No. 25A-1448

In the Supreme Court of the United States

CATHERINE HERRIDGE,

Third-Party Applicant,

v.

YANPING CHEN,

Respondent.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants-Appellees

To the Honorable John G. Roberts, Jr., Chief Justice of the United States Supreme Court and Circuit Justice for the D.C. Circuit

OPPOSITION TO APPLICATION FOR A STAY OF THE MANDATE PENDING FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

On five separate occasions—twice in the district court and three times in the court of appeals—Applicant Catherine Herridge has asserted that a qualified reporter's privilege allows her to shield the identity of her source(s), almost certainly one or more federal officials, who abused their access to protected records and violated federal law to harm Respondent Yanping Chen, an American citizen. The lower courts have resoundingly rejected her position, faithfully applying the First Amendment qualified privilege balancing test that has been the law of the D.C. Circuit and other circuits for decades. Herridge has resorted to shifting strategies after each defeat, first asserting that D.C. Circuit precedent supports her position that an amorphous, unbounded balancing test governs assertions of reporter's privilege, before pivoting to conjure a nonexistent circuit split after a three-judge panel unanimously ruled against her and no member requested a vote on *en banc* review. None of Herridge's stratagems obscure the fundamental truth that the lower courts below recognized: Herridge's qualified interest in shielding the identity of her source(s) is outweighed by Chen's countervailing entitlement, under the Privacy Act, to discover the identity of the federal official(s) who violated her rights.

Herridge now asks this Court to stay the D.C. Circuit's mandate pending a petition for a writ of certiorari. The already-onerous burden a stay applicant shoulders is even more exacting in this case because the D.C. Circuit already refused to stay its mandate. *See* 67a; *Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) ("[W]hen a district court judgment is reviewable

by a court of appeals that has denied a motion for a stay, the applicant seeking an overriding stay from this Court bears 'an especially heavy burden.'" (quoting *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers))). Herridge has not come close to meeting the stringent standard that governs her stay application.

The *sine qua non* of requests for interim relief like stay applications is a showing that the applicant is likely to succeed on the merits. *See Trump v. Cook*, No. 25A312, 2026 WL 1855613, at *7 (June 29, 2026) ("We start and stop with the first factor. In our view, the Government has not shown that it is likely to prevail on the various legal arguments advanced in its stay application."). Herridge has not demonstrated either a reasonable probability that four Justices will consider the issues raised in her stay application sufficiently meritorious to grant certiorari or a fair prospect that a majority will vote to reverse the judgment below. *See* Appl. 15. Indeed, this Court has denied multiple certiorari petitions raising the very arguments Herridge makes here. *See Risen v. United States*, 572 U.S. 1149 (2014); *Thomas v. Lee*, 547 U.S. 1187 (2006). There have been no ensuing developments postdating these denials that warrant this Court's intervention now.

First, and most fundamentally, this case is an exceedingly poor vehicle for this Court to consider the freewheeling balancing test Herridge advocates for because the district court concluded that even if it applied her preferred test, ***she would still be required to disclose the identity of her source(s)***. *See* 22a-24a, 40a-47a; *Mont. v. Planned Parenthood of Mont.*, 145 S. Ct. 2627 (2025) (Statement of Justice Alito

respecting the denial of certiorari) ("[B]ecause of the way this case was litigated below, it provides a poor vehicle for deciding [the] question."). Herridge's application omits any mention of these findings, which doom her ability to show that she will ultimately be successful on the merits even under the framework that she contends this Court should adopt. Herridge thus wants this Court to engage in a purely academic exercise that will have no bearing on the ultimate outcome of this case.

Second, there is no circuit split over how to assess reporter's privilege claims under the First Amendment, nor is there any basis to conclude that this Court would reverse the D.C. Circuit. To the contrary, federal courts of appeals and state supreme courts have uniformly utilized the same approach the D.C. Circuit did, requiring litigants seeking to defeat the privilege to show both the centrality of the information being sought and that other avenues for obtaining the information have been exhausted before seeking it from the reporter. Herridge's suggestion that other courts have diverged from the D.C. Circuit's methodology, *see* Appl. 17, is fanciful. Furthermore, there is no dispute that Chen made the rigorous showing necessary to satisfy both the centrality and the exhaustion factors. Herridge's additional arguments for reversal, *see* Appl. 23-31, are retreads of assertions she made below, and she does not engage with the lower courts' systematic rejection of those claims.

Third, Herridge's arguments that the D.C. Circuit should have recognized a common-law reporter's privilege broader than the First Amendment privilege are equally unavailing. Lower courts have rejected similar efforts to create a common-law reporter's privilege out of whole cloth under Federal Rule of Evidence 501 because

neither "reason" nor "experience" supports it. *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996); 63a-64a. Herridge hangs her hat on *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979), the one decision she claims recognized a "non-constitutional privilege under common law principles." Appl. 4. But *Riley* relied on both the First Amendment *and* common law to articulate a test ***identical*** to the test the D.C. Circuit used below. *See Riley*, 612 F.3d at 716-17. Once again, adoption of that test would not change the ultimate outcome here.

Herridge is on no firmer ground in arguing that the non-merits factors favor a stay. She does not dispute, nor could she, that instead of revealing her source(s), she can pay the district court's contempt fine while pursuing a petition for a writ of certiorari. That dooms any claim of irreparable harm because if Herridge ultimately prevails before this Court, she can recoup that money. And Herridge gives short shrift to both Chen's and the public's interests by asserting that further delays in disclosing the identity of her source(s) are negligible. Although Herridge has repeatedly failed to convince the courts that her position is meritorious, she has reaped the benefits of a stay that the district court entered over two-and-a-half years ago. Allowing her to continue obfuscating would render the Privacy Act toothless, as litigants like Herridge could obtain an endless and unwarranted series of stays to blunt the weighty "private right of action" codified in the Privacy Act. 24a. Herridge's application for a stay should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

I. The District Court Proceedings.

A. Chen's Privacy Act lawsuit.

Chen is an American citizen who, in 1998, founded the University of Management and Technology (UMT), an educational institution headquartered in Virginia. 55a. Beginning in 2010, Chen became the focus of an FBI investigation concerning statements she made on immigration forms about her work in China in the 1980s. 2a. As part of that investigation, the FBI executed search warrants for Chen's home and UMT, and seized materials during both searches. *Id.* "After some six years of investigation, Dr. Chen was informed that no charges would be filed." *Chen v. FBI*, 435 F. Supp. 3d 189, 191 (D.D.C. 2020); 56a.

One year later, Fox News ran a "series of negative reports about Dr. Chen and the for-profit university she runs," causing Dr. Chen and her business to suffer "financial and reputational harm." *Chen*, 435 F. Supp. 3d at 191. Herridge spearheaded those reports, which focused on Chen's alleged past ties to the Chinese military. 2a. These reports included personal photographs seized from Chen's home during the FBI search, and information from Chen's immigration and naturalization papers. 56a. Subsequently, the Department of Defense (DOD) terminated UMT's participation in the tuition assistance program. 56a.

In December 2018, Chen filed a lawsuit against the FBI, DOD, and two other federal agencies, asserting that a disgruntled federal employee, angered over federal prosecutors' decision not to charge Chen with any crime, willfully leaked information about her in violation of the Privacy Act. 3a. While Chen sought damages relating to DOD's decision to cancel UMT's participation in the tuition assistance program, she

also sought other damages permitted under the Privacy Act, such as expenditures to remediate the harm from the Fox publications, and unrelated lost profits. 22a-23a. Chen further sought the minimum statutory damages and attorneys' fees and costs provided by the Privacy Act. 5 U.S.C. § 552a(g)(4).

