

PUBLIC COPY—SEALED MATERIALS REDACTED
No. 26A-

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

**APPLICATION FOR STAY OF MANDATE PENDING FILING AND
DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI AND FOR
IMMEDIATE ADMINISTRATIVE STAY**

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PARTIES TO THE PROCEEDINGS

Applicant is national security reporter Catherine V. Herridge. Ms. Herridge was involuntarily subpoenaed as a non-party witness in the district court civil proceedings in this case in connection with work she did when she was Chief Intelligence Correspondent at Fox News Network, LLC. She was Appellant in the court of appeals. Fox News Network, LLC is also a non-party witness in the district court.

Respondent is Yanping Chen, Plaintiff in the district court civil proceedings seeking recovery against the Defendants under the Privacy Act and Appellee in the court of appeals.

Defendants in the district court civil proceedings are the Federal Bureau of Investigation, the U.S. Department of Justice, the U.S. Department of Defense, and the U.S. Department of Homeland Security.

The proceedings below are:

1. *Yanping Chen v. FBI et al.*, 1:18-cv-03074-CRC (D.D.C.).
2. *Yanping Chen v. FBI et al.*, No. 23-5198 (D.C. Cir.).
3. *Yanping Chen v. FBI et al.*, No. 24-5050 (D.C. Cir.).

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND
CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

This presents a classic and clear case for a stay of the mandate. The courts below have ordered a national security reporter, Applicant Catherine V. Herridge, to hand over her confidential source(s)—presumptively the names of U.S. government personnel with knowledge of a counterespionage investigation—to a former colonel in the People’s Liberation Army (PLA), the army of the Chinese Communist Party, who has filed a civil suit against the government under the Privacy Act. *See* App. 1a–28a (Disclosure Order); ■■■■■■■■■■. Compliance with that order would cause irreparable harm twice over by depriving Ms. Herridge of her First Amendment rights and forever disclosing the identity of her confidential source(s). Both lower courts adjudicated this important case without inflicting that irreparable harm—the district court that ordered disclosure stayed its own contempt order to allow orderly appellate review, and the Court of Appeals took over two years to deliberate with that stay in place. This Court should give itself the same opportunity for orderly review by staying the issuance of the mandate.

Accordingly, pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. §1651, Ms. Herridge respectfully seeks an order staying issuance of the mandate from the court of appeals pending the filing and disposition of a petition for a writ of certiorari. Given the exigent circumstances, she **requests that the Court act by noon on Monday, June 29, 2026 to stay the issuance of the mandate pending disposition of this application or to issue an administrative stay to preserve the status quo while the Court considers**

this application.

This case underscores the importance of reporting based on confidential sources. In 2017, Ms. Herridge was the lead reporter on a series of stories about counterespionage concerns with Plaintiff, a former colonel in the PLA who was running a university catering to U.S. military personnel and gathering information on thousands of U.S. servicemembers in the process. Making matters worse, the Department of Defense (DOD) itself was effectively funding this whole enterprise through a tuition assistance program. In 2018, following Herridge's reporting, DOD conducted an independent inquiry and publicly terminated the university from the tuition assistance program "on national security grounds." Rather than challenge that termination decision as arbitrary, capricious, or otherwise erroneous, Plaintiff sued the government under the Privacy Act, claiming that information from government files that had appeared in Ms. Herridge's stories caused DOD to reach its decision. In that civil lawsuit, Plaintiff subpoenaed Herridge, and the courts below have rejected Ms. Herridge's claim of reporter's privilege and ordered her to turn over the name(s) of her confidential national security source(s) to a former PLA colonel whom DOD found to be a national security risk. That order has been stayed while the lower courts adjudicated the important issues raised by Ms. Herridge's claim of reporter's privilege, and a stay of the mandate will preserve the status quo to permit this Court's orderly review of those issues.

This case raises vitally important questions about both: (i) the standards for applying the First Amendment reporter's privilege, and (ii) whether this Court should

recognize a reporter's privilege under federal common law. All the factors this Court considers overwhelmingly favor maintaining the status quo pending Ms. Herridge's forthcoming petition for certiorari.

First, there is at least a reasonable probability that the Court will grant certiorari because the decision below conflicts with decisions of other circuits. The D.C. Circuit held that the First Amendment reporter's privilege turns on a stark two-factor test that considers only: (1) whether the information sought (here, the identity of sources) is "central" to the plaintiff's case, and (2) whether the plaintiff exhausted alternative avenues of discovery. Because the identity of a source is always central in a Privacy Act case (among other things, to prove willfulness and intent), that test reduces the privilege to a mere exhaustion requirement under which a plaintiff *always* gets access to confidential sources eventually. That approach conflicts with the test applied by other circuits, which engage in a genuine balancing to weigh the plaintiff's interest in disclosure against society's interest in the "free flow of information" to the press—a balancing that allows courts to, among things, distinguish between civil and criminal cases. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980). Those circuits recognize that protecting society's interest in the functioning of the press may outweigh a plaintiff's needs in a particular case. This case would almost certainly have come out differently in those circuits: Ms. Herridge introduced evidence that her effectiveness as a national security reporter would be destroyed if she were forced to divulge her source(s) to a former PLA colonel. And that interest unquestionably outweighs

Plaintiff's interest in a civil suit that may ultimately amount to nothing more than \$1,000 in statutory damages, even if successful.

The decision below also deepens an acknowledged circuit split on whether to recognize a reporter's privilege under Rule 501 of the Federal Rules of Evidence, through which Congress expressly authorized federal courts to define new privileges by interpreting "[t]he common law ... in the light of reason and experience." The D.C. Circuit joined several other circuits in declining to recognize a non-constitutional privilege, notwithstanding its miserly view of the First Amendment privilege. That decision squarely conflicts with the Third Circuit's decision in *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979), which not only recognizes a non-constitutional privilege under common law principles, but also requires courts to "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," *id.* at 716—which is precisely what the D.C. Circuit refused to do.

Second, there is at least a fair prospect that the Court would reverse. Whether under the First Amendment or federal common law, there is a fair prospect that the Court will hold that a former PLA colonel's need to obtain the identity of Ms. Herridge's confidential source(s)—presumptively U.S. government official(s)—in this civil case does not outweigh Ms. Herridge's interest in maintaining the confidentiality of her source(s) and the public's interest in national security reporting. As a matter of First Amendment law, the D.C. Circuit's mechanical two-factor test amounts to a rule of automatic disclosure of confidential sources in virtually every case where a

plaintiff needs the information no matter how low the stakes for the plaintiff or how high the costs to the fourth estate, chilling the free flow of information to the press and undermining its ability to fulfill the “essential role in our democracy” of “bar[ing] the secrets of government and inform[ing] the people.” *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). This case perfectly illustrates the importance of confidential sources and the centrality of a reporter’s privilege to the First Amendment’s distinct textual protection of the freedom of the press. Ms. Herridge’s interest in keeping secret the identity of her source(s)—(presumptively) government personnel with information critical to rooting out improper foreign influences—could not be more compelling, while Plaintiff’s need for the information in this low-stakes civil matter is relatively trivial. Only by applying a test that systematically underweights First Amendment values could the D.C. Circuit conclude that disclosure was warranted.

