No. 12-627

In the Supreme Court of the United States

ED MOLONEY AND ANTHONY MCINTYRE, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
DAVID M. LIEBERMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners had an adequate opportunity to be heard on their First Amendment objections to subpoenas issued in support of a criminal investigation in the United Kingdom, when the lower courts considered and dismissed their claims on the merits.

2. Whether a court deciding whether to quash a law-enforcement subpoena issued pursuant to a mutual legal assistance treaty and 18 U.S.C. 3512 (Supp. V 2011) must consider the same specific discretionary factors applicable to a general foreign discovery request under 28 U.S.C. 1782(a).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, treaty, statutes, and rules:

Treaty, statutes and rules—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 685 F.3d 1. The order of the district court denying petitioners' motion to intervene (Pet. App. 47a-90a) is reported at 831 F. Supp. 2d 435. The order of the district court directing compliance with the government's subpoena (Pet. App. 91a-95a) is unreported but is available at 2012 WL 194432. The oral ruling of the district court dismissing petitioner's civil complaint is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2012. A petition for rehearing was denied on August 31, 2012 (Pet. App. 44a). The petition for a writ of certiorari was filed on November 16, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States District Court for the District of Massachusetts denied petitioners' request to intervene in support of a subpoena target's motion to quash. Pet. App. 47a-90a. It also dismissed petitioners' subsequent civil complaint objecting to the subpoenas on the same legal grounds that had been raised in the intervention motion. See *id.* at 13a & n.7. In a consolidated appeal, the court of appeals affirmed. *Id.* at 1a-42a.

1. This case involves a formal request by the United Kingdom to the United States, seeking assistance with a criminal investigation into the 1972 kidnapping and murder of Jean McConville in Northern Ireland. Pet. App. 9a. The mutual legal assistance treaty between the United States and the United Kingdom generally provides that the two governments "shall provide mutual assistance" with criminal matters, including by "providing documents, records, and evidence" that are located in one country and may be useful for an investigation or prosecution in the other. See Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters (U.S.-U.K. MLAT), S. Treaty Doc. No. 13, 109th Cong., 2d Sess. 354 (Art. 1); see *id.* at 367 (Art. 19). Pursuant to that treaty and 18 U.S.C. 3512 (Supp. V 2011), the United States submitted an application, ex parte and under seal, to the United States District Court for the District of Massachusetts, requesting that an Assistant United States Attorney be appointed commissioner to gather evidence on the United Kingdom's behalf. Pet. App. 9a; see 18 U.S.C. 3512(a)(1) (permitting a federal judge, upon application by an appropriate federal official, to "issue such orders as may be neces-

sary to execute a request from a foreign authority for assistance" in a criminal matter). The district court granted the application. Pet. App. 9a.

The commissioner subsequently issued two sets of subpoenas to officials at Boston College requesting materials archived there, many of which had been collected as part of an academic project known as the "Belfast Project." Pet. App. 9a-10a. In the Belfast Project, which ran from 2001 to 2006, researchers sponsored by Boston College had interviewed former members of the Provisional Irish Republican Army, the Provisional Sinn Fein, the Ulster Volunteer Force, Protestant paramilitary groups, and law enforcement, who were "involved in the 'Troubles' in Northern Ireland from 1969 forward." *Id.* at 5a-9a. The agreements signed by the interviewees purported to grant them the authority to control the release of their interview materials during their lifetimes, but Boston College has "absolute title" to those materials, and the materials are stored at Boston College. *Id.* at 7a-8a.

The commissioner's first set of subpoenas, issued in May 2011, sought records of interviews with two particular interviewees. Pet. App. 9a-10a. The Boston College officials voluntarily produced responsive materials related to one of the interviewees (who was deceased) but not the other. *Id.* at 10a.[1] The second set of subpoenas, issued in August 2011, sought records of "any and all interviews" with certain other interviewees

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[1] Counsel for petitioners has informed the government that the second interviewee died on January 23, 2013. Because interviewees' putative rights are limited to their lifetimes, any challenge to the May subpoenas may be moot. This development would not, however, moot petitioners' challenge to the August subpoenas.

