

PUBLIC COPY—SEALED MATERIALS REDACTED
No. 25A1448

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

REPLY IN SUPPORT OF 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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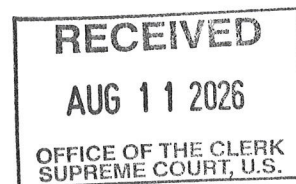


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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Plaintiff's opposition confirms that a stay of the mandate is warranted to allow this Court to consider Ms. Herridge's petition for certiorari before an order forcing her to turn over the identity of (presumptively) a U.S. government official to a former colonel in the Chinese PLA takes effect. Both courts below gave themselves the opportunity to decide the critical First Amendment issues here before that unprecedented disclosure order took effect. This Court should give itself the same opportunity.

First, Plaintiff fails to rebut Ms. Herridge's straightforward showing that this Court is reasonably likely to grant certiorari because this case implicates two distinct circuit splits: one on the standards for applying the First Amendment reporter's privilege and another on whether to recognize a non-constitutional reporters' privilege under Federal Rule of Evidence 501. This Court's guidance is needed on both issues. Plaintiff's suggestion that the district court supposedly already held that Ms. Herridge would fall short even under her preferred First Amendment test (Opp. 13–19) misrepresents the record. Plaintiff floated that argument below in opposition to Ms. Herridge's motion for a stay pending interlocutory appeal, and the district court itself rejected the argument. The district court flatly stated that it "remains possible that any refinement of the applicable test by the Circuit on appeal would alter the result." *Chen v. FBI*, No. 18-cv-3074, 2023 WL 6461011, at *1 (D.D.C. Sept. 6, 2023). That is equally true of any refinements from this Court.

Second, there is a fair prospect that this Court would reverse the D.C. Circuit on at

least one of the questions presented. Plaintiff cannot avoid the fact that the D.C. Circuit's approach to the First Amendment privilege boils down to a mere exhaustion requirement under which a plaintiff's need *always* trumps the privilege. That is no privilege at all. There is little reason to think this Court would take such a miserly view of the First Amendment, contrary to the majority of circuits that have addressed the issue, especially when this case so well illustrates the perverse consequences of the rule. When a constitutional privilege forces a reporter to turn over the identity of a U.S. government official to a former PLA colonel so that she can pursue a civil claim against the U.S. government under the Privacy Act, something is seriously awry. And even if this Court affirmed a decision reducing the constitutional privilege to an exhaustion requirement, the Court would still likely adopt a broader non-constitutional privilege under Rule 501, drawing on the near-uniform consensus among the states as Rule 501 expressly authorizes.

Third, there can be no dispute that Ms. Herridge faces irreparable harm absent a stay. Without a stay, she will either be forced to disclose her source(s), which Plaintiff does not dispute is a quintessential irreparable harm, or be held in contempt backed by fines currently set at \$800 a day. And notwithstanding Plaintiff's novel theory, this Court should not simply assume that Ms. Herridge will incur those fines and essentially preserve this Court's ability to adjudicate her certiorari petition on pain of contempt. A stay exists precisely to avoid situations where the only possibility for avoiding irreparable harm and preserving this Court's ability to consider a petition is to go into contempt. Regardless, being forced to pay daily fines for exercising one's First Amendment rights—in effect, a pay-as-you-go access fee for the Constitution—is itself an obvious and unambiguous

infringement on the First Amendment, which this Court's cases have for decades recognized as an irreparable injury. All the more so when the fees could, in total, amount to "hundreds of thousands of dollars of fines." App. 50a. Not a single case holds otherwise.

Finally, Plaintiff cannot and does not identify *any* material harm that would befall her as a result of a stay. A stay here would simply preserve the status quo that allowed the district court and court of appeals to adjudicate these consequential issues without contempt sanctions piling up or an appeal-mooting disclosure. Indeed, the court of appeals took over two and a half years to resolve this appeal with a stay in place. Extending the stay for a much shorter period to allow this Court to consider these critical issues makes eminent sense and clearly serves the public interest.

The bottom line in this case is that Ms. Herridge lived up to the highest standards of her profession, fulfilled the key role of the press in our democracy, and performed a public service by exposing what DOD later determined was a genuine national security threat. But under the D.C. Circuit's cramped view of the First Amendment, her reward is the brutal dilemma of choosing between disclosing her confidential source(s)—and thereby breaching the trust essential to her career as an investigative journalist—or suffering crippling fines. Absent a stay, Ms. Herridge will be forced to that choice before this Court even has an opportunity to decide whether it should review the D.C. Circuit's decision. None of that has anything to recommend it. The Court should stay the mandate from the D.C. Circuit so that it may consider the petition for a writ of certiorari in the ordinary course.