B. Chen's exhaustive efforts to identify the leaker.

"Over the next five years, Chen pounded the pavement to uncover the identity of the potential leaker." 31a. She served dozens of document requests, interrogatories, and requests for admission; took 18 depositions of current and former government employees; issued over a dozen third-party subpoenas; and obtained declarations from 22 government personnel connected to the FBI's investigation. *Id.* Chen was "unable to obtain direct evidence that any of them, or any other person, was responsible for the suspected leak." 31a. As a result, Chen served deposition and document subpoenas on Herridge and Fox in May and June of 2022. 3a-4a. Herridge and Fox moved to quash the subpoenas on the ground that the materials sought were protected by a First Amendment or common-law reporter's privilege. 4a.

C. The district court's denial of Herridge's motion to quash.

The district court concluded that Chen overcame Herridge's assertion of the reporter's privilege. 6a, 25a.

The district court began its analysis by canvassing the D.C. Circuit's precedents, beginning with *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981). *Zerilli*, the district court observed, articulated a test that minimized "impingement upon the reporter's ability to gather news," ensuring that "the civil litigant's interest in

disclosure" would "yield to the journalist's privilege" in "all but the most exceptional cases." 7a. That test consists of two prongs: (1) centrality, namely a showing that the information sought goes to "the heart of the matter" and is "crucial"; and (2) exhaustion, as "reporters should be compelled to disclose their sources only after the litigant has shown that he has exhausted every reasonable alternative source of information." *Id. Zerilli* also analyzed whether the suit was "not frivolous." 8a.

The D.C. Circuit underscored that ruling in *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005). Like *Zerilli*, *Lee* "did not apply a free-form balancing of interests but rather struck the balance between private and public interests by reference to the specific factors identified in *Zerilli*—the centrality of the requested discovery and the exhaustion of reasonable alternatives." 10a. The district court concluded that "some consideration of the merits of a plaintiff's case may also factor into the analysis of the centrality of the sought-after information," for if an "obvious flaw will prevent a plaintiff from succeeding on her Privacy Act claim, then it might be said that the leaker's identity does not go to the heart of the matter." 11a n.2 (internal quotations omitted). The district court then found that Chen demonstrated that the information she was seeking was central to her Privacy Act claim because the identity of the leaker was essential to her ability to show willfulness and intent. 15a. It also found that Chen satisfied the exhaustion prerequisite. 21a.

Critically, the district court then, "for the sake of completeness," considered the other considerations Herridge maintained were relevant and found that they "would not change the outcome here in any event." 22a. The district court was

unmoved by Herridge's argument that it was unlikely that Chen could "obtain damages." *Id.* Next, the district court compared the interests underpinning Chen's Privacy Act suit and Herridge's interest in newsgathering, and concluded that Chen's interest prevailed because the "Privacy Act protects not just Chen but all private citizens, whether blameworthy or blameless, from the risk that government officials might be tempted to abuse their access to sensitive information by leaking materials intended to embarrass particular individuals." 24a.

The district court also declined Herridge's invitation to recognize a common-law newsgathering privilege that would circumvent established First Amendment precedents delineating the contours of the reporter's privilege and undermine "the fundamental purpose of the Privacy Act." 26a. Thus, the district court authorized Chen to "depose Herridge regarding the identity and intent of the source or sources of the documents and images allegedly provided to her in violation of the Privacy Act." 28a.

D. The district court's decision holding Herridge in contempt.

At her deposition, Herridge refused to disclose her source(s), and Chen moved to hold Herridge in contempt for defying the district court's order. 36a-37a.

After reiterating that both the "centrality and exhaustion" factors outlined in *Zerilli* "weigh[ed] heavily in Chen's favor," 33a, the district court concluded that Herridge was in contempt of its disclosure order. 38a-39a. And even though the district court "could have stopped there," 33a, it left no doubt that Herridge would be required to reveal her source(s) even under "a free-wheeling balancing of interests."

40a.

First, although Herridge again asserted that Chen would be "unable to recover any damages," Herridge failed to refute the court's conclusions that the "compromising photographs of Chen" that Herridge used "could support a Privacy Act claim." 41a. Second, the district court found that "any national-security concerns over requiring Herridge to reveal her source ring hollow" because it was "hard to fathom how disclosing Herridge's source would place America in jeopardy." 42a. The district court rebuked Herridge for attempting to diminish Chen's interests by claiming that Chen "was making U.S. servicemembers' information available to a foreign power"; "[t]he Court's job is to apply the law evenhandedly, not to adjudicate who is worthy of the law's protection." *Id.* Third, the district court found that Herridge's warnings of a chilling effect on reporting were accommodated by the *Zerilli* balancing test and noted the complete absence of any evidence that "floodgates to journalists' notepads have opened or the wellspring of confidential sources has dried up" in the wake of *Lee*. 44a.

The only remaining question was the "appropriate sanction for Herridge's contempt." 48a. After surveying civil contempt penalties imposed in "similar contexts," the district court "adopt[ed] the low-end of this range" "and impose[d] a fine of $800 per day" until Herridge complied. 49a. It "stay[ed] that contempt sanction, however, to afford Herridge an opportunity to appeal th[e] decision." 49a.

II. Proceedings in the D.C. Circuit.

A. The D.C. Circuit's affirmance of the district court's decision.

On appeal, Herridge "reassert[ed]" the qualified reporter's privilege. 54a. A three-judge panel of the D.C. Circuit unanimously affirmed the district court's decision.

The panel initially noted that "Herridge does not contest the district court's determination that *Lee*'s centrality and exhaustion requirements for overcoming the privilege were satisfied." 60a. The two arguments Herridge advanced on appeal—that Chen's Privacy Act claim "is frivolous or meritless" and that *Lee* "conflicts with prior circuit precedent"—were both rejected. *Id.*

Writing for the panel, Judge Katsas first made it clear that the D.C. Circuit's "governing framework" was "flexible enough to accommodate" "an inquiry" into the frivolousness of Chen's Privacy Act claim as part of assessing centrality, as "if a claim would fail regardless of what the requested discovery might reveal, there is no good reason for deeming the discovery to be centrally important." 60a. But it found that Chen's Privacy Act claim was not frivolous. Like the district court, the panel noted that Chen sought damages stemming directly from Herridge's reporting and "even if Herridge collected 'almost all' of her information from material that was already in the public domain, Chen plausibly alleges that some of it had to come from Privacy Act violations—such as the disclosure of photographs seized from Chen's home during the FBI search." 61a. That was critical because "so long as Chen establishes that *some* Privacy Act violation harmed her, she may recover actual or statutory damages if it was willful." *Id.* (emphasis in original).

Next, the panel found that *Zerilli* did not endorse the freewheeling balancing

test that Herridge advocated for, but instead established "more precise guidelines" "to determine how the balance should be struck in a particular case." 63a. The straightforward application of that test "suffice[d] to foreclose Herridge's privilege claim here" and also disposed of Herridge's argument that "Chen's claim is simply *not that important*." 61a-62a (emphasis in original).

