No. 06A525

IN THE SUPREME COURT OF THE UNITED STATES

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THE NEW YORK TIMES COMPANY, APPLICANT

v.

ALBERTO GONZALES, ET AL.

_____

ON APPLICATION FOR A STAY OF THE MANDATE
PENDING THE FILING OF A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Solicitor General, on behalf of the United States, respectfully files this memorandum in opposition to the application for a stay of the mandate of the United States Court of Appeals for the Second Circuit pending the filing of a petition for a writ of certiorari.

INTRODUCTION

In a ruling "limited to the facts before us," the court of appeals held that (1) any qualified common law privilege for a reporter's confidential sources "would be overcome as a matter of law" on the facts of this case, thus making it "unnecessary" for the court "to rule on whether such a privilege exists under Rule

501" of the Federal Rules of Evidence, and (2) the First Amendment, as authoritatively construed in Branzburg v. Hayes, 408 U.S. 665 (1972), provides no basis for a reporter to resist a grand jury subpoena seeking information about the identity of the reporter's sources – especially where, as in this case, the record establishes "probable cause to believe that the press served as a conduit to alert the targets of an asset freeze and/or searches." The New York Times Company v. Gonzales, 459 F.3d 160, 169, 171, 173 (2d Cir. 2006). After the full court of appeals denied rehearing en banc, the panel denied applicant's request for a 30-day stay and instead stayed issuance of the mandate for one calendar week to allow applicant to seek a stay from this Court. Applicant now seeks a stay from this Court pending the filing of a petition for a writ of certiorari. The application should be denied.

Applicant cannot show a reasonable probability that four members of this Court would vote to grant review of the court of appeals' decision, which creates no conflict of authority and is tied to the unique facts of the case. Nor can applicant show that five members of this Court would vote to reverse the decision below, which assumed the existence of a qualified reporter's privilege, but found it overcome on the undisputed facts. Finally, entry of a stay threatens to frustrate the public interest in a prompt and thorough grand jury investigation of a vitally important matter. As the court of appeals stated: "The disclosure of an

impending asset freeze and/or search that is communicated to the targets is of serious law enforcement concern, and there is no suggestion of bad faith in the investigation or conduct of the investigation." 459 F.3d at 174; id. at 171 (finding a "clear showing of a compelling governmental interest in the investigation, a clear showing of relevant and unique information in the reporters' knowledge, and a clear showing of need").

A stay would be particularly injurious to the public interest in this case because it would cause irreparable harm to a significant criminal investigation. The statute of limitations will imminently expire on December 3 and 13, 2006, on certain substantive offenses that the grand jury is investigating. Declaration of Patrick J. Fitzgerald ¶ 5, at 2-3 (Nov. 13, 2006). In light of that potential bar to the grand jury's completion of its work, delay holds a serious potential to thwart the full scope of a criminal investigation. In contrast, the harm to applicant is not nearly so great as it suggests. The court's narrow holding in this unusual case does not create a far-reaching precedent allowing disclosure into the confidentiality of a reporter's sources. And any claim that telephone records unrelated to the present investigation will be disclosed can be alleviated by applicant's own cooperation. The balance of equities therefore decidedly tips against the relief requested.

STATEMENT

1. Following the September 11, 2001, attacks on the World Trade Center and the Pentagon, the government intensified efforts to investigate fund-raising in the United States that supports terrorist activities. As part of that investigation, the government came to suspect that two entities – the Holy Land Foundation (HLF) and the Global Relief Foundation (GRF) – were raising funds for terrorism. The government therefore planned to freeze the assets of HLF and GRF, search their offices, or both, on December 4 and 14, 2001, respectively. One day before the government actions against HLF and GRF took place, however, New York Times reporters contacted HLF and GRF to seek comment on the imminent asset freezes by the government. No official or agent of the government was authorized to disclose the planned asset freezes or searches of HLF and GRF. Disclosures of law enforcement actions can violate federal criminal laws, including prohibitions against obstruction of justice. In each instance, the government believes that the advance notice provided by the New York Times' reporters reduced the effectiveness of the searches and compromised the safety of FBI agents who participated in them. 459 F.3d at 162-163; Gov't C.A. Br. 5-7.

GRF's headquarters were located in Chicago, Illinois. In response to learning of the leaks of the government's plans to move against HLF and GRF, the United States Attorney for the Northern

District of Illinois opened a grand jury investigation to identify the governmental employee or employees who told the New York Times' reporters about the government's imminent action. The government has at all times treated the two reporters as witnesses rather than subjects or targets of the investigation. But the government asked the New York Times to provide the reporters' telephone records for limited time frames in order to determine the sources of leaks from the government. When the New York Times refused to cooperate, the government informed it that, in view of the extraordinary circumstances of the investigation and the exhaustion of alternative avenues of inquiry, the government would seek to obtain the telephone records from third parties.[1] 459 F.3d at 164-165; Gov't C.A. Br. 7-9.

2. On August 9, 2004, the New York Times filed a civil action in the Southern District of New York seeking a declaratory judgment that privileges derived from the common law and the First Amendment barred the government from enforcing a subpoena for the reporters' telephone records held by third parties. The government moved to

[1] The government originally notified the New York Times that it intended to seek telephone records covering a total of 33 days, but it ultimately narrowed the time frame of records sought to a total of eleven days, covering periods immediately before the reporters' communications to HLF and GRF on December 3 and 13, 2001, concerning imminent government action against those entities, and a period immediately before an article in the New York Times pertaining to GRF. The records now at issue cover the following time periods: September 27-30, 2001 (4 days), December 1-3, 2001 (3 days), and December 10-13 (4 days).

dismiss the complaint on the ground that the New York Times had an adequate remedy by moving to quash any such subpoenas under Federal Rule of Criminal Procedure 17. The district court denied the motion, concluding that it had authority and discretion to entertain the action for a declaratory judgment. The court then granted summary judgment for the New York Times. It held that both the common law and the First Amendment supplied a qualified privilege to reporters to protect confidential sources. It further held that, in the circumstances of this case, those privileges protected against compelled disclosure of the reporters' telephone records held by third parties. The New York Times Company v. Alberto Gonzales, 382 F. Supp.2d 457 (S.D.N.Y. 2005); 459 F.3d at 165.

