No. 26-461

IN THE

Supreme Court of the United States

CATHERINE V. 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 OF SENATORS TED CRUZ, MIKE LEE, AND CYNTHIA LUMMIS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[*]

As members of the United States Senate, *amici curiae* Senators Ted Cruz, Mike Lee, and Cynthia Lummis are committed to protecting the free-speech rights guaranteed by the First Amendment and have a special interest in protecting the First Amendment rights of their constituents and of all Americans. The proper application of the reporter's privilege ensures the freedom and efficacy of the vigorous press apparatus essential to a free state and a free people. When, as here, the application of those principles touches on matters of national security, the interests of *amici* are all the more pressing.

Senators Cruz and Lee both sit on the Senate Judiciary Committee, which oversees the Department of Justice and the FBI. Senator Cruz chairs its Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights. Senator Lee chairs the Foreign Relations Committee's Subcommittee on Multilateral International Development, Multilateral Institutions, and International Economic, Energy, and Environmental Policy. Senator Lummis sits on the Committee on Commerce, Science, and Transportation, including its Subcommittee on Telecommunications and Media. *Amici* have a strong interest in speaking to the important issues presented in this case.

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[*] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief wasn't authored in whole or in part by any party or counsel for any party. No person or party other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. *Amici* timely notified counsel for all parties of their intention to file this brief as required by Supreme Court Rule 37.2.

INTRODUCTION

Catherine Herridge is a world-class reporter who covered the FBI counterintelligence investigation of respondent Yanping Chen. Herridge's reports presented evidence that Chen was a colonel in the Chinese People's Liberation Army but concealed that fact on her immigration forms. Pet. App. 6, 66–67. The Department of Defense dropped the university Chen founded from its tuition-assistance program "on national security grounds." Pet. 7. Chen didn't challenge that decision. *Id.* at 8.

Instead, she sued the FBI and other federal agencies under the Privacy Act and subpoenaed Herridge for the name of the source of her reporting. Pet. App. 6–7, 24–25, 50–52. The district court ordered Herridge to answer, Pet. App. 7, 25–29, and the D.C. Circuit affirmed, holding that once a plaintiff shows the source is central to her claim and that she has exhausted other avenues, the privilege is overcome—whatever the national-security or First Amendment cost. Pet. App. 9–14. Herridge has refused to reveal her source, and, as a result, has been held in contempt and fined $800 a day. Pet. App. 8, 45, 49.

This Court addressed the reporter's privilege for the first time more than fifty years ago and held that reporters—like other citizens—must answer a grand jury's questions about crimes they witnessed. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). This Court hasn't revisited the issue since—and it's never squarely addressed the reporter's privilege in the civil context.

Courts have since expressed "confusion" as to how to apply *Branzburg* while avoiding the "'obvious First

Amendment problems'" involved in "'[c]ompelling a reporter to disclose the identity of a confidential source.'" *In re Miller*, 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concurring) (quoting *Zerilli* v. *Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981)). As one judge explained, "[g]iven this confusion, appellate courts have subsequently hewed closer to Justice Powell's [*Branzburg*] concurrence—and Justice Stewart's dissent—than to the majority opinion, and a number of courts have since recognized a qualified reporter's privilege, often utilizing a three-part balancing test." *United States* v. *Sterling*, 724 F.3d 482, 523 (4th Cir. 2013) (Gregory, J., dissenting in part).

In the absence of clear guidance from this Court, most circuits have recognized a qualified reporter's privilege in civil cases. Pet. 14–20. They require a plaintiff to demonstrate that her interest in the information outweighs the reporter's and society's interest in keeping the identity of the source confidential. Pet. 17–20 (citing *Cusumano* v. *Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998); *Ashcraft* v. *Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000); *Shoen* v. *Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993); *Grandbouche* v. *Clancy*, 825 F.2d 1463, 1466–67 (10th Cir. 1987)).

The D.C. Circuit has taken a different approach. It recognizes the reporter's privilege, but reduces it to a checklist, requiring a plaintiff to show only that (1) the source's identity is central to her claim and (2) other reasonable avenues to obtain the information have been exhausted. Pet. App. 9–10, 12. After making that showing, a plaintiff is entitled to pierce the reporter's privilege and obtain confidential source information. Pet. App. 11–13.

