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Nos. 05-969 and 05-1114

IN THE

Supreme Court of the United States

BOB DROGIN, H. JOSEF HEBERT, AND JAMES RISEN,
Petitioners,

v.

WEN HO LEE, *et al.*,
Respondents.

PIERRE THOMAS,
Petitioner,

v.

WEN HO LEE, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

**RESPONDENT WEN HO LEE'S
BRIEF IN OPPOSITION**

DAVID J. SCHENCK
DAVID L. HORAN
JONES DAY
2727 North Harwood St.
Dallas, Texas 75201
(214) 220-3939

BRIAN A. SUN
(Counsel Of Record)
BETSY A. MILLER
CHRISTOPHER LOVRIEN
CONSTANCE M. DOUGHERTY
JONES DAY
555 South Flower St.
Fiftieth Floor
Los Angeles, California 90071
(213) 489-3939

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*Counsel for Respondent Wen
Ho Lee*

QUESTION PRESENTED

Whether the court below properly determined, based on the particular factual record of this case and settled circuit precedent recognizing the existence of a qualified “reporter’s privilege,” that four reporters were permissibly held in civil contempt for refusing to comply with orders to reveal their knowledge of government leaks of information about a private citizen in violation of the federal Privacy Act, 5 U.S.C. § 552a.

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INTRODUCTION

This is a third-party appeal arising out of Dr. Wen Ho Lee's Privacy Act lawsuit against three government agencies for leaking information to reporters in violation of Dr. Lee's statutorily protected privacy rights. Four reporters ask this Court to recognize and apply new and expanded constitutional and common-law privileges that the reporters hope will permit them to keep secret the identity of government agents who violated federal law by leaking statutorily protected information to the press. Affirming the District Court, the Court of Appeals properly declined this same request and upheld the contempt adjudication against Petitioners (Bob Drogin, H. Josef Hebert, James Risen, and Pierre Thomas) for failing to comply with the District Court's discovery orders requiring them to reveal the identity of the leakers. This decision, which was based on the particular facts of the case and the application of settled circuit precedent, does not warrant review.

STATEMENT OF THE CASE

Mindful of the increasing opportunity for abuse and the government's accumulation of voluminous and potentially harmful information about private citizens, Congress has determined that such information, when kept in a statutorily defined system of records, should not be released to third parties except when authorized by law. Thus, pursuant to 5 U.S.C. § 552a ("Privacy Act" or "Act"), a federal employee or agency may not release information protected by the Privacy Act to any person. Violation of the Act is a federal crime. *Id.* § 552a(i). The Act also explicitly creates a private right of action and a civil remedy. *Id.* § 552a(g). No party to these proceedings has challenged the validity of the Privacy Act. Petitioners Drogin, Hebert, Risen, and Thomas, however, seek to eviscerate its protections, asking this Court to grant certiorari and to create a new reporter's privilege intended to promote and encourage leaks by federal employees despite the Privacy Act.

1. The Government Targets Dr. Lee.

Dr. Wen Ho Lee is a naturalized American citizen who, from 1978 until his termination in 1999, was employed as a hydrodynamics code physicist by the University of California at the Los Alamos National Laboratory (“Los Alamos”), a nuclear weapons laboratory run by the Department of Energy (“DOE”). In the waning days of the Clinton Administration, a political firestorm erupted over that administration’s perceived laxness toward espionage activities thought to be emanating from the People’s Republic of China. In particular, Congress and the press began to question openly the security arrangements at the Nation’s nuclear research facilities. Dr. Lee came under investigation by both the DOE and the Federal Bureau of Investigation (“FBI”) for acts of espionage he did not commit. Facing mounting political pressure and having utterly failed to uncover any evidence of espionage, one or more government employees with access to Dr. Lee’s personnel and investigation files turned to the press.

2. Leaks To The News Media Create Pressure To Indict Dr. Lee.

A series of articles, authored by each of the reporters involved in this case, identified Privacy Act-protected information about Dr. Lee and the government’s suspicions of espionage at Los Alamos.¹ On March 6, 1999 (two days before Dr. Lee was fired by the DOE), the *New York Times* ran a front page story—co-authored by Petitioner Risen—quoting “anonymous government sources” that suggested

¹ See Risen articles (JA 59-69 (Risen, co-author), 121-124, 126-129, 230-234 (Risen, co-author)); Drogin articles (JA 182-184, 420-423, 424-427 (Drogin, co-author), 428-432, 433-437, 438-440, 441-443, 444-447); Hebert articles (JA 473-474, 475-476, 477-478, 479-481, 482-484); Thomas articles (JA 1937-1940 (Thomas, contributing), 1941-1943 (Thomas, contributing), 1944-1945); see also Lee (Appeal) Br. 5-10 (describing articles). “JA” and “CSJA” citations refer to the Joint Appendix and Corrected Supplemental Joint Appendix, respectively, filed in the D.C. Circuit.