The panel also declined Herridge's invitation to "end-run" its precedent by creating a federal common-law privilege broader than the extant First Amendment reporter's privilege. 63a. Specifically, the panel held that "Herridge has provided little cause to think that 'reason and experience' support the privilege that she propounds." 63a (quoting *Jaffee*, 518 U.S. at 8). "As to reason, the First Amendment analysis in cases like *Zerilli* and *Lee* thoroughly lays out the competing considerations of encouraging newsgathering while also respecting the elemental principle that 'the public has a right to every man's evidence.'" *Id.* (quoting *Trump v. Vance*, 591 U.S. 786, 791 (2020)). "As to experience," the panel found that states' treatment of the reporter's privilege varied "widely" "both in the abstract and on the question whether case-by-case interest balancing is appropriate." 63a. "In short," the panel concluded that "if the First Amendment itself does not entitle Herridge to disobey discovery obligations imposed on every other citizen in the circumstances of this case, we see little reason to create that entitlement as a matter of judge-made common law." 63a-64a.

B. The D.C. Circuit's denial of Herridge's petitions for panel rehearing and rehearing *en banc*, and application to stay its mandate.

Herridge filed petitions for panel rehearing and rehearing *en banc* where, for the first time, she argued that the D.C. Circuit's precedents addressing the qualified reporter's privilege under the First Amendment engendered a circuit split. *See Chen v. FBI*, No. 24-5050, Doc. No. 2146468, at 12-15 (D.C. Cir. Nov. 20, 2025). Herridge's petitions were both denied. *See id.*, Docs. No. 2174726 and 2174732 (D.C. Cir. May 22, 2026). The D.C. Circuit noted in its denial of Herridge's petition for rehearing *en banc* that none of its members called for a vote. *Id.* Herridge then filed a motion to stay the D.C. Circuit's mandate that echoed all of the arguments she makes in the instant stay application. That motion was filed on June 12, 2026. *See* 67a. A week-and-a-half later, the D.C. Circuit summarily denied Herridge's motion. *See id.*

LEGAL STANDARD

"Denial of [] in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)). A party seeking a stay must: (1) demonstrate a "reasonable probability" that this Court will grant certiorari; (2) make a "strong showing" that it is likely to succeed on the merits; and (3) show that irreparable harm would ensue absent a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see Cook*, 2026 WL 1855613, at *7.

When, as here, a court of appeals has already denied a request for a stay, the hill a stay applicant must surmount is even steeper. *See Edwards*, 512 U.S. at 1302 (Scalia, J., in chambers) ("[W]hen a district court judgment is reviewable by a court

of appeals that has denied a motion to stay, the applicant seeking an overriding stay from this Court bears 'an especially heavy burden.'" (quoting *Packwood,* 510 U.S. at 1320 (Rehnquist, C.J., in chambers))); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers) ("[The] burden is particularly heavy when, as here, a stay has been denied … by a unanimous panel of the Court of Appeals.").

Finally, in "close cases," this Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190.

ARGUMENT

This is not a close case. Herridge has not shown that she is likely to succeed on either her First Amendment reporter's privilege claim or her claim that the panel erred by declining to recognize a common-law reporter's privilege. Nor has she shown that she would suffer irreparable harm in the absence of a stay.

I. This Case is an Exceedingly Poor Vehicle for Supreme Court Review Because the District Court Considered Herridge's Proposed Test.

Herridge's application fails because she cannot demonstrate a "reasonable probability" that four Justices of the Court will consider the issue "sufficiently meritorious" to grant certiorari, *Hollingsworth*, 558 U.S. at 190, or that there is a "significant possibility" that five Justices will vote to reverse the district court's judgment, *Packwood*, 510 U.S. at 1319, given how unlikely it is that she will ultimately succeed on the merits of her qualified privilege claim. On this score, Herridge hides the ball from the Court. She claims that her forthcoming certiorari petition will posit that in place of the supposedly "mechanical two-factor test" that

the D.C. Circuit utilizes to evaluate claims of qualified reporter's privilege, this Court should instead announce a rule that permits a "broader analysis" that "weighs the plaintiff's interest in disclosure of a source" against society's interest in "the free flow of information to the press." Appl. 15. And she suggests that she could have prevailed below under that approach, because that broader, free-form balancing of interests would have allowed the district court to also consider: (1) the merits of Chen's Privacy Act claim, including whether Chen is likely to only obtain minimal damages; (2) the impact of disclosure on newsgathering; and (3) supposed national security concerns arising from disclosure. *Id*. at 26-28.

But Herridge's argument suffers from an incurable defect: her repeated assertions that "the courts below refused to consider" these arguments, Appl. 17, are simply false. The district court's thorough disclosure and contempt orders gave substantive attention to all of these arguments "for [the] sake of completeness" and found that considering them as part of a freewheeling balancing approach "***would not change the outcome in any event***." 22a, 33a-34a, 40a. In other words, put simply: Herridge is going to lose on the ultimate issue of whether she needs to disclose her source(s), regardless of whether this Court dictates that the free-form balancing test that she is asking for applies to First Amendment reporter's privilege claims. That reality makes her forthcoming certiorari petition entirely academic, and it makes this case an extraordinarily "poor vehicle" for the Court to use to issue a constitutional ruling that will not even impact the ultimate result of the case. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 470 n.6 (2013).

In its first pass on the question, the district court's disclosure order denied Herridge's motion to quash, holding that Chen had overcome the qualified reporter's privilege because she had demonstrated that her Privacy Act claim was not frivolous, that the identity of Herridge's source(s) was central to her claim, and that she had exhausted reasonable alternative avenues of uncovering the leaker's identity. 5a-22a. But the district court did not stop there. "[F]or the sake of completeness," it also considered the arguments Herridge urged as part of a broader, unbounded balancing test; namely, Herridge's claim that Chen was unlikely to recover substantial damages, and Herridge's argument that Chen's interest in pursuing her claim should be discounted because she was investigated—but never charged, let alone convicted—for alleged false statements on immigration and naturalization forms. 22a-24a. Ultimately, the district court concluded that these considerations "likely would not change the outcome here in any event," 22a, because Herridge was simply incorrect that Chen's damages would be nonexistent, *see* 22a-23a, and because Herridge failed to recognize that "[t]he Privacy Act protects not just Chen but all private citizens, whether blameworthy or blameless, from the risk that government officials might be tempted to abuse their access to sensitive information by leaking materials intended to embarrass particular individuals." 24a.

Herridge tried again when opposing Chen's motion for contempt after Herridge defied the district court and refused to identify the leaker. In its contempt order, the district court reiterated that Chen had satisfied the D.C. Circuit's test for overcoming the qualified privilege, and noted that while "[t]he Court could have stopped there,"

"for [the] sake of completeness and in recognition of the important First Amendment rights at stake, it proceeded to explain why a full-bore analysis of Chen's likelihood of success on the merits of her claim or a free-form balancing of the public and private interests was unlikely to tilt the scales back in Herridge's direction." 33a-34a. The additional arguments that Herridge asked the district court to consider as part of an unmoored balancing included her contentions that the district court should have engaged in a summary-judgment-like analysis of the merits of Chen's Privacy Act claim, that national security reporting should receive special solicitude, and that requiring disclosure of Herridge's source(s) would have a "chilling effect" on reporters. 40a.

The district court methodically shot down these arguments. It concluded that Herridge did not demonstrate any infirmities in the merits of Chen's claim, because Herridge cast doubt on only one category of damages that Chen seeks and did not dispute that the Fox News broadcasts authored by Herridge contained Privacy Act-protected materials giving her reporting "more traction than it otherwise would have had." 41a-42a. As the D.C. Circuit noted below, Chen thus remained able to recover the "statutory floor of $1,000" so long as she "establishe[d] that *some* Privacy Act violation harmed her[.]" 55a, 61a (emphasis in original).