That approach is wrong—particularly in important Privacy Act cases like this one. Certiorari is warranted because the D.C. Circuit's departure from the approach of other circuits strikes at the intersection of two critically important issues: national security and the First Amendment. The decision below—requiring a reporter with free-press protections to hand over a confidential source that could compromise the Nation's security—jeopardizes both. The D.C. Circuit's approach also entrenches a circuit split that's ripe for this Court's review, independently warranting certiorari.

The D.C. Circuit's rule doesn't permit a court to ask whether disclosure of a reporter's sources would harm national security, whether it would dry up reporting on which the public and Congress depend, or whether a damages claim the court below acknowledged may be worth as little as $1,000 justifies those harms. Pet. App. 11–13. Even a judge convinced that disclosure would compromise a counterintelligence investigation would find his hands tied under the D.C. Circuit's test so long as the information is central to the plaintiff's civil case and other reasonable avenues have been exhausted. *Ibid.* And the sources with the most to lose—those who talk to national-security reporters—are likely to be the first to go silent when a promise of confidentiality can't be kept.

This Court's guidance as to whether a court may consider the United States' national security and core constitutional rights when compelling a reporter to disclose confidential source information is sorely needed. Other bodies of law that deal with confidential sources in investigations—like the law-enforcement privilege the FBI invoked in this very case—

weigh factors beyond the needs of the case and the plaintiff's ability to obtain the information some other way. Yet the D.C. Circuit's holding prevents judges evaluating a claim of reporter's privilege from doing so.

That shouldn't be the law anywhere. It certainly shouldn't be the law in our Nation's capital, where every Privacy Act plaintiff is entitled to sue. This Court should grant the petition and clarify that lower courts must consider important national-security and First Amendment interests in evaluating claims of reporter's privilege.

ARGUMENT

I. THE D.C. CIRCUIT'S TWO-STEP TEST ERRONEOUSLY COMPELS DISCLOSURE NO MATTER THE COST TO NATIONAL SECURITY OR THE FIRST AMENDMENT.

Under the D.C. Circuit's mechanical, two-step framework for evaluating an assertion of the reporter's privilege, a court may weigh only the centrality of the information to a plaintiff's claim and whether all other reasonable alternative avenues to obtain that information have been exhausted. Pet. App. 9–13. Because the D.C. Circuit has held that these are the *only* factors a court may consider, a judge who is convinced that disclosure would endanger the United States' national security or threaten the First Amendment nevertheless *must* compel discovery. That rule is not only wrong, but it poses serious risks to national security and the First Amendment.

A. This Court has never squarely addressed the reporter's privilege in the civil context. In the absence

of guidance from this Court, the D.C. Circuit embraced a two-step test when a plaintiff seeks a confidential source from a journalist.

The D.C. Circuit first addressed the reporter's privilege in the Privacy Act context shortly after this Court held in *Branzburg* that reporters must answer a grand jury's questions about crimes they witnessed. In *Zerilli*, two plaintiffs sued the government under the Privacy Act, alleging that employees of the Justice Department had leaked transcripts of FBI surveillance to the Detroit News, and they deposed the reporter to learn his sources. 656 F.2d at 706–07. The D.C. Circuit held that the First Amendment supplies a qualified privilege and reasoned 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." *Id.* at 712. Centrality and exhaustion were employed as "more precise guidelines" for "how the balance should be struck." *Id.* at 713. Striking that balance, the court held that the privilege protected the reporter's sources. *Id.* at 707.

Over two decades later, the D.C. Circuit narrowed the reporter's privilege in *Lee* v. *U.S. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005). Plaintiff Wen Ho Lee, the subject of a nuclear-espionage investigation, sued under the Privacy Act over leaks about him, deposed twenty government officials without finding the alleged source, and then subpoenaed five reporters. The panel held that because the sources' identities went to the heart of Lee's case, and because Lee had exhausted alternative avenues of obtaining their identities, the privilege was overcome—full stop. *Id.* at 59–61; *Lee* v. *U.S. Department of Justice*, 428 F.3d

299, 301 (D.C. Cir. 2005) (Tatel, J., dissenting from the denial of rehearing en banc) ("the panel never balanced the public and private interests"). Four judges voted to rehear the case, and three wrote to explain why the panel was wrong. *Id.* at 300 & n.1, 300–03.

