No. 12-627

In The
Supreme Court of the United States

ED MOLONEY and ANTHONY McINTYRE,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF *AMICUS CURIAE* OF ARTICLE 19: GLOBAL CAMPAIGN FOR FREE EXPRESSION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae ARTICLE 19: Global Campaign for Free Expression ("ARTICLE 19"), an international organization with headquarters in London, England, and regional offices in Senegal, Kenya, Bangladesh, Mexico, and Brazil, advocates for freedom of expression as a fundamental human right. Founded in 1987 and named for the corresponding article of the Universal Declaration of Human Rights, the organization has participated as *amicus curiae* or by intervention in free expression cases around the world, including in the United States. ARTICLE 19 has a strong interest in the clarification of the newsgatherer's privilege—or the right to the protection of sources—and the right to an evidentiary hearing on such privilege claims, since the right to the protection of sources is a necessary element of the right to freedom of expression. ARTICLE 19 has a strong interest in protecting the work of journalists, human rights defenders, researchers, and others who make use of confidential sources, particularly those who work in

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[1] In accordance with Supreme Court Rule 37, the parties were notified ten days prior to the due date of this brief of the intention to file this brief. The parties have consented to the filing of this brief. Consent letters have been submitted to the Court, concurrently with the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

conflict and post-conflict societies where the free flow of information is especially vulnerable.

SUMMARY OF ARGUMENT

Petitioners Ed Moloney and Anthony McIntyre are professional researchers who worked in conjunction with Boston College over a period of five years to compile an oral history of the Troubles, a 30-year period of conflict in Northern Ireland. This research effort, known as the Belfast Project, involved interviews conducted between 2001 and 2006 with former members of paramilitary groups. Because of the sensitive nature of this research and the potential risks that it posed to the researchers and participants, the interviews were given based on a promise that each interviewee's statement would remain confidential in an archive at Boston College until the interviewee died. Five years after the interviews were completed, the U.S. Department of Justice served subpoenas for confidential interview tapes pursuant to a request from British law enforcement authorities under a United States–United Kingdom Mutual Legal Assistance Treaty ("US–UK MLAT"). Moloney and McIntyre objected in court to these subpoenas because the requested tapes were of interviewees still living, and therefore the promise of confidentiality under which the interviews were given still applied.

The First Circuit held that the researchers had no constitutional right to object to the subpoenas

under *Branzburg v. Hayes*, 408 U.S. 665 (1972), and the US-UK MLAT displaced any procedural challenge to the subpoena. In their Petition to this Court, the researchers explain why this holding (1) conflicts with other federal court decisions and (2) deepens the circuit split over the meaning of *Branzburg* itself. We do not repeat these arguments in this brief.

Instead, we explain why review is necessary to clarify the constitutional right to the protection of sources, particularly for journalists and researchers working internationally and in conflict and post-conflict societies. Case-specific evaluation of source protection claims is the norm, rather than the exception, among both individual states and the international community. The special concerns of journalists and researchers working internationally, particularly those working in conflict and post-conflict areas, demonstrate the need for First Amendment jurisprudence that respects and protects confidential sources and information, even where government officials proceed under an MLAT. To dismiss such a First Amendment challenge before it can be meaningfully asserted and examined unnecessarily exposes U.S. writers and researchers who carry on vital news-gathering activities, as well as the sources themselves, to violence and retaliation from abroad.

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ARGUMENT

I. Worldwide Recognition of the Right to Protect Sources Underscores the Need for Due Process and First Amendment Protection of Confidential Interviews Like Those Conducted Here

A. The Majority of U.S. States and a Multitude of Other Nations Unambiguously Protect Newsgatherers' Sources

Since this Court's decision in *Branzburg*, the protection of newsgatherers' sources and information has gained wide acceptance. Legal protections differ in their scope and details,[2] but their prevalence confirms the need to clarify the right to protect sources as an element of the First Amendment right to gather and disseminate information in the public

[2] For example, some offer a qualified privilege; others provide for an absolute one. *Compare* Press Law No. 5187 art. 12 (June 9, 2004) (Turk., absolute), *with* Evid. Am. (Journalists' Privilege) Act 2011, No. 21 (Austl., qualified). Some are limited to professional journalists, while others extend to the act of gathering news in the public interest and disseminating it to the public. *See, e.g.*, Minn. Stat. § 595.021-023 (protection applies to any person engaged in gathering information and disseminating to the public); Arrêt n° 91, 2006 (Cour d'arbitrage June 7, 2006) (Belgium) (annulling legislative distinction between professional and non-professional journalists for purposes of source protection). Protections extend beyond source identities to confidential information and documents. *E.g.,* Cal. Const. art. 1 § 2(b) (protection extends to any unpublished information obtained while newsgathering); N.C. Gen. Stat. § 8-53.119(b) (same); *Sanoma Uitgevers BV v. Netherlands*, [2010] 30 BHRC 318 ¶ 72 (protection applies to materials that could identify source).