ARGUMENT

Contrary to Plaintiff's assertions, Ms. Herridge does not face an "especially heavy burden" (Opp. 2) in seeking this stay. The applicable standard is well-settled: The Court considers whether 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," without placing any especially heavy burdens on the stay applicant. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). As Plaintiff's own cited cases illustrate, her elevated standard applies only where an applicant seeks a stay of a district court order from this Court after being rebuffed by the lower courts. *See, e.g., Edwards v. Hope Medical Group for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers).¹ This case involves almost the opposite situation, where the lower courts have granted a stay pending appeal and kept that stay in place to facilitate appellate review. In that circumstance, no heightened standard applies, and the lower courts' actions strongly suggest that at least one of the factors this Court considers—irreparable harm—is satisfied. Regardless, this is such a quintessential situation for a stay that all the factors favor a stay under either standard.

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

As Ms. Herridge explained in her application to this Court, there is a reasonable

¹ *Beame v. Friends of the Earth*, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers), is similarly off point. There, the mandate from the court of appeals had issued months earlier, the district court had already entered an order on remand implementing that decision, and it was effectively the district court's new order that the applicant was seeking to stop. *Id.*; *see also Friends of the Earth v. Carey*, 76 F.R.D. 33, 37 (S.D.N.Y. 1977) (showing that request for a stay started in district court).

probability that this Court will grant her petition for a writ of certiorari because this case squarely implicates two separate and longstanding circuit splits on important issues of national significance. App.15a–23a. Plaintiff’s efforts to undermine the likelihood of plenary review all fail.

A. The District Court Did Not Enter an Alternative Holding Applying a Broader Balancing Test Under the First Amendment Privilege.

Plaintiff’s primary argument why the Court is unlikely to grant review rests on a blatant misstatement of the record. Contrary to Plaintiff’s assertions (Opp. 13–19), the district court did not enter an alternative holding applying the comprehensive balancing analysis that Ms. Herridge advocated. Instead, the district court squarely anchored its analysis on only “two guideposts: centrality and exhaustion,” App. 33a, and held that “those two factors are dispositive,” *id.* 40a. To be sure, in denying Ms. Herridge’s motion to quash, the district court went on to suggest, “for the sake of completeness,” that considering other factors in the balance “*likely* would not change the outcome.” *Id.* 22a (emphasis added). But the district court itself made clear that “*this prediction was far from conclusive.*” *Chen*, 2023 WL 6461011, at *1 (emphasis added). Indeed, the district court emphasized that “[i]t thus remains possible that any refinement of the applicable test by the Circuit on appeal would alter the result.” *Id.* That is consistent with this Court’s repeated recognition that predictive judgments are not the same thing as an actual analysis applying the governing test as refined by this Court. *Cf. Mullin v. Doe*, 2026 WL 1825840, at *11 (U.S. June 25, 2026) (plurality op.) (describing comparable “likelihood of success” analysis as “mak[ing] only a predictive—not a final—decision about the outcome of the case”). Simply

put, the district court itself expressly disavowed the alternative holding that Plaintiff is now trying to attribute to it.

In the Contempt Order, the district court similarly included a terse discussion about the likely outcome of weighing other factors, but in staying that order it again repeated the view that the “Circuit may ... refine the applicable First Amendment test in Herridge’s favor,” App. 50a—which could change the outcome of the case. The stay would have been pointless if Plaintiff were right and the district court believed it had already applied Ms. Herridge’s test, such that any “refinement” of the test on appeal would be meaningless. Thus, the district court itself acknowledged (again) that it had not made an alternative holding foreclosing Ms. Herridge’s arguments about the proper test for the reporter’s privilege. If anyone is “hid[ing] the ball” (Opp. 13) about what the district court said, it is Plaintiff.

In addition, to the extent the district court set out a cursory discussion of what a broader balancing “likely” would look like, it clearly was not applying the full balancing analysis that Ms. Herridge called for. For example, the passage Plaintiff cites as supposed evidence that the district court considered factors like the limited value of Plaintiff’s Privacy Act claim shows the opposite. The district court rejected such an analysis because it would “exceed[]” the “cursory inspection” of the merits that it believed was authorized under D.C. Circuit precedent. App. 41a.

Further, part of the test Ms. Herridge sought would require examining elements of Plaintiff’s case on summary judgment. The district court squarely rejected that analysis. *See* App. 22a; *id.* 34a (insisting it was “premature to preview summary judgment”).

Moreover, the whole point of testing Plaintiff's case on partial summary judgment (or motions in limine to exclude evidence of certain categories of damages) would be to narrow the case to establish that Plaintiff was likely to recover no damages or at most nominal damages. And that matters, because under a genuine balancing approach, it would make no sense to force the disclosure of a reporter's confidential sources in support of claim worth only a nominal amount. The district court, however, even in its hypothetical consideration of other factors, proceeded on the view that, if *any* part of Plaintiff's claim could survive, the First Amendment reporter's privilege would always *lose*. *See id.* 23a; *id.* 41a. That does not reflect even a hypothetical application of a balancing test. Instead, that outcome reflects an absolute rule that, if a plaintiff *needs* access to a confidential source even for a nominal claim, the plaintiff *always* gets access. Nothing could be further from the rule Ms. Herridge sought to have the courts apply.

