

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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CATHERINE V. HERRIDGE,

*Petitioner,*

v.

YANPING CHEN,

*Respondent.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals for the  
District of Columbia Circuit**

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**PETITION FOR WRIT OF CERTIORARI  
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August 20, 2026

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## QUESTION PRESENTED

This case involves the compelled disclosure of a journalist's confidential source(s) in civil litigation. Most circuits to address the question have held that, in the civil-litigation context, the reporter's privilege (whether rooted in the First Amendment or Federal Rule of Evidence 501) protects confidential sources from forced disclosure unless a meaningful balancing of the interests favors disclosure. In the decision below, the D.C. Circuit rejected that approach and applied a mechanical, two-factor test under which reporters must *always* give up their confidential sources to a private civil litigant if (1) the source is central to the litigant's case and (2) the litigant has exhausted other avenues of discovery. Applying that test, the court ordered Emmy-winning national security reporter Catherine Herridge to provide the name of her confidential counterintelligence source(s) to a former colonel in the Chinese People's Liberation Army in a low-stakes Privacy Act lawsuit against the federal government.

The question presented is:

Whether and in what circumstances civil plaintiffs may compel disclosure of a reporter's confidential sources under the First Amendment and Federal Rule of Evidence 501.

**PARTIES TO THE PROCEEDING**

Petitioner Catherine V. Herridge is a non-party subject to document and deposition subpoenas in the district court proceedings below. She was also the appellant in proceedings before the United States Court of Appeals for the District of Columbia Circuit. Respondent Yanping Chen is the plaintiff in the district court action and the appellee in the D.C. Circuit proceedings below. The Federal Bureau of Investigation, United States Department of Justice, United States Department of Defense, and United States Department of Homeland Security are defendants in the district court action.

**STATEMENT OF RELATED PROCEEDINGS**

*Chen v. FBI*, No. 24-5050 (D.C. Cir.) (opinion and judgment filed Sept. 30, 2025);

*Chen v. FBI*, No. 2305198 (D.C. Cir.) (appeal dismissed Sept. 25, 2023); and

*Chen v. FBI*, No. 1:18-cv-03074 (D.D.C.) (opinion and order finding petitioner in contempt filed Feb. 29, 2024).

## TABLE OF CONTENTS

|                                                                                                                     |       |
|---------------------------------------------------------------------------------------------------------------------|-------|
| QUESTION PRESENTED .....                                                                                            | i     |
| PARTIES TO THE PROCEEDING .....                                                                                     | ii    |
| STATEMENT OF RELATED PROCEEDINGS .....                                                                              | iii   |
| TABLE OF AUTHORITIES .....                                                                                          | viii  |
| PETITION FOR WRIT OF CERTIORARI .....                                                                               | 1     |
| OPINIONS BELOW .....                                                                                                | 4     |
| JURISDICTION .....                                                                                                  | 5     |
| CONSTITUTIONAL AND STATUTORY<br>PROVISIONS INVOLVED .....                                                           | 5     |
| STATEMENT OF THE CASE .....                                                                                         | 5     |
| REASONS FOR GRANTING THE PETITION .....                                                                             | 12    |
| I. The Decision Below Conflicts With Decisions<br>Of Other Circuits .....                                           | 14    |
| II. The Panel Below Erred In Adopting An<br>Excessively Narrow Understanding Of The<br>Reporter’s Privilege .....   | 23    |
| III. The Question Presented Is Important And<br>Recurring, And This Case Is An Ideal Vehicle<br>To Resolve It ..... | 32    |
| CONCLUSION .....                                                                                                    | 35    |
| APPENDICES                                                                                                          |       |
| Appendix A                                                                                                          |       |
| Order, Supreme Court of the United<br>States, <i>Herridge v. Chen</i> , No. 25A1448<br>(June 26, 2026) .....        | App-1 |

## Appendix B

Order, Supreme Court of the United States, *Herridge v. Chen*, No. 25A1448 (July 2, 2026) ..... App-2

## Appendix C

Opinion, United States Court of Appeals for the District of Columbia Circuit, *Herridge v. Chen*, No. 24-5050 (Sept. 30, 2025)..... App-3

## Appendix D

Order, United States Court of Appeals for the District of Columbia Circuit, *Herridge v. Chen*, No. 24-5050 (May 22, 2026) ..... App-15

## Appendix E

Order, United States Court of Appeals for the District of Columbia Circuit, *Herridge v. Chen*, No. 24-5050 (May 22, 2026) ..... App-17

## Appendix F

Order, United States Court of Appeals for the District of Columbia Circuit, *Herridge v. Chen*, No. 24-5050 (June 23, 2026) ..... App-19

## Appendix G

Memorandum Opinion and Order, United States District Court for the District of Columbia, *Chen v. FBI*, No. 18-cv-3074 (Feb. 29, 2024) ..... App-21

## Appendix H

Complaint, United States District Court for the District of Columbia, *Chen v. FBI*, No. 18-cv-3074 (Dec. 21, 2018) ..... App-50

## Appendix I

Catherine Herridge et al., *Fox News investigation: DoD-funded school at center of federal probes over suspected Chinese military ties*, Fox News (Feb. 24, 2017) ..... App-65

## Appendix J

Catherine Herridge et al., *Congress investigating taxpayer-backed school over alleged ties to Chinese military after Fox News report*, Fox News (May 1, 2017) ..... App-73

## Appendix K

Catherine Herridge et al., *FBI ‘reopening’ probe of DoD-funded school with suspected Chinese military ties, rep says*, Fox News (June 28, 2017) ..... App-77

## Appendix L

Relevant Constitutional Provision and Federal Rule ..... App-82  
 U.S. Const. amend. I ..... App-82  
 Fed. R. Evid. 501 ..... App-82

## SEALED APPENDICES

## Appendix M

..... App-83

Appendix N

|            |        |
|------------|--------|
| [REDACTED] |        |
| [REDACTED] |        |
| [REDACTED] |        |
| [REDACTED] | App-91 |

## TABLE OF AUTHORITIES

**Cases**

|                                                                                                           |                        |
|-----------------------------------------------------------------------------------------------------------|------------------------|
| <i>Ashcraft v. Conoco, Inc.</i> ,<br>218 F.3d 282 (4th Cir. 2000).....                                    | 18, 19, 21, 24         |
| <i>Baker v. F &amp; F Inv.</i> ,<br>470 F.2d 778 (2d Cir. 1972) .....                                     | 29, 30                 |
| <i>Branzburg v. Hayes</i> ,<br>408 U.S. 665 (1972).....                                                   | 3, 22, 25, 34          |
| <i>Bruno &amp; Stillman, Inc.</i><br><i>v. Globe Newspaper Co.</i> ,<br>633 F.2d 583 (1st Cir. 1980) .... | 17, 18, 20, 21, 26, 27 |
| <i>Cochran v. United States</i> ,<br>770 F.2d 949 (11th Cir. 1985).....                                   | 22                     |
| <i>Cruz v. Guevara</i> ,<br>801 F.Supp.3d 767 (N.D. Ill. 2024).....                                       | 17                     |
| <i>Cusumano v. Microsoft Corp.</i> ,<br>162 F.3d 708 (1st Cir. 1998) .....                                | 17, 18                 |
| <i>Department of Educ. v. NCAA</i> ,<br>481 F.3d 936 (7th Cir. 2007).....                                 | 16                     |
| <i>Gonzales v. Nat’l Broad. Co., Inc.</i> ,<br>194 F.3d 29 (2d Cir. 1999) .....                           | 16, 20                 |
| <i>Grandbouche v. Clancy</i> ,<br>825 F.2d 1463 (10th Cir. 1987).....                                     | 19                     |
| <i>Grosjean v. Am. Press Co.</i> ,<br>297 U.S. 233 (1936).....                                            | 24                     |
| <i>In re Grand Jury Procs. (Ridenhour)</i> ,<br>520 So.2d 372 (La. 1988) .....                            | 19                     |
| <i>In re Grand Jury Procs.</i> ,<br>5 F.3d 397 (9th Cir. 1993).....                                       | 20                     |

