

No. 26-461

IN THE
Supreme Court of the United States

CATHERINE HERRIDGE,
Petitioner,
v.
YANPING CHEN,
Respondent.

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

BRIEF IN OPPOSITION

ANDREW C. PHILLIPS
Counsel of Record
ARCHITH RAMKUMAR
MARK THOMSON
LEANNA SOLOMIN
MEIER WATKINS PHILLIPS
PUSCH LLP
1120 20th St NW, Suite 550
Washington, DC 20036
(202) 318-3655
andy.phillips@mwpp.com
*Counsel for Respondent
Yanping Chen*

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QUESTION PRESENTED

American citizen Yanping Chen seeks to vindicate her rights under the Privacy Act after an egregious leak of her protected records. After Chen was subjected to a years-long FBI investigation based on information she disclosed on her immigration and naturalization forms, she was not charged with any wrongdoing. Shortly after the declination, unidentified government official(s)—likely federal investigator(s) unhappy with the decision not to charge Chen—unlawfully leaked protected records from the investigation to reporter Catherine Herridge at Fox News. Fox then used that information to run a series of reports about Chen, falsely insinuating that Chen is a Chinese spy.

Chen sued the FBI and other agencies under the Privacy Act, and over the ensuing five years, sought to uncover the identity of the leaker through discovery of the government defendants and third parties. Only after her efforts failed conclusively to identify Herridge's source(s) did Chen subpoena Herridge. Herridge claimed that the identity of her source(s) was covered by a qualified reporter's privilege and refused to identify the leaker. Applying the factors used by Circuits across the country, the D.C. Circuit held that Chen overcame Herridge's assertion of the privilege because: (1) Chen demonstrated that her Privacy Act claim was far from frivolous; (2) the identity of the leaker was essential to Chen's claim; and (3) Chen had exhausted all other avenues for obtaining the leaker's identity. The D.C. Circuit also refused to break new ground in creating a common law reporter's privilege different from the First Amendment privilege it already recognized.

The question presented is whether the D.C. Circuit's decision is correct.

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INTRODUCTION

The premise underlying Catherine Herridge's petition for a writ of certiorari is a pernicious one: that this Court should not only authorize but require district courts to pick and choose which litigants before them deserve the protection of federal law, based not on the merits of their claims, but on subjective value judgments such as whether they believe a plaintiff's claim is "low-stakes." Pet. 1, 4.

On five separate occasions, the lower courts refused to accede to that proposition—one that is inimical to the bedrock principle that everyone is entitled to equal treatment under the law—and rejected Herridge's claim that a qualified reporter's privilege entitles her to shield the identity of the federal official(s) who broke the law by leaking Privacy Act-protected materials to Herridge. *See* App. 37-38. This Court also recognized that Herridge's position was untenable when it denied her request for a stay of the D.C. Circuit's mandate. *See* App. 2. It should do the same now and deny the petition.

The fundamentals of Herridge's petition have not changed since this Court denied her stay application four months ago. *See* App. 2. There is no circuit split over the test utilized to assess a reporter's claim of qualified privilege where the identity of a confidential source is sought in a civil case. Herridge's proposal to supplant that well-established and defined qualified privilege test with an unbounded, freewheeling balancing approach would prove inherently unworkable. And this case is a suboptimal vehicle to issue a constitutional ruling, because Herridge is going to lose on the question of whether she must reveal her source(s), regardless of whether this Court grants the

petition and orders the lower courts to adopt her preferred approach.

First, there simply is no circuit split over how to assess reporter's privilege claims involving confidential sources under the First Amendment. Federal courts of appeals evaluating the First Amendment reporter's privilege—including the D.C. Circuit here—consistently focus on the centrality of the information being sought and exhaustion of other avenues for obtaining the information, while accommodating consideration of whether the plaintiff's underlying claim is frivolous. The courts of appeals have used that test for decades to evaluate qualified reporter's privilege claims in civil cases involving confidential sources. Herridge identifies no disagreement among the Circuits that would change the result were this case pending elsewhere. And her misguided invocation of *McKevitt v. Pallasch*, 339 F.3d 530, 532-33 (7th Cir. 2003), *see* Pet. 16, is of no moment. The information at issue in that case did “not come from a confidential source” and therefore did not implicate the First Amendment. 339 F.3d at 533.

Second, the decision below was correct. Herridge does not “contest the district court's determination that” Chen overcame Herridge's qualified privilege claim because the “centrality and exhaustion requirements for overcoming the privilege were satisfied.” App. 10. This existing test strikes the appropriate balance between competing interests and anchors judicial discretion to tangible guideposts. And it is decidedly pro-reporter, designed to provide that the reporter's privilege “prevail[s] in all but the most exceptional cases.” *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981). Herridge's proposal for a new test that eschews the well-defined factors of centrality,

exhaustion, and non-frivolousness in favor of an unbounded, “anything-goes” balancing of all manner of considerations is impractical and unworkable. App. 25-26. It would put district courts in the impossible position of having to divine which litigants are entitled to the protection of the law based on entirely subjective value judgments such as gauging the relative importance of a plaintiff’s claim or a plaintiff’s perceived motivation for bringing suit. And Herridge’s contention that district courts should be made to engage in that misguided exercise under the guise of a new and broader common law reporter’s privilege fares no better. The inherent hazards of a freewheeling balancing approach would persist regardless of whether it is nestled under the First Amendment or common law. And in any event, neither “reason” nor “experience” supports the creation of such a privilege out of whole cloth. *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996); App. 14.

Third, this case is a poor vehicle for this Court to consider the contours of the reporter’s privilege for the simple and fundamental reason that the district court considered every single factor Herridge wanted it to consider, yet it explicitly concluded—twice—that none of those factors would “tilt the scales back in Herridge’s direction.” App. 27; App. 35 (“[T]he Court continues to believe that a free-wheeling balancing of interests would not change the outcome in any event.”). Herridge’s proclamation that this case is an “ideal vehicle” is irreconcilable with the district court’s uncontroverted findings that show that Herridge would not prevail even under the test that she advocates for. Pet. 34. In her stay papers, Herridge maintained that the district court could plausibly revisit its findings, Stay Reply at 5-7, Case No. 25A1448 (July 2, 2026) (“Stay Reply”). That position strains credulity.