The D.C. Circuit, moreover, did not engage in any further balancing analysis—even in musings in dicta—and it also decided the case on the express assumption that even a claim for “as little as \$1,000 in statutory damages,” *id.* 61a, would overcome the First Amendment privilege. That decision leads directly to the anomalous situation here where Ms. Herridge faces daily contempt sanctions that potentially approximate the entire value of the plaintiff's claim. That is absurd. A decision from this Court adopting a genuine balancing analysis for the privilege would plainly require redoing that analysis and almost certainly change the outcome in the case.

B. The Court Would Likely Grant Review to Resolve the Circuit Conflict on the First Amendment Privilege.

Once Plaintiff's illusory "alternative holding" theory is debunked, it is plain that the circuit conflict concerning the First Amendment privilege warrants review by this Court. Plaintiff's claim that the circuit split Ms. Herridge identifies is "fanciful" (Opp. 3) simply ignores the content of the cases making up the split. As Ms. Herridge has explained, the D.C. Circuit's test for applying the First Amendment reporter's privilege—under which the privilege is always overcome if (1) the information sought from a reporter is central to the case ("centrality"), and (2) the movant has exhausted other sources of information ("exhaustion"), (App. 62a–63a)—conflicts with the tests applied by multiple other circuits and state supreme courts. Plaintiff's efforts to explain away the conflicts follow a pattern. She isolates a snippet of language from an opinion addressing factors similar to centrality and exhaustion and then ignores directives explaining that those factors do not stand alone and that courts must also engage in a broader balancing of interests. That gets plaintiff nowhere, as no one is suggesting that centrality and exhaustion are irrelevant, but the circuits are plainly split on whether those two factors are the *only* factors or just two factors to consider in a broader balancing.

For example, Plaintiff notes that in *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980), the First Circuit identified "centrality, exhaustion, and non-frivolousness" as factors to consider. Opp. 19–20. Of course they are. But *Bruno* immediately explained that those factors were *not* an exclusive list of the "inquiries [that] should be made by the court," and that, instead, "[t]he task is one that demands sensitivity,

invites flexibility, and defies formula.” *Bruno*, 633 F.2d at 598. Plaintiff has no response to the First Circuit’s insistence that the *Bruno* test “contemplates consideration of a myriad of factors, often uniquely drawn out of the factual circumstances of the particular case.” *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998). In particular, as Ms. Herridge pointed out, the First Circuit specifically instructs that courts should “assess[]” “the importance to the [journalist’s] continued newsgathering effectiveness of preserving the source’s confidentiality,” *Bruno*, 633 F.2d at 597–98, a factor the D.C. Circuit squarely refused to consider. Plaintiff ignores this language. Plaintiff also has no good answer for the First Circuit’s instruction that courts must consider whether disclosure of a particular source might cause “harm ... disproportionate to a plaintiff’s litigation needs.” *Id.* at 595. Under Plaintiff’s reading, *Bruno* prohibited the exact proportionality analysis it claimed to be mandating.

Plaintiff also distorts *Bruno* by claiming that, when the First Circuit repeatedly instructed that a plaintiff must show “jury issues” on the essential elements of its case, it was not referring to summary judgment and, instead, was simply repeating the requirement that the case must not be frivolous. Opp. 20–21. That is nonsense. The First Circuit made clear it was identifying distinct requirements as it set out a virtual checklist, explaining that, even where (1) “the case does not appear frivolous,” (2) there “appears to be a jury issue” on essential elements, and (3) “the desired information appears more than remotely relevant,” the court still must pursue a further inquiry to “assess the extent to which there is a need for confidentiality.” *Bruno*, 633 F.2d at 597. In fact, the First Circuit made it express that courts should consider summary judgment *before* ordering disclosure,

instructing that courts “defer disclosure ... until more discovery has taken place *with the possibility that summary judgment would be appropriate.*” *Id.* at 598 (emphasis added). Postponing disclosure until elements of Plaintiff’s case could be tested on summary judgment is exactly what Ms. Herridge sought in this case and the D.C. Circuit refused to contemplate.

Plaintiff similarly distorts the Fourth Circuit’s test. She focuses solely on the fact that the Fourth Circuit has identified (1) relevance, (2) exhaustion, and (3) whether the plaintiff has a “compelling interest” in the information as factors to be considered. Opp. 21–22 (citing *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000)). But she ignores the Fourth Circuit’s holding that, even when those factors are satisfied, “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” before disclosure is ordered. *Ashcraft*, 218 F.3d at 287–88 & n.12. That is precisely the balancing of interests that the panel in this case refused to perform.