(wrongly) that Dr. Lee had failed a polygraph test and otherwise implicated him in treason. JA 317-328. While the article did not identify Dr. Lee by name, it did recount Dr. Lee's employment history and other identifying information, as well as supposed connections to Chinese espionage operations. See JA 320-322. Dr. Lee's name was revealed two days later, on March 8, 1999, by Petitioner Hebert, who confirmed Dr. Lee's identity through "confidential sources." JA 473-474.

Having illegally leaked its own unfounded allegations, the government then used these press accounts in its efforts to pressure Dr. Lee to confess to espionage. During a videotaped March 7, 1999 interrogation, FBI personnel threw Petitioner Risen's *New York Times* article in front of Dr. Lee, told Dr. Lee that it all but identified him by name, and repeatedly threatened him about the effect that such coverage would have on his family and his career. CSJA 2366. When the interrogation yielded no concessions of espionage, the government leaked additional information to Petitioners, who, in turn, released it to the world.²

On March 8, 1999, after 21 years of service, Dr. Lee was fired from the DOE. Within 48 hours of his termination, three of the four Petitioners had published five articles identifying Dr. Lee by name, and/or providing significant and damaging details about the government's espionage investigation and/or other personal information protected by the Privacy Act.³ By March 9, 1999, Dr. Lee had lost his

² See Risen articles (JA 121-124, 126-129, 230-234 (Risen, co-author)); Drogin articles (JA 182-184, 420-423, 424-427 (Drogin, co-author), 428-432, 433-437, 438-440, 441-443, 444-447); Hebert articles (JA 473-474, 475-476, 477-478, 479-481, 482-484); Thomas articles (JA 387-390 (Thomas, contributing), 1941-1943 (Thomas, contributing), 1944-1945).

³ See Risen article (JA 121-124), Drogin article (JA 420-423), Hebert articles (JA 473-474, 475-476, 477-478, 479-481). Petitioner Thomas's articles were published later, in April and October of 1999, and contained additional harmful information, obtained from confidential

job, his reputation, and his privacy, and he was on display to the entire world as a presumed traitor and a spy.

3. The Government's Espionage Case Collapses.

By the end of March 1999, the government had devoted 60 agents and conducted more than 1,000 interviews in their pursuit of Dr. Lee. Despite this, the government was unable to uncover any credible evidence that Dr. Lee was a spy for China. Unfortunately, having branded Dr. Lee a traitor and a spy to the news media and the American public, the government faced tremendous political pressure to prosecute him for something. The government thus quietly ended its espionage investigation (dubbed "Kindred Spirit") and initiated a new investigation, appropriately named "Sea-Change." The new investigation focused on Dr. Lee's voluntary admission, made during one of his many sessions with the FBI, that he had copied certain information from the classified section of the Los Alamos computer system to an unclassified data storage space for work-related reasons and not for any sinister purpose.

Spurred by continuing accusations in court papers and the popular press that Dr. Lee had been revealing sensitive information about nuclear weapons technology to the Chinese government, the government persuaded a federal district judge to hold Dr. Lee in solitary confinement, without bail and under special administrative measures, claiming that Dr. Lee was a serious danger to this country's national security. In the months that followed, however, Dr. Lee's criminal defense counsel proved just the opposite, and, after incarcerating Dr. Lee in solitary confinement for more than nine months, the government was forced to concede that its case was crumbling for lack of any credible evidence of espionage or espionage-related activities against Dr. Lee.

(continued...)

sources, about the government's investigation of Dr. Lee. *See* JA 1937-1940, 1941-1943, 1944-1945.

Thereafter, the government dropped 58 of the 59 counts included in the original indictment, and, in exchange for his immediate release, Dr. Lee pled guilty to the sole, remaining count of mishandling computer files. At the hearing, the judge, in an extraordinary statement made in open court, apologized to Dr. Lee and singled out “top decision makers in the executive branch ... who have caused embarrassment by the way this case began and was handled” and who “have embarrassed our entire nation and each of us who is a citizen.” JA 1267.

4. Dr. Lee Brings This Privacy Act Case Against The Government Agencies.

Shortly after Dr. Lee’s arrest and indictment in December 1999, and amidst numerous embarrassing and harmful leaks, Dr. Lee filed a Privacy Act lawsuit against the United States Department of Justice (“DOJ”), the FBI and the DOE, claiming that anonymous government sources had leaked Privacy Act-protected information about Dr. Lee to the news media. As even former Director of the FBI Louis Freeh (himself a former federal judge) has acknowledged, the disclosures of information about Dr. Lee—including his name, details about his travels, and results of his polygraph examinations—violated the Privacy Act. JA 746, 753-765; CSJA 2364.

