

No.

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IN THE  
Supreme Court of the United States

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PIERRE THOMAS,

*Petitioner,*

v.

WEN HO LEE,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The District Of Columbia Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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### **QUESTION PRESENTED**

In civil litigation arising under the Privacy Act, the D.C. Circuit upheld a contempt order seeking to compel journalist Pierre Thomas, a nonparty, to disclose the identity of the confidential sources who spoke with him concerning the Government's investigation into nuclear scientist Wen Ho Lee's possible involvement in atomic espionage on behalf of the People's Republic of China.

The following question is presented:

Whether the D.C. Circuit erred in upholding the contempt order because the requested confidential source information is protected from disclosure by a reporter's privilege established by the federal common law, *see* Fed. R. Evid. 501, and by First Amendment principles protecting the free flow of truthful information about matters of public concern that outweigh the plaintiff's interest in obtaining discovery in his private civil action.

**PARTIES TO THE PROCEEDINGS**

The parties to the consolidated proceeding below included Bob Drogin, H. Josef Hebert, James Risen, Jeff Gerth, Pierre Thomas, Wen Ho Lee, the United States Department of Justice, the United States Department of Energy, and the Federal Bureau of Investigation.

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## **PETITION FOR A WRIT OF CERTIORARI**

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Petitioner Pierre Thomas respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

### **OPINIONS AND ORDERS BELOW**

The D.C. Circuit's opinion (Pet. App. 1a) is reported at 413 F.3d 53. The panel's order denying rehearing (Pet. App. 6a) is not reported. The court's order denying rehearing en banc by a 4-4 vote and the dissents therefrom (Pet. App. 52a) are reported at 428 F.3d 299. The district court's opinion denying Thomas's motion to quash (Pet. App. 34a) is reported at 287 F. Supp. 2d 15, and the district court's opinion holding Thomas in civil contempt (Pet. App. 21a) is reported at 327 F. Supp. 2d 26.

### **JURISDICTION**

The D.C. Circuit filed its opinion on June 28, 2005, and denied Thomas's timely requests for rehearing or rehearing en banc on November 2, 2005. On January 23, 2006, the Chief Justice granted Thomas's application for an extension of time in which to file a petition for certiorari up to and including March 2, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).<sup>1</sup>

### **CONSTITUTIONAL PROVISION AND RULE INVOLVED**

Federal Rule of Evidence 501 provides: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivi-

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<sup>1</sup> Three reporters who were also involved in the underlying proceedings have filed a consolidated petition for certiorari seeking review of the D.C. Circuit's decision. *See Drogin v. Lee*, No. 05-969 (Pet. for Cert. filed Jan. 31, 2006).

sion thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”

The First Amendment provides, in pertinent part: “Congress shall make no law . . . abridging the freedom of speech, or of the press.”

### STATEMENT OF THE CASE

This case presents important and recurring questions concerning the extent to which a reporter’s confidential source information is protected, at federal common law and under the First Amendment, from compelled disclosure in civil cases. The 4-4 vote by the en banc D.C. Circuit reflects the division and confusion over these issues that have plagued courts throughout the country.

1. Respondent Wen Ho Lee is a nuclear scientist formerly employed by the Department of Energy (DOE) at the Los Alamos National Laboratory. Pet. App. 3a. From 1996 through 1999 Lee was investigated by DOE and the Federal Bureau of Investigation (FBI) on suspicion that he had engaged in espionage on behalf of the People’s Republic of China by transmitting highly classified information concerning nuclear weapons. *Id.* A select committee of Congress also investigated Lee’s possible involvement in atomic espionage. *Id.* at 90a.

Lee was ultimately indicted on multiple counts and pleaded guilty to a felony count of unlawful retention of national defense information for having downloaded classified research files from the mainframe computer at Los Alamos without authorization. Pet. App. 3a; JA1920.<sup>2</sup>

Several months before Lee’s indictment, the press began reporting on the Government’s suspicion that Lee may have transferred nuclear secrets to China. On January 7, 1999, *The Wall Street Journal* broke the story that the Government was investigating suspected espionage at Los Alamos. Pet.

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<sup>2</sup> “JA” citations refer to the Joint Appendix filed in the D.C. Circuit.

App. 3a. *The Washington Post* followed with an article on February 17, 1999. *Id.*

On March 6, 1999, *The New York Times* published a story describing the Government's investigation in detail, and on March 9 published another story identifying Lee by name as the investigation's target. Pet. App. 3a-4a. Later that day, Secretary of Energy Bill Richardson appeared on national television to announce that Lee was the target of the investigation. JA2177. Over the next few weeks, Secretary Richardson appeared many more times on television and was quoted in newspaper articles defending the investigation and explaining the basis for the Government's suspicion that Lee had stolen nuclear secrets on behalf of China. JA101-05, 138-39, 2188-91.

Each of these announcements, which preceded Thomas's involvement in the story, generated intense public controversy and debate over this matter of significant national concern. Among the issues raised and discussed were why the Government had failed to remove a suspected spy from a federal job involving classified information concerning nuclear technology despite a four-year investigation; why investigators had been unable to amass sufficient evidence to support espionage charges; which agency was to blame for the apparently botched investigation; and why Lee was being incarcerated prior to his indictment.

2. Petitioner Pierre Thomas is a journalist who was employed by CNN at all times relevant to this lawsuit.<sup>3</sup> Thomas did not begin reporting on the Los Alamos investigation until well over a month after the Government had publicly identified Lee by name as the investigation's target, and the

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<sup>3</sup> Thomas is currently employed as Justice Department correspondent by ABC News. Before joining CNN, Thomas spent a decade as a local and national-affairs reporter for *The Washington Post*. Thomas has won many awards for his reporting, including a Peabody Award for his role in the network coverage of the September 11 attacks, and the Morton Mintz Investigative Journalism Award, which he won twice. Pet. App. 72a, 79a.

investigation had already received extensive coverage in the national media. In reporting the three articles at issue in this case, Thomas relied on both named and confidential sources. Pet. App. 73a-74a.