Plaintiff’s characterizations of the law in the Ninth and Tenth Circuits are similarly misplaced. Opp. 22. She again points to language discussing factors such as centrality and exhaustion—again, factors all agree are relevant—but ignores the instruction that those two factors are not dispositive and courts must engage in more comprehensive balancing. *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993), explained that the “First Amendment privilege and the opposing need for disclosure [must] be judicially weighed in light of the surrounding facts, and a balance struck to determine where lies the paramount interest.” *Id.* at 1292–93. It then went on to consider additional factors that “diminish[] the journalist’s, and the

public's, interest in nondisclosure.” *Id.* at 1295. As for the Tenth Circuit, *Grandbouche v. Clancy*, 825 F.2d 1463 (10th Cir. 1987) explained that the listed factors are “[a]mong the factors that the trial court must consider” and that the court still must decide “whether the privilege must be overcome by the need for the requested information” *after* considering the enumerated factors. *Id.* at 1466–67.

Finally, Plaintiff’s interpretation of *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) (Posner, J.)—which she claims did not deepen the split in authority by rejecting the privilege—defies the Seventh Circuit’s (and *McKevitt*’s author’s) understanding of the case. *U.S. Dep’t of Educ. v. Nat’l Collegiate Athletic Ass’n*, 481 F.3d 936, 938 (7th Cir. 2007) (Posner, J.) (citing *McKevitt* for the proposition that “[t]here isn’t even a reporter’s privilege in federal cases”); *see also, e.g., Cruz v. Guevara*, 801 F. Supp. 3d 767, 774 (N.D. Ill. 2024) (“[N]o federal reporter’s privilege exists in the Seventh Circuit.”); *Beverly v. Watson*, No. 14-cv-4970, 408 U.L. 3633316, at *5 (N.D. Ill. July 7, 2016) (same); *Thayer v. Chiczewski*, 257 F.R.D. 466, 468 (N.D. Ill. 2009) (same). There is a reason all those authorities disagree with Plaintiff: *McKevitt* is crystal clear in rejecting the existence of a First Amendment privilege. 339 F.3d at 532–33 (finding it “surprising” that some courts recognize a privilege after *Branzburg* and instructing that “rather than speaking of privilege, courts should simply make sure that a subpoena ... directed to the media, like any other subpoena ... is reasonable”).

Plaintiff also mischaracterizes state decisions. First, Plaintiff dismisses *In re Grand Jury Proc. (Ridenhour)*, 520 So. 2d 372 (La. 1988), merely because it cites *Zerilli* as an example of a case recognizing the privilege, despite the fact that the case plainly calls for a

comprehensive balancing of interests. *Id.* at 376. Next, Plaintiff claims that *In re Letellier*, 578 A.2d 722, 726 (Me. 1990), is inapposite because it endorsed balancing in a criminal case. That argument cuts *against* Plaintiff—courts generally apply a *less* protective version of the privilege in criminal cases. The case Plaintiff cites to support her argument makes this point clear, as the court, faced with a civil action, went beyond *Letellier*’s balancing test and added *Bruno*’s requirement that Plaintiff show a jury issue on the essential elements of its case. *Levesque v. Doocy*, 247 F.R.D. 55, 57–58 (D. Me. 2007) (granting motion to quash for failure to show jury issues). Other state courts have adopted a balancing test as well. *See, e.g., State v. Davis*, 720 So. 2d 220, 224 (Fla. 1998) (requiring courts to weigh the parties’ interests as part of its “compelling need” factor); *Mitchell v. Superior Ct.*, 690 P.2d 625, 634 (Cal. 1984) (listing “the importance of protecting confidentiality in the case at hand” as a factor to be weighed).

Finally, there is no merit to Plaintiff’s argument that Ms. Herridge has made an “opportunistic shift” (Opp. 24) by asserting a conflict among the circuits only after the D.C. Circuit panel issued its decision. That claim is doubly misguided: First, what mattered in the D.C. Circuit was D.C. Circuit precedent, *see LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996), which Ms. Herridge addressed at length below. Aplt. Br. at 22–29, *Chen v. FBI*, No. 24-5050 (D.C. Cir. June 26, 2024). And second, the circuit conflict was *created* by the D.C. Circuit’s novel and cramped understanding of First Amendment protections in this case; there was no occasion to inform the court of a circuit split that did not yet exist. Once the panel created the split, Ms. Herridge promptly raised it to the court in her next filing—her petition for rehearing en banc—as even Plaintiff acknowledges.

C. There Is a Reasonable Probability the Court Will Grant Certiorari to Resolve the Conflict on the Common Law Reporter's Privilege under Rule 501.

Plaintiff's assertions that the Court would not grant certiorari to address the existence of a non-constitutional reporter's privilege under Rule 501 also miss the mark.