interest. *See Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (newsgathering protections not limited to institutional press); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (investigative book authors have right to protect source materials). Forty states and the District of Columbia have now enacted statutory privileges.[3] Nine of the remaining ten states have recognized a reporter's privilege by judicial decision.[4] "The fact that some 49 states and the District of Columbia have extended some form of newsgathering privilege to citizens is a 'national referendum' attesting to the country's sense of the critical role that a vibrant press plays in a free society." Rodney Smolla, *Panel Discussion and Collected Essays: Are Journalists Privileged?: The First Amendment, Journalists, and Sources: A Curious Study in "Reverse Federalism"*, 29 Cardozo L. Rev. 1423, 1429 (2008).

This trend is not limited to the United States. Approximately 100 national governments recognize

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[3] A list of privilege statutes by state is set out in the Appendix.

[4] *See State v. Siel*, 122 N.H. 254, 259-60, 444 A.2d 499, 503 (1982); *In re Wright*, 108 Idaho 418, 422-23, 700 P.2d 40, 44-45 (1985); *In re John Doe Grand Jury Invest.*, 574 N.E.2d 373, 375 (Mass. 1991); *Hopewell v. Midcontinent Broadcasting Corp.*, 538 N.W.2d 780, 782 (S.D. 1995); *State ex rel. Classic III, Inc. v. Ely,* 954 S.W.2d 650, 654-60 (Mo. Ct. App. 1997); *Waterloo/Cedar Falls Courier v. Hawkeye Community College*, 646 N.W.2d 97, 101-02 (Iowa 2002); *State v. St. Peter*, 132 Vt. 266, 271, 315 A.2d 254, 256 (1974); *Brown v. Commonwealth*, 214 Va. 755, 757, 204 S.E.2d 429, 431 (1974); *Mississippi v. Hardin,* Crim. No. 3858 (Cir. Ct. Yalobusha Cty., Mar. 23, 1983).

the fundamental right to the protection of sources. David Banisar, *Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources* 21 (Privacy Int'l 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1706688. European countries recognizing the privilege include Austria, France, the Netherlands, Romania, Poland, Croatia, Armenia, Georgia, Lithuania, and Germany. *See, e.g.*, Media Act 1981 § 31 (Austria); *Van den Biggelaar v. Dohmen & Langenberg*, NJ 1996/578 (S. Ct. 1996) (Netherlands); 2004 Law on Freedom of Speech and Expression § 11 (Geor.); Media Act 2004 art. 30, Official Gazette No. 59/2004 (Croat.); Code of Crim. Proc. Art. 180 § 2 (Pol.); Law on Radio and Television Broadcasting, Law No. 504 art. 7 (Rom.); Ruling on Compliance (Lith. Const. Ct. Oct. 23, 2002); Law On Dissemination of Mass Information § 5 (Arm.); Civ. P. Code sec. 383(1)(5) (F.R.G.); Crim. P. Code sec. 53(1)(5) (F.R.G.). French law provides a privilege which is virtually absolute. Code of Crim. P. art. 109 (Fr.). The law in Sweden requires journalists to maintain the confidentiality of sources or face criminal penalties. Const. of Sweden ch. 1 art. 3; Freedom of the Press Act ch. 3 art. 5 (Swed.).

The right to the protection of sources has also been recognized in Central and South America. The constitutions of Brazil, Paraguay, Argentina, and Ecuador provide explicit source protection; Ecuador's, for example, requires the state to guarantee "professional secrecy and the confidentiality of the sources of those who inform, issue their opinions through the

media or other forms of communication or who work in any communication activity." Const. of Ecuador Article 20; *see also* Const. of the Federative Rep. of Brazil Article 5.XIV; Const. of the Republic of Paraguay art. 29; Const. of Argentina, Habeas Data art. 43. Mexico enacted a federal source protection law in 2006. Bis inciso III art. 243 del Codigo Penal Federal, Ley del Secreto Profesional del Periodista en el Distrito Federal. Testimonial privileges for journalists are found in El Salvador, Peru, Chile, Brazil, Uruguay, Venezuela, and Panama. Crim. P. Code Ch. V art. 187-A (El. Sal.); Crim. Code sec. 165(2)(a) (Peru); Ley de Libertad de Opinion e Informacion y Ejercicio del Periodismo tit. II art. 7 (Chile); Lei de Imprensa 1967 art. 7 (Braz.); Ley de Prensa 16.099 art. 1 (Uru.); Ley del Ejercicio del Periodismo art. 8, Gaceta Oficial N° 4.819 (Dec. 22, 1994) (Venez.); Ley 67 art. 21 (1978) (Pan.).