Thomas contributed to two articles posted on CNN's website on April 28, 1999. Pet. App. 62a, 65a. Those articles reported on the suspicions of Government officials that Lee had improperly downloaded classified information concerning nuclear weapons to a nonsecure system, and noted that the FBI had come under increasing scrutiny for its handling of the investigation. *Id.* On October 14, 1999, following similar reports in the *Los Angeles Times* and *The Atlanta Journal-Constitution*, Thomas reported, in an article posted on CNN's website, that the Government was continuing to investigate Lee's downloading of classified national security information onto unclassified tapes but lacked evidence that he had transferred the information to anyone. *Id.* at 69a; JA1931, 1935.

The information in Thomas's articles tracked the allegations that ultimately formed the basis of Lee's indictment and publicly announced plea agreement. In December 1999, Lee was indicted on 59 counts, and in 2000, as part of his agreement to plead guilty to a felony charge, Lee admitted using a nonsecure computer to download national defense information to a tape, and retaining that tape. JA1923. The United States District Court for the District of New Mexico convicted Lee of one count of Unlawful Retention of National Defense Information and sentenced him to time served.

3. On December 20, 1999, Lee sued the Department of Justice, the FBI, and DOE, seeking money damages. Lee alleged that employees of those agencies violated his rights under the Privacy Act, 5 U.S.C. § 552a, by disclosing to the press information concerning Lee and the Los Alamos investigation. Pet. App. 4a. Lee's Second Amended Complaint listed numerous articles and news broadcasts that he alleged contained information disclosed in violation of the Privacy Act. Pet. App. 100a-102a. Thomas, however, had no in-

volvement in any of the listed articles or broadcasts, and neither Thomas nor his CNN reporting was even mentioned in the Second Amended Complaint.

Discovery began on July 31, 2001. Pet. App. 5a. On September 26, 2002, having made what he claimed were unsuccessful attempts to discover which Government officials may have disclosed information covered by the Privacy Act, Lee issued subpoenas to Thomas and four other nonparty journalists. JA405. Lee demanded testimony and documents concerning the identity of the journalists' confidential sources and the information they provided. *Id.*<sup>4</sup>

Thomas moved to quash the subpoena and sought a protective order, asserting a reporter's confidential source privilege. Citing *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), among other authorities, Thomas argued that the information Lee sought was not centrally relevant, and did not "go to the heart," of Lee's Privacy Act claim. Docket Entry #80, at 7-9. Thomas noted that, while the complaint asserted violations of the Privacy Act based on alleged disclosures concerning the Government's initial suspicions of espionage, the results of Lee's lie detector tests, suspicious behavior by Lee's wife, and the April-May 1999 coverage by news organizations other than CNN, the complaint did not include any mention of Thomas's reporting. *Id.* at 7.

Thomas's motion also noted Lee's failure to exhaust alternative sources for the information. Although Lee's counsel had deposed current and former government officials, such as former FBI Director Louis Freeh and DOJ official John Dion, Lee's counsel had not asked either deponent a single question concerning Thomas or his sources. Docket Entry #80, at 8-9. The record is replete with similar instances. For example, although Lee sought to force Thomas to disclose any confidential communications he had with De-

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<sup>4</sup> The other reporters were James Risen and Jeff Gerth of *The New York Times*, Bob Drogin of the *Los Angeles Times*, and H. Josef Hebert of the Associated Press.

partment of Energy Counterintelligence Director Ed Curran, when Lee's counsel deposed Curran, counsel never asked Curran whether he had spoken to Thomas. JA914. Additionally, Lee made little to no effort to elicit this information from other sources through written discovery, as none of Lee's interrogatories or requests for admission referred in any way to Thomas or his reporting.

On October 9, 2003, the court denied Thomas's motion to quash, along with similar motions filed by the four other nonparty reporters. Pet. App. 34a. The court held generally that the information Lee sought was central to proving his Privacy Act case, but did not make an individualized assessment as to whether each individual reporter was likely to possess the information. *Id.* at 40a-41a. The court also held generally that Lee had made reasonable efforts to obtain the information from other sources, but again did not make individualized assessments as to each reporter. *Id.* at 42a-49a.

The court directed "that upon the occasion of their depositions . . . the journalists shall, if asked, truthfully answer questions as to the identity of any officer or agent of defendants, or any of them, who provided information to them directly about Wen Ho Lee, and as to the nature of the information so provided." Pet. App. 51a. The court also directed that the reporters produce all records provided to them by an officer or agent of the defendants. *Id.*

Thomas sat for a deposition on January 8, 2004. Lee's counsel focused on just three CNN articles: the two articles posted on April 28, 1999 (to which Thomas contributed reporting) and the article posted on October 14, 1999 (which Thomas wrote). JA1937-45. Thomas produced documents as required, and answered the vast majority of questions asked by Lee's counsel. Thomas declined, however, to answer certain questions concerning his communications with confidential sources based on the reporter's privilege under both federal common law and the First Amendment. *See* JA1623 *et seq.*

Lee moved to hold Thomas in contempt. On August 18, 2004, the court issued an order holding Thomas in civil contempt, along with the four other journalists who, like Thomas, had asserted the privilege. Pet. App. 21a. The court imposed a fine of \$500 per day (payable to the United States) until the journalists complied with the order to testify, but stayed the sanction pending appeal, noting that “there is no pending criminal investigation, and the journalists undoubtedly have a good faith belief in the appropriateness of their constitutional arguments.” *Id.* at 33a.

4. Thomas appealed to the D.C. Circuit, which consolidated his appeal with those of the other reporters. On June 28, 2005, the panel affirmed the contempt finding against Thomas and three of the other journalists. Pet. App. 1a.<sup>5</sup>

The court stated that “[i]n both the District Court and before us, [the reporters] rely on the theory that the First Amendment and federal common law create a privilege” protecting a reporter’s confidential source information, noting that “[n]ot only the breadth of this claimed privilege, but its very existence has long been the subject of substantial controversy.” Pet. App. 7a.

The court explained that circuit precedent recognizes a qualified First Amendment privilege in civil cases, and that the privilege may be overcome when the information sought “go[es] to the heart of the matter” and the party seeking the information has “exhaust[ed] every reasonable alternative source of information.” Pet. App. 11a (citing *Zerilli*, 656 F.2d at 713) (quotation marks omitted).