Dr. Lee engaged in extensive discovery efforts to press the government to identify these anonymous sources. Only after exhausting all viable avenues did Dr. Lee turn to Petitioners for this information, as Petitioners had personally witnessed these violations of the Privacy Act. On October 11, 2002, October 14, 2002, September 25, 2002, September 26, 2002, and August 20, 2002, Dr. Lee issued subpoenas to five reporters.⁴ Each of the reporters then moved to quash the

⁴ Subpoenas were issued to Petitioners Drogin, Hebert, Risen, and Thomas, as well as Jeff Gerth. The Court of Appeals reversed the District Court’s contempt ruling as to Mr. Gerth, and he is no longer part of this case. Drogin Cert. App. 19a-21a.

subpoenas. In considering the Motions to Quash, the District Court engaged in a thorough evaluation of the entire discovery record, taking on the unusual burden of reviewing all 420 written discovery requests and the transcripts of 20 depositions of key government officials. *See* JA 18-19. The District Court, following D.C. Circuit precedent recognizing a qualified First Amendment privilege, *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), ruled that Dr. Lee had been confronted with “a pattern of denials, vague or evasive answers, and stonewalling” by the government, Drogin Cert. App. 47a, and denied the reporters’ Motions to Quash. *Id.* 53a-54a.

When the reporters appeared for their depositions, however, each refused to answer any questions regarding government officials leaking information about Dr. Lee, despite the District Court’s order. CSJA 2433-2443, 2445-2454. After reviewing the deposition transcripts and briefs, the District Court held each reporter in contempt for violating the clear and specific terms of its discovery order. Drogin Cert. App. 22a-35a.

5. The Court Of Appeals Upholds The Contempt Ruling As To Four Reporters.

On appeal, the reporters argued that the District Court misunderstood their particular circumstances and wrongly held that they were not entitled to refuse to testify on the basis of any qualified First Amendment “reporter’s privilege.” The D.C. Circuit panel unanimously affirmed the District Court’s contempt ruling as to four of the five reporters. Drogin Cert. App. 1a-21a. On November 2, 2005, the Court of Appeals denied Petitioners’ request for panel rehearing and/or rehearing *en banc*. *Id.* 96a-97a, 104a-105a.

REASONS FOR DENYING THE PETITIONS

This case is uniquely ill-suited for reviewing the questions presented by Petitioners. This is a Privacy Act case brought against government agencies in the wake of a series of leaks to the media of statutorily protected material about a private

citizen. The Petitions raise no genuine conflict among the circuits with regard to whether a reporter's privilege applies in the context of this case, because a privilege cannot be premised on the "public's right to know" where, as here, the public expressly *does not* have a right to know and where releasing the information constitutes an undeniable federal crime that implicates a public interest in ferreting out lawbreakers. The decision below may have granted Petitioners, if anything, more protection than this Court's holding in *Branzburg v. Hayes*, 408 U.S. 655 (1972)—which flatly rejected the very existence of a privilege at all because reporters have no immunity from generally applicable law. Regardless, any conflicts cited by Petitioners regarding the availability of a First Amendment or federal common-law reporter's privilege in a civil case are more illusory than real and do not require this Court's intervention, particularly in light of the protections already available under the Federal Rules of Civil Procedure to any third party against unreasonable and oppressive subpoenas.

Further, Petitioners significantly overstate the effect on their newsgathering ability that could possibly flow from the rare judicial directive requiring a reporter to reveal a confidential source's identity for purposes of a federal court case. Finally, the judgment below is correct and would be affirmed under any qualified privilege the Court might recognize, should the Court be inclined to overrule *Branzburg*. Certainly, Petitioners' arguments to the contrary do not warrant this Court's review.

**I. THIS CASE IS A UNIQUELY POOR VEHICLE
FOR REVIEWING THE QUESTIONS
PRESENTED.**

The alleged circuit splits Petitioners cite—whether as to a would-be First Amendment or federal common-law privilege that has lingered undiscovered in two centuries of press litigation in this Court—are of no consequence in a case brought against the government for statutory violations by

government agents donning the cloak of confidentiality and leaking private and possibly classified information to reporters. Petitioners cannot point to any conflict among the circuits as to whether any reporter's privilege—assuming one exists at all—would preclude disclosure of confidential sources where the government illegally employs the means of an anonymous leak to the press to violate a citizen's statutorily protected privacy rights under the Privacy Act. As the D.C. Circuit below correctly noted, “the protections of the Privacy Act do not disappear when the illegally disclosed information is leaked to a journalist, no matter how newsworthy the government official”—or, one could add, the reporter—“may feel the information is.” Drogin Cert. App. 12a.

Nevertheless, Petitioners invite this Court to recognize and apply new and expanded constitutional and common-law privileges in a manner that would eviscerate the protections of the Privacy Act. The Court should decline to do so.

A. The Unique Context Of This Privacy Act Case Counsels Against Review Of The Existence Or Applicability Of A Reporter's Privilege.

