effectively rejected such a privilege. *See id.* at 34 (Scalia, J., dissenting). Conversely, the reporter's privilege is supported by an overwhelming consensus among the states.

This overwhelming consensus shows that "reason and experience" strongly support recognition of a reporter's privilege. *See Jaffee*, 518 U.S. at 15. It also demonstrates the need for a federal reporter's privilege as a matter of sound public policy. In *Jaffee*, the Court noted that "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court." *Id.* at 24. Thus, "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these

confidential communications." *Id.* The same is true for a federal common-law reporter's privilege. Absent a federal privilege, state privilege laws will be frustrated and defeated.

Such is the case here, where the San Francisco Police Department solicited the help of the F.B.I., EOR 91 (Apr. 5, 2006 Order at 2), and from there the federal government chose to investigate what on its face appears to be an alleged crime with an exceedingly thin and speculative nexus to federal criminal jurisdiction. Had Mr. Wolf been subpoenaed in state court, California's shield law—which establishes absolute protection for confidential sources as well as non-confidential but unpublished news material—would protect him from being forced to divulge the portions of the videotape that have not yet been publicly disseminated. *See* Cal. Const. art. I, § 2(b); Cal. Evid. Code § 1070(b). Yet he is now in jail for refusing to disclose that same information to a federal grand jury. The lack of a comparable federal protection thus thwarts the state-law privilege. It also injects enormous uncertainty and confusion into newsgathering, because the reporter cannot know in advance if he is going to be subpoenaed in state court, where there is protection from subpoenas, or federal court, where there is no such protection.

b. The Department Of Justice Guidelines Also Support Recognition Of A Reporter's Privilege

Further indication of the well-settled nature of the reporter's privilege exists in the United States Department of Justice's own policy guidelines, which establish a policy "designed to protect the legitimate needs of the news media in the context of criminal investigations and prosecutions." *Gonzales*, 2006 U.S. App. LEXIS 19436, at *41 (Sack, J., dissenting). These guidelines, 28 C.F.R. § 50.10, state:

> Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, *whether civil or criminal*, which might impair the news gathering function.

Id. (emphasis added). The guidelines also provide, *inter alia*: (i) "All reasonable attempts should be made to obtain information from *alternative sources* before considering issuing a subpoena to a member of the news media" (*id.* § 50.10(b) (emphasis added)); and (ii) "In criminal cases, there should be reasonable grounds to believe . . . that the information sought is *essential* to a successful investigation" (*id.* § 50.10(f)(1) (emphasis added)).

These guidelines show that "the government does not dispute that journalists require substantial protection from compulsory government processes that would impair the journalists' ability to gather and disseminate the news." *Gonzales*, 2006

U.S. App. LEXIS 19436, at *40-41 (Sack, J., dissenting). Thus, the issue "is not whether [Mr. Wolf] is protected in these circumstances, or what the government must demonstrate to overcome that protection, but to whom the demonstration must be made." *Id.* at *45. And, quite simply, it makes far more sense for impartial courts, rather than the Attorney General, to be the arbiters of whether a journalist should be forced to disclose unpublished information.

As Judge Tatel noted in his concurrence in *Miller*, "the executive branch possesses no special expertise that would justify judicial deference to prosecutors' judgments about the relative magnitude of First Amendment interests." 438 F.3d at 1175 (Tatel, J., concurring). And "[a]ssessing those interests traditionally falls within the competence of courts." *Id.* Agreeing with Judge Tatel, Judge Sack in his dissent in *Gonzales* rejected the notion that the executive branch "has the sort of wholly unsupervised authority to police the limits of its own power under these circumstances." 2006 U.S. App. LEXIS 19436, at *47, *48-49 (Sack, J., dissenting) (noting that majority opinion "makes clear that the government's demonstration of 'necessity' and 'exhaustion' must, indeed, be made to the courts, not just the Attorney General").