"containing information about the abduction and death of Mrs. Jean McConville." *Ibid.*

2. The Boston College officials moved to quash both sets of subpoenas. Pet. App. 10a. The district court concluded that it had discretion, similar to the discretion it would have in the grand-jury context, to quash these subpoenas, but it declined to do so. *Id.* at 69a-70a, 75a-77a, 90a. It rejected the Boston College officials' contention that the requested materials were shielded from disclosure by a First Amendment privilege for confidential academic materials. *Id.* at 77a-89a. The court accepted that "subpoenae targeting confidential academic information deserve heightened scrutiny," but reasoned, based on the evidence (some of which was submitted under seal), that the subpoenas were "in good faith, and relevant to a nonfrivolous criminal inquiry"; that the requested materials were not "readily available from a less sensitive source"; that the "serious[ness]" of the potential crimes under investigation "weigh[ed] strongly in favor" of enforcement; and that disclosure would cause "no harm to the free flow of information related to the Belfast Project itself because the Belfast Project stopped conducting interviews in May 2006." *Ibid.*

Although it declined to quash the subpoenas in their entirety, the district court did grant some limited alternative relief. Pet. App. 12a-14a. First, it agreed to review the materials requested in the May subpoenas in camera before requiring their disclosure. *Id.* at 12a. Following that in camera review, the district court ordered enforcement of the May subpoenas, and the Boston College officials have not appealed that order. *Ibid.* Second, following extensive in camera review, the district court ordered the disclosure only of some materials in response to the August subpoenas, concluding that

certain other materials were beyond the subpoenas' scope. *Id.* at 14a & n.9. The Boston College officials have appealed that order, *id.* at 14a, and the appeal is still pending.

3. Petitioners here are the director of the Belfast Project and one of its primary researchers (who is a former member of the Irish Republican Army), both of whom worked as temporary contractors for Boston College. Pet. App. 5a-7a. They moved to intervene as of right, or for permissive intervention, in the subpoena proceedings initiated by the Boston College officials, raising arguments that largely tracked the Boston College officials' arguments. *Id.* at 11a; see Fed. R. Civ. P. 24. The district court denied the motion. Pet. App. 89a. The court reasoned that petitioners had no federal statutory right to intervene; that the U.S.-U.K. MLAT "prohibits them from challenging the Attorney General's decisions to pursue the MLAT request"; that the Boston College officials, who were the recipients of the subpoenas, "adequately represent[ed] any potential interests" of petitioners; and that those officials had in fact "argued ably in favor of protecting" the interests of petitioners and the interviewees. *Ibid.*

Petitioners then proceeded to file a separate civil action presenting the same legal theories as their prior intervention complaint. Pet. App. 12a-13a. In a ruling from the bench, the district court dismissed the complaint. *Id.* at 13a. The court concluded that petitioners lacked standing to bring claims under the U.S.-U.K. MLAT; that their First Amendment claims were the same as the already-rejected claims of the Boston College officials; that the Attorney General "as a matter of law ha[d] acted appropriately"; and that "were this case to go forward on the merits," it could "conceive of no

different result" than the one it had already reached in rejecting the motions to quash. *Ibid.* (brackets omitted).

4. a. Petitioners appealed both the denial of their intervention motion and the dismissal of their separate civil complaint. Pet. App. 4a-5a. The appeals were consolidated, and the court of appeals affirmed. *Id.* at 1a-42a.

The court of appeals concluded, as an initial matter, that petitioners' "claims under the US-UK MLAT fail because [they] are not able to state a claim that they have private rights that arise under the treaty, and because a federal court has no subject matter jurisdiction to entertain a claim for judicial review of the Attorney General's actions pursuant to the treaty." Pet. App. 16a; see *id.* at 16a-25a. The court emphasized, among other things, that Article 1 of the U.S.-U.K. MLAT expressly states that the treaty "shall not give rise to a right on the part of any private person * * * to impede the execution of a request." *Id.* at 17a (quoting U.S.-U.K. MLAT 354).

The court of appeals additionally concluded that even assuming that the district court had discretion under federal law to quash the subpoenas—an issue the court of appeals expressly declined to decide—the district court had not abused its discretion in determining that the balance of interests favored enforcement. Pet. App. 26a-27a. In a footnote, the court of appeals rejected petitioners' argument that the district court's discretion should have been guided by the factors set forth in *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). Pet. App. 26a n.17. The court of appeals observed that those factors had been developed in the context of a different statute—28 U.S.C. 1782(a)—that was not at issue in this case and that here, the U.S.-U.K.