The panel below applied *Lee*'s mechanical test and upheld the district court's contempt order—fining Herridge $800 per day for refusing to reveal her source. Pet. App. 49. The D.C. Circuit held that, under *Lee*, a plaintiff must first demonstrate centrality—*i.e.*, that the information sought goes "to the 'heart' of the case." Pet. App. 9 (quoting *Lee*, 413 F.3d at 60). A plaintiff then must demonstrate that she "exhaust[ed] reasonable alternative sources" by "deposing numerous witnesses." *Ibid.* That's "the end of the matter." *Ibid.*

B. The D.C. Circuit's test is flawed, particularly in Privacy Act cases where centrality will nearly always be straightforward to establish. A Privacy Act plaintiff must prove that the agency acted "intentional[ly] or willful[ly]," 5 U.S.C. § 552a(g)(4), in unlawfully disclosing records, and she can't do that without knowing who provided her records in the first place. *Lee*, 413 F.3d at 60.

The second component of the D.C. Circuit's test—exhaustion—is similarly flawed in this context because a plaintiff need only stack up depositions to compel a reporter's confidential source. Pet. App. 6–9. That means the subject of a counterintelligence investigation needs only the stamina to outlast several depositions before a federal court orders a reporter to name her source. Exhaustion measures effort, not stakes. And the stakes are often high in Privacy Act

cases, as most other circuits have recognized. See Pet. 17–20 (collecting cases).

The upshot is that "[b]arring an unexpected confession by the leaker, in most such cases the subject of the leak will be able to satisfy the centrality and exhaustion requirements." *Lee*, 428 F.3d at 302 (Garland, J., dissenting from the denial of rehearing en banc); see *id.* at 301–02 (Tatel, J., dissenting from the denial of rehearing en banc).

C. Compelled disclosure has real, significant costs in at least two areas: **(1)** national security and **(2)** the First Amendment. But the D.C. Circuit's test forbids courts from considering these critical factors. Each presents an independent reason to grant the petition.

1. The D.C. Circuit's version of the reporter's privilege ignores the real threat disclosure poses to our Nation's security in Privacy Act cases. Both of the D.C. Circuit's recent cases applying its two-step test, for example, arose from national-security investigations: *Lee* from "what the government then believed to be nuclear espionage," 428 F.3d at 302 (Tatel, J., dissenting from the denial of rehearing en banc), and this case from an FBI counterintelligence investigation into a former PLA officer, Pet. 5. Chen seeks the source of records the FBI collected in that investigation, along with "when and how" they reached Herridge. Pet. App. 7.

Our law guards that kind of information closely—for good reason. "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" *CIA* v. *Sims*, 471 U.S. 159, 175

(1985). That's why maintaining secrecy extends beyond readily apparent national-security threats to include "the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Ibid.*

What's more, foreign intelligence services have "substantial expertise in deducing the identities of intelligence sources from seemingly unimportant details," and "bits and pieces of data 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.'" *Sims*, 471 U.S. at 178. Who disclosed information from a counterintelligence investigation, and when and how, are pieces of exactly that kind of information. Once compelled, this information leaves the government's control and enters civil discovery—into the hands of the very person the investigation concerned.

The government itself treats that kind of information as sensitive. In this very case, when Chen asked the FBI whether a particular individual had served as a source in its investigation of her, the head of the FBI's Counterintelligence Division explained that confirming or denying a source relationship "would threaten serious broader harm to the United States' law enforcement interests by discouraging other current or potential [sources] or other witnesses from cooperating with the FBI and other law enforcement agencies." *Chen* v. *FBI*, No. 18-cv-3074, Dkt. 46, at 6 (D.D.C. May 11, 2021). The district court weighed that interest against Chen's need and held that the public interest prevailed. *Id.* at 7–11. When the same plaintiff pursued Herridge's source in the same case,

circuit precedent made the public interest irrelevant. Pet. App. 11–13.

That absurd workaround may permit a plaintiff to learn what the intelligence community already established—in the same case—is protected national-security information. It also makes the reporter engaged in First Amendment-protected activity the weak link, since a plaintiff must try and fail to gain the same information in other ways—here, from federal agencies themselves.

The harm doesn't stop at the courthouse steps. Sources with access to the most sensitive investigations are the first to go quiet when a promise of confidentiality can't be kept: "Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters." *Zerilli*, 656 F.2d at 712. National-security reporting—where exposure can cost a source a clearance, a career, or worse—is where that reluctance bites hardest.