Applying this standard, the court upheld the contempt order. The court stated, “it is clear that the information Lee is seeking goes to the heart of his case,” because “[i]f he cannot show the identities of the leakers, Lee’s ability to show the other elements of the Privacy Act claim, such as willfulness and intent, will be compromised.” Pet. App. 12a. Mir-

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<sup>5</sup> The court vacated the finding as to Jeff Gerth due to insufficiency of evidence. Pet. App. 18a.

roring the district court's approach, the court of appeals lumped all of the journalists together and did not conduct an individualized assessment as to whether the specific information sought from Thomas went to "the heart" of Lee's Privacy Act case, or would even provide a basis for a Privacy Act claim. *Id.*

Deferring to the district court, the court of appeals also held that Lee had "met his burden as to exhaustion." Pet. App. 12a. Noting that Lee had taken "20 or so depositions," and that "the number of depositions necessary for exhaustion must be determined on a case-by-case basis," the court concluded that the district court's ruling was "well within its discretion." *Id.* at 13a-14a.<sup>6</sup> And again, like the district court, the court of appeals conducted no individualized inquiry as to Thomas or the other reporters. *Id.*

Although the court explicitly acknowledged that Thomas had raised the common law privilege argument in the district court and on appeal, it declined to address the issue. Pet. App. 7a & n.2.

On November 2, 2005, the court denied rehearing en banc by a 4-4 vote, with two of the court's ten active judges not participating. Pet. App. 52a. Three of the four dissenting judges filed separate opinions from the order denying rehearing en banc. Judges Tatel and Garland stated that "the panel never balanced the public and private interests" and consequently "the panel's arid two-factor test allows the exigencies of even the most trivial litigation to trump core First Amendment values." *Id.* at 56a. "[I]f the reporter's privilege is limited to those requirements, it is effectively no privilege at all," Judges Tatel and Garland explained, as "[p]laintiffs wielding Privacy Act suits will routinely succeed in putting reporters who receive whistleblower leaks to the choice of testifying or going to jail." *Id.* at 58a. Judges Tatel and Gar-

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<sup>6</sup> In deciding the case under an abuse-of-discretion standard, on the basis that "what we are reviewing is a discovery order," the court rejected the suggestion that it had any duty of "independent review" under *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). Pet. App. 9a.

land stated that the en banc petition raised questions of “exceptional importance,” and emphasized that “[t]he significance of the court’s decision in this case should not be underestimated.” *Id.* at 56a, 58a.

Judge Rogers, a member of the panel who nonetheless dissented from the denial of rehearing en banc, agreed that this case presents “significant issues” and that “[t]he important First Amendment protections implicated in these cases are obvious.” Pet. App. 54a, 55a.

### **REASONS FOR GRANTING THE WRIT**

This case presents important and pressing issues that have left the lower courts in dire need of guidance from this Court. The law governing the reporter’s privilege is in serious disarray, as the two most recent decisions on this topic from the D.C. Circuit exemplify. The en banc court’s 4-4 split comes less than a year after a panel of that court, in another reporter’s privilege case, split three ways and issued four separate opinions that reflected the confusion over these issues. *See In re Grand Jury Subpoena to Judith Miller*, 397 F.3d 964, *reh’g en banc denied*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied*, 125 S. Ct. 2977 (2005).

The decision also comes at a time when an unprecedented number of reporters face subpoenas demanding that they reveal their confidential sources under penalty of fines or imprisonment. *See Rachel Smolkin, Under Fire*, 27 *Am. Journalism Review* 18 (2005). This threat has arisen in other Privacy Act cases, including the lawsuit filed by Steven Hatfill, whom the Government named as a “person of interest” in the 2001 anthrax attacks. *See Hatfill v. Ashcroft*, D.D.C. No. 03-1793.

This Court has not considered whether federal law provides protection for confidential sources since its sharply divided and perplexing decision in the grand jury context in *Branzburg v. Hayes*, 408 U.S. 665 (1972). The *Branzburg* majority opinion and Justice Powell’s concurrence have been subject to drastically differing interpretations, without any

guidance from this Court. This Court has never said whether *Branzburg* applies in civil litigation, let alone in Privacy Act cases like this one, where a plaintiff seeks to subordinate the free flow of truthful information about government affairs to his quest for civil damages.

At the same time, the three decades since *Branzburg* have witnessed significant changes in the legal landscape that strongly support recognition of a federal reporter's privilege. In 1975, Congress adopted Federal Rule of Evidence 501, instructing federal courts to recognize new privileges as appropriate in light of "reason and experience." In embracing this flexible approach, Congress declined to adopt the privilege rule originally promulgated by this Court—which had set forth nine specific, enumerated privileges—in favor of an open-ended grant of lawmaking authority that "directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)).

Moreover, at the time *Branzburg* was decided—in the pre-Watergate era—only 17 States recognized a reporter's privilege. Today, 49 States and the District of Columbia do. As the Court held in *Jaffee*, which itself was decided more than 20 years after *Branzburg*, "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." 518 U.S. at 9.

In this case, Thomas reported truthful information concerning matters of significant public importance. Based on Privacy Act claims brought by a private plaintiff, however, he has been dragged into litigation, subjected to fines and a contempt citation, and ordered to reveal his confidential sources. This severely intrudes on First Amendment interests and has a chilling effect on future reporting. The decision below thus conflicts with *Bartnicki v. Vopper*, 532 U.S. 514 (2001), and other cases in which this Court has held that privacy interests cannot trump the strong First Amendment interest in ensuring the free flow of truthful information about

matters of public concern. This is precisely the approach the en banc dissenters advocated in this case. Pet. App. 55a-59a.

The sharp disagreements among the lower courts, and the many changes in the law over the last 30 years, have resulted in conflicting legal standards throughout the country, and even between the federal and state courts of certain States. This case dramatically illustrates the inconsistency, as Thomas would likely have prevailed under the District of Columbia's shield law, D.C. Code §§ 16-4701 *et seq.*, had this lawsuit been brought in District of Columbia Superior Court rather than federal court. This uncertainty frustrates and defeats the nearly unanimous policies of the States in this area. It also leads to confusion by sources and reporters, and the specter of jail and other harsh penalties for reporters who do not know what promises, if any, they can make to their sources when engaged in newsgathering. The lower courts—as well as journalists, their sources, and litigants—would benefit greatly from this Court's guidance.