MLAT itself supplies the substantive standards for evaluating a request for assistance. *Ibid.*

Finally, the court of appeals concluded that petitioners' First Amendment allegations were properly dismissed for failure to state a claim (and that it was therefore unnecessary to consider whether the district court should have allowed petitioners to intervene directly in the subpoena proceedings to assert those arguments). Pet. App. 28a-37a & n.27. The court of appeals found petitioners' assertions of an academic-confidentiality privilege to be controlled by this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), "which held that the fact that disclosure of the materials sought by a subpoena in criminal proceedings would result in the breaking of a promise of confidentiality by reporters is not itself a legally cognizable First Amendment or common law injury." Pet. App. 30a; see also *id.* at 32a-33a (relying also on *University of Pennsylvania* v. *EEOC*, 493 U.S. 182 (1990), which "rejected" a claim that "peer review materials produced in a university setting should not be disclosed in response to an EEOC subpoena in an investigation of possible tenure discrimination," Pet. App. 32a). Observing that *Branzburg* had balanced law-enforcement interests against individual interests, the court of appeals reasoned that the law-enforcement interest in this case (which touched on the interests of two separate sovereigns) was potentially even stronger than in *Branzburg* and that petitioners' interests in non-disclosure were no stronger than the personal-safety, criminal-liability, and job-security interests asserted on behalf of the confidential informants in *Branzburg*. *Id.* at 34a-36a.

The court of appeals additionally concluded that "[e]ven if *Branzburg* left us free, as we think it does not,

to engage in an independent balancing * * * , we would still affirm, for the same reasons." Pet. App. 34a n.24. The court also found "no plausible claim here of a bad faith purpose to harass" in requesting the subpoena that might warrant quashing it. *Id.* at 32a n.22 (noting that *Branzburg* left open the question whether a subpoena could be quashed on that ground).

b. Judge Torruella concurred in the judgment. Pet. App. 38a-42a. In his view, petitioners "cannot carry the day, not because they lack a cognizable interest under the First Amendment, but because any such interest has been weighed and measured by the Supreme Court and found insufficient to overcome the government's paramount concerns in the present context." *Id.* at 41a. With respect to petitioners' intervention motion, Judge Torruella "harbor[ed] doubts as to whether Boston College could ever 'adequately represent' the interests of academic researchers who have placed their personal reputations on the line," but acknowledged that such concerns were "moot" because petitioners "are unable to assert a legally-significant protectable interest," as the federal rules require in the context of a motion to intervene as of right. *Id.* at 42a.

5. The court of appeals denied rehearing and rehearing en banc. Pet. App. 44a. It also denied a motion to stay the mandate pending the filing of a petition for a writ of certiorari, but granted a temporary stay to permit petitioners the opportunity to seek a stay from this Court. *Id.* at 46a.

6. While these proceedings were taking place, petitioner McIntyre separately sought an order from the High Court of Justice in Northern Ireland to enjoin the Police Service of Northern Ireland (PSNI) from accepting the requested materials. See Gov't Stay Opp. App.

1a-9a. On October 2, 2012, that court denied relief, concluding in part that McIntyre "failed to make out an arguable case that disclosure of the Boston College tapes would, as he claimed, materially increase the risk to his life or that of his family." *Id.* at 4a. The British court observed, among other things, that British intelligence authorities had "assessed that the threat to the applicant from Northern Ireland-related terrorist groups would remain LOW in the event that material from the Boston College tapes were released to the PSNI." *Ibid.* (emphasis omitted). The British court also observed that petitioners had themselves publicized their involvement in the Belfast Project long before the subpoenas here were issued (including through the publication of a book) and that petitioners themselves are responsible for publicity about the subpoenas, which were originally filed under seal. *Id.* at 5a-6a.

7. On October 17, 2012, Justice Breyer granted a stay of the court of appeals' mandate, conditioned on petitioners' filing of a petition for a writ of certiorari.

ARGUMENT

Petitioners contend that they were denied a right to be heard on their First Amendment challenge to the subpoenas (Pet. 17-22) and that the court of appeals should have applied the factors set forth in *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), in reviewing whether the district court abused its discretion by enforcing the subpoenas (Pet. 32-36). The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. a. Petitioners first contend that the court of appeals denied them a right to be heard on their First Amendment objections to the government subpoenas.

