

No. _____

In the
Supreme Court of the United States

CATHERINE HERRIDGE,

Petitioner,

v.

YANPING CHEN,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the D.C. Circuit**

PUBLIC PETITIONER'S APPENDIX

PATRICK F. PHILBIN

KYLE T. WEST

CHASE T. HARRINGTON

TORRIDON LAW PLLC

801 17th Street, NW

Suite 1100

Washington, DC 20006

PAUL D. CLEMENT

Counsel of Record

JAMES Y. XI

NICCOLO A. BELTRAMO

CLEMENT & MURPHY, PLLC

706 Duke Street

Alexandria, VA 22314

(202) 742-8900

paul.clement@clementmurphy.com

Counsel for Petitioner

August 20, 2026

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Appendix A

SUPREME COURT OF THE UNITED STATES

No. 25A1448

CATHERINE HERRIDGE,

Applicant,

v.

YANPING CHEN, et al.,

Respondents.

Filed: June 26, 2026

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the mandate of the United States Court of Appeals for the District of Columbia Circuit, case No. 24-5050, is hereby stayed pending further order of the undersigned or of the Court. It is further ordered that a response to the application be filed on or before Wednesday, July 1, 2026, by 12 p.m. (EDT).

/s/ John G. Roberts, Jr.

Chief Justice of the United
States

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Appendix B

SUPREME COURT OF THE UNITED STATES

No. 25A1448

CATHERINE HERRIDGE,

Applicant,

v.

YANPING CHEN, et al.,

Respondents.

Filed: July 2, 2026

ORDER

The application for stay presented to The Chief Justice and by him referred to the Court is denied. The motions for leave to file the application and reply under seal are granted. The order heretofore entered by The Chief Justice is vacated.

Justice Kavanaugh would grant the application for stay.

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Appendix C

**UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

No. 24-5050

YANPING CHEN,

Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Appellees,

CATHERINE HERRIDGE,

Appellant.

Argued: Nov. 18, 2024

Decided: Sept. 30, 2025

Before: Katsas and Childs, *Circuit Judges*, and
Edwards, *Senior Circuit Judge*.

OPINION

KATSAS, *Circuit Judge*: Yanping Chen alleges that federal officials violated the Privacy Act by disclosing records about her compiled as part of an FBI investigation. The records were published by Fox News. In discovery, Chen sought to compel Catherine Herridge—one of the journalists involved in publishing the records—to identify who had leaked

them. Herridge invoked a First Amendment reporter's privilege to avoid being compelled to testify. The district court held that Chen had overcome that qualified privilege and ordered Herridge to answer Chen's questions. When Herridge refused to do so, the court held her in contempt. On appeal, Herridge reasserts the privilege. We affirm the district court.

I

The First Amendment to the Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. Const. Amend. I. In *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), this Court recognized a "qualified reporter's privilege" based on the First Amendment. *Id.* at 712-14. Where it applies, the privilege allows reporters to resist civil discovery into the identity of their confidential sources. *See id.* We identified two considerations as being "of central importance" in determining whether the privilege applies—the litigant's "need for the information" and her efforts "to obtain the information from alternative sources." *Id.* at 713. We further noted that the "equities weigh somewhat more heavily in favor of disclosure" if, as in libel cases, the journalist is a party and successful assertion of the privilege "will effectively shield him from liability." *Id.* at 714.

The reporter's privilege often arises in litigation under the Privacy Act, which prohibits government agencies from publicly disclosing certain records about individuals without prior consent from the individual to whom the record pertains. 5 U.S.C. § 552a(a)(4), (b). An individual harmed by a Privacy Act violation may bring a civil action against the offending agency. *Id.*

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§ 552a(g)(1), (5). If the agency acted “in a manner which was intentional or willful,” then the affected individual may recover “actual damages,” subject to a statutory floor of \$1,000. *Id.* § 552a(g)(4)(A).

II

A

We recite the facts as alleged in the complaint. Yanping Chen was born in China. In 1987, she moved to the United States to study at George Washington University, from which she eventually obtained graduate degrees. Chen became a lawful permanent resident in 1993 and a citizen in 2001.

In 1998, Chen founded the University of Management and Technology (UMT), an educational institution headquartered in Arlington, Virginia. Until January 2018, UMT participated in the Department of Defense’s “Tuition Assistance Program,” which pays a portion of tuition expenses for military students.

In 2010, the Federal Bureau of Investigation began investigating Chen for statements made on her immigration forms. The FBI interviewed Chen’s family and colleagues, seized her computer, used an informant to gather information about her, monitored her travel, and recorded her private conversations. In 2012, the FBI executed search warrants at Chen’s home and UMT’s main office. The FBI seized materials including tax records, business documents, family photographs, and electronic storage devices. In 2016, the U.S. Attorney’s Office for the Eastern District of Virginia decided not to file charges against Chen.

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In 2017, Fox News aired a report alleging that Chen had concealed her prior work for the Chinese military. The network later published an FBI form memorializing an interview with Chen's daughter, personal photographs seized from Chen's home during the FBI search, and information from Chen's immigration and naturalization papers. The reports stated that the FBI searches had occurred as part of a counter-intelligence operation. They also cited anonymous sources describing a conflict between the FBI and the U.S. Attorney's Office over whether to file charges against Chen, as well as comments from an anonymous FBI agent who was upset that UMT continued to receive payments from DoD. The print versions of these reports were authored by Catherine Herridge.

In 2018, DoD terminated UMT's participation in the Tuition Assistance Program. That decision, along with a broader hit to UMT's reputation, caused its enrollment and revenue to fall sharply. These losses impacted Chen's income and the value of her personal investment in UMT.

B

In December 2018, Chen filed this Privacy Act lawsuit against the FBI and various other federal agencies. She sought damages and an injunction prohibiting further disclosures of information about her.

In discovery, Chen served various document requests, interrogatories, and requests for admission, took eighteen depositions of current and former government employees, issued over a dozen third-party subpoenas, and obtained declarations from 22

government personnel who were connected to the FBI investigation. Despite all of this, Chen was unable to determine who was responsible for leaking the materials aired in the Fox reports. Ultimately, in mid-2022, Chen served Herridge and Fox with deposition and document subpoenas. Both Herridge and Fox moved to quash the subpoenas on the ground that they sought information protected by reporter's privileges grounded in the First Amendment and federal common law.

The district court denied Herridge's motion to quash in relevant part. It concluded that Chen had met her burden to overcome the qualified First Amendment privilege recognized in this Court's precedents. The court then refused to recognize a distinct newsgathering privilege under federal common law. The court sequenced discovery so that Chen could depose Herridge regarding her sources for the records allegedly disclosed in violation of the Privacy Act before seeking potentially the same information from Fox News. The court thus largely denied Herridge's motion and granted Fox's while allowing Chen to renew her subpoenas at a later time if necessary.

Following unsuccessful attempts to appeal the discovery order, Herridge sat for a deposition on September 26, 2023. When questioned, she refused to disclose the identity of her source, and she refused to provide information on when and how she received the leaked items. Herridge stated that she was disobeying the discovery order so that she could seek appellate review of it.

The district court held Herridge in civil contempt. It imposed a fine of \$800 per day until Herridge complied with the discovery order, but stayed the fine pending resolution of this appeal.

III

A non-party may appeal an adjudication of civil contempt even before the entry of final judgment in the underlying case. *See, e.g., U.S. Cath. Conf. v. Abortion Rts. Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *In re Clinton*, 973 F.3d 106, 112 (D.C. Cir. 2020). And our review of the contempt order “logically includes” a review of the discovery order underlying the contempt. *Lee v. DOJ*, 413 F.3d 53, 59 (D.C. Cir. 2005). Whether a discovery order correctly articulates our test for the reporter’s privilege is a legal question that we review *de novo*. *Id.* We review a district court’s application of that test for abuse of discretion. *Id.*

We begin with a survey of the caselaw recognizing a reporter’s privilege under the First Amendment. Next, we discuss the district court’s application of governing precedent to this case. Finally, we consider Herridge’s invitation to announce a new reporter’s privilege rooted in federal common law rather than the Constitution.

IV

A

Under *Zerilli*, reporters have a qualified First Amendment privilege to protect the identity of their sources from civil discovery. 656 F.2d at 710-12. After recognizing the privilege, we set forth “more precise guidelines” for determining when it can be overcome. *Id.* at 713. We identified two considerations “of central

importance” for doing so—whether the information is “crucial” to the case and whether the litigant seeking the information “has exhausted every reasonable alternative source of information.” *Id.* In addition, we stated that a litigant may be more likely to overcome the privilege in cases where the reporter is a party (as in libel cases) than in cases where she is not (as in Privacy Act cases like this one). *Id.* at 714.

In *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005), this Court held that a litigant may overcome the privilege by showing centrality and exhaustion—even in a case where the reporter is not a party. Like this case, *Lee* involved an appeal by non-party journalists held in contempt for refusing to identify their confidential sources in Privacy Act litigation. *Id.* at 55. Applying *Zerilli*’s “two guidelines [for] determining when a court can compel a non-party journalist to testify about a confidential source,” we held that the district court had not abused its discretion in requiring the reporters to testify. *Id.* at 59-60. First, the plaintiff had shown that the information he sought went to the “heart” of the case, given the difficulty in proving intent or willfulness without knowing the identity of the leakers. *Id.* at 60. Second, by deposing numerous witnesses before seeking to compel the reporters’ testimony, the plaintiff had met his burden to exhaust reasonable alternative sources of information. *Id.*

For the *Lee* Court, that was the end of the matter. We expressly declined to engage with *Zerilli*’s distinction between journalists who are parties to a lawsuit and those who are not, since all the journalists in the case before the court were non-parties. *Lee*, 413

F.3d at 57 n.1. And in response to an objection that we were leaving journalists without enough protection, we explained that a litigant's power to subpoena a journalist remains constrained by the requirements of centrality and exhaustion, which are not perfunctory, and by "the usual requirements of relevance, need, and limited burdens on the subpoenaed person" embodied in federal procedural and evidentiary rules. *Id.* at 60.

B

On appeal, Herridge does not contest the district court's determination that *Lee*'s centrality and exhaustion requirements for overcoming the privilege were satisfied. Herridge nonetheless asks us to rule in her favor because (1) Chen's Privacy Act claim is frivolous or meritless and (2) *Lee* conflicts with prior circuit precedent and therefore does not bind us. We reject both contentions.

1

Herridge argues that we should uphold the privilege because Chen's Privacy Act claim is frivolous. We agree that our governing framework is flexible enough to accommodate such an inquiry. In *Zerilli*, we noted that the claim at issue was "not frivolous" as part of our inquiry into whether the information sought was "crucial" to the plaintiff's case. 656 F.2d at 714. And although *Lee* did not separately discuss frivolousness, we did reiterate the importance of considering whether the information sought "goes to the heart of his case." 413 F.3d at 60. Such an inquiry can readily accommodate assessing whether the underlying claims are frivolous. For if a claim would fail regardless of what the requested discovery

might reveal, there is no good reason for deeming the discovery to be centrally important, much less for abrogating the privilege on that basis. *See, e.g., Carey v. Hume*, 492 F.2d 631, 637-38 (D.C. Cir. 1974).