A multitude of other countries' constitutions, laws, and judicial decisions also embrace the right to protect sources. Mozambique protects source confidentiality in its constitution. Mozambique Const. art. 74(3). Burundi and Angola do so by statute. Press Law No. 1/025, art. 8 (2003) (Burundi); 2006 Press Law art. 20(1) (Angl.). Finally, Japan, Canada, Australia, and New Zealand have established case-specific judicial balancing tests to analyze source protection claims. Case 2006 (Kyo) No. 19, Minshu Vol. 60, No. 8, 2006.10.03 (Japan); *R. v. Nat'l Post*, [2010] 30 BHRC 348 ¶¶ 24, 28, 65, 69 (Can.); Evid.

Am. (Journalists' Privilege) Act 2011, No. 21 (Austl.); Evid. Act 2006, § 68 (N.Z.).

B. International Law and the Decisions of International Tribunals Confirm that Freedom of Expression Includes the Right to the Protection of Sources

International courts have interpreted the right to the protection of sources broadly, in order to provide the greatest protection for the free flow of information and ensure the ability of journalists and other publishers—including nongovernmental organizations—to report on matters of public interest. For example, the European Court of Human Rights has interpreted Article 10 of the European Convention, which guarantees the right to free expression, to require source protection. *Goodwin v. United Kingdom*, [1996] 1 BHRC 81 ¶ 39. *Goodwin* concerned a British journalist who received information from a confidential source, which originated from stolen business documents. The European Court of Human Rights held that by ordering the journalist to disclose notes identifying the source to the company involved, the UK courts had violated the journalist's right to freedom of expression because the company had failed to show "exceptional circumstances where vital public or individual interests were at stake." *Id.* ¶ 37. Even where a journalist possessed confidential information related to an ongoing wrong, "there was not . . . a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order

and the means deployed to achieve that aim." *Id.* ¶ 46.

Goodwin recognized that protection of sources is "one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of contracting states. . . ." *Id.* ¶ 39; *see also Telegraaf Media Nederland Landelijke Media B.V. v. Netherlands*, App. No. 39315/06 ¶ 127 (Eur. Ct. H.R. Nov. 22, 2012) ("Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined. . . .").

The European Court of Human Rights has extended the holding of *Goodwin* and broad source protection to the criminal context. *See, e.g.*, *Roemen v. Luxembourg*, App. No. 51772/99 ¶¶ 58-60 (Eur. Ct. H.R. Feb. 25, 2003) (search case). Addressing a police order to disclose confidential source documents, the same court has held that pre-disclosure judicial review of the circumstances and need for disclosure also is required. *Sanoma Uitgevers B.V. v. Netherlands*, [2010] 30 BHRC 318 ¶¶ 97-100.

The right to the protection of sources also finds support in the Council of Europe's standard-setting bodies. The Committee of Ministers' Recommendation No. R (2000) 7 on protection of sources calls for every member state to adopt in their domestic law and practices, *inter alia*, "explicit and clear" legal protection for the journalist's right of non-disclosure. This

protection extends to any person "who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication." *Id.*

Numerous international bodies beyond the Council of Europe have also endorsed a strong policy of source protection. The privilege follows from the guarantee of Article 19 of the International Covenant on Civil and Political Rights, which includes "the right . . . to seek, receive, and impart information and ideas" within the right of freedom of expression. The U.N. Commission on Human Rights' 2005 annual resolution stressed "the need to ensure greater protection for all media professionals and for journalistic sources." The Right to Freedom of Opinion and Expression, H.R. Res. 2005/38, E/CN.4/2005/L.10/Add.11 (Apr. 19, 2005). The African Commission on Human and Peoples Rights maintains the protection of sources in Principle XV of its Declaration of Principles on Freedom of Expression in Africa. And the Inter-American Commission on Human Rights has adopted the protection of sources as part of its Declaration of Principles on Freedom of Expression, reaffirming in 2002 that "Freedom of expression is understood as encompassing the right of journalists to maintain the confidentiality of their sources." Inter-American Commission on Human Rights, OAS, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/ll.1 16 Doc. 5 rev. 1 corr. (Oct. 22, 2002), *available at* www.cidh.org/Terrorism/Eng/part.k.htm.

C. As International Courts Have Recognized, Case-Specific Judicial Review of Disclosure Requests Is Necessary to Ensure Source Protection and Free Expression

Determining the scope of a privilege or even the propriety of a subpoena should require examination of surrounding facts before any disclosure will be ordered. Indeed, Justice Powell's concurrence in *Branzburg* calls for "case-by-case" adjudication of privilege claims. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring). European law is in accord, requiring case-specific review of the facts giving rise to the request for disclosure when the right to protect sources is at risk: "The principle that in cases concerning protection of journalistic sources the 'full picture should be before the court' was highlighted in one of the earliest cases of this nature to be considered by the [European Convention on Human Rights] bodies." *Sanoma Uitgevers B.V. v. Netherlands*, [2010] 30 BHRC 318 ¶ 90 (citing *BBC v. UK*, App. No. 25794/94 (admissibility dec., Jan. 18, 1996)).

