No. 26-461

In the
Supreme Court of the United States

CATHERINE V. HERRIDGE,

Petitioner,

v.

YANPING CHEN,

Respondent.

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

BRIEF OF *AMICUS CURIAE* SCREEN ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA") is the world's largest labor union representing working media artists. SAG-AFTRA represents more than 160,000 actors, announcers, broadcasters, journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists, influencers and other media professionals. The professionals represented by SAG-AFTRA are the faces and voices that entertain and inform America and the world. SAG-AFTRA exists to secure the strongest possible protections for media artists in the 21st century and beyond.

SAG-AFTRA counts among its membership over 10,000 broadcast journalists and media professionals working in radio, television and digital media as reporters, anchors, program hosts, DJs, news writers, editors, producers, and other related roles. News and broadcast members work across the country, in markets of all sizes, at the local, regional, national and even international level. They work across different media, including online, on mobile, and in other new and emerging media.

As a representative of professionals who use and rely on the reporter's privilege, SAG-AFTRA has unique insight into the impact of this case on its

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from A*micus Curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Timely notice was provided to the parties of the filing of this brief.

members and the broader news and broadcast industry. It therefore has an interest in this litigation.

SUMMARY OF ARGUMENT

This Court has only ruled once on whether the First Amendment protects a reporter's confidential sources, and that was more than fifty years ago. In the decades since, the circuits have developed divergent tests over when courts can compel a reporter to name their confidential source in civil cases. Most strike a balance, weighing the litigant's need against the public's interest in the free flow of information. The D.C. Circuit once did, too. Now, however, plaintiffs in the D.C. Circuit overcome the privilege by showing only that the source's identity is central to the case and that they have exhausted other avenues to obtain it. In a Privacy Act leak case, such as Chen's, centrality is nearly automatic and exhaustion turns largely on the plaintiff's resources. Nothing else matters: not the value of the reporting, not the source's interests, and not whether the person seeking the source is the wrongdoer the source exposed.

The reporter's privilege matters to the journalists that *Amicus* represents. A reporter often makes a promise of confidentiality years before any subpoena issues, as happened here, without knowing who might sue, where they will sue, or even what law will govern. The protection is weakest where much of the reporting on the federal government happens. And the burden falls on the individual reporter: she is the one held in contempt. She might have no employer or legal department supporting her and, even when she does, she might not be allowed to accept help paying the fines.

The harm rarely reaches this Court, often because these cases settle. This case is a rare exception: a non-

party reporter who was held in contempt rather than name her source, with the question of privilege squarely presented. The Court should therefore grant the petition and, ultimately, confirm a privilege that weighs the interests at issue, including the public's.

ARGUMENT

I. Introduction

This case arises from a series of news reports by the Petitioner, Catherine Herridge, nearly a decade ago. Pet. 5; Pet. App. 6. By Herridge's account, nearly all her reporting was based on non-government and non-confidential sources, including on-camera interviews with a former university employee turned whistleblower. Pet. 5. Half a decade later, Respondent, Yanping Chen, subpoenaed Herridge after discovery failed to reveal the source of the leaked information. Pet. App. 7. Herridge refused to name her confidential source, leading the district court to hold her in contempt, levying a fine of $800 a day (stayed while she seeks review). Pet. App. 8. Herridge now asks the Court to weigh in.

Amicus takes no position on the underlying reporting, on the allegations it described, or even on the government's conduct toward Chen. Nor does it argue the privilege should be absolute: disclosure might be reasonable once all relevant interests, including the public's, have been weighed.

The Privacy Act protects important interests, particularly in this era of big data and social media. It protects every American, journalists, lawyers, and jurists included, from misuse of information about them held by the government. Chen is no exception, and she is entitled to pursue her claim against the government. What she needs for that is a government employee's identity, not the reporter's testimony.

The First Amendment also protects important interests, and its protection of the press also matters, as much today as any time in this nation's history.

This brief is about its role in protecting the confidential relationships that help reporters keep the public informed about what the government is doing, including, perhaps especially, what the government would rather keep quiet. The public interest in a free press, and the individual source's privacy interests, should be a reasoned part of any analysis regarding whether to compel disclosure of the source's identity.