As a matter of federal common law, the D.C. Circuit’s approach is even worse. In enacting Rule 501 of the Federal Rules of Evidence, Congress expressly authorized federal courts to define new privileges by interpreting “[t]he common law ... in the light of reason and experience.” Where the Court has applied Rule 501 to recognize a psychotherapist-patient privilege, *see Jaffee v. Redmond*, 518 U.S. 1 (1996), there is (at the very least) a “fair prospect” that the Court would recognize a privilege shielding reporters from the forced disclosure of confidential sources. *See* 23 Charles A. Wright & Kenneth W. Graham, *Federal Practice & Procedure* §5426 (1980 & Supp. 2013) (“Congress expected that Rule 501 would be used to create a privilege for

newsmen.”). At least 48 states and the District of Columbia have recognized a reporter’s privilege. It would defy “reason and experience” to refuse to recognize the same privilege in federal court either as a matter of constitutional law or common law principles. Fed. R. Evid. 501.

Third, absent a stay, Ms. Herridge will suffer irreparable harm twice over. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)). If the order requiring disclosure is put into effect, Ms. Herridge’s pledge of confidentiality would irremediably be breached, and the identity of the source(s) would forever be disclosed. No court would be able to undo that disclosure, which is why the courts below kept a stay in place while they adjudicated.

Fourth, maintaining the status quo will not materially harm Plaintiff. At worst, a stay would merely postpone disclosure—if the order below is ultimately affirmed. The district court itself recognized there was no urgency to disclosing Ms. Herridge’s source(s) as it stayed its own contempt order pending appeal, and the court of appeals kept that stay in place while it deliberated over *two years*. Extending that stay by a few months to allow this Court time to consider a petition for certiorari will not cause any material harm.

Fifth, the public interest favors a stay. As amici as diverse as Senator Ted Cruz and the New York Times underscored below, the public has a critical interest in First Amendment protections promoting the flow of information to the press,

especially in matters involving national security. If the decision below stands, sources everywhere will now think twice about sharing important and confidential information with reporters for fear that their identity will be exposed in civil litigation. The decision below should be recognized for what it is: A profound threat to the First Amendment and the press's ability to "bare the secrets of government and inform the people." *N.Y. Times Co.*, 403 U.S. at 717 (Black, J., concurring).

DECISIONS BELOW

The Contempt Order requiring Ms. Herridge to disclose her confidential source(s) and setting a fine of \$800 a day is reproduced at App. 29a–52a. The D.C. Circuit's order affirming the district court is reproduced at App. 53a–64a. The D.C. Circuit's order denying a motion to stay the mandate is reproduced at App. 67a.

JURISDICTION

This Court has jurisdiction over an application for a stay pending review under 28 U.S.C. §§1254 and 1651. The district court stayed its Contempt Order through a timely appeal. App. 52a. The D.C. Circuit denied a motion to stay issuance of its mandate. App. 67a. Once the mandate issues, the district court's stay will expire. Thus, the relief sought here is not available in any other court. Sup. Ct. R. 23(3).

BACKGROUND AND PROCEDURAL HISTORY

A. The Counterespionage Investigation into Plaintiff and Ms. Herridge's Reporting

Ms. Herridge was the lead reporter on three Fox News stories in 2017 (the "Fox Reporting") describing a counterespionage investigation into Plaintiff Yanping Chen, the founder of the University of Management and Technology (UMT). The stories

reported evidence that Plaintiff had been a colonel in the People's Liberation Army and that she sought to hide that fact by lying on immigration forms to become a U.S. citizen and telling others to lie under oath to conceal her past. App. 73a–81a.

Nearly all of the Fox Reporting was based on information obtained from non-government and non-confidential sources. Among other things, the stories featured on-camera interviews with Stephen Rhoads, a whistleblower and former UMT employee who had served as an FBI informant. *Id.* Rhoads explained that Plaintiff had admitted to him that she had been a PLA colonel and instructed him to lie about that fact when he testified before a federal grand jury: “Oh, you don’t tell them anything You don’t—you don’t know I was a colonel in the P.L.A. They’ll never have proof to say that.” *Id.* at 74a–75a. Rhoads also explained that UMT was collecting information about U.S. servicemembers’ military history that could then be remotely accessed. *Id.* at 75a. An expert on the Chinese military, Peter Mattis, explained that the personnel records would provide a “curated database” that would be of interest to the PLA for two reasons: “The first is, militaries everywhere want to know what a potential adversary might look like—what are their capabilities, how will they act? The second is this might also serve as a vehicle for recruiting individuals.” *Id.* at 78a.¹

Rhoads explained that UMT was receiving \$250,000 to \$300,000 per month in taxpayer dollars from DOD through a tuition assistance program. *Id.* at 77a. As

¹ Cf. Dan Lamothe, *China’s military seeks to exploit U.S. troops, veterans, general warns*, Wash. Post (Sept. 8, 2023), available at tinyurl.com/mrvcmhdv.

Rhoads summed it up: “It’s a bad deal for the soldiers ... it’s a bad deal for the taxpayer.” *Id.* at 74a.

The stories explained that the FBI and the U.S. Attorney’s Office disagreed about taking action against Plaintiff based in part on concerns about disclosing intelligence sources and methods.² *Id.* at 75a. In addition, the Naval Criminal Investigative Service (NCIS) confirmed on the record that there was “still an active multi-agency investigation” into UMT. *Id.* at 80a.

Finally, the stories included some information that Plaintiff later claimed had come from government files and thus was subject to the Privacy Act. Plaintiff pointed to pictures allegedly seized in FBI searches of her home and offices at UMT (including photographs of her wearing the uniform of a PLA colonel), *see* Compl. ¶¶26, 31, *Chen v. FBI*, 1:18-cv-3074 (D.D.C. Dec. 21, 2018), ECF No. 1, portions of her immigration forms (including a form showing her false denial that she had ever been affiliated with the Communist Party), *id.* ¶¶25, 27; and images or information from FBI memoranda memorializing interviews with her, including, in particular, an interview in which she denied having held rank in the PLA, *id.* ¶¶26, 29. When the stories ran, however, almost all of the information Plaintiff identified as the basis for her Privacy Act claims—with the exception of photographs of her in her PLA colonel’s uniform—was already a matter of public record in the Eastern District of Virginia in the

² Prosecuting an espionage case consistent with the defendant’s constitutional rights may force the government to disclose classified information, including intelligence sources and methods. The prosecution may not be worth further compromising national security. *See generally* Karen H. Greve, *Graymail: The Disclose or Dismiss Dilemma in Criminal Prosecutions*, 31 Case W. Reserve L. Rev. 84 (1980).

affidavit the FBI had used to secure search warrants. For example, the FBI Affidavit described Plaintiff's false statement on an immigration form that she had never been affiliated with the Communist Party, *Aff. in Support of Two Appls. for Search Warrants* ¶¶20–21, *In re Search of: 2122 21st Rd. N., Arlington, Va.*, No. 1:12-sw-1002 (E.D. Va. Mar. 10, 2017), ECF No. 1, and detailed Plaintiff's denial that she had held rank in the PLA during her 2012 interview by the FBI, *id.* ¶¶48–49.³

B. DOD Finds That [REDACTED] and Terminates Funding “On National Security Grounds”

In 2018, DOD publicly announced that it had concluded an inquiry and was terminating UMT from the tuition assistance program “on national security grounds.”⁴ DOD determined that [REDACTED]

[REDACTED]

[REDACTED] DOD also found that [REDACTED]

[REDACTED] and that [REDACTED]

[REDACTED]

[REDACTED] DOD noted that [REDACTED]

[REDACTED] DOD found that [REDACTED]

[REDACTED] that [REDACTED]

[REDACTED] and that [REDACTED]

³ Although the affidavit had been under seal, in litigation brought by Plaintiff seeking sanctions for an alleged leak, the district court held that, because the order sealing it had expired four years earlier, the information in the affidavit was “public information” and there could be no violation in disclosing it. *See id.*, ECF No. 20 (May 8, 2017 H'rg Tr. at 26:10–13; 29:21–30:3).