Congress made the disclosures at issue in this case a crime. 5 U.S.C. § 552a(i)(1). Recognizing the government's disincentive to prosecute itself for violations, Congress separately authorized a civil remedy and provided liquidated damages. There is no conflict among the circuits as to the Privacy Act's enforceability, regardless of any promises a reporter may make. To confer a special immunity that would permit government violators of the Act to escape liability for their violations would render it meaningless. Unsurprisingly, neither this Court nor any circuit has held that any privilege would confer any such immunity. *See Branzburg*, 408 U.S. at 691 (“It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws.”).

Rather, it is settled, as even Petitioners implicitly concede, that violations of this Act examined in the course of grand jury or criminal proceedings confront no privilege that would preclude disclosure of confidential sources. *See id.* at 667. Indeed, this Court recently denied petitions attempting to challenge this longstanding baseline rule in a case raising the same issues Petitioners raise here (the existence of and appropriate standard for a First Amendment or federal common-law privilege) but in the criminal context. *Miller v. United States*, No. 04-1507, 125 S. Ct. 2977 (2005); *Cooper v. United States*, No. 04-1508, 125 S. Ct. 2977 (2005).

Curiously, Petitioners' arguments asking the Court to create a privilege here focus heavily on whether some lower courts have, notwithstanding *Branzburg's* holding and the denials of the *Miller* and *Cooper* Petitions, recognized the privilege in *criminal* cases. Drogin Pet. 22-24; Thomas Pet. 14-15, 17-18. This civil case is of course not a proper vehicle to decide whether a First Amendment or common-law privilege should be recognized in the grand jury or criminal context.

At the same time, however, the Privacy Act is not likely to be vigorously enforced by the government itself through a self-serving criminal investigation. As such, civil Privacy Act cases such as this one, while fairly rare, will necessarily function as the *de facto* substitute for the Act's criminal remedy and thereby serve the public purpose of ferreting out criminal violations of citizens' rights by the government.

B. Petitioners' Request For The Power To Immunize Government Leakers From Privacy Act Liability Provides No Credible Grounds For Review.

Petitioners view the fact that this is a Privacy Act case as inconsequential in the face of their desire to use anonymous sources. They urge that the Act can and should be eviscerated by the expansive privilege by which they seek to conceal violators' identities, for the stated purpose of *encouraging* violations of the Privacy Act because

government employees often possess newsworthy information. That, however, is a decision for Congress, not the courts and certainly not the press.⁵

Notably, Petitioners can cite no case that has held that the interests statutorily protected by the Privacy Act must yield to any promise of confidentiality that a reporter decides to make to a source. The reason is clear. The Privacy Act—including its criminal and civil penalties—forms part of the backdrop against which any government agent leaks information as an anonymous source, be it for defensible whistle-blowing purposes or improper motives (between which no privilege can differentiate). Consistent with this Court's precedents, reporters are not and should not be empowered to extinguish the protections that Congress provided the Nation's citizens by means of a *de facto* immunity to be conferred on government leakers by reporters through an unpierceable promise of confidentiality. *See Branzburg*, 408 U.S. at 691-92, 695-96, 697.

Casting aspersions, as Petitioners repeatedly do, on the motives of Privacy Act plaintiffs or the importance of the Act's protections does not compel a contrary conclusion. Drogin Pet. 9-10, 15-16, 19; Thomas Pet. 9-10, 14-16, 21, 23-25, 27-29. Indeed, Petitioner Thomas tries to turn the circumstances surrounding this case on their head. He alleges that Dr. Lee's effort to vindicate his rights that were violated by government officials' *past* unlawful disclosures somehow is an effort to "seek[] to subordinate the free flow of truthful information about government affairs to his quest for civil damages." Thomas Pet. 10. This hyperbole withers under the slightest scrutiny. Whatever truthful information

⁵ Congress, in fact, has been considering a federal shield law. *See, e.g.*, H.R. 581, 109th Cong. (2005); H.R. 3323, 109th Cong. (2005); S. 340, 109th Cong. (2005); S. 1419, 109th Cong. (2005). For this additional reason, the Court should at a minimum await another day and a more appropriate case to consider whether a nonstatutory privilege should be recognized as a matter of constitutional or federal common law.

about government affairs and “matters of public concern” or “significant public importance” may have been leaked to Petitioners has already been reported. And, further, had the leaks truly been intended to promote a greater public discourse in national security—and not an attack on one man who was later held in solitary confinement for nine months for crimes he did not commit—they would not have identified Dr. Lee by name. The public did not, at that premature moment, need to know the identity of a man who would not, ultimately, be convicted of the heinous crimes of which he was falsely accused. Regardless, even if Dr. Lee had been a public figure and the leaks had been truthful, government employees are not licensed by the Privacy Act or any First Amendment notions of the public’s “right to know” to release information simply because they deem it newsworthy. Not even the most ardent First Amendment advocate would claim, for example, that an employee of the Department of Health and Human Services or another agency having ready access to medical records should be allowed, let alone encouraged, to disclose medical records and other sensitive materials about the President at the employee’s unilateral discretion.