3. The United States appealed, and the court of appeals reversed. The court first concluded that Rule 17(c) of the Federal Rules of Criminal Procedure did not preclude resort to the declaratory judgment procedure and that the district court did not abuse its discretion in deciding to entertain this action. The court also concluded the New York Times could assert whatever reporter's privileges might exist in order to oppose enforcement of subpoenas for telephone records held by third parties (e.g., the telephone service providers). The court concluded that, "so long as the third party plays an 'integral role' in reporters' work, the records of third parties detailing that work are, when sought by

the government, covered by the same privileges afforded to the reporters themselves and their personal records." 459 F.3d at 168. The court, however, concluded that no valid claims of privilege exist in this case. Id. at 168-174.

a. As to the common law, the court determined that it was "unnecessary * * * for us to rule on whether [a qualified reporter's] privilege exists under Rule 501" of the Federal Rules of Evidence, because "it would be overcome as a matter of law" on the facts of this case. 459 F.3d at 169. The court began by agreeing with the district court that any possible common law privilege for a reporter's confidential sources would be qualified, rather than absolute.[2] Ibid. The court explained that "the government has a highly compelling and legitimate interest in preventing disclosure of some matters and that * * * interest would be seriously compromised if the press became a conduit protected by an absolute privilege through which individuals might covertly cause disclosure." Ibid. The court next held that it need not determine the precise scope of any qualified privilege, because "whatever standard is used, the privilege has been overcome as a

[2] In the district court, the New York Times had unsuccessfully advocated an essentially absolute privilege, 382 F.Supp.2d at 501, but in the court of appeals, the Times effectively abandoned that position by relegating it to a footnote and stating that, because the government had assertedly failed to overcome a qualified privilege, "there is no need for th[e] [court of appeals] to go further at this time." Appl. C.A. Br. 61 n.22.

matter of law on the facts before us."[3] Id. at 170.

The court of appeals reasoned that the grand jury's investigation focused both on the unauthorized disclosure of the government's planned asset freezes and searches and on the reporters' communications to the foundations at issue. The reporters' communications, the court noted, "had the effect of alerting the[] [foundations] to those plans, perhaps endangering federal agents and reducing the efficacy of the actions." 459 F.3d at 170. The court concluded that the government had a "compelling interest" in protecting the confidentiality of its actions to thwart terrorist financing, particularly where unauthorized disclosures "may constitute a serious obstruction of justice." Ibid.

The court also found it "beyond argument that the evidence from the reporters is on its face critical" to the grand jury investigation. 459 F.3d at 170. First, the court noted, the reporters were the only witnesses, other than the sources themselves, who could describe the circumstances of the leaks. Ibid. Second, "the reporters were not passive collectors of

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[3] The court of appeals described three different formulations of the asserted qualified privilege, 459 F.3d at 169-170, including that advocated by applicant (Appl. C.A. Br. 61): "a test requiring a showing that the information sought is 'highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from available sources.'" 459 F.3d at 169-170 (quoting In re Petroleum Prods. Antitrust Litig., 680 F.2d 5, 7 (2d Cir. 1982)).

information whose evidence is a convenient means for the government to identify an official prone to indiscretion." Ibid. Rather, "the communications to the two foundations were made by the reporters themselves and may have altered the results of the asset freezes and searches." Ibid. The court thus determined that the reporters' information is "critical" to the investigation: "There is simply no substitute for the evidence they have." Ibid.

The court stressed that its "holding is limited to the facts before" it, i.e., where "the reporters were active participants in the alerting of the targets." 459 F.3d at 171 & n.5. The court observed that, in this context – where reporters made disclosures of planned asset freezes or searches to the targets of those actions – the limited information sought by the grand jury would not imperil "a free press." Ibid. The court explained that "[l]earning of imminent law enforcement asset freezes/searches and informing targets of them is not an activity essential, or common, to journalism." Ibid. The court added that it saw "no public interest in having information on imminent asset freezes/searches flow to the public, much less to the targets." Ibid.

b. As to the First Amendment, the court of appeals recognized that this Court's decision in Branzburg v. Hayes, 408 U.S. 665 (1972), stands as the "governing precedent regarding reporters' protection under the First Amendment from disclosing confidential sources." 459 F.3d at 172. The court stated that Branzburg held

that the First Amendment does not give reporters any privilege to withhold evidence from a grand jury greater than privileges held by other citizens. Ibid. (citing Branzburg, 408 U.S. at 690). While the court observed that Branzburg said that a grand jury investigation that is not conducted in good faith might give rise to First Amendment issues, ibid. (citing Branzburg, 408 U.S. at 707), the court concluded that the law enforcement interests in this case are genuine and serious, and "there is no suggestion of bad faith in the investigation or conduct of the investigation." Id. at 174.

Accordingly, the court vacated the district court's judgment and remanded for it to enter judgment in accordance with the court of appeals' opinion, "without prejudice to the district court's redaction of materials irrelevant to the investigation upon an offer of appropriate cooperation."[4] 459 F.3d at 174.

c. Judge Sack dissented. 459 F.3d at 174-189. Judge Sack would have adopted a qualified common law privilege for reporters in the "leak" context that contained three elements: "(1) that the

[4] In both its common law and First Amendment discussions, the court of appeals noted that the New York Times expressed concern about the "overbreadth" of the proposed subpoenas, which would seek telephone records that would reveal sources irrelevant to the present investigation. The court's response was that this "problem can be remedied by redaction with the cooperation of the Times and its reporters." Id. at 174 & n.8; see also id. at 171 ("the government, if offered cooperation that eliminates the need for the examination of the Times' phone records in gross, cannot resist the narrowing of the information to be produced.").

information being sought is necessary – highly material and relevant, necessary or critical, (2) that the information is not obtainable from other available sources, and (3) that nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in news gathering and maintaining a free flow of information to citizens." Id. at 187 (citations and internal quotation marks omitted). On the present record, the dissent would have found that the government had not made the showings necessary to overcome a qualified privilege, so formulated. Id. at 187-189. In particular, Judge Sack believed that the government's failure to furnish specific information about the course of the grand jury investigation meant that it had not sufficiently established: the materiality and relevance of the information sought; the government's exhaustion of alternative means to identify the sources of the leaks; or the reasons why the public interest balancing test that the dissent fashioned would be satisfied. Ibid.

