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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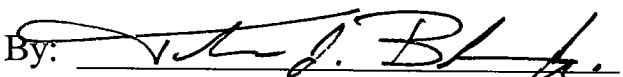
By: 
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INTEREST OF *AMICI CURIAE*

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]

C. *Branzburg* Is Irrelevant To The *Jaffee* Rule 501 Analysis.

The district court stated that *Branzburg* "rejected the whole idea of a federal common law privilege," EOR 162 (Aug. 1, 2006 Tr. at 87:8), and based on that view, and two pre-*Jaffee* decisions of this Court interpreting *Branzburg*, rejected the argument that a common-law privilege exists. *Id.* at 86:19-24. This was error.

Indeed, the *sole* issue presented and decided in *Branzburg* was whether a *First Amendment* privilege existed that protected the reporters in that case. *See* 408 U.S. at 667 ("The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press *guaranteed by the First Amendment.*") (emphasis added). Thus, while the D.C. Circuit did not reach the common-law issue in *Miller*, 438 F.3d at 1150, two of the three judges agreed that *Branzburg* did not limit the power of the lower courts to recognize a common-law reporter's privilege. *See id.* at 1160 (Henderson, J., concurring) ("The boundaries of constitutional law and common law do not necessarily coincide . . . and while we are unquestionably bound by *Branzburg*'s rejection of a reporter's privilege rooted in the First

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[Footnote continued from previous page]

(noting that the principal draftsman of the Federal Rules of Evidence declared in presenting the Conference Report to the House that Rule 501 "was 'not intended to freeze the law of privilege as it now exists,' and that its language 'permits the courts to develop a privilege for newspaperpeople on a case-by-case basis'") (quoting 120 Cong. Rec. H12253-54 (daily ed. Dec. 18, 1974)).

Amendment, we are not bound by *Branzburg*'s commentary on the state of the common law in 1972"); *id.* at 1166 (Tatel, J., concurring) (rejecting prosecutor's argument that *Branzburg* resolved Rule 501 issue: "*Branzburg* did no such thing."); *see also New York Times Co. v. Gonzales*, 2006 U.S. App. LEXIS 19436 at *53 (2d Cir. Aug. 1, 2006) (Sack, J., dissenting) ("[A]s the majority implicitly acknowledges . . . any limits on the constitutional protection imposed by *Branzburg* do not necessarily apply to the common law privilege under Federal Rule of Evidence 501.").

While the *Branzburg* Court observed that, as of 1972, no privilege had been recognized "[a]t common law," 408 U.S. at 685-86, 693, the Court could not possibly have addressed the question whether such a privilege should be recognized under Rule 501 because the Rule did not yet exist. In fact, the Court specifically observed that "[a]t the federal level, Congress has freedom to determine whether a 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 and, equally important, to refashion those rules as experience from time to time may dictate." *Id.* at 706.

Three years later, in 1975, Congress enacted Rule 501. Rather than enacting a series of specific federal privileges that could only be expanded or contracted by further legislation—the scheme that the Court seemed to anticipate in *Branzburg*—

Congress explicitly "authorize[d] federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'" *Jaffee*, 518 U.S. at 8 (quoting Rule 501). Rule 501 thus established new standards that did not exist when the Court decided *Branzburg*, and nothing in *Branzburg* limits recognition of a common-law privilege today.

This Court's decision in *In re Lewis*, upon which the district court relied, is not to the contrary. As in *Branzburg, Lewis* presented *only* the First Amendment issue. 517 F.2d at 238. Although the court noted *Branzburg*'s statement that common law at the time did not recognize a privilege, it also expressed the view that, under Rule 501—which had just been enacted—Congress made clear that it "intended that the courts should continue to develop the federal common law of privilege on a case-by-case basis" based on changing circumstances, including a reporter's privilege. *Id.* at 238 n.4.

