Nos. 04-1507 & 04-1508

IN THE

Supreme Court of the United States

JUDITH MILLER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

MATTHEW COOPER AND TIME INC.,
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v.
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE STATES OF OKLAHOMA, TEXAS, NEBRASKA, NORTH CAROLINA, TENNESSEE, NEW MEXICO, UTAH, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MONTANA, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, VERMONT, WASHINGTON, WEST VIRGINIA AND WISCONSIN AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The thirty-four *Amici* States and the District of Columbia, each of which appears in this Court through its respective

Attorney General, recognize some form of a "reporter's privilege" through either legislation or judicial decision. The privilege protects journalists from compelled disclosure of information obtained from confidential sources. In applying the privilege, most States employ a balancing test that weighs the public interest in protecting reporters' newsgathering and the free flow of information against the relevance of the information, the availability of alternative sources and the public interest in compelling disclosure.

These "shield laws," like those of the other fifteen states that have them, share a common purpose: to assure that the public enjoys a free flow of information and that journalists who gather and report the news to the public can do so in a free and unfettered atmosphere. The shield laws also rest on the uniform determination by the States that, in most cases, compelling newsgatherers to disclose confidential information is contrary to the public interest.

As Judge Tatel noted in his concurring opinion in the court of appeals, there has been a "shift in favor of the [reporter's] privilege" among the States since this Court last addressed the issue in *Branzburg v. Hayes*, 408 U.S. 665 (1972), "from seventeen states with statutory privileges then to thirty-one plus D.C. today, with another eighteen providing common law protection." Pet. App. 59a.[1] The statutes and judicial decisions of the fifty jurisdictions that fueled this "dramatic growth in support for the reporter privilege," *id.* 61a, are collected in the Miller Petition (No. 04-1507) at 23 nn.21-22.

The decision below – in which the court of appeals declined to fashion *any* corresponding federal reporter's privilege – conflicts with the recognition of such a privilege by virtually every State and the District of Columbia. A federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and

[1] The fiftieth State, Wyoming, has yet to address the issue.

protect "buck[s] the clear policy of virtually all states," Pet. App. 58a (Tatel, J., concurring), and undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them. *Cf. Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996).[2]

The *Amici* States also have a vital interest in this issue independent of protecting the integrity of their shield laws. Uncertainty and confusion – exemplified by the split in the federal courts of appeals and by the fractured panel opinions below – have marked this area of the law in the three decades that have passed since this Court decided *Branzburg* and the Congress enacted Rule 501 of the Federal Rules of Evidence. This increasing conflict has undercut the State shield laws just as much as the absence of a federal privilege.

REASONS FOR GRANTING THE PETITIONS

I. THE LACK OF A FEDERAL REPORTER'S PRIVILEGE UNDERMINES THE LEGISLATIVE AND JUDICIAL DETERMINATIONS OF FORTY-NINE STATES AND THE DISTRICT OF COLUMBIA

Forty-nine States and the District of Columbia recognize some form of reporter's privilege.[3] The scope of the privileges varies, but all rest on a legislative or judicial determination that an informed citizenry and the preservation of news information sources are of vital importance to a free

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[2] *Amici* take no position on whether such a privilege would cover the communications at issue in this case, or on the Fifth Amendment questions presented in the Petitions for Certiorari.

[3] Some have done so by statute and others by judicial decision; some privileges are absolute, but most are qualified; most jurisdictions use the "privilege" label; others, such as Maine, employ the case-by-case balancing test approach outlined in Justice Powell's concurring opinion in *Branzburg*, 408 U.S. at 709-10. *See In re Letellier*, 578 A.2d 722, 725-27 (Me. 1990).

society. Without such a privilege, reporters in those States would find their newsgathering abilities compromised, and citizens would find themselves far less able to make informed political, social and economic choices.

The determinations made by Nebraska and North Carolina typify those of the other forty-eight jurisdictions. As the Nebraska Legislature found, a shield law vindicates the State's policy of "insur[ing] the free flow of news and other information to the public," and guaranteeing that "those who gather, write, or edit information for the public or disseminate information to the public . . . perform these vital functions only in a free and unfettered atmosphere." Neb. Rev. Stat. Ann. § 20-144. Moreover, "compelling such persons to disclose a source of information or disclose unpublished information is contrary to the public interest and inhibits the free flow of information to the public." *Id.*

In North Carolina, the reporter's privilege likewise is intended

> to protect the free flow of information and avoid the impediment that occurs when reporters are subjected to in-court examination of their newsgathering activities. . . .
>
> . . . The compelled production of a reporter's resource materials and testimony can constitute a significant intrusion into the newsgathering and editorial processes and may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the reporter's privilege.

Higgins v. Young, No. 97CVD563, 2001 WL 1692379, at *2 (N.C. Super. Ct. Aug. 8, 2001) (unpublished opinion) (citing N.C. Gen. Stat. § 8-53.11(c)).

