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 OF SOCIAL SCIENCE SCHOLARS AS *AMICI CURIAE* SUPPORTING PETITIONERS

AMIT KURLEKAR
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
580 California Street
Suite 1500
San Francisco, CA 94104
415-765-9500
akurlekar@akingump.com

L. RACHEL LERMAN
Counsel of Record
ANYA STEIN
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
310-229-1000
rlerman@akingump.com
astein@akingump.com

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are fourteen scholars with expertise in social research. Each is signing the brief in his or her individual capacity.

This case involves the United States Justice Department's subpoena of research materials – specifically, taped interviews with former members of the Irish Republican Army (IRA) – pursuant to the United States' Mutual Legal Assistance Treaty (MLAT) with the United Kingdom. The subpoenaed materials were collected by Petitioners with the understanding that they would not be made publicly available until the death of the person interviewed absent the interviewee's written consent. The interviews are part of the Belfast Project, a study by scholars and journalists seeking to acquire a deeper understanding of the causes and consequences of the conflict that swept through Northern Ireland between 1969 and 1998. Petitioners and the people they interviewed participated in the Belfast Project because they wanted to contribute to social knowledge

[1] Counsel of record for all parties received timely notice of the intent of *amici curiae* to file this brief pursuant to Supreme Court Rule 37.2. All parties have consented to the filing of this brief and their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that this brief was not written in whole or in part by counsel for any party and that no person or entity other than counsel for *amici* has made a monetary contribution to the preparation and submission of the brief.

and to help limit the possibility of future violent conflict in Northern Ireland and elsewhere.

The importance of the case goes well beyond the specific goals of the Belfast Project. Any social science or oral history research is threatened by the potential subpoena of confidential materials, including sensitive or personal information that may or may not involve illegal activity. The threat of unlimited subpoena power undermines the ability of any researcher to promise confidentiality and thus to obtain honest and reliable answers to the most pressing issues of our time.

Amici believe that the court of appeals' failure to honor confidentiality in the context of social science research radically undermines the ability of researchers to engage with their subjects. This is especially so in the context of a divided society like Northern Ireland, where governmental authorities may have a stake in undermining or even preventing the findings of neutral and objective scholarly research that will inform the interpretation of contemporary and historical events. The court of appeals' decision thus jeopardizes the long-term ability of scholars to gain information regarding profoundly sensitive and controversial subjects, including information that can help society avoid violent conflicts in the future. Further, the interests of individual researchers and their affiliated institutions may not be perfectly aligned. As this case demonstrates, scholars cannot simply rely on their institutions to protect them or their research. *Amici* urge this Court to grant review

so that scholars can make informed and responsible decisions and intelligently assess the risks and benefits of a particular academic approach.

The fifteen *amici* are listed on the attached List of Scholars.

STATEMENT OF THE CASE

Amici summarize the facts relevant to this brief.

1. The Belfast Project was sponsored by Boston College to mark the end of three decades of violence in Northern Ireland. A range of research ideas was canvassed and the college accepted a proposal from Petitioner Ed Moloney, an author and journalist whose work focuses on violence and politics in Northern Ireland, and Lord Paul Bew, an historian of Northern Ireland. Pet. at 1, 5-6. The inspiration for the research was the multi-party Good Friday Agreement of 1998, a critical milestone in the peace process following many years of strife in Northern Ireland, known as the "Troubles," that lasted from 1969 until the late 1990s. Pet. at 6.

The Belfast Project aimed to record and preserve for academic study the firsthand accounts of the "Troubles" by members of the Provisional Irish Republican Army (IRA), Provisional Sinn Fein, the Ulster Volunteer Force, and other paramilitary and political groups. Pet. App. at 5a; Pet. at 6-7. By learning why ordinary people on both sides of the conflict

were moved to take up arms and, ultimately, to lay them down and engage in the peace process, the Belfast Project researchers hoped to produce a study that would inform the decisions of policymakers who wrestle with and try to resolve social conflict. Pet. at 7.

Boston College agreed to sponsor the Belfast Project, with Moloney serving as Project Director. Pet. at 6; Pet. App. at 5a. Petitioner Anthony McIntyre – an author, journalist, Ph.D., and former IRA member – was hired as Lead Project Researcher. Pet. at 1, 6.