The district court separately determined that Herridge's purported national security concerns "ring hollow" because "it is much more plausible that ferreting out the government agent who may have leaked the records would benefit, not harm, national security by exposing someone inclined to mishandle sensitive records," and

because in any event, "the government is a party to this action and could easily intervene to protect those interests." 42a. The district court also again rejected the same blame-the-victim aspersions Herridge casts on Chen before this Court, concluding that an argument the plaintiff "had it coming" is not a viable defense under the Privacy Act, which "protects 'all private citizens, whether blameworthy or blameless, from the risk that government officials might be tempted to abuse their access to sensitive information by leaking materials intended to embarrass particular individuals.'" 42a-43a (quoting 24a). And finally, the district court found that Herridge's theoretical "chilling effect" concerns were inconsistent with reality: "[a]lmost two decades have passed since *Lee* reaffirmed *Zerilli* and required the reporter there to divulge his source, yet there is limited evidence that the floodgates to journalists' notepads have opened or the wellspring of confidential sources has dried up during that period." 43a-44a. "[C]ases requiring reporters to divulge confidential sources have remained few and far between." 45a. Ultimately, the district court again emphasized, even more emphatically, that "a free-wheeling balancing of interests would not change the outcome in any event." 40a.

Very conspicuously, Herridge does not remotely acknowledge the district court's twice-over conclusion that even if it applied the test that Herridge urges this Court to adopt, Herridge would still lose and be required to reveal her source(s). *See* Appl. 12-13. The reason for this transparent obfuscation is obvious: the district court's findings mean that even if the Court were to grant a stay, ultimately grant her petition for a writ of certiorari, and issue an opinion concluding that the district court

was required to consider all of the factors Herridge raises in her application, Herridge would still lose on the merits of her qualified privilege claim.

As a court of last resort, it is typical for this Court, when promulgating new legal tests or standards, to remand the action to the district court to actually apply them to the facts of the case. *See, e.g.*, *Golan v. Saada*, 596 U.S. 666, 683 (2022) (finding that the district court did not apply "the correct legal standard" and holding "it is appropriate to follow the ordinary course and allow the District Court to apply the proper legal standard in the first instance here"); *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193 (2017) ("The District Court is best positioned to determine in the first instance the extent to which, under the proper standard, race directed the shape of these 11 districts.").

Given that the district court has already applied the standard Herridge urges this Court to adopt and concluded that even under that standard, Herridge must disclose the identity of her source(s), Herridge faces an intractable hurdle in demonstrating that the Court should grant the extraordinary relief of a stay—both because this Court has held that if a court concludes that there is not a "likelihood that the claim will succeed on the merits," it "must deny interim relief," *Mullin v. Doe*, 609 U.S.--, 2026 WL 1825840, at *11 (June 25, 2026), and because of the low likelihood that four Justices will vote to grant certiorari in a case where the Court is being asked to render a decision on a legal issue—a constitutional issue, no less—that would have no impact on the ultimate outcome of the dispute. *See, e.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936) (Brandeis, J., concurring)

(noting that "[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case (quoting *Burton v. U.S.*, 196 U.S. 283, 295 (1905))).

II. Herridge Has Not Otherwise Shown This Court Is Likely to Grant Certiorari on Parameters Governing Assertions of the First Amendment Reporter's Privilege or That She Will Ultimately Prevail in Asserting Such a Privilege.

A. Herridge's claimed circuit split is a fabrication.

Herridge contends that by hewing to *Lee* and *Zerilli*, the panel deepened a circuit split by refusing to engage in a broader multi-factor balancing test. Appl. 15-16. Herridge is wrong. The panel's approach is consonant with how the First, Fourth, Ninth, and Tenth Circuits have balanced the interests germane to the qualified reporter's privilege under the First Amendment. Herridge herself recognized as much below; she made no mention of a circuit split in her initial presentation to the D.C. Circuit, with good reason. *See Chen v. FBI*, No. 24-5050, Doc. No. 2061709, at 29-31 (D.C. Cir. June 26, 2024). And this Court's denial of the certiorari petition filed in *Lee* buttresses the lack of any circuit split. *See Thomas v. Lee*, petition for a writ of certiorari, 2006 WL 535406, at *15-*19 (Mar. 2, 2006), *cert. denied*, *Thomas*, 547 U.S. at 1187.

Herridge principally argues that the D.C. Circuit's decision conflicts with *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980). *See* Appl. 16-18. In that case, the First Circuit delineated three factors in its "balancing approach": (1) "relevance in an important sense to plaintiff's claim"; (2) "availability of the information from other sources"; and (3) "non-frivolousness of the cause of

action." *Bruno & Stillman, Inc.*, 633 F.2d at 598. In other words, the factors in the First Circuit's balancing test are centrality, exhaustion, and non-frivolousness—*the same* considerations that the D.C. Circuit relied on here.[1] *See* 60a. The cherry-picked snippets of *Bruno & Stillman* that Herridge relies on do not undercut this conclusion. Although the First Circuit noted that "courts must balance the potential harm to the free flow of information that might result against the asserted need for the requested information," 633 F.2d at 596, Appl. 16, it immediately went on to specify precisely how courts strike that balance: by evaluating the discrete three factors that the D.C. Circuit also relied on as informing the "findings of fact" that district courts must make to resolve reporter's privilege claims. 633 F.2d at 598.

Herridge argues that *Bruno & Stillman* endorsed a more stringent testing of the merits of plaintiffs' claims, akin to evaluating whether the claims will survive "partial summary judgment." Appl. 17. But the First Circuit's statement that the "plaintiff should show that it can establish jury issues on the essential elements of its case," *id.*, is preceded by a sentence conspicuously omitted from Herridge's motion: "As a threshold matter, the court should be satisfied that a claim is not frivolous, a pretense for using discovery powers in a fishing expedition." 633 F.2d at 597. In other words, the First Circuit's reference to "jury issues" is simply part of the same non-frivolousness inquiry that the D.C. Circuit applied in this case. *See* 60a-61a. And although the First Circuit noted that a finding of non-frivolousness "does not

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[1] That the panel considered frivolousness as part of centrality rather than as a standalone factor makes no meaningful difference in the analysis.

terminate the sensitive balancing process," 633 F.2d at 599 n.17, Appl. 17, that observation is unremarkable, given the need for courts to also consider centrality and exhaustion. In short, *Bruno & Stillman* does not support the unbounded balancing test that Herridge advocates for. Nor does it demonstrate any "split" because the First Circuit applied the same test that the D.C. Circuit has utilized for decades in evaluating qualified reporter's privilege claims under the First Amendment. The First Circuit's statement that "there may be cases where revelation of sources will threaten physical or other harm that will be quite disproportionate to *a plaintiff's litigation needs,"* 633 F.2d at 595, Appl. 17 (emphasis added), is hardly helpful to Herridge; that statement explicitly contemplates assessing the centrality factor that the D.C. Circuit applied below. *See* 60a.