2. A Common-Law Reporter's Privilege Serves Powerful Public And Private Interests

Freedom of the press is a crucial public and private right created "not for the benefit of the press so much as for the benefit of all of us." *Time Inc. v. Hill*, 385

U.S. 374, 389 (1967). Our "Constitution specifically selected the press" to fulfill an "important role" in our democracy. *Mills v. Alabama*, 384 U.S. 214, 219 (1966). The press "serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve." *Id.* The press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965). As one court has succinctly put it, "news gathering is essential to a free press" and

> "[t]he press was protected so that it could bare the secrets of government and inform the people." Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of information is weakened *whenever the ability of journalists to gather news is impaired.*

Zerilli v. Smith, 656 F.2d 705, 710-11 (D.C. Cir. 1981) (emphasis added) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring)).

These important interests are directly implicated not just by efforts to compel disclosure of confidential sources,[2] but also non-confidential information. In *Shoen* I, for example, this Court ruled in favor of an investigative author who claimed that he could not be compelled to testify and to produce notes and tape recordings of interviews he conducted with a source who was a defendant in a defamation action. 5 F.3d at 1290. The court based its ruling on a "qualified privilege against compelled disclosure" by a journalist that was "[r]ooted in the First Amendment." *Id.* at 1292. In doing so, it adopted the view of scholars and other courts that "the compelled disclosure of nonconfidential information harms the press' ability to gather information . . . by converting the press in the public's mind into an investigative arm of prosecutors and the courts." *Id.* at 1295. Forced deputizing of the press in this manner is anathema to a free society, let alone a free press.

The *Shoen* I court also stated that "[i]t is their independent status that often enables reporters to gain access, without a pledge of confidentiality, to meetings or

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[2] *E.g., Riley v. Chester*, 612 F.2d 708, 714 (3d Cir. 1979) ("A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis," which "will seriously erode the essential role played by the press in the dissemination of information and matters of interest and concern to the public.") (citations omitted).

places where a policeman or a politician would not be welcome." *Id.* And "[i]f perceived as an adjunct of the police or of the courts, journalists might well be shunned by persons who might otherwise give them information without a promise of confidentiality, barred from meetings which they would otherwise be free to attend and to describe, *or even physically harassed if, for example, observed taking notes or photographs at a public rally.*" *Id.* (emphasis added).

In this case, the federal government seeks Mr. Wolf's unaired footage of a demonstration in San Francisco in which there was, according to the district court, a "possible attempted arson" on a local police car and, more seriously, an alleged assault on a local police officer. EOR 142 (Aug. 1, 2006 Tr. at 36:7), EOR 150 (Aug. 1, 2006 Tr. 74:18-19). It is obvious, therefore, that San Francisco police officers were in a very dangerous position during the nighttime demonstration. The failure to recognize a reporter's privilege here would place journalists like Mr. Wolf at an even greater risk of harm. Mr. Wolf and other journalists would be unarmed police officers by proxy. Their cameras would be government cameras and their sources would come to realize that a journalist was no different than a government investigator. This would severely hamper journalists' ability to gather news and would subject them to increased physical danger as de facto, if unwilling, informants.

Thus, although the district court relied heavily on the view that this case does not involve the use of a confidential source and suggested that only "the clippings on the cutting room floor that are at stake here," EOR 162 (Aug. 1, 2006 Tr. at 87:22-88:3), there is much more at stake in this case. Strong public and private interests support a common-law reporter's privilege that protects unpublished information even if it is not confidential. As the California Supreme Court recognized: "Nor is the interpretation of the shield law to vigorously protect unpublished though non-confidential information in any sense irrational. A comprehensive reporter's immunity provision, in addition to protecting confidential or sensitive sources, has the effect of safeguarding [t]he autonomy of the press . . . . The threat to the autonomy of the press is posed as much by a criminal prosecutor as by other litigants." *Miller v. Superior Court*, 21 Cal. 4th 883, 898, 901 (1999) (internal quotations and citations omitted) (ordering trial court to quash subpoena seeking a complete, unedited videotape of a jailhouse interview); *see also United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) ("The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes.") (citations omitted); *Maughan v. NL Indus.*, 524 F. Supp. 93, 95 (D.D.C. 1981) ("To compel the production of a reporter's resource materials . . . can no doubt constitute a

significant intrusion into and, certainly, a chilling effect upon the newsgathering and editorial processes.").

