IN THE
SUPREME COURT OF THE UNITED STATES

No. 25A1448

CATHERINE HERRIDGE,

Applicant,

v.

YANPING CHEN, ET AL.

Respondents.

BRIEF OF AMICUS CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF APPLICANT'S EMERGENCY APPLICATION FOR STAY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.......ii

INTEREST OF AMICUS CURIAE....... 1

SUMMARY OF THE ARGUMENT....... 2

ARGUMENT....... 4

I. Permitting a contempt order to enter force while a journalist pursues her claim would make a nullity of the reporter's privilege....... 4

CONCLUSION....... 8

TABLE OF AUTHORITIES

Cases

Ashcraft v. Conoco, Inc.,
218 F.3d 282 (4th Cir. 2000). 7

Branzburg v. Hayes,
408 U.S. 665 (1972) 3, 6

Bruno & Stillman, Inc. v. Globe Newspaper Co.,
633 F.2d 583 (1st Cir. 1980) 6

Chen v. Fed. Bureau of Investigation,
153 F.4th 1289 (D.C. Cir. 2025). 2, 4

Chen v. Fed. Bureau of Investigation,
721 F. Supp. 3d 1 (D.D.C. 2024) 2

Grosjean v. Am. Press Co.,
297 U.S. 233 (1936) 3

In re Grand Jury Proc. (Ridenhour),
520 So. 2d 372 (La. 1988) 7

In re Roche,
448 U.S. 1312 (1980) 2, 4, 5, 6

John Doe Agency v. John Doe Corp.,
488 U.S. 1306 (1989) 5

LaRouche v. Nat'l Broad. Co.,
780 F.2d 1134 (4th Cir. 1986) 6

Lee v. Dep't of Justice,
428 F.3d 299 (D.C. Cir. 2005) 7, 8

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) 2

Miami Herald Publ'g Co. v. Tornillo,
418 U.S. 241 (1974) 6

Miller v. Transamerican Press, Inc.,
621 F.2d 721 (5th Cir. 1980) 6

Mitchell v. Superior Ct.,
690 P.2d 625 (Cal. 1984).. 7

Riley v. City of Chester,
612 F.2d 708 (3d Cir. 1979)... 6

Shoen v. Shoen,
48 F.3d 412 (9th Cir. 1995).. 6

Silkwood v. Kerr-McGee Corp.,
563 F.2d 433 (10th Cir. 1977)... 7

Zerilli v. Smith,
656 F.2d 707 (D.C. Cir. 1981)... 3, 7

Other authorities

Introduction to the Reporter's Privilege Compendium, Reporters Comm. for Freedom of the Press (last updated Nov. 5, 2021),
https://perma.cc/M84R-JUJS 3

RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*,
93 Minn. L. Rev. 585 (2008)... 5

INTEREST OF AMICUS CURIAE

Amicus curiae the Reporters Committee for Freedom of the Press (the "Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, it's attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.[1]

Because of the vital role that confidential journalistic sources play in the free flow of information to the public, the Reporters Committee has a strong interest in ensuring that journalists can offer credible assurances of confidentiality to their sources. Accordingly, the Reporters Committee respectfully submits this amicus brief in support of non-party Catherine Herridge's emergency motion for a stay.

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[1] No counsel for any party authored this brief in whole or in part. Amicus and its counsel authored this brief in its entirety. No person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Even before the Founding, this nation's traditions recognized that anonymity sits at the heart of press freedom. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring in the judgment) (emphasizing "the extent to which anonymity and the freedom of the press were intertwined in the early American mind" dating back to the 1735 trial of John Peter Zenger). In this case, journalist Catherine Herridge—subpoenaed as a non-party in a litigant's civil case—was held in contempt for refusing to breach the confidentiality she promised to her sources. *See Chen v. Fed. Bureau of Investigation*, 721 F. Supp. 3d 1, 14 (D.D.C. 2024), *aff'd*, 153 F.4th 1289 (D.C. Cir. 2025). She now faces the threat of daily $800 fines unless she strips these sources of the anonymity she pledged to protect. *Id*. at 16. And because the U.S. Court of Appeals for the D.C. Circuit declined to stay its mandate pending disposition of Herridge's forthcoming petition for certiorari, the mounting weight of those fines will destroy Herridge's opportunity to seek review of the significant constitutional questions raised by her case. This Court should grant an emergency stay to avoid that unjust result, which would chill the work of journalists well beyond the facts of this proceeding. *See In re Roche*, 448 U.S. 1312, 1316 (1980) (Brennan, J., in chambers) (staying contempt sanction against reporter that would force him to "surrender his secrets (and moot his claim of right to protect them)" before this Court could consider a petition for certiorari).