Herridge is on no firmer ground in claiming that the "Fourth Circuit also applies a full-fledged balancing test" that deviates from what the D.C. Circuit did here. Appl. 18. The Fourth Circuit has instead adopted a substantially similar three-part test: "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000). The "compelling interest" inquiry in *Ashcraft* was drawn from the Fifth Circuit's decision in *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *opinion supplemented on denial of reh'g*, 682 F.2d 932 (5th Cir. 1980). *See Ashcraft*, 218 F.3d at 287. And *Miller*'s distillation of what constitutes a "compelling interest" dovetails with how the D.C. Circuit has defined centrality. *See Miller*, 621 F.2d at 726-27 ("The

only way that Miller can establish malice and prove his case is to show that Transamerican knew the story was false or that it was reckless to rely on the informant. In order to do that, he must know the informant's identity."). In short, nothing in *Ashcraft* suggests that the qualified reporter's privilege turns on additional, unnamed factors.

And there is not even a semblance of a conflict stemming from any of the other decisions that Herridge cites. *See* Appl. 18; *Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir. 1993) (citing *Zerilli*, 656 F.2d at 713); *id.* n.14 ("[B]ecause we hold that plaintiffs have not satisfied the exhaustion requirement, we express no opinion on whether plaintiffs have made a sufficient showing on the other questions considered in the balance—i.e., whether the information sought is relevant … and whether it is crucial to the maintenance of plaintiffs' legal claims."); *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) ("[T]he factors that the trial court must consider are (1) the relevance of the evidence; (2) the necessity of receiving the information sought; (3) whether the information is available from other sources; and (4) the nature of the information.").[2]

In a last-ditch attempt to resuscitate her circuit-split argument, Herridge points this Court to the Seventh Circuit's decision in *McKevitt v. Pallasch*, 339 F.3d 530, 532-33 (7th Cir. 2003). *See* Appl. 19. But even a cursory inspection of *McKevitt* reveals it is inapposite. In that case, the information at issue did not "come from a

[2] District courts in the Tenth Circuit have interpreted this factor as requiring an assessment of whether "the information at issue is critical to the case," *i.e.*, centrality. *Farmland Partners Inc. v. Fortunae*, No. 18-cv-02351-KLM, 2020 WL 12575073, at *7 (D. Colo. May 18, 2020).

confidential source" and the source was actually pushing for disclosure; it was the journalists who "paradoxically" wanted to keep the information secret because of "intellectual property" concerns. *McKevitt*, 339 F.3d at 533-34. "Disputes over intellectual property," the Seventh Circuit sensibly concluded, "are not profitably concluded in the idiom of the First Amendment." *Id.* Unless Herridge is planning to transmute her claim into an intellectual property claim, *McKevitt* has no relevance one way or another to this case, as neither party disputes that the First Amendment applies to this case, and the pertinent question is what protections reporters have under it.

State supreme courts' approaches are in accord with what the D.C. Circuit did below. Herridge claims otherwise (at 18-19), but one of the cases she cites expressly relies on *Zerilli*—discrediting her attempts to manufacture a split in authority. *In re Grand Jury Proceedings (Ridenhour)*, 520 So. 2d 372, 375-76 n.12 (La. 1988) (citing *Zerilli* and noting that "[c]onsideration should be given to insure that the party seeking the information is not on a mere fishing expedition").[3] The other case, *In re Letellier*, 578 A.2d 722, 726 (Me. 1990), *see* Appl. 18-19, was a criminal, not a civil, case, and recognized, based in part on *Zerilli*, that "the balancing of interests" "in criminal actions" is "different." 578 A.2d at 725 n.7. Indeed, district courts in the District of Maine have recognized the limited utility of *Letellier* for that very reason,

[3] Other state courts, including the Supreme Courts of Wisconsin and Florida, agree. *See State v. Davis*, 720 So. 2d 220, 227 (Fla. 1998) ("[T]he court must determine whether the movant has established that: (1) the reporter possesses relevant information; (2) the same information is not available from alternative sources; and (3) the movant has a compelling need for any information the reporter may have."); *State ex rel. Green Bay Newspaper Co. v. Cir. Ct., Branch 1, Brown Cnty.*, 335 N.W.2d 367, 373 (Wis. 1983) (similar); *Clampitt v. Thurston Cnty.*, 658 P.2d 641, 644 (Wash. 1983) (citing *Zerilli*, 656 F.2d at 714).

see, e.g., *Levesque v. Doocy*, 247 F.R.D. 55, 56-57 (D. Me. 2007), and have instead recognized that *Bruno & Stillman* is more on point. And as demonstrated above, there is no difference between the First Circuit's approach in *Bruno & Stillman* and what the D.C. Circuit did here.

It bears repeating that Herridge, in her opening D.C. Circuit brief, did not argue that *Zerilli* and *Lee* had engendered a circuit split. Quite the opposite. Herridge argued that under both *Zerilli* and the "approach" utilized by other circuits, including the First Circuit, the D.C. Circuit was required to assess the strength of Chen's claim. *See Chen v. FBI*, No. 24-5050, Doc. No. 2061709, at 29-30 (D.C. Cir. June 26, 2024). Only after the panel did just that and concluded, unequivocally, that Chen's claim was not frivolous, *see* 61a, did Herridge then pivot to claiming that the panel exacerbated a circuit split. That opportunistic shift only underscores the absence of any circuit conflict here. Herridge is simply mistaken in claiming that "protections afforded by the First Amendment" "vary" "based upon the geographic circuit in which" reporters find themselves, Appl. 20. The circuits have congruently evaluated centrality, exhaustion, and non-frivolousness, providing pellucid guidance to reporters across the country.

B. Herridge fails to show this Court is likely reverse the D.C. Circuit's conclusion that the qualified privilege must yield here.

Faced with the inescapable conclusion that there is no circuit split on how to evaluate qualified reporter's privilege claims under the First Amendment—which means it is highly unlikely that this Court would even grant certiorari on this issue—Herridge makes a hodgepodge of arguments assailing the decision below to bolster

her claim that there is a fair prospect that this Court would reverse. *See* Appl. 23-30. These misguided contentions failed below, and Herridge has done nothing to cure the deficiencies painstakingly outlined by both the district court and the D.C. Circuit.

As an initial matter, Herridge's myopic focus on the "significant societal costs" when reporters are forced to divulge their sources, Appl. 23, is indistinguishable from a proposition that this Court has already repudiated: that reporters occupy a unique, "privileged position" because if reporters are forced to identify sources, said sources will "be reluctant to furnish newsworthy information in the future." *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972). "[T]his is not the lesson history teaches us": "the common law recognized" no privilege for reporters not to testify in grand jury proceedings yet the "existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press." *Id.* at 699; *see id.* at 693 ("[T]he evidence fails to demonstrate that there would be a significant construction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen."). After all, under Herridge's view, those same costs would inure in criminal proceedings, and this Court specifically recognized the possibility "that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation." *Id.* at 693. But that did not stop it from concluding, like the D.C. Circuit below, that interests in newsgathering are not an end-all, be-all.

Herridge also makes no effort to explain how the test she wants this Court to adopt would work in practice. As the district court found, courts are ill-suited to judge

"the newsworthiness of" a reporter's story, and having courts balance "private interest[s]" "against the public interest in newsgathering, measured by the leaked information's value" "would be inherently unworkable." 11a-12a (internal quotations omitted); *Chatrie v. United States*, No. 25-112, 2026 WL 1844468, at *16 (June 29, 2026) ("[T]he Government's approach to Fourth Amendment protection would raise a host of workability issues.").