**I. THE CIRCUITS ARE SPLIT OVER THE EXISTENCE AND SCOPE OF A REPORTER'S PRIVILEGE.**

**A. *Branzburg* Has Created Substantial Confusion In The Lower Courts.**

In *Branzburg*, this Court, by a 5-4 vote, declined to hold that a reporter's privilege relieved journalists from an obligation to testify in a grand jury investigation being conducted in good faith. In an opinion by Justice White, the Court recognized that "news gathering is not without its First Amendment protections," 408 U.S. at 707, but went on to reject protection in that case. In language that presaged Rule 501, the Court observed that "[a]t the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate." *Id.* at 706.

In a concurring opinion, Justice Powell—whose vote was essential to the judgment—seemed to endorse some form of privilege by recommending “the striking of a proper balance between freedom of the press” and the needs of law enforcement. 408 U.S. at 710. Justice Stewart’s dissent, foreshadowing the three decades of confusion that would follow, described Justice Powell’s opinion as “enigmatic,” *id.* at 725, and the lower courts are now deeply split over whether Justice Powell’s opinion should be construed to limit—or even replace—the majority’s holding. *E.g.*, *McKevitt v. Pallasch*, 339 F.3d 530, 531-32 (7th Cir. 2003) (“[s]ince the [four] dissenting Justices would have gone further than Justice Powell in recognition of the reporter’s privilege, and preferred his position to that of the majority opinion . . . , maybe his opinion should be taken to state the view of the majority of the Justices—though this is uncertain, because Justice Powell purported to join Justice White’s ‘majority’ opinion”). Some courts have even gone so far as to label Justice White’s opinion a “plurality,” while others have noted that Justice Powell joined that opinion despite writing a concurrence that seemed to question its fundamental conceptual underpinnings.<sup>7</sup> As Justice Stewart wrote three years after *Branzburg*, “the Court rejected the [reporters’] claims by a vote of five to four, or, considering Mr. Justice Powell’s concurring opinion, perhaps by a vote of four and a half to four and a half.” Potter Stewart, “*Or of the Press*”, 26 *Hastings L.J.* 631, 635 (1975).

Judge Posner recently surveyed the confused state of the law and observed that “[a] large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter’s privilege, though they do not agree on its scope.” *McKevitt*, 339 F.3d at 532. At the same time, other courts “refuse to recognize the privilege.” *Id.*

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<sup>7</sup> Compare, *e.g.*, *United States v. Smith*, 135 F.3d 963, 968-69 (5th Cir. 1998) (“we have previously construed *Branzburg* as a plurality opinion”) with *In re Grand Jury Proceedings*, 5 F.3d 397, 400 (9th Cir. 1993) (“It is important to note that [*Branzburg*] is *not* a plurality opinion.”).

Whatever the intended meaning of *Branzburg*, the lower courts have been interpreting the decision, and Justice Powell's concurrence, in disruptively different ways, resulting in inconsistent and conflicting legal standards that only this Court can reconcile. See *In re Grand Jury Subpoena to Judith Miller*, 397 F.3d at 978 (Sentelle, J., concurring) (“I think [the common law privilege] argument should appropriately be made to the Supreme Court” as “it is only the High Court and not this one that may act upon that argument.”); *id.* at 988 (Tatel, J., concurring) (“if *Branzburg* is to be limited or distinguished in the circumstances of this case, we must leave that task to the Supreme Court”).

**B. The Common Law Privilege Issue Has Divided The Lower Courts.**

Rule 501 “authorizes federal courts to define new privileges by interpreting ‘common law principles . . . in the light of reason and experience.’” *Jaffee*, 518 U.S. at 8. As this Court has explained, “the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.” *Id.* (quoting *Funk v. United States*, 290 U.S. 371, 383 (1933)). Congress, in promulgating Rule 501, “did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to ‘continue the evolutionary development of testimonial privileges.’” *Jaffee*, 518 U.S. at 8-9 (quoting *Trammel*, 445 U.S. at 47). Courts have followed this mandate and recognized many privileges under Rule 501, including the psychotherapist privilege, the spousal privilege, the cleric-communicant privilege, the military secrets privilege, and many others. *In re Grand Jury Subpoena to Judith Miller*, 397 F.3d at 989 (Tatel, J., concurring).

But the question whether a common law reporter's privilege exists—and if so, under what circumstances does it apply—has split the lower courts and is ripe for resolution.<sup>8</sup>

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<sup>8</sup> In this case, the D.C. Circuit did not reach the common law issue, instead relying on its decision in *Zerilli* recognizing a qualified First Amendment privilege. The court acknowledged that “[i]n both the Dis-

In *In re Grand Jury Subpoena to Judith Miller*, 397 F.3d 964, a three-judge panel of the D.C. Circuit split three ways over the issue, with each judge issuing a separate concurrence in addition to the court’s opinion, which pointedly noted that “[t]he Court is not of one mind on the existence of a common law privilege.” *Id.* at 973. Relying largely on *Branzburg*, Judge Sentelle concluded that no privilege existed and suggested that this Court’s guidance may be needed; Judge Tatel would have recognized a qualified privilege; and Judge Henderson, while disagreeing with Judge Sentelle that *Branzburg* foreclosed recognition of a common law privilege, declined to resolve the question based on the particular facts in that case. *See* 397 F.3d at 973.

The Third Circuit has recognized the common law privilege in civil cases, *see Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) (“journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources”), as well as in criminal trials. *See United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980) (“journalists have a federal common-law qualified privilege arising under Fed. R. Evid. 501 to refuse to divulge their confidential sources”).

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strict Court and before us, [the reporters] rely on the theory that the . . . federal common law create[s] a privilege that protects the right of a journalist to conceal confidential sources of information in the face of otherwise legitimate compulsion of testimony in federal courts.” Pet. App. 7a. The court declined, however, to address the common law privilege argument, asserting that it “was not a basis for the District Court’s decision” and was not argued at length on appeal. *Id.* at 7a n.2. But the issue is nonetheless preserved for this Court’s review, as the Court’s “traditional rule . . . precludes a grant of certiorari *only* when the question presented was not pressed or passed upon below,” *United States v. Williams*, 504 U.S. 36, 41 (1992) (emphasis added and quotation marks omitted). “[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon,” and *vice versa*. *Id.* Even if not “passed upon” by the court of appeals, the issue was undeniably “pressed” and thus preserved for review.