First, contrary to Plaintiff's claims, nothing in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which rejected an absolute *First Amendment* reporter's privilege in the *criminal* context, bars recognition of a *common law* reporter's privilege (whether absolute or qualified) in *civil* cases. Indeed, much has changed since this Court decided *Branzburg* in 1972. In 1975, Congress enacted Rule 501 of the Federal Rules of Evidence, which affirmatively invites federal courts to define new privileges by interpreting "[t]he common law ... in the light of reason and experience." As this Court has explained, Rule 501 reflects Congress' "affirmative intention not to freeze the law of privilege," but to "leave the door open to change," *Trammel v. United States*, 445 U.S. 40, 47 (1980), and the evolutionary development of testimonial privileges." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996). And while only 17 states recognized a reporter's privilege when the Court decided *Branzburg*, *see* 408 U.S. at 689 n.27, virtually every state recognizes the privilege today. That consensus "indicates that 'reason and experience' support recognition of the privilege." *Id.* at 13.²

Second, Plaintiff's attempt to claim that there is no split in authority between the Third Circuit—which recognizes a common law privilege—and the D.C. Circuit—which refuses to do so—fails. Plaintiff contends that the Third Circuit's reporter's privilege test,

² The criminal cases Plaintiff cites similarly inapposite. *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013); *In re Grand Jury Procs.*, 5 F.3d 397 (9th Cir. 1993). Both found themselves bound by *Branzburg* and invoked the importance of enforcing the criminal laws as part of their analyses.

regardless of its basis, is identical to the D.C. Circuit's test. But that claim is again an exercise in selective quotation. In a now-familiar move, Plaintiff points to language in *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979), instructing courts to consider factors similar to centrality and exhaustion, which everyone agrees are relevant considerations, but ignores the court's clear instruction that courts must "balance ... 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 again something the D.C. Circuit expressly refused to do. Plaintiff's fallback argument—that the *Riley* test must be identical to the D.C. Circuit test because the D.C. Circuit has previously cited *Riley*—fails for the reasons given above.

Plaintiff's argument that there is too much "vari[ation]" in state privileges to support creating a federal analog also fails. Opp. 34. First, there is no variation on the most critical question: whether a reporter's privilege exists in the first place. Second, variation on the precise contours of that privilege is not fatal. In *Jaffee*, this Court recognized a common-law psychotherapist's privilege *despite* variation in the contours of the state-level analogs. See 518 U.S. at 12 (noting that 50 states applied "some form" of relevant privilege); see also *id.* at 16 (discussing variations). Last, any variation is of little consequence here. Twenty-three jurisdictions recognize an absolute privilege in non-defamation civil cases. Appl. 33. Two more recognize a privilege that, although not always absolute, would be absolute in this case because they contain only exceptions not relevant here.³ Eighteen more require

³ Ark. Code Ann. §16-85-510; R.I. Gen. Laws §§9-19.1 to -3.

a comprehensive balancing of interests.⁴ As does the Third Circuit’s test. *Riley*, 612 F.2d at 716. In other words, the states (and District of Columbia) are virtually uniform in the only metric that matters—almost all provide a privilege that is more protective than the rule adopted below. Were the Court to endorse even the least protective of these options and require an actual balancing of interests, the outcome of this case would likely change. That reality similarly disposes of Plaintiff’s argument that the common law privilege would simply mirror the D.C. Circuit’s test—that claim has not been borne out in *any* of the jurisdictions to have adopted a reporter’s privilege, whether under statute or common law.

Finally, the fact that the Court declined to grant certiorari in *Risen v. United States*, 572 U.S. 1149 (2014), and *Thomas v. Lee*, 547 U.S. 1187 (2006), changes nothing. *Risen* was a criminal case, and recognition of a reporter’s privilege in the criminal context remains rare. As for *Thomas*, twenty years have passed since the Court declined review in that case. Over those twenty years, states have continued to enact or expand reporter’s privilege statutes, and their experience with the successful expansion of the privilege is a key factor in determining whether to recognize a common law privilege. *Jaffee*, 518 U.S. at 12. This Court’s instruction that courts should “continue the evolutionary development of testimonial privileges,” *id.* at 9, would be meaningless if a twenty-year-old, unexplained

⁴ Alaska Stat. §§09.25.300, .310(b); Colo. Rev. Stat. §13-90-119; Conn. Gen. Stat. §52-146t; *State v. Davis*, 720 So. 2d 220, 224 (Fla. 1998); Haw. Rev. Stat. §621-31; 735 Ill. Comp. Stat. 5/8-907; *Lamberto v. Bown*, 326 N.W.2d 305, 309 (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, 375 (Mass. 1991); *State ex rel. Classic III Inc. v. Ely*, 954 S.W.2d 650, 655 (Mo. Ct. App. 1997); *Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 160 N.H. 227, 235–36 (2010); N.M. R. Evid. Rule 11-514; *Grand Forks Herald v. Dist. Ct. in & for Grand Forks Cnty.*, 322 N.W.2d 850, 857 (N.D. 1982); Tenn. Code Ann. §24-1-208; Tex. Civ. Prac. & Rem. Code §22.024; *Clemente v. Clemente*, 56 Va. Cir. 530, at *1 (2001).

denial of certiorari foreclosed recognition of a privilege that nearly all the states have adopted. *Cf. Stebbing v. Maryland*, 469 U.S. 900, 907 (1984) (Marshall, J., dissenting) (“[I]t is axiomatic that denials of writs of certiorari have no precedential value.”).