Finally, to the extent the court in *In re Scarce*, 5 F.3d 397, 403 n.3 (9th Cir. 1993), suggested that *Branzburg* somehow froze the law of privilege in 1972, it did so without the benefit of the Supreme Court's decision three years later in *Jaffee*, which makes clear that such an approach is incorrect. The landscape has changed dramatically since 1972—Congress enacted Rule 501 and an overwhelming majority of U.S. jurisdictions have now adopted a reporter's privilege. Under *Jaffee*, the common-law privilege issue must be considered in that light. Indeed,

"[t]o disregard this modern consensus in favor of decades-old views, as the [government] urges, would not only imperil vital newsgathering, but also shirk the common law function assigned by Rule 501 and 'freeze the law of privilege' contrary to Congress's wishes." *See Miller*, 438 F.3d at 1170 (Tatel, J., concurring) (citing *Trammel*, 445 U.S. at 47). Accordingly, *Scarce* is not controlling in this case.

II. THIS COURT SHOULD RECOGNIZE A COMMON-LAW PRIVILEGE AND APPLY IT HERE TO REVERSE THE CONTEMPT ORDER

This Court should recognize a common-law reporter's privilege and apply it to this case. There is no need for the Court to resolve every possible issue that might arise in the future; it need address only those "considerations . . . necessary for decision of this case." *Jaffee*, 518 U.S. at 18 ("A rule that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner. Because this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would govern all conceivable future questions in this area.") (internal quotations omitted).

First, the privilege applies in a grand jury proceeding. *See* Fed. R. Evid. 1101(c) ("The rule with respect to privileges applies at all stages of all actions, cases, and proceedings."); *see also Shoen* I, 5 F.3d at 1292 (9th Cir. 1993)

(First Amendment privilege "protects journalists against compelled disclosure in all judicial proceedings, civil and criminal alike") (internal quotations omitted); Fed. R. Evid. 501, Adv. Comm. Note (1974) (Rule 501 intended to "provide[] that privileges shall continue to be developed by the courts of the United States *under a uniform standard applicable to both civil and criminal cases*") (emphasis added).

Second, Mr. Wolf, as a freelance journalist being subpoenaed for information obtained as part of the "gathering and dissemination of news," is entitled to the protection of a common-law reporter's privilege. *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1458-59, 1466 (2006) (holding that California shield law protected Internet publisher from being compelled to produce unpublished material under subpoena); *People v. Von Villas*, 10 Cal. App. 4th 201, 231 (1992) (applying California shield laws to freelance writer). As this Court has noted, "[w]hat makes journalism journalism is not its format but its content." *Shoen* I, 5 F.3d at 1293 (finding "no principled basis for denying the protection of the journalist's privilege to investigative book authors while granting it to more traditional print and broadcast journalists").[4]

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[4] Independent journalists have made significant contributions to the public interest throughout our nation's history, from the reform of the meat industry in the early twentieth century, to exposing the health hazards of tobacco, to shaping public opinion of the Vietnam War. *See* Leon Harris, *Upton Sinclair:*

[Footnote continued on next page]

Third, the Court should hold that, before a journalist may be compelled to divulge unpublished material in response to a subpoena, the requesting party must demonstrate "a sufficiently compelling need for the journalist's materials to overcome the privilege." *Id.* at 1296.[5] "At a minimum, this requires a showing that the information sought is not obtainable from another source. In other words, before disclosure may be ordered, the requesting party must demonstrate that she has exhausted all reasonable alternative means for obtaining the information." *Id.* Only if the requesting party meets this threshold would it be necessary to demonstrate that the information is "non-cumulative" and or "actual relevance" to "an important issue in the case." *See Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995) ("*Shoen* II").

[Footnote continued from previous page]
American Rebel (1975), at 85-90; Carl Jensen, *Stories That Changed America: Muckrakers in the 20th Century* (2000), at 78-81; *cf. Mills*, 384 U.S. at 219 (noting that "the press" includes "not only newspapers, books, and magazines, but also humble leaflets and circulars").