Between 2001 and 2006, Belfast Project researchers recorded interviews with forty-one subjects, including twenty-six combatants on the republican side of the conflict, fourteen members of Protestant paramilitary groups, and one member of law enforcement. Pet. App. at 7a.

Interviewers and interviewees agreed not to disclose the existence or scope of the Belfast Project without the permission of Boston College. Pet. at 7; Pet. App. at 6a, 52a. Interviewees also signed donation agreements restricting access to Belfast Project interview records during their lifetime without their express written approval. Pet. at 7; Pet. App. at 7a-8a.

2. Boston College considered the Belfast Project confidential, and worked with its leadership to implement numerous safeguards to preserve that confidentiality. Pet. App. at 84a.

To maintain interviewees' anonymity, Boston College and Moloney used a coding system. Pet. App.

at 6a. Only Moloney and the librarian of the John J. Burns Library of Rare Books and Special Collections at Boston College (the Burns Library) had access to the identification key. *Id*.

Although the interviews were originally going to be stored both in Boston and in Belfast, Northern Ireland, Project leadership determined that they could be safely stored only in the United States. Pet. App. at 6a. Boston College safeguarded Project materials in the "Treasure Room" of the Burns Library "with extremely limited access." Pet. App. at 5a.

3. These assurances of confidentiality were essential to obtain interviewees' participation in the Belfast Project. Pet. at 7-10.

The need for confidentiality was particularly acute for former IRA combatants. Pet. at 7-8; Pet. App. at 36a n.26. Due to well-founded fears of violent reprisals (Pet. at 8-9), former IRA members would never have agreed to tell their stories to Project researchers had they known these interviews could be disclosed during their lifetime. Pet. at 7-8; Pet. App. at 36a n.26. One interviewee admitted his former affiliation in the IRA for the first time during his interview with McIntyre; he did so only because of his personal trust in McIntyre. Pet. App. at 84a. In fact, McIntyre himself would not have agreed to participate in the Project had he understood that the interviews could be disclosed by "legal process." Pet. App. at 53a.

Boston College's librarian understood that, "[h]ad the assurances of confidentiality not been made, it is doubtful that any paramilitary would have participated in this oral history project. Their stories would have died with them, and an opportunity to document and preserve a critical part of the historical record would have been lost forever." Pet. App. at 36a, n.26.

4. In May and August of 2011, a commissioner appointed pursuant to 18 U.S.C. § 3512 and the MLAT between the United States and the United Kingdom subpoenaed Boston College in connection with a criminal investigation in the United Kingdom into the abduction and death of Jean McConville, an alleged British informant in Northern Ireland. Pet. App. at 8a-9a; Pet. at 11.

The May 2011 subpoena sought oral history recordings and other materials associated with Belfast Project interviewees Dolours Price and Brendan Hughes.[2] Pet. App. at 3a, 8a. Boston College turned over the Hughes materials because Hughes had died and therefore had no confidentiality interests remaining under the terms of the donation agreement, but

[2] In 2010, Northern Ireland news organizations reported that Price had disclosed in interviews with Boston academics her involvement in the murder and disappearance of IRA targets, including McConville. Pet. App. at 8a-9a; Pet. at 11. Around the same time, following Hughes's death, Moloney published a book and released a documentary based on Project interviews with Hughes and another former republican activist. Pet. App. at 8a & 8a n.3.

moved to quash the subpoena of the Price materials. Pet. App. at 3a, 7a-8a.

The August 2011 subpoena sought any information contained in Project materials relating to the disappearance or death of McConville. Pet. App. at 3a. Boston College moved to quash this subpoena as well. *Id*.

The district court, after reviewing *in camera* the subpoenaed materials, denied both of Boston College's motions to quash and ordered production. Pet. App. at 3a. Boston College did not appeal. Pet. at 12.

5. Petitioners unsuccessfully sought to intervene in the proceedings related to the motions to quash both sets of subpoenae. Pet. App. at 4a, 89a-90a. When the district court denied intervention, Petitioners filed an original civil complaint challenging the subpoenae, which was dismissed. Pet. App. at 4a.