Further, Dr. Lee aims not to “improperly use[]” the Act “as a weapon to force disclosure of sources with impunity.” Thomas Pet. 25. He seeks only to remedy the violations of his privacy rights that occurred when statutorily protected, personal information—which does not concern “matters of significant public importance” but was a source of great pain and humiliation for this U.S. citizen—was leaked illegally to the press.

Petitioners’ reliance on this Court’s decisions in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), and other cases involving actions seeking to impose civil liability on media defendants is misplaced. Thomas Pet. 23-24. Dr. Lee is not suing Petitioners at all, much less on the basis of any privacy interest unmoored to a specific statutory protection, and Dr. Lee is not seeking damages from any media defendants for

the leaks, much less to “punish” any reporters for what they published. Petitioners here are asked only to comply with generally applicable law and answer to the duty of every citizen to respond to lawful judicial subpoenas and answer relevant questions put to them about the government’s violation of a federal statute that protects citizens from government abuse. *Cf. Branzburg*, 408 U.S. at 691-92, 695-96, 697. Neither is this a case of the *government* using its substantial resources to stamp out or impair the press—quite the opposite, as here government agents have used the press to violate generally applicable law and, at least implicitly, teamed with reporters to evade liability and destroy the life and reputation of a private citizen.

In this and other cases, contrary to Petitioners’ assertions (Drogin Pet. 25; Thomas Pet. 22), creating a reporter’s privilege will significantly impair plaintiffs’ access to relevant evidence that is essential to a just result in cases brought to enforce the protections of the Privacy Act and other statutorily provided remedies. No reporter’s privilege has existed in many federal jurisdictions for many years, particularly in criminal cases and clearly in the grand jury context, and yet government leaks can and do frequently occur. With the absolute or near-absolute reporter’s privilege that Petitioners seek (*e.g.*, Drogin Pet. 11, 26-27), such leaks cannot seriously be expected to decrease, but, as Petitioners apparently hope, they may well increase if reporters are granted an absolute license to refuse to identify leakers who will not be inclined to incriminate themselves. What is certain, however, is that, even where leaks are illegal or prove to be false, Petitioners’ requested privilege (which does not differentiate between truthful and false information) will prevent citizens whose statutorily protected rights are violated by the leaks from obtaining the evidence they need to remedy such violations under the Privacy Act and other statutorily provided protections.

II. THE CONFLICTS AND THE ASSERTED NEED FOR A PRIVILEGE ARE OVERSTATED.

A. The Decision Below Creates No Conflict With This Court's Precedent Rejecting The Existence Of A Reporter's Privilege.

Petitioners complain about the differences among the circuits regarding the existence of a privilege in civil cases (and, curiously, criminal and grand jury proceedings) and the particular requirements for its protection. Petitioners, however, try to disregard the simple fact that a conclusion by any federal court that there is a reporter's privilege under the First Amendment in a civil case is, as Judge Posner has very recently observed, "rather surprising[]" in light of" this Court's holding in *Branzburg* that no reporter's privilege exists. *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003). The D.C. Circuit's decision—in its result, if not its reasoning—is undeniably consistent with *Branzburg's* holding.

In *Branzburg*, a five-member majority of the Court declined "to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." 408 U.S. at 690. *Branzburg's* holding relied upon the long-standing rule that journalists have "no special immunity from the application of general laws," even if civil or criminal laws of general applicability incidentally burden newsgathering activities, *id.* at 682-83 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)), as this Court has recently reaffirmed, *see Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 201 (1990). Most importantly, the *Branzburg* Court did not find a First Amendment privilege and *then* hold that it was overcome by a compelling interest that was confined to the criminal proceedings before the Court. Neither did *Branzburg*, as Petitioner Thomas would suggest, merely "reject protection in that case." Thomas Pet. 11. Rather, relying on a civil

defamation case, the Court flatly rejected the very existence of the privilege at all, *Branzburg*, 408 U.S. at 686 (citing *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958) (Stewart, J.)), ultimately rejecting the argument that a “burden on news gathering ... make[s] compelled testimony from newsmen constitutionally suspect and ... require[s] a privileged position for them.” *Id.* at 682.

The *Branzburg* Court also repudiated any suggestion that a qualified reporter’s privilege existed at common law. *Id.* at 683, 695. As one court recently observed, *Branzburg* “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.” *In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004).