[5] Thus far, this case does not appear to involve an effort to compel disclosure of a confidential source, so this Court need not address what showing must be made to justify such forced disclosure. Many jurisdictions impose more demanding standards for justifying compelled disclosure when a confidential source is at issue. *See, e.g.*, D.C. Code §§ 16-4703(a)-(b) (creating an absolute privilege protecting the identity of sources or information revealing those sources and qualified privilege as to non-confidential unpublished information); *see also Shoen* I, 5 F.3d at 1295 ("[T]he absence of confidentiality may be considered in the balance of competing interests as a factor that diminishes the journalist's, and the public's, interest in non-disclosure.").

These are familiar requirements drawn directly from this Court's *Shoen* I and II decisions, and that have been adopted in one form or another by most legislatures and courts that have adopted a reporter's privilege. *See, e.g., Shoen* I, 5 F.3d at 1293, 1296; *Shoen II*, 48 F.3d at 416; *Mitchell v. Superior Court*, 37 Cal. 3d 268, 281-82 (1984); D.C. Code § 16-4703(a); N.J. Stat. Ann. § 2A:84A-21.3(b); Ga. Code Ann. § 24-9-30. The Justice Department Guidelines also impose similar requirements. 28 C.F.R. § 50.10(b).

The government has manifestly failed to satisfy the exhaustion requirement in this case, and so this Court's analysis may stop with this factor. Indeed, it appears that the U.S. Attorney has not even attempted to make a showing that alternative sources have even been consulted, let alone exhausted, or that Mr. Wolf's videotape is unique. As the district court repeatedly pointed out, the events Mr. Wolf filmed took place on a public street, EOR 162 (Aug. 1, 2006 Tr. at 87:16-18), and the published portion of Mr. Wolf's video shows numerous participants and onlookers (some with cameras) and dozens of police officers. In other words, the record reveals a veritable treasure trove of alternative sources, including possible eye witnesses from law enforcement. The government does not appear to have submitted a brief or affidavit—in camera or otherwise—explaining what efforts it has undertaken to exhaust these alternative sources, and it never even addressed this issue at the August 1 hearing. And the district court did not

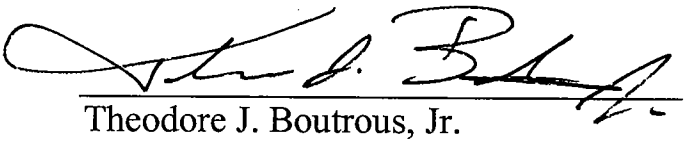
conduct any sort of exhaustion analysis whatsoever in finding that, even if a common-law privilege exists, this case is "a slam dunk for the government." *Id.* at 88. *Compare Miller*, 438 F.3d at 1180, 1182 (Tatel, J., concurring) (relying on "the compelling showing of need and exhaustion" based on the Special Counsel's ex parte affidavit and his "voluminous classified filings"). The government seems to want Mr. Wolf's video not because it is the *only* source of information about what happened to the police car, but because it speculates that it *might* be the *best and most convenient* source of information. This Court should hold that this is insufficient to satisfy the exhaustion requirement.

CONCLUSION

This Court should reverse with directions that the contempt order be vacated and Mr. Wolf released forthwith from prison.

Dated: August 11, 2006

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was printed in Times New Roman 14-point typeface and that, per Fed. R. App. P. 29(d) it contains 6950 words, as calculated under Fed. R. App. P. 32(a)(7)(B).

Theodore J. Boutrous, Jr.

LEXSTAT FED R EVID 501

*** CURRENT THROUGH CHANGES RECEIVED JUNE, 2006 ***

FEDERAL RULES OF EVIDENCE
ARTICLE V. PRIVILEGES

USCS Fed Rules Evid R 501

Review Court Orders which may amend this Rule.
Review expert commentary from The National Institute for Trial Advocacy

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1933.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Committee on the Judiciary, House Report No. 93-650. Article V as submitted to Congress contained thirteen Rules. Nine of those Rules defined specific nonconstitutional privileges which the federal courts must recognize (i.e. required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Another Rule provided that only those privileges set forth in Article V or in some other Act of Congress could be recognized by the federal courts. The three remaining Rules addressed collateral problems as to waiver of privilege by voluntary disclosure, privileged matter disclosed under compulsion or without opportunity to claim privilege, comment upon or inference from a claim of privilege, and jury instruction with regard thereto.