We reject Herridge’s contention that the Privacy Act claim here is frivolous. Herridge presses two main points: “most” of Chen’s alleged damages were caused by DoD’s independent decision to cut off funds to UMT, Appellant’s Br. at 34, and “almost all” of Herridge’s reporting came from sources other than Privacy Act information, *id.* at 42. But “most” is not all, and Chen does seek damages not flowing from a loss of business after DoD severed its ties with UMT. Likewise, even if Herridge collected “almost all” of her information from material that was already in the public domain, Chen plausibly alleges that some of it had to have come from Privacy Act violations—such as the disclosure of photographs seized from Chen’s home during the FBI search. And so long as Chen establishes that *some* Privacy Act violation harmed her, she may recover actual or statutory damages if it was willful. 5 U.S.C. § 552a(g)(4)(A); *Doe v. Chao*, 540 U.S. 614, 627 (2004). In sum, Herridge’s arguments at most suggest that Chen is likely to recover only a small amount of damages, but that does not render her claim frivolous.

2

Beyond this discrete point about frivolousness, Herridge more broadly urges that Chen’s claim is simply *not that important*. In Herridge’s view, regardless of centrality and exhaustion, the reporter’s privilege should prevail if a court determines that the social importance of the news story outweighs the

plaintiff's personal interest in vindicating her claim. Here, for example, Herridge argues that "the public's interest in protecting journalists' ability to report without reservation on sensitive issues of national security" should outweigh Chen's merely private interest in recovering perhaps as little as \$1,000 in statutory damages. Appellant's Br. at 3 (quoting *Lee v. DOJ*, 428 F.3d 299, 302 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of rehearing en banc)).

Herridge's proposed balancing test echoes the view advanced by the judges dissenting from denial of rehearing *en banc* in *Lee*. See 428 F.3d at 300-03. As they were in dissent, we are left simply to apply the *Lee* panel opinion. And although Herridge describes that opinion as silent on the questions whether and how to weigh factors *beyond* centrality and exhaustion, even silence is fatal to her position here. Again, Herridge contends that the district court erred in ordering her to disclose the identity of her confidential source, despite its findings as to centrality and exhaustion. Given this posture, it makes no difference whether *Lee* affirmatively forbade the broader interest-balancing favored by Herridge or simply failed to apply it. Either way, *Lee* 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. 413 F.3d at 60. And that suffices to foreclose Herridge's privilege claim here.

Perhaps recognizing as much, Herridge falls back to an argument that *Zerilli* affirmatively requires case-by-case balancing regardless of *Lee*. She

therefore asks us to disregard *Lee* as inconsistent with prior circuit precedent. But there is no inconsistency. *Zerilli* upheld an assertion of the reporter's privilege in a case where the plaintiff had failed to exhaust, *see* 656 F.2d at 714, and it expressly reserved the question "whether compelled disclosure would have been appropriate if [plaintiffs] had fulfilled their obligation to exhaust alternative sources," *id.* at 714 n.52. Then, *Lee* answered that question in the affirmative, in a Privacy Act case where the plaintiff had established both centrality and exhaustion. *See* 413 F.3d at 57-61. Herridge points us to *Zerilli*'s more general statement that "courts should look to the facts of each case, weighing the public interest in protecting the reporter's sources against the private interest in compelling disclosure." 656 F.2d at 712. But *Zerilli* made that statement in the course of deciding whether to recognize a reporter's privilege at all. *See id.* at 710-12. Having done so, the Court then established "more precise guidelines ... to determine how the balance should be struck in a particular case." *Id.* at 713. And as explained above, it crystallized those guidelines into two inquiries "of central importance"—whether the information is "crucial" to the case and whether the litigant could obtain it from a "reasonable alternative source." *Id.*

V

Finally, Herridge urges us to recognize, as a matter of federal common law, a reporter's privilege broad enough to permit the case-by-case interest balancing urged by the *Lee* dissents. We decline this invitation to end-run our precedent.

Rule 501 of the Federal Rules of Evidence authorizes federal courts to recognize new privileges “in the light of reason and experience.” Fed. R. Evid. 501; see *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996). But Herridge has provided little cause to think that “reason and experience” support the privilege that she propounds. As to reason, the First Amendment analysis in cases like *Zerilli* and *Lee* thoroughly lays out the competing considerations of encouraging newsgathering while also respecting the elemental principle that “the public has a right to every man’s evidence.” *Trump v. Vance*, 591 U.S. 786, 791 (2020). As to experience, Herridge contends that virtually every state has recognized some form of a reporter’s privilege. She attached to her opening brief a chart summarizing the relevant law in every state. But as this chart demonstrates, the privilege varies widely in its scope from state to state, both in the abstract and on the question whether case-by-case interest balancing is appropriate. In short, if the First Amendment itself does not entitle Herridge to disobey discovery obligations imposed on every other citizen in the circumstances of this case, we see little reason to create that entitlement as a matter of judge-made common law.

For these reasons, we decline to recognize a federal common law newsgathering privilege.

Affirmed.

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Appendix D

**UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

No. 24-5050

YANPING CHEN,

Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Appellees,

CATHERINE HERRIDGE,

Appellant.

Filed: May 22, 2026

Before: Katsas and Childs, *Circuit Judges*, and
Edwards, *Senior Circuit Judge*.

ORDER

Upon consideration of appellant's sealed petition for panel rehearing filed on November 14, 2025, and the redacted petition for panel rehearing filed on November 20, 2025; the order of September 30, 2025, dismissing appellant's motion to unseal as moot; and the Freedom of the Press Foundation's motion to intervene for the limited purpose of unsealing, as well as the opposition and reply thereto, it is

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ORDERED that the petition be denied. It is

FURTHER ORDERED that the order of September 30, 2025, dismissing appellant's motion to unseal as moot be vacated and the motion be referred to the district court under Circuit Rule 47.1(c). It is

FURTHER ORDERED that the Freedom of the Press Foundation's motion to intervene for the limited purpose of unsealing be dismissed as moot, without prejudice to any intervention motion that the Foundation may wish to file in the district court.

Per Curiam

FOR THE COURT:

Clifton B. Cislak, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

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Appendix E

**UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

No. 24-5050

YANPING CHEN,

Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Appellees,

CATHERINE HERRIDGE,

Appellant.

Filed: May 22, 2026

Before: Srinivasan, *Chief Judge**; Henderson, Millett,
Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan,
and Garcia, *Circuit Judges*, and Edwards,
Senior Circuit Judge.

ORDER

Upon consideration of appellant's sealed petition
for rehearing en banc filed on November 14, 2025 and
the redacted petition for rehearing en banc filed on

* Chief Judge Srinivasan did not participate in this matter.

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November 20, 2025, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Clifton B. Cislak, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

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Appendix F

**UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

No. 24-5050

YANPING CHEN,

Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Appellees,

CATHERINE HERRIDGE,

Appellant.

Filed: June 23, 2026

Before: Katsas and Childs, *Circuit Judges*, and
Edwards, *Senior Circuit Judge*.

ORDER

Upon consideration of appellant's motion to stay issuance of the mandate pending the filing and consideration of a petition for writ of certiorari in the Supreme Court, and the opposition thereto, it is

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ORDERED that the motion be denied.

Per Curiam

FOR THE COURT:

Clifton B. Cislak, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

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Appendix G

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

No. 18-cv-3074

YANPING CHEN,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

Filed: Feb. 29, 2024

MEMORANDUM OPINION AND ORDER

In August 2023, the Court partially denied journalist Catherine Herridge's motion to quash a subpoena in this Privacy Act lawsuit, thereby permitting Plaintiff Yanping Chen to depose Herridge regarding the sources for her investigative reports on Chen's affiliations with the Chinese military. At her deposition the following month, though, Ms. Herridge refused to answer any questions about the identity and intent of her sources. The question now is whether Herridge should be found in civil contempt for defying the Court's clear and unambiguous order. After careful consideration, the Court concludes that a finding of civil contempt is warranted.

The Court does not reach this result lightly. It recognizes the paramount importance of a free press in our society and the critical role that confidential sources play in the work of investigative journalists like Herridge. Yet the Court also has its own role to play in upholding the law and safeguarding judicial authority. Applying binding precedent in this Circuit, the Court resolved that Chen's need for the requested information to vindicate her rights under the Privacy Act overcame Herridge's qualified First Amendment reporter's privilege in this case. Herridge and many of her colleagues in the journalism community may disagree with that decision and prefer that a different balance be struck, but she is not permitted to flout a federal court's order with impunity. Civil contempt is the proper and time-tested remedy to ensure that the Court's order, and the law underpinning it, are not rendered meaningless.

At the same time, Herridge does have a right to appeal this contempt order in the hopes of persuading the D.C. Circuit to recalibrate the existing qualified reporter's privilege in her favor or forge a new federal common law newsgathering privilege that sweeps more broadly than the Constitution. To provide ample room for her to exercise that right, the Court will stay the contempt sanction pending a timely appeal.

I. Background

Before delving into the present dispute, it is worth recounting the long journey to this point. Dr. Yanping Chen is a naturalized U.S. citizen who, in 1998, founded the University of Management and Technology ("UMT"), an educational institution that attracted a substantial number of military

servicemembers who attended with tuition assistance from the Department of Defense. Compl. ¶¶ 13, 42. Beginning in 2010, Chen became the focus of an FBI investigation concerning statements she made on immigration forms about her work in China in the 1980s. *Id.* ¶ 15. As a part of that investigation, the FBI executed search warrants for Chen's home and the main office of UMT, seizing materials during both searches. *Id.* ¶¶ 18, 20.

Prosecutors eventually informed Chen that no charges would be filed against her, but about a year later, Fox News Network ("Fox") ran a series of television segments and news articles about her. The thrust of the stories, principally authored by then-Fox reporter Catherine Herridge, was that Chen had concealed her former membership in the Chinese military on her U.S. immigration forms and might have used UMT to funnel valuable information about the American military to the Chinese government. *Id.* ¶¶ 22, 25-31; see Catherine Herridge, *Fox News Investigation: DoD-Funded School at Center of Federal Probes over Suspected Chinese Military Ties*, Fox News (Feb. 24, 2017, 1:58 PM), <https://www.foxnews.com/politics/fox-news-investigation-dod-funded-school-at-center-of-federal-probes-over-suspected-chinese-military-ties>. The reporting also included family photographs of Chen, excerpts from Chen's immigration forms, and a snippet from what appears to be an internal FBI memorandum summarizing an interview of Chen's daughter conducted for the investigation. Compl. ¶¶ 25-31.

Believing these materials could only have come from the FBI's search and that someone in the

government leaked them to Herridge and Fox in violation of the Privacy Act—which generally prohibits federal agencies from disclosing internal records about a person without her consent—Chen filed suit in 2018 against the FBI, the Department of Defense, and two other agencies. *Id.* ¶ 23; see 5 U.S.C. § 552a. Over the next five years, Chen pounded the pavement to uncover the identity of the potential leaker. She served scores of document requests, interrogatories, and requests for admission; took 18 depositions of current and former government employees; issued over a dozen third-party subpoenas; and obtained declarations from 22 government personnel who had a connection to the FBI’s investigation. Opp’n to Herridge Mot. to Quash at 2. Through that discovery, Chen developed a theory for how Herridge and Fox obtained the allegedly leaked records: that they came from an internal FBI PowerPoint presentation created by the lead agent on her case. *Id.* at 1. She also homed in on a few individuals who, she thinks, may have leaked the PowerPoint—namely, the lead case agent who created the PowerPoint, self-identified FBI-informant Stephen Rhoads (who was an on-the-record source for Herridge’s reporting), and a few other government agents who might have possessed the PowerPoint. *Id.* at 10-11. Despite her best efforts, Chen has been unable to obtain direct evidence that any of them, or any other person, was responsible for the suspected leak.

