No. 11-232

IN THE

Supreme Court of the United States

ELLIE WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Ellie Williams, a social media influencer, purports to possess information critical to the Department of Justice's ongoing prosecution of a sitting U.S. Senator. However, she refuses to comply with a subpoena ordering her to disclose both the information itself and its source. Williams argues that, as a journalist, the First Amendment shields her from the normal obligation to testify when summoned by the prosecution in a federal criminal trial.

The question presented is whether journalists have a First Amendment privilege not to testify regarding their confidential sources in a federal criminal trial.

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The NYU Law Moot Court Case Record is herein known as Petitioner's Appendix. The opinion of the court of appeals (Pet. App. R9–R14) is unreported. The order of the district court denying in part and granting in part the petitioner's motion to quash subpoena and/or for protective order (Pet. App. R3–R8) is unreported.

SUMMARY OF ARGUMENT

Ellie Williams seeks to avoid a criminal trial subpoena demanding her testimony about information that could aid the government's prosecution of a sitting U.S. Senator. She cites the First Amendment in claiming that she has a journalist's privilege not to reveal confidential information received from her sources. However, that position is unsupported by this Court's precedent.

First, Branzburg v. Hayes controls this case and held that there is no federal journalist privilege, absolute or qualified. There is a binding majority opinion in *Branzburg*, giving Powell's separate concurrence little pertinence to this case.

Next, this Court should adopt the substantial relations standard held in *Branzburg*. As an alternative, the Court may also proceed under *Branzburg's* broad guidance that there is no federal journalist privilege. Other tests, such as the balancing test, have proven unworkable. And Justice Stewart's three-factor test lacks a precedential foundation.

Last, using *Branzburg's* substantial relations standard, this Court should hold that Williams must testify, as the government has fulfilled its burden under that standard. Even using the balancing test, Williams' First Amendment burden is outweighed by the Sixth Amendment interest in fair and sufficiently investigative trials.

ARGUMENT

I. *Branzburg* Already Addressed Reporter's Privilege And Controls This Case.

The issue of what privileges, if any, the First Amendment grants journalists against subpoenas calling for their testimony in federal criminal trials has perplexed lower courts for years now, generating a slew of contradictory holdings. But it shouldn't be this way. This Court has already addressed the same exact issue in *Branzburg v. Hayes*, where it issued a judgement that answers the question presented today in crystal clear terms: The First Amendment does not give journalists *any* special privileges against testimony in criminal trials.

To be clear, discussion of today's case begins and ends with *Branzburg*. There is no need to look elsewhere, despite Petitioner's attempts to obfuscate. A majority of justices in *Branzburg* declined to create a constitutional privilege for journalists, be it an absolute privilege or a qualified one. To read the case any differently would amount to putting words in the Court's mouth.

Petitioner, bolstered by a smattering of lower court rulings, including one in this case, argues that Justice Powell's separate concurring opinion changes the game. See Pet. App. R-5. ("The Branzburg Concurrence … Allow[s] for a Journalist Privilege.") In their view, Powell's suggestion of a balance between First Amendment freedom of press and the testimonial obligation of all citizens amounts to a creation of some privilege for journalists. But this mistaken interpretation is easily defeated by looking to the plain language of the majority opinion, which Powell joins, in which the justices specifically reject the balancing Petitioner wants the Court to engage in today. Powell's concurrence merely emphasizes a position already taken in the majority opinion: Protections still exist for journalists in extreme cases of harassment. But today's case is neither extreme nor does it involve

harassment. Consequently, Powell's concurrence should have little pertinence to the Court's consideration.

The only question the Court needs to seriously entertain today regarding *Branzburg* is whether the facts of this case align sufficiently with those in *Branzburg*. Petitioner raises two points of distinguishability between *Branzburg* and this case. First, *Branzburg* involved a grand jury subpoena, while today's case involves a subpoena for testimony before a trial jury. Second, in *Branzburg*, the information sought from the reporters was the names of sources who were themselves the subjects of criminal investigation, whereas in today's case the information sought by the subpoena is the name of a source who merely has knowledge regarding the suspect in a criminal trial. The Court should reject these two points of distinguishability, however. While the case at hand does have factual differences from *Branzburg*, those differences are either logically insignificant vis-à-vis the reasoning of *Branzburg*, or they are explicitly considered and dismissed in the majority opinion.

A. *Branzburg* Rejected Both An Absolute Privilege And A Qualified Privilege For Journalists.

Lower courts that include discussions of *Branzburg* often butcher the case beyond recognition. Misguided by a few seminal circuit court rulings that have wrongly interpreted the case, most of them fail to recognize three key truths about *Branzburg*: (1) there is a binding majority ruling in *Branzburg*, (2) *Branzburg* rejects an absolute journalist privilege, and (3) *Branzburg* rejects a qualified journalist privilege. It isn't enough for lower courts to just accept one — or even two — of these truths; this Court must clarify the *conjunction* of these three *Branzburg* holdings today.