|                                                                                                    |                                    |
|----------------------------------------------------------------------------------------------------|------------------------------------|
| <i>In re Letellier</i> ,<br>578 A.2d 722 (Me. 1990) .....                                          | 19                                 |
| <i>In re Miller</i> ,<br>397 F.3d 964 (D.C. Cir. 2005) .....                                       | 3                                  |
| <i>In re Miller</i> ,<br>438 F.3d 1141 (D.C. Cir. 2006) .....                                      | 4, 30, 34                          |
| <i>Jaffee v. Redmond</i> ,<br>518 U.S. 1 (1996) .....                                              | 3, 29, 30, 31                      |
| <i>Landmark Commc'ns, Inc. v. Virginia</i> ,<br>435 U.S. 829 (1978) .....                          | 23                                 |
| <i>LaRouche v. Nat'l Broad. Co., Inc.</i> ,<br>780 F.2d 1134 (4th Cir. 1986) .....                 | 19                                 |
| <i>United States v. LaRouche</i> ,<br>841 F.2d 1176 (1st Cir. 1988) .....                          | 20                                 |
| <i>Lee v. Department of Just.</i> ,<br>428 F.3d 299 (D.C. Cir. 2005) .....                         | 2, 3, 9, 10, 12,<br>13, 15, 26, 34 |
| <i>McKevitt v. Pallasch</i> ,<br>339 F.3d 530 (7th Cir. 2003) .....                                | 14, 16                             |
| <i>Miller v. Transamerican Press, Inc.</i> ,<br>621 F.2d 721 (5th Cir. 1980) .....                 | 16                                 |
| <i>Minneapolis Star &amp; Tribune Co.</i><br><i>v. Minn. Comm'r</i> ,<br>460 U.S. 575 (1983) ..... | 29                                 |
| <i>Mitchell v. Superior Ct.</i> ,<br>690 P.2d 625 (Cal. 1984) .....                                | 19                                 |
| <i>N.Y. Times v. United States</i> ,<br>403 U.S. 713 (1971) .....                                  | 24                                 |
| <i>Pell v. Procunier</i> ,<br>417 U.S. 817 (1974) .....                                            | 25                                 |

|                                                                                                                                                                              |                |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| <i>Riley v. City of Chester</i> ,<br>612 F.2d 708 (3d Cir. 1979) .....                                                                                                       | 20             |
| <i>Shoen v. Shoen</i> ,<br>5 F.3d 1289 (9th Cir. 1993).....                                                                                                                  | 19, 21         |
| <i>State v. Davis</i> ,<br>720 So.2d 220 (Fla. 1998) .....                                                                                                                   | 19             |
| <i>United States v. Caporale</i> ,<br>806 F.2d 1487 (11th Cir. 1986).....                                                                                                    | 16             |
| <i>United States v. Sterling</i> ,<br>724 F.3d 482 (4th Cir. 2013).....                                                                                                      | 3, 20, 34      |
| <i>Univ. of Pa. v. EEOC</i> ,<br>493 U.S. 182 (1990).....                                                                                                                    | 28             |
| <i>Zerilli v. Smith</i> ,<br>656 F.2d 705 (D.C. Cir. 1981).....                                                                                                              | 23             |
| <b>Statutes and Rule</b>                                                                                                                                                     |                |
| 5 U.S.C. §552a(a)(4).....                                                                                                                                                    | 33             |
| 5 U.S.C. §552a(b) .....                                                                                                                                                      | 8, 33          |
| 5 U.S.C. §552a(g)(4).....                                                                                                                                                    | 8              |
| Fed. R. Evid. 501 .....                                                                                                                                                      | 28, 29, 31, 32 |
| <b>Other Authorities</b>                                                                                                                                                     |                |
| Aff. in Support of Two Appls. for Search<br>Warrants, <i>In re Search of 2122 21st Rd. N.</i> ,<br><i>Arlington</i> , No. 1:12-sw-1002<br>(E.D. Va. Dec. 3, 2012).....       | 7              |
| Mark Fainaru-Wada & Lance Williams,<br><i>Game of Shadows: Barry Bonds, BALCO,</i><br><i>and the Steroids Scandal that Rocked</i><br><i>Professional Sports</i> (2006) ..... | 32             |

|                                                                                                                                                                                                                                                                                                                                                                                     |    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Natalie Gross, <i>DoD bans popular TA school from accepting the benefit</i> , Military Times (Apr. 6, 2018), <a href="https://perma.cc/D9VA-MXWF">perma.cc/D9VA-MXWF</a> .....                                                                                                                                                                                                      | 7  |
| Seymour M. Hersh, <i>The Massacre at My Lai</i> , The New Yorker (Jan. 15, 1972), <a href="https://perma.cc/42SN-G56G">https://perma.cc/42SN-G56G</a> .....                                                                                                                                                                                                                         | 33 |
| Seymour M. Hersh, <i>Torture at Abu Ghraib</i> , The New Yorker (May 3, 2004), <a href="https://perma.cc/QXM2-L9DN">https://perma.cc/QXM2-L9DN</a> .....                                                                                                                                                                                                                            | 33 |
| Neil Sheehan, <i>Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement</i> , N.Y. Times (June 13, 1971), <a href="https://www.nytimes.com/1971/06/13/archives/vietnam-archive-pentagon-study-traces-3-decades-of-growing-u-s.html">https://www.nytimes.com/1971/06/13/archives/vietnam-archive-pentagon-study-traces-3-decades-of-growing-u-s.html</a> ..... | 33 |
| <i>Reporter's Privilege Compendium</i> , Rep.'s Comm. for Freedom of the Press, (last accessed Aug. 16, 2026), <a href="https://www.rcfp.org/reporters-privilege/">https://www.rcfp.org/reporters-privilege/</a> .....                                                                                                                                                              | 31 |
| S. Rep. No. 93-1277 (1974) .....                                                                                                                                                                                                                                                                                                                                                    | 29 |
| Tim Weiner, <i>W. Mark Felt, Watergate Deep Throat, Dies at 95</i> , N.Y. Times (Dec. 19, 2008), <a href="https://www.nytimes.com/2008/12/19/washington/19felt.html">https://www.nytimes.com/2008/12/19/washington/19felt.html</a> .....                                                                                                                                            | 32 |
| Charles A. Wright & Kenneth W. Graham, <i>Fed. Prac. &amp; Proc.</i> (1st ed. Apr. 2026 update) .....                                                                                                                                                                                                                                                                               | 29 |
| U.S. Dep't of Just., Off. of Priv. & C.L., <i>Overview of the Privacy Act of 1974</i> (2020 ed.), <a href="https://perma.cc/F5NT-NB2L">https://perma.cc/F5NT-NB2L</a> .....                                                                                                                                                                                                         | 8  |