After years of failed efforts and false starts, Chen sought to pursue the one seemingly surefire method to discover how Herridge and Fox obtained the materials in question: to ask them herself. Chen served Fox and

Herridge with deposition subpoenas in May and June of 2022, respectively. *See* Notice of Filing Dep. Subpoena (Herridge deposition subpoena); Fox Mot. to Quash, Ex. H. (Fox deposition subpoena). She also served both with subpoenas for relevant documents and communications. *See* Herridge Mot. to Quash, Ex. L (Herridge document subpoena); Fox Mot. to Quash, Ex. G (Fox document subpoena). Herridge and Fox moved to quash the subpoenas, asserting the qualified First Amendment reporter's privilege and, alternatively, urging the Court to adopt a federal common law newsgathering privilege.

The Court partially denied Herridge's motion on August 1, 2023. *See Chen v. Fed. Bureau of Investigation*, No. 18-cv-3074 (CRC), 2023 WL 5289432 (D.D.C. Aug. 17, 2023) (redacted public version). Following binding case law, the Court explained that Chen's need for the requested evidence overcame Herridge's qualified First Amendment privilege and that it would be improper for the Court to circumvent that precedent by fashioning a wider common law privilege. *Id.* at *11.

Starting with the First Amendment, the Court faithfully applied the test that the D.C. Circuit established over forty years ago in *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981). *Zerilli* began from the premise that the *qualified* reporter's privilege requires courts to weigh "the public interest in protecting the reporter's sources against the private interest in compelling disclosure." *Id.* at 712. *Zerilli* did not, however, end its analysis with that "general" guidance or contemplate that district courts would engage in a free-form, anything-goes balancing exercise. *Id.* It

instead identified a “number of more precise guidelines” that “can be applied to determine how the balance should be struck in a particular case.” *Id.* Chief among those considerations are (1) whether the information sought is “central” to the claim and (2) whether the plaintiff has “exhausted every reasonable alternative source of information.” *Id.* at 713. Twenty-four years later, the Circuit doubled down on this test in *Lee v. Department of Justice*, reiterating that, in deciding when to “compel a non-party journalist to testify about a confidential source,” courts must focus on whether the information goes to “the heart of the matter” and whether the litigant has “exhausted ‘every reasonable alternative source of information.’” 413 F.3d 53, 59 (D.C. Cir. 2005) (quoting *Zerilli*, 656 F.2d at 713). Thus, while not forbidding consideration of other factors, the Circuit has made clear—not once, but twice—that district courts should anchor their analysis to *Zerilli*’s two guideposts: centrality and exhaustion.

Both factors weigh heavily in Chen’s favor, the Court concluded. On centrality, directly tracking the Circuit’s reasoning when confronted with the identical issue in *Lee*, “it is clear that the information [Chen] is seeking goes to the heart of [her] case.” *Id.* at 60. “[T]he relevant information is the identity of the individuals who may have leaked information in violation of the Privacy Act. If [Chen] cannot show the identities of the leakers, [her] ability to show the other elements of the Privacy Act claim, such as willfulness and intent, will be compromised.” *Id.* As to exhaustion, Chen’s five-year odyssey to uncover the leaker’s identity assured the Court that her request to depose Herridge had come at “the end, and not the beginning,

of the inquiry.” *Zerilli*, 656 F.2d at 713 (quoting *Carey v. Hume*, 492 F.2d 631, 638 (D.C. Cir. 1974)). The only reasonable option left was for Chen to ask Herridge herself. With the two central factors lopsided in Chen’s favor, the Court resolved that Herridge’s qualified First Amendment privilege must give way. *See Chen*, 2023 WL 5289432 at *3-11.

The Court could have stopped there. But for sake of completeness and in recognition of the important First Amendment rights at stake, it proceeded to explain why a full-bore analysis of Chen’s likelihood of success on the merits of her claim or a free-form balancing of the public and private interests was unlikely to tilt the scales back in Herridge’s direction. Though it was premature to preview summary judgment, the Court recognized that *Zerilli* permits courts to sneak a peek at the merits to ensure the case is “not frivolous” such that no purpose would be served in forcing disclosure. 656 F.2d at 714. Peering around the corner, the Court found that Chen’s Privacy Act claim easily surpassed that low bar. The Court was also unmoved by Herridge’s contention that Chen’s “parochial” interest in her Privacy Act claim should yield to the public interest in a robust free press, especially when the reporting touches on national security and the subject is not an “innocent person.” *See Herridge Mot. to Quash* at 26, 34-39. Privacy Act claims vindicate more than the personal interests of the litigant, the Court explained; they serve a systemic function in deterring the “intentional or willful” dissemination of private records maintained by our government. *Chen*, 2023 WL 5289432 at *11 (quoting 5 U.S.C. § 552a(g)(4)). That is as true here as in any other case. On the other side of the ledger, the Court

questioned just how much the public interest was actually advanced by Herridge including the purportedly leaked materials in the reporting when, on her own account, these records added little of substance to her stories. If they were just garnish, as Herridge claims, any conflict between the Privacy Act and the First Amendment could have been avoided without a serious loss to public understanding. Therefore, even if it were to venture beyond the Circuit's "more precise guidelines" and consider the full panoply of possible interests, the Court found the outcome would likely remain the same. *See id.* at *10-11.

Moving beyond the First Amendment's scope, the Court rejected Herridge and Fox's invitation to open a back door to a broader balancing test by recognizing a federal common law newsgathering privilege. *Id.* at *11-12. In doing so, the Court followed the lead of other courts in this district that have uniformly declined similar requests to "circumvent" the D.C. Circuit's First Amendment case law by forging a more protective common law privilege. *Lee v. Dep't of Just.* ("Lee II"), 401 F. Supp. 2d 123, 139 (D.D.C. 2005); *accord Hatfill v. Gonzales*, 505 F. Supp. 2d 33, 43-48 (D.D.C. 2007). As these courts recognized, a federal common law newsgathering privilege of the sort Herridge and Fox advocated "would create a subjective and elastic standard," saddle courts with the "daunting and well-nigh impossible task" of determining "whether the harm caused by leaked information outweighs the 'value' of that information to the citizenry," and undermine "the fundamental purpose of the Privacy Act" of "discourag[ing] the kind of [alleged] leaks that are at issue in this action."

Lee II, 401 F. Supp. 2d at 139, 141-42. Given that the Circuit recognizes a well-established First Amendment privilege that protects journalists' interests and channels judicial discretion in balancing that interest against evidentiary need, the Court found that Herridge and Fox had not carried their burden of "demonstrat[ing] with a high degree of clarity and certainty that" their proposed privilege would "effectively advance a public good" relative to these potential drawbacks. *Chen*, 2023 WL 5289432 at *12 (quoting *Lee II*, 401 F. Supp. 2d at 137).

To minimize any intrusion into the press function, the Court concluded its opinion by sequencing discovery. *Id.* at *12-13. It first provisionally granted Fox's motion to quash both subpoenas directed against the network as duplicative of the Herridge subpoenas. *Id.* at *12. By the same token, the Court granted Herridge's motion to quash the document subpoena for the time being because this request would have proven unnecessary if Herridge provided the missing link in her deposition. *Id.* at *13. It further cabined Herridge's deposition subpoena to ensure she did not have to answer any questions concerning sources who did not provide her information covered by the Privacy Act. *Id.* at *7, 13. Having whittled down the subpoenas to their core, the Court concluded with a clear order: "Chen may depose Herridge regarding the identity and intent of the source or sources of the documents and images allegedly provided to her in violation of the Privacy Act, and any non-privileged other matters relevant to her Privacy Act claim." *Id.* at *13.

Herridge then requested that this Court certify the Order for interlocutory appeal pursuant to 28

U.S.C. § 1292(b). Exercising its discretion, the Court declined to certify because, in part, Herridge could refuse to comply with the Order and appeal from any subsequent finding of civil contempt. *See* Op. & Order, ECF No. 152 (“Certification Order”); Op. & Order, ECF No. 158 (“Motion for Reconsideration Order”). As the Court explained, that procedure is customary both in this jurisdiction and throughout the country. Herridge simultaneously sought an immediate appeal of this Court’s Order to the D.C. Circuit under 28 U.S.C. § 1292(b)’s collateral-order doctrine. The Circuit dismissed the appeal for lack of jurisdiction, reasoning along similar lines that Herridge could adequately vindicate her assertion of privilege by “seek[ing] appellate review of the district court’s order denying her motion to quash by defying that order and appealing from any contempt citation.” Order, *Chen v. Fed. Bureau of Investigation*, No. 23-5198 (D.C. Cir. Sept. 25, 2023). As a result, the Court’s Order remained in full effect.

Pursuant to that Order, Herridge sat for her deposition on September 26, 2023. *See* Contempt Mot., Ex. 3 (“Herridge Dep.”). In it, Herridge acknowledged that the Court’s Order required her to “identify the source or sources of any Privacy Act material related to Dr. Chen that [she] received in the course of [her] reporting on Dr. Chen and the University of Management & Technology.” *Id.* at 19:20-24; *see id.* at 19:25 (answering “yes”). Herridge also repeatedly admitted that she knew who the source was. *See id.* at 84:20-85:12, 86:11-87:5, 91:5-14, 94:18-95:10. Nonetheless, she steadfastly refused to disclose her source’s identity or provide any information on when and in what form she received the allegedly leaked

materials. *See, e.g., id.* at 33:19-41:23, 44:20-49:11. When pressed, Herridge declared:

I have complete respect for the court and its authority and for the order. I have no desire to defy a court order, but my understanding is that the courts have ruled that in order to seek further judicial review, I must now disobey the order, and for that reason, among others, I am invoking my First Amendment rights and declining to answer the question.

Id. at 20:7-13; *see also id.* at 208:2-10 (repeating that statement).

Chen responded by filing an application for an order to show cause why Ms. Herridge should not be found in civil contempt for defying the Court's Order. Herridge opposes the application, urging the Court to modify its Order based on "additional information." Alternatively, she requests that any civil-contempt sanction be nominal and stayed pending appeal.

II. Legal Standards

This Court has both an "inherent and a statutory power to enforce compliance with its orders through the remedy of civil contempt." *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 16 (D.D.C. 2000). The "power to punish for contempts is inherent in all courts; its existence is essential to ... the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." *Broderick v. Donaldson*, 437 F.3d 1226, 1234 (D.C. Cir. 2006) (quoting *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874)). Building on that innate power, Federal Rule of Civil Procedure 45(e) provides that an "issuing court may hold in contempt a person who, having been

served, fails without adequate excuse to obey the subpoena.”

A person is in contempt of court if she “violates a definite and specific court order requiring [her] to perform or refrain from performing a particular act or acts with knowledge of that order.” *SEC v. Bankers All. Corp.*, 881 F. Supp. 673, 678 (D.D.C. 1995) (citation omitted). The party seeking a finding of contempt must demonstrate, by clear and convincing evidence, that (1) there was a court order in place; (2) the order clearly and unambiguously required certain conduct; and (3) the alleged contemnor failed to comply with that order. *Int’l Painters & Allied Trades Indus. Pension Fund v. ZAK Architectural Metal & Glass LLC*, 736 F. Supp. 2d 35, 38 (D.D.C. 2010). The alleged contemnor’s intent in failing to comply is irrelevant, so a court need not find that an individual acted in bad faith to hold her in contempt. *Bilzerian*, 112 F. Supp. 2d at 16.

The purpose of civil contempt is not to punish but “to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance.” *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981). Accordingly, civil-contempt sanctions “must be calibrated to coerce compliance or compensate a complainant for losses sustained.” *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 823 (D.C. Cir. 2009).