1. There Is A Controlling Majority Opinion In *Branzburg*.

Here's a fact lower courts (and Petitioner) seem to struggle with: There is a controlling, binding majority opinion in

Branzburg. *Branzburg v. Hayes*, 408 U.S. 665, 665 (1972) ("WHITE, J., wrote the opinion of the Court, in which BURGER, C.J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined."). Yet perplexingly, lower courts have construed the ruling as a plurality one. The District Judge in this case, while conceding that *Branzburg* was not a plurality opinion, still proceeded to apply the rule in *Marks v. United States*, which deals exclusively with plurality opinions. See Pet. App. R5. Even more egregious is the Third Circuit's complete mischaracterization: "The *plurality* opinion of the Supreme Court in *Branzburg v. Hayes*…" *United States v. Criden*, 633 F.2d 346, 360 (3d Cir. 1980) (emphasis added). If you're confused, you're not alone. Lower courts have bent over backwards attempting to downplay the majority ruling in *Branzburg*. This Court must put an end to that today.

The fact that Justice Powell joined in the majority opinion — as opposed to concurring only in the judgement — is highly significant. It means that he agreed with the majority's *reasoning*. As such, the words in White's opinion *are* precedential and have full binding force on lower courts. The question before the Court today, then, is not whether the Court is bound by White's opinion. The answer to that one is easy: Yes. The question, rather, is what White's opinion says about a journalist's privilege. The answer to this question is, in the government's view, fatal for Petitioner's case.

2. The Majority In *Branzburg* Rejected An Absolute Journalist's Privilege.

The Court in *Branzburg* firmly rejected any notion of an absolute privilege for journalists against testimony in criminal trials: "We are asked to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." *Branzburg*, 408 U.S. at 690.

Fortunately, the lower courts appear to have correctly accepted this fact, and there is unilateral consensus among the

Circuits (even the Third!) that an absolute privilege against testimony in criminal trials does not exist. See, *e.g.*, *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979) ("The Supreme Court decided that a journalist *does not have an absolute privilege* under the First Amendment to refuse to appear and testify before a grand jury…") (emphasis added), *Criden*, 633 F.2d at 357 ("…Supreme Court teachings that there is no absolute right for a newsman to refuse to answer relevant and material questions asked during a criminal proceeding."), *Baker v. F F Investment*, 470 F.2d 778, 783 (2d Cir. 1972) ("the Supreme Court's decision in *Branzburg* denies the existence of a principle granting an absolute newsman's testimonial privilege"), *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980) (conceding that if *Branzburg* establishes a privilege, "…the privilege is not absolute…"), and *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975) (conceding that if *Branzburg* establishes a privilege, "…the privilege is a limited or conditional one.").

Given that an absolute privilege for reporters does not exist, the question now is whether a qualified one does.

3. The Majority In *Branzburg* Rejected A Qualified Journalist's Privilege.

Six circuits and countless district courts are promulgating a troubling falsehood — that *Branzburg* established at least a qualified, or conditional, journalist's privilege. This Court must intervene and clarify what it already ruled in *Branzburg*: There is no qualified journalist's privilege. There are two reasons why courts that do recognize such a privilege are mistaken.

First, and most importantly, the majority opinion in *Branzburg* explicitly considers, then rejects, the idea of a qualified privilege. In his ruling, White first points out the logical problem with reporters requesting a qualified privilege: It wouldn't help them. If the reporters' chief concern is their tenuous relationships with their sources, putting extra steps between the issuance of a subpoena and the reporter's

eventual compliance with that subpoena would do nothing to alleviate this concern. As White explained, "The prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem." *Branzburg*, 408 U.S. at 702. This remark isn't just logical wordplay — it weakens a core justification for the qualified privilege. After all, the Court already found that the compelling interest in prosecuting criminal activity outweighed the harms to journalistic freedom caused by not having an absolute privilege. But if those harms existed the same with or without even a lowly *qualified* privilege, why have that privilege at all?

But the majority opinion doesn't stop at just saying the qualified privilege is unnecessary — it rejects the privilege outright. White points out various factual judgements that the courts would need to make, concluding that "The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order." *Id.* at 703-704. Specifically, the courts would have to define which categories of reporters qualified for the privilege, a classification that has risks with both under-inclusion (insufficient protection for nontraditional journalists) and over-inclusion (if everyone is as a journalist then no one can be called to testify). *Id.* at 704 ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.") (quoting *Lovell v. Griffin*, 303 U. S. 444 (1938)) and *Id.* at 705 ("…any author may quite accurately assert that he is contributing to the flow of information to the public."). The courts would also have to make determinations improper for the judiciary: "Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?" *Id.* at 706. White also expressed concern that establishing a qualified privilege would take that right away from the legislature: "The task of judges … is not to

make the law, but to uphold it in accordance with their oaths. Congress has freedom to … fashion standards and rules as narrow or broad as deemed necessary." *Id.* at 706. The Court's rejection of the qualified privilege was nothing short of explicit: A qualified privilege would require courts to make factual and legal determinations that surpass the authority of the judiciary.