That contention is incorrect. Both lower courts considered on the merits—and rejected on the merits—petitioners' First Amendment arguments. Pet. App. 13a & n.7, 29a-37a. In evaluating petitioners' complaint, the court of appeals "accept[ed] as true all well-pleaded facts, analyz[ed] those facts in the light most hospitable to [petitioners'] theory, and dr[ew] all reasonable inferences for" petitioners. *Id.* at 15a (citation omitted). It nevertheless concluded that petitioners had "fail[ed] to state a claim" under the First Amendment. *Id.* at 28a.[2]

Petitioners are thus wrong to assert that the court of appeals "held that they had no right to be heard in opposition to the subpoenas" (Pet. 18) and that they were improperly denied the right to "present evidence" (Pet. 24) in support of their claims. Had petitioners alleged facts that would entitle them to relief, the lower courts presumably would have given them the opportunity to present evidence in support of those allegations. But a complaint that fails sufficiently to allege a First Amendment claim, no less than a complaint that fails sufficiently to allege any other sort of claim, is subject to dismissal on the pleadings. Fed. R. Civ. P. 12(b)(6); *Ashcroft* v. *Iqbal*, 556 U.S. 662, 666, 675 (2009) (conclud-

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[2] To the extent petitioners contend (Pet. 20 & n.6) that they should have been allowed to intervene in support of the Boston College officials' motion to quash, that contention does not warrant this Court's review. As the court of appeals observed, the conclusion that petitioners' First Amendment claims lack merit renders immaterial the question whether the district court should have permitted petitioners to intervene to raise those claims. Pet. App. 37a n.27; see *id.* at 42a (Torruella, J., concurring in the judgment). Furthermore, a challenge to the denial of intervention would at bottom simply be a fact-bound challenge to the district court's conclusion that the Boston College officials adequately represented petitioners' interests. *Id.* at 89a.

ing that complaint including First Amendment free-exercise claim was insufficient); *id.* at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.") (internal quotation marks and citation omitted).

Contrary to petitioner's assertions (Pet. 27), nothing precluded the lower courts from determining, based solely on the allegations of the complaint that it accepted as true, either that a balancing of competing First Amendment interests favored enforcing the subpoenas, Pet. App. 34a n.24, or that petitioners had raised "no plausible claim" of the government's "bad faith purpose to harass" with respect to the subpoenas, *id.* at 32a n.22. In any event, petitioners were not, in fact, denied an opportunity to present evidence in relation to the subpoenas. The Boston College officials submitted affidavits from petitioners in connection with the motion to quash the subpoenas, and the district court had that evidence before it in ruling on the officials' First Amendment claims. Gov't C.A. Br. 54.

b. Petitioners err in contending (Pet. 18-20) that the decision below conflicts with the Second Circuit's decision in *New York Times Co.* v. *Gonzales*, 459 F.3d 160 (2006). In *New York Times Co.*, a newspaper filed a declaratory-judgment action to prevent the issuance of grand-jury subpoenas seeking reporters' telephone records from third-party telephone providers. *Id.* at 162. The district court granted summary judgment to the newspaper, but the court of appeals vacated and remanded, concluding that the newspaper had lacked any common-law or First Amendment privilege that would entitle it to prevent the disclosure. *Id.* at 162-163

(citing *Branzburg* v. *Hayes*, 408 U.S. 665, 682, 690-691, 701 (1972)).

The decision below, which rejected a similar privilege claim, is consistent with *New York Times Co.* Petitioners highlight (Pet. 18-19) the Second Circuit's conclusion that the reporters in *New York Times Co.* had a right to challenge subpoenas issued to third parties. See 459 F.3d at 167-168. But the court of appeals in this case similarly concluded that petitioners could challenge the subpoenas issued to the Boston College officials, see Pet. App. 28a-29a, and simply affirmed the dismissal of petitioners' complaint on the merits, *id.* at 29a-37a. Although the proceedings in *New York Times Co.* were litigated to summary judgment, the Second Circuit did not hold (or have occasion to hold) that claims challenging subpoenas on First Amendment grounds invariably require the presentation of evidence or are immune to motions to dismiss. Nor did it address the specific circumstance of this case, in which the district court had already received evidence from the same plaintiffs (and others) in adjudicating related claims.

c. Petitioners' citation (Pet. 21-22) of other circuit decisions recognizing that courts can entertain First Amendment objections to subpoenas is likewise misplaced, as is their citation (Pet. 22-24) of decisions of this Court for the proposition that First Amendment claimants generally have a "right to be heard." The lower courts in this case considered petitioners' claims, but simply rejected those claims on the merits.