Finally, it bears emphasis that if the Court grants review of the First Amendment question, it would be well served to grant review on the Rule 501 question so that it would have available both constitutional and non-constitutional grounds for decision. What makes no sense is the holding below that there is zero protection—neither constitutional nor common-law—for a national-security reporter forced to turn over the identity of (presumptively) a U.S. government official at the behest of a former PLA colonel pursuing a civil claim likely to produce at most a *de minimis* recovery.

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.

Plaintiff also fails to provide any sound basis for concluding that there is not a “fair prospect that a majority of the Court will vote to reverse the judgment below.” *Hollingsworth*, 558 U.S. at 190. To the contrary, there is every reason think that a majority of the Court would agree that the D.C. Circuit’s rule reducing the reporter’s privilege to a mere exhaustion requirement provides insufficient protection for reporters and their confidential sources. Indeed, this case perfectly illustrates the problems with that rule.

To start, Plaintiff wrongly suggests (Opp. 25) that *Branzburg v. Hayes*, somehow forecloses even the possibility that reporters could be entitled to protection for their confidential sources under the First Amendment. Every circuit to address the question

(except the Seventh Circuit)⁵ has reached the opposite conclusion. The courts of appeals routinely cite *Branzburg* as support for adopting a balancing test to apply the reporter's privilege. See, e.g., *Bruno*, 633 F.2d at 594; *Ashcraft*, 218 F.3d at 287; cf. *Riley*, 612 F.2d at 715 (basing "federal common law privilege" on *Branzburg*). Justice Powell's concurrence explained that the Court's decision in *Branzburg* "does not hold that [reporters] are without constitutional rights with respect to ... safeguarding their sources," and he went on to explain that such constitutional protections should be determined by applying a balancing test. *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring). There is no reason to think that a majority on this Court would reject the approach that circuits like the First Circuit have taken to applying such a test.

Next, Plaintiff tries to pretend that the test applied by the D.C. Circuit already does "balance[] a litigant's need for information against any potential harm that might befall reporters." Opp. 26. But that is obviously incorrect. The D.C. Circuit's approach is an absolute, mechanical rule under which, if a plaintiff *needs* a source to make his case and cannot uncover the source by other means, the plaintiff *always* gets access to the source from the reporter. The rule applies to civil and criminal cases alike, and there is no balancing of interests involved—in fact, there is no consideration of the reporter's interests at all. The mere fact that a plaintiff may be sent back to exhaust some other alternative avenues of discovery first (as in *Zerilli*, see Opp. 26) does not alter the ultimate rule—the plaintiff *always* gets the source eventually because the plaintiff's need is always treated as

⁵ See *McKevitt v. Pallasch*, 339 F.3d 530, 532–33 (7th Cir. 2003).

trumping any First Amendment privilege.

Plaintiff also misses the point in trying to debate whether Ms. Herridge has adequately shown in her stay application that the Privacy Act claim will likely be whittled down to no damages or almost no damages. Opp. 27–28. The relevant point is that the courts below refused even to *consider* whether Plaintiff’s claims might be cut down because they held that it was irrelevant. The D.C. Circuit decided the case on the express assumption that Plaintiff’s claim might end up being nothing more than a claim for “as little as \$1,000 in statutory damages.” App. 61a. But the D.C. Circuit still thought such a trivial claim warranted overriding the First Amendment privilege. *Id.* 61a–62a. There is at least a “fair prospect” that five members of this Court would disagree with that assessment. *See* Opp. 28. And that is especially true in a case like this where the evidence shows that forcing disclosure would hobble the career of the reporter involved.

Plaintiff is similarly off base in trying to brush away the national security context of the case, as if it is somehow “repugnant” (Opp. 29) to bring up the facts. DOD found as a matter of fact that Plaintiff [REDACTED] [REDACTED] and that Plaintiff [REDACTED] [REDACTED]. As a result, DOD determined that Plaintiff and her university were a national security threat and terminated their funding. Plaintiff then decided not to challenge those factual findings in court. Those factual findings may well give the government a defense in the Privacy Act case, *see* App. 28a–29a, and Ms. Herridge’s simple point is that defenses like that should be tested *before* she is required to

turn over her confidential source(s). Contrary to Plaintiff's overheated rhetoric, there would be nothing "repugnant" about a court taking into account that Plaintiff's Privacy Act claim might be vulnerable to defenses based on Plaintiff's past conduct before the court decides that Plaintiff's claim warrants overriding a constitutional privilege. And there is a fair prospect that five members of this Court would agree that such factors should be considered before compelling disclosure of confidential sources in aid of a claim that may collapse.