⁴ Natalie Gross, *DoD bans popular TA school from accepting the benefit*, Military Times (Apr. 6, 2018), perma.cc/D9VA-MXWF.

[REDACTED]

[REDACTED] DOD also noted that [REDACTED]

[REDACTED]

[REDACTED]

C. Plaintiff Sues the Government Under the Privacy Act and Subpoenas Ms. Herridge To Uncover Her Confidential Source(s)

Plaintiff never challenged any of DOD's findings in court. Instead, she sued several agencies under the Privacy Act seeking to have the federal government compensate her for her lost revenue when DOD found that she was a national security threat and cut off taxpayer funding for UMT. Although she did not sue Ms. Herridge, she sought to blame her losses on an alleged leak of Privacy Act information to Ms. Herridge. Plaintiff's theory was that, if Ms. Herridge had not run her stories, DOD never would have stumbled onto what Plaintiff was up to (or never would have done anything about it), so Ms. Herridge's reporting supposedly "caused" DOD to reach its independent decision to cut off Plaintiff's funds "on national security grounds."

In June 2022, Plaintiff served subpoenas seeking to uncover Ms. Herridge's confidential source(s). Ms. Herridge moved to quash, asserting a reporter's privilege under both the First Amendment and FRE 501. Ms. Herridge argued that, under established precedent, the district court needed to weigh the public interest in protecting the reporter's sources against the private interest in compelling disclosure. That weighing tipped decisively in favor of non-disclosure for multiple reasons, including: (1) the fact that nearly all of the Fox Reporting involved public information, limiting Plaintiff's potential damages and the magnitude of her claim; (2) the fact

that DOD made an independent decision to terminate UMT's contract on national security grounds, thereby breaking any chain of causation between any Privacy Act violation and Plaintiff's alleged damages; (3) the risk that Plaintiff is using her Privacy Act suit to have the government pay her compensation for passing information to the CCP; (4) the immense harm that forced disclosure would do to Ms. Herridge's ability to work as a national security reporter; and (5) the importance of confidential sources to national security reporting and the public's interest in protecting the ability of the press to provide such reporting—especially where, as here, the reporting exposed what DOD confirmed was a real national security risk.

The district court denied in relevant part the motion to quash and ordered Ms. Herridge to disclose her confidential source(s). Disclosure Order, App. 1a–28a. The court held that two factors controlled analysis of the First Amendment reporter's privilege: (1) whether the information sought is central to the plaintiff's case ("centrality") and (2) whether the plaintiff exhausted reasonable alternative avenues of discovery ("exhaustion"). *See id.* at 10a–11a. As Ms. Herridge pointed out, because the identity of a source is always deemed "central" to a Privacy Act claim (because the plaintiff needs the source to prove willfulness and intent), a test focused on solely "centrality" and "exhaustion" is really nothing more than an exhaustion requirement under which *every* plaintiff *always* gets access to a reporter's confidential sources eventually.

The district court also declined to recognize a reporter's privilege under Federal Rule of Evidence 501. *Id.* at 25a–27a.

D. The District Court Holds Ms. Herridge in Contempt and the Court of Appeals Affirms

When Ms. Herridge subsequently declined to identify her source(s) at deposition, the district court held Ms. Herridge in contempt. Contempt Order, App. 52a. The court set a civil contempt fine of \$800 per day, but stayed its order “until completion of proceedings on a timely appeal.” *Id.*

On appeal, the D.C. Circuit affirmed, holding that the analysis for applying the First Amendment reporter’s privilege is limited to the two factors of centrality and exhaustion after taking some two years to deliberate while the stay remained in place.⁵ *Id.* at 62a–63a. The court also refused to recognize a reporter’s privilege under the auspices of Federal Rule of Evidence 501. *Id.* at 63a–64a. The court of appeals subsequently denied rehearing and rehearing en banc after taking five and a half months to consider the request, Orders, *Chen v. FBI*, No. 24-5050 (D.C. Cir. May 22, 2026), Nos. 2174726, 2174732.

Ms. Herridge moved to stay issuance of the mandate, and the court granted a joint motion for a briefing schedule making her reply brief due on June 23, 2026. App. 66a. On June 23, however, before Ms. Herridge even had a chance to file her reply brief, the court denied the motion to stay the mandate. *Id.* 67a.

REASONS FOR GRANTING THE APPLICATION

This case presents the classic circumstances in which a stay of the mandate is necessary to allow the orderly functioning of the appellate process. Absent a stay,

⁵ The D.C. Circuit acknowledged that a court could also assure itself that the plaintiff’s case was not “frivolous” before ordering disclosure. *Id.* at 60a.

Ms. Herridge will be subject to an order overriding First Amendment protections and forcing her to disclose her confidential source(s). There will be no way to reverse that disclosure or eliminate that irremediable First Amendment injury. That is why the lower courts maintained a stay over their years of deliberations. A much shorter extension of the stay is warranted to preserve the status quo during this Court's deliberations and to prevent both the irreparable harm to Ms. Herridge's First Amendment rights and the irreversible disclosure of her source(s).

In contrast to the severe and irreversible harms to Ms. Herridge, there is no urgency that warrants precipitously forcing Ms. Herridge to disclose her source(s) before this Court has an opportunity to consider a petition for certiorari. The underlying dispute is a civil case seeking damages—not a criminal prosecution or civil case seeking emergency relief. The district court proceeded accordingly. It has overseen this litigation for *seven and a half years*, stayed its own contempt order almost *two and half years ago*, and recognized that there was no need for the case to move forward during appellate review. The district court rightly held that Ms. Herridge should be allowed to “litigate her First Amendment claim to the hilt before revealing her source” because “it is better to be safe than sorry when it comes to First Amendment rights.” Contempt Order, App. 51a. The D.C. Circuit had the benefit of that stay for more than two years while it considered the case. Granting a stay of the D.C. Circuit's mandate would put this Court in the same position as the D.C. Circuit—having the ability to address the case on the Court's usual schedule, without the urgent press of a possible First Amendment injury. The balance of equities tips

strongly in favor of extending the stay and avoiding an irrevocable step that this Court later may decide violates Ms. Herridge’s First Amendment rights.

A stay is warranted when there is “(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); accord *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers). Additionally, in “a close case it may be appropriate to ‘balance the equities’—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.” *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). All these factors weigh decisively in favor of a stay.

I. There Is a Reasonable Probability This Court Will Grant Certiorari.

A. The Decision Below on the First Amendment Reporter’s Privilege Creates a Conflict with Several Other Circuits and State Courts of Last Resort and Warrants Review by This Court.

The decision below endorsing a mechanical, two-factor test for applying the First Amendment reporter’s privilege conflicts with decisions of at least the First, Fourth, Ninth, and Tenth Circuits. Those courts, as well as several state supreme courts, engage in 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. *Bruno*, 633 F.2d at 596. The square conflict in the standards used to determine the application of a crucial constitutional privilege warrants review by this Court.