The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee, through a single Rule, 501, left the law of privileges in its present state and further 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. That standard, derived from *Rule 26 of the Federal Rules of Criminal Procedure*, mandates the application of the principles of the common law as interpreted by the Courts of the United States in the light of reason and experience. The words "person, government, State, or political subdivision thereof" were added by the Committee to the lone term "witness" used in Rule 26 to make clear that, as under present law, not only witnesses may have privileges. The Committee also included in its amendment a proviso modeled after Rule 302 and similar to language added by the Committee to Rule 601 relating to the competency of witnesses. The proviso is designed to require the application of State privilege law in civil actions and proceedings governed by *Erie R. Co. v Tompkins, 304 U.S. 64 (1938)*, a result in accord with current federal court decisions. See *Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555-556 n.2 (2nd Cir.*

1967). The Committee deemed the proviso to be necessary in the light of the Advisory Committee's view (see its note to Court [proposed] Rule 501) that this result is not mandated under Erie.

The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy. In addition, the Committee considered that the Court's proposed Article V would have promoted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and federal courts. The Committee's proviso, on the other hand, under which the federal courts are bound to apply the State's privilege law in actions founded upon a State-created right or defense removes the incentive to "shop".

Notes of Committee on the Judiciary, Senate Report No. 93-1277. Article V as submitted to Congress contained 13 rules. Nine of those rules defined specific nonconstitutional privileges which the Federal courts must recognize (i.e., required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Many of these rules contained controversial modifications or restrictions upon common law privileges. As noted supra, the House amended article V to eliminate all of the Court's specific rules on privileges. Through a single rule, 501, the House provided that privileges shall be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience (a standard derived from *rule 26 of the Federal Rules of Criminal Procedure*) except in the case of an element of a civil claim or defense as to which State law supplies the rule of decision, in which event state privilege law was to govern.

The committee agrees with the main thrust of the House amendment: that a federally developed common law based on modern reason and experience shall apply except where the State nature of the issues renders deference to State privilege law the wiser course, as in the usual diversity case. The committee understands that thrust of the House amendment to require that State privilege law be applied in "diversity" cases (actions on questions of State law between citizens of different States arising under *28 U.S.C. § 1332*). The language of the House amendment, however, goes beyond this in some respects, and falls short of it in others; State privilege law applies even in nondiversity. Federal question civil cases, where an issue governed by State substantive law is the object of the evidence (such issues do sometimes arise in such cases); and, in all instances where State privilege law is to be applied, e.g., on proof of a State issue in a diversity case, a close reading reveals that State privilege law is not to be applied unless the matter to be proved is an element of that state claim or defense, as distinguished from a step along the way in the proof of it.

The committee is concerned that the language used in the House amendment could be difficult to apply. It provides that "in civil actions * * * with respect to an element of a claim or defense as to which State law supplies the rule of decision," State law on privilege applies. The question of what is an element of a claim or defense is likely to engender considerable litigation. If the matter in question constitutes an element of a claim, State law supplies the privilege rule; whereas if it is a mere item of proof with respect to a claim, then, even though State law might supply the rule of decision, Federal law on the privilege would apply. Further, disputes will arise as to how the rule should be applied in an antitrust action or in a tax case where the Federal statute is silent as to a particular aspect of the substantive law in question, but Federal cases had incorporated State law by reference to State law. [For a discussion of reference to State substantive law, see note on Federal Incorporation by Reference of State Law, Hart & Wechsler, The Federal Courts and the Federal System, pp. 491-494 (2d ed. 1973).] Is a claim (or defense) based on such a reference a claim or defense as to which federal or State law supplies the rule of decision?