## PETITION FOR WRIT OF CERTIORARI

The decision below orders Emmy-award winning national security reporter Catherine Herridge to hand over her confidential source(s)—presumably U.S. government personnel with knowledge of a counterespionage investigation—to a former colonel in the People’s Liberation Army, the army of the Chinese Communist Party, who has filed a civil suit against the government under the Privacy Act. In reaching that illogical result, the D.C. Circuit deepened two circuit conflicts. The court dramatically diluted the First Amendment reporter’s privilege with a two-factor test under which every civil litigant who needs a reporter’s confidential source and cannot discover it by other means can automatically compel disclosure. That approach creates a privilege in name only and parts ways with multiple circuits that provide reporters with meaningful protection by balancing a civil litigant’s needs against the recognized harm to the press that results from forcing disclosure of sources. Respondent’s effort to force a national-security reporter to disclose her sources to a suspected foreign agent pursuing a low-stakes Privacy Act claim would have failed in other circuits. Having the least First Amendment protection for reporters in the Nation’s capital has nothing to recommend it. The D.C. Circuit also deepened an existing conflict with the Third Circuit, which recognizes a reporter’s privilege under Federal Rule of Evidence 501. This Court’s intervention is sorely needed to resolve the conflicts in the law and restore a reporter’s privilege that adequately protects the press.

In 2017, petitioner Herridge was the lead reporter on a series of stories about counterespionage concerns regarding respondent Yanping Chen, a former colonel in the PLA who was running a university that catered to U.S. military personnel and collected information on thousands of U.S. servicemembers in the process. Making matters worse, the Department of Defense was effectively funding this enterprise through a tuition assistance program. In 2018, DOD conducted an inquiry and publicly terminated the university from the tuition assistance program on national security grounds. Rather than challenge that decision, Chen sued the government under the Privacy Act, claiming that information from government files that had appeared in Herridge's stories caused DOD to cut off her funding. Chen then subpoenaed Herridge, and the courts below rejected Herridge's claim of reporter's privilege and ordered her to turn over the name(s) of her confidential national security source(s) to Chen, a former PLA colonel whom DOD found to be a national security threat.

The decision below cries out for this Court's review. Confidential sources in the Nation's capital have provided the basis for some of the most important news reports in the Nation's history. Yet the D.C. Circuit's "arid two-factor test allows the exigencies of even the most trivial litigation to trump core First Amendment values." *Lee v. Department of Just.*, 428 F.3d 299, 301 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of rehearing en banc). Indeed, the decisions below provide a roadmap for using the Privacy Act to destroy the reporter's privilege. Under the panel's approach, no reporter could make a credible promise of confidentiality to any government

source. Any modern-day Watergate malefactor, disgraced government official, or foreign espionage suspect could file a Privacy Act suit and compel the disclosure of a modern-day Deep Throat. *Id.* at 302 (Garland, J., dissenting from denial of rehearing en banc). In the D.C. Circuit, in contrast to other circuits, the reporter's privilege "is effectively no privilege at all." *Id.* In the one location where First Amendment interests are at their zenith, the privilege is at its nadir.

This Court should not let that anomaly persist. Only once, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), has the Court considered the reporter's privilege, and that was in the context of a criminal case. That 5-4 decision is over fifty years old and hardly settled the law on the issue. As one judge put it, the "lessons of *Branzburg* about as clear as mud." *United States v. Sterling*, 724 F.3d 482, 523 (4th Cir. 2013) (Gregory, J., dissenting). "*Branzburg's* internal confusion," *In re Miller*, 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concurring), has caused all manner of uncertainty and disagreement about the federal reporter's privilege and its scope. Complicating matters further, three years after *Branzburg* noted that "Congress has freedom" to provide for a non-constitutional privilege, 408 U.S. at 706, Congress enacted Federal Rule of Evidence 501, which "authorizes federal courts to define new privileges by interpreting 'common law principles ... in light of reason and experience.'" *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996). While the Third Circuit has taken up Congress' invitation to recognize a federal reporter's privilege under common law principles, others (including the D.C. Circuit) have refused. Given the confusion engendered by

*Branzburg*, some judges have insisted that only this Court can resolve the question. See *In re Miller*, 438 F.3d 1141, 1155 (D.C. Cir. 2006) (Sentelle, J., concurring) (explaining that the “common law privilege” argument “should appropriately be made to the Supreme Court”).

This case offers the rare clean vehicle for the Court to provide clarity in this critically important area of law, in a context where the stakes could not be higher. If the reporter’s privilege protects anything, it protects against the forced disclosure of a national-security source to a former colonel in the PLA pursuing a low-stakes civil claim. While the decision below purports to recognize a privilege, its two-part test provides no meaningful protection. Instead, it provides a roadmap on how to force the disclosure of confidential sources for those who attribute some adverse government action to the press. That makes illusory the promises of confidentiality that are critical to uncovering wrongdoing in our Nation’s capital. The decision below renders the reporters’ privilege weakest where it matters most. The petition should be granted.

#### OPINIONS BELOW

The district court order holding petitioner in contempt of court is reported at 721 F.Supp.3d 1 and reproduced at App.21-49. The D.C. Circuit decision affirming the district court’s order is reported at 153 F.4th 1289 and reproduced at App.3-14. The D.C. Circuit order denying petitioner’s petition for rehearing en banc is not reported but is reproduced at App.17-18.

## **JURISDICTION**

The D.C. Circuit issued its opinion on September 30, 2025 and its order denying rehearing en banc on May 22, 2026. App.3, 17. This Court has jurisdiction under 28 U.S.C. §1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The First Amendment and Federal Rule of Evidence 501 are reproduced at App.82.

## **STATEMENT OF THE CASE**

Petitioner Catherine Herridge is an acclaimed journalist whose reporting focuses on national security matters. In 2017, she published a series of stories for Fox News describing a counterespionage investigation into respondent Yanping Chen, the founder of the University of Management and Technology (UMT). The stories presented evidence that Chen had been a colonel in the People's Liberation Army and that she sought to hide that fact by lying on immigration and naturalization forms and telling others to lie under oath to conceal her past. App.65-72, 73-76, 77-81.