4. On September 1, 2006, the New York Times filed a petition for rehearing en banc. On September 7, 2006, the United States filed a motion requesting that the court of appeals expedite review of the appellee's petition for rehearing en banc. In support of its motion, the government submitted a declaration by United States Attorney Patrick J. Fitzgerald, stating that the five-year statute

of limitations on certain substantive offenses under investigation will expire in December 2006:

> The disclosures that are the subject of the grand jury's investigation include disclosures that were made on or about December 3 and December 13, 2001. Thus, the statute of limitations applicable to certain substantive offenses based on those disclosures will expire on or about December 3 and December 13, 2006.

Declaration of Patrick J. Fitzgerald (September 3, 2006).

On November 2, 2006, the full court of appeals denied the New York Times' petition for rehearing en banc without ordering a response from the government. Under Federal Rule of Appellate Procedure 41(b), the mandate would ordinarily issue seven calendar days after the denial of the petition for rehearing. Under Rule 41(d)(1), however, the filing of a motion for stay of the mandate delays the issuance of the mandate until the court disposes of the motion.

On November 9, 2006, The New York Times filed a motion in the court of appeals for a 30-day stay of the mandate pending the filing of a petition for a writ of certiorari. The United States opposed that motion, again emphasizing the looming expiration of the statute of limitations for certain substantive crimes under investigation and attaching an affidavit from United States Attorney Fitzgerald. On November 16, 2006, the court of appeals entered an order staying the issuance of the mandate for one calendar week to permit the New York Times to seek a stay from this Court.

ARGUMENT

THE APPLICATION FOR A STAY OF THE MANDATE PENDING THE FILING OF A PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

To secure a stay pending the filing and disposition of a petition for writ of certiorari, an applicant must show that there is "a reasonable probability that certiorari will be granted * * *, a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed." Barnes v. E-Systems, Inc., 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers); see Planned Parenthood of Southeastern Pennsylvania v. Casey, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers). "[I]n a close case it may [also] be appropriate to 'balance the equities' – to explore the relative harms to applicant and respondent, as well as the interests of the public at large." Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). When, as in this case, the court of appeals has denied a stay, the applicant's burden "is particularly heavy." Beame v. Friends of the Earth, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers). "The burden is on the applicant to 'rebut the presumption that the decision below -- both on the merits and on the proper interim disposition -- is correct.'" Casey, 510 U.S. at 1310 (quoting Rostker, 448 U.S. at 1308)).

Applicant cannot make the requisite showing in this case. There is no reasonable probability that this Court will grant

certiorari or reverse the court of appeals' decision. The court of appeals did not resolve whether a common law qualified reporter's privilege exists in a grand jury investigation. Rather, it held only that, if one exists and whatever its scope, it was overcome on the facts of this particular case. That decision is correct, factbound, and creates no conflict of authority. The court's rejection of a First Amendment privilege is also consistent with, and indeed compelled by, Branzburg v. Hayes, and it too raises no conflict with other authority that would warrant review. Even if review were warranted on the general issue of a reporter's privilege, this case presents a highly atypical fact pattern, in which the reporters themselves were active participants in alerting the targets of asset freeze and searches to imminent government action. In that circumstance, the case for disclosure of the reporter's telephone records is compelling: the government's investigation is manifestly important; the reporters' information is critical; and "[t]here is simply no substitute for the evidence they have." 459 F.3d at 170. For those and other reasons – including that this case involves an assertion of privilege in telephone records held by third parties, rather than the usual claim of privilege for the reporter's own records or testimony – this case would provide an exceptionally unsuitable vehicle for consideration of the general legal issues that applicant seek to raise.

Finally, if it is necessary to consider the stay equities, the public interest strongly favors denial of the stay. The government is nearing the end of the limitations period on certain substantive criminal charges stemming from the disclosures at issue. While other criminal charges may remain, it would unreasonably frustrate the grand jury's investigation if delay prevented full and adequate consideration of the serious potential criminal charges at issue. That irreparable harm to the public interest strongly counsels against a stay. In contrast, the harm faced by applicant is limited and can be reduced by measures within applicant's control.

A. Applicant Cannot Establish A Reasonable Probability That The Court Will Grant Certiorari Or Reverse the Judgment In This Case

Applicant's primary submission (Appl. 8-12) is that conflicts in authority warrant this Court's review of both the qualified common-law privilege issue and the First Amendment issue. Contrary to that claim, the court of appeals' decision does not create or deepen any such asserted conflicts. And unique features of this case – including the involvement of reporters in disclosures under investigation and their assertion of the privilege as to telephone records held by third parties – further diminish any likelihood that the Court would grant certiorari or reverse the judgment below.

1. Applicant argues (App. 9-10) that courts are in disarray on whether the First Amendment protects reporters against

compulsion to reveal confidential sources in criminal proceedings. In fact, since this Court's rejection of any such privilege in the grand jury context in Branzburg v. Hayes, no federal appellate decision has recognized any First Amendment protection for reporters who interpose a confidential-source privilege against a grand jury subpoena.