Second, most rulings "upholding" a qualified privilege cite *Branzburg* in the broadest of terms, and while doing so, they give jarringly incorrect summaries of the Court's ruling. Judgements out of the Third Circuit perfectly demonstrate the extent of this problem.

In *Riley v. City of Chester*, the Third Circuit Court of Appeals made the following observations about *Branzburg*: (1) *Branzburg* "acknowledged the existence of First Amendment protection for 'newsgathering'"; and (2) *Branzburg* "decided that a journalist does not have an absolute privilege under the First Amendment to refuse to appear and testify before a grand jury to answer questions relevant to an investigation into the commission of crime." *Riley*, 612 F.2d at 714. Using these two observations, as well as whatever we are to make of "the strong public policy which supports the unfettered communication to the public of information," the court concluded: "[J]ournalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources." *Id.* at 715. And thus, a new common law privilege was born.

But wait. In ruling this way, the Third Circuit ignored at least three glaring truths about *Branzburg*. First, as explained above, White's opinion explicitly questioned the efficacy and practicality of a qualified privilege for journalists, if not rejected the privilege entirely. See *supra* pp. 6. The Third Circuit did not engage whatsoever with any of these portions of the ruling, an omission that seriously calls its analysis of the case into question. Second, White specifically notes the *absence* of any common law precedent supporting heightened privileges for the press: "The common law recognized no such privilege … From the beginning of our country

the press has operated without constitutional protection for press informants, and the press has flourished." *Branzburg*, 408 U.S. at 688-699. Third, even if this Court finds that the majority opinion in *Branzburg* did not reject a qualified privilege, that is hardly enough to support the creation of such a privilege. According to the Third Circuit, *Branzburg* did not *not* say there was a privilege, so there must be a privilege. Brilliant.

Concerningly, decisions like that in *Riley* have canonized an errant reading of *Branzburg* within the circuits, leading judges to become increasingly divorced from what the Court actually decided in that case, all while becoming increasingly resolute that their error is rooted in precedent. Take *United States v. Cuthbertson* for example. Just one year after the *Riley* ruling, the Third Circuit relied on its mistaken reading of *Branzburg* to affirm a federal journalist's privilege: "We … found support for this privilege in *Branzburg v. Hayes*, where the Supreme Court acknowledged the existence of first amendment protection for newsgathering." *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980) (citations omitted). Perhaps the court knew that *Branzburg* lends no support to the qualified privilege theory, which is why it tellingly employed a non sequitur: The fact that there exists First Amendment protection for newsgathering, an obvious fact that was never in question, says nothing about the existence of a qualified privilege.

The third circuit is not alone in erring on this issue. In the seminal case establishing a three-part test for balancing First and Sixth Amendment interests, *LaRouche v. National Broadcasting Co., Inc.,* the Fourth Circuit Court of Appeals ruled that *Branzburg* (1) established a journalist privilege, and (2) charged lower courts with the responsibility to balance the interests involved: "In determining whether the journalist's privilege will protect the source in a given situation, it is necessary for the district court to balance the interests involved. *Branzenburg v. Hayes*, 408 U.S. 665, 710, 92 S.Ct. 2646, 2671, 33 L.Ed.2d 626 (1972) (Powell, J.,

concurring)." *Larouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986). In establishing a three-part test that many other courts would go on to employ, the *LaRouche* court engaged in no analysis of *Branzburg*. Absent is any mention of the majority's concern with a qualified privilege, or their rejection of balancing, or the fact that Powell's opinion does not control. In fact, at least one factor (whether the information can obtained from other sources) of the three-factor test was explicitly rejected by the majority opinion. See *Branzburg*, 408 U.S. at 701 (Holding that it is nonsensical to require the State to preliminarily prove that a reporter "possess relevant information not available from other sources, for only the grand jury itself can make this determination."). The Fourth Circuit even managed to misspell the case name in the one place it cites *Branzburg* (what is *Branzenburg?*). See *id.* Were they reading the wrong case? Because it certainly seems like it.

Such is the convoluted lower court jurisprudence Petitioner wants the Court to rely on to blatantly ignore its own binding precedent. The circuit courts assert that the majority in *Branzburg* stayed silent on the issue of a qualified privilege, leaving the door open to such a privilege. They are wrong. White's opinion gave clear, convincing reasons why a qualified privilege would be illogical and create tough, inappropriate questions for the judiciary to answer. To throw that out in favor of misguided restatements of precedent is something this Court should decline to do.

4. Powell's Concurrence Merely Restates The Majority Opinion And Does Not Introduce A Balancing Test.

It is not unreasonable to assume that if Powell had not filed a separate concurring opinion in *Branzburg*, this case would not even be on the Court's docket today. Indeed, Powell's concurrence, which Justice Stewart called "enigmatic," has almost singlehandedly created the circuit split explained above.

