06-16995, 06-16996

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: GRAND JURY SUBPOENAS TO MARK FAINARU-WADA, LANCE WILLIAMS, and THE SAN FRANCISCO CHRONICLE,

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARK FAINARU-WADA; et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF AND APPENDIX FOR AMICI CURIAE STATES OF NEW YORK, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, ILLINOIS, IOWA, KENTUCKY, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEVADA, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, OREGON, TENNESSEE, TEXAS, UTAH, WASHINGTON, WEST VIRGINIA AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF REVERSAL OF THE DISTRICT COURT

ELIOT SPITZER
Attorney General of the
State of New York
The Capitol
Albany, New York 12224
(518) 473-6948

Dated: December 7, 2006

CAITLIN J. HALLIGAN
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
ANDREA OSER
Assistant Solicitor General
KATE H. NEPVEU
Assistant Solicitor General
of Counsel

Attorneys for Amici Curiae

[additional counsel listed on signature page]

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IDENTITY AND INTEREST OF THE AMICI CURIAE

Twenty-four states and the Commonwealth of Puerto Rico file this amici brief under Federal Rule of Appellate Procedure 29(a) in support of reversal of the district court's order. Unlike the district court, almost all of these states would provide reporters with at least some protection against revealing the identities of confidential sources before a grand jury. This protection embodies the amici states' recognition that the free flow of information is vital to the workings of a healthy democracy; that journalists play a crucial role in gathering and reporting such information; that the most important information must often come from sources who need or prefer to remain confidential; and that without the confidentiality guaranteed by the reporter's privilege, the sources will remain silent and their information secret. The district court's decision undermines the states' protection by refusing to recognize any federal common-law privilege, let alone a privilege that would consider the public's interests before requiring disclosure of confidential sources. As a result, the amici states urge the Court to adopt a qualified federal common-law privilege that considers the interests of the public, as well as the interests of the litigants, before requiring reporters to disclose the identities of their confidential sources. Amici take no position on the application of this privilege to the facts of the case.

SUMMARY OF ARGUMENT

In determining whether to recognize a federal common-law evidentiary privilege, federal courts consider the policies of the states with respect to the asserted privilege. Here, the states' broad protection for reporters weighs in favor of recognizing a common-law reporter's privilege. Moreover, that privilege should require that any effort to overcome it include a showing that the public interest in disclosure outweighs the public interest in confidentiality. A lesser federal privilege, or no privilege at all, renders meaningless the states' protections and chills speech as much as a complete absence of state protection would.

ARGUMENT

THE COURT SHOULD RECOGNIZE A QUALIFIED COMMON-LAW PRIVILEGE THAT WEIGHS THE INTERESTS OF THE PUBLIC AND THE LITIGANTS BEFORE REQUIRING REPORTERS TO DISCLOSE THE IDENTITIES OF THEIR CONFIDENTIAL SOURCES

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . 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." In Jaffee v. Redmond, 518 U.S. 1 (1996), the Supreme Court applied Rule 501 to recognize a new evidentiary privilege protecting communications between psychotherapists and patients. In doing so, it relied heavily on "the policy decisions of the States," for two reasons.

Id. at 12-13. First, it recognized that "a consensus among the States indicates that 'reason and experience' support recognition of the privilege." Id. at 13. Second, it understood that "any State's promise of confidentiality would have little value if the [communicant] were aware that the privilege would not be honored in a federal court." Id. Both of these factors apply as strongly here as they did in Jaffee, and therefore support recognition of a federal common-law reporter's privilege.[1]

The states' extensive protection of reporters indicates that a privilege should be recognized that also protects reporters in federal court. As described in the Appendix, thirty-nine states protect journalists who are asked to name confidential sources before a grand jury, nineteen of them via an absolute privilege or immunity from contempt, and twenty others with a qualified privilege subject to a balancing test.[2] Fully thirty-four of these states (including California, where the articles under investigation were published, and all of the other states in this Circuit but the one that has not spoken on the issue) would

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[1] The Court also considered two other factors, the importance of the public and private interests involved, and the likely evidentiary benefit that would result from denying the privilege. 518 U.S. at 11-12. Since these factors are fully briefed elsewhere, amici simply note their position that these factors also support recognition of a reporter's privilege.

[2] As described in Appellants' Opening Brief (pp. 35-36 & nn. 10-11), every state except Wyoming would protect journalists in some circumstances.

unquestionably provide some protection to the reporters in this case, were the reporters before a grand jury in those states. Moreover, unless the reporters are considered to be eyewitnesses to a crime, another four states would protect them.[3]

Thus, there is "a consensus among the States." Jaffee, 518 U.S. at 13. This consensus demonstrates that "'reason and experience' support recognition of the privilege." Id. Just as importantly, however, the consensus demonstrates the extent of the harm of not recognizing a federal privilege. As the Supreme Court said in Jaffee, the lack of a federal privilege renders the states' protections of "little value" to one who wishes to communicate confidentially, because the communication remains unprotected in federal court. Id. Denying a federal privilege thus "would frustrate the purposes of the state legislation" and the state court decisions that seek "to foster these confidential communications." Id.