In *Sanoma*, a journalist was permitted to take photographs at an illegal street race on the condition of maintaining the participants' anonymity. *Id.* ¶¶ 10-11. The police later believed that one of the cars racing had been used as a getaway car in a robbery, so they ordered disclosure of the photographs. *Id.* ¶¶ 14-18. The European Court of Human Rights held that because no pre-disclosure judicial assessment took place in *Sanoma*, the order to disclose

confidential materials violated the journalist's Article 10 rights.

"[A]ny interference with the right to protection of such sources must be attended with legal procedural safeguards commensurate with the importance of the principle at stake. . . . First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body," a body "separate from the executive and other interested parties." *Id.* ¶¶ 88-90. A prosecutor seeking disclosure is "defending interests potentially incompatible with journalistic source protection and can hardly be seen as objective and impartial so as to make the necessary assessment of the various competing interests." *Id.* ¶ 93. The decisional criteria must include "whether a less intrusive measure can suffice to serve the overriding public interests established." *Id.* ¶ 92. Where the judiciary lacks power to reject the order, the "situation is scarcely compatible with the rule of law." *Id.* ¶ 98.

Due process—like requirements for challenging the compelled disclosure of confidential sources and information are expressed in laws beyond Europe as well. Canadian courts require a weighing of the public interest in free expression against the interest of the state in investigating and prosecuting crimes before allowing disclosure. *R. v. Nat'l Post*, [2010] 30BHRC 348 ¶¶ 24, 28, 61, 65, 69. Courts in Australia likewise weigh the harm of disclosure against the desirability of the evidence before requiring the disclosure of a journalist's confidential source and the

information the source provided. Evid. Am. (Journalists' Privilege) Act 2011, No. 21. New Zealand allows the privilege to be abridged only if the High Court determines that the impact of disclosure—including its chilling effect—is outweighed by the public interest. Section 68, Evid. Act 2006. Article XV of the Declaration of Principles on Freedom of Expression in Africa expressly provides that disclosure of confidential material can only be "ordered by a court, after a full hearing."

Therefore, by curtailing the presentation of evidence concerning the protection of sources, the First Circuit's decision departs from internationally accepted due process guarantees.[5] It also exports this contradiction and uncertainty to other countries when, as here, the work of journalists, newsgatherers, human rights defenders, and other investigative researchers crosses international borders. In the First Circuit's view, treaties become a vehicle to reduce or avoid judicial scrutiny where disclosure of confidential sources is sought.[6] The First Amendment's guarantees of free expression require more protection.

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[5] The right to be heard also forms a part of state-level privilege regimes in the United States. *E.g.*, Conn. Gen. Stat. § 52-146t(b) (Conn.) (disclosure only after a hearing); K.S.A. § 60-483 ("The party claiming the privilege . . . shall be entitled to a hearing."); N.D.C.C. § 31-01-06.2 (no disclosure unless directed by the court upon findings "after hearing").

[6] In contrast, the United States has taken a dim view of importing foreign libel law to circumvent First Amendment protections. *See* SPEECH Act of 2010, 28 U.S.C. § 4102.

II. Confidential Source Information Requires Heightened Protection in Conflict and Post-conflict Societies

A. International Criminal Tribunals Recognize the Need to Protect Sources and the Information They Provide to Journalists and Other Information-Gatherers in Conflict Areas

International news is the paradigm of information provided in the public interest; if anything, there should be "a broader newsgathering right in the context of international or global government actions." Lee C. Bollinger, *Uninhibited, Robust, and Wide-Open: A Free Press for a New Century* 125 (2010). International newsgathering brings with it many additional reasons to rely on and protect confidential sources:

> A foreign journalist, often unfamiliar with a country, has to employ selective belief with all sources. If startling information comes from a new, unknown source, it is thoroughly checked against reports from other trusted sources or confirmed 'off the record' to the journalist's satisfaction by, for example, someone inside a government agency or embassy.

Lisa Kloppenberg, Note, *Disclosure of Confidential Sources in International Reporting*, 60 S. Cal. L. Rev. 1631, 1663 (1987). Additional limits on the availability of information exist in areas where violent conflicts and human rights violations have occurred.

Survivors face retaliation against themselves and their families—even when located in a different country—for speaking publicly. *See, e.g.*, Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 Mich. L. Rev. 2031, 2080 (1998) (noting that many survivors and witnesses in Rwanda and the Balkans refused to come forward for fear of retaliation). Confidentiality serves as the only practical way for their stories to be told and for human rights abuses to be exposed.