Branzburg itself resolved the question whether the First Amendment protects a reporter's confidential sources in a good-faith grand jury investigation: it held that no special First Amendment protection exists. 408 U.S. at 707-708; see Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (the First Amendment does not "relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source"); University of Pennsylvania v. EEOC, 493 U.S. 182, 201 (1990) (Branzburg "rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary"). Since that time, every federal appellate court that has resolved the issue has followed Branzburg's holding.[5]

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[5] See, e.g., In re: Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1142 (D.C. Cir.), cert. denied, 125 S. Ct. 2977 (2005); In re Grand Jury Proceedings, 5 F.2d 397, 399-404 (9th Cir. 1993)

Applicant cites cases from three circuits (the First, Third, and Eleventh), apart from the court of appeals below, that, applicant claims, have recognized a reporter's privilege under the First Amendment in criminal cases. Appl. 9 (citing In re Special Proceedings, 373 F.3d 37, 45 (1st Cir. 2004); United States v. LaRouche Campaign, 841 F.2d 1176, 1181 (1st Cir. 1988); In re Grand Jury Subpoena of Williams, 766 F. Supp. 358, 367 (W.D. Pa. 1991), affirmed by an equally divided court, 963 F.2d 567 (3d Cir. 1980) (en banc), cert. denied, 449 U.S. 1126 (1981); United States v. Cuthbertson, 630 F.2d 139, 146-147 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981); United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986)). None of those decisions assists it.[6]

(no privilege in good-faith grand jury inquiry involving legitimate law enforcement needs, where information sought does not have only a remote and tenuous relationship to the investigation); United States v. Smith, 135 F.3d 963, 968-969 (5th Cir. 1998); cf. In re Grand Jury Proceedings, Storer Communications, 810 F.2d 580, 587-588 (6th Cir. 1987) (state statute that conferred reporter's privilege on newspaper reporters, and not on broadcast media reporters, did not interfere with any "fundamental right" and thus triggered only rational basis equal protection scrutiny) (citing Branzburg).

[6] Applicant also garners no assistance from prior decisions of the Second Circuit itself (Appl. 9): the panel explained why none of its precedent involved circumstances comparable to this case (459 F.3d at 173); the full court of appeals denied rehearing en banc, thus indicating no dissonance in circuit precedent; and, in any event, a claim of intra-circuit conflict would not warrant this Court's review, see Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). Applicant's citation (Appl. 9-10) of civil cases likewise does not advance its claim of a conflict; this case involves grand jury subpoenas and is squarely controlled by Branzburg.

In Special Proceedings, the First Circuit held that Branzburg precludes recognition of a First Amendment reporter's privilege in the context of a special prosecutor's investigation, a context the court found analogous to a grand jury investigation. 373 F.3d at 44-45 ("In Branzburg, the Supreme Court flatly rejected any notion of a general-purpose reporter's privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege. * * * Branzburg governs in this case even though we are dealing with a special prosecutor rather than a grand jury."). The First Circuit's earlier decision in LaRouche considered, not a grand jury subpoena, but a defendant's effort to subpoena for trial "outtakes" of an television network's interview with a prospective government witness. 841 F.2d at 1177, 1182; cf. Special Proceedings, 373 F.3d at 45 (noting that LaRouche involved a "situation[] distinct from Branzburg").

In Williams, the Third Circuit affirmed a district court decision by an equally divided en banc court, 963 F.2d 567, thus establishing no precedent, see Rutledge v. United States, 517 U.S. 292, 204 (1996). In Cuthbertson, similar to LaRouche, the Third Circuit considered privilege claims only as to a defense subpoena for statements of government trial witnesses and recognized a qualified privilege in that context (630 F.2d at 146-147); no grand jury subpoena was at issue.

Finally, in Caporale, the Eleventh Circuit applied a

reporter's privilege in a post-trial evidentiary hearing concerning allegations of jury tampering. 806 F.2d at 1504. Again, like the other decisions on which applicant relies, Caporale did not involve a grand jury subpoena.

In addition, none of the cases cited by applicant establishes an absolute privilege; at most, they point towards a qualified privilege. E.g., Caporale, 806 F.2d at 1504; Cuthbertson, 630 F.3d at 146-147. In light of the court of appeals' unequivocal ruling in this case that any qualified common-law privilege (regardless of its formulation) is overcome by the strength of the government's interest and the necessity of acquiring information from applicant, any qualified First Amendment privilege would also have to yield. For that reason as well, the decision below would not create any conflict worthy of this Court's review.

In sum, the courts are not in disarray on the question presented by this case: whether reporters may assert a constitutional privilege against revelation of their confidential sources in response to a grand jury investigation conducted in good faith. Consistent with this Court's holding in Branzburg, the federal appellate courts have uniformly and correctly held that they may not.[7]

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[7] Applicant's reliance (Appl. 10 n.5) on state court decisions is also misplaced. Only one of the state cases applicant cites applied a First Amendment reporter's privilege in a grand jury investigation after Branzburg. See In re Letellier, 578 A.2d 722 (Me. 1990). That case misconstrued Branzburg and relied on

2. Applicant also argues (Appl. 11) that conflicts over the existence and scope of a common law reporter's privilege under Federal Rule of Evidence 501 warrant this Court's review. Contrary to applicant's claim, there is no reasonable probability that this Court will grant certiorari to review that issue. Nor is it likely that the Court would reverse the court of appeals' holding that, even if a reporter's privilege existed, it would be overcome on the unusual facts of this case.

a. The ultimate basis for the court of appeals' decision is that, even if the law recognized a qualified reporter's privilege in the context of a good faith grand jury investigation, the privilege would be overcome on the unique facts of this case. The court accordingly found it "unnecessary * * * to rule on whether [a qualified reporter's] privilege exists under Rule 501." 459 F.3d at 169. In so holding, the court considered a variety of formulations of the qualified privilege and held that "whatever standard is used, the privilege has been overcome as a matter of law on the facts before us."[8] Id. at 170. One of the formulations

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First Circuit decisions applying a reporter's privilege in civil proceedings. Id. at 724-726. In any event, Letellier ultimately required the reporter to disclose the subpoenaed material to the grand jury, so the recognition of the privilege was not essential to the judgment. Id. at 727-730. And, as noted in the text, any qualified privilege would similarly be overcome on the facts here.