If this Court recognizes a reporter's privilege, it should require a finding that disclosure is in the public's interest before confidentiality is breached. While the states are not uniform in this regard,[4] the majority, thirty-two of them,

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[3] The remaining state, Rhode Island, would provide a privilege for anything but an investigation into a breach of grand jury secrecy.

[4] The federal courts have also expressed differences of opinion about the scope of a common-law reporter's privilege. Compare In Re Grand Jury Subpoena (Miller), 397 F.3d 964, 998

provide at least that much protection to reporters before a grand jury. For instance, eight states -- Alaska, Arkansas, Connecticut, Illinois, Louisiana, Minnesota, North Dakota, and Tennessee -- require findings that disclosure is essential to the public interest (or that non-disclosure would be contrary to that interest). Five more -- Colorado, Hawaii, Massachusetts, New Mexico, and Wisconsin -- require the private interests in disclosure to be so important that they outweigh the public interest in confidentiality. And, of course, nineteen states provide an absolute privilege.

Reason and policy support explicit consideration of the public interest in any balancing test this Court adopts. Since the existence of the privilege derives from a recognition that it serves public interests, logically speaking it should be overcome only if public interests are no longer served by its application in a particular case. The alternative is a test that considers only the interests of the litigants, generally formulated as requiring the sought-after information to be material, relevant,

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(D.C. Cir. 2005) (Tatel, J., concurring) (arguing for a common-law reporter's privilege that weighs the public's interests), and The New York Times Co. v. Gonzales, 459 F.3d 160, 186 (2d Cir. 2006) (Sack, J., dissenting) (same), with In Re Grand Jury Subpoena (Miller), 397 F.3d at 976 (Sentelle, J., concurring) (arguing that a common-law reporter's privilege should be rejected) and The New York Times Co., 459 F.3d at 169-70 (declining to state the precise contours of a qualified common-law privilege because any such privilege would be overcome on the facts before the court).

otherwise unavailable, and necessary to the party seeking disclosure (see Appendix at A-4). But such a test is problematic when the privilege is asserted by reporters who are asked to name their confidential sources of leaked information, because the litigant seeking disclosure can almost always argue that it needs the information and cannot obtain it elsewhere. A privilege that does not include a consideration of the public's interests, in addition to the litigants' interests, thus would be ineffective. See The New York Times Co. v. Gonzales, 459 F.3d 160, 185-86 (2d Cir. 2006) (Sack, J., dissenting); In Re Grand Jury Subpoena (Miller), 397 F.3d 964, 997-98 (D.C. Cir. 2005) (Tatel, J., concurring). And as with recognition of the privilege generally, recognition of a less-protective privilege would undermine the states' protections and chill the speech that the states seek to foster.

CONCLUSION

For the reasons set forth above, the Court should recognize a qualified common-law reporter's privilege that can only be overcome after a showing that the public interest would be served by disclosure of confidential sources to a grand jury.

Dated: Albany, New York
December 7, 2006

Respectfully submitted,

ELIOT SPITZER
Attorney General of the
State of New York
The Capitol
Albany, New York 12224
(518) 473-6948

By:_____
ANDREA OSER
Assistant Solicitor General

CAITLIN J. HALLIGAN
Solicitor General

DANIEL SMIRLOCK
Deputy Solicitor General

KATE H. NEPVEU
Assistant Solicitor General

of Counsel

Terry Goddard
Attorney General of Arizona
1275 West Washington
Phoenix, AZ 85007
(602) 542-4266

Bill Lockyer
Attorney General
State of California
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 445-9555

John W. Suthers
Attorney General of Colorado
1525 Sherman St.
Fifth Floor
Denver, CO 80203
(303) 866-4500

Richard Blumenthal
Attorney General of
Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5318

Charles J. Crist, Jr.
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

Mark J. Bennett
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

Lisa Madigan
Attorney General of Illinois
100 West Randolph Street
Chicago, IL 60601
(312) 814-3000

Thomas J. Miller
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, IA 50319
(515) 281-5164

Gregory D. Stumbo
Attorney General of Kentucky
Suite 118, Capitol Building
700 Capitol Avenue
Frankfort, KY 40601-3449
(502) 696-5300

J. Joseph Curran, Jr.
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6300

Thomas F. Reilly
Attorney General of
Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

Jim Hood
Mississippi Attorney General
Department of Justice
P.O. Box 220
Jackson, MS 39205
(601) 359-3680