III. Analysis

A. Herridge Is in Contempt of Court

There is no genuine dispute that Herridge is in contempt of the Court’s August 1, 2023 Order partially denying her motion to quash Chen’s deposition

subpoena. The Order clearly and unambiguously required Herridge to answer questions about “the identity and intent of the source or sources of the documents and images allegedly provided to her in violation of the Privacy Act, and any non-privileged other matters relevant to [Chen’s] Privacy Act claim.” *Chen*, 2023 WL 5289432, at *13. Herridge understood that straightforward directive. In her motion for certification, filed ten days later, she acknowledged the Court had directed her “to respond to the deposition subpoena to answer questions identifying confidential source(s) for the Fox reporting.” Mot. to Certify Appeal at 4. At her deposition the following month, however, Herridge willfully disobeyed the Order by refusing to answer questions about the identity of the sources who supplied the allegedly leaked materials. *See* Herridge Dep. at 20:11 (“I must now disobey the order.”). That obvious violation of “a definite and specific court order” warrants a finding of civil contempt. *Bankers Alliance Corp.*, 881 F. Supp. at 678.

Herridge does not attempt to argue otherwise. She instead requests that, in lieu of finding her in contempt, the Court modify its Order based on “additional information that is relevant under *Zerilli* balancing”—including declarations from two esteemed journalists on the importance of confidential sources and from two former counterintelligence officials discussing the national-security interests purportedly at play here. *See* Opp’n at 17-28. But this “additional information” is just a new chapter in the same book of arguments Herridge raised, and the Court rejected, in her motion to quash the subpoenas.

It does not undermine the Court's prior decision or support the requested modification.

For starters, none of the additional information speaks to the two "precise guidelines" established in *Zerilli* and echoed in *Lee*: (1) whether the requested discovery is central to the plaintiff's claim and (2) whether the plaintiff has exhausted other reasonable alternatives of accessing the information. *See Zerilli*, 656 F.2d at 712-13; *Lee*, 413 F.3d at 57-60. As the Court explained previously, in defining the contours of the reporter's privilege, *Zerilli* and *Lee* did not embrace an open-ended weighing of all possible interests but rather struck the balance between private and public interests by reference to these two central factors. *See Chen*, 2023 WL 5289432, at *3-6. Applying this framework here, the Court found that both considerations favored Chen. Identifying the alleged leaker was central to Chen's Privacy Act claim, and she had exhausted all reasonable alternative avenues of identifying Herridge's source. *See id.* at *7-9. With a one-sided score on the two most important factors, the Court concluded, the balance weighed in Chen's favor and supported her request to depose Herridge.

Herridge's current motion does not refute any of this analysis. She does not contend that the Court erred in finding Chen had satisfied her burden on both factors. Nor does she point to any new authority indicating that the Court misconstrued *Zerilli* and *Lee* when resolving that the balancing test should center on centrality and exhaustion—an understanding

shared by numerous courts in this district.¹ Herridge simply renews her prior claim that “*Zerilli* calls for a broad-ranging balancing inquiry” to decide whether to pierce the reporter’s privilege. *See* Opp’n at 18-19. The Court rejected this contention once before and, upon second look, it is equally unpersuaded. It therefore reaffirms the core rationale behind its prior decision: *Zerilli* and *Lee* call on courts to focus primarily (even if not exclusively) on centrality and exhaustion, and those two factors are dispositive here.

Moreover, as was true the last go-around, the Court continues to believe that a free-wheeling balancing of interests would not change the outcome in any event. Herridge urges the Court to place three more considerations onto the scale: (1) the merits of Chen’s Privacy Act claim, including her prospects for recovering damages; (2) the national-security interests at stake; and (3) the broad chilling effect that Herridge fears will result from forcing her to disclose her sources. The Court mulled each of these considerations in its prior opinion, *see Chen*, 2023 WL 5289432, at *10-11, and nothing in the current motion alters the Court’s thinking.

First, Herridge plows old ground in arguing that her First Amendment interests outweigh Chen’s interest in pursuing her Privacy Act claim because, in

¹ *See, e.g., Hatfill*, 505 F. Supp. 2d at 37-47; *Lee II*, 401 F. Supp. 2d at 139; *In re Subpoena to Goldberg*, 693 F. Supp. 2d 81, 85 (D.D.C. 2010); *U.S. Commodity Futures Trading Comm’n v. McGraw-Hill Companies, Inc.*, 507 F. Supp. 2d 45, 50 (D.D.C. 2007); *Tripp v. Dep’t of Def.*, 284 F. Supp. 2d 50, 55 (D.D.C. 2003); *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115, 119, 121-22 & n.8 (D.D.C. 2002).

her view, Chen will be unable to recover any damages. Herridge asserts that any financial harm to UMT was caused by the Defense Department's independent decision in January 2018 to cut off tuition assistance, not her reporting, and that any reputational harm is impossible to trace to the alleged Privacy Act violation because the lion's share of her reporting came from lawful sources. *See* Opp'n at 1, 18-19. As the Court has explained, however, this effort to pick apart Chen's claim far exceeds *Zerilli*'s cursory inspection to ensure the "suit is not frivolous." *See Chen*, 2023 WL 5289432, at *10-11 (quoting *Zerilli*, 656 F.2d at 714). And regardless, even if it proves true that only a snippet of Herridge's reporting—such as the compromising photographs of Chen and her husband—could support a Privacy Act claim, the Court still "does not doubt that the images of Chen holding or wearing a Chinese military uniform could have given the Fox reporting more traction than it otherwise would have had and caused Chen more damage than she otherwise would have suffered." *Id.* at *10.

Downplaying the significance of the leaked materials is also a double-edged sword for Herridge. If the leaked materials truly did not affect the substance of her reporting on Chen but were instead mere ornamentation, as Herridge says, the press function need not have come into conflict with Chen's statutory privacy rights at all. Herridge could have published the same set of stories minus the records—the incriminating photographs, excerpts from immigration forms, and snippets of FBI interviews—without compromising the informational value of her pieces. Had she done so, the Privacy Act would not be implicated, Chen would have no case, and the

subpoenas would never have issued. Herridge (or her producers) instead decided to gild the lily by including these evocative (and click-inducing) details—opening the door for a Privacy Act claim and discovery into the identity of the potential leaker.

Second, Herridge again urges the Court to consider the national-security implications of requiring her “to reveal the identity of her confidential source(s) to Plaintiff—a former colonel in the [People’s Liberation Army] whom [the Department of Defense] expressly determined to be a national security risk.” Opp’n at 21. She submits declarations from two counterintelligence experts who contend that, from their vantage, there is a “serious risk” Chen used UMT “to provide information on U.S. servicemembers” to Chinese officials and that Chen was not absolved of wrongdoing just because she was never prosecuted. *Id.* at 22-24. But whether or not these charges are true, any national-security concerns over requiring Herridge to reveal her source ring hollow. It is hard to fathom how disclosing Herridge’s source would place America in jeopardy. In fact, it is much more plausible that ferreting out the government agent who may have leaked the records would benefit, not harm, national security by exposing someone inclined to mishandle highly sensitive law-enforcement records. And on the off chance there were an actual security risk, the government is a party to this action and could easily intervene to protect these interests (as it has done on occasion in this case already).

Under the banner of “national security,” Herridge also maintains that it is appropriate to consider the “risk that Plaintiff was making U.S. servicemembers’

information available to a foreign power—and thus that her ‘private interest’ in this Privacy Act suit is, in effect, seeking taxpayer money to recover funding for that conduct.” *Id.* at 25-26. The Court strongly disagrees. The Court’s job is to apply the law evenhandedly, not to adjudicate who is worthy of the law’s protection. That the plaintiff “had it coming” is not a viable defense under the Privacy Act. The Act protects “all private citizens, whether blameworthy or blameless, from the risk that government officials might be tempted to abuse their access to sensitive information by leaking materials intended to embarrass particular individuals.” *Chen*, 2023 WL 5289432, at *11. Whatever her past, Chen is no exception.

Third, Herridge asserts that forcing her to disclose her source would have a chilling effect and undermine the ability of the press to inform the public on important matters. On this score, Herridge submits declarations from the Dean of the Columbia Journalism School, Jelani Cobb, and Pulitzer Prize winning investigative journalist Steve Coll. *See* Opp’n at 19-21. Dean Cobb explains that confidential sources are “vital to the functioning of a free and independent press” and contends that the “act of disclosing a confidential source, even as the result of a court order, erodes the ability of journalists everywhere to credibly promise confidentiality to sources who demand it, and would have a chilling effect on the flow of important information to journalists reporting on government matters.” *Id.*, Ex. B ¶¶ 5, 11. Mr. Coll adds that these concerns are only magnified in the areas of national security and international affairs, where it is often impossible to uncover what’s going on without

confidential sources who are willing to turn over protected information. *Id.*, Ex. C ¶¶ 6-8. The Reporters Committee for Freedom of the Press echoes these worries in its amicus brief. After touting that confidential sources have enabled journalists to tell some of the most important public-interest stories of the past half century—from Watergate to the Iran-Contra affair to warrantless surveillance post-9/11—the Reporters Committee warns that compelled disclosure here could stifle similar stories going forward, especially those involving sensitive issues of national security. Reps. Comm. Br. at 2-3, 11-13.

The Court appreciates these concerns and does not question the vital role of a free press in “bar[ing] the secrets of government and inform[ing] the people.” *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). It also recognizes and respects that, in many instances, confidential sources provide an essential ingredient for investigative reporting. That does not give the Court a free pass to ignore binding precedent, however. The Circuit in *Zerilli* was also “mindful of the preferred position of the First Amendment and the importance of a vigorous press.” 656 F.2d at 712. Yet, recognizing that the reporter’s privilege is not ironclad, the Circuit crafted a balancing test to determine when confidentiality must give way to competing interests—the central one being the interest of a litigant who needs the information to vindicate her rights and has exhausted every reasonable alternative source. *Id.* at 712-13; *see also Carey*, 492 F.2d at 639 (rejecting the contention that there is “an absolute First Amendment barrier to the compelled disclosure by a newsman of his confidential sources under any

circumstances”). The Court is not free to disregard the balance the Circuit has struck by placing a thumb on the scale in favor of confidentiality.

Even if the Court enjoyed such discretion, it is important not to overstate the impact of requiring disclosure here. Judge Tatel expressed similar concerns about the detrimental effect compelling disclosure may have on journalists’ ability to gather information in his dissent from the denial of rehearing en banc in *Lee* back in 2005. *See Lee v. Dep’t of Just.*, 428 F.3d 299, 301-02 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of reh’g en banc). Time has told a somewhat different story. Almost two decades have passed since *Lee* reaffirmed *Zerilli* and required the reporter there to divulge his source, yet there is limited evidence that the floodgates to journalists’ notepads have opened or the wellspring of confidential sources has dried up during that period. At most, there appears to have been an uptick in the number of subpoena requests for confidential sources in federal proceedings during the early 2000s. *See* RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 Minn. L. Rev. 585, 637-52 (2008); *see also id.* at 586 (acknowledging that the uptick in subpoena requests did “not constitute an avalanche in scale”). But whether this was a blip or a sustained increase, a matter Herridge does not plumb, it has not resulted in widespread piercing of the privilege. Other courts in this district have long embraced and applied this Court’s reading of *Zerilli* and *Lee*. *See supra* pg. 12 n.1. And still, cases requiring reporters to divulge confidential sources have remained few and far between, as the Reporters Committee acknowledges.