[8] The panel majority also noted that the facts would overcome even the formulation of the privilege favored in Judge Sack's dissenting opinion, stating: "We harbor no doubt whatsoever that, on the present record, the test adopted by our dissenting colleague

the court considered was the formulation specifically advocated by applicant. Compare id. at 169-170 with App. C.A. Br. 61; see page 8, note 3, supra; Appl. 2.

The only legal holding of the court was that if any privilege exists in this context, it would be qualified, rather than absolute. 459 F.3d at 169-170. Applicant does not seriously contest that holding. As a result, this case presents no legal issue concerning the existence or scope of a qualified common law reporter's privilege to protect confidential sources in a criminal case: the panel assumed the standard applicant advocated – and ruled against it on the facts. After a detailed discussion of the facts (459 F.3d at 169-171), the court of appeals correctly concluded:

> There is therefore a clear showing of a compelling governmental interest in the investigation, a clear showing of relevant and unique information in the reporters' knowledge, and a clear showing of need. No grand jury can make an informed decision to pursue the investigation further, much less to indict or not to indict, without the reporters' evidence. It is therefore not privileged.

Id. at 171. There is no reasonable probability that this Court would grant certiorari to review the court of appeals' conclusion that, on the particular facts and record in this case, the qualified privilege that applicant advocates was overcome.

b. Applicant asserts (Appl. 5, 12, 13), that the court's

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for overcoming a qualified privilege has been satisfied." 459 F.3d at 171 n.5.

holding that the privilege was overcome lacked evidentiary support, such that "the Second Circuit effectively held that reporters' First Amendment and federal common law-based privileges will always be overcome provided that counsel for the government simply asserts, without submitting evidence of any kind, that he has satisfied the applicable test." Appl. 12. The court, however, explicitly found the government's showing sufficient in this case because "unique knowledge of the reporters" lay "at the heart of the investigation" in light of their role in "informing the targets" of upcoming assets freezes. 459 F.3d at 171. The court could not have been clearer that its holding was "limited to the facts" before it (which are far from a typical fact pattern) and "in no way suggest[ed] that [the showing made here] would be adequate in a case involving less compelling facts." Ibid. Accordingly, the court of appeals itself placed careful limits on its holding and did not announce the far-reaching rule that applicant ascribes to it.

In addition, the record amply supports the conclusion that the government exhausted all reasonable means of investigation before seeking to subpoena the telephone records at issue. The record establishes that government agents searched HLF's and GRF's offices on December 4 and 14, 2001. The articles that contemporaneously appeared in the New York Times made it evident that government plans for imminent action had been leaked. After the searches, the

United States Attorney's office and the FBI "commenced an investigation to determine whether government officials were responsible for disclosing to the Times that a search of GRF's office was imminent." 382 F.Supp.2d at 467. More than eight months elapsed from the December 2001 searches before the United States Attorney wrote to applicant to request voluntary cooperation from the reporter involved in the GRF disclosure and production of his telephone records for a defined period related to that disclosure. Ibid. (discussing letter from Patrick J. Fitzgerald dated August 7, 2004) Applicant refused cooperation, stating that its reporter's newsgathering activities and discussions with confidential sources were privileged. Ibid.

Nearly two years then passed before the United States Attorney renewed contacts with applicant, informing it that the government's inquiry now encompassed the HLF disclosure. The United States Attorney requested voluntary cooperation from the reporters involved in both disclosures. At that time, Fitzgerald notified applicant that, pursuant to the Department of Justice Guidelines for Issuance of Subpoenas to Members of the News Media, 28 C.F.R. 50.10, he had been "duly authorized to obtain and review information from other sources, particularly those entities providing telephone service to The New York Times, [and the reporters involved]." 382 F.Supp.2d at 467. Subsequently, applicant requested a meeting with senior officials of the

Department of Justice to discuss Fitzgerald's efforts to obtain telephone records in this case. In declining to meet, Deputy Attorney General James Comey specifically assured applicant that "[h]aving diligently pursued all reasonable alternatives out of regard for First Amendment concerns, and having adhered scrupulously to [Department of Justice] policy, including a thorough review of Mr. Fitzgerald's request within [the Department of Justice], we are now obliged to proceed." Id. at 469.

A critical component of the Department of Justice Guidelines is that

> All reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media, and similarly all reasonable alternative investigative steps should be taken before considering issuing a subpoena for telephone toll records of any member of the news media.

28 C.F.R. 50.10(b). In order to issue such a subpoena, the Attorney General personally must authorize that action. 28 C.F.R. 50.10(e) ("No subpoena may be issued to any member of the news media or for the telephone toll records of any member of the new media without the express authorization of the Attorney General."). Before seeking the Attorney General's involvement and authorization, "the government should have pursued all reasonable investigation steps as required by paragraph (b) of this section." 28 C.F.R. 50.10(g)(1). The Attorney General's authorization reflects a determination that such pursuit had occurred. And in

the district court the government submitted an affidavit attesting that it has "reasonably exhausted alternative investigative means." 459 F.3d at 171; 382 F.Supp.2d at 511.