Judge Tatel put the stakes plainly. A private damages claim, like this one, "pales in comparison to the public's interest in avoiding the chilling of disclosures about what the government then believed to be nuclear espionage." *Lee*, 428 F.3d at 302 (Tatel, J., dissenting from the denial of rehearing en banc). So "it's hard to imagine how [that] interest could outweigh the public's interest in protecting journalists' ability to report without reservation on sensitive issues of national security." *Ibid.*

Yet under the decision below, a court convinced that the disclosure of information would add a piece to

a foreign intelligence service's puzzle must order disclosure anyway. Pet. App. 11–13. No private plaintiff should be able to override the Nation's security interests by satisfying a test measuring little but persistence.

Congress's oversight of the Executive Branch moreover depends in part on the press. Members, including *amici*, learn of waste, abuse, and security lapses from reporters like Herridge. Sensitive reporting that matters to oversight—on intelligence, law enforcement, and defense—is most dependent on sources who can't be named. *Amici*'s own committee work illustrates the point. See p. 1, *supra*. In each of those roles, reporting that depends on confidential sources can be the first notice Congress gets that something has gone wrong inside an agency it oversees.

For example, the Senate Judiciary Committee oversees the FBI and the Department of Justice—two of the agencies Chen sued. Those agencies investigate in secret, hold enormous power over the people they investigate, and don't always volunteer their mistakes. Congress regularly learns about how they use that power through reporting that depends on confidential sources. A rule that lets any investigation's subject unmask those sources through civil discovery will dry up that reporting, see Part I.C.2, *infra*, and with it impede Congress's critical oversight of executive agencies. That's reason alone to grant the petition.

2. On top of threatening national security, the D.C. Circuit's rule stifles reporters' First Amendment freedoms in Privacy Act cases. That betrays the First

Amendment's free-press guarantee—and independently warrants this Court's review.

The freedom of the press is among our most sacred rights. The First Amendment protects the press so that it can "bare the secrets of government and inform the people." *New York Times Co.* v. *United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). That's because "[o]nly a free and unrestrained press can effectively expose deception in government." *Ibid.* The press "serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials." *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966); see also *ibid.* ("The Constitution specifically selected the press * * * to play an important role in the discussion of public affairs."). It can't play that role without the ability to gather news, and, as the D.C. Circuit has previously recognized, "the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired." *Zerilli*, 656 F.2d at 711.

Because the costs of error aren't symmetrical, courts should weigh these important First Amendment interests before ordering disclosure of information notwithstanding the reporter's privilege. When a court wrongly compels disclosure, the harm is immediate and irreversible. Indeed, the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mahmoud* v. *Taylor*, 606 U.S. 522, 569 (2025). Chen's assurance that compelled disclosure will be "the exception, not the rule," BIO 21, is cold comfort against this backdrop.

On the other hand, when a court wrongly protects a source, the plaintiff loses evidence—sometimes evidence she needs. But that's the price of every privilege, and the law pays it without hesitation for lawyers, spouses, and psychotherapists, among others. See *Jaffee* v. *Redmond*, 518 U.S. 1, 11 (1996) (collecting cases). As this Court has long recognized, First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society," and "need breathing space to survive." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). A test that lets courts weigh those considerations gives the press that breathing space. An easy-to-satisfy, two-step checklist takes it away.

In *Branzburg*, this Court recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. at 681. Justice Powell, who cast the deciding vote, added that reporters aren't "without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Id.* at 709 (Powell, J., concurring). Indeed, he noted that the "balance of these vital constitutional and societal interests on a case-by-case basis" has long been the right way to determine the reporter's privilege. *Id.* at 710. That's why most circuits recognize a qualified privilege in civil cases that balances a plaintiff's interest in uncovering a source against the reporter's and society's interest in preventing disclosure. See Pet. 14–20, 29–31.

To be sure, the First Amendment—like any constitutional right—isn't boundless in its protections. That's why the reporter's privilege is a qualified one, and it yields in favor of disclosure when the balance tips the other way. See, e.g., *Branzburg*, 408 U.S.

at 690 (grand jury investigating crimes the reporters witnessed). But that only means that courts should decide each case based on the specific facts—including whether public interests override the private interests at stake. See Pet. 14–20.

* * *

The D.C. Circuit's two-step reporter's privilege test not only threatens our national security but also undermines core First Amendment values. Whatever formulation of the reporter's privilege this Court adopts, it should be one that at minimum allows a court to weigh those interests before it orders a reporter to name a source. The Court should grant the petition to make that clear.