Finally, Plaintiff's vague assertion that a genuine balancing test would somehow be "inherently unworkable" (Opp. 26) is belied by the experience of the multiple circuits that rely on such a test. The First Circuit, for example, explains that its balancing test "demands sensitivity, invites flexibility, and defies formula," *Bruno*, 633 F.2d at 598, and that it "contemplates consideration of a myriad of factors, often uniquely drawn out of the factual circumstances of the particular case," *Cusumano*, 162 F.3d at 716. But that test has not proven unworkable in the more than forty years it has been applied.

B. There Is a Fair Prospect that the Court Will Recognize a Common Law Privilege Under 501.

When determining whether a common-law privilege would comport with "reason and experience," this Court considers two main factors: (1) 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 9–10, and (2) the "policy decisions of the States" with respect to state-level evidentiary privileges, *id.* at 12.

Plaintiff does not seriously dispute that the reporter's privilege advances a "public

good transcending the normally predominant principle of utilizing all rational means for ascertaining truth”—nor could she, as the legislatures and courts of forty-eight states and the District of Columbia, as well as nearly every U.S. court of appeals, hold differently. This factor plainly weighs in favor of recognizing a common law reporter’s privilege.

Rather than challenge the first factor, Plaintiff argues that the “policy decisions of the States” prong does not favor creation of a privilege because there is too much variation in how the states apply the privilege. As explained above, however, variation is not fatal. *See Jaffee*, 518 U.S. at 12 (noting that 50 states applied “some form” of relevant privilege); *see also id.* at 16 (discussing variations). The variations that exist, moreover, are of little consequence here, as forty-three jurisdictions recognize a privilege that would be more protective of Ms. Herridge than the D.C. Circuit’s test. *Supra* Part I.C. Even the least protective common law version of the privilege would likely change the outcome here.

Plaintiff’s related argument—that a common law privilege is unnecessary because it would mirror the D.C. Circuit’s test—similarly fails. Given the importance of the policy decisions of the states under *Jaffee*, there is no reason to suspect that this Court would adopt a version of the privilege mirroring the D.C. Circuit’s test. Almost no states have adopted such a limited version of the privilege. Accordingly, the policy decisions of the states also weigh in favor of recognizing a privilege.

Finally, Plaintiff briefly suggests that recognition of a common law reporter’s privilege would pose practical challenges (Opp. 34), but fails to answer even basic questions like how or why. Presumably, if there were genuine practical difficulties in applying a common law reporter’s privilege, they would have surfaced sometime in the half-century

during which the Third Circuit has recognized one. Plaintiff's inability to articulate even one is self-impeaching.

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

Plaintiff wholly fails to rebut the obvious irreparable harm that Ms. Herridge will suffer if the order below goes into effect. Plaintiff cannot and does not dispute that if Ms. Herridge complies with the order and discloses her source(s) she will suffer irreparable harm. There would be no way to undo the disclosure, and it would likely make this case moot, thus depriving Ms. Herridge of judicial review. *See, e.g., John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). Instead, Plaintiff rests entirely on the blithe suggestion (Opp. 35) that Ms. Herridge can defy the court order, pay \$800 a day, and continue to withhold her source(s). But courts do not deny otherwise appropriate stays by assuming the applicant can simply go into contempt. Regardless, that "option" does nothing to dispel the irreparable harm Ms. Herridge faces.

First, Plaintiff ignores the settled rule that "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)). Not even Plaintiff can dispute that disclosure of a confidential source is a classic irreparable injury that cannot be undone and would likely moot any appeal. But the First Amendment injury here is not limited to disclosing the source(s). Being forced to pay \$800 a day for the privilege of exercising one's First Amendment rights itself infringes those rights, even if the fines are (in theory) ultimately recoverable. It indisputably burdens those rights in a way that is wholly incompatible with

this Court’s consistent recognition that First Amendment “freedoms are delicate and vulnerable” and that even “[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.” *NAACP v. Button*, 371 U.S. 415, 433 (1963).⁶

Second, Plaintiff does not point to a single case adopting the proposition that mandatory disclosure orders do not impose irreparable injury simply because the fine for violating the order might one day be recoverable on appeal. Instead, Plaintiff’s cited cases stand for nothing more than the generic proposition that recoverable economic loss is not irreparable, without any analysis of the combined First Amendment and civil contempt fines context presented here.⁷

Moreover, it is backwards to evaluate irreparable harm on the assumption that an applicant will simply go into contempt. After all, the whole point of contempt fines in this context is to coerce compliance. Instead, the proper approach in analyzing whether a court order may inflict irreparable harm turns on the harm that would flow from *implementing*

⁶ Plaintiff’s rank speculation (Opp. 38 n.5) that Ms. Herridge can ride out the fines because she is supported by Fox News is not based on anything in the record. In any event, the district court made clear that it would consider modifying its order to require Ms. Herridge to pay all fines *personally*, App. 51a—and that it may increase the fines *weekly* so that Ms. Herridge may “rac[k] up potentially hundreds of thousands of dollars of fines,” *id.* at 50a—if the current order did not compel compliance. The district court has already foreshadowed that support from outside sources will *not* allow Ms. Herridge to avoid compliance.