The Ninth Circuit, on the other hand, has held that there is no reporter's privilege, at least in cases involving grand jury subpoenas. *See, e.g., In re Grand Jury Proceedings*, 5 F.3d 397, 402-03 (9th Cir. 1993) (“*Branzburg* cast doubt on our ability to recognize a news gathering privilege in the grand jury context as a matter of common law”).

The Second Circuit has “long recognized the existence of a qualified privilege for journalistic information” in civil cases, although its decisions “have expressed differing views on whether the journalists’ privilege is constitutionally required, or rooted in federal common law.” *Gonzales v. Nat’l Broad. Co.*, 194 F.3d 29, 32, 35 & n.6 (2d Cir. 1998).

The Fourth Circuit appears to recognize a qualified reporter’s privilege in civil cases. *See United States v. Steelhammer*, 539 F.2d 373, 376-77 & n.\* (4th Cir. 1976) (Winter, J., dissenting) (“[u]nder Federal Rule of Evidence 501, [reporters] should be afforded a common law privilege not to testify in civil litigation between private parties”), *rev’d*, 561 F.2d 539 (4th Cir. 1977) (en banc order adopting position of Judge Winter).

Finally, the First Circuit has taken inconsistent positions. *Compare Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980) (quoting with approval the Third Circuit’s holding in *Riley* that “‘journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources’” and that “the flexibility of Rule 501 left ample room for the development of a finely honed, ‘ad hoc’ approach”) with *United States v. LaRouche Campaign*, 841 F.2d 1176, 1178 n.4 (1st Cir. 1988) (rejecting argument that “a federal common law privilege [exists] wholly apart from the First Amendment”).

### **C. Conflict And Confusion Also Exist Over A First Amendment Privilege.**

Deep divisions among the lower courts exist regarding a First Amendment privilege as well. Unlike the court below, which held that a qualified privilege could be overcome by a mere showing of need and exhaustion, other courts recognize

a more meaningful privilege that gives far more weight to the public interests at stake—a critical element in any First Amendment analysis. Moreover, although the D.C. Circuit recognized a First Amendment privilege in this civil case, it has rejected the privilege in the criminal context, and other courts have rejected a First Amendment privilege altogether.

**1. Even Those Courts That Recognize A First Amendment Privilege Disagree Over Its Application.**

The D.C. Circuit held that the reporter’s privilege may be overcome in a civil action when “the information sought [goes] to the heart of the matter” and when the party seeking the information has “exhaust[ed] every reasonable alternative source of information.” Pet. App. 11a (quotations omitted). The D.C. Circuit’s two-part test approach, which prompted four judges to dissent from the denial of rehearing en banc, directly conflicts with the approach followed by the First, Fourth and Ninth Circuits, as well as many state courts, all of which consider the public’s interest in the information at issue and the reporter’s interest in maintaining confidentiality.

The First Circuit applies a balancing test requiring courts to “place those factors that relate to the movant’s need for the information on one pan of the scales and those that reflect the objector’s interest in confidentiality and the potential injury to the free flow of information that disclosure portends on the opposite pan.” *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998). The Fourth Circuit applies a similar test. In *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287, 288 n.12 (4th Cir. 2000), the court held that, in addition to exhausting alternative sources, the requesting party must establish “a compelling interest in the information,” and this interest must then be “balanced against the reporter’s interest in protecting the confidentiality of his sources.” The Ninth Circuit follows the same approach. See *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975).

The D.C. Circuit’s formulation of the privilege also conflicts with the approach followed by many state courts of last

resort. The California Supreme Court, for example, has held that “when the information relates to matters of great public importance, and when the risk of harm to the source is a substantial one, the court may refuse to require disclosure even though the plaintiff has no other way of obtaining essential information.” *Mitchell v. Superior Court of Marin County*, 37 Cal. 3d 268, 283 (1984). Similarly, the Maine Supreme Court has held that “[t]he First Amendment . . . requires that we balance the competing societal and constitutional interests on a case-by-case basis, weighing any possible injury to the free flow of information against the recognized obligation of all citizens to give relevant evidence regarding criminal conduct.” *In re Letellier*, 578 A.2d 722, 726 (Me. 1990).

The Second and Fifth Circuits have articulated tests that more closely resemble the D.C. Circuit’s test. *See In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir. 1982) (privilege overcome when requested information is “highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources”); *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983) (privilege overcome when “reasonable efforts have been made to learn the identity of the reporter’s informant by alternative means” and “knowledge of the identity of the informant is necessary to proper preparation and presentation of the case”).

## **2. The Circuits Are In Disarray Over Whether, And In What Contexts, A First Amendment Privilege Exists.**

Many courts, including the D.C. Circuit, Pet. App. 8a, recognize a First Amendment privilege in civil cases but not in criminal cases. Other courts recognize the privilege in both civil *and* criminal cases. And still other courts refuse to recognize it in *any* case.

Three circuits—the Fourth, Fifth, and Ninth—follow the approach of the D.C. Circuit, and hold that a First Amendment privilege exists in civil cases, but not in criminal cases. *See LaRouche v. Nat’l Broad. Co.*, 780 F.2d 1134, 1139 (4th

Cir. 1986) and *In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980) and *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir. 1993) and *In re Grand Jury Proceedings*, 5 F.3d 397, 401-02 (9th Cir. 1993).

The Third and Eleventh Circuits, in contrast, hold that reporters have a First Amendment privilege in both civil *and* criminal cases. See *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

Two circuits—the Eighth and Tenth—have recognized a First Amendment privilege in civil cases, but have not directly addressed it in the criminal context. See *Cervantes v. Time, Inc.*, 464 F.2d 986, 992 n.9 (8th Cir. 1972); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977). The Second Circuit recognizes a privilege in both civil and criminal cases (although it has not specified whether the privilege is rooted in the common law or the First Amendment, or both). See *Gonzales*, 194 F.3d at 32, 35 & n.6.