While Herridge leans heavily on the opinions dissenting from the D.C. Circuit's denial of rehearing *en banc* in *Lee v. Department of Justice*, 428 F.3d 299 (D.C. Cir. 2005), *see* Pet. 2, 3, 10, 12, 15, 26, 34, tellingly, this Court denied the certiorari petition filed in *Lee* raising the very arguments Herridge makes here, *Thomas v. Lee*, 547 U.S. 1187 (2006), and Herridge points to no supervening developments in the ensuing 20 years that warrant this Court's intervention now. The unanimity in the decisions below underscores the stability in this area of the law; no D.C. Circuit Judge believed rehearing *en banc* was warranted in this case, *see* App. 15-18, and Herridge's request to stay the mandate below was summarily denied. App. 19-20. Accordingly, Herridge's petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

I. The District Court Proceedings.

A. Chen's Privacy Act Lawsuit.

Chen is an American citizen who, in 1998, founded the University of Management and Technology (UMT), an educational institution headquartered in Virginia. App. 5. In 2010, Chen became the focus of an FBI investigation concerning statements she made on immigration forms. *Id.* As part of that investigation, the FBI searched Chen's home and UMT and seized materials during both searches. *Id.* After six years of investigation, in "2016, the U.S. Attorney's Office for the Eastern District of Virginia decided not to file charges against Chen." *Id.*

One year later, Fox News ran a series of negative television segments and news articles about Chen. App. 23. Herridge spearheaded those reports, which focused on Chen's alleged past ties to the Chinese

military and falsely insinuated that Chen was “funnell[ing] valuable information about the American military to the Chinese government.” *Id.* These reports included personal photographs seized from Chen’s home during the FBI search and information from Chen’s immigration forms. App. 6. Shortly after Fox ran its reports about Chen, the Department of Defense (DOD) terminated UMT’s participation in a tuition assistance program. *Id.* “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.” *Id.*

In December 2018, Chen filed a lawsuit against the FBI and other agencies, asserting that a disgruntled federal employee, likely angered over prosecutors’ decision not to charge Chen with any wrongdoing, willfully leaked information about her in violation of the Privacy Act. App. 6. Chen sought numerous categories of damages, including minimum statutory damages, expenditures to remediate the harm from Fox’s reporting, damages relating to DOD’s decision to cancel UMT’s participation in the tuition assistance program, and unrelated lost profits, along with attendant attorneys’ fees and costs. App. 11, 36; *see* 5 U.S.C. § 552a(g)(4).

B. Chen’s Exhaustive Efforts to Identify the Leaker.

Once discovery commenced, Chen served numerous 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. App. 6-7; App. 24 (“Over the next

five years, Chen pounded the pavement to uncover the identity of the potential leaker.”). Despite these efforts, “Chen was unable to determine who was responsible for leaking the materials aired in the Fox reports.” App. 7. As a result, Chen served deposition and document subpoenas on Herridge in May and June of 2022. *Id.*¹ Relevant here, Herridge moved to quash the subpoenas on the ground that the materials sought were privileged. *Id.*

C. The District Court’s Denial of Herridge’s Motion to Quash.

The district court concluded that Chen overcame Herridge’s assertion of the reporter’s privilege. App. 7.

It began its analysis with *Zerilli*, which articulated a test that minimized “impingement upon the reporter’s ability to gather news” and ensured that “the civil litigant’s interest in disclosure” would “yield to the journalist’s privilege” in “all but the most exceptional cases.” *Chen v. FBI*, 687 F. Supp. 3d 115, 120 (D.D.C. 2023). That test consists of two prongs: (1) centrality, namely a showing that the information sought goes to “the heart of the matter” and is “crucial”; and (2) exhaustion, as “reporters should be compelled to disclose their sources only after the litigant has shown that he has exhausted every reasonable alternative source of information.” *Id.* at 121. Consistent with *Zerilli*’s articulation of the centrality factor, the district court also analyzed, as a threshold consideration, whether Chen’s suit was “not frivolous.” *Id.* After all, “if an obvious flaw will prevent

¹ Chen also subpoenaed Fox; the district court “sequenced discovery so that Chen could depose Herridge” first and thus granted Fox’s motion to quash the subpoena “while allowing Chen to renew her subpoenas at a later time if necessary.” App. 7.

a plaintiff from succeeding on her Privacy Act claim, then it might be said that the leaker's identity does not go to the heart of the matter." *Id.* at 123 n.2 (quotation omitted). The district court then noted that in *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005), the D.C. Circuit reinforced the *Zerilli* framework by evaluating centrality and exhaustion, instead of engaging in a "free-form balancing of interests." *Chen*, 687 F. Supp. 3d at 122; App. 26.

Applying *Zerilli* and *Lee*, the district court found that: (1) Chen's claim was "not frivolous" because Chen "seeks economic damages for consulting fees and reputation management services she claims to have incurred to remediate the harm caused by the Fox reporting"; (2) the information Chen was seeking was central to her Privacy Act claim because the identity of the leaker was essential to show willfulness and intent; and (3) Chen satisfied the exhaustion prerequisite. *Chen*, 687 F. Supp. 3d at 125-26, 129.

Critically, the district court then, "for the sake of completeness," evaluated the other considerations Herridge maintained were relevant and found that they "likely would not change the outcome here in any event." *Id.* at 128. The district court was unmoved by Herridge's argument that Chen likely could not "obtain damages," reasoning that even if Chen were "barred from pursuing damages" based on DOD's revocation of tuition assistance, Chen also sought "economic damages for consulting fees and reputation management services she ... incurred to remediate the harm caused by the Fox reporting," as well as "lost profits" stemming from other "lost business opportunities." *Id.* at 128-29. Next, the district court rejected Herridge's argument that it should discount Chen's interest in enforcing the Privacy Act based on unproven

allegations about her alleged ties to the Chinese military, because the “Privacy Act protects not just Chen but all private citizens, whether blameworthy or blameless, from the risk that government officials might be tempted to abuse their access to sensitive information by leaking materials intended to embarrass particular individuals.” *Id.* at 129-30. Herridge’s arguments that Chen “had it coming” provided no basis to devalue Chen’s entitlement to a remedy under the Privacy Act. *Id.* at 129.

