NO. 01-20745

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: GRAND JURY SUBPOENA TO VANESSA LEGGETT

VANESSA LEGGETT

Defendant-Appellant

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston Division

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BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, AND SOCIETY OF PROFESSIONAL JOURNALISTS, SUPPORTING REVERSAL OF CONTEMPT ORDER AGAINST VANESSA LEGGETT

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

The Reporters Committee for Freedom of the Press ("Reporters Committee") 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. Since its founding in 1970, the Reporters Committee has provided representation, information, legal guidance, and research in press freedom cases, including cases involving the qualified journalist's privilege against compelled disclosure of unpublished material, particularly material related to confidential sources.

The American Society of Newspaper Editors ("ASNE") is a professional organization of more than 900 persons who hold positions as directing editors of daily newspapers in the United States and Canada.

The Radio-Television News Directors Association ("RTNDA") is the world's largest professional organization devoted exclusively to electronic journalism. Formed in 1946, RTNDA's membership encompasses more than 3000 news directors, news associates, educators, and students in more than 30 countries. From its inception, RTNDA has encouraged excellence in electronic journalism.

The Society of Professional Journalists ("SPJ") is a voluntary nonprofit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

The Reporters Committee, ASNE, RTNDA, and SPJ (collectively, "Amici") adopt the arguments contained in Appellant Vanessa Leggett's brief to this Court. Amici write separately to emphasize the constitutional considerations and public policy rationales supporting recognition of a First Amendment privilege afforded members of the press against compelled disclosure of both confidential and nonconfidential material, and the necessity of carefully analyzing the competing interests in adjudicating the issues presented to this Court.

Pursuant to Rule 29(a), (b) of the Federal Rules of Appellate Procedure, Amici are filing concurrently herewith a Motion for Leave seeking the Court's permission to file this Amici Curiae brief in support of reversing the contempt order against Appellant Vanessa Leggett.

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STATEMENT OF THE CASE

Amici adopt and rely upon the Statement of the Case submitted by Appellant Vanessa Leggett.

SUMMARY OF THE ARGUMENT

This brief is directed to the issue whether, and to what extent, there is a constitutional or federal common law privilege, or other protection, afforded members of the press to resist compelled production of confidential and nonconfidential material in response to a grand jury subpoena. Long established precedent from a substantial majority of circuits, including this circuit, supports the existence of a qualified privilege under the First Amendment or federal common law with respect to confidential material. While this Court's 1998 decision in United States v. Smith

decided the issue against the First Amendment interest with respect to unpublished, nonconfidential material subpoenaed in a criminal proceeding, this case presents the issue of unpublished, confidential material. Moreover, strong public policy rationales supporting the qualified privilege apply with equal force to unpublished, nonconfidential material, also at issue in this appeal. The remaining arguments advanced by Appellant Leggett in her brief to support reversal of the contempt order are not addressed by Amici.

ARGUMENT

I. Constitutional considerations, federal common law, and sound public policy dictate that this Court recognize a qualified privilege afforded members of the press to resist the compelled disclosure of newsgathering sources and materials in response to a grand jury subpoena

This appeal concerns an important matter of public interest, namely the ability of members of the press within the jurisdiction of the Fifth Circuit to rely upon a journalist's privilege to protect unpublished information, both confidential and nonconfidential, from compelled disclosure in response to a federal grand jury subpoena. By recognizing and applying a qualified privilege, or at a minimum a balancing test that many federal courts have adopted, this Court will ensure that journalists receive the protection necessary to carry out their constitutionally protected newsgathering and reporting activities. Absent this protection, the press will be reduced to an investigative arm of prosecutors, police, criminal defendants, and civil litigants, resulting in a severe chilling of the flow of information to the public. It is this public need for information that should be at the center of this debate, particularly with respect to confidential sources and information.

The U.S. Supreme Court has recognized the constitutional dimension of this public interest in Branzburg v. Hayes, 408 U.S. 665, 681 (1972), stating that the newsgathering and editorial processes are entitled to protection under the First Amendment: "Without some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg, 408 U.S. at 681. Nine justices agreed that reporters are entitled to some measure of qualified First Amendment protection from grand jury subpoenas. While the Court held, in a plurality opinion, that the reporters could be compelled to reveal sources to a grand jury on the facts presented, the Court also stated that "news gathering is not without its First Amendment protections . . . . We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." Branzburg, 408 U.S. at 707-08, 92 S.Ct. at 2670.