Herridge next claims that reversal is warranted because this Court should craft a test that appropriately balances a litigant's need for information against any potential harm that might befall reporters. *See* Appl. 25-26. But that is exactly what the D.C. Circuit did in *Zerilli*, in a manner exceedingly favorable to reporters. *See* *Zerilli*, 656 F.2d at 712 ("[I]n the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished."). As the district court astutely observed, in "recognizing that the reporter's privilege is not ironclad, the Circuit crafted a balancing test to determine when confidentiality must give way to competing interests—the central one being the interest of a litigant who needs the information to vindicate her rights and has exhausted every reasonable alternative source." 44a. Herridge, as she did below, bemoans this test as insufficiently protective in Privacy Act cases because it is "a mere exhaustion requirement" that will always be overcome. Appl. 23. *Zerilli* itself shows why she is incorrect; even though the D.C. Circuit in that case found that the suit was "not frivolous" and that the information sought was "crucial," it concluded that the

appellants did not fulfill the exhaustion requirement and ruled in the reporter's favor. 656 F.2d at 714. "Vigilant application of the centrality and exhaustion factors" "ensure that compelled disclosure," and any attendant harms "will be the exception, not the rule." 13a. Chen's case is that exception, because issuing "67 requests for production of documents, 67 interrogatories, and 57 requests for admission," while also taking "eighteen depositions," issuing "thirteen third-party subpoenas," and obtaining "22 declarations" was "no easy task." 13a, 16a.

Herridge also asserts that Chen's claim is meritless, and thus unimportant, because she "cannot show any damages from the release of any Privacy Act information." Appl. 29; *id.* at 26, 28-30. As the lower courts concluded below, this argument suffers from myriad flaws.

First, as the district court noted, Herridge's myopic focus on whether Chen can obtain damages related to DOD's cancelation of UMT's participation in the tuition assistance program, Appl. at 30, ignores that Chen seeks multiple other types of damages. 22a-23a. Herridge also elides the distinction between two different inquiries: whether a claim will be successful and the amount of damages available. Whether a litigant is a "prevailing party" "does not turn on the magnitude of the relief obtained"; "a plaintiff who wins nominal damages" can be a "prevailing party." *Farrar v. Hobby*, 506 U.S. 103, 113 (1992). But even assuming (incorrectly) that Herridge were right that Chen may only recover "$1,000 in statutory damages," Appl. 26, that would not render Chen's claim insignificant or unworthy. Many lawsuits effectuate important, non-monetary objectives, and this is one such lawsuit. *See* 24a

("The Privacy Act protects not just Chen but all private citizens, whether blameworthy or blameless, from the risk that government officials might be tempted to abuse their access to sensitive information by leaking materials intended to embarrass particular individuals."); *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring) ("Nominal relief does not necessarily a nominal victory make."). Indeed, the fact that Congress included statutory damages and attorneys' fees provisions in the Privacy Act reflects an intent to encourage litigants to pursue vindication for violations, regardless of the extent of actual damages. *See Aleyska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260-63 (1975).

Second, assuming *arguendo* that it is appropriate to handicap the worthiness of Chen's claim based on the modicum of damages she may recover, Herridge has still failed to show that Chen's claim is even close to frivolous. Herridge recycles her argument that the "vast majority of the information in Ms. Herridge's stories came from sources other than any alleged leak from government files." Appl. 29. Implicit in that statement is the concession that some of the materials were protected by the Privacy Act, and, as both the lower courts found, Chen can recover damages based on the disclosure of that nonpublic information. *See* 23a; 61a ("[E]ven if Herridge collected 'almost all' of her information from material that was already in the public domain, Chen plausibly alleges that some of it had to have come from Privacy Act violations…."). Herridge tellingly proffers no answer to the question posed by the district court: if the nonpublic materials that Herridge relied on were insignificant, then why did she use them? *See* 41a.

Third, Herridge intimates that Chen "is using this action to recover taxpayer money to compensate her for espionage activity on behalf of a foreign power," calling Chen a "fraudster" who is exploiting the Privacy Act. Appl. 28-29 n.10. This offensive, blame-the-victim argument gained no traction below, *see Chen v. FBI*, No. 24-5050, Doc. No. 2061709, at 41 (D.C. Cir. June 26, 2024), and it should not be countenanced now. Chen is not a criminal; she is an American citizen who was never charged with, let alone convicted of, any crime. *Chen*, 435 F. Supp. 3d at 191. Herridge's supposition that the government may be able to establish that Chen's suit "perverts the objectives of the Privacy Act," Appl. 28-29, is thus nothing more than rank, repugnant speculation, and an open invitation for judges to make subjective value judgments about which litigants are worthy of the protections of the Privacy Act—one the district court vociferously declined: "The Court strongly disagrees. The Court's job is to apply the law evenhandedly, not to adjudicate who is worthy of the law's protection." 42a (internal quotations omitted). Herridge's arguments make a mockery of one of the core tenets of the rule of law: that it applies equally to everyone.

Finally, Herridge attaches talismanic significance to the fact that her reporting concerned matters of national security. Appl. 26-28. She fails to explain why this consideration outweighs the centrality and exhaustion findings that the district court made and how this claim is anything more than an unsupported absolute reporter's privilege—at least in the national security context. In any event, the district court's unrefuted findings that her claimed concerns "ring hollow" in this context are dispositive on this point. 42a.

III. This Court is Unlikely to Adopt a Common-Law Reporter's Privilege.

A. Lower courts have consistently refused to recognize a common-law reporter's privilege different from the First Amendment test.

Herridge strains to create a circuit split on the second issue she raises: the recognition of a common-law privilege under Federal Rule of Evidence 501 that is broader than the already-recognized First Amendment reporter's privilege. But, once again, no such split exists.

Like the D.C. Circuit below, *see* 63a-64a, court after court has faithfully heeded this Court's recognition that "[a]t common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information" *Branzburg*, 408 U.S. at 685, and have steadfastly refused to divine a common-law reporter's privilege. *See* Appl. 21; *United States v. Sterling*, 724 F.3d 482, 501 (4th Cir. 2013) ("Rule 501 and the Supreme Court's use of it to recognize a psychotherapist-patient privilege in *Jaffee* does not authorize us to ignore *Branzburg* or support our recognition of a common-law reporter-source privilege today …."); *Price v. Time, Inc.*, 416 F.3d 1327, 1342 (11th Cir. 2005) ("[T]he common law is that there is no confidential source privilege[.]"); *In re Grand Jury Procs.*, 5 F.3d 397, 403 n.3 (9th Cir. 1993) ("We discern nothing in the text of Rule 501, however, that sanctions the creation of privileges by federal courts in contradiction of the Supreme Court's mandate."). Herridge identifies a single decision that she claims has reached a contrary conclusion: the Third Circuit's decision in *Riley*. Appl. 21-23. But her reliance on *Riley* is misplaced.

Most fundamentally, the decision in *Riley* did not sanction a common-law

privilege that is any different from the one recognized under the First Amendment. Just the opposite. *See* 612 F.2d at 714 ("Where a witness claims a privilege founded on the First Amendment of the Constitution, our reason and experience directs us in the first instance to that Amendment."). The Third Circuit's analysis of the First Amendment led it to conclude that litigants seeking information covered by the reporter's privilege must show "materiality, relevance, and necessity of the information sought," while requiring "a strong showing by those seeking to elicit the information that there is no other source for the information requested." *Id.* at 716. And while the Third Circuit also referenced "common law," and attached significant importance to Pennsylvania's reporter's shield law—giving weight to the "interests behind the Pennsylvania statute" and "Pennsylvania's public policy giving newspaper reporters protection from divulging their sources," 612 F.2d at 715—the test the Third Circuit settled on is identical to the one the D.C. Circuit applied below. This reinforces the overarching reason why Herridge cannot prevail in this Court: whether her assertion of the reporter's privilege is rooted in the First Amendment or federal common law, the same test applies, and under that test, applied by numerous district and circuit courts, she clearly loses. *See* Appl. 34 (asking this Court to recognize "some reporter's privilege under one source of law or the other").