The district court also declined Herridge’s invitation to recognize a common-law newsgathering privilege that would circumvent established First Amendment precedents regarding the reporter’s privilege and undermine “the fundamental purpose of the Privacy Act.” *Id.* at 131 (quoting *Lee v. Dep’t of Justice*, 401 F. Supp. 2d 123, 141-42 (D.D.C. 2005)). Thus, the district court authorized Chen to “depone Herridge regarding the identity ... of the source or sources of the documents and images allegedly provided to her in violation of the Privacy Act.” *Id.* at 132.

D. The District Court’s Decision Holding Herridge in Contempt.

At her deposition, Herridge refused to disclose her source(s), and Chen moved to hold Herridge in contempt for defying the district court’s order. App. 30-31. After reiterating that both the “centrality and exhaustion” factors outlined in *Zerilli* “weigh[ed] heavily in Chen’s favor,” App. 26, the district court concluded that Herridge was in contempt of its disclosure order. App. 32-33. And even though the district court “could have stopped there,” App. 27, it reemphasized that “a free-wheeling balancing of interests would not change the outcome in any event,” App. 35.

First, the district court again rejected Herridge's assertion that Chen would be "unable to recover any damages," explaining that at a minimum, the "photographs of Chen ... could support a Privacy Act claim," and those photographs "could have given the Fox reporting more traction ... and caused Chen more damage than she otherwise would have suffered." App. 36.

Second, the district court found that "any national-security concerns over requiring Herridge to reveal her source ring hollow" because it was "hard to fathom how disclosing Herridge's source would place America in jeopardy." App. 37. The district court rebuked Herridge once more for deriding Chen's lawsuit as an attempt to fund the disclosure of "U.S. servicemembers' information ... to a foreign power," noting that "[t]he Court's job is to apply the law evenhandedly, not to adjudicate who is worthy of the law's protection." App. 37-38.

Third, the district court found that Herridge's warnings of a chilling effect were inconsistent with reality, given the "limited evidence that the floodgates to journalists' notepads have opened or the wellspring of confidential sources has dried up" in the wake of the D.C. Circuit's decision in *Lee*. App. 40.

The only remaining question was the "appropriate sanction for Herridge's contempt." App. 45. After surveying civil contempt penalties imposed in "similar contexts," the district court "adopt[ed] the low-end of this range" and impose[d] a fine of \$800 per day to coerce Herridge into complying with its order. App. 46. It stayed that sanction, however, to preserve Herridge's right to appeal. App. 48.

II. Appellate Proceedings.

The D.C. Circuit unanimously affirmed the district court's decision. The panel initially noted that "Herridge does not contest the district court's determination that *Lee*'s centrality and exhaustion requirements for overcoming the privilege were satisfied." App. 10. It then rejected the two arguments Herridge advanced on appeal—that Chen's Privacy Act claim "is frivolous or meritless" and that *Lee* "conflicts with prior circuit precedent." *Id.*

Writing for the panel, Judge Katsas first made it clear that the D.C. Circuit's "governing framework is flexible enough to accommodate ... an inquiry" into the frivolousness of Chen's Privacy Act claim as part of assessing centrality, because "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." App. 10-11. But the panel blessed the district court's non-frivolousness finding while noting that Chen sought damages stemming directly from Herridge's reporting: "even if Herridge collected 'almost all' of her information from material that was already in the public domain," the panel explained, "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." App. 11. That is critical because "so long as Chen establishes that *some* Privacy Act violation harmed her, she may recover actual or statutory damages if it was willful." *Id.* (emphasis in original).

Next, the panel found that *Zerilli* did not endorse the freewheeling balancing test that Herridge advocated for but instead established "more precise guidelines" for assessing reporter's privilege claims.

App. 13. The straightforward application of that test “suffice[d] to foreclose Herridge’s privilege claim” and also disposed of Herridge’s argument that “Chen’s claim is simply *not that important*.” App. 11-12 (emphasis in original).

The panel also declined Herridge’s invitation to “end-run” its precedent by creating a federal common-law privilege broader than the extant First Amendment reporter’s privilege. It explained that “Herridge has provided little cause to think that ‘reason and experience’ support the privilege that she propounds.” App. 13-14 (quoting *Jaffee*, 518 U.S. at 8). “As to reason,” the panel held, “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.’” App. 14 (quoting *Trump v. Vance*, 591 U.S. 786, 791 (2020)). “As to experience,” the panel found that states’ treatment of the reporter’s privilege varied “widely ... both in the abstract and on the question whether case-by-case interest balancing is appropriate.” *Id.*

Herridge filed petitions for panel rehearing and rehearing *en banc*, both of which were denied without a single Circuit judge calling for a vote. App. 17-18. Herridge then filed a motion to stay the D.C. Circuit’s mandate, which was summarily denied, *id.* at 19-20, before seeking a stay in this Court, to no avail. *See id.* at 2. Only one Justice noted that he would have granted the stay application. *See id.*

REASONS FOR DENYING THE PETITION

I. No Circuit Split Exists.

Herridge contends that by hewing to *Lee* and *Zerilli*, the panel’s decision “conflicts with decisions of other circuits.” Pet. 14. It does not. The D.C. Circuit’s approach is consonant with how other Circuits balance the interests germane to the qualified reporter’s privilege under the First Amendment in the confidential source context.

As she did in her stay papers, *see* Stay App. at 15-17, 25-29, Case No. 25A1448 (July 2, 2026), Herridge principally argues that the D.C. Circuit’s decision conflicts with *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980). *See* Pet. 17-18, 20-21, 27. In that case, the First Circuit delineated three factors in its “balancing approach”: (1) “relevance in an important sense to plaintiff’s claim”; (2) “availability of the information from other sources”; and (3) “non-frivolousness of the cause of action.” *Bruno*, 633 F.2d at 598. In other words, the factors in the First Circuit’s balancing test are centrality, exhaustion, and non-frivolousness—the same considerations that the D.C. Circuit relied on here. *See* App. 10-11. Although the First Circuit noted generally that “courts must balance the potential harm to the free flow of information that might result against the asserted need for the requested information,” 633 F.2d at 596, Pet. 18, it immediately went on to specify precisely how courts strike that balance: by evaluating the three factors that the D.C. Circuit also relied on as informing the “findings of fact” that district courts must make to resolve reporter’s privilege claims involving confidential sources. 633 F.2d at 598.