While it cannot be said that a consensus has been reached, there is now wide recognition in the federal circuits, and many state appellate courts, that journalists have a First Amendment privilege, or some protection, against compelled disclosure of their newsgathering activities.(1)

Courts repeatedly have acknowledged the chilling effect and resulting self-censorship that discovery of a journalist's unpublished information would have on the gathering and reporting of news. See, e.g., Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993) ("Society's interest in protecting the integrity of the newsgathering process, and in insuring 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.'") (quoting Herbert v. Lando, 441 U.S.

153, 183 (1979) (Brennan, J. dissenting)). Indeed, the First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth and D.C. Circuits have all interpreted Branzburg as establishing that a qualified privilege exists under the First Amendment for at least some unpublished information.(2) Moreover, eight federal circuits, including the Fifth Circuit, have held that the qualified privilege applies to journalists faced with a subpoena seeking discovery of confidential sources or, where the subpoenaing party has not met its burden, for unpublished information.(3)

Whether the First Amendment's protections of newsgathering activity rise to the level of a qualified privilege, and whether such a privilege is properly attributable to Branzburg, has been the subject of some debate. Nevertheless, it is clear that as a matter of constitutional or federal common law, the press is entitled to some degree of protection against intrusion into its newsgathering activities. Indeed, the mission of the press to inform the public will certainly suffer without such protection, a result that Justice White cautioned against in his pivotal concurrence in Branzburg: "[w]e do not hold . . . that state and federal authorities are free to annex the news media as an investigative arm of the government." Branzburg, 408 U.S. at 709 (White, J. concurring). The resulting harm is to the public, for whom a free press is designed to benefit.

The public policy supporting recognition of a journalist's qualified privilege is significant. An independent press provides information the public needs to make important decisions about the functioning of public and private institutions. In response to this need, broadcasters and publishers produce scores of news stories each day. By their very nature, the events that are of interest to the public and therefore newsworthy - actions of government officials, crime, fires, accidents, and natural disasters - often result in civil and criminal litigation.

In light of these essential and unique functions of the press, which distinguish the press from other private citizens, failure to recognize a journalist's privilege or some protection for unpublished materials, particularly confidential information, will have profound consequences. Abrogation of the privilege would result in the following: (1) the free flow of information to the public will be hampered as confidential informants come to understand that their identity and information will not be protected; (2) the public will begin to think of journalists as investigators for the government and private litigants, as opposed to independent newsgatherers serving the public interest; (3) the press will be burdened by an overwhelming number of requests for assistance by litigators in civil and criminal cases; and (4) journalists will curtail their research if they are required to serve as evidence collectors in addition to their traditional role as people who gather and disseminate news and information.

The constitutional considerations at issue in this appeal are weighty, and the public policy rationales for recognizing a journalist's qualified privilege are significant and real. This Court should recognize the assertion of a qualified privilege on behalf of Appellant Leggett to prevent the compelled disclosure of unpublished information, confidential and nonconfidential, in response to the grand jury's subpoena, or at a very minimum, recognize the need for protection in the form of a balancing test on a case-by-case basis.

A. This Court should apply a First Amendment privilege against compelled disclosure of confidential information or material, and the identity of confidential sources

The Fifth Circuit follows the majority of jurisdictions in recognizing a First Amendment qualified privilege against compulsory disclosure of confidential sources. See, e.g., In re Selcraig, 705 F.2d 789 (5th Cir.1983); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir.1980); United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir.1986), cert. denied, 482 U.S. 917, 107 S.Ct. 3191, 96 L.Ed.2d 679 (1987). This Court stated in In re Selcraig: "We have recognized that the First Amendment shields a reporter from being required to disclose the identity of persons who have imparted information to him in confidence." In re Selcraig, 705 F.2d at 792 (citing Miller v. Transamerican Press, 621 F.2d 721 (5th Cir.), modified on rehearing,628 F.2d 932 (5th Cir.1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 238 (1981)). This Court went on to state that "[o]ur course was dictated by our careful reading of the plurality and concurring opinions in Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)." Id.