d. At points (*e.g.*, Pet. 15), petitioners equate their claim of a "right to be heard" with a claim that they were entitled to a "case-specific" analysis of the First Amendment interests at stake in enforcing the particular subpoenas here. If that is their claim, it lacks merit,

because the court of appeals did in fact engage in such a case-specific analysis. The court weighed the law-enforcement interests favoring enforcement against the job-security and personal-safety interests that favored non-enforcement, and it concluded that the former outweighed the latter, in light of *Branzburg* v. *Hayes*, *supra*, and *University of Pennsylvania* v. *EEOC*, 493 U.S. 182 (1990). Pet. App. 29a-37a.

In *Branzburg*, this Court "decline[d]" to "interpret[] the First Amendment to grant newsmen a testimonial privilege" that would preclude enforcement of a grand-jury subpoena. 408 U.S. at 690. After weighing the competing constitutional and policy concerns, and surveying the relevant history, the Court concluded that reporters may not assert such a privilege either to protect a source who was himself engaged in criminal conduct or to protect a source "not engaged in criminal conduct but [possessing] information suggesting illegal conduct by others." *Id.* at 692-693; see *id.* at 682-708. In *University of Pennsylvania*, the Court applied similar reasoning to reject an "academic freedom" privilege that would have precluded enforcement of a civil administrative document subpoena seeking confidential peer review materials from a university. 493 U.S. at 195-201.

The court of appeals in this case determined that *Branzburg*, as supplemented by *University of Pennsylvania*, was controlling because it demonstrated that, in this context, governmental law-enforcement interests outweigh interests in confidentiality and journalistic or academic freedom. Pet. App. 29a-37a; see *Branzburg*, 408 U.S. at 690 ("Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government."); *id.* at 696 ("[I]t is obvious that agreements to

conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy."). The court of appeals reasoned that the government's interest in this case (carrying out its treaty obligation to assist in a foreign sovereign's law-enforcement efforts) was potentially even stronger than the more typical law-enforcement interest that the Court found to be overriding in *Branzburg*. Pet. App. 34a. It additionally reasoned that the interests asserted by petitioners were no stronger than the interests asserted by the reporters in *Branzburg*. *Id.* at 35a-36a.

Petitioners were not deprived of a case-specific determination of their claims simply because the court of appeals concluded that *Branzburg*'s interest-balancing dictated the outcome of the interest-balancing here. A decision can be case-specific even if the fact pattern the case presents is controlled by a decision of this Court. Cf. *Ornelas* v. *United States*, 517 U.S. 690, 698 (1996) ("similarity of facts" in Fourth Amendment cases requires consistency in outcomes). In any event, the court of appeals determined, as an alternative ground for its holding, that it would reach the same outcome based on independent interest-balancing, even if it were not bound to follow *Branzburg*. Pet. App. 34a n.24. Accordingly, petitioners would not benefit from a holding that case-specific balancing is required, since that has already occurred.

e. Petitioners briefly contend (Pet. 28-32) that granting certiorari would allow this Court to resolve the substantive scope of *Branzburg*—*i.e.*, the extent to which reporters and others can resist subpoenas on First Amendment grounds. It is unclear how this substantive issue fits within the scope of their first question presented, which concerns only the existence of "a First

Amendment or Due Process right to be heard and to present evidence." Pet. i. But even if the question presented did encompass that issue, it would not warrant review.

Petitioners and their amici identify no decision of any other court of appeals that conflicts with the decision below. Every circuit decision they cite involving a journalist's attempt to resist a government or grand-jury criminal-investigatory subpoena has—in accord with the decision below—rejected the journalist's arguments.[3] *New York Times Co.*, 459 F.3d at 172-174 (2d Cir.); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1146-1147 (D.C. Cir. 2006); *United States* v. *Smith*, 135 F.3d 963, 968-972 (5th Cir. 1998); *In re Grand Jury Proceedings*, 5 F.3d 397, 399-402 (9th Cir. 1993), cert. denied, 510 U.S. 1041 (1994); *In re Shain*, 978 F.2d 850, 852-853 (4th Cir. 1992); *In re Grand Jury Proceedings*, 810 F.2d 580, 583-586 (6th Cir. 1987).