Herridge argues that *Bruno* endorsed a more stringent testing of the merits of plaintiffs' claims, akin to evaluating whether the claims will survive "summary judgment." Pet. 17, 20. But the First Circuit's statement that the "plaintiff should show that it can establish jury issues on the essential elements of its case," *Bruno*, 633 F.2d at 597, is preceded by a sentence conspicuously omitted from Herridge's petition: "As a threshold matter, the court should be satisfied that a claim is not frivolous, a pretense for using discovery powers in a fishing expedition," *id.* In other words, the First Circuit's reference to "jury issues," Pet. 17, is simply part of the same non-frivolousness inquiry that the D.C. Circuit applied in this case. See App. 10-11; *Bruno*, 633 F.2d at 599 n.17 ("We take no exception to the court's finding that plaintiff's claim is not frivolous."). Underscoring that point, the First Circuit observed that once courts are satisfied that "the case does not appear frivolous" and "the desired information appears more than remotely relevant," then the "need to preserve confidentiality" is appropriately accounted for if courts "require that resort to nonconfidential sources first be exhausted." *Id.* at 597-98. That is precisely what the D.C. Circuit did here.

Herridge is on no firmer ground in claiming that the "Fourth Circuit applies a similar balancing approach" that deviates from what the D.C. Circuit did here. Pet. 18. Indeed, the Fourth Circuit has adopted a substantially similar three-part test: "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) (citation and quotation omitted). Contra Herridge, this "compelling interest" inquiry is not an

invitation to conduct freeform balancing. It is drawn directly from the Fifth Circuit's decision in *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir.), *opinion supplemented on denial of reh'g*, 628 F.2d 932 (5th Cir. 1980). See *Ashcraft*, 218 F.3d at 287; *Miller*, 621 F.2d at 726 ("The other circuits have followed a three part test ... (1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?"). And *Miller's* distillation of what constitutes a "compelling interest" dovetails with how the D.C. Circuit has defined centrality. See *Miller*, 621 F.2d at 726-27 ("The only way that Miller can establish malice and prove his case is to show that Transamerican knew the story was false[.] ... In order to do that, he must know the informant's identity.").

Herridge claims that the Third Circuit's decision in *Riley v. City of Chester*, 612 F.2d 708, 714-15 (3d Cir. 1979), "applies the very balancing approach that the D.C. Circuit rejected." Pet. 19-20. Not so. The Third Circuit's test is the same. See *Riley*, 612 F.2d at 717 ("Plaintiffs must show that they exhausted other means of obtaining the information. The material sought must provide a source of crucial information going to the heart of the (claim)." (citation and quotation omitted)). In fact, the D.C. Circuit expressly relied on *Riley* in fashioning the very test that Herridge is now bemoaning as insufficient. See *Zerilli*, 656 F.2d at 712-13 (citing *Riley*, 612 F.2d at 715-18).

No other Circuits have strayed from this approach when evaluating whether reporters are entitled to shield the identities of confidential sources from disclosure. See Pet. 15-16, 19; *Shoen v. Shoen*, 5 F.3d 1289, 1296 n.14 (9th Cir. 1993) ("[B]ecause we hold that plaintiffs have not satisfied the exhaustion

requirement, we express no opinion on whether plaintiffs have made a sufficient showing on the other questions considered in the balance—i.e., whether the information sought is relevant ... and whether it is crucial to the maintenance of plaintiffs’ legal claims.” (citing *Zerilli*, 656 F.2d at 713)); *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (“[T]he factors that the trial court must consider are (1) the relevance of the evidence; (2) the necessity of receiving the information sought; (3) whether the information is available from other sources; and (4) the nature of the information.”);² *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (“[I]nformation may be compelled from a reporter claiming privilege if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources.”); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7-8 (2d Cir. 1982) (“The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists’ sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.” (citing *Zerilli*, 656 F.2d at 713-15), *cert. denied*, 459 U.S. 909 (1982)).³ In short, the

² District courts in the Tenth Circuit have interpreted “the nature of the information” factor as requiring an assessment of whether “the information at issue is critical to the case,” i.e., centrality. *Farmland Partners Inc. v. Fortunae*, No. 18-cv-02351-KLM, 2020 WL 12575073, at *7 (D. Colo. May 18, 2020); *Bacon v. Archer*, No. 17-mc-00192-KLM, 2018 WL 4467182, at *7-8 (D. Colo. Sept. 17, 2018) (similar).

³ There is no dissonance in state supreme courts’ approaches. See Pet. 19 n.1; *State v. Davis*, 720 So. 2d 220, 227 (Fla. 1998)

cases Herridge invokes to substantiate her claimed circuit split have, at most, merely employed “different verbal formulations of the same underlying legal rule,” and such “minor linguistic discrepancies” do not evince an “actual divide[].” Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006).

In a last-ditch attempt to resuscitate her circuit-split argument, Herridge points to the Seventh Circuit’s decision in *McKevitt* for the proposition that courts “do not agree on [the] scope” of the privilege. Pet. 14 (quoting *McKevitt*, 339 F.3d at 532). But even a cursory inspection of *McKevitt* reveals that it has no bearing on the question presented here.

The Seventh Circuit in *McKevitt* considered whether journalists were properly compelled to produce tape recordings of interviews with an individual who later became a key witness in an international prosecution, which implicated “[t]he federal interest in cooperating in the criminal proceedings of friendly foreign nations.” 339 F.3d at 532. The interviewee was not “a confidential source”; indeed, the source pushed for disclosure, and it was the journalists who “paradoxically” wanted to keep the information secret because of

(“[T]he court must determine whether the movant has established that: (1) the reporter possesses relevant information; (2) the same information is not available from alternative sources; and (3) the movant has a compelling need for any information the reporter may have.”); *In re Grand Jury Proceedings (Ridenhour)*, 520 So. 2d 372, 375-76 n.12 (La. 1988) (citing *Zerilli* and noting that “[c]onsideration should be given to insure that the party seeking the information is not on a mere fishing expedition”); *Mitchell v. Superior Ct.*, 690 P.2d 625, 632-35 (Cal. 1984) (also citing *Zerilli*). *In re Letellier*, 578 A.2d 722, 726 (Me. 1990), see Pet. 19 n.1, is a criminal case, and therefore inapposite.