In light of the overall context of this case, the record supports the inference that the government pursued all reasonable alternative investigative steps to obtain the information it sought before seeking the telephone records at issue.[9] The timing of the government's initial contact with applicant – eight months after the disclosures in question – supports the inference that the government had diligently, but unsuccessfully, pursued other means of identifying the government official or officials who provided information to applicant's reporters. Nearly another two years ensued before the government renewed its requests to applicant – during which time the United States Attorney obtained authorization from the Attorney General to issue subpoenas. Before seeking such authorization, the United States Attorney was required by regulation to exhaust alternative investigative means, and a court can presume that the United States Attorney carried out that requirement in good faith. See United States v. Armstrong, 517

[9] The Attorney General's Guidelines cover review of telephone records even though no appellate decision before this case had permitted a claim of reporter's privilege in that context, and, as discussed below, see page 32, infra, no such claim is warranted. The decision to seek telephone records in this case rather than to compel testimony or documents from the reporters themselves itself represented a measured approach that took into account the reporters' interests.

U.S. 456, 464 (1996) ("in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties") (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926)). The Deputy Attorney General reiterated that the Department had pursued "all reasonable alternatives out of regard for First Amendment concerns" before approving the review of the reporters' telephone records. 382 F.Supp.2d at 469. Against that background, it would be unreasonable to reject the government's declaration that all reasonable steps had been exhausted based on speculation that, despite determinations at the highest level of the Justice Department that other means had been exhausted, the government had overlooked or failed to employ obvious alternative means of identifying the sources of the leaks.

c. Contrary to applicant's claim (Appl. 11), the court of appeals' decision does not conflict with Jaffee v. Redmond, 518 U.S. 1 (1996), in which this Court recognized a psychotherapist-patient privilege under Rule 501. To the extent that applicant suggests that because Jaffee rejected case-by-case balancing in the psychotherapist-patient context, it forbids balancing of interests concerning any claim of privilege, applicant is clearly mistaken. See, e.g., Roviaro v. United States, 353 U.S. 53, 60-62 (1957) (qualified informant's privilege requires "balancing the public interest in protecting the flow of information against the

individual's right to prepare his defense"). In any event, applicant effectively abandoned any claim of an absolute privilege in the court of appeals, see page 7, note 2, supra, and does not explicitly advocate such a privilege here.

3. The unlikelihood that this Court would grant review in his case is underscored by the Court's recent denial of certiorari in a case raising highly similar issues. "The action of the Court on an earlier petition for certiorari involving the same or similar questions * * * is of course relevant" to whether a stay should issue. Robert L. Stern, et al., Supreme Court Practice 794 n.71 (8th Ed. 2002) (collecting citations); see, e.g., Packwood v. Senate Select Committee, 510 U.S. 1319, 1321 (1994) (Rehnquist, C.J.) ("Our recent denial [of certiorari] demonstrates quite clearly the unlikelihood that four Justices would vote to grant review on this issue."); South Park School District v. United States, 453 U.S. 1301, 1303-1304 (1981) (Powell, J.) (denying stay because there was no reasonable probability that review would be granted as Court had denied review in an "almost identical" case three years earlier).

In June 2004, this Court denied a petition for a writ of certiorari in a case in an analogous posture and raising nearly identical arguments in favor and against the grant of review. In

re: Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir.),[10] cert. denied, 125 S. Ct 2977 (2005). In that case, the court of appeals' rationale bore a striking resemblance to the rationale of the court of appeals in this case. Judge Sentelle's opinion for the court stated:

> The District Court held that neither the First Amendment nor the federal common law provides protection for journalists' confidential sources in the context of a grand jury investigation. For the reasons set forth below, we agree with the District Court that there is no First Amendment privilege protecting the evidence sought. We further conclude that if any such common law privilege exists, it is not absolute, and in this case has been overcome by the filings of the Special Counsel with the District Court.

438 F.3d at 1142 (Sentelle, J., Opinion for the Court). Judge Henderson's concurring opinion further stated:

> Because my colleagues and I agree that any federal common-law reporter's privilege that may exist is not absolute and that the Special Counsel's evidence defeats whatever privilege we may fashion, we need not, and therefore should not, decide anything more today than that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect.

Id. at 1159 (Henderson, J., concurring). In light of this Court's denial of certiorari in Miller – in the face of legal arguments nearly identical to those presented here – there is no reasonable probability that the Court will grant review in this case.

A further factor undercutting the likelihood of this Court's

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[10] The case was decided on February 15, 2005. The opinion was reissued on February 3, 2006. 438 F.3d at 1141.

review is that Congress has periodically considered legislative proposals that would create a federal reporter's privilege. See 382 F. Supp.2d 507 n.45. In fact, bills are currently under consideration by the Congress.[11] This active consideration of reporter's privilege legislation in both Houses of Congress provides strong additional reason for this Court's restraint. This Court has stated that "we are disinclined to exercise this authority [to recognize new privileges under Rule 501] expansively. We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself. * * * The balancing of conflicting interests of this type is particularly a legislative function." University of Pennsylvania *v.* EEOC, 493 U.S. 182, 190 (1990). See also Branzburg, 408 U.S. at 706 ("At the federal level, Congress has freedom to determine

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[11] On July 18, 2005, Representative Mike Pence, with co-sponsors, introduced in the House the Free Flow of Information Act of 2006, H.R. 3323, 109th Cong., to establish a qualified reporter's privilege. On May 18, 2006, Senator Richard Lugar, with co-sponsors, introduced in the Senate the Free Flow of Information Act of 2006, S. 2831, 109th Cong., to establish a qualified reporter's privilege. On September 20, 2006, the Senate Committee on the Judiciary held a hearing on the subject of "Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement," at which the Deputy Attorney General testified. For the House and Senate bills and a notice of the Judiciary Committee hearing including the prepared testimony of several witnesess, see: http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.3323 (House Bill); http://www.govtrack.us/data/us/bills.text/109/s/s2831.pdf (Senate Bill); http://judiciary.senate.gov/hearing.cfm?id=2070 (Judiciary Committee Hearing).

whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate."). In view of Congress's current consideration of qualified-privilege legislation to protect a reporter's confidential sources, intervention by this Court to create such a privilege is especially unlikely and unwarranted.

4. Even if the issue of a reporter's privilege to protect confidential sources might other otherwise warrant this Court's attention, this case would be a singularly unsuitable vehicle for review because of its atypical facts.