Petitioners appealed the denial of their motions to intervene and dismissal of their original complaint to the United States Court of Appeals for the First Circuit. Pet. App. at 4a. The First Circuit affirmed the district court's denial of relief for the reasons discussed in the Petition. Pet. App. at 38a.

SUMMARY OF ARGUMENT

Forty years ago, this Court issued its fractured decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972).

While the concurring opinion of Justice Powell is frequently viewed as the "common denominator" of the plurality, the lower courts have taken differing approaches to Justice Powell's suggestion that courts apply a balancing approach to determine when a reporter can assert a privilege against providing testimony or evidence that would breach his or her promise of confidentiality to a third party.

While most courts apply balancing in the civil context, few have resolved whether to apply it in the criminal context or in the grand jury context. The Court of Appeals' opinion in this case – rejecting balancing and even the reporter's right to be heard before granting a subpoena that would reveal confidential information – creates an intercircuit split and is inconsistent with most courts' reading of *Branzburg*. The Court of Appeals' opinion is also at odds with this Court's precedent honoring the freedom of the press and the academy.

The result in the case creates potentially crippling uncertainty for those who gather information from confidential sources, including academic researchers like *amici*. Such researchers need to be able to assure their sources that their confidentiality will be respected and their interests considered by a court of law before the court grants a subpoena and publicizes their private information or personal identity. Without such assurances, many persons will be unwilling to speak with researchers, limiting the scope of social science research and leaving irreparable lacunae in human knowledge. The public will

ultimately pay the price, because the sort of research at issue here is critical to studies that inform policy-makers seeking to manage civil strife.

This case presents the Court with an opportunity to clarify the level of confidentiality that researchers can promise their sources, so that they can collaborate with full awareness of the risks they are taking when they participate in the academy's search for truth.

The Court also faces a related opportunity to provide guidance on the scope of the long-recognized, but ill-defined, constitutional right to academic freedom. For a half-century, this Court has recognized that academic freedom is "a special concern of the First Amendment," *Keyishian v. Bd. of Regents of Univ. of State of NY*, 385 U.S. 589, 603 (1967), but has yet to delineate the contours of the right to academic freedom. The result is an unstable legal landscape. The Court of Appeals in this case has limited the realm of academic freedom to pedagogical concerns, while the Seventh Circuit has extended the right to academic freedom to protect the confidentiality of academic research. A constitutional right to academic freedom means little if uncertainty over its scope chills scholars from exercising it freely.

Amici respectfully urge the Court to grant the petition and bring uniformity to the law governing the confidentiality of academic research.

REASONS THE WRIT SHOULD BE GRANTED

REVIEW IS NEEDED TO CLARIFY THE SCOPE OF THE LAW PROTECTING ACADEMIC RESEARCHERS FROM DISCLOSURE OF CONFIDENTIAL MATERIALS, INCLUDING THE IDENTITY OF RESEARCH PARTICIPANTS.

A. Contrary to the Court of Appeals' holding, the First Amendment provides journalists a qualified right to maintain the confidentiality of their sources, even in grand jury proceedings.

As discussed by Petitioners (Pet. 21-22, 28-31) and other *amici*, this Court's opinion in *Branzburg v. Hayes*, 408 U.S. 665 (1972), resulted in confusion among federal Circuit Courts of Appeals regarding the existence and scope of a "reporter's privilege of constitutional or common law dimensions" in civil and criminal cases. (Pet. 33a n.23.)

Justice White, speaking for the plurality, stated that "there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation," and "no privilege to refuse to appear before such a grand jury until the Government demonstrates some 'compelling need' for a newsman's testimony." *Branzburg*, 408 U.S. at 708.

Justice Stewart, speaking for the four dissenting Justices, observed that the plurality's position could compromise not only news gathering but the administration of justice: "The sad paradox of the Court's

position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import." *Branzburg*, 408 U.S. at 746 (Stewart, J., dissenting) (citing *NAACP v. Button*, 371 U.S. 415, 433 (1972)).

