**No. 11-5028**

**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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UNITED STATES OF AMERICA,

*Plaintiff-Appellant*,

v.

JEFFREY ALEXANDER STERLING,

*Defendant-Appellee*,

and

JAMES RISEN,

*Intervenor-Appellee*.

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On Appeal From The United States District Court For The
Eastern District of Virginia (Brinkema, J.)
No. 1:10-cr-485

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**UNOPPOSED MOTION FOR ENLARGEMENT OF WORD LIMIT**

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The United States respectfully seeks leave to file a brief in this case totaling 21,000 words or less. Defendant Jeffrey Sterling and intervenor James Risen do not object to this request. In support of this motion, the United States states the following:

1. This is an interlocutory government appeal from two pretrial orders suppressing evidence in a criminal proceeding, and a third pretrial order requiring the disclosure of classified information at trial. The government's opening brief

is due on or before January 13, 2012. This Court previously granted the parties' request to permit the government, Sterling, and Risen to file separate briefs of up to 18,000 words each. *See* Order (Dkt. No. 21, filed Nov. 28, 2011).

2. a. The first issue on appeal relates to the district court's decision to quash a government trial subpoena seeking Risen's testimony. Sterling is charged with illegally disclosing top secret national defense information to Risen, a reporter for *The New York Times*. The government sought Risen's testimony to establish that Sterling was indeed the source of the information. The district court held that Risen is protected by a First Amendment "reporter's privilege" that prohibits the government from requiring him to disclose his source, even in a criminal case.

b. This issue was litigated extensively at the grand jury and pretrial stages, resulting in the submission of numerous exhibits and declarations, multiple hearings, and a lengthy memorandum opinion by the district court. The issue of whether a "reporter's privilege" exists in a criminal case absent a finding of bad faith or harassment presents an important constitutional question of first impression in this Circuit. The government believes it is necessary to explain the lengthy procedural history concerning this issue and to fully address relevant precedent from the Supreme Court and other circuits in order to respond

adequately to the district court's decision. Moreover, because the district court employed a multi-factor balancing test to determine whether the "reporter's privilege" applied—and upheld Risen's claim of privilege based on extensive findings of fact concerning the government's evidence and its need for Risen's testimony—the government must provide a fairly detailed explanation of its anticipated trial evidence in order to adequately explain why the district court's balancing determination was error.

3. a. The second issue on appeal relates to the district court's decision to strike two of the government's witnesses as a sanction for the late disclosure of alleged impeachment material related to those witnesses. This decision was rendered orally at a pretrial hearing and is based on factual conclusions concerning the weight and necessity of the government's evidence and the history of discovery in this case. The district court's decision to strike these witnesses effectively terminated the prosecution.

b. In order to adequately respond to the district court's decision, the government believes it is necessary to explain the government's extensive discovery efforts (much of which involved the review and disclosure of classified information); the import of the alleged impeachment material at issue and the ways in which Sterling proposes to use it; and the ways in which the two

witnesses are important to the government's case. The government must also address the effect of precedent from the Supreme Court and from this and other circuits concerning a district court's limited authority to strike witnesses as a sanction for an alleged discovery violation.

4. a. The third issue on appeal relates to the district court's decision to require the government to disclose to Sterling and the jury the true names of government witnesses who are covert CIA officers or contractors. This decision was rendered orally at two pretrial hearings, and requires a close familiarity with the extensive procedural history concerning the discoverability and admissibility of the witnesses' true identities (which are classified). That history includes numerous motions, exhibits, declarations, and pretrial hearings convened pursuant to the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3, as well as a succession of written and oral orders in which the district court approved measures to shield the witnesses' identities in order to ensure their safety and prevent possible harm to national security.

b. In order to adequately respond to the district court's decision, the government believes it is necessary to explain in detail the substance of the CIPA proceedings in this case, which establish the reasons why the witnesses' true identities cannot be disclosed. The government must also explain the background

and meaning of CIPA, and must address the effect of precedent from the Supreme Court and from this and other circuits concerning the admissibility of classified information and the national security and safety implications of disclosing the true identities of covert intelligence officers.

5. The government has worked diligently to comply with the existing 18,000-word limitation for its opening brief. Nonetheless, the government has concluded that it cannot adequately address the necessary factual, procedural, and legal issues presented by the three issues on appeal (each of which is almost entirely distinct from the others) within the existing limitation.

6. The government further notes that it is the only party that must address all three issues on appeal. Risen has intervened solely with respect to the first issue, and Sterling was substantively involved in only the second and third issues. The Court's briefing schedule permits Risen and Sterling to file separate briefs addressing their respective issues, each of which may contain up to 18,000 words. Thus, Risen and Sterling will have a total of 36,000 words in which to respond to the government's opening brief. Risen and Sterling do not object to the government's request to file an opening brief totaling 21,000 words or less.

WHEREFORE, the United States respectfully requests that this Court grant its unopposed motion for leave to file an opening brief in this case totaling 21,000 words or less.

Respectfully submitted,

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January 3, 2012

## CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2012, I filed the foregoing Unopposed Motion for Enlargement of Word Limit with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to the following registered users:

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