First, as the court of appeals emphasized, this case does not involve reporters who merely acquired and then published information from confidential sources. Rather, the reporters disclosed information to the targets of imminent law enforcement action before that action took place. As the court explained, applicants' "reporters were not passive collectors of information whose evidence is a convenient means for the government to identify an official prone to indiscretion." 459 F.3d at 170. Rather, "the communications to the two foundations were made by the reporters themselves and may have altered the results of the asset freezes and searches." Ibid. Thus, the reporters' actions here lie at the core of the grand jury investigation but at the periphery of normal

news gathering.

In light of those facts, the court of appeals found it beyond question that the reporters' information "is critical to the present investigation"; "[t]here is simply no substitute for the evidence they have." 459 F.3d at 170. The court also found no need to analyze prior circuit precedent concerning First Amendment claims of the press in other judicial contexts because "[n]one involved a grand jury subpoena or the compelling law enforcement interests that exist when there is probable cause to believe that the press served as a conduit to alert the targets of an asset freeze and/or searches." Id. at 173. The court thus "emphasize[d] that [its] holding is limited to the facts before us." Id. at 171. The narrowly limited nature of the court's holding undermines any claim that this case should be the flagship for defining a qualified privilege for reporters in a criminal investigation. The fact that the reporters here relayed disclosures from a government source to targets of an imminent law enforcement action substantially weakens any claim of freedom of the press. It also sets this case apart from others that have considered reporter's privilege issues. Accordingly, this unusual case constitutes a poor vehicle for certiorari.[12]

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[12] As noted, the government has treated the reporters whose calls are at issue as witnesses, rather than subjects or targets of the grand jury investigation. Nevertheless, applicant's reporters have admitted contacting representatives of HLF and GRF in advance of the government's planned actions to seek comment. The

Second, this case does not involve a direct effort to obtain information from a reporter, either through testimony or subpoenaed records in the hands of the reporter herself. Rather, this case involves telephone records held by third parties. Application of a reporter's privilege to such records would be wholly unwarranted, even if the reporter herself could assert a qualified privilege. No one has a justified expectation of privacy in the telephone numbers of other persons whom the individual calls or who call the individual: those numbers are conveyed to the telephone company and form part of its business records. See Smith v. Maryland, 442 U.S. 735, 742-746 (1979). Whatever restrictions might be placed on the grand jury's acquisition of evidence from reporters themselves, no such restrictions should be placed on acquisition of telephone records from third parties.

Reporters might find it essential to use the telephone to talk with sources. But they might equally claim that it is essential to take airplanes, rent hotel rooms, and use taxis to visit and meet with confidential sources. Any suggestion that a press privilege would protect against the grand jury's ability to subpoena that evidence from third parties would be work a major inroad into the

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government's compelling interest in tracing the origins and nature of such disclosures distinguishes this investigation from the mine run of cases raising claims of a reporter's privilege.

grand jury's investigatory functions.[13] See Reporter's Committee v. AT&T, 593 F.2d 1030, 1048-1049, 1053 (D.C. Cir. 1978) (rejecting claimed right of reporters to advance notice of subpoenas issued to telephone service provider). Accordingly, there is substantial reason to question whether a reporter's privilege claim can even be asserted in the present case. See Gov't C.A. Br. 46-50 (arguing against recognition of such a claim). The existence of that threshold issue amplifies the reasons for finding no reasonable probability that certiorari would be granted in this case.[14]

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[13] The court of appeals relied on circuit precedent in holding that a reporter can assert a privilege in material in the hands of a third party "so long as the third party plays an 'integral role' in reporters' work." 459 F.3d at 168. The court was willing to say only that "arguably" that analysis would not cover "lodging, air travel, and taxicabs." Id. at 168 n.3. But the logic of the court's analysis carries a broad potential to reach a variety of records held by third parties, unjustifiably giving the press a privilege vastly more protective than any other privilege.

[14] Two additional threshold issues further decrease the suitability of this case for certiorari review. First, the court of appeals held that the Declaratory Judgment Act permitted the district court to entertain this action, notwithstanding the existence of Federal Rule of Criminal Procedure 17(c), which specifically provides a means to move to quash a grand jury subpoena. Second, the court of appeals held that the district court did not abuse its discretion in entertaining this declaratory judgment action, notwithstanding the existence of a plainly more appropriate forum: the district court in the Northern District of Illinois supervising the underlying grand jury investigation. 459 F.3d at 167. Resolution of either of those threshold issues against applicant would obviate the need to consider the questions applicant seeks to raise.

B. The Balance of Equities And The Public Interest Weigh Heavily Against Granting a Stay of the Mandate

In addition to applicant's inability to demonstrate that this Court would grant review and reverse the court of appeals' decision, there is additional and highly significant reason for denying a stay: the balance of equities strongly favors such a denial. The government is pursuing a criminal investigation of the utmost importance, and further delay threatens to thwart the grand jury's ability to complete its vital work. The harm to applicant's interests, in contrast, is far more attenuated than the application acknowledges.

1. As the government informed the court of appeals, the five-year statute of limitation on substantive criminal offenses relating to the disclosure of confidential information concerning asset freezes and searches of HLF and GRF will expire on December 3 and 14, 2006, respectively. While other potential criminal charges may remain, it would be extraordinarily injurious to the public interest to permit the statute of limitations to expire without permitting the grand jury to do its work – to consider any and all crimes that may have been committed in this sensitive and significant case. See United States v. R. Enterprises, Inc., 498 U.S. 292, 297 (1991) ("The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred."); Branzburg, 408 U.S. at 701 ("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.") (internal quotation marks omitted).