The Sixth and Seventh Circuits have taken an entirely different position, and hold that there is no First Amendment privilege in either civil *or* criminal cases. See *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987); *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

Thus, while Federal Rule of Evidence 1101(c) provides that federal privileges apply “at all stages of all actions, cases, and proceedings,” the existence and scope of the reporter’s privilege vary from circuit to circuit, and may even vary *within* a circuit depending on the nature of the proceeding. This extraordinary and unprecedented situation warrants this Court’s attention.<sup>9</sup>

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<sup>9</sup> Plenary review is further warranted to resolve the circuit split over the proper standard of review of orders directing the disclosure of confidential sources. The D.C. Circuit’s adoption of an abuse-of-discretion

**D. This Court Should Grant Review And Recognize A Reporter's Privilege.**

**1. Jaffee And Rule 501 Support A Common Law Privilege.**

Whereas the D.C. Circuit panel relied on its prior ruling in *Zerilli* to decide this case based on a qualified First Amendment privilege, the federal common law and Federal Rule of Evidence 501 provide a more direct route to recognizing protection for confidential sources, and the common law analysis is the logical antecedent to the constitutional approach in any event.

This Court's analysis in *Jaffee* strongly supports recognition of a common law privilege that would prohibit compelled disclosure of Thomas's confidential source information in this case. In *Jaffee*, the Court recognized a psychotherapist-patient privilege, applicable to social workers, by reference to three factors: (1) whether such a privilege is widely recognized by the States; (2) whether the proposed privilege serves significant public and private interests; and (3) whether recognition of those interests outweighs the burden on truth-seeking that might be imposed by the privilege. *See In re Grand Jury Subpoena to Judith Miller*, 397 F.3d at 991-1001 (Tatel, J., concurring) (applying *Jaffee* analysis to reporter's privilege).

Each *Jaffee* factor supports recognition of a reporter's privilege. *First*, the reporter's privilege is overwhelmingly recognized by the States. Whereas the *Branzburg* Court noted that the majority of the States had not recognized the

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standard directly conflicts with the approach followed by the Ninth and Eleventh Circuits, both of which apply a *de novo* standard. *See Price v. Time, Inc.*, 416 F.3d 1327, 1334 (11th Cir. 2005); *Shoen v. Shoen*, 48 F.3d 412, 414 (9th Cir. 1995). The D.C. Circuit's decision also conflicts with *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), which underscored the duty of independent appellate review in cases involving the alleged infringement of First Amendment rights. *See Pet. for Cert. in Drogin v. Lee*, No. 05-969, at 27-30 (filed Jan. 31, 2006).

privilege as of 1972, forty-nine States, as well as the District of Columbia, have now recognized a reporter's privilege. Thirty-one of these States and the District of Columbia have done so by enacting statutes, commonly referred to as "shield laws." *See, e.g.*, D.C. Code §§ 16-4701 *et seq.* The remainder have done so by judicial decision. *See In re Grand Jury Subpoena to Judith Miller*, 397 F.3d at 993-94 (Tatel, J., concurring). "[T]he existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Jaffee*, 518 U.S. at 9.

*Jaffee* further recognized that because "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court," the "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." 518 U.S. at 13 (footnote omitted). So too here: any State's promise of confidentiality has little value if the source and reporter cannot rely with a high degree of certainty on the fact that federal courts will also honor the privilege. But right now, federal law is highly uncertain and unpredictable, effectively nullifying state-law protections in many jurisdictions.

*Second*, freedom of the press furthers "a public good of transcendent importance." *Jaffee*, 518 U.S. at 11. It was established "not for the benefit of the press so much as for the benefit of all of us." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). As this Court has recognized, the press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965). And, as discussed below, in recent cases addressing the "collision between claims of privacy and those of a free press," *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975), this Court has struck the balance in favor of the First Amendment to ensure the unfettered flow of truthful information regarding matters of public concern. *See, e.g., Bartnicki*, 532 U.S. 514. The First Amendment freedoms at

stake—and the importance of a free press to an informed citizenry—are at least as important as the mental health interests at issue in *Jaffee*.

In performing this public function, journalists often must rely on promises of confidentiality to their sources. In many cases this is the only way they can obtain and report information of great public interest. Throughout the nation's history, confidential communications to reporters have resulted in news stories of the greatest public importance, with Watergate perhaps the most famous example. See JA1804 (affidavit of investigative reporter Jack Nelson), JA1808 (affidavit of historian Anna Nelson). If private litigants can invoke the power of the courts to compel reporters to reveal their confidential sources simply to help them collect civil damages, such forced disclosure “would dam the flow to the press, and through it to the people, of the most valuable sort of information: not the press release, not the handout, but the firsthand story based on the candid talk of a primary news source.” Alexander Bickel, *The Morality of Consent* 84 (Yale 1975). See also *Branzburg*, 408 U.S. at 693 (“The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational.”); Affidavit of Pierre Thomas (Pet. App. 74a) (“Based on my years as a journalist, I believe that compelling reporters to testify about conversations with confidential sources or to reveal any potentially identifying information about those sources, such as where they work, would seriously jeopardize the ability of reporters to obtain information on a confidential basis.”). Reason and experience demonstrate that a reporter's privilege furthers important interests.

*Third*, these interests outweigh any likely evidentiary benefits that would result from denial of the privilege. As this Court explained in *Jaffee*:

If the [psychotherapist's] privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled. . . . Without a privilege, much of the desirable evi-

dence to which litigants . . . seek access . . . is unlikely to come into being. This unspoken “evidence” will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

518 U.S. at 11-12. *See also Swidler & Berlin v. United States*, 524 U.S. 399, 407-08 (1998) (“the loss of evidence admittedly caused by the [attorney-client] privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place”).

The same is true regarding the reporter’s privilege. Given the amount of “evidence” that is “unlikely to come into being” absent a reporter’s privilege, “the likely evidentiary benefit that would result from the denial of the privilege is modest.” *Jaffee*, 518 U.S. at 11, 24. Forty-nine States and many federal courts have been applying a form of reporter’s privilege for years, with no discernible effect on private plaintiffs or law enforcement.