The most famous line in Powell's concurrence is one that appears to endorse a qualified journalist privilege and propose a balancing test for determining the extent of that privilege: "The asserted claim to 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." *Branzburg*, 408 U.S. at 710. Many circuit courts have treated this one line like pure gold. See, e.g., *Criden*, 633 F.2d at 355 ("The tension has been described as a balance between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.") (citing *Branzburg*, 408 U.S.) (internal quotation marks omitted); *McKevitt v. Pallasch,* 339 F.3d 530, 531 (7th Cir. 2003) ("Justice Powell … stated in a concurring opinion that such a claim should be decided … by balancing the freedom of the press against the obligation to assist in criminal proceedings."); *Farr*, 522 F.2d at 468 ("The … *Branzburg holding* … seems to require … a balance struck to determine where lies the paramount interest.").

However, these readings of Powell's concurrence divorce his words from context: Powell was writing in the specific context of extreme cases of harassment and abuse. In advancing what Respondent believes is a more accurate reading of the concurrence, we follow the wisdom of the fourth and fourteenth circuits, the only two circuits that have parsed Powell's words correctly.

The concurrence begins with clear tone-setting: "The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Branzburg*, 408 U.S. at 709. Powell proceeds to detail the protections journalists have against bad faith subpoenas:

> As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the

> grand jury investigation is not being conducted in good faith, he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash, and an appropriate protective order may be entered. The asserted claim to 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.
>
> *Id.* at 709-710.

Seeing Powell's oft-cited line in the context of his concurrence changes things considerably. Clearly, he is not advocating for the creation of a qualified privilege that he rejected just pages earlier in joining the majority opinion. The phrase "the asserted claim to privilege" is akin to other phrases commonly used in the law, such as "the alleged offense," or the "supposed violation." Powell is not endorsing a qualified privilege — he is merely describing the reporter's claim. Next, then, his suggestion of a balancing test is also highly situation dependent. The line about balancing interests is nested within a paragraph that begins with two conditionals ("If a newsman believes that the grand jury investigation is not being conducted in good faith," *and* "if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation.") See *supra*. The double conditional should make it apparent that Powell did not mean for his balancing suggestion to be employed in normal cases; he presented the option as one the courts could explore in extreme cases of harassment or abuse against journalists.

This sentiment is reflected in the majority opinion itself. White issued a warning in his concluding lines that, "Official harassment of the press undertaken not for purposes of law enforcement, but to disrupt a reporter's relationship with his news sources would have no justification." *Id.* at 708. In fact, the majority specifically alluded to the fact that, had the facts at the time indicated any sort of overreach or harassment, it might have been decided differently: "We do not deal, however, with a governmental institution that has abused its proper function…" *Id.* at 699-700.

In other words, Powell's concurrence says nothing remarkable that was not already expressed in the majority opinion. A couple circuits have, correctly, agreed. The fourth, for example, correctly held: "Justice Powell's concurrence expresses no disagreement with the majority's determination … Powell's concurrence in Branzburg simply does not allow for the recognition of a First Amendment reporter's privilege in a criminal proceeding." *United States v. Sterling*, 724 F.3d 482, 496 (4th Cir. 2013). Similarly, the fourteenth circuit ruled that, "The concurrence does not actually express any disagreement with the majority's determination that 'reporters are entitled to no special privilege.'" Pet. App. R-11 (quoting *Branzburg*, 408 U.S.).

B. *Branzburg* And This Case Are Indistinguishable.

If *Branzburg* does indeed reject both an absolute and qualified privilege for journalists, Petitioner asks the Court to find it distinguishable from the case at hand. In their view, two differences merit this judgement. First, *Branzburg* dealt with a grand jury subpoena, while the subpoena in this case originated from the prosecution in a case that has already made its way to the trial stage. Second, the information sought in *Branzburg* was the names of a journalist's sources who were the direct subject of a criminal investigation. In this case, the source sought merely possesses information *regarding* the subject of a criminal prosecution. However, both

attempts fall flat. If anything, the reasoning of *Branzburg* fits more tightly around the facts in this case than those in the *Branzburg* itself.

1. Trial Jury Subpoenas Are Less Likely To Deter Sources Than Grand Jury Subpoenas.

The first claim made by Petitioner is that this case involves a subpoena issued at the trial stage of a federal criminal prosecution, whereas the subpoenas in *Branzburg* were at the stage of grand jury proceedings. They're right that this difference is significant, but wrong about what it means for this case: We contend that there is actually a stronger link between the *Branzburg* reasoning and trial subpoenas than with grand jury subpoenas.

The *Branzburg* court repeatedly noted the critical, constitutionally mandated role grand juries play in the justice system: "The adoption of the grand jury 'in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice.'" *Branzburg*, 408 U.S. at 687 (quoting *Costello v. United States*, 350 U.S. 359 (1956)). As such, grand juries have a duty to digest as much information as possible to arrive at the correct conclusion: "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" *Id.* at 701 (quoting *Wood v. Georgia*, 370 U.S. 375 (1962)).