Justice Powell, whose vote was necessary to the 5-4 decision, wrote separately to emphasize "the limited nature" of the Court's holding, and to make clear that, even in the grand jury context, prosecutors are not "free to 'annex' the news media as an 'investigative arm of government.'" *Branzburg*, 408 U.S. at 709 (Powell, J., concurring). Accordingly, Justice Powell stressed, each claim of privilege "should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id*. at 710.[3]

---

[3] Justice Powell's concurrence may be viewed as the "minimum common denominator of all the views expressed," *Gilbert v. Allied Chem. Corp*., 411 F. Supp. 505, 510 (E.D. Va. 1976), and is the primary authority used in subsequent reporter's privilege cases. *E.g., In re Petroleum Prods. Antitrust Litig*., 680 F.2d 5, 8 (2d Cir.), *cert. denied*, 103 S.Ct. 215 (1982); *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981); *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp*., 563 F.2d 433, 437 (10th Cir. 1977); *Bursey v. United States*, 466 F.2d 1059, 1091 n.2 (9th Cir. 1972).

The interest balancing described by Justice Powell in *Branzburg* has been construed by virtually every federal appeals court that has considered the question as mandating recognition of a qualified reporter's privilege in civil cases. Several courts have also extended it to the criminal context. *E.g., United States v. Criden*, 633 F.2d 346, 356 (3d Cir. 1980) (recognizing the privilege in a criminal case, and emphasizing its importance: "the communications media not only serve as the vehicle that widely disperses information but also constitute an important instrument of democracy. * * * Without the protection of the source, the cutting edge of this valuable societal instrument would be severely dulled and public participation in decision-making severely restricted."); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) ("We see no legally-principled reason for drawing a distinction between civil and criminal cases. * * * Indeed, the important social interests in the free flow of information that are protected by the reporter's qualified privilege are particularly compelling in criminal cases.").

In the grand jury and similar contexts (like the one presented here), however, the Circuits are split. *See New York Times Co. v. Gonzales*, 459 F.3d 160, 167-168 (2d Cir. 2006) (affirming reporters' right to bring a declaratory judgment action raising First Amendment and common law challenges to a grand jury subpoena); *cf. In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 401-402 (9th Cir. 1993) (holding there is no reporter's privilege in the grand jury context).

The First Circuit's opinion in this case, rejecting the existence of a reporter's privilege and eschewing the need for balancing altogether (Pet. App. 32a-35a), only deepens the split, and compels review by this Court.[4]

B. Preservation of confidentiality is at least as important to social science researchers as it is to newspaper journalists because it is essential to their academic enterprise.

This Court has long recognized that a "reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's protection of a free press[.]" *Branzburg*, 408 U.S. at 725-726 (Stewart, J., dissenting) (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) and

[4] This Court need not rest its analysis of privilege entirely on First Amendment jurisprudence. *Branzburg* was decided three years before Rule 501 of the Federal Rules of Evidence first "authorize[d] federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'" *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) (recognizing common law privilege protecting communications between psychotherapists and their patients) (citation omitted); *see also Gonzales*, 459 F.3d at 181 (Sack, J., dissenting) ("A qualified journalists' privilege seems to me easily – even obviously – to meet each of [the *Jaffee*] qualifications. The protection exists. It is palpable; it is ubiquitous; it is widely relied upon; it is an integral part of the way in which the American public is kept informed and therefore of the American democratic process.").

New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)). The "guarantee is 'not for the benefit of the press so much as for the benefit of all of us.'" *Id*. at 726 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)) (footnotes omitted).[5]

This Court has likewise recognized that society's interest in a full and free flow of information extends beyond the sphere of news reporting to other types of information-gatherers, such as academic scholars. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978) (the press "does not have a monopoly on either the first amendment or the ability to enlighten").

Although Petitioners here are journalists by trade, they conducted interviews with persons involved in the Irish Troubles in the context of an academic study sponsored by a university. The express goal of the Belfast Project – to learn why ordinary people on both sides of the conflict took up arms and why, ultimately, they were willing to lay

---

[5] Justice Stewart opined that, "'in the case of the reporter-informer relationship, society's interest is not in the welfare of the informant per se, but rather in creating conditions in which information possessed by news sources can reach public attention.'" *Branzburg*, 408 U.S. at 726 n.2 (Stewart, J., dissenting (quoting Note, 80 Yale L.J. 317, 343 (1970)). *But cf. Ethical and Legal Strategies for Projecting Confidential Research Information*, Can. J.L. & Soc'y, 39, 41-42 (2000) (stressing "the ethical obligation * * * to ensure that *research participants cannot be identified* on the basis of the information presented and to prevent information being linked to them[.]") (emphasis added).

down arms and engage in the peace process, Pet. at 7 – is a goal characteristic of social science. Because the line between journalism and academic study is blurred in cases like this one, this Court should bear in mind the interests of reporters and scholars alike in considering the scope of the so-called "reporter's" privilege.