Rule 501 and *Jaffee* emphasize that Congress intended the common law to be evolutionary and that new privileges can and should be recognized over time. This Court should now acknowledge what reason and experience so clearly indicate: that there is a federal common law reporter’s privilege.

## **2. *Bartnicki* And Other First Amendment Decisions Also Support A Privilege.**

In addition, or in the alternative, this Court should recognize a First Amendment-based privilege along the lines sketched out by Judges Tatel and Garland. A First Amendment privilege that can be overcome by a mere showing of need and exhaustion affords no meaningful protection to reporters and their sources, as such a privilege can be defeated with ease, particularly in Privacy Act cases where the plaintiff seeks to uncover the source of a leak. Courts have recognized that a First Amendment reporter’s privilege “is necessary to ensure a free and vital press” because “[i]f reporters were routinely required to divulge the identities of their

sources, the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic." *Ashcraft*, 218 F.3d at 287.

This Court's recent First Amendment decisions demonstrate that the D.C. Circuit's formulation of the privilege undervalues these First Amendment principles. In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), for example, the Court held that the First Amendment barred a privacy-based claim for money damages against a radio station that had broadcast recordings of cell phone calls discussing a union's negotiations with a local school board that had been unlawfully intercepted by a third party. The Court explained that the lawsuit "implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern." *Id.* at 533-34. "[P]rivacy concerns give way," the Court stated, "when balanced against the interest in publishing matters of public importance." *Id.* at 534. Thus, "our decisions establish that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech." *Id.* at 534 n.21 (quoting *Butterworth v. Smith*, 494 U.S. 624, 634 (1990)).<sup>10</sup>

Here, Lee is wielding the Privacy Act in a way that is potentially more harmful to First Amendment interests than was the lawsuit in *Bartnicki*. Yet Thomas, who is not even a

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<sup>10</sup> This Court has expressly recognized "that since Warren and Brandeis championed an action against the press for public disclosure of truthful but private details about the individual which caused emotional upset to him, it has been agreed that there is a generous privilege to serve the public interest in news." *Time, Inc. v. Hill*, 385 U.S. at 383 n.7 (citing twenty-two "representative cases in which the State 'right of privacy' was held to give way to the right of the press to publish matters of public interest") (internal quotation omitted). In every instance that the Court has been required to resolve "the conflict between truthful reporting and state-protected privacy interests," *Florida Star v. B.J.F.*, 491 U.S. 524, 530 (1989), it has found that the published information was of public concern and thus that its publication could not be subjected to government-imposed sanctions.

party to this lawsuit, has been accorded less protection than were the *Bartnicki* defendants. Even though Thomas has not been accused of any wrongdoing, he has been subjected to a contempt order, a fine, and possibly other sanctions for declining to reveal his confidential sources for his truthful reporting on a matter of substantial public concern—indeed, a matter of far greater concern than the union-school board negotiations in *Bartnicki*. The D.C. Circuit’s refusal to give *any* weight to the public’s interest in maintaining the confidentiality of sources—and thereby ensure the free flow of important information to the public—conflicts with *Bartnicki* and other post-*Branzburg* decisions. See *Florida Star*, 491 U.S. at 535 (holding that First Amendment trumps privacy interests in case where media reported name of rape victim whose identity had been disclosed unlawfully); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979) (“if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order”); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (First Amendment bars punishment for publishing confidential information received from a source legally barred from divulging the information).

As this Court has made clear, even if the individuals who disclosed the information to the media can be sued, imposing significant burdens on the reporters who communicated this information to the public—whether through the threat of civil damage awards, as in *Bartnicki*, or through subpoenas, fines and contempt citations, as in this case—infringes on the First Amendment. “The test is not the form in which state power has been applied but, whatever the form, whether such power has been in fact exercised.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

This Court’s decisions teach that the public interest in information must always be considered and weighed in the balance in cases where a plaintiff pursues money damages through a privacy-based claim. As the dissenting D.C. Circuit judges recognized, absent some protection that gives

weight to the public's interest, the Privacy Act can be improperly used as a weapon to force disclosure of sources with impunity, doing great damage to First Amendment values. *See* Pet. App. 56a (noting that “the identity of a leaker is itself ‘the heart of the matter’ . . . in any Privacy Act case”) (Tatel & Garland, JJ., dissenting from denial of rehearing en banc); *id.* at 58a (stating that if reporter's privilege can be overcome by showing of nothing more than need and exhaustion, “[p]laintiffs wielding Privacy Act suits will routinely succeed in putting reporters who receive whistleblower leaks to the choice of testifying or going to jail”) (Garland & Tatel, JJ., dissenting from denial of rehearing en banc).

## **II. THE QUESTION PRESENTED IS IMPORTANT, SUBSTANTIAL AND RECURRING.**

### **A. Uncertain Standards That Provide Limited Protection Chill Speech And Prevent Information From Reaching The Public.**

This case presents issues of “exceptional importance” and “[t]he significance of the court's decision in this case should not be underestimated.” Pet. App. 56a, 58a (Tatel & Garland, JJ., dissenting from denial of rehearing en banc). “The important First Amendment protections implicated in these cases are obvious.” Pet. App. 54a (Rogers, J., dissenting from denial of rehearing en banc). This Court's silence on the issue since *Branzburg*, coupled with the lower courts' dramatically different approaches, has created a state of uncertainty that itself interferes with the gathering and dissemination of news, defeating the First Amendment protections afforded by *Bartnicki* and the policies embodied by Rule 501.

Confidential sources are critical to reporting on matters of public importance and thus are vital to self-governance. This case, for example, involves news stories concerning years of government investigation of suspected atomic espionage on behalf of the People's Republic of China carried out by a federal employee. The investigation itself cost taxpayers substantial amounts of money. Thomas's reporting ex-

posed the weaknesses in the Government's espionage case and truthfully reported the serious breaches of national security to which Lee ultimately confessed.

This Court has repeatedly recognized the important role of the press in obtaining and communicating information to the public in light of our “‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’” *Bartnicki*, 532 U.S. at 535 (quoting *Sullivan*, 376 U.S. at 270). The press, on the public's behalf, “serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966). Everything in our history and jurisprudence teaches that the compelled disclosure of reporters' confidential sources endangers their ability to perform their constitutionally-recognized duties. This in turn stems the flow of information on public events that is vital to an informed citizenry and a healthy democracy. See *Florida Star*, 491 U.S. at 535 (acknowledging “the timidity and self-censorship which may result from allowing the media to be punished for publishing truthful information”) (internal quotation omitted).