See Reps. Comm. Br. at 2 (“Privacy Act cases involving efforts to compel the identities of confidential journalistic sources are rare[.]”). That’s because, as *Lee* recognized, vigilant application of the centrality and exhaustion factors should ensure that compelled disclosure is the exception, not the rule. *Lee*, 413 F.3d at 60 (finding that an inquiry centered on these guidelines “does not leave journalists without protection”). Consistent with this expectation, courts applying the Circuit’s framework often have found that plaintiffs’ subpoena requests falter on one or both of these factors. See, e.g., *In re Subpoena to Goldberg*, 693 F. Supp. 2d at 88; *Hatfill*, 505 F. Supp. 2d at 49-50; *Tripp*, 284 F. Supp. 2d at 60-61; *Hutira*, 211 F. Supp. 2d at 121-22. That suggests *Zerilli* and *Lee* may have found the right balance after all.

To be sure, beyond actual case results, stakeholders in this area should remain attuned to the ripple effects that court decisions have on confidential sources’ willingness to come forward in the first place. Identifying this impact can be tricky business, however. Much of the reporting on this score is anecdotal, and systematic studies lend only mild support for the notion that confidential sources may be slightly more hesitant to speak up nowadays. See Jones, *supra*, at 648-49 (finding 62.5% of newsroom leaders in 2007 reported that sources were as willing to speak on condition of confidentiality as five years before whereas 25.5% reported they were “somewhat less” willing to do so). But even then, it is uncertain whether sources are holding their tongues because, in their view, courts appear more solicitous of requests to compel reporters to disclose sources. See Randall D. Eliason, *The Problems with the Reporter’s Privilege*, 57

Am. U. L. Rev. 1341, 1359 (2008) (contending that “of all of the risks of exposure that a source faces, the danger that a reporter will be subpoenaed and compelled to testify is probably the most remote”). At a minimum, any marginal chilling effect has certainly not frozen the information pipeline. Instances of journalism built on confidential sources remain legion. See Reps. Comm. Br. at 12-13 (offering a “small sampling” of examples). The current dispute is a case in point. The Court’s interpretation of *Zerilli* and *Lee* was the prevailing law in this district at the time of the alleged leak. But Herridge’s source was still apparently undeterred by the prospect that, at some point in the future, a court might order Herridge to name her source. Projecting forward, then, it is far from clear that the Court’s decision will unnecessarily clog the free flow of information.

Finally, beyond these three considerations Herridge raised, the Reporters Committee also notes that the Department of Justice recently amended its internal policies to restrict its own use of compulsory processes to pierce the reporter’s privilege. See Reps. Comm. Br. at 8-10 (citing 28 C.F.R. § 50.10). That amendment may well be a salutary development deserving of applause, but it does not alter how the Court should resolve the current dispute based on this Circuit’s precedent. In fact, the Department of Justice’s forbearance showcases that federal court enforcement of the First Amendment is not the final word when it comes to protecting confidential sources. There is a robust body of local, state, and federal laws promoting the freedom of speech and press in ways that extend beyond the First Amendment’s safeguards. See Genevieve Lakier, *The Non-First*

Amendment Law of Freedom of Speech, 134 Harv. L. Rev. 2299 (2021). One need look no further than the reporter’s privilege. Almost every State has enacted some form of “shield law” protecting reporters from having to disclose their sources. *See Chen*, 2023 WL 5289432, at *12. Congress could do the same with a few strokes of a pen, but it has not done so. *See Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) (“At the federal level, Congress has freedom to determine whether a statutory newsman’s privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate.”). Absent congressional intervention or a shift in Circuit precedent, the Court’s duty is to apply and enforce the law on the books.

* * *

In sum, after considering all the “additional information” Herridge has provided, the Court finds no compelling reason to modify its August 1, 2023 Order requiring her to answer questions concerning the identity and intent of the source or sources of the records allegedly given to her in violation of the Privacy Act, as well as any non-privileged other matters relevant to her Privacy Act claim. Herridge plainly violated that Order when she refused to divulge the identity of the suspected leaker during her deposition last September. That defiance warrants a finding of civil contempt, no matter how noble Herridge’s justification for refusing to reveal her source. *See Bilzerian*, 112 F. Supp. 2d at 16 (noting a contemnor’s intent is irrelevant). Herridge may

disagree with the Court's decision, as is her right, and she may believe that the Circuit's reporter's privilege doctrine strikes the wrong balance by undervaluing the importance of confidentiality for a free press. Still, the fact remains that "[l]itigants may not defy court orders because their commands are not to the litigants' liking. If the rule of law is to be upheld, it is essential that the judiciary takes firm action to vindicate its authority and to compel compliance with lawfully issued directives." *Am. Rivers v. Army Corps of Eng'rs*, 274 F. Supp. 2d 62, 70 (D.D.C. 2003). A finding of civil contempt is therefore appropriate and necessary to uphold those principles here.

Yet contempt must be confined to the clear and unambiguous scope of the Court's order, *see Int'l Painters*, 736 F. Supp. 2d at 38, so it cannot extend as far as Chen advocates. To repeat, the August 1, 2023 Order required Herridge to divulge her source and answer questions about any non-privileged other matters relevant to Chen's Privacy Act claim. Chen complains that, in addition to not naming the leaker, Herridge also declined to answer questions on various other matters such as "the preparation of the Fox News stories, the timing of their publication, and why certain materials and information were included or omitted." Contempt Mot. at 9. But those matters at least arguably fall within the First Amendment reporter's privilege, which "shields both confidential and nonconfidential information from compelled disclosure," *Hutira*, 211 F. Supp. 2d at 120, and generally guards against compelled disclosure of information that would have "a chilling effect upon the newsgathering and editorial processes," *Maughan v. NL Indus.*, 524 F. Supp. 93, 95 (D.D.C. 1981).

Disclosing these other items would intrude upon, and possibly chill, Herridge's newsgathering and editorial processes. The Court's Order therefore did not clearly require Herridge to answer these questions, so she cannot be found in contempt for refusing to do so.

B. Contempt Sanction

The remaining question is: What is the appropriate sanction for Herridge's contempt? Civil-contempt sanctions may "be employed for either or both of two purposes; to coerce the [contemnor] into compliance with the court's order, and to compensate the complainant for losses sustained." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04 (1947). In considering these twin purposes, courts have "wide discretion" and "broad equitable powers to craft remedial sanctions." *United States v. Two Gen. Elec. Aircraft Engines*, 317 F. Supp. 3d 516, 522 (D.D.C. 2018) (quotation marks omitted). Exercising that discretion here, the Court will impose a fine of \$800 per day until Herridge complies with the Court's Order but stay that fine for thirty days or until completion of proceedings on a timely appeal, whichever is later.

Herridge requests that the Court impose no more than a nominal sanction, such as \$1 per day. *See* Opp'n at 29. But such a trivial sanction would not serve the fundamental purpose of civil contempt: ensuring compliance with a court order. It would permit Herridge to pay pittance in perpetuity while continuously violating the Court's directive and effectively vitiating Chen's right to pursue her Privacy Act claim. That cannot be correct. Judicial orders are not tollbooths that can be bypassed with spare change.

Recognizing this reality, other courts in this district have imposed far stiffer penalties in similar contexts to ensure journalists comply with disclosure orders. In *Hatfill II*, for example, the court imposed a graduated fine of \$500 for the first seven days following entry of the contempt order, which increased to \$1,000 per day the following week, escalating to \$5,000 per day thereafter. *Hatfill v. Mukasey* (“*Hatfill II*”), 539 F. Supp. 2d 96, 99 n.5 (D.D.C. 2008). Similarly, in *Lee III*, the court rejected the reporter’s request for a nominal sanction as “insufficient to [] coerce compliance” and imposed a fine of \$500 per day. *Lee v. U.S. Dep’t of Just.* (“*Lee III*”), 327 F. Supp. 2d 26, 33 (D.D.C. 2004). The Court will adopt the low-end of this range (roughly adjusted for inflation) and impose a fine of \$800 per day until Herridge complies with the August 1, 2023 Order.

The Court will stay that contempt sanction, however, to afford Herridge an opportunity to appeal this decision. Courts in this district and beyond have routinely stayed contempt sanctions to provide journalists ample room to litigate their assertions of privilege fully in the court of appeals before being coerced into compliance. *See, e.g., Lee III*, 327 F. Supp. 2d at 33; *United States v. Cutler*, 6 F.3d 67, 70 (2d Cir. 1993); *United States v. Cuthbertson*, 630 F.2d 139, 143 (3d Cir. 1980). Indeed, when the district court denied a stay of contempt sanctions in *Hatfill III*, 539 F. Supp. 2d at 106, the D.C. Circuit stepped in and granted the stay request, *see Hatfill v. Mukasey*, No. 08-5049, Doc. No. 1104546 (D.C. Cir. March 11, 2008) (per curiam). Following suit, the Court will stay the contempt sanction against Herridge pending a timely appeal.

Apart from being the standard practice in this context, a stay pending appeal is justified here under the four-factor test for determining whether such a stay is warranted: “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.” *Cuomo v. U.S. Nuclear Regul. Comm’n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam). First, given that prior reporter’s privilege cases have divided the Circuit and attracted en banc activity, and that almost two decades have passed since the Circuit decided *Lee*, it is possible that the Circuit may take the opportunity to refine the applicable First Amendment test in Herridge’s favor or recognize a new federal common law newsgathering privilege broader than the constitutional analog. See *Citizens for Resp. & Ethics in Washington v. Off. of Admin.*, 565 F. Supp. 2d 23, 28 (D.D.C. 2008) (noting a “court is not required to find that ultimate success by the movant is a mathematical probability” (quotation marks omitted)). Second, absent a stay, Herridge would have to choose between disclosing her source’s identity—a decision that “is, by its very nature, irreparable,” *Robert Half Int’l Inc. v. Billingham*, 315 F. Supp. 3d 419, 433-34 (D.D.C. 2018)—or face possible financial hardship by racking up potentially hundreds of thousands of dollars in fines in the interim. Third, though the Court appreciates that an appeal will further delay resolution of Chen’s Privacy Act claim, the time it will take to pursue an appeal is somewhat marginal in comparison to the five years Chen has already spent

to suss out the leaker's identity. Fourth, the Court recognizes there are competing public interests at stake—namely, the First Amendment interest in protecting confidential sources versus a substantial interest in ensuring compliance with court orders and enforcement of the Privacy Act. But given that the question now is only whether to defer contempt sanctions in the interim to ensure that Herridge can litigate her First Amendment claim to the hilt before revealing her source, the Court finds that the public interest also favors the stay request. *See* Certification Order at 3 (“[I]t is better to be safe than sorry when it comes to First Amendment rights.”).

The Court concludes that these two elements—a \$800 per day fine combined with a stay pending appeal—will adequately ensure compliance with the Court's Order while preserving Herridge's right to appeal that decision. *See Lee III*, 327 F. Supp. 2d at 33 (“[T]he journalists' argument that the fine should be nominal where constitutional issues will be presented on appeal can be addressed simply by staying the fine pending appeal.”). At the present juncture, the Court does not deem it necessary to award Chen any compensatory sanctions for costs and fees related to Herridge's deposition or the ensuing contempt proceeding. Chen argued all along (and the Court and the Circuit agreed) that refusing to comply with the Court's Order and being found in contempt was the ordinary and proper route for obtaining appellate review here. That Herridge ultimately chose to pursue this avenue to appellate review does not necessarily warrant compensation for Chen. The Court also opts, for now, not to follow the approach adopted in *Hatfill II* and forbid Herridge from accepting funding from

any other persons or entity to pay her contempt sanction. *See* 539 F. Supp. 2d at 107. The Court may reconsider these matters down the line depending on how things play out after any appellate proceedings.