Another problem not entirely avoidable is the complexity or difficulty the rule introduces into the trial of a Federal case containing a combination of Federal and State claims and defenses, e.g. an action involving Federal antitrust and State unfair competition claims. Two different bodies of privilege law would need to be consulted. It may even develop that the same witness-testimony might be relevant on both counts and privileged as to one but not the other. [The problems with the House formulation are discussed in Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Georgetown University Law Journal 125 (1973) at notes 25, 26 and 70-74 and accompanying text.]

The formulation adopted by the House is pregnant with litigious mischief. The committee has, therefore, adopted what we believe will be a clearer and more practical guideline for determining when courts should respect State rules of privilege. Basically, it provides that in criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced. [It is also intended that the Federal law of privileges should be applied with respect to pendant State law claims when they arise in a Federal question case.] Conversely, in diversity cases where the litigation in question turns on a substantive question of State law, and is brought in the Federal courts because the parties reside in different States, the committee believes it is clear that State rules of privilege should apply unless the proof is directed at a claim or defense for which Federal law supplies the rule of decision (a situation which would not commonly arise.) [While such a situation might require use of two bodies of privilege law, federal and state,

in the same case, nevertheless the occasions on which this would be required are considerably reduced as compared with the House version, and confined to situations where the Federal and State interests are such as to justify application of neither privilege law to the case as a whole. If the rule proposed here results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rule favoring reception of the evidence should be applied. This policy is based on the present *rule 43(a) of the Federal Rules of Civil Procedure* which provides:

In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.] It is intended that the State rules of privilege should apply equally in original diversity actions and diversity actions removed under *28 U.S.C. § 1441(b)*.

Two other comments on the privilege rule should be made. The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

Further, we would understand that the prohibition against spouses testifying against each other is considered a rule of privilege and covered by this rule and not by rule 601 of the competency of witnesses.

Notes of the Conference Committee, House Report No. 93-1597. Rule 501 deals with the privilege of a witness not to testify. Both the House and Senate bills provide that federal privilege law applies in criminal cases. In civil actions and proceedings, the House bill provides that state privilege law applies "to an element of a claim or defense as to which State law supplies the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under *28 U.S.C. § 1332* or *28 U.S.C. § 1335*, or between citizens of different States and removed under *28 U.S.C. § 1441(b)* the privilege of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to "an element of a claim or defense." If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state privilege law applies to that item of proof.

Under the provision in the House bill, therefore, state privilege law will usually apply in diversity cases. There may be diversity cases, however, where a claim or defense is based upon federal law. In such instances, Federal privilege law will apply to evidence relevant to the federal claim or defense. See *Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942)*.

In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law. As Justice Jackson has said:

A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447, 471 (1942)* (Jackson, J., concurring). When a federal court chooses to absorb state law, it is applying the state law as a matter of federal common law. Thus, state law does not supply the rule of decision (even though the federal court may apply a rule derived from state decisions), and state privilege law would not apply. See C. A. Wright, Federal Courts 251-252 (2d ed. 1970); *Holmberg v. Armbrecht, 327 U.S. 392 (1946); DeSylva v. Ballentine, 351 U.S. 570, 581 (1956);* 9 Wright & Miller, Federal Rules and Procedure § 2408.

In civil actions and proceedings, where the rule of decision as to a claim or defense or as to an element of a claim or defense is supplied by state law, the House provision requires that state privilege law apply.

The Conference adopts the House provision.

CERTIFICATE OF SERVICE

I, Michael H. Dore, hereby certify as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is Gibson, Dunn & Crutcher LLP, 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; I am a member of the bar of this Court, and on August 11, 2006, I served the following:

1. **MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANT JOSHUA WOLF URGING REVERSAL**

2. **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**

on the interested parties in this action, by emailing pdf copies of the above documents to the parties' attorney(s) of record, addressed as follows:

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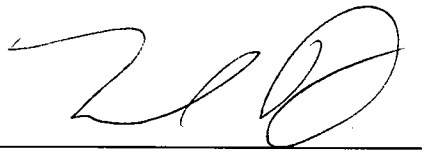
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 11, 2006, at Los Angeles, California.



Michael H. Dore