Journalists, researchers, and human rights defenders who collect information in conflict and post-conflict areas perform a crucial function. The idea "that the pen may be mightier than the sword fits quite literally into the context of journalism and war and post-conflict situations." Lisa J. Laplante & Kelly Phenicie, *Mediating Post-Conflict Dialogue: The Media's Role in Transitional Justice Processes*, 93 Marq. L. Rev. 251, 284 (2009). Reporting on human rights abuses, conflict conditions, and war crimes is often the first step to attract the world's attention and international response. When an investigation into foreign conflict conditions becomes the target of a foreign subpoena, special problems arise for the protection of speech under the First Amendment.

International criminal tribunals have recognized a strong privilege with respect to the work of war correspondents and non-governmental human rights defenders. Without such a privilege, journalists, researchers, and human rights defenders could not assume their role as neutral observers and conduits

of front-line information. The ability to carry on war reporting, human rights research, and relief efforts would be directly threatened.

The International Criminal Tribunal for the Former Yugoslavia ("ICTY") has created a testimonial privilege for war correspondents, stating that "society's interest in protecting the integrity of the newsgathering process is particularly clear and weighty" for these individuals. *Prosecutor v. Brdanin*, Case No. IT-99-36-AR73.9 ¶ 36 (App. Dec. 11, 2002). The journalist in *Brdanin*, Jonathan Randal, was a correspondent for *The Washington Post* in Yugoslavia. He had interviewed a Serb leader during the war in the Balkans, who was later accused of war crimes. When the prosecution offered this article as evidence, the defense objected, so the Prosecution obtained a subpoena for Randal's testimony. Randal asserted a privilege from being compelled to testify.

The *Brdanin* court cited European law as well as *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993), as confirmation that the protection of sources from disclosure is part of protecting the integrity of the newsgathering process. The tribunal credited war correspondents with having played "a vital role in bringing to the attention of the international community the horrors and reality of conflict." *Brdanin*, Case No. IT-99-36-AR73.9 ¶ 36. The privilege was addressed to the specific risks that sources and journalists face in conflict situations, where the threat of violence may be imminent and where "accurate information is often difficult to obtain and may

be difficult to distribute or disseminate as well." *Id.* ¶ 36. "[I]n order to do their jobs effectively, war correspondents must be perceived as independent observers rather than as potential witnesses for the Prosecution." *Id.* ¶ 42. To treat them otherwise, the tribunal reasoned, is to create a risk of reprisal against the journalist, reprisal against the sources, denial of access to sources, and denial of access to conflict zones. *Id.* ¶¶ 42-43.

In consideration of these interests, the Tribunal established a privilege under which journalists are required to testify about sources only when the petitioning party demonstrates that "the evidence sought is of direct and important value in determining a core issue in the case" and "the evidence sought cannot reasonably be obtained elsewhere." *Id.* ¶ 50. *Brdanin* is in accord with the Council of Europe Committee of Ministers' Recommendation No. R (96) 4 (May 3, 1996), which calls on its member states to ensure the confidentiality of sources in "situations of conflict and tension."

The holdings of *Goodwin* and *Brdanin* have led the Special Court for Sierra Leone to establish a privilege similar to that of the ICTY. Moreover, the Sierra Leone court expressly extended its protections beyond professional journalists to human rights defenders who research, uncover, and report war crimes and human rights abuses. *Prosecutor v. Brima, Kamara, and Kanu*, Case No. SCSL-04-16-AR73, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to

Testify ¶ 33. (May 26, 2006); *see id.* ¶ 28 (Justice Robertson, QC, concurring). *Cf.* Int'l Crim. Ct. R. 73(4) (providing testimonial immunity to relief workers associated with the International Committee of the Red Cross).

Foreign governments will have their own reasons for singling out journalists and their sources. Authoritarian regimes that stifle open dissent commonly harass journalists. *See, e.g.*, Monroe E. Price et al., eds., *The Experience of Intergovernmental and Non-Governmental Organizations: A Background Paper for the UNESCO World Press Day Conference in Geneva: May 2000*, 2 Cardozo Online J. Confl. Resol. 1, 30 (2001) (noting harassment of journalists in Kosovo). Many regimes also institute pretextual law enforcement actions. *See, e.g.*, Reporters Without Borders, *Release of Journalist Held on State Secrets Charge* (Oct. 26, 2007); Committee to Protect Journalists, *Dagestan Authorities Try to Close Independent Weekly* (June 17, 2009). Even a legitimate foreign investigation calling for disclosure could pose an undue threat to the safety of journalists, researchers, and human rights defenders, and their sources.