IV. Conclusion

For these reasons, it is hereby

ORDERED that Herridge is in civil contempt of the August 1, 2023 Order of this Court; it is further

ORDERED that Herridge is fined in the sum of \$800.00 per day, payable to the United States, until she complies therewith; it is further

ORDERED that the aforementioned fine will be stayed for a period of thirty days, or until completion of proceedings on a timely appeal, whichever is later; it is further

ORDERED that Chen's application for a compensatory award of sanctions is denied without prejudice.

SO ORDERED.

[handwritten: signature]
CHRISTOPHER R. COOPER
United States District Judge

Date: February 29, 2024

App-50

Appendix H

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

No. 18-cv-3074

YANPING CHEN,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

Filed: Dec. 21, 2018

COMPLAINT

1. Plaintiff Yanping Chen brings this action against Defendants the Federal Bureau of Investigation, the United States Department of Justice, the United States Department of Defense, and the United States Department of Homeland Security (collectively, the “Government” or “Defendants”), for monetary, injunctive, and declaratory relief to rectify injuries she has suffered as a result of the Government’s illegal and unwarranted public disclosure of her personal information in violation of the Privacy Act, 5 U.S.C. § 552a.

2. Enacted in the wake of the Watergate scandal, the Privacy Act balances the federal government’s occasional need to collect sensitive

information about U.S. citizens with those citizens' constitutional rights, including the right to privacy. The Privacy Act does this in relevant part by prohibiting government agencies from publicly disclosing private information about individuals without their consent. One or more of Defendants here violated these prohibitions by leaking to Fox News a wealth of private information and documents, including family photographs seized from Dr. Chen's home as part of an investigation that resulted in no charges. These leaks were unlawful and resulted in serious and ongoing harm to Dr. Chen, her family, and her business.

3. Defendants have disregarded the protections afforded by the Privacy Act—and by the Constitution—by using the federal government's investigatory powers to gather extensive information about Dr. Chen and then selectively releasing information to smear her reputation and damage her livelihood.

PARTIES

4. Plaintiff Yanping Chen is a citizen of the United States and a resident of the Commonwealth of Virginia.

5. Defendant Federal Bureau of Investigation ("FBI") is an executive agency of the United States of America and an "agency" within the meaning of 5 U.S.C. § 552a(a)(1).

6. Defendant United States Department of Justice ("DOJ") is an executive agency of the United States of America and an "agency" within the meaning of 5 U.S.C. § 552a(a)(1).

7. Defendant United States Department of Defense (“DOD”) is an executive agency of the United States America and an “agency” within the meaning of 5 U.S.C. § 552a(a)(1). The Naval Criminal Investigative Service (“NCIS”) is a civilian law enforcement agency within DOD.

8. Defendant United States Department of Homeland Security (“DHS”) is an executive agency of the United States of America and an “agency” within the meaning of 5 U.S.C. § 552a(a)(1).

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552a(g)(1)(D) because Dr. Chen alleges she has been adversely affected by the Government’s violations of the Privacy Act and of her rights under the U.S. Constitution.

10. The District of Columbia is a proper venue for this action pursuant to 5 U.S.C. § 552a(g)(5) and 28 U.S.C. § 1391.

STATEMENT OF FACTS

11. Dr. Chen was born in China. She came to the United States in 1987 to study as a visiting scholar at George Washington University, following on her work as a cardiologist and medical researcher with the Chinese astronaut program. Dr. Chen earned a Master’s Degree and a Ph.D. in Public Policy from George Washington University.

12. While at George Washington University, Dr. Chen met her now-husband, Dr. J. Davidson Frame, a U.S. citizen. Dr. Chen chose to make the United States

her home, becoming a lawful permanent resident in 1993 and a U.S. citizen in 2001.

13. In 1998, Dr. Chen founded the University of Management and Technology, an educational institution that provides post-secondary and graduate education to working adults. The university is headquartered in Arlington, Virginia. More than 12,000 students have received degrees from the university over its 20-year history.

14. Dr. Chen wholly owns the University of Management and Technology and derives a substantial part of her income from its operations.

15. In 2010, Dr. Chen—like many Chinese-American scientists around that time—became the focus of an FBI investigation. The investigation appeared to focus on statements Dr. Chen made on immigration forms concerning her work in the 1980s as a scientist for the Chinese astronaut program.

16. Thereafter, over a six-year period, the FBI probed deeply into Dr. Chen's personal and professional life. Agents of the U.S. Government conducted interviews of her family and colleagues, obtained her immigration records, monitored her travel, seized her computer from her as she was transiting through an airport, employed an undercover informant to covertly gather information about her, and secretly monitored and recorded her conversations.

17. During the course of the investigation, in 2012, FBI Special Agent Timothy S. Pappa applied to the U.S. District Court for the Eastern District of Virginia for warrants to search Dr. Chen's home and

the main office of the University of Management and Technology, both located in Arlington, Virginia.

18. On December 5, 2012, the FBI executed search warrants for Dr. Chen's home and the main office of the University of Management and Technology. NCIS and DHS personnel were present during the FBI's searches.

19. Even though the court had ordered that the warrant applications and warrants be kept secret and under seal, news media reported on the searches as they occurred.

20. During the searches, the FBI collected 51 boxes of materials from Dr. Chen's home and 24 items from her office. Those materials included tax records and business documents, family photographs, family and personal communications, business communications, personal memorabilia, computers and digital storage devices (including an iPad and two iPods), video tapes, and cell phones. The personal photographs seized from Dr. Chen's home included photographs that showed her at home with her husband; posing with her then-minor daughter, also a U.S. citizen; and paying respects at her father's gravesite.

21. The FBI labeled and stored the materials seized from Dr. Chen's home using labels that listed a specific file number, i.e., 200D-WF-240088; the date of seizure; a designated item number; a description of the item; and the location of the search (which, in the case of the searches of Dr. Chen's home, included her personal residential address). Those materials accordingly became part of "a group of any records ... from which information is retrieved by the name of the

individual or by some identifying number, symbol, or other identifying particular assigned” to records related to Dr. Chen. 5 U.S.C. § 552a(a)(5) (definition of “system of records”). Attached hereto as Exhibit A is a copy of a photograph that fairly and accurately depicts one of the labels that the FBI used to identify seized materials.

22. After six years of investigation, in March 2016, the U.S. Attorney’s Office for the Eastern District of Virginia informed Dr. Chen’s attorney that no charges would be filed against her.

23. On information and belief, starting at some time before late February 2017, one or more agents of the FBI (or, possibly, other Defendants) unlawfully disclosed to one or more persons associated with Fox News various records and information pertaining to Dr. Chen and her private affairs that the FBI had collected or generated in the course of its investigation of her and that the FBI thereafter had stored in one or more of its systems of records (hereinafter the “Leaked Records”). On information and belief, some of the Leaked Records had also been stored in one or more systems of records of other Defendants.

24. As a direct and foreseeable result of the unlawful disclosure of the Leaked Records to Fox News, Fox News in turn published, broadcast, and otherwise disseminated much of the contents of the Leaked Records to its nationwide audiences, resulting in personal, professional, and financial harm to Dr. Chen.

25. On February 24, 2017, Fox News aired the first of three negative reports about Dr. Chen that drew heavily from contents of the Leaked Records. In

an “exclusive” report during its primetime broadcast, which draws millions of viewers, Fox News used some of the Leaked Records as purported support for the report’s allegation that, many years earlier, Dr. Chen had lied on her immigration forms about whether she had previously worked for the Chinese military. The print version of the February 24 report is attached hereto as Exhibit B.

26. Among other things, the February 24, 2017 Fox News report revealed information derived from, and images of, an FBI FD-302 Form, bearing file number “200D-WF-240088,” that purported to memorialize an FBI interview of Dr. Chen’s daughter. Attached hereto as Exhibit C is an image of this form from the February 24, 2017 Fox News Report. This Fox News Report also displayed images of personal photographs seized from Dr. Chen’s home during the FBI search. On information and belief, before they were disclosed to Fox News, that FBI form and those photographs had been stored in one or more FBI system(s) of records.

27. The February 24, 2017 Fox News report also revealed data taken from, and images of, Dr. Chen’s immigration and naturalization forms; Dr. Chen’s certificate of U.S. Citizenship, which includes her birthdate, INS Registration Number, height, and marital status; and Dr. Chen’s immigration application. On information and belief, before they were disclosed to Fox News, these documents were stored in one or more systems of records maintained by the FBI and/or in one or more systems of records maintained by the U.S. Citizenship and Immigration Services, a component of Defendant DHS.

28. The February 24, 2017 Fox News report stated that representatives of Fox News had reviewed other documents showing that the FBI searched Dr. Chen's home and the University of Management and Technology's main office as part of a counter-intelligence case. On information and belief, those documents were also among the Leaked Records and, before having been disclosed to Fox News, were stored in one or more systems of records maintained by the FBI and/or in one or more systems of records maintained by the other Defendants.

29. The February 24, 2017 Fox News report also selectively discussed details of FBI interviews of Dr. Chen and her daughter as well as information purportedly drawn from Dr. Chen's immigration paperwork. On information and belief, these aspects of the report were also drawn from or based upon some of the Leaked Records.

30. Fox News published and broadcast additional "exclusive" reports about Dr. Chen on April 28, 2017 and June 28, 2017. These reports, like the initial report, subsequently received additional coverage from other media sources. The print version of the April 28 report is attached hereto as Exhibit D and the print version of the June 28 report is attached hereto as Exhibit E.

31. The April 28, 2017 Fox News report publicly displayed the contents of additional personal photographs that the agents of one or more of the Defendants seized from Dr. Chen's home, including photographs depicting Dr. Chen's daughter and the gravesite of her father. The June 28, 2017 Fox News report publicly displayed similar material.

32. Fox News continues to host the reports based on the Leaked Records and images of some of the Leaked Records themselves on its website.

33. Before the government's execution of the search warrant at Dr. Chen's home, the only known copies of the photographs published by Fox News were kept in Dr. Chen's home.

34. On May 8, 2017, James Gillis, an Assistant U.S. Attorney involved in the investigation of Dr. Chen and an agent of Defendant DOJ, conceded during a hearing before Magistrate Judge Anderson of the United States District Court for the Eastern District of Virginia that the photographs featured in the Fox News reports "came from the search take."

35. On June 25, 2018, Dr. Chen, through her counsel, asked the Office of Inspector General for Defendant DOJ to investigate the illegal disclosure of the Leaked Records. The DOJ Office of Inspector General advised counsel for Dr. Chen that it would not conduct any such investigation.

36. On November 15, 2018, the Office of Inspector General for Defendant DOJ told counsel for Dr. Chen, as part of its purported rationale for declining to conduct the requested investigation, that Defendants DOD and DHS (or components thereof) had also had access to the records in Dr. Chen's FBI file, and therefore could have been sources of any leak that resulted in the Fox News reports. This representation by a representative of Defendant DOJ is a part of the basis for naming DOD and DHS as additional defendants.

37. The widespread publication, broadcast, and dissemination of the Fox News reports that were

initially aired on February 24, 2017, April 28, 2017, and June 28, 2017 (hereinafter the “Leak-Based Fox News Reports”), which were based on the unlawfully Leaked Records—which, in turn, had been obtained during the course of a U.S. government investigation of Dr. Chen that resulted in no charges whatsoever—upended Dr. Chen’s personal and professional life.

38. The unwanted storm of negative media attention focused on Dr. Chen that resulted from Defendants’ disclosure of the Leaked Records, and from the subsequent dissemination of the Leak-Based Fox News Reports, was so severe that it caused persons unknown to Dr. Chen to send hateful mail and other communications to, and direct death threats at, Dr. Chen and other staff at the University of Management and Technology.