In 1998, this Court decided United States v. Smith, 135 F. 3d 963 (5th Cir. 1998), holding that there is no qualified journalist's privilege under the First Amendment to refuse to disclose nonconfidential information in response to a subpoena in a criminal proceeding. Id. at 972. It is clear that the Smith decision does not abrogate a journalist's privilege with respect to confidential sources and material, since Smith only involved "on the record," nonconfidential sources. Id. at 971-92. Consequently, Branzburg and its progeny, including this Court's prior decisions in In re Selcraig and Miller v. Transamerican Press, should guide this Court with respect to confidential sources and material. See Smith, 135 F.2d at 972 ("Both Miller and Selcraig recognized privileges meant to protect newsreporters from unnecessarily revealing the identities of confidential sources."). Under this precedent, the journalist's qualified privilege is viable under the First Amendment for confidential sources and information.

B. This Court should further recognize and apply a First Amendment privilege against compelled disclosure of unpublished, nonconfidential material

While Smith held that there is no qualified journalist's privilege with respect to nonconfidential sources of information in response to a subpoena in a criminal trial, this Court can still apply a balancing test as advocated by Judge Powell in his Branzburg concurrence to protect such information from compelled disclosure where appropriate. Such a test will protect the public against curtailment of the free flow of information, which can occur both in civil and criminal proceedings.

Indeed, the very same public policy concerns regarding a free press are present in the context of criminal proceedings as in civil litigation. Even assuming that the government's interest is greater than a private litigant's interest due to the criminal nature of the proceeding, it is not a difference in kind but a matter of degree. The public interest in a free press, and the constitutional dimensions of press activity, remain unchanged.(4) This balancing of interests should be employed whether an explicit privilege is recognized or not. Justice Powell's concurrence in Branzburg supports this case-by-case approach:

The asserted claim of privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with

respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."

Branzburg, 408 U.S. at 710 (Powell, J., concurring).

Many federal courts have relied upon Justice Powell's rationale of balancing the interests at stake instead of rigidly rejecting the existence of the qualified privilege. As the Third Circuit held in United States v. Cuthbertson:

The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes. Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege. Therefore, we hold that the privilege extends to unpublished materials in the possession of CBS.

Cuthbertson, 630 F.2d 139, 147 (3rd Cir. 1980), cert. denied, 449 U.S. 1126 (1981). Similarly, the Ninth Circuit in Shoen v. Shoen, which also addressed a subpoena to a book author as here, held that news organizations should be free from:

the threat of administrative and judicial intrusion into the newsgathering and editorial process; the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool of government or of a private party; the disincentive to compile and preserve nonbroadcast material; and the burden on journalist's time and resources in responding to subpoenas.

Shoen, 5 F.3d 1289, 1294-95 (9th Cir. 1993) (quoting United States v. The LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988)).

The Shoen Court further concluded, in holding that a reporter's newsgathering activities were entitled to protection regardless of whether there had been a promise of confidentiality, that the "body of circuit case law and scholarly authority [is] so persuasive that we think it unnecessary to discuss the question further." Shoen, 5 F.3d at 1295. "[W]hen facts acquired by a journalist in the course of gathering the news become the target of discovery, a qualified privilege against compelled disclosure comes into play." Id. at 1292; see also Shoen v. Shoen, 48 F.3d 412, 416 (9th Cir. 1995) (Shoen II) (establishing a test to determine when a court can pierce the reporter's privilege).

These precedents are no less persuasive because they involve civil litigation -- the interest in preserving a free press is the same. Instead of a blanket rejection of the qualified privilege in grand jury or criminal proceedings, this Court should acknowledge the vital public interests at stake and balance the competing interests accordingly, as Justice Powell urged. This Court's decision in Smith does not foreclose this avenue of protecting the public from diminished access to information that will surely follow when the work product of journalists becomes easily obtainable by subpoena. This can be accomplished by employing a balancing test and determining whether the government has met its burden to overcome the interest of the press in its unpublished, nonconfidential information.