Under the D.C. Circuit's decision, the reporter's privilege always fails if the information sought from a reporter is (1) central to the case and (2) the movant has exhausted other sources for getting the information. *See* App. 62a–63a. Worse still, because circuit precedent always treats the identity of a source as “central” to a Privacy Act claim (in order to prove intent and willfulness, *see Lee v. Dep't of Justice*, 413 F.3d 53, 60 (D.C. Cir. 2005)), this mechanical test effectively reduces the reporters' privilege to an exhaustion requirement under which *every* Privacy Act plaintiff can *always* get access to confidential sources eventually, no matter how trivial or tenuous the plaintiff's claims. It leaves no room to consider the reporter's interest in keeping her source a secret.

That mechanical approach, which converts a crucial constitutional privilege into a mere exhaustion requirement, conflicts with the tests adopted by multiple other Circuits, which require broad balancing to apply the reporter's privilege and which consider many factors the D.C. Circuit refused to consider, including the public interest in preserving the ability of reporters and ultimately the public to obtain information from confidential sources. The First Circuit, for example, holds that applying the reporter's privilege requires courts to broadly “balance the potential harm to the free flow of information that might result [from disclosure] against the asserted need for the requested information.” *Bruno*, 633 F.2d at 595–96. That includes “the importance to the [journalist's] continued newsgathering effectiveness of preserving the source's confidentiality.” *Id.* at 597–98. Ms. Herridge presented evidence explaining that disclosing her source(s) would destroy her ability to function

as a national security investigative journalist, App. 82a–85a, but the courts below refused to consider that information.

The D.C. Circuit’s approach departs from the First Circuit’s in other ways. While the D.C. Circuit considered whether Plaintiff’s Privacy Act claims were “frivolous,” *id.* 60a–61a, it forbade any further examination into the merits of those claims, *id.* 61a–62a. The First Circuit, however, expressly holds that a “finding that plaintiff’s claim is not frivolous” “does not terminate the sensitive balancing process.” *Bruno*, 633 F.2d at 599 n.17. Instead, the First Circuit requires that, before overcoming the privilege, “plaintiff should show that it can establish jury issues on the essential elements of its case not the subject of the contested discovery.” *Id.* at 597. In other words, the plaintiff’s claims should be tested on partial summary judgment to determine whether they will entirely (or mostly) collapse. *See id.* (elements of plaintiff’s claim should be “established as a jury issue before discovery is compelled”). Ms. Herridge argued for precisely such testing of Plaintiff’s case on partial summary judgment, but the D.C. Circuit refused to consider it.

The First Circuit has also acknowledged 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.” *Bruno*, 633 F.2d at 595. The D.C. Circuit, however, forbade considering such factors. Ms. Herridge submitted declarations detailing the significant risk that Plaintiff was engaged in espionage for China and the risks involved in forcing disclosure to her of the identity of (presumptively) government personnel with knowledge of counterespionage

investigations. App. 93a–104a. The D.C. Circuit refused even to consider such national security harms from the disclosure of confidential sources in this case.

The First Circuit is not alone in requiring a broader balancing of interests. The Fourth Circuit applies a full-fledged balancing test. It has set out three factors to be considered—relevance, exhaustion, and whether the plaintiff has a “compelling interest in the information”—but has cautioned that those factors do not end the inquiry. *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287–88 & n.12 (4th Cir. 2000). Even where a plaintiff shows a compelling interest, the “compelling nature of the interest [in disclosure] would have to be balanced against the reporter’s interest in protecting the confidentiality of his sources.” *Id.* at 288 n.12.

The Ninth Circuit broadly requires that the “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,” *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (quotation omitted), and the Tenth Circuit has similarly endorsed a “balancing test,” while identifying four non-exhaustive factors “[a]mong the factors that the trial court must consider,” *Grandbouche v. Clancy*, 825 F.2d 1463, 1466–67 (10th Cir. 1987).

State courts of last resort have also held that the First Amendment reporter’s privilege requires a broad balancing of interests.⁶ The Supreme Judicial Court of Maine has expressly adopted the First Circuit’s approach from *Bruno*. *See, e.g., In re*

⁶ There are relatively few state supreme court decisions addressing the contours of the First Amendment reporter’s privilege because most States have adopted robust reporter’s privilege protections by statute. *See infra* nn.11, 12.

Letellier, 578 A.2d 722, 726 (Me. 1990). The Louisiana Supreme Court has explained that, even in the criminal context, after the government has shown that a reporter’s information is “necessary” for a case, the court still must “balance” that need against “the possible ‘chilling effect’ the disclosure will have on the freedom of the press and the ability to gather news” and that “additional weight should be given to the reporter’s interest when the information concerns his investigation of or criticism of the government.” *In re Grand Jury Proc. (Ridenhour)*, 520 So. 2d 372, 376 (La. 1988).

The split in authority is further deepened by the Seventh Circuit, which holds that there is no First Amendment reporter’s privilege. *McKevitt v. Pallasch*, 339 F.3d 530, 532–33 (7th Cir. 2003); see *Cruz v. Guevara*, 801 F. Supp. 3d 767, 774 (N.D. Ill. 2024) (“[N]o federal reporter’s privilege exists in the Seventh Circuit.”).

These divergent approaches to a constitutionally based privilege present an important question of constitutional law that should be resolved by this Court. The Court last addressed the First Amendment reporter’s privilege in *Branzburg v. Hayes*, in which a divided Court held that a reporter did not have an absolute First Amendment privilege to refuse to appear before a federal grand jury pursuant to a subpoena. 408 U.S. 665, 709 (1972). Justice Powell, who provided the fifth vote for the majority, wrote separately to explain that, while there was no First Amendment right to refuse to appear, reporters are not “without constitutional rights with respect to the ... safeguarding of their sources.” *Id.* at 709–10 (Powell, J., concurring). He explained that, when those rights are implicated, “the asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of

the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct” and that the balance would have to be struck on a “case-by-case basis.” *Id.* at 709–10 & n.* (Powell, J., concurring); see *Marks v. United States*, 430 U.S. 188, 193 (1977).⁷

The Court has never addressed the reporter’s privilege in a civil case,⁸ and as explained above, in the absence of further guidance since Justice Powell’s lone concurrence over fifty years ago, the courts of appeals and state courts have adopted widely divergent approaches to the privilege. There is no reason that the protection afforded by the First Amendment should vary so drastically based upon the geographic circuit in which reporter finds himself. Instead, there is a reasonable probability that four Justices will agree that guidance from this Court is badly needed to establish a uniform standard for applying this important constitutional protection that is vital for preserving the functioning of the press.

B. The Decision Below Deepens a Circuit Split over Whether a Non-Constitutional Reporter’s Privilege Exists under the Authority Conveyed by Federal Rule of Evidence 501.

There is likewise a reasonable probability that this Court will grant certiorari to resolve the question whether, under the auspices of Federal Rule of Evidence 501, reporters possess a non-constitutional evidentiary privilege against compelled disclosure of confidential sources and information. This question has divided the

⁷ The four dissenting Justices would have recognized a stronger privilege. *Id.* at 725 (Stewart, J., dissenting).

⁸ *Herbert v. Lando*, 441 U.S. 153 (1979), addressed a claimed privilege over editorial process, not confidential sources, in the very different scenario where journalists were defendants in a defamation action.