“intellectual property” concerns. *Id.* at 533-34. “Disputes over intellectual property,” the Seventh Circuit sensibly concluded, “are not profitably conducted in the idiom of the First Amendment.” *Id.* at 534. Although the Seventh Circuit noted that in view of *Branzburg v. Hayes*, 408 U.S. 665 (1972) “the interest of the press in maintaining the confidentiality of sources is not absolute,” it refrained from opining on the question Herridge asks this Court to take up: how the reporter’s privilege should operate when sources’ interests in confidentiality are beyond dispute. 339 F.3d at 532; *see* Pet. i. “When the information in the reporter’s possession does not come from a confidential source,” “it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure.” *McKevitt*, 339 F.3d at 533; *see also Taylor v. City of Chicago*, No. 14 C 737, 2015 WL 6561437, at *2 (N.D. Ill. Oct. 29, 2015) (“In *McKevitt* ... the Seventh Circuit held that the First Amendment offers no protection ... at least in the context of nonconfidential sources.”). The decision should not be read to stand for any broader proposition unmoored from its actual holding and cannot bear the weight Herridge places on it.⁴

At bottom, Herridge’s claim that “the circuits are deeply divided over ... what must be shown to overcome the privilege” in the confidential-source context, Pet. 23, is meritless. Instead, the federal courts of appeals have congruently evaluated centrality, exhaustion, and non-frivolousness. That has been the

⁴ Herridge’s reliance on subsequent unreasoned dicta from the Seventh Circuit in *Department of Education v. NCAA*, Pet. 16, is similarly entitled to little weight; that case concerned an entirely inapposite question: whether a “private-investigator’s privilege” exists. 481 F.3d 936, 938 (7th Cir. 2007).

stable state of the law for decades, long providing pellucid guidance to reporters and litigants across the country.

II. The Decision Below Is Correct.

The D.C. Circuit’s well-established, existing First Amendment test—drawn directly from *Zerilli*, see App. 10-13—is appropriately calibrated to strike a balance between reporters’ interests in protecting sources and litigants’ interests in obtaining crucial discovery where it is unavailable elsewhere. The latter interest is particularly important here, where a government official is suspected of willfully violating a citizen’s civil rights, and allowing the reporter to shield that leaker’s identity would subvert Congress’s intent to uncover and deter such violations. Conversely, Herridge’s proposal for a new, freewheeling balancing approach is unworkable. It would allow for unconstrained judicial discretion and put district courts in a position of having to make inappropriate, subjective value judgments about which litigants deserve the protection of the law.

A. The Existing First Amendment Qualified Privilege Test Strikes the Appropriate Balance.

Although the First Amendment is silent regarding a reporter’s privilege—and notwithstanding this Court’s observation that neither the common law nor historical practice recognized one, *Branzburg*, 408 U.S. at 698—the federal courts of appeals, including the D.C. Circuit, have established a qualified reporter’s privilege that can only be overcome by a showing of non-frivolousness, centrality, and exhaustion. While Herridge decries the D.C. Circuit’s existing test as “mechanical” and “a privilege in name only,” Pet. 1, 15,

the reality is that the test strikes a careful and appropriate balance that provides robust protection for reporters' promises of confidentiality while also ensuring that, in proper cases, litigants will not be deprived of congressionally authorized protections.

The test articulated in *Zerilli* is an inherently pro-reporter test, a point gleaned from the language of the case itself. In its discussion of the important role a free press plays in a democracy, *Zerilli* recognized that “disclos[ing] the identity of a source [could] significantly interfere with [a reporter’s] news gathering ability.” *Zerilli*, 656 F.2d at 711. In an effort “to minimize impingement” on a reporter’s First Amendment rights, *Zerilli* accordingly explained that “in the ordinary case the civil litigant’s interest in disclosure should yield to the journalist’s privilege.” *Id.* at 712. And “mindful of the preferred position of the First Amendment and the importance of a vigorous press,” the *Zerilli* court doubled down on this point, explaining that if the “privilege [did] not prevail in all but the most exceptional cases, its value [would] be substantially diminished.” *Id.*; see Pet. 23 (citing *Zerilli* for the proposition that “[c]ompelling a reporter to disclose the identity of a confidential source raises obvious First Amendment problems”).

Other courts have recognized *Zerilli*’s pro-reporter bent. The California Supreme Court, in adopting a qualified reporter’s privilege, noted *Zerilli*’s robust defense of First Amendment principles in its holding. See *Mitchell*, 690 P.2d at 628. And courts across the country have followed suit, citing *Zerilli*’s exposition on the importance of the press in providing information to the public when assessing the reporter’s privilege. See *Condit v. Nat’l Enquirer, Inc.*, 289 F. Supp. 2d 1175, 1181 (E.D. Cal. 2003) (“Because the

condition of exhaustion has not been met, the [reporter's] protection from disclosure remains intact." (citing *Zerilli*, 656 F.2d at 713)); *Lenhart v. Thomas*, 944 F. Supp. 525, 530 (S.D. Tex. 1996) (citing *Zerilli* for the proposition that "[r]espondent must fulfill his obligation to exhaust alternative sources even though he fears that the investigation may be time consuming, costly, and unproductive"); *In re Arya*, 589 N.E.2d 832, 838-39 (Ill. App. Ct. 1992) (citing *Zerilli* and overturning a lower court decision that ordered a reporter to disclose his source); *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675, 681 (Tex. Ct. App. 1991) (citing *Zerilli* as evidence that courts are "jealous guardians of the press freedoms guaranteed in the First Amendment"). The stringent protections the D.C. Circuit affords reporters belie Herridge's claim that "the reporter's privilege is the least protective in the Nation's capital." Pet. 14.