The First Circuit itself "favor[s] * * * a similar level of protection for journalists and academic researchers" when it comes to preserving the confidentiality of their sources. *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998).

> Journalists are the personification of a free press, and to withhold such protection would invite a "chilling effect on speech," [citation] and thus destabilize the First Amendment. * * * [S]cholars too are information gatherers and disseminators. If their research materials were freely subject to subpoena, their sources likely would refuse to confide in them. * * * Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses.

Id. *See also Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (authors of investigative book entitled to same protection as journalists because such authors "have historically played a vital role in bringing to light 'newsworthy' facts on topical and controversial matters of great public importance").

Social science scholars echo this reasoning. As several have observed,

> "it is the commonly held assumption in the [social science] profession, just as it is in medicine, law, and journalism, that people will tell a truer tale and act with less inhibition if they believe what they say or do will be held in the strictest confidence. This scientific rationale, combined with the ethical principle that one respects the privacy of research subjects[ ] has created uniform agreement among social scientists that confidentiality should be preserved by every possible means to protect the interests of both social science and the subjects of its research."

Paul G. Stiles, John Petrila, Research and Confidentiality: Legal Issues and Risk Management Strategies, 17 Psychol. Pub. Pol'y & L. 333, 337 (2011) (quoting Robert T. Bower & Priscilla de Gasparis, *Ethics in Social Research: Protecting the Interests of Human Subjects*, New York: Praeger Publishers, 1978, 23); *see also* Robert H. McLaughlin, *From the Field to the Courthouse: Should Social Science Research Be Privileged?,* 24 Law & Soc. Inquiry 927, 934-935 (1999) (stating that recognition of academic privilege is necessary to "support a researcher's promises of confidentiality to informants," as an ethical matter and because it is clear that "[t]he prospect of having to refuse to respond to a subpoena

or to testify * * * chills the depth of researchers' inquiries.").[6]

Social scientists gather data, including the personal accounts of individuals who witnessed or participated in social or political events, not to relate events as they occur, but to provide a thorough, accurate, and meaningful analysis of those events after their studies are complete. An untimely subpoena can thus "disrupt[ ] the normal flow of research and publication," and "leav[e] the researcher vulnerable to potentially career-damaging critique." *Ethical and Legal Strategies for Projecting Confidential Research Information*, Can. J.L. & Soc'y at 62-63.

A subpoena can also compromise the privacy and even the safety of persons who agree to participate in studies like the Belfast Project. Often the most "[i]ndispensable information comes in confidence from * * * informers operating at the edge of the law who are in danger of reprisal from criminal associates, from people afraid of the law and of government[.]" *Gonzales*, 459 F.3d at 180 (Sacks, J., dissenting) (internal quotation and citation omitted). Cutting off

[6] This Court similarly recognizes the importance of establishing trust between defendants and prosecutors in the plea bargaining context. *Puckett v. United States*, 556 U.S. 129, 141 (2009) (the "policy interest in establishing the trust between defendants and prosecutors * * * is necessary to sustain plea bargaining [and is] an 'essential' and 'highly desirable' part of the criminal process.") (quoting *Santobello v. New York*, 404 U.S. 257, 261–262 (1971)).

the sources of inside information that are essential to understanding decision-making processes and the interpersonal dynamics that inform decisions will impoverish social science research. This will, in turn, deprive the public of studies that are as complete, accurate, and reliable as possible; *i.e.*, studies that can most usefully be applied – by lawmakers, among others – to develop strategies for improving society.

Researchers need assurance that the courts will, at the very least, balance the need for confidentiality in social scientific studies with the needs of law enforcement. This Court should take the opportunity presented by this case to consider more fully the need to protect academic researchers by according them, as well as journalists, a well-defined privilege under the First Amendment or common law.