Courts of Appeals. Compare *Riley v. City of Chester*, 612 F.2d 708, 714–15 (3d Cir. 1979) (recognizing a privilege under common-law principles), with *United States v. Sterling*, 724 F.3d 482, 505 (4th Cir. 2013) (rejecting such a privilege); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1178 n.4 (1st Cir. 1988) (same); *Price v. Time, Inc.*, 416 F.3d 1327, 1342 (11th Cir. 2005) (“[T]he common law is that there is no confidential source privilege.”).⁹

Like the D.C. Circuit, several courts of appeals have squarely held that “there is no ... common-law privilege that protects [a journalist] from having to respond to the government’s subpoena and give what evidence he has.” *Sterling*, 724 F.3d at 505. The Third Circuit, by contrast, has held that “journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources.” *Riley*, 612 F.2d at 715. That common-law privilege derived from “[t]he strong public policy which supports the unfettered communication to the public of information,” embodied in the First Amendment, and the views of the states on the question of reporters’ evidentiary privileges. *Id.* Even still, the Third Circuit explained that “there are countervailing interests which will suffice to transcend the journalist’s privilege.” *Id.* Drawing on Justice Powell’s *Branzburg* concurrence, the Third Circuit held that to overcome the privilege, a litigant must show “a demonstrated, specific need for evidence.” *Id.* at 716 (quotation omitted). Then, the court must “balance on one hand the policies which give rise to the privilege and their applicability to the facts at hand

⁹ Still more courts have recognized a reporter’s privilege but cannot decide whether it derives from the First Amendment or federal common law. *Gonzales v. NBC, Inc.*, 194 F.3d 29, 35 n.6 (2d Cir. 1999).

against the need for the evidence sought to be obtained.” *Id.*

That disagreement is not academic. In this case, the D.C. Circuit flatly rejected a common-law reporter’s privilege. App. 63a–64a. By contrast, had this case arisen in the Third Circuit, Herridge would likely have been privileged from being forced to disclose her source(s). Any arguable need for this information would be outweighed by the societal interests justifying the privilege (which the D.C. Circuit refused to consider). Authorizing compelled disclosure of confidential sources in the national-security context would seriously undermine the freedom of the press. While all reporting relies on the ability to use and protect confidential sources, *Riley*, 612 F.2d at 714; *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972), that dynamic is especially pronounced in the national-security context. National security reporters, like Herridge, inherently must rely on confidential sources. The pervasiveness of classification and confidentiality in the national security realm means that few—if any—sources will be willing to provide information to journalists without meaningful guarantees that their identities will be protected. If reporters can be forced to disclose their sources, few in the government will be willing to provide important information to the press on matters of great public significance. That problem is particularly acute when the compulsion to disclose can occur even in low-stakes civil suits brought by private parties. Permitting such disclosure harms not only journalists, but also the public at large, through loss of critical information about their government’s affairs. See *N.Y. Times Co.*, 403 U.S. at 717 (Black, J., concurring).

Under *Riley*, the balance is not even close: While Plaintiff’s interest in

compelling Herridge to testify is minimal, the costs of compelling her testimony would be substantial. In service of advancing a civil suit that may yet collapse on other grounds or lead to recovering only paltry sums of money, the D.C. Circuit's rule risks undermining critical newsgathering methods and hamstringing the free press in its service to our democracy. A court applying *Riley* would likely find that the privilege had not been overcome and would not have compelled Herridge to testify.

The stark disagreement on the existence of a federal common-law evidentiary privilege for reporters under Federal Rule of Evidence 501 can only be resolved by this Court. There is a reasonable probability that the Court will agree to review the D.C. Circuit's decision to resolve that conflict. Sup. Ct. R. 10.

II. There Is at Least a Fair Prospect that the Court Would Reverse.

A. There Is a Fair Prospect the Court Would Reject the D.C. Circuit's Mechanical Test for the First Amendment Reporter's Privilege.

There is also at least a "fair prospect," *Hollingsworth*, 558 U.S. at 190, that this Court would reverse the D.C. Circuit and hold that the First Amendment reporters' privilege is not a mere exhaustion requirement under which *every* plaintiff who needs the information can *always* get access to a reporter's confidential sources eventually, no matter how tenuous or trivial the plaintiff's underlying claim. As explained below, when journalists' confidential sources are disclosed in litigation, there are significant societal costs in terms of injury to the functioning of the press and the public's ability to receive information. That is why most circuits that have addressed the issue recognize that courts should balance the litigant's need against the harm to First

Amendment values that follows from compelled disclosure. This Court is more likely to adopt that approach, which calls for both a genuine balancing of interests and for testing elements of the plaintiff's case on summary judgment *before* disclosure of confidential sources is compelled.

This Court has acknowledged that reporters are “entitled to some constitutional protection of the confidentiality of [their] sources.” *Pell v. Procunier*, 417 U.S. 817, 834 (1974). It could hardly be otherwise given the First Amendment’s distinct protection for “the press.” And as many lower courts have recognized, the First Amendment reporter’s privilege reflects that textual commitment and is critical because there are significant costs to society when reporters are forced to disclose confidential sources. “If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the public’s understanding of important issues and events would be hampered in ways inconsistent with a healthy republic.” *Ashcraft*, 218 F.3d at 287; *see also, e.g., Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), *opinion supplemented on denial of reh’g*, 628 F.2d 932 (5th Cir. 1980) (“[F]orced disclosure of journalists’ sources might deter informants from giving their stories to newsmen . . .”). Simply put, journalists rely on confidential sources for information, especially information about the government. When journalists are compelled to disclose their sources in litigation, it has a chilling effect that dries up the flow of information to the press and prevents the press from fulfilling its “essential role in our democracy” of “bar[ing] the secrets of government and inform[ing] the people.” *N.Y. Times Co.*, 403 U.S. at 717

(Black, J., concurring). In no context is that more critical than in the national-security context, where reporting depends on the ability to maintain confidences.

Given these substantial costs, the majority of circuits to address the matter recognize that a litigant's claimed need for disclosing a source should be balanced against the harm that will follow for the functioning of the press. In the decision below, by contrast, the D.C. Circuit rejected any balancing of interests in favor of a mechanical test that turns solely on whether the information is "central" to the plaintiff's case (*i.e.*, whether the plaintiff actually *needs* the information to make his case) and whether the plaintiff has exhausted alternative avenues for getting the information. That approach effectively reduces the test to an exhaustion requirement under which *every* plaintiff who needs access to a source *always* gets access eventually, no matter how trivial the plaintiff's underlying claim. There is least a fair prospect that five members of this Court would agree that approach is insufficiently protective of the First Amendment values at stake. Two aspects of the test applied by other circuits (and rejected by the D.C. Circuit) are likely to prevail.

First, the majority of circuits that have addressed the issue call for genuinely balancing a litigant's asserted need for a reporter's confidential source against the "potential harm to the free flow of information [to the press] that might result" from forced disclosure. *Bruno*, 633 F.2d at 596. Such a balancing necessarily acknowledges that, in some scenarios, a litigant's claim may simply not involve a substantial enough interest to justify incurring the societal costs involved in overcoming the First Amendment reporter's privilege.