Mike McGrath
Attorney General of Montana
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

George J. Chanos, Attorney
General
Office of the Attorney General
Nevada Department of Justice
100 North Carson Street
Carson City, NV 89701
775-684-1112

Patricia A. Madrid
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6000

Roy Cooper
Attorney General of North
Carolina
9001 Mail Service Center
Raleigh, NC 27699-9001
(919) 716-6400

W.A. Drew Edmondson
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105-4894
(405) 521-3921

Hardy Myers
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301
(503) 378-4400

Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548
(512) 463-2100

Robert E. Cooper, Jr.
Attorney General and Reporter
of Tennessee
P.O. Box 20207
Nashville, TN 37202-0207
(615) 7841-3491

Mark L. Shurtleff
Utah Attorney General
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-2320
(801) 538-9600

Rob McKenna
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Darrell V. McGraw, Jr.
West Virginia Attorney General
Office of the Attorney General
State Capitol, Room 26-E
Charleston, WV 25305
(304) 558-2021

Roberto J. Sànchez Ramos
Secretary of Justice
Commonwealth of Puerto Rico
P.O. Box 9020192
San Juan, PR 00902-0192
(787) 721-2900

Attorneys for Amici Curiae

APPENDIX: STATES' PROTECTION OF REPORTERS AGAINST DISCLOSURE OF CONFIDENTIAL SOURCES BEFORE A GRAND JURY

Absolute Protection (19 states)

State	Source
AL	Ala. Code § 12-21-142 (2005).
AZ	Ariz. Rev. Stat. § 12-2237 (2006).
CA	Cal. Const., Art. I, § 2(b).
DE	Del. Code Ann. tit. 10, §§ 4320 to 4321 (2005).
DC	D.C. Code Ann. §§ 16-4701 to 16-4704 (2006).
IN	Ind. Code §§ 34-46-4-1 to 34-46-4-2 (2006).
KY	Ky. Rev. Stat. § 421.100 (2006).[1]
MD	Md. Ann. Code, Cts. & Jud. Pro., § 9-112 (2006).
MI	Mich. Comp. Laws § 767.5a (2006).[2]
MT	Mont. Code Ann. §§ 26-1-901 to 26-1-903 (2005).
NE	Neb. Rev. Stat. §§ 20-144 to 20-147 (2006).
NV	Nev. Rev. Stat. §§ 49.275, 49.385 (2006).
NJ	N.J. Stat. Ann. §§ 2A:84A-21, 2A:84A-21.1 (2006).
NY	N.Y. Civ. Rights Law § 79-h (2006).
OH	Ohio Rev. Code Ann. §§ 2739.04, 2739.12 (2006).
OK	Okla. Stat. tit. 12, § 2506 (2005).
OR	Or. Rev. Stat. §§ 44.510 to 44.540 (2006).

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[1] Branzburg v. Pound, 461 S.W.2d 345, 347-48 (Ky. 1971), aff'd sub nom. Branzburg v. Hayes, 408 U.S. 665 (1972), held that the statute protects the source of information, not the information itself; it therefore does not protect the identity of perpetrators of a crime who also happen to be informants.

[2] Except for investigations of crimes punishable by life imprisonment, in which case the privilege is qualified.

Absolute Protection (con't)

State	Source
PA	42 Pa. Cons. Stat. § 5942 (2006).
RI	R.I. Gen. Laws §§ 9-19.1-1 to 9-19.1-3 (2006).[3]

[3] Does not apply to the source of information concerning details of grand jury proceedings; the privilege is qualified for criminal prosecutions of a felony or for preventing threats to human life.

Qualified Protection Requiring Consideration of the Public Interest (13 states)

State	Source
AK	Alaska Stat. §§ 09.25.300 to 09.25.390 (2006) (overcome if confidentiality would be contrary to public interest).
AR	Ark. Code Ann. § 16-85-510 (2006) (overcome if article was published in bad faith, with malice, and not in the interest of the public welfare).
CO	Colo Rev. Stat. § 13-90-119 (2006) (overcome if private interests outweigh public's interests).[4]
CT	Conn. Public Act No. 06-140 (enacted June 6, 2006; effective October 1, 2006) (overcome if overriding public interest in disclosure).
HI	In re Goodfader's Appeal, 367 P.2d 472, 483 (Haw. 1961) (overcome if litigant's interest outweighs the reporter's "obligation to the tradition of his calling").
IL	735 Ill. Comp. Stat. §§ 5/8-901 to 5/8-909 (2006) (overcome if disclosure essential to public interest).
LA	La. Rev. Stat. §§ 45:1451 to 45:1453 (2006) (overcome if disclosure essential to public interest).
MA	In re John Doe Grand Jury Invest., 574 N.E.2d 373, 375 (Mass. 1991) (overcome if private interests outweigh public's interests).
MN	Minn. Stat. §§ 595.021 to 595.024 (2005) (overcome if disclosure necessary to prevent injustice).
NM	N.M. R. Evid. 11-514 (2005) (overcome if private interests outweigh public's interests).
ND	N.D. Cent. Code § 31-01-06.2 (2006) (overcome if disclosure necessary to prevent miscarriage of justice).
TN	Tenn. Code Ann. § 24-1-208 (2006) (overcome if overriding public interest in disclosure).