Incredibly, Herridge proclaims that a "court applying *Riley* would likely find that the privilege had not been overcome and would not have compelled Herridge to testify." Appl. 23. The only possible way to reach that conclusion is to ignore *Riley*'s unqualified holding applying the same centrality and exhaustion test the courts

below applied here. If there were any doubt on that point, *Zerilli* extinguishes it, as the D.C. Circuit expressly relied on *Riley* in fashioning the very test that Herridge has decried as insufficient. *See Zerilli*, 656 F.2d at 712 ("Every other circuit that has considered the question has also ruled that a privilege should be readily available in civil cases, and that a balancing approach should be applied." (citing *Riley*, 612 F.2d at 715-16)). The D.C. Circuit's favorable citation of *Riley* cements the conclusion that there is no dissonance between the Third Circuit's decision in *Riley* and the decision below.[4]

B. The D.C. Circuit correctly declined to recognize a common-law reporter's privilege broader than the First Amendment privilege.

Herridge's common-law privilege argument suffers from a separate, but equally dispositive infirmity: the D.C. Circuit's rationale for rejecting her invitation to recognize a federal common-law privilege is sound and fully in accord with this Court's precedent, evinced, in part, by this Court's rejections of multiple entreaties to recognize a federal common-law reporter's privilege. *See Risen v. United States*, petition for a writ of certiorari, 2014 WL 690255, at *21-*30 (Jan. 13, 2014), *cert denied*, *Risen*, 572 U.S. at 1149; *Thomas*, 2006 WL 535406, at *19-*22, *cert denied*, *Thomas*, 547 U.S. at 1187. Herridge makes no effort to address that reasoning, which is fatal to her assertion that there is a "fair prospect that" this Court would reverse the D.C. Circuit's decision on this ground. Appl. 31.

[4] The same is true of the Second Circuit's decision in *Gonzales v. NBC, Inc.*, 194 F.3d 29, 35 n.6 (2d Cir. 1999). *See* Appl. 21 n.9; *Gonzales*, 194 F.3d at 36 ("We need only determine whether the parties to the Louisiana Action have established that the outtakes are of likely relevance to a significant issue in the case, and contain information not reasonably obtainable from other available sources. We answer both questions affirmatively.").

Whether to recognize a common-law privilege under Federal Rule of Evidence 501 is anchored to *Jaffee*'s twin guideposts: reason and experience. 518 U.S. at 8. As to "reason," the D.C. Circuit found that the existing "First Amendment analysis in cases like *Zerilli* and *Lee* thoroughly lays out the competing considerations of encouraging newsgathering," on the one hand and "respecting the elemental principle" of the public's right to evidence, on the other hand, making it unnecessary to create a common-law privilege that did the exact same thing. 63a. "As to experience," the D.C. Circuit found that states' treatment of the reporter's privilege "varies widely in its scope" "both in the abstract and on the question" of "whether case-by-case interest balancing is appropriate," and that divergence weighed against the creation of a federal common-law reporter's privilege. *Id.* Other courts have reached the exact same conclusion. *See Sterling*, 724 F.3d at 502 ("Even if we were at liberty to reconsider the existence of a common-law reporter's privilege under Rule 501, we would decline to do so."); *id.* at 504 ("[T]here is still no uniform judgment of the States on the issue of a reporter's privilege or shield." (internal quotations omitted)).

Herridge argues that the interests implicated by a common-law reporter's privilege are "equal or greater in importance to the interests involved in the psychotherapist-patient privilege this Court recognized in *Jaffee*." Appl. 32. That statement, even if true, fails to explain why this Court should create a common-law reporter's privilege different from the First Amendment privilege that already exists or "ignore *Branzburg*." *Sterling*, 724 F.3d at 501; *see McKevitt*, 339 F.3d at 532 ("[I]t

is likewise obvious that the newsgathering and reporting activities of the press are inhibited when a reporter cannot assure a confidential source of confidentiality. Yet that was *Branzburg* and it is evident from the result in that case that the interest of the press in maintaining the confidentiality of sources is not absolute.”). Furthermore, Herridge overlooks crucial differences between the psychotherapist-patient privilege, on the one hand, and the reporter’s privilege, on the other. “[U]nlike in the case of the spousal, attorney-client, and psychotherapist-patient privileges that have been recognized, the reporter-source privilege does not share the same relational privacy interests or ultimate goal,” and has “little in common with the privileges historically recognized in the common law and developed under Rule 501.” *Sterling,* 724 F.3d at 502-03.

Nor have states reached a consensus on the reporter’s privilege on par with states’ treatment of the psychotherapist-patient privilege. “[T]he [reporter’s] privilege varies widely” “from state to state,” 63a, underscoring *Branzburg*’s observation that “judicially created privileges in this area ‘would present practical and conceptual difficulties of a high order,’ … that are best dealt with instead by legislatures of the state and federal governments.” *Sterling*, 724 F.3d at 504 (quoting *Branzburg*, 408 U.S. at 704); Appl. 34 (“[J]urisdictions have not coalesced around a single answer to the question whether the reporter’s privilege should be absolute or qualified.”).

Ultimately, if Herridge were correct that a common-law reporter’s privilege must be created because the privilege “advances a public good of the highest order,” Appl. 34-35 (quotations omitted), then *Branzburg* would have come out the other way.

There is thus no basis to conclude that this Court would reverse the D.C. Circuit's conclusion that there is no federal common-law privilege under Federal Rule of Evidence 501. *See Sterling*, 724 F.3d at 501 ("Rule 501 and the Supreme Court's use of it to recognize a psychotherapist-patient privilege in *Jaffee* does not authorize us to ignore *Branzburg* or support our recognition of a common-law reporter-source privilege today.").

IV. Herridge Cannot Demonstrate Irreparable Harm.

Herridge's request for a stay should be denied for failure to satisfy the essential element of irreparable harm. *See Hollingsworth*, 558 U.S. at 190. Herridge's claimed free-speech injury arising from potential enforcement of the district court's contempt order while her certiorari petition is pending does not amount to irreparable harm for the simple reason that she retains the ability to maintain her recalcitrance, refuse to disclose her source(s), and instead pay the civil fines imposed by the district court.

Herridge repeatedly frames the "harm" in question as the supposedly inevitable deprivation of her claimed First Amendment right to withhold the identity of her source(s) when the district court's contempt order takes effect and theoretically obliges her to do so. She argues that "[a]bsent a stay, Ms. Herridge will suffer irreparable harm because the contempt order requires her to disclose her confidential source(s) in violation of her First Amendment rights," and that "[i]f the order below were carried into effect, Ms. Herridge's First Amendment rights would be violated, her promise(s) of confidentiality would be irretrievably breached, the identity of her source(s) would be irrevocably disclosed, and no court could ever make the identity of

the source(s) secret again." Appl. 35. But, as she begrudgingly acknowledges, Herridge has a ready alternative "option" available to her: "defying the Contempt Order and incurring [the] fines" imposed by the district court during the "few months" it will take her to seek review in this Court. *Id*. at 6, 36. That option suffices for this Court to conclude that Herridge has not shown irreparable harm because the harm of having to pay a civil fine is definitionally not irreparable.