There is at least a fair prospect that this Court would adopt such a balancing approach rather than the mechanical quasi-exhaustion test applied below. The D.C. Circuit, for example, acknowledged that Plaintiff's claim may ultimately amount to nothing more than a claim for \$1,000 in statutory damages—yet held that Plaintiff should *still* get access to Ms. Herridge's confidential source(s). App. 61a–62a. There is at least a fair prospect that this Court would not agree that a claim for a nominal \$1,000 in damages warrants incurring the harms to the press that follow from compelling disclosure of confidential sources.

The D.C. Circuit's absolutist approach is especially wrongheaded when one also considers the impact that compelling disclosure of source(s) would have on Ms. Herridge's ability to function as a national security reporter. As the First Circuit has explained, a court should consider specifically “the importance to the [journalist's] continued newsgathering effectiveness of preserving the source's confidentiality.” *Bruno*, 633 F.2d at 597–98. Here, Ms. Herridge introduced uncontested evidence that her career as a national security reporter would be destroyed if she is compelled to hand over her national security source(s) to a former colonel in the PLA. App. 82a–85a. No national security sources would ever trust Ms. Herridge (or other national security reporters) again if she does that. The D.C. Circuit refused even to consider the cost to Ms. Herridge of compelling disclosure to Plaintiff, let alone the broader negative impacts on newsgathering in the national security space. There is at least a fair prospect, however, that five members of this Court would agree that these are relevant factors to weigh in the balance.

This case also presents unique dangers related to compelled disclosure of sources that this Court likely would agree merit some consideration. As explained above, DOD entered detailed findings that Plaintiff was a national security risk and [REDACTED]

[REDACTED]. Ms. Herridge also introduced two declarations from counter-espionage experts explaining that Plaintiff's activity fit the intelligence methods and objectives of Chinese espionage in the United States. *Id.* at 93a–104a. The idea that this Plaintiff ought to be able to force the disclosure of the identities of government officials involved in bringing her machinations to light borders on the absurd. *Cf. Bruno*, 633 F.2d at 595 (“[T]here may be cases where revelation of sources will threaten . . . other harm that will be quite disproportionate to a plaintiff's litigation needs.”). The potential disclosure of sources and methods may well explain the absence of a criminal prosecution here, and so allowing a Privacy Act suit to inflict some of the same harms and irreparable First Amendment injuries to boot (while potentially allowing Plaintiff to secure even more taxpayer money) makes no sense whatsoever.

Beyond that, the district court's contempt order requires Ms. Herridge not just to disclose information in the abstract, but to turn over the names of her source(s)—presumptively government personnel with knowledge of a counter-espionage investigation—to a former colonel in the PLA whom DOD found [REDACTED]

[REDACTED] *Cf. Miller*, 621 F.2d at 725 (courts should consider that a “plaintiff might

relish an opportunity to retaliate against the informant”). The D.C. Circuit refused even to acknowledge these aspects of the case. But there is at least a fair prospect that five members of this Court might find these considerations relevant before holding that Plaintiff’s case overrides Ms. Herridge’s First Amendment rights.

The second important aspect of the standard applied by other circuits is the instruction that courts should consider testing elements of the plaintiff’s claim on summary judgment before compelling disclosure of confidential sources. There is at least a fair prospect that this Court would agree with the First Circuit that part of a court’s role in a case such as this is to take steps “moderating or avoiding a clash with First Amendment values,” including by examining whether elements of the plaintiff’s case may fail on summary judgment. *Bruno*, 633 F.2d at 596. In this case, partial summary judgment briefing could establish that Plaintiff’s claim entirely fails, or at least that it is radically cut down in scope. It makes no sense to force disclosure of Ms. Herridge’s confidential source(s) *before* finding out such results. Partial summary judgment might show there is no need to disclose the source(s) at all because Plaintiff’s claims fail on another ground. And at a minimum, it might narrow the scope and magnitude of Plaintiff’s claims, which would provide the court a more accurate picture for weighing the competing interests at stake.

For example, the government has indicated that it believes it has an unclean hands defense to Plaintiff’s Privacy Act claim. As noted above, there is a serious risk that Plaintiff is using this action to recover taxpayer money to compensate her for espionage activity on behalf of a foreign power. The government may be able to

establish that such a suit perverts the objectives of the Privacy Act and that Plaintiff cannot recover.¹⁰ If the government is likely to succeed in that defense, it would make no sense to compel disclosure of Ms. Herridge’s confidential source(s) now. Instead, the sensible approach would be to sequence the litigation to put off discovery from Ms. Herridge and first require Plaintiff to show she can actually “establish jury issues” and that her claims are not foreclosed by a clean hands defense. *Bruno*, 633 F.2d at 597; *see also id.* at 598 (disclosure of confidential sources should be deferred to assess “the possibility that summary judgment would be appropriate”).

Alternatively, summary judgment may establish that Plaintiff cannot show any damages from the release of any Privacy Act information. The vast majority of the information in Ms. Herridge’s stories came from sources other than any alleged leak from government files, including a whistleblower willing to speak on camera. As the district court acknowledged, at the end of the day, it is likely that the *only* information in the stories that qualifies as Privacy Act information is the photographs of Plaintiff in her PLA colonel’s uniform. App. 23a. But it is unlikely that Plaintiff can prove distinct damages from the release of those pictures. If that is correct, examining Plaintiff’s ability to prove damages on summary judgment may eliminate most or all of her damages claims. Even if that ruling would not eliminate the case

¹⁰ Plaintiff’s case is no different from the case of a fraudster who has had a disability pension revoked on the ground that he is not disabled because he is playing tennis every day. Instead of challenging that decision, though, he sues the government under the Privacy Act, arguing that the government cut off his pension only because of some news stories with photographs (allegedly leaked from government files) showing him playing tennis—and he seeks to recover his pension payments as Privacy Act damages. Such a claim fundamentally perverts the objectives of the Privacy Act, and the government would have a compelling argument that Congress never authorized such a result.

entirely (if Plaintiff claims statutory damages), it vastly increases the possibility that there could be an alternative resolution to the case before it becomes necessary to force disclosure of Ms. Herridge's confidential source(s).

Similarly, summary judgment will likely foreclose all of Plaintiff's damages claims—or the vast majority of them—on the alternative ground that her damages were caused by DOD's decision to cut her university off from the Tuition Assistance Program and to announce publicly that it was doing so on “national security grounds.” See [REDACTED] *supra* n.4. That announcement was undoubtedly a devastating blow for Plaintiff's business, which had catered to members of the military, and for her reputation. It likely can be shown that *all* of Plaintiff's damages flowed from that action—an action that Plaintiff chose not to challenge in court. Moreover, that independent agency action provides a supervening cause that cuts off any claim that Plaintiff's damages were caused by a Privacy Act violation. Plaintiff cannot plausibly show that Ms. Herridge's articles somehow *caused* DOD's action after the agency conducted its own investigation and made findings of fact on the evidence before it. Thus, if Plaintiff's ability to prove causation of damages were tested on summary judgment, it would likely show that she cannot prove damages resulting from any Privacy Act violation, or at most minimal damages. Again, that information would not only aid the proper weighing of competing interests in the case, it might also open ways for an alternative resolution. There is at least a fair prospect that this Court would agree with the First Circuit that such avenues for eliminating or simplifying the case should be tested before compelling disclosure of confidential sources.