In this case, the court of appeals made clear that "[t]he grand jury * * * has serious law enforcement concerns as the goal of its investigation." 459 F.3d at 170. It also emphasized the centrality of the reporters' information to that inquiry: "the unique knowledge of the reporters is at the heart of the investigation, and there are no alternative sources of information that can reliably establish the circumstances of the disclosures of grand jury information and the revealing of that information to targets of the investigation." Id. at 171. Reviewing applicant's telephone records is thus essential to the grand jury's work. Under those circumstances, the public interest in completing the investigation, and avoiding irreparable injury through the running of the limitations period, is paramount to respondent's claims of irreparable harm. Staying the mandate pending the filing and disposition of a certiorari petition, even on an expedited basis, would surely preclude the grand jury from completing its work before the imminent running of the limitations period.

Because of the harm faced by the government if this Court granted a stay, applicant's reliance (Appl. 7) on In re Roche, 448 U.S. 1312 (1980 (Brennan, J.) is misplaced. In that case, a

reporter was held in civil contempt for failing to reveal, at a deposition in anticipation of state judicial disciplinary proceedings, the individuals on a list of hearing witnesses who had served as confidential sources for the reporter's investigation of alleged judicial misconduct. Id. at 1312-1313. In granting a stay, Justice Brennan noted that, absent a stay, the reporter faced either revelation of his sources or going to jail, while, with a stay, "the judge subject to the disciplinary inquiry can obtain the information he seeks by deposing the hearing witnesses." Id. at 1316. Justice Brennan also noted that the disciplinary committee could alleviate any burden on the State by "continu[ing] disciplinary proceedings until resolution of applicant's petition for a writ of certiorari." Id. at 1316-1317. Here, neither of those things is true: the government does not have an alternative source for the information at issue, and delay to consider a certiorari petition would inevitably mean that certain potential charges would be time-barred.

2. While applicant claims irreparable injury if a stay is not granted, any claim of harm to applicant's interests must be analyzed carefully, in light of the specific circumstances of this case. Such an analysis reveals only minimal inroads on applicants' interests, at best.

The government sought third-party telephone records pertaining to applicant only after exhausting all reasonable alternative means

and engaging in a thorough deliberative process within the Department of Justice. See 459 F.3d at 164; 28 C.F.R. 50.10 (Department of Justice Guidelines for Issuance of Subpoenas to Members of the News Media); see also 382 F.Supp.2d at 481-484 (describing the Department of Justice's Guidelines in the course of holding that they do not confer privately enforceable rights). Pursuant to this policy, the Department of Justice issues media-related subpoenas only when necessary to obtain important, material evidence that cannot be reasonably obtained through other means. The painstaking process and internal discretion employed by the Department of Justice in this area reduces any claims of broad harm to the press from denying a stay in this case.[15]

Further undermining any suggestion of sweeping harm to the press is the context of the reporters' actions in this case. The government's criminal inquiry in this instance responded to highly unusual circumstances. In the district court, applicants' reporters asserted that, in the wake of the September 11, 2001, attacks, they wrote 78 articles for the New York Times concerning terrorism and related threats, "dozens of which articles * * * contain information attributed to confidential sources." 382 F.Supp.2d at 499. Yet the vast majority of those articles

[15] See Branzburg, 408 U.S. at 706-707 (noting the Department's Guidelines and observing that "[t]hese rules are a major step in the direction the reporters herein desire to move" and "may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials").

triggered no governmental inquiry to applicant whatsoever. What provoked the current inquiry were their phone calls to HLF and GRF seeking comment on imminent, non-public law enforcement action. As the court of appeals concluded: "We see no danger to a free press" in denying application of the privilege to applicant here; "[l]earning of imminent law enforcement asset freezes/searches and informing targets of them is not an activity essential, or common, to journalism." 459 F.3d at 171; id. at 171 n.5 ("we see no public interest in having information on imminent asset freezes/searches flow to the public, much less to the targets").

The New York Times asserts that, "[w]ithout a stay, the government would immediately be entitled to obtain and review the telephone records it seeks which will reveal the identity of numerous confidential sources of The Times and its reporters." Appl. 7. But the court of appeals provided a means to alleviate such claims of "overbreadth" on remand to the district court. The court remanded the case "without prejudice to the district court's redaction of materials irrelevant to the investigation upon an offer of appropriate cooperation." Id. at 174. Nothing inherent in this investigation makes it necessary for the government to review telephone records that "would reveal the identities of dozens of confidential sources that have no relationship whatsoever to the government's investigation" (Appl. 4) – unless applicant makes such a review necessary by failing to cooperate. Appropriate

cooperation in this context, of course, must give the government a full and expeditious opportunity to identify phone numbers that are connected with the leaks and disclosures to the targets in this case. It is essential that any such narrowing process occur promptly, in light of the severe deadlines that the grand jury faces. But consistent with those requirements, applicant has the power to limit the extent of disclosure of confidential-source telephone numbers to those that are relevant to the present investigation.

As for the broader claims of irreparable harm to the news gathering process, applicant offers the same arguments and claims that were advanced in Branzburg. 408 U.S. at 693-694. Events since 1972 confirm the conclusions the Court drew in that case: the occasional disclosure of confidential sources in legal proceedings does not have the dire consequences hypothesized by reporters. Investigative journalism continues to flourish. See, e.g., 382 F.Supp.2d at 498 (describing, inter alia, exposure of Watergate through information from "Deep Throat"; revelation improper activities during the Carter presidency; reporting on the Iran/Contra affair; and exposure of information concerning Abu Ghraib – all of which depended in part on confidential sources). Experience shows that requiring the media to identify sources when necessary to conduct thorough and complete grand jury investigations has not restricted the free flow of information to

the press – and certainly not to a degree that outweighs the public interest in the truth-seeking function of grand jury investigations.

In sum, balancing the significant harm to the public interest in effective grand jury investigations and fair enforcement of the criminal law against the attenuated harm to the news gathering process, the scales tip decidedly against granting a stay in this case.

CONCLUSION

The application for a stay of the mandate pending the filing of a petition for a writ of certiorari should be denied.

Respectfully submitted.

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