Herridge's portrayal of the existing privilege as not "meaningful," and "an automatic rule of disclosure in Privacy Act cases" is at odds not only with the language and holding of *Zerilli*, but with lived experience. Pet. 15, 31. A key prong of the *Zerilli* test is that a civil litigant must "exhaust[] every reasonable alternative source of information" before the reporter can be compelled to disclose a source. *Zerilli*, 656 F.2d at 713; *see also Clampitt v. Thurston Cty.*, 658 P.2d 641, 644 (Wash. 1983) (noting that litigants must meet *Zerilli*'s "very substantial" exhaustion requirement). Herridge gives short shrift to this exhaustion requirement, which is far more rigorous than she lets on. Indeed, this "weighty obligation" of exhausting alternative sources of information may be "unproductive," *McArdle v. Hunter*, No. 81-10038, 7 Med. L. Rep. 2294, 2295 (E.D. Mich. 1981), as well as "costly and time-consuming." Bernard Bell, *Privacy Act Litigation and*

the Journalist Privilege, Yale J. Reg.: Notice & Comment (Oct. 13, 2025), <https://www.yalejreg.com/nc/privacy-act-litigation-and-the-journalist-privilege>. Given how exacting this requirement is, it is hardly surprising that orders requiring disclosure of a source are rare; “few plaintiffs are likely to have the fortitude, the financial resources, and the prospect of a sufficiently sizable recovery to bear such expenses over years.” *Id.*

Notably, *Zerilli* itself rebuffed the plaintiff’s efforts to overcome the reporter’s privilege because the plaintiff there failed to satisfy the exhaustion requirement, even though the suit was “not frivolous” and the information sought was “crucial.” *Zerilli*, 656 F.2d at 714-15. That was hardly an anomaly; “many of the cases” in the D.C. Circuit have rejected disclosure due to a plaintiff’s failure to exhaust alternative sources of information. *Chen*, 687 F. Supp. 3d at 124. This “[v]igilant application” of the exhaustion factor thus helps to “ensure that compelled disclosure will be the exception, not the rule.” *Id.*

Chen’s case *is* exceptional because of the herculean efforts she undertook to identify the leaker before seeking disclosure from Herridge. Chen served scores of discovery requests, took 18 depositions, and obtained declarations from an additional 22 government employees, all of whom denied being the leaker. *See* App. 24. That Chen had to undergo this “five-year odyssey” of discovery before seeking to depose Herridge, App. 26, puts the lie to any notion that the exhaustion requirement is “mechanical,” Pet. 23.

Herridge is correct in noting that the centrality factor generally will be satisfied in most Privacy Act cases. But for good reason. Because the statute requires showing that the leak was “intentional or willful,” 5 U.S.C. § 552a(g)(4), discovering the leaker’s

identity is “crucial,” *Zerilli*, 656 F.2d at 714, and without it, the plaintiff’s case would be greatly “compromised,” *Lee*, 413 F.3d at 60. Herridge fails to grapple with the fact that, in the context of a Privacy Act suit where the plaintiff has exhausted all reasonable alternative avenues, the reporter’s shielding of the source is doubly deleterious: it denies the plaintiff a statutory remedy *and* protects a federal official who abused his position to violate a citizen’s civil rights. Nothing in the Privacy Act suggests that Congress wanted wrongdoers to evade detection simply by laundering unlawful disclosures through journalists. “[T]he protections of the Privacy Act do not disappear when the illegally disclosed information is leaked to a journalist, no matter how newsworthy the government official may feel the information is.” *Id.* And as this Court recognized in *Branzburg*, “the [First] Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.” 408 U.S. at 691-92.

In sum, it is “no longer open to question that there are countervailing interests which will suffice to transcend the journalist’s privilege to refuse to divulge sources.” *Riley*, 612 F.2d at 715. Chen’s countervailing interests stem directly from the Privacy Act: “Congress has recognized the weightiness of such disclosures” contravening the Act, *Chen*, 687 F. Supp. 3d at 129, by enacting criminal penalties for government officials who willfully leak protected records, 5 U.S.C. § 552a(i)(1), and by creating a private civil right of action. 5 U.S.C. § 552a(g)(4). “Denying civil litigants access to the identity of government officials who have allegedly illegally leaked information to reporters would effectively leave Privacy Act violations immune from

judicial condemnation, while leaving potential leakers virtually undeterred from engaging in such misbehavior when the communications are made to reporters.” *Hatfill v. Gonzales*, 505 F. Supp. 2d 33, 45 (D.D.C. 2007). While it is decidedly pro-reporter and difficult to satisfy, the existing qualified privilege test appropriately allows for the possibility that Privacy Act plaintiffs can obtain access to information necessary to vindicate their rights and hold lawbreaking federal officials to account.

**B. Herridge’s Proposed Freeform Balancing
Is Inherently Unworkable.**

Herridge’s proposed approach would have this Court not only empower, but require, district courts to subjectively weigh litigants’ “interests” with no limits as to what considerations a given judge may elect to place on the scale in the name of “balancing.” Herridge argues that in addition to centrality, non-frivolousness, and exhaustion, the district court should have also considered things like (1) the “risk” that Chen might have engaged in espionage, notwithstanding that she was never charged with, let alone convicted of, any such thing, Pet. 9, 12, 21; (2) whether Chen’s Privacy Act claim is “low-stakes” because, according to Herridge, Chen might ultimately obtain relatively minimal damages, *id.* at 4, 21, 24; and (3) that Herridge’s ability to protect her source(s) should receive special solicitude because the reporting at issue here related to “national security.” *Id.* at 9, 21.

Herridge does not suggest that this list is exhaustive. Rather, she advocates for a general “weigh[ing] [of] the public interest in protecting a reporter’s sources against [the plaintiff’s] private interest in compelling disclosure.” Pet. 9. Such an approach, which the district court aptly branded “free-form, anything-goes analysis,” *Chen*, 687 F. Supp. 3d at

120, would “give district courts free rein to populate [the] test with whatever factors they please.” *Id.* at 121. That approach would not only “raise a host of workability issues,” *Chatrie v. United States*, 609 U.S. 605, 636 (2026), but it would make a mockery of the fundamental precept that all are entitled to equal protection of the law.

District court judges asked to engage in the freewheeling balancing Herridge advocates for here have roundly criticized it as unfeasible. In subsequent proceedings in *Lee*, for example, District Judge Rosemary Collyer dismissed such an approach as “inherently unworkable.” *Lee*, 401 F. Supp. 2d at 139. For one thing, it would “create a subjective and elastic standard whose outcome could not be predicted.” *Id.* Moreover, “[s]ubmission of a reporter’s privilege to a judge’s determination of the newsworthiness of his or her story is also very troubling,” as “[c]ourts are ill-suited to decide the degree to which information is beneficial or unimportant to the common weal.” *Id.* As for having to weigh that amorphous determination against a plaintiff’s perceived interest in obtaining redress, Judge Collyer warned that “[t]he determination of whether the harm caused by the leaked information outweighs the ‘value’ of that information to the citizenry would be a daunting and well-nigh impossible task,” and “[w]hether a reporter must reveal his sources should not rest on the value assigned by a jurist to the reporter’s story or the litigant’s purpose.” *Id.* at 139-40.