II. THE SPLIT AMONGST THE LOWER COURTS IS ESPECIALLY IMPORTANT, BECAUSE THE D.C. CIRCUIT'S RULE IS ESSENTIALLY A NATIONAL RULE FOR PRIVACY ACT CASES.

The petition establishes a clear circuit split independently worthy of certiorari. Pet. 14–23. But given its role as a central hub for Privacy Act cases, where these issues most often arise, the D.C. Circuit's position on the wrong side of the split is even more consequential.

The Privacy Act's civil remedies run only against federal agencies. 5 U.S.C. § 552a(a)(1), (g)(1). And any Privacy Act plaintiff may sue in the District of Columbia, regardless of where she lives. *Id.* § 552a(g)(5). The agencies that keep investigative files sit in and around Washington. Many of the reporters who cover those agencies are likewise located near Washington. So for Privacy Act cases like this one, the D.C. Circuit's rule is effectively a national rule.

The harms described above are felt most acutely in Washington, D.C. That's where much of the federal government operates and protects sensitive information. It's where reporters who cover those institutions—like Herridge—often work. And it's where Congress conducts the oversight that those reporters often make possible. No other forum concentrates national-security information, the press that reports on it, and the body that oversees it in one place.

That concentration makes the national-security harm flowing from the D.C. Circuit's rule all the worse. The sources with access to the most sensitive investigations—counterintelligence files, defense programs, intelligence operations—work in and around Washington. Under the decision below, any of them can be unmasked in a Privacy Act suit once the plaintiff has deposed enough officials. The result, as the petition puts it, is that "there will be compelled disclosure as a matter of course in Privacy Act cases." Pet. 33–34. A rule with those consequences in the city that houses the Nation's security apparatus is especially dangerous.

The data bear out that concern. The U.S. District Court for the District of Columbia handles a little over one percent of the Nation's civil filings and about five percent of the civil cases involving the United States.[1] Yet roughly a third of the Privacy Act suits filed last

[1] In the twelve-month period ending September 30, 2024, 3,795 of the 290,896 civil cases commenced in the federal district courts were filed in the District of Columbia (1.3%), as were 2,282 of the 45,636 civil cases in which the United States was a party (5.0%). Admin. Office of the U.S. Courts, *Judicial Business 2024*, tbl. C-3, https://tinyurl.com/3enu97ap.

year were filed in the U.S. District Court for the District of Columbia.[2] No other federal district court comes close.

The same factors make the First Amendment harm worse, too. Reporting on the government is at the core of the First Amendment's protections. See Part I.C.2, *supra*. Washington is the epicenter of that protected activity: it's where the government and its officials, agencies, and those who report on them live. A rule that strips protection from confidential-source reporting here strips it from the reporting the First Amendment is most concerned to protect.

That's all the more reason to take up *this* case. Waiting for the question to percolate won't help. The D.C. Circuit has shown it won't correct its error in Privacy Act cases, even over forceful dissent. In 2005, several judges wrote to explain why *Lee* was wrong. *Lee*, 428 F.3d at 300–03 (Rogers, Tatel, and Garland, JJ., dissenting from the denial of rehearing en banc). When Herridge asked the full court to revisit *Lee*, no judge called for a vote. One of the four judges who voted to rehear *Lee*, Judge Edwards, sat on the panel below and joined its conclusion that the court was "left simply to apply the *Lee* panel opinion." Pet. App. 12. When a judge who voted to rehear *Lee* considers himself bound by it twenty years later, the D.C. Circuit

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[2] Federal Judicial Center, Integrated Database, Civil Cases 5 Year File (cv21to26), https://tinyurl.com/5555e8pc. The database records every civil case filed in the federal district courts, including the statutory cause of action entered on the civil cover sheet. Between January 1 and December 31, 2025, sixty-two cases were filed nationwide under the code 5 U.S.C. § 552, subsection PA (Privacy Act). Twenty-one of those were in the District of Columbia.

has made clear it won't course-correct. Only this Court can right the ship.

* * *

Private interests may sometimes prevail over public ones when the risk to the public is low. But, at minimum, a court must be allowed to consider those public interests—especially national-security and First Amendment costs—before it orders a reporter to identify a confidential source. The D.C. Circuit's rule forbids exactly that.

This Court hasn't addressed the reporter's privilege since *Branzburg*, and it has never squarely addressed that privilege in a civil case. Whether a court should consider the Nation's security or the First Amendment before unmasking a confidential source is a question this Court—and only this Court—can answer. It should answer that question now and confirm that the answer is yes.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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