Nearly all of Herridge's 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. App.66-67, 69-70, 74, 80. Rhoads explained that Chen had admitted to him that she had been a PLA colonel and instructed him to lie about that fact when he was called to testify before a federal grand jury. App.66, 70. Rhoads also explained

that UMT was collecting information about U.S. servicemembers' military history that could then be remotely accessed. App.69. 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." App.75. Rhoads explained that DOD was paying UMT \$250,000 to \$300,000 per month through a tuition assistance program. App.74. As Rhoads summed it up: "It's a bad deal for the soldiers ... it's a bad deal for the taxpayer." App.74. The stories explained that the FBI and the U.S. Attorney's Office disagreed about whether to prosecute Chen, since prosecuting an espionage case consistent with the defendant's constitutional rights may force the government to disclose classified information, including intelligence sources and methods. App.71.

Finally, the stories included some information that Chen later claimed had come from government files and thus was subject to the Privacy Act. She 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), portions of her immigration forms (including a form showing her false denial that she had ever been affiliated with the Communist Party), and information from FBI memoranda memorializing interviews with her, including, in particular, an interview in which she denied having held rank in the PLA. In reality, when

the stories ran, almost all of the information Chen identified as the basis for her Privacy Act claims—with the exception of photographs of her in her PLA colonel's uniform—was a matter of public record in the Eastern District of Virginia in the affidavit the FBI had used to secure search warrants. *See* Aff. in Support of Two Appls. for Search Warrants ¶¶20-21, 48-49, *In re Search of 2122 21st Rd. N., Arlington*, No. 1:12-sw-1002 (E.D. Va. Dec. 3, 2012), Dkt.1.

In 2018, DOD publicly announced that it intended to terminate UMT from the tuition assistance program “on national security grounds.” Natalie Gross, *DoD bans popular TA school from accepting the benefit*, *Military Times* (Apr. 6, 2018), [perma.cc/D9VA-MXWF](https://perma.cc/D9VA-MXWF). DOD determined that [REDACTED]

[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

DOD also found that [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] DOD noted that [REDACTED]

[REDACTED]  
[REDACTED] DOD found that [REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] DOD  
also noted that [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

Chen never challenged any of DOD's findings in court. Instead, she sued several agencies under the Privacy Act, a statute enacted in the wake of the Watergate scandal "to provide individuals with more control over the gathering, dissemination, and accuracy of agency information about themselves." App.50-64; U.S. Dep't of Just., Off. of Priv. & C.L., *Overview of the Privacy Act of 1974* at 138 (2020 ed.), <https://perma.cc/F5NT-NB2L>. As relevant here, the Privacy Act prohibits any agency from "disclos[ing] any record ... by any means of communication to any person, or to another agency" without the permission of "the individual to whom the record pertains," except under certain enumerated circumstances. 5 U.S.C. §552a(b). Where the disclosure of an individual's protected information is "intentional or willful," the United States is liable for actual damages and, at a minimum, \$1,000 in statutory damages. *Id.* §552a(g)(4).

Chen's complaint sought to hold the federal government liable for her lost revenue after DOD terminated funding for UMT "on national security grounds." App.50. Although she did not sue Herridge directly, she sought to pin the blame for her losses on an alleged leak of Privacy Act information to Herridge. According to Chen, if Herridge had not run her stories, DOD never would have stumbled onto what Chen was up to (or never would have done anything about it), so Herridge's reporting supposedly caused DOD to cut off UMT on national security grounds. App.59-60.

In June 2022, Chen served subpoenas seeking to uncover Herridge's confidential source(s). App.24-25. Herridge moved to quash, asserting a reporter's privilege under both the First Amendment and Federal Rule of Evidence 501. App.25. Herridge argued that the district court should weigh the public interest in protecting a reporter's sources against Chen's private interest in compelling disclosure. That weighing would tip decisively in favor of non-disclosure for multiple reasons, including: (1) nearly all the reporting involved public information, limiting Chen's potential damages and the magnitude of her claim; (2) 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 Chen's alleged damages; (3) the risk that Chen is using her Privacy Act suit to effectively nullify the government's decision to cut ties with her by forcing the government to compensate her for passing information to the Chinese Communist Party; (4) the immense harm that forced disclosure would do to 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. *See generally* D.Ct.Dkt.96 (redacted public motion to quash).

The district court denied in relevant part the motion to quash and ordered Herridge to disclose her confidential source(s). App.25-29. The court held that, under the D.C. Circuit's decision in *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005),

two factors controlled the analysis of the First Amendment reporter's privilege: (1) whether the information sought is central to the plaintiff's case and (2) whether the plaintiff exhausted reasonable alternative avenues of discovery. *See* App.25-27. As 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 just an exhaustion requirement that is always satisfied when the reporter's source is truly confidential. *Accord Lee*, 428 F.3d at 302-03 (Garland, J., dissenting from denial of rehearing en banc). The district court then declined to recognize a reporter's privilege under Federal Rule of Evidence 501. App.28-29.

When Herridge declined to identify her source(s) at her deposition, the district court held her in contempt. App.43-44. The court fined her \$800 per day, but stayed its order "until completion of proceedings on a timely appeal." App.46-47.

The D.C. Circuit affirmed. App.3-4. Applying *Lee*, the panel concluded that the reporter's privilege is overcome whenever a plaintiff shows that the requested information is central to his case and that he has exhausted other potential sources of that information before turning to the reporter. App.9-10. The court rejected Herridge's argument that a court must go beyond that mechanical two-factor test and balance the important interests on both sides of the constitutional calculus before declaring the privilege overcome. App.11-13. "Herridge's proposed balancing test," the court explained, "echoes the view advanced

by [Judges Tatel, Garland, and Rogers] dissenting from denial of rehearing en banc in *Lee*.” App.12. The court felt itself bound by the panel opinion in *Lee*, which “held that a district court permissibly found a reporter’s privilege overcome based on findings of centrality and exhaustion in a Privacy Act case, without any broader balancing of private and public interests.” App.12.

The court then rejected Herridge’s argument that a court should not force a reporter to disclose her sources without first assessing whether the plaintiff’s claims could survive summary judgment. App.10-11. That order of proceedings would prevent an unnecessary disclosure in a case like this where Chen’s claim would fail for multiple independent reasons. Instead, the D.C. Circuit held that the plaintiff need only prove that her claims could survive Rule 12(b)(6)-type plausibility review before forcing a reporter to give away her sources. App.10-11.

Finally, the court rejected Herridge’s argument that a more nuanced reporter’s privilege should be recognized as a matter of federal common law under Federal Rule of Evidence 501. The Court refused to “end-run [its] precedent” under the First Amendment by creating a new test under Rule 501. App.13. Even though 48 states and the District of Columbia have adopted similar privileges—most of them after this Court’s *Branzburg* decision—the panel found that minor variations among the states defeated any argument that the state-level consensus supported recognition of a federal common law rule here. App.14. The court thus rejected Herridge’s arguments and affirmed the district court’s contempt order.

The court denied Herridge's en banc petition and her motion to stay the mandate. App.17-18, 19-20. This Court likewise denied Herridge's motion to stay the mandate over Justice Kavanaugh's dissent. App.2.