Additional decisions cited by petitioner and his amici have no direct bearing here. Some of them are civil cases, which do not address the law-enforcement interest at issue in this case. See, *e.g.*, Pet. 30 (citing *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980) (subpoena in private civil suit)); Soc. Sci. Scholars' Amicus Br. 20 (citing *Dow Chem. Co.* v. *Allen*, 672 F.2d 1262 (7th Cir. 1982) (subpoenas issued by pri-

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[3] Petitioners cite (Pet. 29) a two-decade-old district court opinion recognizing a common-law qualified journalist's privilege in the grand-jury context. *In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358, 367-369 (W.D. Pa. 1991), aff'd by an equally divided court, 963 F.2d 567 (3d Cir. 1992) (en banc). But district court decisions "affirmed by an equally divided court sitting en banc * * * are lacking in precedential value." *Tunis Bros. Co.* v. *Ford Motor Co.*, 763 F.2d 1482, 1501 (3d Cir. 1985), vacated on other grounds, 475 U.S. 1105 (1986).

vate party in civil administrative enforcement proceeding)). Others involve subpoenas by criminal defendants on collateral or impeachment-related matters, not subpoenas by the government or the grand jury seeking evidence in furtherance of an ongoing criminal investigation. *United States* v. *Caporale*, 806 F.2d 1487, 1503-1504 (11th Cir. 1986) (defense request for potential evidence about jury tampering), cert. denied, 482 U.S. 917, and 483 U.S. 1021 (1987); *United States* v. *Burke*, 700 F.2d 70, 76-77 (2d Cir.) (same), cert. denied, 464 U.S. 816 (1983); *United States* v. *Cuthbertson*, 630 F.2d 139, 146-147 (3d Cir. 1980) (same), cert. denied, 449 U.S. 1126 (1981); see also *McKevitt* v. *Pallasch*, 339 F.3d 530, 531-533 (7th Cir. 2003) (rejecting claim of reporter's privilege raised in response to foreign defendant's request for impeachment materials).

Decisions by courts involving subpoenas by civil litigants and criminal defendants do not demonstrate that those courts would feel free to reexamine *Branzburg*'s balancing of interests in cases, like this one, that involve law-enforcement investigations. Indeed, the First Circuit itself has issued decisions in both the civil and the criminal-defendant contexts with which petitioners apparently agree. See Pet. 30 (favorably citing *United States* v. *LaRouche Campaign*, 841 F.2d 1176, 1181-1182 (1st Cir. 1988) (defendant's request for impeachment evidence in criminal case)); Soc. Sci. Scholars' Amicus Br. 15 (favorably citing *Cusumano* v. *Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) (private party's request for production of research materials in civil case)). But the First Circuit has nevertheless recognized, in accord with other circuits, that *Branzburg* controls in the context of law-enforcement investigations. Pet. App. 29a-37a.

This case would, in any event, be an unsuitable vehicle for addressing any disagreement among the circuits about the scope of *Branzburg*. First, the court of appeals' interpretation of *Branzburg* was not outcome-determinative. The court expressly concluded, as an alternative to its main holding, that even were it "free * * * to engage in an independent balancing" of the relevant interests, it "would still affirm, for the same reasons." Pet. App. 34a n.24. Second, this case arises in the unusual context of a subpoena issued under 18 U.S.C. 3512, pursuant to a mutual-assistance treaty, in aid of a foreign criminal investigation. The court of appeals suggested that this might create an even clearer case for rejecting a First Amendment privilege than *Branzburg* itself (Pet. App. 34a), and, to the extent that is true, further review in this case would be unlikely to provide useful guidance for the more common scenarios in which *Branzburg*-type issues typically arise.

2. Petitioners separately contend (Pet. 32-36) that the court of appeals erred in declining to apply the factors set forth in *Intel Corp.* v. *Advanced Micro Devices, Inc.*, *supra*, to the district court's decision to enforce the subpoenas in this case. Petitioners do not assert, however, that the decision below creates a circuit conflict on this issue—or even that any other circuit has addressed the issue. See Pet. 32 ("[T]his appears to be the first court of appeals decision addressing an MLAT subpoena issued pursuant to 18 U.S.C. § 3512."). The Court should deny certiorari for that reason alone. Sup. Ct. R. 10.