The compelled disclosure of the identity of a journalist's confidential source has a decisive and devastating impact on the integrity of the newsgathering process. "The First Amendment guarantees a free press primarily because of the

important role it can play as 'a vital source of public information.'" *Zerilli v. Smith*, 656 F.2d 707, 710–11 (D.C. Cir. 1981) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)). Journalists necessarily rely on confidential sources to break stories of utmost important to the public, from public corruption to government waste and beyond. And many such sources require credible assurances of confidentiality before coming forward because they face serious consequences if their identities are revealed, including loss of employment, legal liability, and threats to their safety. *See Introduction to the Reporter's Privilege Compendium*, Reporters Comm. for Freedom of the Press (last updated Nov. 5, 2021), https://perma.cc/M84R-JUJS.

For precisely this reason, virtually all states and most federal appellate courts recognize a reporter's privilege in civil litigation—one that applies with special force where, as here, the journalist is not a party to the underlying dispute. *Id.* (collecting authorities). Overwhelmingly, those jurisdictions apply the privilege by balancing the "vital constitutional and societal interests" at stake in ordering a journalist to compromise their confidential associations "on a case-by-case basis [that] accords with the tried and traditional way of adjudicating such questions." *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring). Many of those jurisdictions recognize that "in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege." *Zerilli*, 656 F.2d at 712. Here, though, the D.C. Circuit held that a court need not balance the relevant interests as long as the information sought is central to a plaintiff's claim and the plaintiff has

exhausted other avenues for obtaining the information. *Chen v. Fed. Bureau of Investigation*, 153 F.4th 1289, 1295 (D.C. Cir. 2025). That test will always be trivially satisfied in matters like this one, where a plaintiff leverages the Privacy Act to allege that a federal official spoke about them with a reporter. And were such cases to lead routinely to the compelled disclosure of source identities, that result would chill sources from speaking to journalists in the first place.

This outcome would put the D.C. Circuit at odds with the six appellate courts and numerous state high courts that adopt a true balancing approach to the reporter's privilege. To avoid forcing Herridge to "surrender [her] secrets (and moot [her] claim of right to protect them)" before this Court can review the question, this Court should stay the district court's contempt order pending disposition of her petition for certiorari. *In re Roche*, 448 U.S. at 1316 (Brennan, J., in chambers).

ARGUMENT

I. Permitting a contempt order to enter force while a journalist pursues an appeal would make a nullity of the reporter's privilege.

Imposing potentially ruinous fines while a journalist seeks review of her privilege claim places the journalist in an untenable situation and poses significant threats to the newsgathering process that transcend the facts of this case. While some journalists at large news organizations may have the institutional backing and resources to continue to work under such a burden, other journalists may have no choice but to accede to the personal and professional harm of relinquishing their rights. And journalists aware of that risk may simply avoid lines of inquiry that could put them in that situation in the first place. "[R]eporters who feel threatened

by subpoena and the real possibility of jail time or substantial individual fines for noncompliance will shy away from stories that might give rise to subpoenas—especially those involving confidential sources, who will expect them to go to jail or pay the fines rather that revealing their identities." RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 Minn. L. Rev. 585, 619 (2008). Such a chilling effect would strike with even greater force for stories likely to generate a Privacy Act claim, especially those involving national security or federal law enforcement where credible assurances of confidentiality are especially important.