### **REASONS FOR GRANTING THE PETITION**

This case goes to the heart of the press's function in a democracy. At bottom, this dispute involves a clash between a suspected foreign agent's desire to misuse the Privacy Act to nullify the government's decision to terminate contracts with her and the public's interest in being informed about a national security threat. When a civil litigant seeks to force the press to disclose the identity of its confidential sources, most courts engage in a meaningful balancing test in assessing whether the reporter's privilege is overcome. The D.C. Circuit's two-factor test, however, leaves nothing to balance, especially in Privacy Act cases where the source's identity is always central and exhaustion will always be satisfied unless the source voluntarily reveals him or herself. As Judge Tatel has explained, the D.C. Circuit's approach to the reporter's privilege "allows the exigencies of even the most trivial litigation to trump core First Amendment values." *Lee*, 428 F.3d at 301 (Tatel, J., dissenting from denial of rehearing en banc). If the reporter's privilege is overcome anytime "the subject of the leak will be able to satisfy the centrality and exhaustion requirements," it "is effectively no privilege at all." *Id.* at 302 (Garland, J., dissenting from denial of rehearing en banc). The implications are significant: Under the D.C. Circuit's approach, "Plaintiffs wielding Privacy Act suits will routinely succeed in putting

reporters who receive whistleblower leaks to the choice of testifying or going to jail.” *Id.* at 302-03.

The threat to First Amendment values, not to mention common sense, necessitates this Court’s intervention. The decision below allows the Privacy Act to be weaponized to force reporters to turn over confidential sources in the short run and to undermine the entire enterprise of relying on confidential sources in the long run. And the “more such strategies succeed, the more they will be employed.” *Id.* at 303. This is a case in point: The order below forces an Emmy-winning reporter to disclose her national-security sources—presumably high-level government officials who helped expose a national security threat—to the very person who posed the threat. The decision below provides an obvious and easily replicable roadmap for anyone who believes confidential reporting helped contribute to their exposure and downfall. If the decision below is allowed to stand, it is hard to see how any would-be source would believe that promises of confidentiality could stick. Any subject of a government investigation or convicted felon—indeed, even a suspected foreign agent—could file a Privacy Act suit and compel the disclosure of high-level government sources who disclosed information to the press.

In short, this case presents important and pressing issues that have left the lower courts in dire need of guidance. The law governing the reporter’s privilege is in disarray. Circuits are deeply divided over whether a federal reporter’s privilege exists at all; if so, what the source of that privilege is; and, irrespective of the source, what must be shown to

overcome the privilege. Worse still, because of the D.C. Circuit's arid two-factor test, the reporter's privilege is the least protective in the Nation's capital, where it matters most.

This Court has not considered whether federal law provides protection for confidential sources since its sharply divided decision in the criminal grand jury context in *Branzburg*. The uncertainty that decision has generated frustrates and defeats the nearly unanimous policies of the states in this area. It also leads to confusion by sources and reporters, and creates a specter of jail time and other harsh penalties for reporters who do not know what promises, if any, they can make to their sources when engaged in newsgathering. The lower courts, as well as journalists, their sources, and litigants, would greatly benefit from this Court's guidance.

#### **I. The Decision Below Conflicts With Decisions Of Other Circuits.**

The federal courts of appeals are split over the existence, source, and scope of a reporter's privilege in civil cases. At least one circuit has held that there is no reporter's privilege at all. Other courts agree that there is a federal reporter's privilege but disagree about whether it stems from the First Amendment or Federal Rule of Evidence 501. Among the courts of appeals that recognize the privilege, there is disagreement about when and in what circumstances it can be overcome. See *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (noting that courts "do not agree on [the] scope" of the privilege). The Second, Fifth, Eleventh, and D.C. Circuits have adopted tests that allow "the exigencies of even the most trivial

litigation to trump core First Amendment values.” *Lee*, 428 F.3d at 301 (Tatel, J., dissenting from denial of rehearing en banc). Several other circuits require a meaningful balancing of the competing interests implicated by the compelled disclosure of confidential sources. However one looks at it, this Court’s guidance is sorely needed to settle the confusion amongst the federal courts of appeals about the existence, source, and scope of the reporter’s privilege.

1. In the decision below, the D.C. Circuit reaffirmed its mechanical, two-factor test for applying the reporter’s privilege 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. *See* App.11-13. Because the identity of a source is always central in a Privacy Act case (to prove willfulness and intent), *see Lee*, 413 F.3d at 60, that test reduces to an exhaustion requirement that is essentially always satisfied when the reporter and her source honor their confidentiality agreement. That amounts to an automatic rule of disclosure in Privacy Act cases—no matter how tenuous or trivial the plaintiff’s underlying claim. Put differently, courts in the D.C. Circuit, where virtually any person vexed by a disclosure by a federal employee can bring a Privacy Act claim, need not—indeed, may not—balance the competing interests implicated by the compelled disclosure of confidential sources; compelled disclosure is inevitable.

The Second Circuit has adopted a similar approach. Plaintiffs can overcome the privilege in that circuit by making out “a clear and specific showing”

that the information they seek is “highly material and relevant” to their claims, “necessary or critical to the maintenance of the claim,” and “not obtainable from other available sources.” *Gonzales v. Nat’l Broad. Co., Inc.*, 194 F.3d 29, 31 (2d Cir. 1999). That three-prong test is arguably more protective than the D.C. Circuit’s, since it requires a heightened “clear and specific showing” and requires that the requested information be not just “central” but “critical to the maintenance of the claim.” *Id.* But like the D.C. Circuit, the Second Circuit does not balance the interests of the public and the reporter against the interests of the plaintiff in determining whether the privilege has been overcome. The Fifth and Eleventh Circuits have adopted the Second Circuit’s test and reasoning. *See Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

The Seventh Circuit also refuses to balance the interests of the public and the reporter against the interests of the plaintiff, but that is because in the Seventh Circuit, “[t]here isn’t even a reporter’s privilege in federal cases.” *Department of Educ. v. NCAA*, 481 F.3d 936, 938 (7th Cir. 2007); *accord McKevitt*, 339 F.3d at 532-33. While the Seventh Circuit has acknowledged that “[t]he news media[s] ... ability to” “conduct investigations ... would be enhanced if they were permitted to conceal the identity of their sources,” it has nevertheless concluded that “they are not.” *NCAA*, 481 F.3d at 938; *see also Cruz v. Guevara*, 801 F.Supp.3d 767, 774 (N.D. Ill. 2024) (“[N]o federal reporter’s privilege exists in the Seventh Circuit.”).

2. By contrast, in the First, Third, Fourth, Ninth, and Tenth Circuits, overcoming a claim of privilege (whether under the First Amendment or Federal Rule of Evidence 501) requires plaintiffs to show that their interest in the information outweighs the reporter's and society's interests in keeping the identity of the source(s) confidential.