Under the First Circuit's decision, a U.S.-based journalist, researcher, or human rights defender reporting on a foreign conflict faces a novel risk of discovery requests from foreign law enforcement which could lead to retribution and imperil access to sources worldwide. The problem could recur in multiple other

contexts as the United States concludes MLAT's with more and more countries,[7] if there is no opportunity under the First Amendment or the MLAT itself to object.

B. The Post-Conflict Context of the Subpoenas in This Case Warrants Particular Vigilance About Source Protection and the Right to Be Heard About Disclosure Concerns

Although they were denied a full hearing by the District Court in this case, Petitioners nonetheless managed to submit preliminary declarations asserting that paramilitary groups enforce a code of silence regarding their activities by way of threats and violence, supporting the argument that the confidentiality of sources remains an essential part of research and newsgathering about conflict issues in Northern Ireland. (*E.g.*, D. Mass. No. 11-CV-12331, Doc. # 1 Ex. E.) Petitioners' concerns are buttressed by the experience of other newsgatherers and informants in the region.

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[7] The United States has negotiated MLAT treaties with almost sixty different countries and is active in negotiating additional agreements. Bureau for Int'l Narcotics & Law Enforcement Affairs, U.S. Dep't of State, *International Narcotics Control Strategy Report Volume II: Money Laundering and Financial Crimes* 20 (2012) (listing countries), *available at* http://www.state.gov/documents/organization/184329.pdf.

Confidentiality was essential to the functioning of the internationally appointed Independent Monitoring Commission ("IMC") in Northern Ireland from 2004 to 2011, both during and after the time of the Belfast Project interviews at issue here. Specific legal immunities ensured that the Commission "could receive material from official and private sources secure in the knowledge that no third party could force us to reveal either its origin or its contents," a protection that the IMC stated was "essential if people were to be forthcoming with us." *Twenty-Sixth and Final Report of the Independent Monitoring Commission: 2004-2011 Changes, Impact, and Lessons* ("IMC Final Report") ¶ 8.19-8.20, *available at* http://cain.ulst.ac.uk/issues/politics/docs/imc/imc040711.pdf. Disclosure of IMC materials was sought in numerous court cases—even an abduction prosecution—and denied in each instance. IMC Final Report ¶ 8.19 n.34.

After the 1998 Good Friday Agreement and related ceasefires, violence and political instability remained part of life in Northern Ireland. In 2004, the British Army still "had a clearly defined role in certain aspects of law enforcement in Northern Ireland," maintaining an "operational order under which they had functioned since 1969" including the presence of over 14,100 troops. IMC Final Report ¶ 6.2. The Provisional Irish Republican Army ("IRA"), as well as the loyalist Ulster Defence Association ("UDA") and Ulster Volunteer Force ("UVF"), had not

yet decommissioned their arms—a slow process that would last until the end of the decade.[8] Delays in paramilitary decommissioning, political deadlock, and the continuation of violence resulted in London's suspension of the Northern Ireland Assembly and reestablishment of direct rule from 2002 to 2007, reflecting the political instability of the region. Kristin Archick, Congressional Research Service, *Northern Ireland: The Peace Process* 4-5, 7 (2012), *available at* http://www.fas.org/sgp/crs/row/RS21333.pdf.

Several killings during the time of the Belfast Project interviews highlight the threat to researchers and informers. In 2001, loyalist paramilitaries murdered a journalist, Martin O'Hagan, in County Armagh. David McKittrick et al., *Lost Lives: The Stories of the Men, Women, and Children Who Died as a Result of the Northern Ireland Troubles* 1499-1500 (2007 ed.). That same year police informer William Stobie was murdered by the UDA after providing information about the Troubles-related murder of Pat Finucane from over a decade before. *Id.* at 1503. In 2005, the year before the Belfast Project interviews were completed, former loyalist leader Jim Gray was murdered by the UDA after suspicion that he intended to give information to the police. *Id.* at 1541. Also in 2005, a high-ranking member of the IRA, Denis Donaldson, admitted to having been a spy for

[8] The Provisional IRA did not decommission its arms until 2005. The UVF and UDA did not decommission until 2009 and 2010. IMC Final Report ¶ 5.4.

British intelligence. The following year he was murdered by republican paramilitaries. *Id.* at 1545; Belfast Telegraph, *Real IRA: We Murdered Denis Donaldson* (Apr. 13, 2009), *available at* http://www.belfasttelegraph.co.uk/news/local-national/real-ira-we-murdered-denis-donaldson-14267446.html.