District Judge Reggie Walton echoed these concerns two years later in *Hatfill*. He warned that trying to subjectively weigh the worthiness of a plaintiff’s cause—i.e., “the harm the leak caused”—against a journalist’s interest in protecting a particular source—

i.e., “the leaked information’s value”—was “extremely problematic.” *Hatfill*, 505 F. Supp. 2d at 46. And he agreed with Judge Collyer that such an approach would prove “inherently unworkable.” *Id.* at 47 n.8 (quoting *Lee*, 401 F. Supp. 2d at 138-39).

The arguments Herridge advances here highlight the perils of a freewheeling balancing approach. Take, for example, Herridge’s argument that the district court should have considered and weighed the “risk” that Chen may have been passing information to a foreign government. Pet. 9, 27. The FBI investigated Chen for six years, App. 55, yet Chen was never charged with, let alone convicted of, any wrongdoing, App. 23; Pet. 6. Herridge does not explain how a court should “weigh” the mere existence of an investigation that resulted in no charges. Pet. 9. Nor does she explain how denying a litigant a congressionally authorized remedy on that basis could possibly be compatible with the fundamental principle that all are entitled to equal protection of the law.

As the district court observed, “[t]he Court’s job is to apply the law evenhandedly, not to adjudicate who is worthy of the law’s protection.” App. 37-38.⁵ “The [Privacy] 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.” App. 38 (quotation and citation omitted). In response,

⁵ In granting Chen’s motion to seal documents related to these allegations, the district court left no doubt on this point, reiterating that “Chen has not been charged with a crime,” and therefore her privacy interests trumped “scandalous and unsubstantiated allegations” against her. Order at 4, *Chen v. FBI*, No. 1:18-cv-3074 (D.D.C. Sept. 14, 2026) (Dkt. 216).

Herridge cites the government’s boilerplate assertion of an unclean hands defense to argue that Chen’s claim may ultimately fail. *See* Pet. 27. But an argument “[t]hat the plaintiff ‘had it coming’ is not a viable defense under the Privacy Act.” App. 38.⁶

Herridge also argues that the district court should have discounted Chen’s interest in disclosure based on the modicum of damages she might ultimately recover, claiming, with no support, that “there is no world in which Chen could survive summary judgment” due to an alleged lack of damages. Pet. 20-21. On this score, Herridge’s arguments are disingenuous. As the lower courts repeatedly noted in rejecting this argument, Chen seeks multiple categories of damages that Herridge does not even mention, let alone question. App. 11, 35-37. Moreover, as the D.C. Circuit observed (and Herridge herself acknowledges), the Privacy Act provides for “a statutory floor of \$1,000.” App. 5, 12; Pet. 21. Thus, what Herridge is really arguing is “that Chen’s claim is simply *not that important*.” App. 11 (emphasis in original).

Chen, of course, disputes the notion that her recoverable damages are minimal, but regardless, gatekeeping a Privacy Act litigant’s right to relief based on whether her likely damages meet some subjective threshold level of worthiness is self-evidently problematic. For one, the difference between what is a “minimal” recovery and a windfall may very well be in the eye of the beholder. Moreover, the fact that Congress included statutory damages and attorneys’ fees provisions in the Privacy Act reflects an

⁶ Herridge makes no effort to establish that the equitable defense of unclean hands is even a viable defense to a statutory Privacy Act claim.

intent to encourage litigants to pursue vindication for *all* violations of the Act. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 260-63 (1975), *superseded on other grounds by Civil Rights Attorney’s Fees Awards Act of 1976*, as recognized in *Lackey v. Stinnie*, 604 U.S. 192 (2025); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (“When a plaintiff brings an action ... he does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance [that] public interest[.]”). Indeed, “[t]he grant of a cause of action to any ‘aggrieved person’ [was] designed to encourage the widest possible citizen enforcement through the judicial process.” S. Rep. No. 93-1183 at 83 (Sept. 26, 1974). Herridge ignores that “Privacy Act claims vindicate more than the personal interests of the litigant”; “they serve a systemic function in deterring the ‘intentional or willful’ dissemination of private records maintained by our government.” App. 27. So even assuming Chen could only recover statutory damages (a point Chen vigorously disputes), “[n]ominal relief does not necessarily a nominal victory make.” *Farrar v. Hobby*, 506 U.S. 103, 121 (1992) (O’Connor, J., concurring).

Finally, Herridge argues that reporting about “national security” should receive special protection in a freeform balancing approach. Pet. 21. Such concerns “ring hollow,” as the district court noted, because it “is hard to fathom how disclosing Herridge’s source would place America in jeopardy.” App. 37. And as the district court astutely observed, a judge could just as easily conclude, if given free rein to do so, that “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.” *Id.*

C. The D.C. Circuit Correctly Rejected Herridge’s Invitation to Create a Common-Law Reporter’s Privilege More Expansive Than the Reporter’s Privilege Already Recognized Under the First Amendment.

Herridge’s assertion that the D.C. Circuit erred in failing to divine, out of whole cloth, a federal common-law reporter’s privilege under Federal Rule of Evidence 501 broader than the already-recognized First Amendment reporter’s privilege, *see* Pet. 28-32, is similarly unavailing. The D.C. Circuit’s rationale for rejecting her invitation is fully in accord with this Court’s rejections of multiple entreaties to recognize a federal common-law reporter’s privilege. *See* Petition for Writ of Certiorari, *Risen v. United States*, No. 13-1009, 2014 WL 690255, at *21-30 (Jan. 13, 2014); *Risen v. United States*, 572 U.S. 1149 (2014) (denying certiorari); Petition for Writ of Certiorari, *Thomas v. Lee*, No. 05-1114, 2006 WL 535406, at *19-22 (Mar. 2, 2006); *Thomas*, 547 U.S. at 1187 (denying certiorari). Indeed, it is telling that in the 30 years that *Jaffee* has been on the books, no court has recognized a federal common-law reporter’s privilege broader than the existing First Amendment privilege.