There is little dispute that criminal trials have the same, if not a higher, fact-finding prerogative as grand juries. This fact was affirmed in *United States v. Nixon*, where this Court, almost explicitly, held that *Branzburg's* rule does apply to criminal trials. After recognizing that "[the] need to develop all relevant facts in the adversary system is both fundamental and comprehensive," the Court correctly extended *Branzburg's* relevancy: "Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry, rather than a trial, 'that the public …

has a right to every man's evidence, except for those persons protected by a constitutional, common law, or statutory privilege.'" *United States v. Nixon*, 418 U.S. 683, 709 (1974) (quoting *Branzburg*, 408 U.S.) (internal quotation marks omitted).

Thus, it is insufficient for Petitioner to assert that the trial context of the present case makes it distinguishable from the grand jury inquiry in *Branzburg* merely because the two contexts are different — to do so begs the question.

Petitioner does make one causal claim on this point that merits consideration, however. They assert that the greater level of secrecy surrounding a grand jury inquiry makes it completely different from trial proceedings, which are public. The difference, according to Petitioner, is that compelling journalists to testify in open court poses a scale-tippingly large threat to their relationships with their sources, because sources can protect their anonymity with closed-door grand jury proceedings but cannot with trial proceedings. There are two problems with this reasoning.

First, it is wrong to assume that what goes on during grand jury inquiries remains a secret forever. The press may, and frequently does, petition courts to release transcripts of grand jury proceedings. And these requests are frequently granted. The truth is, nothing concretely protects a source's identity or guarantees perpetual anonymity in grand jury proceedings. In fact, the Federal Rules of Criminal Procedures outline several scenarios where disclosure of transcripts and other grand jury materials may occur, including "preliminarily to or in connection with a judicial proceeding", or "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(6). These scenarios are certainly plausible for most criminal cases. But why does all this matter? Importantly, in this context, maintaining confidentiality is an all-or-nothing game: The sources Petitioner references who are genuinely concerned with the exposure of their identity are never satisfied

with 90%, or even 95%, odds that their identity remains a secret — anything short of 100% is too risky for them. Neither grand jury proceedings nor trial proceedings can guarantee that. Does it matter that grand jury inquiries are generally much more secret than open court? No. All that matters is that neither venue can guarantee absolute confidentiality, which means there is no pertinent difference between grand jury inquiries and trial proceedings as it relates to a deterrent effect on sources. It is irrational for a source to feel comfortable with the black box of grand jury inquiries but suddenly uncomfortable when *Branzburg* is extended to trials. That's not to mention the fact that this Court has already suggested *Branzburg's* applicability to trials in *Nixon*: If any deterrent effect on sources is to occur, it will have already occurred.

Second, even if this Court finds that grand jury proceedings are completely foolproof in their confidentiality, such secrecy is a double-edged sword. While it may provide confidential sources with some peace-of-mind, it also troubles these sources that they are unable to truly know what information is conveyed by a journalist to a grand jury. As correctly noted by the trial judge in *Branzburg*, "The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainties in the minds of those who fear a betrayal of their confidences." *Branzburg*, 408 U.S. at 709 n.5 (quoting App. 44). In open court, sources can directly observe what information a journalist does and does not reveal — comparatively, this transparency actually makes sources more comfortable. This possibility puts the government well past its burden of merely demonstrating that sources are equally uncomfortable with grand jury inquires as they are with trial proceedings.

2. Branzburg Applies Equally To Cases Where The Confidential Source Is Not The Subject Of Investigation.

The most audacious claim Petitioner advances is that because the information sought from Williams in this case is the name of a source who is not the direct subject of the criminal inquiry, the ruling in *Branzburg* does not apply. Arguments like this one force Respondent to wonder if Petitioner actually *read Branzburg's* majority opinion, or if they instead relied solely — like many circuit courts — on the errant rulings of *other* circuit courts for their knowledge of the case. It is true that *Branzburg* involved reporters whose sources were directly the subjects of criminal investigations, such as "several dozen drug users," and "persons … seen making hashish from marihuana." *Branzburg*, 408 U.S. at 668-669. It is also true that the majority ruling devoted considerable ink considering the deterrent effect of a ruling against reporters for sources actively engaged in criminal activity. See *id.* at 692 ("The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.") and *id.* at 688 ("The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection.").

However, *Branzburg* also specifically addressed sources who themselves were not the subject of criminal investigations and merely possessed knowledge about criminal activity: "There remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others." *Id.* at 693. The Court first cast doubt on the suggestion that many of these 'indirect' sources would in fact stop talking to journalists if they were not granted a privilege. But it then doubled down on the importance of pursuing criminal activity:

> Accepting the fact … [that] informants not themselves implicated in crime will … refuse to talk to newsmen if they fear identification…, we cannot accept the argument that the public

> interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes.
>
> *Id.* at 695.

The Court made it clear that *Branzburg's* rule applies equally to cases where a journalist's source is not the direct subject of a criminal investigation, so there is no question that it applies to this case.

II. The Substantial Relations Test Advanced In *Branzburg* Is The Best Standard To Use Here.

In overturning the decision of the district court in this case, the Fourteenth Circuit Court of Appeals correctly held that there is no federal journalist privilege. See Pet. App. R-10-11 ("We do not understand the decision of the district court to elevate certain circuits while disregarding the decisions of the Supreme Court and our other sister circuits.") However, absent from the ruling was a reference to the positive rule propagated in *Branzburg* that sets out the burden the government must meet in order to subpoena information generally. Respondent believes it is important that this Court affirm the substantial relations test established in *Branzburg* so that lower courts have a clear, workable standard to govern future cases. This low burden, we believe, is appropriately set to reflect the permissive sentiment expressed by the majority.