Violence persists to this day. Even after decommissioning by the Provisional IRA, UVF, and UDA, dissident paramilitary factions have carried out assaults, murders, and organized criminal activity. Archick, *The Peace Process*, *supra* at 12. The State Department has designated the Continuity Irish Republican Army and the Real Irish Republican Army as foreign terrorist organizations. U.S. Dep't of State, Foreign Terrorist Organizations, http://www.state.gov/j/ct/rls/other/des/123085.htm. Between 2004 and 2011, the Independent Monitoring Commission reported twenty-one paramilitary murders and over eight hundred casualties of paramilitary violence. IMC Final Report ¶ 5.3.

Dissident violence has increased since 2008. *Twenty-Second Report of the Independent Monitoring Commission* 5 (2009) ("Dissident republican activity since the early summer of 2008 had been consistently more serious than at any time since we had started to report in April 2004."). In 2009, dissidents announced their intent "to execute anyone providing services, in any shape or form, to the enemy." *See Galloway v. Breen*, [2009] NICty 4. The same year, masked men believed to be from the Real IRA set up a roadblock in County Armagh warning people against cooperating

with the security forces. *See generally* BBC News, *Timeline of Dissident Republican Activity* (Nov. 2012), *available at* http://www.bbc.co.uk/news/uk-northern-ireland-10866072. In 2010, Real IRA member Kieran Doherty was found stripped and shot dead shortly after he told his family that security forces had tried to recruit him. Donna Deeney, Belfast Telegraph, *Shot Real IRA Man's Family Want PSNI Chief and Minister to Attend Inquest* (Oct. 23, 2012), *available at* http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/shot-real-ira-mans-family-want-psni-chief-and-minister-to-attend-inquest-16228097.html. In 2011, The Real IRA issued a public death threat to "all . . . informers," stating, "We want to send a message out that if you are an informer we will get you." Ken Foy, Evening Herald, *RIRA Vows to Kill Garda Informers After Bombing* (Aug. 25, 2011), *available at* http://www.herald.ie/news/rira-vows-to-kill-gardainformers-after-bombing-2857351.html. The statement followed an August bombing attack which seriously injured another accused informant in the front doorway of his home in County Meath. *Id.*

In July of this year, three republican dissident groups announced their intention to merge and continue an armed campaign. David McKittrick, *Newly-Merged Dissident Republican Groups in Terrorism Vow,* Belfast Telegraph (July 27, 2012), *available at* http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/newlymerged-dissident-republican-groups-in-terrorism-vow-16190435.html. Recent months have seen numerous attacks on police

including the murder-ambush of prison officer David Black as he drove to work. *See generally* BBC News, Timeline of Dissident Republican Activity, *supra* (chronicling dissident violence in 2009, 2010, 2011, and 2012); Belfast Telegraph, *Police "Face Dissident Threat"* (June 8, 2012), *available at* http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/police-face-dissidents-threat-16169990.html. A steady stream of paramilitary assaults (so-called punishment shootings and beatings) against asserted drug dealers and others has also carried on. In some widely reported instances, parents have complied with demands to deliver their own children to be shot in the legs by appointment, rather than seek help from the police.[9]

Courts have previously determined that these conditions warrant source protection. In 2009, for example, the Recorder of Belfast halted a police request for a journalist's sources after the journalist received information about the recent shooting of four soldiers (two of whom died) and two pizza delivery

[9] As the BBC recounts, "They have persuaded some parents to hand over their children—some as young as 18—to be shot by appointment in a non-lethal way to spare them more serious injuries, and dozens more young people have been ordered to leave the city." These parents were too fearful to go to the police. Liz MacKean, BBC News, *RAAD Republican Group Threatens More PSNI Attacks* (June 20, 2012), *available at* http://www.bbc.co.uk/news/uk-northern-ireland-18510327; *see also Police "Face Dissident Threat"*, *supra*, (counting 79 punishment attacks over the last year).

men at Massereene Barracks by the Real IRA. *Galloway v. Breen*, [2009] NICty 4 ¶¶ 1-5, 43. The Court recognized that the information sought was of substantial value to the investigation of a heinous and high-profile crime, but nonetheless refused to order disclosure. *Id.* ¶ 16. It cited increased activity of the Continuity IRA and Real IRA, the "ruthless nature" of the paramilitaries, general threats issued against those "providing services . . . to the enemy," and warnings given to the reporter against cooperating with the police. *Id.* ¶¶ 16, 29. It also cited reports of the Independent Monitoring Commission that the dissident republican threat showed no signs of abating. *Id.* ¶ 42. Even though the reporter "acknowledged that at present she does not regard herself under any immediate risk," *id.* ¶ 37, the Court accepted her argument that disclosure would create a risk that violated her right to protect sources and her right to life.[10] *Id.* ¶¶ 33, 39, 43.