B. There Is a Fair Prospect that the Court Would Recognize a Non-Constitutional Privilege Under FRE 501.

If this Court granted certiorari, there is also a fair prospect that it would reverse the D.C. Circuit's decision and recognize the existence of a non-constitutional evidentiary privilege for reporters under FRE 501 against the compelled disclosure of their sources. That recognition, expressly authorized by Congress in Rule 501, would align federal law with the law of 48 states and the District of Columbia.

In determining whether to recognize a common-law evidentiary privilege under Rule 501, this Court considers two main factors. First, it assesses whether the proposed privilege advances a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.” *Jaffee*, 518 U.S. at 9 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). Second, it looks to the “policy decisions of the States” with respect to state-level evidentiary privileges. *Id.* at 12. “[T]he existence of a consensus among the States indicates that ‘reason and experience’ support recognition of the privilege.” *Id.* at 13 (quoting Fed. R. Evid. 501). Thus, in *Jaffee*, this Court placed heavy weight on the fact that “all 50 States and the District of Columbia ha[d] enacted into law some form of psychotherapist privilege.” *Id.* at 12.

The reporter's privilege advances critical societal interests. “An untrammelled press [is] a vital source of public information, and an informed public is the essence of working democracy.” *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983). “Historically, we have viewed freedom of speech and of the press as indispensable to a free society and its government.” *Smith v. Daily Mail*

Pub. Co., 443 U.S. 97, 106 (1979) (Rehnquist, J., concurring in the judgment). “Compelled disclosure of confidential sources unquestionably threatens a journalist’s ability to secure information that is made available to him only on a confidential basis.” *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972). Without confidential sources, reporters “could reprint government statements, but not ferret out underlying disagreements among officials; they could cover public governmental actions, but would have great difficulty getting potential whistleblowers to talk about government misdeeds.” *In re Grand Subpoena, Judith Miller*, 438 F.3d 1141, 1168 (D.C. Cir. 2006) (Tatel, J., concurring in the judgment). In short, “the deterrent effect [of] such disclosure ... threatens [the] freedom of the press and the public’s need to be informed.” *Baker*, 470 F.2d at 782. “It thereby undermines values which traditionally have been protected by federal courts applying federal public policy.” *Id.*

These interests are equal or greater in importance to the interests involved in the psychotherapist-patient privilege this Court recognized in *Jaffee*. *Jaffee* recognized a need for a psychotherapist-patient privilege because the work of a psychotherapist involves an “imperative need for confidence and trust.” 518 U.S. at 10. “Effective psychotherapy ... depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.” *Id.* In that context, “the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.” *Id.* Just so here. Cultivation of relationships between a journalist and confidential sources likewise depends on an “atmosphere of confidence

and trust.” *Id.* Confidentiality is often “essential” for sources to be willing to provide information to journalists, *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981); sources will not be willing to provide information of vital public importance to journalists if they must fear that the journalist will be subject to compulsory process and their names will be identified in open court. *Baker*, 470 F.3d at 782. Indeed, “the mere possibility of disclosure” will have a significant “deterrence effect” which “threatens [the] freedom of the press and the public’s need to be informed.” *Jaffee*, 518 U.S. at 10; *Baker*, 470 F.3d at 782.

“[T]he existence of a consensus among the States indicates that ‘reason and experience’ support recognition of the privilege.” *Jaffee*, 518 U.S. at 13; Fed. R. Evid. 501 (making “reason and experience” the benchmark for recognition of evidentiary privileges). The consensus here is overwhelming: Forty-eight States and the District of Columbia all recognize the existence of a privilege for reporters against the compelled disclosure of their sources. 23 jurisdictions recognize an absolute privilege against compelled disclosure of a reporter’s sources in civil cases.¹¹ 26 more recognize a qualified privilege.¹² Only two states—Mississippi and Wyoming—have failed to

¹¹ Ala. Code §12-21-142; Ariz. Rev. Stat. §12-2237; Cal. Evid. Code §1070; D.C. Code §§16-4702, 4703; Del. Code Ann. tit. 10, §4322; Idaho Code §9-714; Ind. Code §34-46-4-2; Ky. Rev. Stat. Ann. §421.100; Md. Code Ann., Cts. & Jud. Proc. Code §9-112; Mont. Code Ann. §26-1-902; Neb. Rev. Stat. §20-146; Nev. Rev. Stat. §49.275; N.J. Stat. Ann. §2A:84A-21; N.Y. Civ. Rights Law §79-h(b); Ohio Rev. Code Ann. §2739.12; Or. Rev. Stat. §§44.520-.530 (excepting certain limited circumstances in defamation suits); 42 Pa. Cons. Stat. Ann. §5942; S.D. Codified Laws §19-2-15; Utah R. Evid. 509 (exception where necessary to prevent imminent injury or death); 12 Vt. Stat. Ann. tit. 12, §1615; Wash. Rev. Code §5.68.010; W. Va. Code §57-3-10; Wis. Stat. §885.14.

¹² Alaska Stat. §§09.25.300, .310; Ark. Code Ann. §16-85-510; Colo. Rev. Stat. §13-90-119; Conn. Gen. Stat. §52-146t; Fla. Stat. §90.5015; Ga. Code Ann. §24-5-508; Haw. Rev. Stat. §621-31; 735 Ill. Comp. Stat. 5/8-907; *Lamberto v. Bown*, 326 N.W.2d 305, 307 (Iowa 1982); Kan. Stat. Ann. §60-482; La. Stat. Ann. §45:1453; Me. Rev. Stat. tit. 16, §61; *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373,

weigh in on whether a reporter's privilege exists in their courts. That consensus is comparable to the consensus in *Jaffee*—there, the Court noted that the uniform agreement of “all 50 States and the District of Columbia” “confirmed” “[t]hat it is appropriate for the federal courts to recognize a psychotherapist privilege.” *Jaffee*, 518 U.S. at 12. And while jurisdictions have not coalesced around a single answer to the question whether the reporter's privilege should be absolute or qualified, there is no doubt that there is an overwhelming nationwide consensus on the fact that such a privilege exists in the first place.¹³

Finally, it bears emphasis that while there are strong arguments for recognizing a reporter's privilege under the First Amendment and strong arguments for recognizing a privilege under FRE 501, there are even stronger arguments for recognizing some reporter's privilege under one source of law or the other. This case allows the Court to consider both possible routes to the sensible outcome here.

There is more than a fair chance that the Court would recognize under Rule 501 a federal common-law privilege for reporters to decline to identify their sources under compulsory process. The privilege advances a “public good” of the highest

375 (Mass. 1991); Mich. Comp. Laws §§767.5a, 767A.6; Minn. Stat. §§595.023-.025; *Missouri ex rel. Classic III Inc. v. Ely*, 954 S.W.2d 650, 653-55 (Mo. Ct. App. 1997); *Keene Pub. Corp. v. Cheshire Cnty. Sup. Ct.*, 406 A.2d 137, 138 (N.H. 1979); N.M. R. Evid. 11-514; N.C. Gen. Stat. §8-53.11; N.D. Cent. Code §31-01-06.2; Okla. Stat. tit. 12, §2506; R.I. Gen. Laws §§9-19-1 to -3; S.C. Code Ann. §19-11-100; Tenn. Code Ann. §24-1-208; Tex. Civ. Prac. & Rem. Code §22.024; Va. Code Ann. §19.2-271.5.