39. Dr. Chen suffered financial harm as a result of the illegal disclosure of the Leaked Records by one or more of the Defendants.

40. The University of Management and Technology’s enrollments and revenues sharply decreased in the wake of the Leak-Based Fox News Reports. This decrease has had a severe and negative effect on Dr. Chen’s income and the value of her personal investment in the University of Management and Technology, which she wholly owns.

41. The illegal disclosures of the Leaked Records to Fox News also led to inquiries from Members of Congress and the DOD about Dr. Chen and the University of Management and Technology.

42. On January 23, 2018, and apparently as a direct consequence of the Leak-Based Fox News Reports, DOD suspended (and on March 28, 2018

ultimately terminated) the University of Management and Technology's long-standing participation in the DOD Tuition Assistance program. The Tuition Assistance program pays a significant portion of tuition expenses for military students and is a critical source of funding for servicemembers seeking to further their education. The termination of the university's participation in the Tuition Assistance program directly caused further decreases in enrollments and revenues to the University of Management and Technology, directly resulting in further substantial injury, including substantial personal financial losses, to Dr. Chen.

43. According to the Leak-Based Fox News Reports, the FBI and U.S. Attorney's Office refused to provide any comment on the record to Fox News regarding the matters discussed and disclosed in those reports. The reports did, however, cite anonymous sources who reportedly had described conflict between the FBI and the U.S. Attorney's Office over whether to bring charges against Dr. Chen. The same Fox News reports also cited (but did not name) a Special Agent in the FBI's Washington Field Office who, according to the reports, was upset that the University of Management and Technology was continuing to participate in the DOD's Tuition Assistance program. Attached hereto as Exhibit F is an image of an email from the unnamed Special Agent to an FBI informant displayed in the February 24, 2017 report.

44. Soon after Dr. Chen was informed that no charges would be brought against her, and in violation of federal law, one or more agents of the Defendants, who possessed or had access to confidential FBI

records pertaining to the investigation, caused the Leaked Records to be disclosed to one or more employees or agents of Fox News.

**COUNT ONE: VIOLATION OF THE
PRIVACY ACT**

45. Plaintiff hereby restates and incorporates by reference paragraphs 1-44 of this Complaint as if fully set forth herein.

46. The Privacy Act requires that “[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains,” subject to certain exceptions. 5 U.S.C. § 552a(b).

47. While there are limited exceptions to this prohibition on disclosure, *see* 5 U.S.C. § 552a(b)(1) through (12), none of those exceptions authorized or allowed the disclosure to Fox News of the records and information concerning Dr. Chen that are the subject of this suit.

48. At no time did Dr. Chen authorize any of the Defendants or their agents to disclose any information pertaining to her to anyone outside the federal government, including anyone associated with Fox News.

49. The United States is liable for actual damages, costs of the action, and attorneys’ fees if the court determines that an agency willfully or intentionally disclosed records pertaining to an individual without their permission. 5 U.S.C. § 552a(g)(4).

50. The Leaked Records broadcast in the Fox News reports included “records” within the meaning of the Privacy Act. These records could not have been obtained by Fox News except from the Defendants, either directly or indirectly.

51. At least some and likely all of the Leaked Records, before being unlawfully disclosed as described above, were contained in a system of records within, and under the control of, the FBI, the DHS, and/or other Defendants.

52. As a matter of policy and practice, the records and information that the FBI collects or creates during the course of an investigation are incorporated into and thereafter maintained in the FBI’s Central Records System, which the FBI has designated a “system of records” for Privacy Act purposes. *See* 63 Fed. Reg. 8659, 8671; *see also* 66 Fed. Reg. 17200; 66 Fed. Reg. 29994. Such records also may be accessed through the SENTINEL system, which allows for electronic case management. On information and belief, this policy and practice was followed with respect to at least some, if not all, of the Leaked Records.

53. Some of the Leaked Records (including but not necessarily limited to immigration forms and other records pertaining to Dr. Chen) were contained in, or derived from records contained in, a system of records maintained by DHS. Some or all of these DHS records were maintained in the Citizenship and Immigration Data Repository, which DHS has designated a “system of records” for Privacy Act purposes. *See* 75 Fed. Reg. 54642, 54644.

54. The disclosure or disclosures of the Leaked Records by one or more employees or agents of the Defendants was a willful and intentional violation of the Privacy Act.

55. As a direct and foreseeable result of the illegal leak or leaks of Dr. Chen's private information to Fox News, three Fox News reports were published and broadcast, leading to the destruction of Dr. Chen's livelihood and the termination of the University of Management and Technology's participation in DOD's Tuition Assistance program.

56. Although the government has never charged Dr. Chen in court with any misconduct, her reputation has suffered substantial harm and she has been financially damaged as a result of Defendants' unlawful conduct. The illegal leak of personal information has diminished Dr. Chen's income, limited her professional opportunities, and decreased the value of the university that she wholly owns and into which she has invested the last two decades.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court provide the following relief:

- a. Enjoin Defendants from further unauthorized and illegal disclosures of Dr. Chen's private information;
- b. Award Dr. Chen actual damages, the exact amount of which is to be determined at trial;
- c. Award Dr. Chen reasonable costs and attorney's fees as provided by the Privacy Act;

- d. Refer any Government officials responsible for violating the Privacy Act for prosecution under 5 U.S.C. § 552a(i)(1);
- e. Direct the Defendants to state publicly that the documents underlying the Fox News reports were illegally and selectively leaked with the intent to harm Dr. Chen; and
- f. Grant such further and other relief as this Court deems just and proper.

Dated: December 21, 2018 Respectfully submitted,

/s/Patrick Carome

* * *

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)

EXCLUSIVE: Based just four miles from the Pentagon in northern Virginia is an innocuous-sounding online school for “management and technology”—which a Fox News investigation reveals has been at the center of multiple federal probes about its leadership’s alleged ties to the Chinese military and whether thousands of records from U.S. service members were compromised.

The University of Management and Technology in Rosslyn, Va., which opened in 1998, touts a campus in Beijing and “partnerships” with universities around the world. The U.S. taxpayer-funded school claims to have had 5,000 graduates in the last five years and to be “especially proud of our students stationed in US military bases around the globe.”

However, there is another side to the school’s leadership that drew the attention of the FBI, the Justice Department, the Pentagon, Immigration and Customs Enforcement, and the Naval Criminal Investigative Service (NCIS) since at least 2012—and perhaps as early as 2009.

In December 2012, the FBI made two very public raids of UMT and the northern Virginia home of university president Yanping Chen Frame and its academic dean, her husband J. Davidson Frame. Documents reviewed by Fox News show it was a counter-intelligence case, known as a “200d,” one of

the most highly sensitive categories for a federal probe.

Photos, exclusively obtained by Fox News, appear to show Chen as a young officer in the People's Liberation Army, the military wing of China's communist party. Another photo shows Frame saluting his wife, Chen, who is holding a uniform. Three independent experts said it was a Chinese military colonel's uniform.

Yet since those FBI raids, UMT has continued to collect more than \$6 million from Defense Department tuition assistance programs as well as the Department of Veterans Affairs through the post-9/11 GI bill.

"It's a bad deal for the soldiers, and it's a bad deal for the taxpayer," Stephen Rhoads, a military veteran turned whistleblower who says he worked with the FBI on the case, told Fox News in an exclusive interview. "Nobody's getting what they paid for."

Rhoads said he worked at UMT recruiting vets when the FBI approached him in 2012 regarding the federal investigation. Emails and other documents reviewed by Fox News corroborate key elements of Rhoads' story.

"One of the first sentences she [Chen] ever threw out—after she found out I was an Army officer, was, 'Well ... I was a colonel in the army,'" Rhoads explained. "During our first face-to-face encounter, absolutely ... she did not deny it." Rhoads said he thought Chen meant the U.S. Army, and asked whether she trained in Texas. "She laughed and said, 'Oh, no, I was in the Chinese army, you know.'"

Chen, 64, came to the United States in 1987 from Beijing on a non-immigrant visa with her daughter Lele Wang. The Chinese government funded Chen's research at George Washington University where she received a Ph.D. in Public Policy in 1999, the year after UMT was created.

While Rhoads says Chen was upfront about her Chinese military experience, he claimed she hid those ties on immigration applications. Fox News reviewed Chen's immigration records where she consistently denied ties to the Chinese or any foreign military. When asked, "Have you ever been a member of, or in any way affiliated with, the communist party or any other totalitarian regime?" Chen checked "no." She would later become a naturalized U.S. citizen.

While there are no U.S. laws preventing a naturalized citizen from running a school like UMT, the Fox News investigation found that Chen's ties to the Chinese military appear to run deep.

Three outside experts consulted by Fox News confirmed the authenticity of the Chinese uniforms in the photos of Chen and Frame.

"If somebody was wearing that uniform, I would say that there's a very great likelihood that they were in the People's Liberation Army," Dennis Blasko, a leading Chinese military expert said, referring to the photo of what appears to be Chen in uniform.

Asked about the photo of Frame saluting his wife, Blasko observed, "This is a P.L.A. officer's uniform—active duty—from between 1987 and 2007 ... And from the epaulettes, we can see this—three stars and two red stripes would be a full colonel."

Blasko emphasized that P.L.A. insignia can only be purchased with the permission of the Chinese military, and “you would have to have a certificate from your unit to buy [it.]”

Blasko, a West Point graduate who worked as a military attache in China, wrote “The Chinese Army Today: Tradition and Transformation for the 21st Century,” one of the definitive books about the Chinese military.

In her George Washington University dissertation, Chen thanks her father, a P.L.A. general, who directed arms and technology development. “My father, General Chen Bin, gave me the inspiration to pursue this area of study,” Chen wrote. “As former Chairman of COSTIND (1982-87), he was an important player in supporting and directing the (Chinese) space program.”

In her 2012 FBI interview, Chen denied she ever was a colonel in the P.L.A., emphasizing she had worked as a doctor in the Chinese space program. Chen said it was a “civilian agency.” The interview summary suggests federal agents challenged Chen’s characterization. Outside experts told Fox News the Chinese civilian and military space programs are intertwined.

While Chen’s immigration application is more than a decade old, and past the five-year statute of limitations, there may be a “continuation” of fraud, according to Ray Fournier who worked with the State Department’s office of diplomatic security for more than 20 years. Fournier, an expert on visa and passport fraud, worked for the Joint Terrorism Task Force in San Diego, where his investigative work led

to an arrest warrant for the American-born cleric Anwar Awlaki, who was later killed by the CIA.

Fournier said, "If she has marked 'no' on the petition, but if in fact, the answer is yes ... then we have a false statement. And where that comes into play, most assuredly, is in the arena of passport fraud. It is this application." With each renewal of Chen's U.S. passport, Fournier said, investigators should determine whether the falsehood was repeated. "These are issues of inadmissibility," he said.

While going through the immigration process, Chen was also launching what would become a multi-million-dollar online academy. But that academy's work would eventually attract the attention of federal investigators, who questioned whether students' records were remotely accessed from China.

Before the 2012 raid, Chen's daughter Lele Wang who also works at UMT, told the FBI that "'Contractors' in the UMT Beijing Office have [administrator] privileges" to access the student database.

Rhoads said UMT recruited service members who provided their military history when they enrolled. "It got uploaded into an O-drive, they called it ... their personal military bio, you know, where they were trained, how they were trained, how long, that could be remotely accessed."

Rhoads said Chen had a particular interest in Ohio's Wright-Patterson Air Force Base, which is a research and technology hub.