Serious threats against journalists and informants continue in 2012. In August, death threats

[10] Another trial court in Belfast rejected Petitioner McIntyre's application for judicial review of the Belfast Project subpoenas. That decision, however, included no analysis of Article 10 rights of expression (implemented by the Human Rights Act 1998 (U.K.)) and purported to rely on the fact that McIntyre's case was not concerned with protecting journalistic sources. *See* Government Opposition to Request for Stay, at 20-21 & App. 1a. Petitioner Moloney was not a party to the Belfast proceeding, and he is himself an investigative journalist engaged in publishing.

were made against a Belfast-based reporter, who was accused of being a "republican supporter." Noel McAdam, Belfast Telegraph, *Journalists' Union Seeks Talks Following Loyalist Death Threat* (Aug. 22, 2012), *available at* http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/journalists-union-seeks-talks-following-loyalist-death-threat-16200601.html. This September, a murder trial collapsed when multiple witnesses refused to testify about a 2010 murder of a man by an armed, masked gang. Eamonn MacDermott, Belfast Telegraph, *Murder Trial Collapses After Witnesses Refuse to Take Stand* (Sept. 12, 2012), *available at* http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/murder-trial-collapses-after-witnesses-refuse-to-take-stand-16209824.html. In November, Real IRA supporters made death threats against a female journalist who had been reporting about murdered Real IRA boss Alan Ryan. Ken Foy, Irish Herald, *Ryan Thugs Make Death Threats to Woman Reporter* (Nov. 29, 2012), *available at* http://www.herald.ie/news/ryan-thugs-make-death-threats-to-woman-reporter-3310039.html. Just days ago, in the middle of the night, police found a viable bomb on the doorstep of a Northern Ireland press photographer. Belfast Telegraph, *Pipe Bomb Attack on Northern Ireland Photographer Mark Pearce's Home* (Dec. 14, 2012), *available at* http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/pipe-bomb-attack-on-northern-ireland-photographer-mark-pearces-home-16250533.html.

Reporters and researchers in the United States studying conflict and post-conflict areas like Northern

Ireland, including the petitioners here, should not have their confidential sources undermined. At the very least, researchers and journalists like Petitioners should be entitled to a full hearing before they are required to disclose their sources. The First Circuit's institution of a per se rule in favor of foreign subpoenas chills newsgathering to a degree never contemplated in *Branzburg*.

CONCLUSION

For these reasons and the reasons set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A: STATUTORY NEWSGATHERERS' PRIVILEGES

Alaska	AS 09.25.300-.390
Alabama	Ala. Code § 12-21-142
Arkansas	Ark. Code Ann. § 16-85-510
Arizona	A.R.S. §§ 12-2237, -2214
California	Cal. Evid. Code § 1070
Colorado	C.R.S. § 13-90-119
Connecticut	Conn. Gen. Stat. § 52-146t
Delaware	10 Del. C. § 4320-4326
District of Columbia	D.C. Code §§ 16-4701 to -4704
Florida	Fla. Stat. § 90.5015
Georgia	O.C.G.A. § 24-9-30
Hawaii	HRS Div. 4, Tit. 33, Ch. 621
Illinois	735 ILCS 5/8-901 to 8-909
Indiana	Ind. Code §§ 34-46-4-1 to -2.
Kansas	K.S.A. §§ 60-480 to -485.
Kentucky	Ky. Rev. Stat. Ann. § 421.100
Louisiana	La. R.S. 45:1451 to :1459
Maryland	Md. Cts. & Jud. Proc. Code Ann. § 9-112
Maine	16 M.R.S.A. 61
Michigan	MCL 767A.6, MCL 767.5a
Minnesota	Minn. Stat. §§ 595.021-.025
Montana	Mont. Code Ann. § 26-1-902

North Carolina	N.C. Gen. Stat. § 8-53.11
North Dakota	N.D.C.C. § 31-01-06.2
Nebraska	Neb. Rev. Stat. §§ 20-144 to -147
New Jersey	N.J.S.A. 2A:84A-21 et seq.
New Mexico	N.M. Rule Evid. 11-514
Nevada	N.R.S. § 49.275
New York	N.Y. Civ. Rights Law § 79-h
Ohio	Ohio Rev. Code § 2739.04
Oklahoma	Okla. Stat. tit. 12 § 2506
Oregon	O.R.S. 44.510 to .540
Pennsylvania	42 Pa. C.S.A. § 5942(a)
Rhode Island	R.I. Gen. Laws §§ 9-19.1-1 through 9-19.1-3
South Carolina	S.C. Code Ann. § 19-11-100
Tennessee	Tenn. Code Ann. § 24-1-208
Texas	Tex. Code Crim. Proc. Arts. 38.11, 38.111, Tex. Civ. Prac. Remedies Code §§ 22.021-.027
Utah	Utah R. Evid. 509
Washington	R.C.W. 5.68.010
West Virginia	W. Va. Code § 57-3-10
Wisconsin	Wis. Stat. § 885.14