The clearest baseline, therefore, for evaluating the need to review the reporter’s privilege that Petitioners seek is the holding of this Court’s decision in *Branzburg*. *Branzburg*, 408 U.S. at 667 (holding that “requiring newsmen to appear and testify before state or federal grand juries [does not] abridge[] the freedom of speech and press guaranteed by the First Amendment”). That holding has not been questioned by this Court in over thirty years, despite the supposed state of confusion of which Petitioners now complain. *E.g.*, Drogin Pet. 20-22; Thomas Pet. 2, 11-13, 25.⁶ Recent efforts to have this Court change this long-standing rule have already been denied. *See Miller v. United States*, No. 04-1507, 125 S. Ct. 2977 (2005); *Cooper v. United States*, No.

⁶ Petitioners’ complaint is, at best, ironic coming from media litigants and lawyers who have long encouraged courts to constrict or misconstrue *Branzburg*’s holding since the day the decision was issued and thereby to create the supposed confusion that they now ask this Court to resolve. *See McKeivitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (noting that “[s]ome of the cases that recognize the privilege ... essentially ignore *Branzburg*, ... some treat the ‘majority’ opinion in *Branzburg* as actually just a plurality opinion, ... [and] some audaciously declare that *Branzburg* actually created a reporter’s privilege”).

04-1508, 125 S. Ct. 2977 (2005). Nothing has changed in the year since those denials.

The decision below, if anything, granted Petitioners more protection than this Court's holding in *Branzburg* permits. It did not, however, create or exacerbate any conflict with this Court's decisions that this Court needs to step in and settle.

B. No Differences Between The Circuits Regarding The Applicability Of A Reporter's Privilege Merit Review.

Further, regardless of whether any lower court looks to the First Amendment, federal common law, or the Federal Rules to decide if a reporter should be required to testify about an ostensibly confidential source, the lower courts have all looked to largely the same standards and generally reach the same results on similar facts. In fact, there is no pressing need for a First Amendment or federal common-law privilege insofar as the Federal Rules properly protect a reporter—like any other third party called to testify—from irrelevant, unnecessary, or unduly burdensome testimony. *See* FED. R. CIV. P. 26, 45. As Judge Posner has observed:

It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas. We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist. The approach we are suggesting has support in *Branzburg* itself....

McKevitt, 339 F.3d at 533 (citations omitted).

The court below similarly noted that, regardless of the existence of any First Amendment privilege in the D.C. Circuit or elsewhere, “the usual requirements of relevance,

need, and limited burdens on the subpoenaed person still apply. *See* Fed. R. Evid. 401, 403; Fed. R. Civ. P. 45(c)(1).” Drogin Cert. App. 12a. In short, even where a federal court properly rejects the existence of a constitutional or common-law privilege, the generally applicable federal discovery rules will effectively resolve a third-party reporter’s challenge to a subpoena in those rare circumstances in which a party is forced to turn to reporters for information that cannot otherwise be obtained. Accordingly, any differences between the circuits regarding whether a First Amendment or federal common-law privilege exist or how they should be applied in any given case do not merit this Court’s intervention.

C. Petitioners Overstate The Importance Of And Need For The Privilege They Seek.

Furthermore, even insofar as federal courts have reached different conclusions regarding the existence of a reporter’s privilege, Petitioners overstate the importance of and need for such a privilege. To be sure, the right to a free press insures that, through lawful disclosures to the press, reporters can effectively report to the public through the sources needed to convey the news or, as Petitioner Thomas puts it, maintain the “free flow of truthful information about matters of public concern.” Thomas Pet. 10-11. Moreover, even where information is unlawfully disclosed, the press is generally at liberty to report the information free of prior restraints. *See generally N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

Petitioners suggest, however, that simply recognizing the importance of a free press and the use of confidential sources, in and of itself, and without more, requires a court to recognize and apply a privilege that excuses reporters from revealing their sources even where the reporters, when receiving the information, have witnessed a crime. Not so. *Branzburg* confirms that the analysis of the need for a privilege must focus on whether sources will be deterred

from providing information to the media—not on reporters’ ability to make promises that they can confidently keep in the face of legitimate, judicially sanctioned demands for testimony or on the *ad hoc* weighing of the “importance” of a story reported with confidential sources, as Petitioners would urge. See *Branzburg*, 408 U.S. at 679-80, 681, 691, 693. No matter how often Petitioners proclaim the importance of a free press and confidential sources or describe the unsurprising phenomenon that government leakers prefer anonymity, Petitioners cannot show that any alleged absence of an absolute or near-absolute reporter’s privilege or any “confusion” regarding the existence of any such privilege has resulted in the silencing of would-be sources, in news going unreported, or in the impairment of the press’s ability to fulfill its “function in a democracy.” *E.g.*, Thomas Pet. 2; Drogin Pet. 12.

Indeed, the Court observed in *Branzburg* that the media as third-party witnesses are not required “to publish [their confidential] sources” or routinely or “indiscriminately to disclose them on request”; that in fact “reporters remain free to seek news from any source by means within the law”; and that the Court’s decision to reject the requested reporter’s privilege “involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources.” 408 U.S. at 690-91; *accord id.* at 681-82.