A. The Substantial Relations Test Best Captures The Majority Ruling In *Branzburg*.

Writing for the *Branzburg* majority, White noted that the facts of the case satisfied a rule proposed in an earlier case, *Gibson v. Florida Legislative Investigation Committee*, where this Court held that, to compel the disclosure of information, the government must show "a substantial relation between the information sought and a subject of overriding

and compelling state interest." White appeared to suggest using the *Gibson* rule as the test going forward:

> If the test is that the government "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," it is quite apparent (1) that the State has the necessary interest in extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both persons and property; and (2) that, based on the stories Branzburg and Caldwell wrote and Pappas' admitted conduct, the grand jury called these reporters as they would others -- because it was likely that they could supply information to help the government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment.
>
> *Branzburg*, 480 U.S. at 700-701 (quoting *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963)) (internal quotation marks omitted).

Though White uses the conditional "if," the majority likely would have agreed for the substantial relations test to dictate future cases. To begin with, the test accurately captures the State's burden when issuing subpoenas in criminal trials. The majority held that reporters generally have no special privileges not afforded to the average citizen when it comes to their obligation to testify about criminal activity, but warned that the courts and juries could not abuse their subpoena power to harass reporters or maliciously hamper their newsgathering ability. The substantial relations test guarantees both parts of that holding.

First, the test sets a low bar for subpoenas to pass as valid. The subpoenas only need to meet two criteria: *(1) There must exist an overriding or compelling State interest.* White's affirmation that "extirpating the traffic in illegal

drugs, … forestalling assassination attempts on the President, and … preventing the community from being disrupted by violent disorders endangering both persons and property" all qualify as compelling state interests make it quite obvious that the suspected violation of federal law in a criminal trial would similarly qualify. See *id. (2) The information sought in the subpoena must be reasonably connected to that State interest.* This requirement is also easy for the State to achieve: As stated in Branzburg, it merely needs to be "likely" that the subpoenaed reporter "could supply information to help the government" achieve its fact-finding goal. See *id.*

Second, the substantial relations test reflexively guards against abusive subpoenas. The fear of the government having an unchecked power to issue subpoenas on members of the press is a well-documented one, and not only from this Court. The lower courts have routinely emphasized the potential harms of loosening the State's leash too far. See, *e.g.*, *Gonzales v. National Broadcasting Co., Inc.*, 194 F.3d 29, 35 (2d Cir. 1998) (warning against "the symbolic harm of making journalists appear to be an investigative arm of the judicial system"), *Branzburg*, 408 U.S. at 725 (Justice Stewart denounced the majority opinion as an attempt to "annex the journalistic profession as an investigative arm of government.") (Stewart, J., dissenting). Fortunately, the substantial relations test ensures the State cannot abuse its subpoena power in federal criminal trials. The test's requirement that the information sought from a subpoena is substantially relevant to the alleged criminal investigation prevents the cases of overreach highlighted in *Branzburg*: "'expos[ing] for the sake of exposure,'" *Id.* at 700 (quoting *Watkins v. United States*, 354 U. S. 178 (1957)); "'prob[ing] at will and without relation to existing need,'" *Id.* (quoting *DeGregory v. Attorney General of New Hampshire*, 383 U. S. 825 (1966)); or "forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether crime has been

committed." *Id.* (citing *NAACP v. Alabama*, 357 U. S. 449 (1958)). Each of these instances of overreach would fail the substantial relations test, demonstrating how this test successfully alleviates the majority's concern with a weaponized State investigative force.

Admittedly, the Court in *Branzburg* does not explicitly endorse the substantial relations test as the basis for its ruling. If Petitioner objects to our suggestion of this test on those grounds, we are prepared to drop the test entirely. Indeed, the government would be more than happy if the Court only upheld *Branzburg's* broad ruling that reporters generally have no absolute or qualified privileges against testimony and stopped there — in our view, that would mean Petitioner loses this case even faster. But we believe it to be charitable — and well-serving for the Court's interest in establishing clear precedent — to uphold the substantial relations test as a map of where the *Branzburg* majority wanted the government's subpoena power to reach.

B. The Balancing Test Is Unsupported By Precedent and Not Workable.

Justice Powell is extremely popular among the circuit courts. Unfortunately, wrongly so. Powell's concurring opinion in *Branzburg* has been canonized by lower courts looking for a reason to create a qualified journalist privilege that simply does not exist. We need not repeat ourselves in explaining why his concurrence does not, in fact, have any pertinence to the case today. For that discussion, see *supra*, pp. 10. Not only have the courts erred in adopting Powell's balancing test to begin with, but their application of the test only proves how unworkable it truly is.