II. Before piercing the First Amendment privilege against compelled disclosure of confidential and/or nonconfidential material, this Court should require the government to satisfy the three-part test set forth in Branzburg and its progeny

This Court should apply the three-prong test set forth in Branzburg and Miller, utilized by the majority of federal circuit courts, to determine if the government has met its burden to pierce the qualified privilege or otherwise overcome the interests of the press and public. The United States must show that the information sought is (1) highly material and relevant; (2) necessary or critical to the maintenance of the claim or defense; and (3) not obtainable from other sources. Miller, 621 F.2d at 726; see also United States v. Burke, 700 F.2d 70, 77 (2nd Cir.), cert. denied, 464 U.S. 816, 104 S.Ct. 72, 78 L.Ed.2d 85 (1983); Lenhart v. Thomas, 944 F. Supp. 525 (S.D. Tex.,1996). The party seeking disclosure of a confidential informant's identity bears the burden of proving by substantial evidence that these three requirements have been met. In re Selcraig, 705 F.2d at 792; Miller, 621 F.2d at 726. When the government has not made this showing, courts should be more willing to accept the argument that the government is using its subpoena powers to harass the press, a danger recognized by the Supreme Court in Branzburg and this Court in Smith. See Branzburg, 408 U.S. at 710; Smith, 135 F.3d at 971.

Compulsory disclosure of a journalist's unpublished information and confidential sources should be the last resort for obtaining information; all other means should first be exhausted. Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir.1981); Riley v. City of Chester, 612 F.2d 708, 717 (3rd Cir.1979); see also United States v. Hubbard, 493 F. Supp. 202, 205 (D.D.C. 1979). The government must fulfill its obligation to exhaust alternative sources, even if such an investigation may be time consuming, costly, and unproductive. Zerilli, 656 F.2d at 714. Exhaustion requires that the government demonstrate to the court unsuccessful, independent attempts to gain the requested information from non-party sources. LaRouche v. National Broadcasting Co., 780 F.2d 1134, 1139 (4th Cir.), cert. denied, 479 U.S. 818, 107 S.Ct. 79, 93 L.Ed.2d 34 (1986). It is not constitutionally permissible to hold a member of the press in contempt for not disclosing information covered by a qualified privilege while the government determines whether it can obtain that same information from another source. Zerilli, 656 F.2d at 714.

CONCLUSION

Allowing unrestrained subpoenas for a journalist's work product will affect the vitality of the press in the Fifth Circuit. The impact of denying Appellant Leggett a means to challenge the subpoena in this case is real and immediate. Reasonable journalists will fear that the use of similar subpoenas will allow prosecutors and civil litigants to use journalists as private investigators, thereby restricting the free flow of information to the public. Therefore, amici curiae urge this Court to explicitly recognize that the qualified journalist's privilege protects Appellant Leggett's confidential sources and information, that a balancing test should apply to unpublished, nonconfidential information, and that compelled disclosure can only be allowed when the government demonstrates that the specific, known information sought is highly relevant to the case, not merely duplicative or cumulative, and all reasonable alternate sources of the information have been exhausted. Otherwise, the presumption should be that the government is harassing the press through a fishing expedition to support its investigation.

The adjudication of contempt against Appellant Leggett is unconstitutional as a violation of Leggett's First Amendment qualified privilege. Therefore, the contempt order should be reversed.

RESPECTFULLY SUBMITTED,

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FOOTNOTES:

1.

See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Corp., 633 F.2d 583, 595-96 (1st Cir. 1980); United States v. Burke, 700 F.2d 70, 77 (2d Cir.), cert. denied, 464 U.S. 816, 78 L. Ed. 2d 85, 104 S. Ct. 72 (1983); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980), cert. denied, 449 U.S. 1126, 67 L. Ed. 2d 113, 101 S. Ct. 945 (1981); LaRouche v. National Broadcasting Co., 780 F.2d 1134, 1139 (4th Cir.), cert. denied, 479 U.S. 818, 93 L. Ed. 2d 34, 107 S. Ct. 79 (1986); Miller v. Transamerican Press, 621 F.2d 721, 725 (5th Cir. 1980), cert. denied, 450 U.S. 1041, 68 L. Ed. 2d 238, 101 S. Ct. 1759 (1981); Cervantes v. Time, Inc., 464 F.2d 986, 992-93 & n.9 (8th Cir. 1972), cert. denied, 409 U.S. 1125, 35 L. Ed. 2d 257, 93 S. Ct. 939 (1973); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-37 (10th Cir. 1977); Zerilli v. Smith, 211 U.S. App. D.C. 116, 656 F.2d 705, 714 (D.C. Cir. 1981); Norandal, U.S.A., Inc. v. Local Union No. 7468, 13 Media L. Rep. (BNA) 2167, 2168 (Ala. Cir. Ct. 1986); Nebel v. Mapco Petroleum, Inc., 10 Media L. Rep. (BNA) 1871, 1872 (Alaska 1984); Matera v. Superior Court, 825 P.2d 971, 973 (Ariz. Ct. App. 1992); Mitchell v. Superior Ct., 690 P.2d 625, 632 (Cal. 1984); In re Grand Jury Subpoenas, 8 Media L. Rep. (BNA) 1418, 1419 (Colo. 1982); Connecticut State Board of Labor Relations v. Fagin, 370 A.2d 1095, 1096 (Conn. Super. Ct. 1976); Delaware v. Hall, 16 Media L. Rep. (BNA) 1414, 1414-15 (Del. Mun. Ct. 1989); Tribune Co. v. Huffstetler, 489 So. 2d 722, 723 (Fla. 1986); Hopewell v. Midcontinent Broadcasting Inc., 538 N.W.2d 780 (S.D. 1995); Matter of Contempt of Wright, 700 P.2d 40, 44-45 (Idaho 1985); In re Stearns, 12 Media L. Rep. (BNA) 1837, 1841 (Ind. Ct. App. 1986); Winegard v. Oxberger, 258 N.W.2d 847, 850 (Ia. 1977), cert. denied, 436 U.S. 905 (1979); State v. Sandstrom, 581 P.2d