The lack of a corresponding federal reporter's privilege undermines these vital State interests. Without it,

> the degree to which confidential sources could be protected would be rendered uncertain, thereby lessening the likelihood that such sources will cooperate and undercutting the very benefit to the public that . . . many . . . states . . . sought to bestow through [their] shield law[s].

New York Times Co. v. Gonzales, No. 04 Civ. 7677(RWS), 2005 WL 427911, at *41 (S.D.N.Y. Feb. 24, 2005, as amended Mar. 2, 2005).

To quote Judge Tatel, continued denial of a federal reporter's privilege would "'frustrate the purposes of the state legislation' by exposing confidences protected under state law to discovery in federal courts." Pet. App. 57a (quoting *Jaffee*, 518 U.S. at 13).

II. CHANGES IN THE STATE LAW LANDSCAPE IN THE THIRTY YEARS SINCE *BRANZBURG* AND THE ENACTMENT OF RULE 501, AND THE DISARRAY IN THE CIRCUITS, MAKE THE ISSUE RIPE FOR DECISION BY THIS COURT

Rule 501 of the Federal Rules of Evidence "did not freeze the law governing the privileges of witnesses in federal trials," but instead directed the "federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee*, 518 U.S. at 8-9 (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)). The federal courts are to do so "by interpreting 'common law principles . . . in the light of reason and experience.'" *Id.* at 8 (quoting Rule 501) (alteration in original). In deciding whether that "evolutionary development" has reached the point where "reason and experience" make it appropriate to define a new testimonial privilege,

State precedent and the existence of a consensus among the States are of particular importance. *Id.* at 12-13.

As this Court observed in *Jaffee*, the "policy decisions of the States bear on the question whether federal courts should recognize a new privilege." *Id.* (citing *Trammel*, 445 U.S. at 48-50; *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980)). 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." *Jaffee*, 518 U.S. at 13. The case for the privilege is even stronger where, as here, "the information sought is protected by a state privilege." *Pearson v. Miller*, 211 F.3d 57, 67 (3d Cir. 2000).[4]

Here, as in *Jaffee*, a "consistent body" of policy determinations by State legislatures reflects both "reason" and "experience." *Jaffee*, 518 U.S. at 13 (citing *Funk v. United States*, 290 U.S. 371, 376-81 (1933)). And, again as in *Jaffee*, the history of the reporter's privilege shows that in the years since *Branzburg* and the enactment of Rule 501, the States' lawmakers moved quickly to adopt the reporter's privilege, as they "rapidly recognized the wisdom" of such a privilege. 518 U.S. at 14.

To be sure, the States' shield laws and judicially crafted reporter's privileges vary in scope and exceptions. But all State *Amici* agree that some form of a reporter's privilege grounded in federal common law is appropriate, and the majority of States have adopted a balancing test approach akin to that suggested by Judge Tatel. *See* Pet. App. 62a-72a. Because "confidential sources are essential to the workings of the press—a practical reality that virtually all states and the

[4] If this matter had involved a District of Columbia, instead of a federal, grand jury, the District of Columbia shield law (D.C. Code Ann. §§ 16-4701-16-4704) would have protected Petitioners.

federal government now acknowledge," the *Amici* States, like Judge Tatel, believe that "'reason and experience' compel recognition of a privilege for reporters' sources." Pet. App. 84a-85a.[5]

The consensus among the States on the reporter's privilege issue is as universal as the federal courts of appeals decisions on the subject are inconsistent, uncertain and irreconcilable. For example, the Eleventh Circuit holds that the privilege exists in both criminal and civil cases,[6] the Ninth Circuit applies the privilege in the civil[7] and criminal[8] trial contexts, but not in the grand jury context,[9] and the Seventh Circuit concludes[10] that there is no privilege at all.[11] These vagaries in the application of the federal privilege corrode the protection the States have conferred upon their citizens and newsgatherers, as an "'uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" *Jaffee*, 518 U.S. at 18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

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[5] *Amici* take no position at the Petition Stage on the precise form and scope of such a privilege.

[6] *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

[7] *Shoen v. Shoen*, 5 F.3d 1289, 1295-96 (9th Cir. 1993).

[8] *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975).

[9] *Scarce v. United States (In re Grand Jury Proceedings)*, 5 F.3d 397, 401-02 (9th Cir. 1993).

[10] *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

[11] These divergent approaches are canvassed at length in the Miller Petition (No. 04-1507) at 13-19 and the Cooper/Time Petition (No. 04-1508) at 14-16, 22-23.

CONCLUSION

The present confusion and lack of clarity as to the existence and the scope of a federal reporter's privilege, three decades after *Branzburg* and Rule 501, disserve the public, sources and reporters in every State. A decision in this case by this Court, definitively resolving the question of a reporter's privilege, "will provide critical guidance in similar situations in the future." Pet. App. 53a (Tatel, J., concurring). Accordingly, "[f]or the sake of reporters and sources whom such litigation may ensnare," this Court "should take this opportunity to clarify the rules governing their relationship," *id.*, by granting the Petitions.

Respectfully submitted,

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