C. This Court should grant the writ to resolve lower court confusion over the scope of the constitutional right to academic freedom.

This Court has recognized that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendental value to all of us." *Keyishian v. Bd. of Regents of Univ. of State of NY*, 385 U.S. 589, 603 (1967). Indeed, this Court has cautioned it would "'imperil the future of our Nation'" "'to impose any strait jacket upon the intellectual leaders in our colleges and universities'":

> "No field of education is so thoroughly comprehended by man that new discoveries cannot

> yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

Id. (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (Warren, C.J., plurality op.)). *See also, e.g., Healy v. James*, 408 U.S. 169, 180-181 (1972) (reaffirming "this Nation's dedication to safeguarding academic freedom"); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) ("academic freedom [is] 'a special concern of the First Amendment'") (quoting *Keyishian*, 385 U.S. at 603); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 195-197 (1990); *Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 237 n.3 (2000) ("We have long recognized the constitutional importance of academic freedom") (Souter, J., concurring).

In refusing to quash the August 2011 subpoena, the Court of Appeals dismissed the possibility that Petitioners could invoke the constitutional right to academic freedom, opining in a footnote that this right protects only against "government attempts to influence the content of academic speech and direct efforts by government to determine who teaches." Pet. App. 30a n.20.

The Court of Appeals cited *Univ. of Pa*., 493 U.S. at 197-198, as support for its view that academic

freedom is limited to teaching and does not extend to research. Pet. App. 30a n.20. But *Univ. of Pa.* fails to support this view. In affirming the enforcement of an EEOC subpoena seeking peer review materials used in a university's tenure decisions, this Court expressly declined "to define * * * the precise contours" of the right to academic freedom, limiting its analysis to the facts before it. 493 U.S. at 198. In rejecting the university's argument that peer review materials should be kept confidential, this Court observed that its analysis was informed by the university's failure to "allege that the Commission's subpoenas are intended to or will in fact direct the content of university discourse toward or away from particular subjects or points of view." *Id.*

Petitioners, by contrast, allege just that. Specifically, they argue that allowing the government unlimited subpoena power will effectively "direct the content of university discourse away from" historical accountings of violent conflicts – such as the centuries-long sectarian "Troubles" in Ireland, or similar strife in the Balkans, Africa, or the Middle East – by chilling the participation of those individuals whose fear of reprisal would prevent them from contributing absent credible guarantees of confidentiality.

The Court of Appeals' ruling here conflicts with the views expressed by the Seventh Circuit in *Dow Chem. Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982), which correctly reviewed this Court's precedents to hold that "whatever constitutional protection is afforded by the First Amendment extends as readily

to the scholar in the laboratory as to the teacher in the classroom." *Id*. at 1275. The *Dow* court affirmed the quashing of an administrative subpoena seeking the work product of university researchers, concluding that "what precedent there is at the Supreme Court level suggests that to prevail over academic freedom the interests of government must be strong and the extent of intrusion carefully limited." *Id*. (citing *Sweezy*, 354 U.S. at 251, and *Keyishian*, 385 U.S. at 604-605). Otherwise, enforcing a subpoena that seeks disclosure of confidential research materials would "threaten substantial intrusion into the enterprise of university research." *Id*. at 1276.

This intrusion, in turn, would be "capable of chilling the exercise of academic freedom" by the researchers in "several" ways, *Dow*, 672 F.2d at 1276 – ways that apply just as much to this case as they did in *Dow*. For example, violating the confidentiality of research could "unnerv[e]" and "discourag[e]" researchers like those involved in the Project by allowing "the fruits of their labors" to be "appropriated by" and "scrutinized by a not-unbiased third party whose interests [are] arguably antithetical to theirs" – government officials who have no interest in protecting the welfare of participants. *Id*.

Disclosure would thus "'inevitably tend[ ] to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.'" *Dow*, 672 F.2d at 1276 (quoting *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring)). "To these factors must be added the knowledge of the

researchers that even inadvertent disclosure of the subpoenaed data could jeopardize both the studies and their careers," if that disclosure prevents reluctant witnesses from coming forward, for fear of reprisal, and providing their testimonies as to any number of emotionally raw episodes in history. *Id*.