⁷ *Data Axle, Inc. v. Nolting*, 176 F.4th 1097, 1100 (8th Cir. 2026), did not involve a stay or any First Amendment issues and merely noted in denying an interlocutory appeal that there had been no showing that \$1,000-a-day contempt fines would *not* be recoverable on appeal—the court did not even hold that the fines *would* be recoverable. Similarly, *McLean v. Cent. States, S.E. & S.W. Areas Pension Fund*, 762 F.2d 1204, 1210 (4th Cir. 1985), did not involve a stay or any First Amendment nexus and simply suggested in passing that reversal of an underlying order on appeal “ordinarily invalidates any civil contempt sanctions predicated thereon”—without even specifying what sanctions were involved. The other cases are even more irrelevant. See *United States v. Woodbury*, 263 F.2d 784, 787–88 (9th Cir. 1959) (potential that plaintiff might recover damages did not warrant interlocutory appeal); *Sampson v. Murray*, 415 U.S. 61, 91–92 (1974) (“loss of income” from being fired not irreparable harm); *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers) (recoverable economic losses insufficient for irreparable harm); *A.O. Smith Corp. v. F.T.C.*, 530 F.2d 515, 527 (3d Cir. 1976) (cost of complying with FTC order and threat of civil penalty not irreparable harm).

the order. *See, e.g., U.S. 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). And that is why courts routinely stay disclosure orders that threaten First Amendment rights without ever discussing the possibility that the litigant could pay—and later recover—contempt fines. *See, e.g., X Corp. v. Media Matters for Am.*, 120 F.4th 190, 196 (5th Cir. 2024); *In re Special Proc.*, 373 F.3d 37, 41 (1st Cir. 2004) (noting that civil contempt order requiring disclosure of journalist’s source imposed a fine of \$1,000 a day, but that court granted a stay pending appeal because “the claimed threat to First Amendment interests justified a stay”). After all, if compliance with an appealed order would so obviously inflict irreparable harm and moot the appeal that even the opposing party assumes that the applicant will go into contempt despite the mounting sanctions, that is a reason for a stay, not a reason to force an applicant to rack up massive contempt fines to preserve her appellate rights.

In fact, Circuit Justices have granted stays involving compelled disclosures that may violate journalists’ First Amendment rights even where the contempt sanctions are entirely unclear and the stay is justified solely by the *risk* that *any* sanction may compel the journalist to comply. *See Patterson v. Superior Ct. of Cal.*, 420 U.S. 1001, 1001 (1975) (Douglas, J., in chambers) (granting a stay even though “the record before me does not disclose whether these contempt adjudications have ever been formalized in any sense and does not indicate that any sanction has yet been imposed”). Plaintiff’s proposed analysis gauging the burden and recoverability of the sanction should properly never enter the equation.

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

Plaintiff is conspicuously silent about any material harm that she would suffer from a stay—because there is no such harm. This case has been pending for *over seven and a half years*. Plaintiff is seeking a confidential source for stories that were published *more than nine years ago*. Even if the Court were ultimately to deny Ms. Herridge’s petition for certiorari, at this point, waiting three more months until this Court can give the petition due consideration in the ordinary course will not affect Plaintiff’s case in the slightest. When it comes to balancing the equities, weighing Ms. Herridge’s weighty First Amendment interests against Plaintiff’s nonexistent harms is easy: “something ... outweighs nothing every time.” *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010).

Last, Plaintiff’s claim (Opp. 39–40) that a stay will harm the public interest in enforcing the Privacy Act is meritless. The public has limited (if any) interest in Plaintiff’s private action to recover damages. Even assuming such a public interest exists, it strains credulity to suggest that interest will be vindicated only if Ms. Herridge is immediately subjected to fines and forced to disclose her source(s) in a case that is already more than seven and a half years old. A short delay pending a petition for certiorari will have no impact on any public interest in vindicating the Privacy Act in this case. Nor would a stay undermine “the public interest in the enforcement of court orders” (Opp. 40), because it would not prevent the ultimate enforcement of the underlying Contempt Order if that order survives further review.

Properly understood, the public interest favors staying the mandate from the D.C. Circuit, because it favors preserving First Amendment protections for reporters’

confidential sources that foster the free flow of information to the press. Indeed, the public interest clearly tips in favor of a stay. The public interest in robust reporting in the national security arena is obvious and depends on reporters being able to maintain the confidentiality of their sources. *See* Reporters Comm. for Freedom of the Press Amicus Br. 4–8. Here, for example, Ms. Herridge’s reporting plainly promoted that public interest by exposing to public scrutiny a scenario that DOD later determined was a genuine national security threat. The public interest favors fostering the conditions that allow such reporting to occur—including preserving First Amendment protections for reporters’ confidential sources.

CONCLUSION

The Court should stay issuance of the mandate from the D.C. Circuit.

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