In recent months, there has been a wave of reporters being subpoenaed and held in contempt for declining to reveal their confidential sources. For example, Judith Miller of *The New York Times* and Matthew Cooper of TIME magazine were held in contempt for refusing to divulge their confidential sources in connection with the leak of the identity of CIA operative Valerie Plame. Likewise, Jim Taricani, a Rhode Island television reporter, was held in civil and criminal contempt for refusing to disclose to a grand jury the source of a leak. Steven Hatfill, who was identified by the Government as a “person of interest” in the 2001 anthrax attacks, is now pursuing Privacy Act litigation in which he is attempting to force more than a dozen reporters to disclose their confidential sources. See generally Reporters Committee for Freedom of the Press, *Reporters and Federal Subpoenas*, avail-

able at [www.rcfp.org/shields\\_and\\_subpoenas.html](http://www.rcfp.org/shields_and_subpoenas.html) (identifying reporters threatened with subpoenas); Smolkin, *supra*.

In short, the unsettled state of federal law has a chilling effect on speech and the dissemination of important information to the public. This Court's review is necessary to establish federal standards in this area.

**B. This Case Presents The Ideal Vehicle For Deciding These Important Issues.**

This case presents an especially good opportunity for this Court to resolve this question, in that the private interest at stake is so clearly outweighed by the public interest in preserving the confidentiality of sources and ensuring the free flow of information to the public. A reporter on the periphery of this litigation has been dragged into a discovery battle and ordered to reveal his confidential sources on pain of contempt, even though the truthful information he reported concerning a matter of significant public interest has no direct relevance to the claims in the underlying lawsuit. Thomas's reporting was not mentioned in the complaint, even as amended. Moreover, Lee made little to no effort to obtain the information from other sources. Indeed, none of Lee's interrogatories or requests for admission concerned Thomas's reporting.

Thomas's three stories, Pet. App. 62a, 65a, 69a, did not implicate Lee's claims under the Privacy Act. Thomas did not report any of the "private, personal, and acutely hurtful" information mentioned by the district court in denying the reporters' motions to quash, such as information concerning Lee's employment history, his finances, or the results of his polygraph examination. Pet. App. 41a, 50a. To the contrary, Thomas reported on matters that were fundamentally public, rather than private, in character. Thomas's articles examined the Government's investigation into what it suspected was espionage committed by a Government employee, exposed flaws in the Government's case, and highlighted the actual conduct to which Lee pleaded guilty. In *Cochran v. United States*, 770 F.2d 949, 959 n.15 (11th Cir. 1985), the court ex-

plained that the legislative history of the Privacy Act indicates that it “was primarily concerned with the protection of individuals against the release of stale personal information contained in government computer files to other government agencies or private persons.” The court noted that Congress did not demonstrate “any intent to prevent the disclosure by the government to the press of current, newsworthy information of importance and interest to a large number of people” as “there is a great public interest in insuring the dissemination of current, newsworthy information by the press, particularly when the information relates to the operations of government.” *Id.*

In fact, Thomas did not even begin reporting on this story until Lee had already been publicly identified by the Secretary of Energy as a target of the espionage investigation, and much of the information Thomas reported was later confirmed and reflected in Lee’s plea agreement. JA1920-30. There is simply no basis for concluding that the confidential source information sought from Thomas has direct relevance to Lee’s claims under the Privacy Act. Indeed, the subpoena issued to Thomas does not even satisfy the standards of Federal Rules of Civil Procedure 26 and 45, particularly when the First Amendment interests at stake are considered. *See United States v. R. Enters., Inc.*, 498 U.S. 292, 303 (1991) (in context of motion to quash grand jury subpoena under Fed. R. Crim. P. 17(c), directing court of appeals to determine whether heightened relevancy standard applies when First Amendment interests are implicated).

Nor is there any basis for concluding that Thomas possesses information that cannot be obtained from other sources. Lee’s counsel did not vigorously question Government witnesses about whether they communicated with Thomas. In fact, in one notable instance, Lee’s counsel did not even ask a Government witness whether he had ever spoken with Thomas—even though Thomas was ultimately held in contempt for declining to disclose any confidential conversations he may have had with this source. Pet. App. 28a.

Neither the district court nor the court of appeals conducted an individualized inquiry into whether Thomas should be forced to disclose his confidential sources. Rather, both courts treated the five reporters who received subpoenas as a collective unit for purposes of determining whether the privilege was overcome. This type of broad-brush approach gives short shrift to the First Amendment interests at stake, in that it would essentially force all reporters covering a story to disclose their confidential sources without any consideration of whether each individual reporter actually possesses information sufficiently important to the underlying litigation to justify compelled disclosure.

Permitting Lee to use the Privacy Act as a means of forcing the disclosure of Thomas's confidential sources frustrates and denies the public interest in the free flow of information necessary to public debate and decisionmaking. The judges who dissented from the denial of en banc rehearing recognized that the substantial public interest at stake outweighs Lee's private interest in obtaining money damages. As Judge Tatel explained, "[w]ithout slighting Lee's private interest in receiving compensation for governmental malfeasance, his claim pales in comparison to the public's interest in avoiding the chilling of disclosures about what the government then believed to be nuclear espionage." Pet. App. 57a. Judge Tatel added that "it's hard to imagine how [Lee's private] interest could outweigh the public's interest in protecting journalists' ability to report without reservation on sensitive issues of national security." *Id.* Judge Garland similarly faulted the panel for adopting an approach "inconsistent" with the court's commitment that "when striking the balance between the civil litigant's interest in compelled disclosure and the public interest in protecting a newspaper's confidential sources, we will be mindful of the preferred position of the First Amendment and the importance of a vigorous press." *Id.* at 59a (quoting *Zerilli*, 656 F.2d at 712).

**CONCLUSION**

This Court should grant review to resolve the important questions of law that have divided the circuits for decades and left reporters and their sources, as well as courts and litigants, in a state of uncertainty, jeopardizing the free flow of information to the public.

Respectfully submitted.

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