

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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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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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-