In any event, petitioners demonstrate no error in the court of appeals' judgment. The court of appeals assumed, without deciding, that district courts have discretion to quash subpoenas issued pursuant to a multi-

lateral assistance treaty and 18 U.S.C. 3512, and it concluded that the district court did not abuse that discretion here. Pet. App. 27a. The narrow question presented by petitioners is whether the district court was required, in exercising its discretion, expressly to consider certain specific factors that this Court has identified in the context of considering foreign requests for assistance brought pursuant to a separate statute, 28 U.S.C. 1782(a). Those factors include "whether the subpoena is 'unduly intrusive or burdensome,' the nature of the foreign tribunal, the character of the proceedings underway abroad, and whether the foreign proceedings were pending or imminent." Pet. 33 (quoting *Intel Corp.*, 542 U.S. at 264-265).

Petitioners offer no persuasive reason to believe that the Section 1782(a) factors carry special significance in the context of a request pursuant to an MLAT and Section 3512. Section 1782(a), which has its genesis in statutes dating back over 150 years, is a general-purpose statute permitting a "foreign or international tribunal" or "any interested person" to ask a United States court to procure evidence for use in a foreign proceeding. 28 U.S.C. 1782(a); see *Intel Corp.*, 542 U.S. at 247-248. Section 3512, which was enacted three years ago, specifically addresses the situation in which the United States government seeks the aid of a federal court in carrying out a request from a foreign authority in relation to a criminal matter. See Foreign Evidence Request Efficiency Act of 2009, Pub. L. No. 111-79, § 2(4), 123 Stat. 2087. Factors drawn from the legislative history of Section 1782(a), see *Intel Corp.*, 542 U.S. at 264, have no obvious application to MLAT requests under Section 3512. Cf. *In re Comm'r's Subpoenas*, 325 F.3d 1287, 1300 (11th Cir. 2003) ("[I]f the MLAT is read to only

allow assistance that is already obtainable through the letter rogatory process [in Section 1782(a)], it would have accomplished very little."), abrogated in part on other grounds by *Intel Corp.*, 542 U.S. 241.[4]

Rather than providing a vehicle for general requests for assistance—such as the private civil-discovery request at issue in *Intel Corp.*, see 542 U.S. at 246—Section 3512, as applied in this case, enables the United States to comply with its obligations under a mutual legal assistance treaty. Even assuming a court has discretion to deny a request like the one at issue here, that discretion will necessarily be more limited than in the Section 1782(a) context. Requests made pursuant to Section 3512 have already been vetted by the Executive Branch, which has primary authority over foreign relations, see, *e.g.*, *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005) ("In our system of government, the Executive is the sole organ of the federal government in the field of international relations.") (internal quotation marks and citation omitted); *Jama* v. *ICE*, 543 U.S. 335, 348 (2005) (noting Court's "customary policy of deference to the President in matters of foreign affairs"); see also *In re Premises Located at 840 140th Ave. NE*, 634

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[4] Petitioners' amici (Hibernians Amicus Br. 14) suggest that, before Section 3512's enactment, federal courts consulted Section 1782(a) exclusively to evaluate a foreign government's request for assistance under an MLAT. That is incorrect. See *In re Premises Located at 840 140th Ave. NE*, 634 F.3d 557, 571 (9th Cir. 2011) ("[R]equests for assistance via the US-Russia MLAT utilize the procedural mechanisms of § 1782 without importing the substantive limitations of § 1782."); *In re Comm'r's Subpoenas*, 325 F.3d at 1306 ("MLAT requests need not comply with the substantive restraints associated with requests made solely under 28 U.S.C. § 1782."); *In re Erato*, 2 F.3d 11, 15 (2d Cir. 1993) ("[E]xisting law under section 1782 does not control this case.").

F.3d 557, 571 (9th Cir. 2011) ("[I]t should be remembered that, before the request reaches the district court, it has proceeded through the executive branch, which has the right to deny the request for the reasons stated in the treaty and which has the right to request modifications in the event that the request is too burdensome.").

Petitioners' suggestion that the governmental subpoenas in this case are no different from a private civil litigant's discovery request accordingly lacks merit and does not warrant this court's review. The issue, moreover, would not be outcome-determinative. Petitioners advance no argument that this case would turn out differently if the *Intel* factors applied. See *In re Premises*, 634 F.3d at 571 ("When a request for assistance under the MLAT arrives before a district court, * * * almost all the [Section 1782(a)] factors already would point to the conclusion that the district court should grant the request.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
DAVID M. LIEBERMAN
Attorney

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