1. The Balancing Test Has Proved To Be Unworkable.

At the outset, the circuit courts have disagreed on where to strike the balance between the First and Sixth Amendment guarantees. Some courts have prioritized the former.

Others have elevated the latter. *Cf., e.g., Garland v. Torre*, 259 F.2d 545, 549 (2d Cir. 1958) ("We do not hesitate to conclude that [the freedom of the press] must give place under the Constitution to a paramount public interest in the fair administration of justice"); *Farr*, 522 F.2d at 469 ("The paramount interest to be protected was [the court's] duty and obligation relative to the guarantee of due process to the defendants in the on-going trial"); see also *Sterling*, 724 F.3d 482 (upholding *Branzburg's* ruling that the Sixth Amendment right to a fair trial outweighed First Amendment free press guarantees).

Then, circuit courts have added various factors to the balancing equation that only add more confusion to an already difficult task. Among them, is the information related to a public figure? See *Miller v. Transamerican Press*, *Inc.*, 621 F.2d 721, 726 (5th Cir. 1980) ("…there is a First Amendment policy of free investigation of public figures because their activities are matters of public concern … the interest in granting a [journalist] privilege is particularly strong when the article concerns a public figure"). What about public officials? See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163 (1967) ("Differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in … First Amendment policy"). What if the source was promised confidentiality? See *U.S. v. Treacy*, 639 F.3d 32, 42 (2d Cir. 2011) ("Because 'the protection of confidential sources is not involved, the nature of the press interest protected by the privilege is narrower' and the privilege is 'more easily overcome.'") (quoting *Gonzales v. National Broadcasting Co., Inc.*, 194 F.3d 29 (2d Cir. 1998)); see also *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) ("When the information in the reporter's possession does not come from a confidential source, it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure"); but see *In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358, 372 (W.D. Pa. 1991) ("There

need not be an explicit promise of confidentiality for the newsgatherer to invoke his or her privilege.").

If it's not already abundantly clear, the problem with attempting to balance the rights afforded by two constitutional amendments is that it opens a Pandora's box of case law surrounding the respective amendments. Asking courts to then parse through this jurisprudence without any clear instructions as to which factors are relevant amounts to nothing short of a Sisyphean task. The balancing test that advocates insist Powell established is clearly unworkable — probably because it was never meant to be the courts' test in the first place.

C. The Stewart Test Is Unsupported By Precedent.

One test that has perplexingly found its way into the lower court jurisprudence surrounding journalist privilege is the three-part test propagated in *LaRouche,* first seen in Stewart's dissent in *Branzburg*. Under this test, a reporter could assert a privilege unless the government could "(1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information." *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting) (citing *Garland*, 259 F.2d 545).

The court in *LaRouche* appeared to adopt this test for criminal and civil trials broadly. Directly after stating (incorrectly) that Powell's concurrence required a balancing of interest, the court wrote, "To aid in the balancing of these interests, courts have developed a three part test." *Larouche*, 780 F.2d at 1139. The court paid no attention to the fact that this test was explicitly rejected by not only the majority in Branzburg, but also separately in Powell's concurring opinion. See *Branzburg*, 408 U.S. at 701 (explaining the

irrationality of requiring the government show the information is “not available from other sources, for only the grand jury itself can make this determination.”); *id.* at 711 (“The new constitutional rule endorsed by that dissenting opinion (Stewart) would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.”) (Powell, J., concurring).

Fortunately, the fourth circuit appears to have caught on. In Sterling, the court attempted to explain *LaRouche's* problematic holding by limiting it to civil trials, despite the fact that the court in *LaRouche* made no mention of such a limitation. (In fact, by citing *Branzburg*, the court implied that the Stewart test applied to criminal trials as well.)

If the Court can agree to relegate the three-part *LaRouche* test to the realm of civil trials, that is satisfactory. We still ask, with slight undertones of concern, how the *LaRouche* court fashioned a shiny new test from a losing *Branzburg* dissent, but that is a question for another day. The disturbing fact is that the three-part Stewart test is still being used in other circuits today for criminal trials today; the Court must put an end to that.

III. Using *Branzburg*, The Court Should Rule Against Williams.

Having established that *Branzburg* does control the present case, and that *Branzburg* rejected an absolute and qualified journalist's privilege in criminal trials and extended the substantial relations test, all that is remaining for this Court to find is that the facts of this case satisfy that test. As explained earlier, see, supra, pp. 19, this is not a difficult task, and that's by design. If the *Branzburg* majority wanted to set the bar higher, they would have. But they didn't.

Even if this Court finds that the substantial effects test is unconvincing, we ask that it falls back to the general holding of *Branzburg*: There is no privilege, qualified or absolute, for journalists in criminal trials. That holding alone should

generate a judgement against Williams; in a case with near-identical facts, this Court ought to reach an identical ruling.

But what if even that is unconvincing to this Court? Then, it ought to use the only plausible remaining strategy — Powell's balancing test. Even then, this Court should adopt the wisdom of the Fourth and Fourteenth Circuits that the Sixth Amendment guarantee of a fair trial outweighs First Amendment considerations in criminal trials and rule against Williams.