[4] Does not apply to personal observation of a misdemeanor if the information cannot reasonably be otherwise obtained, or to personal observation of a felony.

Qualified Protection Requiring Consideration of the Public Interest (con't)

WI State ex rel. Green Bay Newspaper Co. v. Circuit Court, 335 N.W.2d 367, 371-72 (Wis. 1983) (overcome if private interests outweigh public's interests).

Qualified Protection Not Requiring Consideration of the Public Interest (7 states)

State	Source
FL	Fla. Stat. § 90.5015 (2006).[5]
GA	Ga. Code Ann. § 24-9-30 (2006); In re Paul, 513 S.E.2d 219, 223 (Ga. 1999) ("[T]he statutory language does not distinguish between the source's identity and information received from that source.").
ID	In re Wright, 700 P.2d 40, 41, 43, 45 (Idaho 1985).
IA	Waterloo/Cedar Falls Courier v. Hawkeye Community College, 646 N.W.2d 97, 102-03 (Iowa 2002); Bell v. Des Moines, 412 N.W.2d 585, 587 (Iowa 1987).
MS	Eason v. Federal Broadcasting Co., 697 So. 2d 435, 437 (Miss. 1997) (acknowledging the existence of a qualified privilege); New York Times Co. v. Gonzales, 382 F. Supp. 2d 457, 503 & n38 (S.D.N.Y. 2005) (citing unpublished trial-level opinions applying the qualified privilege to grand jury inquiries); Reporter's Committee for Freedom of the Press, The Reporter's Privilege: Mississippi (2002), available at <http://www.rcfp.org/cgi-local/privilege/item.cgi?i=p&st=MS&sec=1> (citing unpublished trial-level opinion applying the qualified privilege to a confidential source).
NC	N.C. Gen. Stat. § 8-53.11 (2006).[6]
SC	S.C. Code Ann. § 19-11-100 (2005).

[5] Does not apply to eyewitness observations or physical evidence of crimes.

[6] Does not apply to eyewitness observation or physical evidence of crimes or torts.

No Protection Because of Legislative and Judicial Silence (6 states)

State	Source
MO	Compare State ex rel. Classic III Inc. v. Ely, 954 S.W.2d 650, 655 (Mo. Ct. App. 1997) (considering confidential sources in a civil case); CBS Inc. (KMOX-TV) v. Campbell, 645 S.W.2d 30, 32-33 (Mo. Ct. App. 1982) (considering non-confidential information before grand jury).
NH	Compare State v. Siel, 444 A.2d 499, 502-03 (N.H. 1982) (considering qualified privilege in criminal case).
SD	Compare Hopewell v. Midcontinent Broad. Corp., 538 N.W.2d 780, 782 (S.D. 1995) (considering qualified privilege in civil case).
UT	Compare New York Times Co. v. Gonzales, 382 F. Supp. 2d 457, 503 & n38 (S.D.N.Y. 2005) (discussing unpublished trial-level opinions recognizing a qualified privilege in civil and criminal cases).
WA	Compare State v. Rinaldo, 689 P.2d 392, 395-96 (Wash. 1984) (en banc) (considering qualified privilege applicable to civil and criminal cases).
WY	The courts and legislature have remained silent. See New York Times Co. v. Gonzales, 382 F. Supp. 2d 457, 504 (S.D.N.Y. 2005); Reporter's Committee for Freedom of the Press, The Reporter's Privilege: Wyoming (2002), available at <http://www.rcfp.org/cgi-local/privilege/item.cgi?i=p&st=WY&sec=1>.

No Protection (6 states)

State	Source
KS	In re Pennington, 581 P.2d 812, 814-815 (Kan. 1978).
ME	In re Letellier, 578 A.2d 722, 724, 727 (Me. 1990).
TX	State ex. rel. Healey v. McMeans, 884 S.W.2d 772, 775 (Tex. Crim. App. 1994).
VT	In re Inquest Subpoena (WCAX), 890 A.2d 1240, 1241-42 (Vt. 2005).
VA	Brown v. Commonwealth, 204 S.E.2d 429, 431 (Va. 1974).
WV	State ex rel. Hudok v. Henry, 389 S.E.2d 188, 192-93 (W. Va. 1989).