Petitioners cannot credibly claim that a privilege is necessary because lawful disclosures to the press have been quelled by lost expectations that reporters can grant immunity to sources, in view of the long-standing absence of any such immunity when a reporter is called to testify before a grand jury or in a criminal case. Notably, *Branzburg* did not disturb any earlier precedent, and, these realities have not changed in the ensuing thirty-plus years, despite Petitioners’ hysterical protests of a supposed assault on the media’s “right” to promise sources that they will remain anonymous.

Indeed, the same arguments were made and rejected in *Branzburg*, 408 U.S. at 699—and, despite the unsupported and rather remarkable assertions to the contrary by these investigative reporters (*e.g.*, Drogin Pet. 8-10; Thomas Pet. 26-27, 30), the efficacy of investigative reporting has hardly declined since. Thus, despite the present shrieking, there is no evidence that lawful newsgathering has halted or been impaired by the absence of a First Amendment privilege since the First Amendment was ratified in 1789 or, more particularly, since *Branzburg* emphatically rejected such a privilege in 1972.

The notion of a “chilling effect” on sources resulting uniquely from subpoenas issued to reporters in *civil* proceedings is absurd. *Branzburg* clearly dictates that a government source runs the risk of imprisonment for the same violation of the Privacy Act if the reporter to whom he leaks information is required to reveal the source in a grand jury or criminal proceeding. It defies reason to suggest that the possibility that a reporter may be required to reveal a confidential government source’s identity in a civil action deters would-be government whistleblowers from talking to the press because of the threat of exposure to Privacy Act liability and damages and other civil remedies, while the threat of a Privacy Act criminal prosecution of the government agent himself does not.

Not surprisingly, Petitioners do not point to a single instance in which a news story was not and could not be reported because a would-be source was deterred from coming forward by the possibility that the source’s identity might be revealed in the context of a criminal, much less civil, proceeding. *See Branzburg*, 408 U.S. at 693-95. Indeed, Petitioners’ own examples in their Petitions prove the opposite. Drogin Pet. 9, 14, 24-25; Thomas Pet. 21, 25-26. Despite the settled rule of *Branzburg* in criminal and grand jury proceedings and the supposedly uncertain state of a privilege in civil cases, sources have provided information necessary to report stories ranging from Watergate to Abu

Ghraib to Dr. Lee's case—albeit in this instance in criminal and civil violation of the Privacy Act. Indeed, Mark Felt primarily acted as the infamous source code-named Deep Throat for Bob Woodward and Carl Bernstein shortly *after Branzburg* (released June 29, 1972), BOB WOODWARD, *THE SECRET MAN: THE STORY OF WATERGATE'S DEEP THROAT* 51-69, 73-80 (2005), and *before* most state shield laws were on the books, *Branzburg*, 408 U.S. at 682, 689.

Accordingly, any supposed “state of uncertainty” has plainly not “interfere[d] with the gathering and dissemination of news.” Thomas Pet. 25. The *Branzburg* Court's observation that the lack of a privilege hardly has been a deterrent to disclosures has been confirmed repeatedly in the thirty-plus years since the statement was made:

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.

408 U.S. at 698-99. Thus, “[r]eason and experience demonstrate” not “that a reporter's privilege furthers important interests” but that a privilege beyond that provided under the existing state of federal and state law is not necessary for the press to report “news stories of the greatest importance.” Thomas Pet. 21-22.

III. PETITIONERS' REMAINING ARGUMENTS DO NOT MERIT REVIEW BY THIS COURT.

A. Petitioners' Claims Of Legal And Factual Error Are Meritless.

The D.C. Circuit and other federal courts, for reasons that are not entirely clear, looked at *Branzburg*'s holding flatly rejecting the existence of a reporter's privilege and did an about-face. Indeed, implicitly espousing the reasoning that would-be sources will be chilled by the threat of civil damages where they are not by criminal prosecution, the D.C. Circuit adopted one of the most liberal standards for applying a federal reporter's privilege in civil cases, under which district courts are instructed that "in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege" and that the reporter's privilege should "prevail in all but the most exceptional cases." *Zerilli*, 656 F.2d at 712. The decision below simply applied this settled circuit precedent to the particular factual record of this case to determine that the information Dr. Lee seeks is essential to a just result in his pending Privacy Act case and that Dr. Lee thoroughly exhausted other sources for obtaining this information.