A Justice of the Court stayed sanctions against a journalist pending appeal of the denial of privilege and contempt order on just those grounds. *See In re Roche*, 448 U.S. at 1316 (Brennan, J., in chambers). And rightly so. As in any context, "[p]erhaps the most compelling justification . . . to upset an interim decision by a court of appeals [is] to protect this Court's power to entertain a petition for certiorari." *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (internal citation omitted). And that principle has obvious force where a lower court's order requires the disclosure of confidential information, such that compliance would both "moot that part of the Court of Appeals' decision" and "create an irreparable injury" before this Court can decide whether the questions a petitioner raises would merit this Court's review. *Id.* (same as to disclosure ordered under FOIA). On the Respondents' side of the ledger, by comparison, "[w]hat is ranged against the asserted First Amendment interests of

the applicant is essentially respondent's convenience"—the opportunity to proceed with a civil claim a bit sooner rather than a bit later. *In re Roche*, 448 U.S. at 1316 (Brennan, J., in chambers). The balance of equities therefore tilts sharply in favor of a stay here.

The potential for grave collateral harm to public-interest newsgathering also underlines that the questions raised by Herridge's case will warrant this Court's review. *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974) (this Court's prompt review necessary where "to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment . . . could only further harm the operation of a free press"). The D.C. Circuit's construction of the reporter's privilege in this case would make it a pronounced outlier among federal appellate courts and state courts of last resort. Following this Court's decision in *Branzburg*, the lion's share of lower courts apply the reporter's privilege by "balanc[ing] the potential harm to the free flow of information that might result against the asserted need for the requested information." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980).[2] The decision under review, by comparison, asks only if the plaintiff

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[2] *See also Shoen v. Shoen*, 48 F.3d 412, 415–16 (9th Cir. 1995) ("In reaffirming a qualified journalist's privilege, we observed in *Shoen I* that 'the process of deciding whether the privilege is overcome requires that 'the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts, and a balance struck to determine where lies the paramount interest.'"); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986) ("In determining whether the journalist's privilege will protect the source in a given situation, it is necessary for the district court to balance the interests involved."); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725–26 (5th Cir. 1980); *Riley v.*

needs the information and has tried to get it elsewhere—not whether they need it *more* than a "healthy republic" needs "the free flow of newsworthy information." *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000).

As other judges have already warned, an "arid two-factor test" like the one applied here would "allow[] the exigencies of even the most trivial litigation to trump core First Amendment values." *Lee v. Dep't of Justice*, 428 F.3d 299, 301 (D.C. Cir. 2005) (Tatel, J., joined by Garland, J., dissenting from denial of rehearing en banc). The test, for that matter, will virtually always be satisfied in Privacy Act cases in which plaintiffs allege an official leaked information about their conduct to the press. "Barring an unexpected confession by the leaker, in most such cases the subject of the leak will be able to satisfy the centrality and exhaustion requirements," and if the "privilege is limited to those requirements, it is no privilege at all." *Id.* at 302 (Garland, J., joined by Tatel, J., dissenting from denial of rehearing en banc). The forced disclosure of a reporter's sources—previously limited to "the most exceptional cases," *Zerilli*, 656 F.2d at 712—would become run

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City of Chester, 612 F.2d 708, 715–17 (3d Cir. 1979) ("[W]e must balance on one hand the policies which give rise to the privilege and their applicability to the facts at hand against the need for the evidence sought to be obtained in the case at hand."); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977); *Mitchell v. Superior Ct.*, 690 P.2d 625, 630 (Cal. 1984) ("In civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential sources will often be weightier than the private interest in compelled disclosure."); *In re Grand Jury Proc. (Ridenhour)*, 520 So. 2d 372, 376 (La. 1988) ("Once the showing has been made that the disclosure is necessary to the public interest, the trial judge should balance the public interest in having all relevant testimony with the possible 'chilling effect' the disclosure will have on the freedom of the press and the ability to gather news.").

of the mill. "[B]ridled by nothing other than plaintiffs' private interests, the more such strategies succeed, the more they will be employed." *Lee*, 428 F.3d at 303 (Garland, J., joined by Tatel, J., dissenting from the denial of rehearing en banc).

That result would strike at the right of confidential association that underpins effective newsgathering. To preserve this Court's jurisdiction and avert the chilling effect that mounting fines will otherwise impose—not just on Herridge, but on all journalists who rely on confidential sources to keep the public informed—this Court should grant an emergency stay.

CONCLUSION

For the foregoing reasons, amicus respectfully urges the Court to grant Applicant's emergency stay application while she seeks review in this Court.

Respectfully submitted,

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