A. The Government Has Satisfied The Substantial Relations Test.

To satisfy the substantial relations test in the context of a criminal trial subpoena, the government must demonstrate (1) there exists an overriding or compelling state interest, and (2) The information sought in the subpoena must be reasonably connected to that interest. See, *supra*, pp. 20.

First, there exists an overriding or compelling state interest in this case. The *Branzburg* majority held that pursuing criminal activity constituted an overriding or compelling state interest. *Supra*, pp. 20. This case involves the active prosecution of a sitting U.S. Senator on bribery charges out of the Hobbs Act. Without question, the State has a clear compelling interest in punishing corrupt elected officials and deterring future corrupt behavior.

Second, the information sought in the subpoena is reasonably connected to the State interest in punishing corrupt elected officials. All the government wants from Williams is "her notes [on the video] and trial testimony about the video and her source." Pet. App. R-4. That is about as narrowly tailored as it gets. The video in question is a key component in the government's case against Fedra. And as held in *Branzburg*, see, *supra*, pp. 20, it is likely that Williams has information about this critical evidence, by her own admission on social media.

Thus, both parts of the substantial relations test are met in this case. Importantly, there is no harassment or abusive

use of subpoenas present in today's case. Williams made no claims that the subpoena is overly broad or amounts to a fishing expedition by the prosecution. See Pet. App. R-4 ("Williams filed a motion to quash the subpoena claiming she is protected by a journalist privilege under the First Amendment."). That make sense, because the only thing encroaching on abuse in this case is Petitioner's interpretation of *Branzburg*. Because there is so clearly no harassment in this case, Powell's concurrence becomes even less pertinent.

B. Even If This Court Uses Powell's Balancing Test, The Scale Tips Against Williams' Favor.

Any reasonable balancing that this Court can conduct favors the Respondent in this case. Though we are reluctant to wade in waters marked by such tenuous circuit court disagreement, it is painfully clear that, especially with this set of facts, the Sixth Amendment interest in guaranteeing a fair criminal trial outweighs any First Amendment concern of free flow of information.

There is general consensus among the circuits that, in criminal trials, the balance between Sixth and First Amendment concerns is one heavily skewed towards protecting the Sixth Amendment rights. That's plainly obvious from *Branzburg*, where the Court did the authoritative balancing: "We perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters … respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." *Branzburg*, 408 U.S. at 690. As the fourth circuit correctly noted in *Sterling*, it had no choice but to respect this Court's balancing: "The *Branzburg* Court considered the arguments we consider today [and] balanced the respective interests of the press and the public in newsgathering and in prosecuting crimes … We are not at liberty to conclude otherwise." *Sterling*, 724 F.3d at 496. To put it simply, courts

acknowledge the prioritization of the Sixth Amendment guarantee of a fair trial over First Amendment concerns. Cf., *e.g.*, *Garland*, 259 F.2d at 549; *Farr*, 522 F.2d at 469 (9th Cir. 1975).

If any case fits the description created in *Branzburg*, it is this one. Williams has been asked to testify in a federal criminal trial, where "the twofold aim … is that guilt shall not escape or innocence suffer." *Nixon*, 418 U.S. at 709 (quoting *Berger v. United States*, 295 U.S. 88 (1935)). The Sixth Amendment rights of the defendant, Fedra, are also at play. Additionally, given that the failure of Williams to comply with the subpoena might starve the prosecution of a key piece of evidence, the justice-serving interests in this case are especially strong. See *Criden*, 633 F.2d at 358. The Court should find that they outweigh any First Amendment concerns.

But what First Amendment concerns? As *Sterling* summarized, the Court in *Branzburg* primarily investigated the concern that, "The absence of such a qualified privilege would chill the future newsgathering abilities of the press … the *Branzburg* claim, too, was supported by affidavits and amicus curiae memoranda from journalists claiming that their news sources and news reporting would be adversely impacted if reporters were required to testify about confidential relationships." *Sterling*, 724 F.3d at 493. Those concerns have minimal application to Williams. As the appellate court pointed out, Williams does not normally seek out confidential information to share it with the public. She has no network of sources that she relies on for her information. The information she obtained in this case was, in many regards, highly accidental: "Instead of privately messaging Appellee Williams, the source made a public comment online." Pet. App. R-13. It is also highly dubious whether Williams' "journalism" would be impacted at all if she were compelled to testify in this case. If the Court in *Branzburg* evaluated so skeptically the "chilling effect" claims of established career

journalists, it would have laughed at Williams' First Amendment claims here.

To make any further balancing distinctions based on other factors (e.g., confidential vs. non-confidential sources, whether or not there a promise of confidentiality, if the subject of investigation is a public figure, etc.) would require this Court to venture down into the convoluted jurisprudence we surveyed earlier. See, *supra*, pp. 21-22. That is not an effort we will ask the Court to partake in. To be clear, balancing is not the answer to the question in today's case. But even if it is, Williams loses that balance.

CONCLUSION

The judgement of the court of appeals should be affirmed.

Respectfully submitted.

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