812, 814-15 (Kan. 1978), cert. denied, 440 U.S. 929 (1979); In re Ridenhour, 520 So. 2d 372, 376 (La. 1988); In re Letellier, 578 A.2d 722, 726 (Me. 1990); Sinnot v. Boston Retirement Board, 524 N.E.2d 100, 104 (Mass.), cert. denied, 488 U.S. 980 (1988); CBS Inc. v. Campbell, 645 S.W.2d 30, 32-33 (Mo. Ct. App. 1982); New Hampshire v. Siel, 444 A.2d 499, 502-03 (N.H. 1982); O'Neill v. Oakgrove Construction, Inc., 523 N.E.2d 277, 277-78 (N.Y. 1988); North Carolina v. Rogers, 9 Media L. Rep. (BNA) 1254, 1255 (N.C. Super. Ct. 1983); Taylor v. Miskovsky, 640 P.2d 959, 961-62 (Okla. 1981); State v. St. Peter, 315 A.2d 254, 256 (Vt. 1974); Brown v. Commonwealth, 204 S.E.2d 429, 431 (Va.), cert. denied, 419 U.S. 966 (1974); Hudok v. Henry, 389 S.E.2d 188, 192-93 (W.Va. 1989); Zalenka v. Wisconsin, 266 N.W.2d 279, 287 (Wis. 1978).

2. See United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988); Bruno v. Stillman, Inc. v. Globe Newspaper Corp., 633 F.2d 583 (1st Cir. 1980); United States v. Burke, 700 F.2d 70 (2nd Cir. 1982); United States v. Cuthbertson, 630 F.2d 139, 147 (3rd Cir. 1980); LaRouche v. National Broad Co., 780 F.2d 1134 (4th Cir. 1986); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981).

3. See Clyburn v. New World Communications, Inc., 903 F.2d 29 (D.C. Cir. 1990); United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988); LaRouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir. 1986), cert denied, 479 U.S. 818 (1986); United States v. Burke, 700 F.2d 70 (2d Cir. 1983), cert denied, 464 U.S. 816 (1983); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), cert denied, 449 U.S. 1126 (1981); Miller v. Trans-American Press, Inc., 621 F.2d 721 (5th Cir.), modified on rehearing, 628 F.2d 932 (1980), cert denied, 450 U.S. 1041 (1981); See Shoen v. Shoen, 5 F.3d at 1292 (9th Cir. 1993); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977).

4. The U.S. Justice Department recognizes that newsgathering is essential to preserving a free press, as evidenced by its internal policy and procedures for issuing subpoenas to the press implemented by the Nixon Administration's Justice Department in 1973. See 28 C.F.R. 50.10 (2000) (Attorney General's "Policy with regard to the issuance of subpoenas to or filing of criminal charges against members of the news media"). The Justice Department requires that a U.S. Attorney obtain authorization from the Attorney General before serving subpoenas on members of the press. Id. § 50.10; see also id. § 50.10(f)(2), (f)(3) (requiring that federal authorities demonstrate that any information sought -- not just confidential source information -- is "essential to the successful completion of the litigation in a case of substantial importance," and cannot be obtained from "alternative nonmedia sources").

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