Rule 501 authorizes courts to recognize “new privileges” if both “reason and experience” countenance in favor of such recognition. *Jaffee*, 518 U.S. at 8. This Court has held, however, that it is “disinclined to exercise this authority expansively,” and is “especially reluctant to recognize a privilege in an area where it

appears that Congress has considered the relevant competing concerns but has not provided the privilege itself” because the “balancing of conflicting interests of this type is particularly a legislative function.” *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (citing *Branzburg*, 408 U.S. at 706) (cited at Pet. 28). *Jaffee* thus “made clear” that “federal courts’ latitude for adopting evidentiary privileges under Rule 501 remains quite narrow indeed.” *United States v. Sterling*, 724 F.3d 482, 502 (4th Cir. 2013). Against that backdrop, the D.C. Circuit correctly concluded that neither reason nor experience supported Herridge’s arguments for the creation of a federal common-law reporter’s privilege.

“As to reason, the First Amendment analysis in cases like *Zerilli* and *Lee* thoroughly lays out the competing considerations.” App. 14. Herridge does not address this reasoning. She instead argues that the “public interest at stake here is even greater than the interests involved in the psychotherapist-patient privilege recognized in *Jaffee*.” Pet. 30. Herridge’s argument is foreclosed by *Branzburg*, which expressly held that there is no “common law” reporter’s privilege, despite acknowledging that without such a privilege, “news gathering may be hampered.” *Branzburg*, 408 U.S. at 684-85; *see also Sterling*, 724 F.3d at 501 (“*Jaffee* does not authorize us to ignore *Branzburg* or support our recognition of a common-law reporter-source privilege today.”). Herridge also overlooks crucial differences between the psychotherapist-patient privilege, on the one hand, *see* Pet. 30, and the reporter’s privilege, on the other. As the Fourth Circuit has recognized, “unlike in the case of the spousal, attorney-client, and psychotherapist-patient privileges that have been recognized, the reporter-source privilege does not share the same relational privacy

interests or ultimate goal,” and has “little in common with the privileges historically recognized in the common law and developed under Rule 501.” *Sterling*, 724 F.3d at 502-03.

Nor have states reached an “overwhelming” consensus on the reporter’s privilege on par with states’ treatment of the psychotherapist-patient privilege. Pet. 31. “[T]he 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.” App. 14. For example, as Herridge concedes, the states are divided over whether the privilege is absolute or qualified, *see* Pet. 31. Such “varying actions” show that a judicially created privilege “would present practical and conceptual difficulties of a high order.” *Sterling*, 724 F.3d at 504 (citation omitted).

III. This Case Is a Poor Vehicle.

Herridge argues that this case is an “ideal vehicle” for this Court to assess the balancing test she proposes. Pet. 34-35. That assertion is fatally undermined by the reality that the district court, on two separate occasions, evaluated all of Herridge’s arguments and concluded that she would be required to disclose the identity of her source(s) even under her preferred test. Herridge does not engage with these findings.

In denying Herridge’s motion to quash, “for the sake of completeness,” the district court expressly considered a hypothetical application of the broader, unbounded balancing test Herridge proposed—namely, Herridge’s claim that Chen was unlikely to recover damages, and Herridge’s argument that Chen’s interests in pursuing her claim are illegitimate simply because she was investigated for her statements on immigration forms. *Chen*, 687 F. Supp. 3d at

128-30. Ultimately, the district court concluded that these considerations “likely would not change the outcome here in any event.” *Id.* at 128.

Undaunted, Herridge made these same arguments when opposing Chen’s motion for contempt. In its contempt order, the district court reiterated that Chen had satisfied the D.C. Circuit’s test for overcoming the qualified privilege, and then affirmed once more, in the interest of “completeness and in recognition of the important First Amendment rights at stake,” that Herridge would not prevail even under the test she advocates for. App. 27. First, it again concluded that Herridge did not demonstrate any infirmities in the merits of Chen’s claim because Herridge raised questions about only one category of damages that Chen seeks. App. 36. Second, the district court determined that Herridge’s purported national security concerns “ring hollow” and, in any event, “the government is a party to this action and could easily intervene to protect these interests.” App. 37. Third, the district court again held that an argument that the plaintiff “had it coming” is not a viable defense under the Privacy Act. App. 38; *Chen*, 687 F. Supp. 3d at 129. Finally, the district court rejected Herridge’s theoretical “chilling effect” concerns, observing that “[a]lmost two decades have passed since *Lee* reaffirmed *Zerilli* and required the reporter there to divulge his source, yet there is limited evidence that the floodgates to journalists’ notepads have opened or the wellspring of confidential sources has dried up during that period.” App. 40. Having considered all of these arguments a second time, the district court again emphasized that “a free-wheeling balancing of interests would not change the outcome in any event.” App. 35.

In her stay reply, Herridge protested that the district court's findings are simply "predictive" and that, hypothetically, the district court could change its mind on remand. Stay Reply 5-7. But the district court could not have been clearer. It twice "mulled each of [the] considerations" Herridge raised and held that they did not move the needle. *See* App. 35-42. The notion that the district court would suddenly change course is fanciful. And while Herridge at the stay stage tried to put daylight between the arguments she makes here and those the district court assessed by claiming the district court failed to consider whether Chen "was likely to recover no damages or at most nominal damages," Stay Reply 7, the indisputable reality, as confirmed by the record, is that the district court considered and rejected that argument twice. App. 35-37; *Chen*, 687 F. Supp. 3d at 129.

Because the district court twice determined that application of Herridge's proposed freeform balancing would not change the outcome of the qualified privilege question or protect her from having to reveal her source(s), Herridge's petition is essentially academic. It is thus a poor vehicle for this Court to issue a constitutional ruling that will not even impact the ultimate result of the case. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 470 n.6 (2013).

CONCLUSION

Herridge's petition should be denied.

Respectfully submitted,

ANDREW C. PHILLIPS

Counsel of Record

ARCHITH RAMKUMAR

MARK THOMSON

LEANNA SOLOMIN

MEIER WATKINS PHILLIPS

PUSCH LLP

1120 20th St NW, Suite 550

Washington, DC 20036

(202) 318-3655

andy.phillips@mwpp.com

Counsel for Respondent

Yanping Chen

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