And there was more. "She wanted me to go out to these remote reserve and National Guard centers, you

know ... in small-town America and start gettin' U.S. soldiers from those centers. Get their information, basically. Who's out there in the woods? How many units we got?"

Rhoads recalled to Fox News that he was instructed by the FBI to tell Chen that he was going to testify before a Virginia grand jury. "They wanted to, I guess see how ... she would react."

At the time, Rhoads said Chen had no idea he was working with the bureau.

He said, "Well, at this point, she didn't know I was working for them at all. And she's like, 'Oh, you don't tell them anything. We don't know each other. You don't ... know what you don't know,' was her buzz phrase. 'You don't—you don't know I was a colonel in the P.L.A. They'll never have proof to say that'."

Emails obtained by Fox News show Rhoads and at least one FBI agent alerted the Defense Department, but another Memorandum of Understanding (MOU) was signed in 2014 through 2019 allowing UMT to collect millions in federal taxpayer aid.

An FBI agent in one email exchange wrote, "I let my management and the AUSAs [assistant U.S. attorneys] know about her renewal with DoD. Incredible."

Asked about the renewal, as well as whether DoD personnel were warned and additional steps were taken to vet UMT, the DoD chief for Voluntary Education Assistance, Dawn Bilodeau, referred questions to Pentagon spokesperson Laura Ochoa. In an email, Ochoa said, "In light of reports regarding University of Management and Technology (UMT),

the Department is reviewing the DoD MOU signed between the institution and the DoD for compliance.”

No one has been charged with any crime in connection with the investigation. Sources told Fox News that Assistant U.S. Attorney for the Eastern District of Virginia James P. Gillis got the case, but there was a disagreement with the FBI over how to proceed, based on the case law and the extent to which sources and methods would be revealed.

Neither the FBI nor a spokesman for Gillis would comment to Fox News but separately, a spokesman for NCIS said they cannot comment on an “ongoing investigation.” A FOIA request filed by Fox News Senior Executive Producer Pamela Browne confirmed an NCIS investigative file for UMT.

Fox News made repeated requests by phone and via email for interviews with Yanping Chen and J. Davidson Frame. After Chen’s daughter said they were too busy to prepare and traveling out of town, Fox News went to their offices in Rosslyn, Va.

A school representative, who would not identify himself, confirmed Chen and Frame were in the office that day, but after learning Fox News was at the front desk, the couple refused to come out. Fox News’ questions covered how UMT was run, Chen’s suspected military ties, whether service members’ records are secure, and how millions in taxpayer dollars are spent.

Fox News also sent a series of questions to the Chinese embassy in Washington, D.C., but there was no immediate response.

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According to UMT, nearly 20,000 students have studied there, while 10,710 have earned degrees.

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)

EXCLUSIVE: Four congressional committees are demanding answers from the FBI and departments of Justice and Defense about a taxpayer-funded school that markets to the military, after a Fox News investigation exposed alleged ties between the university's leadership and the Chinese military.

The ongoing Fox News investigation has focused on the Virginia-based University of Management and Technology, its president Yanping Chen Frame and the school's academic dean, J. Davidson Frame, Chen's husband. UMT was raided by the FBI in 2012 as part of a counterintelligence investigation, but multiple sources told Fox News the case ran into roadblocks once it reached the U.S. attorney's office.

"There's not only a lot of smoke coming out of this one, there's some fires out there that need to be extinguished and some people that really have to answer the questions," House Oversight Committee Chairman Jason Chaffetz, R-Utah, said.

In a letter to Defense Secretary James Mattis on April 12, Chaffetz said military service members and their personnel records remain at risk. He questioned why the Defense Department continues to fund the school with taxpayer dollars through the GI Bill and the tuition assistance program.

"There was no obligation to give this money. They didn't have to give this money. Somebody made a

proactive decision to authorize this, to move forward, and then why not cut it off?" Chaffetz said.

Since the 2012 FBI raid, UMT received more than \$6 million. Some \$250,000 has been received by the school since Fox News aired its first report in February.

"It's a bad deal for the soldiers ... it's a bad deal for the taxpayer," said former UMT employee Stephen Rhoads, a U.S.-veteran-turned-whistleblower who says he worked as an FBI informant on the case. "It absolutely disgusts me and needs to stop."

After the Fox News investigation, the Defense Department put the school under review but continues to fund it. When he worked there, Rhoads said the school got more than 250,000-\$300,000 per month in taxpayer dollars.

Photos obtained by Fox News apparently show Chen wearing the uniform of a young officer in the Chinese military of the People's Liberation Army, known as the PLA, along with her family. In another undated photo, Chen appears to salute the grave of her father, Chen Bin, who was a senior general in the PLA in charge of technology and arms acquisition.

"Her father joined the Communist Party in the 1930s. He supposedly participated in the Long March and that ... gives her credentials not unlike being an officer in the continental army," said Peter Mattis, a fellow with the Jamestown Foundation and leading expert on China. "The Long March," between 1934-1935, has long been referred to as a bloody pillar of the Chinese Communist Revolution which ultimately led to the creation of the People's Republic of China.

Mattis said a school like UMT would be attractive to the Chinese military.

“You get what you’d call a curated database. You’re not just getting a database of a lot of Americans. You’re getting a database of people who are interesting to you, people who work in the U.S. military, who have access to a sensitive technology,” Mattis said. “This is valuable to China 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.”

Mattis added, “If intelligence is a numbers game and maybe one out of 100 or one out of 500 people are willing to commit treason, then the faster you can go through those numbers, the better off you are. They’re looking for former officials, classmates, spouses, friends and they have no problem recruiting someone with only secondhand access to information.”

Fox News has confirmed that the Naval Criminal Investigative Services (NCIS) is also investigating the UMT. Separately, multiple sources told Fox News that the U.S. attorney for the Eastern District of Virginia, James P. Gillis, declined to prosecute in 2014, but that may be about to change.

The FBI, the U.S. attorney for the Eastern District of Virginia and the Defense Department declined to comment, citing the ongoing probe.

Chaffetz stressed his dismay with the reaction of the Department of Justice. “Just turning the other cheek on something that appears at least on the surface to be so blatant -- that begs the question, what

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are the 100,000-plus people at [the Department of Justice] doing?"

Fox News has an open invitation for an interview with Yanping Chen and J. Davidson Frame. They told Fox News in February they were too busy.

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)

The FBI is “reopening” its probe of a taxpayer-funded online school for military servicemembers after a six-month Fox News investigation exposed its alleged Chinese military ties, according to a senior Republican lawmaker.

“They’ve told us they’re looking more seriously at it, that they’re quote, unquote, reopening that investigation, and I hope to get some answers,” retiring Rep. Jason Chaffetz, R-Utah, told Fox News.

Reached by phone, an attorney claiming to represent the university told Fox News he’s unaware of any current criminal justice probe implicating his client. Separately, the Naval Criminal Investigative Service (NCIS) confirmed in a statement to Fox News that the investigation into the University of Management and Technology (UMT) “is still an active multi-agency investigation so there’s nothing we can say at this point.”

In 2012, the FBI raided the Rosslyn, Va.-based UMT and the home of its president, Yanping Chen Frame, a Chinese-born naturalized U.S. citizen, and her husband J. Davidson Frame, the school’s academic dean.

CONGRESS PROBING TAXPAYER-BACKED SCHOOL OVER ALLEGED CHINESE MILITARY TIES

Documents reviewed by Fox News, as well as recently unsealed court records, show the FBI focused

on whether UMT's military personnel records could be remotely accessed from China, potentially compromising military histories of U.S. servicemembers, as well as Chen's alleged false statements on immigration documents that eventually allowed her to gain U.S. citizenship.

Chaffetz stressed that Senate Judiciary Committee Chairman Chuck Grassley, R-Iowa, is going to "take the reins" on the case from the congressional side. "I know he'll be tenacious in trying to get to the truth, but we want to know about [Yanping Chen] specifically, about what has this school been doing—remember it's taxpayers' funds that are going ... to perpetuate this, and yet there are a lot of question marks on whether or not that data, that information, is going directly to the Chinese government."

With heavy marketing to members of the U.S. military, government records show the school has collected upwards of \$250,000 per month from U.S. taxpayers via the Department of Defense (DoD) through the GI Bill and tuition-assistance programs.

Fox News' investigation found the school's president has long-standing ties to the Chinese military or PLA (People's Liberation Army). While attending George Washington University, where her education was funded by the Chinese government, Chen wrote about her family's PLA connections, thanking her father, Chen Ben, who was a senior general in the Chinese military in charge of technology and arms acquisition. She received a Ph.D. in Public Policy from the school in 1999.

DOD-FUNDED SCHOOL AT CENTER OF FEDERAL PROBES

Photos obtained exclusively by Fox News, and reviewed by a leading national security expert on Chinese military uniforms, appear to show Yanping Chen as a young PLA officer and wearing a PLA uniform alongside family members.

“Her father joined the Communist Party in the 1930s. He supposedly participated in the Long March and that gives her credentials not unlike being an officer in the continental army,” said Peter Mattis, a fellow with the Jamestown Foundation and a leading expert on China. The Long March, from 1934-1935, has long been referred to as a bloody pillar of the Chinese Communist Revolution which ultimately led to the creation of the People’s Republic of China.

Mattis said a school like UMT could be valuable to China 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.”

The high-profile 2012 FBI raid did not result in any charges against UMT or Yanping Chen. After the initial report on the school aired in February, Fox News was told there was a logjam between the FBI and U.S. Attorney’s Office for the Eastern District of Virginia over how to proceed and whether evidence could potentially compromise intelligence collection methods. Since the raid five years ago, UMT has received in excess of \$6 million in government funding.

Four congressional committees are now demanding answers as to why the school still receives taxpayer dollars.

"The rub here is that it's all being funded by taxpayers' money, and so here we are, the American taxpayers, feeding this beast that may potentially be giving information directly to the Chinese government, and that better not be the case," Chaffetz said.

Regarding the UMT investigation, Chaffetz added, "There has been a lot of smoke coming here, and you got whistleblowers who are close to the situation saying something's wrong here, something's not right. ... So I hope the Department of Justice, specifically the FBI, is taking it much more seriously than they have in the past."

Stephen Rhoads—a whistleblower, former UMT employee and veteran who came forward to Fox News—called it "very encouraging" that the House Oversight and Senate Judiciary committees are getting involved and "law enforcement is no longer turning a blind eye to Yanping Chen and UMT."

"I want to thank Fox News for following up on a story that deeply impacts our servicemembers, tax dollars, and national security," he said. "As a servicemember, it is important that allocated funds are not misappropriated."

Yet money keeps flowing to UMT. The Defense Department admitted via email that they put the school under review but continue to fund it. "The Department's Memorandum of Understanding with UMT has not changed. Funding under the MOU flows

directly from the Services to institutions,” a spokesperson said via email.

Grassley sent a three-page letter on June 14 to Homeland Security Secretary John Kelly citing Fox News’ reporting. With a deadline of June 28, Grassley sought information on any Yanping Chen immigration records that may have been “falsified ... to conceal her affiliation with the Chinese military.”

In the first phone call returned to Fox News, attorney John C. Kiyonaga said he represents Yanping Chen and the University of Management and Technology. Kiyonaga said his client has been charged “with absolutely nothing” and characterized the U.S. government’s handling of the case as “full of bluster and innuendo.”

The FBI had no comment. Legal experts said it would be unusual for the bureau to notify an individual or entity in the event a case is re-opened.

Appendix L

**RELEVANT CONSTITUTIONAL PROVISION
AND FEDERAL RULE**

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fed. R. Evid. 501. Privilege in General

The common law—as interpreted by the United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