While having to pay a monetary fine for a few months is concededly an unsavory option, "litigants have always had to deal with difficult choices of this kind." *United States v. Woodbury*, 263 F.2d 784, 787-88 (9th Cir. 1959). When it comes to establishing "irreparable" harm, "[t]he key word in this consideration is irreparable," as "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)); *see Conkright*, 556 U.S. at 1403 (Ginsburg, J., in chambers) ("With respect to irreparable harm, the applicants urge that, should they prevail in this Court, they may have trouble recouping any funds they disburse to beneficiaries. But they do not establish that recoupment will be impossible[.]"); *A.O. Smith Corp. v. F.T.C.*, 530 F.2d 515, 525 (3d Cir. 1976) ("[T]he requisite is that the feared injury or harm be irreparable—not merely serious or substantial."). This Court and other federal courts of appeals have had countless occasions to consider whether suffering a fine or other monetary loss, standing alone, is sufficient to constitute irreparable harm—and the answer has long been a resounding "no." *See, e.g.*, *Nat'l*

Insts. of Health v. Am. Pub. Health Ass'n, 145 S. Ct. (Mem) 2658, 2659 (2025) (per curiam) (noting that "the loss of money is not typically considered irreparable harm"); *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers) ("Normally, the mere payment of money is not considered irreparable."); *Sampson*, 415 U.S. at 90; *Data Axle, Inc. v. Nolting*, 176 F.4th 1097, 1100 (8th Cir. 2026) ("Economic loss, on its own, is not an irreparable harm so long as the losses can be recovered." (internal quotations omitted)). Indeed, consistent with the dictionary definition of "irreparable," this Court has observed that economic loss or expenditure can constitute irreparable harm only if the funds "cannot be recouped" such that they are "irrevocably expended." *Nat'l Insts. of Health*, 145 S. Ct. at 2659 (quoting *Philip Morris USA*, 561 U.S. at 1304).

The harm of having to pay a civil fine is, categorically, not "irreparable," because Herridge can recoup those funds if she ultimately persuades this Court to reach a different result than the district and circuit courts. *See, e.g., Sampson*, 415 U.S. at 90 ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." (quoting *Va. Petroleum*, 259 F.2d at 925)); *Nolting,* 176 F.4th at 1100 ("Nolting has not shown that the $1,000-per-day fine will be irretrievable should he ultimately prevail in a timely appeal."); *McLean v. Cent. States, S.E. & S.W. Areas Pension Fund*, 762 F.2d 1204, 1210 (4th Cir. 1985) ("[R]eversal of the underlying order ordinarily invalidates any civil contempt sanctions predicated thereon."). Herridge does not meaningfully address this well-

settled principle in her irreparable harm argument. Very conspicuously, she also does not even deign to suggest that the amount of the fine that could potentially be imposed would be ruinous or even that she would be unable to pay it.[5]

Obviously anticipating this argument from Chen—as it was part of Chen's successful argument to the D.C. Circuit that there were not sufficient grounds for staying the mandate—Herridge baldly asserts that the option to incur fines rather than reveal her source(s) is "no answer," and claims that this Court has "expressly rejected the idea that a reporter's 'option' of incurring contempt sanctions can eliminate the irreparable harm that comes from an order requiring disclosure of confidential sources." Appl. 36. But the lone authority Herridge cites in support of this argument, *In re Roche*, 448 U.S. 1312 (1980) (Brennan J., in chambers), is easily distinguishable. In *Roche*, Justice Brennan considered an application to stay a contempt order from the Massachusetts Supreme Judicial Court that imposed "commitment to jail" if the reporter did not comply—which Justice Brennan called a legitimately "unpalatable choice." *Id*. at 1316. No surprise there. This Court has held that bodily restraint by confinement "constitutes a significant deprivation of liberty," *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), and it has been recognized that even one unjustified night in jail amounts to irreparable harm. *See United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988) ("[U]necessary deprivation of liberty clearly

[5] The likely reason Herridge does not claim that a fine would be financially ruinous for her is that her litigation efforts are being funded by the war chest of Fox News, which recently confirmed that it is supporting her. *See* Ariel Zilber, "Ex-Fox News reporter Catherine Herridge still on the hook for $800-a-day fine for not revealing her sources, court rules," THE NEW YORK POST (June 25, 2026), *available at* https://nypost.com/2026/06/25/media/ex-fox-news-reporter-catherine-herridge-still-on-the-hook-for-800-a-day-fine-for-not-revealing-her-sources-court-rules/.

constitutes irreparable harm."). Forced confinement by the government is bona fide irreparable harm because that deprivation of liberty is a "cat out of the bag" type of harm that cannot be unwound. *See* Appl. 35. But far from aiding Herridge's cause, *Roche* just serves to illustrate the dispositive point—that the solely monetary fine at issue here is not irreparable under the plain meaning of that word because Herridge can be made whole in the unlikely event that she ultimately prevails before this Court. *Sampson*, 415 U.S. at 90.

At bottom, while Herridge takes pains to appeal to lofty-sounding constitutional principles, those red-herring allusions are not a substitute for satisfying her obligation to demonstrate irreparable harm if this Court does not stay the D.C. Circuit's mandate during the "few months" it will take her to seek review by a petition for a writ of certiorari. Appl. 6; *Hollingsworth*, 558 U.S. at 190. She admittedly has the option to safeguard her claimed First Amendment protections by paying whatever fines may be imposed by the district court and recouping those expenditures should she ultimately prevail. Since this Court has squarely held that such temporary monetary loss does not constitute irreparable harm, Herridge fails to meet her burden.

Finally, because this is not a "close case," there is no need for the Court to balance the equities and weigh the relative harms to Chen and Herridge. *Hollingsworth*, 558 U.S. at 190. Nevertheless, Herridge utterly fails to grapple with the harm that a stay would inflict on both Chen and the public. Her focus on her claimed right to protect her source(s) glosses over exactly what she is shielding from

Chen, the courts, and the public: the identity of federal official(s) who broke the law, abused their access to sensitive records to harm a private citizen, and laundered that corrupt, unlawful conduct through a reporter to escape detection. The entire purpose of the Privacy Act is to create a deterrent to such government abuse, and to allow a victim to seek redress when it occurs. *See F.A.A. v. Cooper*, 566 U.S. 284, 294-95 (2012); 24a (The Privacy Act protects against "the risk that government officials might be tempted to abuse their access to sensitive information by leaking materials intended to embarrass particular individuals").

Allowing Herridge to continue concealing the identity of her source(s) would be an open invitation for government officials to violate the Privacy Act with impunity, which the individual(s) in question here have already been able to do for years, as Herridge has fought tooth and nail despite losing on the issue at every turn. The "public has a right to every man's evidence," 63a, and the "public interest in the enforcement of court orders," which "is essential to the effective functioning of" the "judicial process," would be subverted if Herridge is allowed to continue flouting the district court. *Engebretson v. Mahoney*, 724 F.3d 1034, 1041 (9th Cir. 2013).

CONCLUSION

Herridge's application to stay the D.C. Circuit's mandate should be denied.

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Respectfully submitted,

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