As the First Circuit has explained, "when a subpoena seeks divulgement of confidential information compiled by a journalist, ... courts must apply a balancing test." *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998). First, "the movant must make a prima facie showing that his claim of need and relevance is not frivolous." *Id.* To do so, it is not enough for the plaintiff to demonstrate that his claim meets the Rule 12(b)(6) standard (as it is in the D.C. Circuit, see App.10-11). Instead, the plaintiff must show that he "can establish jury issues on the essential elements of [his] case not the subject of the contested discovery." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980). In other words, the plaintiff must show that his claim could survive summary judgment on all the elements that do not depend on the confidential source information he seeks. *Id.* That approach protects reporters from plaintiffs who would "us[e] discovery powers in a fishing expedition," or whose claims would ultimately fail with or without the confidential information because, for example, of an inability to show causation (as here). *Id.*

If the plaintiff can show that he "can establish jury issues on the essential elements of [his] case," *id.*, and that the confidential information is relevant to

them, “the burden shifts to the objector to demonstrate the basis for withholding the information.” *Cusumano*, 162 F.3d at 716. At that point, the court must assess the “need for confidentiality.” *Bruno*, 633 F.2d at 597. The “need for confidentiality” is case specific: If, for example, the reporter’s information comes from an “unsolicited letter” rather than a cultivated source, then the need for confidentiality is minimal. *Id.* But if “revelation of sources will threaten physical or other harm,” then the need for confidentiality is substantial. *Id.* at 595. The court must then “place those factors that relate to the movant’s need for the information on one pan of the scales and those that reflect the objector’s interest in confidentiality and the potential injury to the free flow of information that disclosure portends on the opposite pan.” *Cusumano*, 162 F.3d at 716. At that final step, “courts must balance the potential harm to the free flow of information that might result against the asserted need for the requested information.” *Bruno*, 633 F.3d at 595-96.

The Fourth Circuit applies a similar balancing approach. A reporter’s privilege can be overcome only when “society’s need for the confidential information in question outweighs the intrusion on the reporter’s First Amendment interests.” *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000). The Fourth Circuit considers “whether there is a compelling interest in the information” and “whether the information can be obtained by alternative means.” *Id.* But courts must nonetheless “balance the interests involved,” *LaRouche v. Nat’l Broad. Co., Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986), which requires weighing the “compelling nature of the interest” in disclosure

against “the reporter’s interest in protecting the confidentiality of his sources,” *Ashcraft*, 218 F.3d at 288 n.12. The Ninth Circuit likewise demands 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). So does the Tenth. See *Grandbouche v. Clancy*, 825 F.2d 1463, 1466-67 (10th Cir. 1987).<sup>1</sup>

3. The Third Circuit adopts a similar balancing approach, albeit under Federal Rule of Evidence 501 rather than the First Amendment, further underscoring the split among lower courts when it comes to the reporter’s privilege. While the D.C. Circuit refused to recognize a reporter’s privilege under Rule 501, the Third Circuit has squarely held that under Rule 501 “journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources.” *Riley v. City of Chester*, 612 F.2d 708, 714-15 (3d Cir. 1979).<sup>2</sup> To overcome the

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<sup>1</sup> Because most states (and the District of Columbia) have adopted robust reporter’s privilege protections by statute, see Stay.App.33-34, there are relatively few state high court decisions addressing the contours of the reporter’s privilege under the First Amendment. The ones that have, however, have adopted the balancing approach adopted by the majority of federal courts of appeals, and rejected by the D.C. Circuit. See *In re Letellier*, 578 A.2d 722, 726 (Me. 1990); *In re Grand Jury Procs. (Ridenhour)*, 520 So.2d 372, 376 (La. 1988); *State v. Davis*, 720 So.2d 220, 224 (Fla. 1998); *Mitchell v. Superior Ct.*, 690 P.2d 625, 634-35 (Cal. 1984).

<sup>2</sup> The First, Fourth, and Ninth Circuits have also rejected a common law reporter’s privilege, at least in the criminal context. See *United States v. LaRouche*, 841 F.2d 1176, 1178 n.4 (1st Cir.

privilege in the Third Circuit, the plaintiff must show “a demonstrated, specific need for evidence.” *Id.* at 716. The court must then “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.* In other words, the Third Circuit applies the very balancing approach that the D.C. Circuit rejected.

4. Had the D.C. Circuit applied the balancing approach employed in other circuits, this case would have come out the other way. To start, if the D.C. Circuit employed the First Circuit’s approach, it would be impossible for Chen to “establish jury issues on the essential elements of [her] case not the subject of the contested discovery.” *Bruno*, 633 F.2d at 597. After all, there is no world in which Chen could survive summary judgment as to causation on her Privacy Act claim. For one, any damages that she suffered as a result of DOD’s termination of its relationship with UMT stemmed from DOD’s internal investigation into Chen and UMT. For another, the vast majority of Herridge’s reporting derived from publicly available information or information a whistleblower provided on camera, not government files covered by the Privacy Act. *See generally* App.65-72, 73-76, 77-81. So even if Chen could show some tenuous connection between Herridge’s reporting and DOD’s decision to terminate its relationship with UMT, she could not show that DOD’s termination was based on

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1988); *Sterling*, 724 F.3d at 505 (4th Cir.); *In re Grand Jury Procs.*, 5 F.3d 397, 402-03 (9th Cir. 1993). The Second Circuit cannot decide whether the reporter’s privilege stems from the First Amendment or Rule 501. *See Gonzales*, 194 F.3d at 35 n.5.

information that Herridge received from her confidential source(s).

Chen's problems would not end there. In other circuits, Herridge would prevail under the "sensitiv[e]" and "flexib[le]" balancing approach that governs. *Bruno*, 633 F.2d at 597-98. Herridge's "interest in protecting the confidentiality of [her] sources" in this context, *Ashcraft*, 218 F.3d at 288 n.12, is "paramount," *Shoen*, 5 F.3d at 1293. There is no suggestion that Herridge's source(s) provided her information without regard to whether it would be kept confidential. *See Bruno*, 633 F.2d at 597. Herridge is a national security reporter whose "continued newsgathering effectiveness" depends on "preserving [her] source's confidentiality." *Id.* at 597-98. Indeed, this is precisely the type of case "where revelation of sources will threaten ... harm" that is "quite disproportionate to [the] plaintiff's litigation needs." *Id.* at 595. Herridge submitted declarations in district court detailing the significant risk that Chen 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. D.Ct.Dkt.176-4, 176-5. The D.C. Circuit refused to even consider such national security harms in this case.

On the other side of the balance, the interest in providing Chen civil damages pales in comparison. This is not some high-stakes case: The D.C. Circuit acknowledged that Chen may have a claim for "only a small amount of damages"—perhaps no more than \$1,000 in statutory damages. App.11. The point of the

Privacy Act, moreover, is to deter the collection and dissemination of private information for partisan purposes—particularly the political misuse of information stored in computer databases. See *Cochran v. United States*, 770 F.2d 949, 959 n.15 (11th Cir. 1985). As other courts of appeals have recognized, it would invert the purposes of the Watergate-era Privacy Act to allow it to be used to unmask government whistleblowers that help reveal government misconduct or, as here, suspected efforts by agents of foreign powers to undermine our national security. See *id.* (explaining that “the Act does not evidence any intent to prevent the disclosure by the government to the press of current, newsworthy information of importance and interest”).