¹³ To be sure, this Court's opinion in *Branzburg*, surveying the law in 1972, cast doubt on the existence of a common-law reporter's privilege. 408 U.S. at 685. But that was in part because no reporter had ever asserted the privilege until 1958. *Id.* at 685-86. Rule 501 was designed “to continue the evolutionary development of testimonial privileges.” *Jaffee*, 518 U.S. at 9. And the development of a near-uniform consensus among states concerning the need for a reporter's privilege shows that the state of the common law is no longer what it was in 1972.

order. *Jaffee*, 518 U.S. at 9. It serves important “public ends.” *Id.* at 11. And it is supported by a nationwide consensus among states that such a privilege is necessary to protect legitimate newsgathering operations. *Id.* at 13.

III. Ms. Herridge Will Suffer Irreparable Harm Absent a Stay.

Absent 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. Circuit Justices considering similar stay requests concerning forced disclosure of confidential sources have had little difficulty finding that the threat of disclosure constituted irreparable harm warranting a stay. *In re Roche*, 448 U.S. 1312, 1316 (1980) (Brennan, J., in chambers).

It is well settled that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)). And this Court has routinely “shown a special solicitude for applicants who seek stays of actions threatening a significant impairment of First Amendment interests.” *N.Y. Times Co. v. Jascavich*, 439 U.S. 1331, 1333 (1978) (Marshall, J., in chambers).

If 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. The “cat [will be] out of the bag.” *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014)

(Kavanaugh, J.). Ms. Herridge would lose “confidentiality . . . for all time,” and “[t]he status quo could never be restored.” *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979). Not surprisingly, courts have recognized that the disclosure of confidential information is, by its nature, irreparable because “once ... putatively protected material is disclosed, the very right sought to be protected has been destroyed.” *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1065 (D.C. Cir. 1998).

In addition, damage to Ms. Herridge’s reputation as a reporter who keeps her promises of confidentiality would be permanent and beyond repair, thus crippling her ability to carry on her work as an Emmy-winning investigative reporter in the national security field. *See* App. 85a.

Plaintiff argued below that Ms. Herridge does not face any irreparable harm because she has an option to avoid immediate disclosure: defying the Contempt Order and incurring fines of \$800 a day. But that is no answer. Every party subject to a court order technically has the “option” of disobeying and incurring contempt sanctions. That choice is never treated as eliminating irreparable harm that would flow from *implementing* the order. *See, e.g., United States v. Philip Morris Inc.*, 314 F.3d 612, 622 (D.C. Cir. 2003) (assuming compliance with disclosure order to find irreparable harm), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009). Indeed, Circuit Justices have 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. *In re Roche*, 448 U.S. at 1316 (Brennan, J., in chambers). The question on a stay is always

whether the order below, *if carried into effect*, would cause irreparable harm pending appeal if the order is later overturned.

In addition, if there is no stay and Ms. Herridge is forced to disclose her source(s), that would likely render this case moot. Once the source(s) are disclosed, this Court could no longer provide Ms. Herridge any relief. The loss of the ability to seek further review would itself compound the irreparable harm she faces. *See, e.g., John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (“The fact that disclosure would moot . . . part of the Court of Appeals’ decision . . . would also create an irreparable injury” justifying stay).

IV. The Balance of Equities and the Public Interest Favor a Stay.

Both the balance of equities and public interest strongly favor a stay. *Cf. Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (considering these factors).

A stay will not harm Plaintiff, because it only “postpones the moment of disclosure[,] assuming [plaintiff] prevails[,] by whatever period of time may be required [] to hear and decide the appeal[.]” *Providence Journal*, 595 F.2d at 890. In addition, Plaintiff’s need for information is not time-sensitive. This case has been pending for seven and a half years, and the district court’s order has been stayed for two and a half years. A short additional delay to allow this Court time to consider a petition for certiorari will not harm Plaintiff. In particular, there is no impending deadline after which the information from Ms. Herridge will no longer be useful.

The public interest also strongly favors a stay. Indeed, the broader public

interest in this case is underscored by the multiple amicus filings below. *See, e.g.*, Amicus Brief of Sen. Ted Cruz, *Chen v. FBI*, No. 24-5050 (D.C. Cir. June 27, 2024); Amicus Brief of The Reporters Committee for Freedom of the Press, *Chen v. FBI*, No. 24-5050 (D.C. Cir. July 1, 2024). Plaintiff is seeking to uncover confidential source(s) related to reporting on a counterintelligence probe. The First Amendment interest in protecting the ability of investigative journalists to gather information from confidential sources is at its zenith in such national security cases. In that context, the need for confidentiality is especially acute because unauthorized leaks can carry severe repercussions. As two-time Pulitzer Prize winning national security journalist Steve Coll explained in a declaration below, the press “could not effectively report” on matters of national security and international affairs without using confidential sources. App. 87a ¶6. Based on his experience as a reporter focusing on national security and international affairs, he explained that “it simply is not possible” to contradict official government positions on these important topics—or to evaluate leaks directed by high-level officials—without using confidential sources who have access to protected information. *Id.* ¶¶6–8.

Given the secrecy surrounding national security matters, the public must particularly rely on a vigorous free press to fulfill the “essential role in our democracy” of “bar[ing] the secrets of government and inform[ing] the people.” *N.Y. Times Co.*, 403 U.S. at 717 (Black, J., concurring). These interests will be irrevocably compromised if Ms. Herridge is wrongly forced to reveal her source(s) before this Court reviews the case, because that disclosure would have a broad chilling effect,

detering potential sources and thereby hampering efforts of all investigative journalists to report on the government. App. 88a ¶11. As courts have recognized, “the press’ function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired.” *Zerilli*, 656 F.2d at 711. Such sources are essential, moreover, for the press to inform the people about situations such as the one in this case—where taxpayer dollars were funding a suspected former colonel in the PLA while she collected information on U.S. servicemembers and made it accessible from China.

The public interest also favors a stay because a remand could moot this case by forcing Ms. Herridge to disclose her source(s). A stay is thus necessary to protect this Court’s jurisdiction and allow it to provide guidance on the appropriate test for applying the First Amendment reporter’s privilege. *See, e.g., In re Roche*, 448 U.S. at 1316 (Brennan, J., in chambers) (stay warranted in reporter’s privilege case because disclosure of the source would “moot [applicant’s] claim”); *N.Y. Nat. Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) (“Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals [is] to protect this Court’s power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals”).

To the extent Plaintiff’s Privacy Act suit may be viewed as also furthering some public interest, *cf.* Contempt Order, App. 51a, a stay will not undermine that interest. A stay will cause only a temporary delay while this Court addresses whether the lower courts applied the correct test before ordering Ms. Herridge to disclose her

source(s). Whatever public interest inheres in the Privacy Act claim can be vindicated after this Court's review—if the order below survives. Without a stay, by contrast, the public interest in promoting the flow of information to the press by protecting journalist's confidential sources would be irretrievably compromised if Ms. Herridge is erroneously forced to disclose her source(s).

CONCLUSION

Ms. Herridge respectfully requests that the Court stay the court of appeals' mandate pending resolution of Ms. Herridge's forthcoming petition for a writ of certiorari and that the Court issue a stay promptly or, at a minimum, issue an **administrative stay of the mandate by 12:00 noon on Monday, June 29, 2026, pending consideration of this application.** The lower courts gave themselves the opportunity to decide the important issues here in an orderly fashion while preventing irreparable harm to Ms. Herridge and the public in the interim. This Court should give itself the same opportunity by granting the stay.

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