

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,

---

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]*

**TABLE OF CONTENTS**

	<b>PAGE</b>
TABLE OF AUTHORITIES . . . . .	ii
IDENTITY AND INTEREST OF THE AMICI CURIAE . . . . .	1
SUMMARY OF ARGUMENT . . . . .	2
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 . . . . .	2
CONCLUSION . . . . .	7
APPENDIX . . . . .	A-1

**TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGE</b>
<u>In Re Grand Jury Subpoena (Miller),</u> 397 F.3d 964 (D.C. Cir. 2005) . . . . .	4n-5n,6
<u>Jaffee v. Redmond,</u> 518 U.S. 1 (1996) . . . . .	2,3,4
<u>The New York Times Co. v. Gonzales,</u> 459 F.3d 160 (2d Cir. 2006) . . . . .	5n,6
 <b>FEDERAL RULES AND REGULATIONS</b>	
Federal Rule of Appellate Procedure 29a . . . . .	1
Federal Rule of Evidence 501 . . . . .	2

## **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.<sup>1</sup>

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.<sup>2</sup> 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

---

<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup>

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,<sup>4</sup> the majority, thirty-two of them,

---

<sup>3</sup> The remaining state, Rhode Island, would provide a privilege for anything but an investigation into a breach of grand jury secrecy.

<sup>4</sup> 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,

---

(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. Sánchez 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). <sup>1</sup>
MD	Md. Ann. Code, Cts. & Jud. Pro., § 9-112 (2006).
MI	Mich. Comp. Laws § 767.5a (2006). <sup>2</sup>
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).

---

<sup>1</sup> 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.

<sup>2</sup> 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).<sup>3</sup>

---

<sup>3</sup> 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). <sup>4</sup>
CT	Conn. Public Act No. 06-140 (enacted June 6, 2006; effective October 1, 2006) (overcome if overriding public interest in disclosure).
HI	<u>In re Goodfader's Appeal</u> , 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	<u>In re John Doe Grand Jury Invest.</u> , 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).

---

<sup>4</sup> 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).<sup>5</sup>
- 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).<sup>6</sup>
- SC S.C. Code Ann. § 19-11-100 (2005).

---

<sup>5</sup> Does not apply to eyewitness observations or physical evidence of crimes.

<sup>6</sup> 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).