This case thus presents a fundamentally different dynamic from *Branzburg*, in which government prosecutors made a judgment that the reporters had information that was necessary to prosecute crimes with little relationship to speech about matters of overriding public concern. 408 U.S. at 667-77. In this civil case, by contrast, no government official has made a judgment that the need for the information outweighs the countervailing considerations favoring non-disclosure, and the court below affirmatively refused to undertake such balancing. Instead, this case involves a single private plaintiff with an axe to grind against the government, which has decided to cut ties with the plaintiff over national security concerns. The First Amendment costs of forced disclosure here are undoubtedly substantial. See *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978) (holding that information leaked to the press by a confidential source “lies near the core of the

First Amendment” because it concerned the “public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect”). But in the D.C. Circuit, in contrast to other circuits, those important First Amendment considerations can be waved away by a plaintiff pursuing a deeply flawed Privacy Act claim.

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In sum, the circuits are deeply divided over whether a federal reporter’s privilege exists at all; if so, what the source of that privilege is; and, irrespective of the source, what must be shown to overcome the privilege. Worse still, the D.C. Circuit’s approach allows virtually any plaintiff with a newsworthy gripe against the government to force the disclosure of confidential sources. Thus, in the one place where the First Amendment interests in reporting based on confidential government sources are greatest, the practical protection for reporters is nil. This Court should intervene to resolve the split and vindicate protections for the press.

## **II. The Panel Below Erred In Adopting An Excessively Narrow Understanding Of The Reporter’s Privilege.**

The panel’s mechanical two-part test cannot be squared with the First Amendment or with Federal Rule of Evidence 501.

1. “Compelling a reporter to disclose the identity of a confidential source raises obvious First Amendment problems.” *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981). The First Amendment singles out the press for distinct constitutional protection because of its important role as a “vital source of public

information.” *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936). That role requires constitutional protection for the news gathering function. And few government actions pose as direct a threat to the press and its public-informing function as state action compelling a reporter to disclose the identity of a source. “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. Put differently, compelling disclosure of confidential sources anywhere “erodes the ability of journalists everywhere to credibly promise confidentiality to sources who demand it.” D.Ct.Dkt.176-2, ¶11 (declaration of Dean of Columbia Journalism School). The result is 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 v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

To be sure, like most constitutional protections, the First Amendment protection against compelled disclosure is not absolute and can be outweighed by countervailing government interests, like criminal prosecution. But there is a vast difference between the government interest in effective criminal law enforcement and the interest of a civil litigant pursuing a dubious statutory claim for minimal damages. And evaluating the nature of the countervailing government interest and the First Amendment interests at stake is precisely why most circuits apply

a balancing test, rather than the kind of mechanical two-factor test employed below.

This Court has addressed the reporter's privilege just once. In *Branzburg*, the Court confirmed that the reporter's privilege was not absolute and must yield in the context of a grand jury conducting a criminal investigation. The Court emphasized the traditional importance of grand juries and the strong public interest in effective criminal investigation. 408 U.S. at 692-95. But while rejecting an absolute privilege, the Court recognized that news gathering is essential to a free press and merits First Amendment protection. *Id.* at 707-08. Justice Powell, who joined the majority opinion, wrote separately to explain the "limited nature of the Court's holding." *Id.* at 709. He explained 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 & n.\* (Powell, J., concurring). 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," and that the balance would have to be struck on a "case-by-case basis." *Id.* at 710.

In the wake of *Branzburg*, this Court has reiterated that reporters are "entitled to some constitutional protection of the confidentiality of [their] sources." *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (citing *Branzburg*, 408 U.S. at 684-85). And the lower courts, for their part, have recognized that civil cases, where the government interest in effective law

enforcement is absent, pose a distinct dynamic. See *Bruno*, 633 F.2d at 594-95. In such cases there is no government interest in law enforcement and there has been no assessment by a prosecutor that pursuit of a reporter and her sources is necessary under the circumstances of the case. Such cases thus demand a judicial evaluation of whether some other government interest is sufficient in the circumstances of the case to override the First Amendment interests recognized by this Court. The D.C. Circuit's "arid two-factor test," however, leaves no room for those considerations. *Lee*, 428 F.3d at 301 (Tatel, J., dissenting from denial of rehearing en banc). In the context of a Privacy Act claim, a "test focused only on need and exhaustion will ... almost always be satisfied, leaving the reporter's source unprotected regardless of the information's importance to the public." *Id.* at 302. While *Chen* nevertheless characterizes the D.C. Circuit's approach as a "balancing test," Stay.Opp.26, in fact it leaves nothing to balance. The outcome of any dispute will be determined solely by the plaintiff's evidentiary needs, rather than any assessment of the competing interests implicated by the compelled disclosure of confidential sources.

That failure to consider any meaningful balancing is exacerbated by the D.C. Circuit's refusal to even consider whether the plaintiff's case will founder at summary judgment even with disclosure. Here, partial summary judgment briefing would establish that *Chen*'s claim fails in its entirety or is radically curtailed in ways that impact the appropriate balancing (and the settlement dynamic). Forcing disclosure of Herridge's confidential source(s) without conducting such an inquiry radically undervalues the

First Amendment interests at stake. Indeed, such a disclose-first-ask-questions-later approach will predictably lead to compelled disclosure in numerous cases where the intrusion on First Amendment values and undermining of the news-gathering function will prove wholly unnecessary.

Here, for example, Chen faces serious problems proving causation, and the government has indicated that it believes it has an unclean hands defense to her Privacy Act claim. As noted above, there is a serious risk that Chen is using this action to recover taxpayer money to compensate her for espionage activity on behalf of a foreign power. The government will likely be able to establish that such a suit perverts the objectives of the Privacy Act and that Chen cannot recover. It would make no sense to compel disclosure of Herridge's confidential source(s) now, before such a ruling. Instead, the sensible approach would be to adopt the First Circuit's approach and sequence the litigation to put off discovery from Herridge and first require Chen to show she can actually "establish jury issues" and that her claims are not foreclosed by an unclean 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 underscore the causation problems that prevent Chen from showing any damages from the release of any Privacy Act information. Much of the information in Herridge's stories came from sources other than any alleged leak from government files, including a whistleblower who spoke 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 Chen in her PLA colonel's uniform. App.36; *accord* D.Ct.Dkt.140 at 23. But it is unlikely that Chen can prove distinct damages from the release of those pictures. Similarly, summary judgment will underscore that Chen's 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." That independent agency action provides a supervening cause that cuts off any claim that Chen's damages were caused by a Privacy Act violation. Chen cannot plausibly show that 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.

2. The court of appeals erred further in not only minimizing the applicable First Amendment protection, but in waving away the possibility of recognizing a non-constitutional privilege under Federal Rule of Evidence 501. In enacting Rule 501, Congress expressly authorized federal courts to define new privileges by interpreting "[t]he common law ... in the light of reason and experience." Fed. R. Evid. 501. Rule 501 "manifests a congressional desire 'not to freeze the law of privilege' but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990). In fact, "Congress expected that Rule 501 would be used to create a privilege for newsmen." 23 Charles A. Wright & Kenneth W. Graham, *Fed. Prac. & Proc.* §5426 (1st ed. Apr. 2026

update); see S. Rep. No. 93-1277, at 7052-53 (1974). Given that at least 48 states and the District of Columbia have recognized a reporter's privilege, wisdom and experience plainly counsel in favor of recognizing the privilege here.