As the law stands now, researchers in the First Circuit – such as those at Boston College, Harvard or Brown University – cannot invoke their right to academic freedom under any circumstances, while researchers in the Seventh Circuit – such as those at Notre Dame University, the University of Chicago, and Marquette – have judicial assurance that their "interest in academic freedom may properly figure into the legal calculation of whether forced disclosure would be reasonable" when confronted with a subpoena. *Dow*, 672 F.2d at 1276-1277.

The Court's intervention is needed to resolve this conflict and, more generally, to provide guidance as to the scope of a constitutional right that lower courts have found difficult to define and enforce. *See, e.g., Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (en banc) ("Academic freedom is a term that is often used, but little explained, by federal courts . . . decisions invoking academic freedom are lacking in consistency") (internal quotations omitted); *Edwards v. City of Goldsboro*, 178 F.3d 231, 248 n.11 (4th Cir. 1999) ("Although the Supreme Court declared over thirty years ago that academic freedom is a 'special concern of the First Amendment,' the caselaw to follow on the subject has left us in murky waters")

(quoting *Keyishian*, 385 U.S. at 603); *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 553 (5th Cir. 1982) ("Academic freedom is an amorphous field about which * * * little [has been] determined in explicit, concrete judicial opinions. * * * While academic freedom is well recognized, its perimeters are ill-defined and the case law defining it is inconsistent"); *accord Kirkland v. Northside Ind. Sch. Dist.*, 890 F.2d 794, 800 n.16 (5th Cir. 1989).

Amici respectfully request that the Court take this opportunity to provide that guidance.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition for certiorari, this Court should grant the petition.

Respectfully submitted,

AMIT KURLEKAR
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
580 California Street
Suite 1500
San Francisco, CA 94104
415-765-9500
akurlekar@akingump.com

L. RACHEL LERMAN
Counsel of Record
ANYA STEIN
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
310-229-1000
rlerman@akingump.com
astein@akingump.com

Attorneys for Amici Curiae

December 19, 2012

APPENDIX
List of Scholars

The following fifteen scholars, listed in alphabetical order, join this brief – in their individual capacities only – as *amici curiae* in support of Petitioners.

1. Robert Aponte
   Associate Professor of Sociology
   Indiana University School of Liberal Arts
   Indiana University-Purdue University
   Indianapolis (IUPUI)

2. William A. Blomquist
   Dean
   Indiana University School of Liberal Arts
   Indiana University-Purdue University
   Indianapolis (IUPUI)

3. Carrie Foote
   Associate Professor of Sociology
   Indiana University School of Liberal Arts
   Indiana University-Purdue University
   Indianapolis (IUPUI)

4. William Gronfein
   Associate Professor of Sociology
   Indiana University School of Liberal Arts
   Indiana University-Purdue University
   Indianapolis (IUPUI)

5. Jay R. Howard
   Dean
   College of Liberal Arts and Science
   Butler University

6. Tamara Leech
   Assistant Professor of Sociology
   Indiana University School of Liberal Arts
   Indiana University-Purdue University
   Indianapolis (IUPUI)

7. Najja Mobido
   Associate Professor of Sociology
   Indiana University School of Liberal Arts
   Indiana University-Purdue University
   Indianapolis (IUPUI)

8. Lynn Pike
   Professor of Sociology
   Indiana University School of Liberal Arts
   Indiana University-Purdue University
   Indianapolis (IUPUI)

9. Brian Powell
   James Rudy Professor of Sociology
   College of Arts and Sciences
   Indiana University, Bloomington

10. Fran Quigley
    Clinical Professor of Law
    Director, Health and Human Rights Clinic
    Indiana University Robert B. McKinney
    School of Law, Indianapolis

11. Robert V. Robinson
    Class of 1964 Chancellor's Professor
    Department of Sociology
    Indiana University, Bloomington

12. Peter Seybold
Associate Professor of Sociology
Indiana University School of Liberal Arts
Indiana University-Purdue University
Indianapolis (IUPUI)

13. David A. Strong
Lecturer in Sociology
Indiana University School of Liberal Arts
Indiana University-Purdue University
Indianapolis (IUPUI)

14. Robert W. White
Professor of Sociology and Department Chair
Indiana University School of Liberal Arts
Indiana University-Purdue University
Indianapolis (IUPUI)