Accordingly, reason and experience demonstrate that the interests at stake here are even more powerful than those in *Jaffee*. Even though the case did not implicate a constitutional right, the Court in *Jaffee* recognized that the psychotherapist's privilege serves "[t]he mental health of our citizenry," which it characterized as "a public good of transcendent importance." 518 U.S. at 11. In comparison, a reporter's privilege fosters First Amendment freedoms and serves the health of our democracy and the ability of our citizenry "to make informed political, social, and economic choices." *Zerilli*, 656 F.2d at 711.

3. Under *Jaffee*, These Important Interests Outweigh Any Claimed Evidentiary Benefits From Compelling Reporters To Testify Without Regard To A Privilege

The significant private and public interests supporting the reporter's privilege outweigh any likely evidentiary benefit that would result from denial of the privilege. On this score, *Jaffee* took judicial notice that

> [i]f the [psychotherapist's] privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled . . . . Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

Jaffee, 518 U.S. at 11-12.

The same is true regarding the reporter's privilege. If prosecutors and grand juries had unlimited ability to subpoena reporters for unpublished material, such as a reporter's drafts and unbroadcast video, journalists would be less likely to create and retain detailed records of newsgathering. *See Shoen* I, 5 F.3d at 1295 ("To the extent that compelled disclosure becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding disclosure requests or compliance therewith rather than to the basic function of providing news and comment.").

Likewise, absent a privilege protecting confidential source identities and off-the-record communications, confidential communications between sources and reporters "would surely be chilled." *Jaffee*, 518 U.S. at 11-12. Indeed, it is well-recognized that "[c]ompelling a reporter to disclose the identity of a source may significantly interfere with [the reporter's] news gathering ability." *Zerilli*, 656 F.2d at 711. That is because "[u]nless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters." *Id.* at 712; *accord Riley*, 612 F.2d at 714.

Given the amount of "evidence" that is "unlikely to come into being" absent a reporter's privilege, "the likely evidentiary benefit that would result from the denial of the privilege is modest." *Jaffee*, 518 U.S. at 11. In fact, the majority of

jurisdictions and the Department of Justice have been applying a form of reporter's privilege since *Branzburg*, with no discernible effect on law enforcement. *See Gonzales*, 2006 U.S. App. LEXIS 19436, at *62 (Sack, J., dissenting) ("This qualified privilege has successfully accommodated the legitimate interests of law enforcement and the press for more than thirty years."). Moreover, the reporter's privilege itself performs a vital truth-seeking function in society and the very nature of the privilege—protecting the ability of the press to discover and report the truth to the public—counteracts the asserted burden on the grand jury's truth-seeking function that would result from the privilege. Indeed, here law enforcement officials benefited directly from the portions of Mr. Wolf's videotape that have been broadcast and posted on the Internet. In short, the public good promoted by recognition of a common-law reporter's privilege thus outweighs any evidentiary benefit that might be gained by failing to recognize the privilege.[3]

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[3] Rule 501's legislative history also supports recognition of a reporter's privilege. *See Riley*, 612 F.2d at 714 (noting that the legislative history of Rule 501 "manifests that its flexible language was designed to encompass, *inter alia*, a reporter's privilege not to disclose a source"). Indeed, the privilege rule originally promulgated by the Supreme Court recognized nine enumerated (nonconstitutional) privileges. *See id.* However, "[f]ollowing testimony on behalf of groups such as the Reporters Committee for Freedom of the Press, the privilege rule was revised to eliminate the proposed specific rules on privileges and to leave the law of privilege in its current state to be developed by the federal courts." *Id.*; *see also In re Lewis*, 517 F.2d 236, 238 n.4 (9th Cir. 1975)

[Footnote continued on next page]