In determining whether to recognize a 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. Second, it looks to the "policy decisions of the States" with respect to state-law 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*, 460 U.S. 575, 585 (1983) (citation omitted). The courts of appeals have long recognized that "[c]ompelled 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 Miller*, 438 F.3d at 1168 (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.

The public interest at stake here is even greater than the interests involved in the psychotherapist-patient privilege recognized in *Jaffee*. *Jaffee* acknowledged 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.* Sources will not be willing to provide information of vital public importance if they fear that their names can easily be exposed in court. *Baker*, 470 F.3d at 782. Indeed, “the mere possibility of disclosure” will have a significant “deterren[t] 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; see Fed. R. Evid. 501. Here, the consensus is overwhelming: Forty-eight states and the District of Columbia all recognize a privilege for reporters against compelled disclosure of confidential sources. See Stay.App.33-34 (collecting jurisdictions); accord *Reporter’s Privilege Compendium*, Rep.’s Comm. for Freedom of the Press, (last accessed Aug. 16, 2026), <https://www.rcfp.org/reporters-privilege/>. In twenty-three jurisdictions, the privilege is absolute in non-defamation civil cases. Stay.App.33-34. Two more recognize a privilege that, although not always absolute, would be absolute here because the only exceptions are inapplicable. *Id.* Eighteen more require a comprehensive balancing of interests. *Id.* That consensus is comparable to the consensus in *Jaffee*.

The D.C. Circuit wrote off this “uniform judgment of the States,” *Jaffee*, 518 U.S. at 14, insisting that variation in the “scope” of the privilege “from state to state” meant that there was no uniform state practice on this question, App.14. But that reasoning cannot be squared with *Jaffee*, which recognized a psychotherapist-patient privilege under Rule 501 despite some variation among the states as to its scope. 518 U.S. at 17-18. Indeed, *Jaffee* identified disagreement on the same issue that the D.C. Circuit complained about in this case—the existence of a “balancing component of the privilege.” *Id.* at 17; see App.14. Yet the Court nevertheless recognized the existence of the psychotherapist-patient privilege.

The net effect of the D.C. Circuit’s refusal to recognize either a meaningful reporter’s privilege

under the First Amendment or a non-constitutional privilege was to deny Herridge protection she would enjoy in other circuits and in virtually every state court and the District of Columbia. Indeed, even the D.C. Circuit would apply the D.C. statutory privilege if Chen had pursued claims under D.C. law, rather than bringing a Privacy Act claim. *See* Fed. R. Evid. 501. That result makes zero sense and just underscores that, unless this Court grants review, reporters will enjoy the least protection in the one forum in which it is most vital.

### **III. The Question Presented Is Important And Recurring, And This Case Is An Ideal Vehicle To Resolve It.**

This case implicates vital questions that strike at the heart of the role of the press in our democracy. Confidential sources have been the origin of some of the most important news stories of our times. Stories ranging from President Nixon's involvement in the Watergate break-in to Barry Bond's use of BALCO steroids have relied on confidential sources who spoke to reporters at great personal and professional risk only because their anonymity was protected. *See* Tim Weiner, *W. Mark Felt, Watergate Deep Throat, Dies at 95*, N.Y. Times (Dec. 19, 2008), <https://www.nytimes.com/2008/12/19/washington/19felt.html>; *see generally* Mark Fainaru-Wada & Lance Williams, *Game of Shadows: Barry Bonds, BALCO, and the Steroids Scandal that Rocked Professional Sports* (2006). That dynamic is especially prevalent in reporting about governmental misconduct, where the risks of being known as a journalist's source can be especially severe. *See* Neil Sheehan, *Vietnam Archive: Pentagon*

*Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. Times (June 13, 1971), <https://www.nytimes.com/1971/06/13/archives/vietnam-archive-pentagon-study-traces-3-decades-of-growing-u-s.html> (Pentagon Papers); Seymour M. Hersh, *The Massacre at My Lai*, The New Yorker (Jan. 15, 1972), <https://perma.cc/42SN-G56G> (My Lai Massacre); Seymour M. Hersh, *Torture at Abu Ghraib*, The New Yorker (May 3, 2004), <https://perma.cc/QXM2-L9DN> (Abu Ghraib).

Yet under the D.C. Circuit's test, virtually every subject of an exposé can uncover the confidential sources involved. Under the panel's decision, no reporter today could make a credible promise of confidentiality to a confidential source. Any modern-day Watergate suspect or convicted felon (or even a former colonel in the PLA) could file a Privacy Act suit and compel the disclosure of sources. Countless communications to reporters about matters of public concern reveal information derived from records pertaining to "an individual." 5 U.S.C. §552a(a)(4), (b). The Privacy Act, passed shortly after Watergate to deter government misuse of computer databases, has ironically become a potent weapon for curtailing the very kind of journalism that prompted its enactment.

In her stay opposition, Chen claimed that compelled disclosure under the D.C. Circuit's test "will be the exception, not the rule." Stay.Opp.27. That claim ignores that the D.C. Circuit's two-factor test, combined with its refusal to require plaintiffs to show that they have a triable case, means that there will be compelled disclosure as a matter of course in Privacy

Act cases. Indeed, the only reason cases like this might not proliferate is that the decision below will endanger reporting based on confidential sources altogether. The D.C. Circuit's decision provides a roadmap to any disgruntled "former officials" or others accused of wrongdoing to force journalists to reveal their sources. *See Lee*, 428 F.3d at 303 (Garland, J., dissenting from denial of rehearing en banc). The chilling effect that will produce will be devastating: Without Deep Throat, there is no story breaking open the Watergate scandal. And the same can be said for dozens more stories over the decades, each of which would be deterred by the D.C. Circuit's test. And it is particularly untenable to have the least protective regime for reporters in the Nation's capital, where the need for reporting based on confidential sources is greatest.

There is little doubt that the courts below are in need of clarification on the existence, source, and scope of the federal reporter's privilege. And that confusion stems in part from the fact that this Court has never addressed the reporter's privilege in the context of a civil lawsuit. *Cf. Branzburg*, 408 U.S. 665 (grand-jury context). *Branzburg* is now more than fifty years old, and its "lessons" are "about as clear as mud." *Sterling*, 724 F.3d at 523 (Gregory, J., dissenting). In the meantime, judges continue to call in the Court to step in and provide guidance. *See, e.g., In re Miller*, 438 F.3d at 1155 (Sentelle, J., concurring).

This case presents an ideal vehicle for it to do so. It presents perhaps the starkest possible example of unbalanced interests on the question of disclosure that this Court will see. There is thus no doubt that, under

a balancing test like the one Herridge proposes, Chen's attempt to breach the reporter's privilege would fail. Indeed, if the reporter's privilege protects anything, it protects against the forced disclosure of a national-security source to a former colonel in the PLA. And because Herridge pressed both First Amendment and common-law arguments below, this case provides the Court flexibility to decide the case on either ground as it deems appropriate.

### CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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