Remarkably, the D.C. Circuit's departure from *Branzburg* does not go far enough for Petitioners. Petitioners ask this Court not only to recognize a privilege it already soundly rejected but, also, to *add* an additional "balancing" test to the D.C. Circuit's standard to ensure that, after this case, no other plaintiff will ever gain access to the identity of government agents who leak statutorily protected information to reporters. The standard Petitioners seek would, in essence, require the judiciary to police an otherwise unlicensed and unregulated body of "reporters" wielding special immunity to generally applicable law. This would compel federal judges to arbitrate the "importance" of leaks *after the fact*, notwithstanding this Court's long-standing aversion in other First Amendment contexts to

standards that “forc[e] state and federal judges to decide on an *ad hoc* basis which publications address issues of ‘general or public interest’ and which do not.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974). As the dissents to the denial of rehearing below candidly admit, such a privilege would make enforcement of statutorily protected rights in Privacy Act and other cases nigh impossible. *Drogin Cert. App.* 99a-103a. The D.C. Circuit correctly rejected Petitioners’ invitation, and this Court need not take up debate over a privilege its own precedent has already rejected.

Further, Petitioners again complain, as they have unsuccessfully to both courts below, that their individual circumstances were not analyzed with sufficient detail. The District Court’s factual analysis, however, is not a suitable subject for this Court’s review. “A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” SUP. CT. R. 10; *see also Halbert v. Michigan*, 125 S. Ct. 2582, 2587 (2005) (noting that this Court “does not sit as an error-correction instance”). Petitioners’ fact-bound arguments provide no basis for granting the Petitions.

B. Petitioners’ Request For A Federal Common-Law Privilege Was Not The Basis For The Decision Below And Does Not Warrant Review.

Petitioners also ask the Court to decide, in the first instance, that a new, federal common-law reporter’s privilege should be created that would provide absolute or near-absolute freedom of confidential sources from disclosure. There is no meaningful conflict among the circuits and the question of a common-law reporter’s privilege was not analyzed by the courts below, much less a basis for the lower courts’ decisions.

Petitioners argue that this Court’s decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), triggered and “intensified” a debate among the circuits as to whether a reporter’s privilege

should be recognized as a matter of federal common law. Drogin Pet. 20. The only circuit court case Petitioners cite for the creation of a common-law reporter's privilege in a civil case is *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979), a case which pre-dates *Jaffee* by 17 years. See Drogin Pet. 20-24; Thomas Pet. 13-15. Neither Petition cites any post-*Jaffee* circuit court decision in any civil case that creates a common-law privilege for reporters. See *id.* Petitioners Drogin, Hebert, and Risen concede as much when they assert that "[t]hree Circuits have squarely addressed the existence of a common-law privilege and, remarkably, have reached three different results[.]" but provide not a single example, other than *Riley*, of any decision actually recognizing such a privilege in the civil context. Drogin Pet. 21-22. There is, in short, no meaningful conflict among the circuits on this question.

Moreover, the courts below in this case did not decide or even analyze whether a common-law reporter's privilege should be created and applied here. Drogin Cert. App. 7a n.2. This Court, of course, typically does "not decide in the first instance issues not decided below." *NCAA v. Smith*, 525 U.S. 459, 470 (1999). Further, the Court "generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 (1996); see also *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (noting that "[i]t is our practice to decide cases on the grounds raised and considered in the Court of Appeals"). While the Court does have discretion to consider an issue that was either passed on or pressed below, in this case, the Court of Appeals explicitly declined to consider the common-law claim because it "was not a basis for the District Court's decision and was scarcely raised on appeal, appearing only in one footnote in one of the journalists' briefs." Drogin Cert. App. 7a n.2. Thus, as the Court of Appeals correctly observed in declining to pass on this issue, Petitioners failed to press the issue below.

C. Petitioners' Arguments Concerning The Standard Of Review For The District Court's Discovery Order Do Not Merit Review.

In every context and for a variety of reasons, discovery and privilege matters have historically and consistently been assigned to the discretion of the trial courts that live with cases on a daily basis.⁷ Notwithstanding the claimed conflict between the D.C. Circuit and the Ninth and Eleventh Circuits, the court below fully complied with this Court's holding in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 & n.23 (1984), that discovery orders—even those implicating claimed First Amendment rights—are no different.

This Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), issued one month before *Seattle Times*, speaks for itself and does not compel any contrary conclusion. Not surprisingly, no circuit has looked to *Bose* to decide the proper standard of review of a lower court's application of a reporter's privilege, and Petitioners do not even attempt to show otherwise.

CONCLUSION

The Petitions for a Writ of Certiorari should be denied.

⁷ Notably, Petitioner Thomas did not deem the standard of review question worthy of anything more than a passing reference in a footnote. See Thomas Pet. 18-19 n.9.

Respectfully submitted,

DAVID J. SCHENCK
DAVID L. HORAN
JONES DAY
2727 North Harwood St.
Dallas, Texas 75201
(214) 220-3939

BRIAN A. SUN
(Counsel Of Record)
BETSY A. MILLER
CHRISTOPHER LOVRIEN
CONSTANCE M. DOUGHERTY
JONES DAY
555 South Flower St.
Fiftieth Floor
Los Angeles, California 90071
(213) 489-3939

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*Counsel for Respondent Wen
Ho Lee*