II. More Than Fifty Years After *Branzburg*, the Courts of Appeals Remain Divided on Reporters' Privilege in Civil Cases, and the D.C. Circuit Test Renders it Meaningless in Privacy Act Cases

It has been more than half a century since this Court decided whether the First Amendment protects a reporter's confidential sources, and *Branzburg v. Hayes*, 408 U.S. 665 (1972), remains the only time it has done so. In the half-century since, courts of appeals have divided over whether a federal privilege exists, where it comes from, and what a civil litigant must show to overcome it.[2] Some require courts to weigh a civil litigant's need for a confidential source against the public's interest in protecting it. Others do not. The D.C. Circuit sits among those who do not, and the decision below removes any doubt about it.

[2] Petitioner's brief discusses the circuit split and the core cases in each circuit. Pet. 14–23.

A. The D.C. Circuit Has Acknowledged That the Facts and Interests in a Grand Jury Case, like *Branzburg,* Differ from Those in a Civil Case

Branzburg was a grand jury case and the "sole issue before" the Court was "the obligation of reporters to respond to grand jury subpoenas . . . and to answer questions relevant to an investigation into the commission of crime." *Branzburg*, 408 U.S. at 682. The Court's answer rested on the grand jury's constitutional role and the public interest in law enforcement. *Id.* at 690–91. Justice Powell, who joined the five-Justice majority, wrote separately to emphasize "the limited nature of the Court's holding" and called for courts to strike "a proper balance" between press freedom and the duty to testify "on a case-by-case basis." *Id.* at 709–10 (Powell, J., concurring).

Civil cases differ significantly from proceedings before a grand jury, including in the balances that should be struck. None of the prosecutorial restraint assumed by the *Branzburg* Court, that prosecutors "will be loath to risk so much for so little," is present in a civil case involving private litigants. *Branzburg*, 408 U.S. at 706–07. There is no grand jury, no criminal investigation, and no prosecutor weighing whether the subpoena is worth its cost to the press and the public. The D.C. Circuit recognized as much in *Zerilli v. Smith*, holding that "in civil cases, where the public interest in effective criminal law enforcement is absent, [*Branzburg*] is not controlling," and that "a qualified reporter's privilege under the First Amendment should be readily available." 656 F.2d

705, 711–12 (D.C. Cir. 1981). The *Zerilli* Court explained that "[c]ompelling a reporter to disclose the identity of a confidential source raises obvious First Amendment problems." *Id.* at 710.

Zerilli reaffirmed 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 (citing *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974)). "[I]n the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege," the court explained, warning that "if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished." *Id.* (noting that confidential sources "will be reluctant to disclose any confidential information to reporters" without confidence that "disclosure is unlikely").

Like this case, *Zerilli* involved Privacy Act claims for alleged government leaks. The *Zerilli* plaintiffs sought to compel a non-party reporter to identify Justice Department employees who allegedly had leaked FBI wiretap logs to the *Detroit News*. *Id.* at 708–09. The court upheld the privilege on multiple grounds, including that the plaintiffs had not exhausted other sources, and that the reporter was not a party nor was he "asserting the privilege in order to protect himself from liability." *Id.* at 715. The court did not decide what would happen if a plaintiff did exhaust their other sources. *Id.* at 714 n.52. The D.C. Circuit answered that question in *Lee v. Dep't of Just.*, 413 F.3d 53 (D.C. Cir. 2005), holding that the privilege gives way.

In *Lee*, the D.C. Circuit took just two of the "number of more precise guidelines" posed by the *Zerilli* court and treated them as sufficient on their own. *Lee v. Dep't of Just.*, 428 F.3d 299, 301 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of rehearing en banc) (quoting *Zerilli*, 656 F.2d at 713). Under *Lee*, civil litigants overcome the privilege merely by showing that the information sought goes to the heart of their case and that they have exhausted reasonable alternative sources. *Lee*, 413 F.3d at 59. The D.C. Circuit admonished courts to "keep in mind that this privilege is not absolute," although the factors effectively render it moot in Privacy Act cases. *Id.*

The panel below read *Lee* as allowing an affirmative finding on those two prongs to overcome the privilege, "without any broader balancing of private and public interests," and applied it that way. Pet. App. 12. That is a far cry from where the D.C. Circuit started when it first recognized the privilege.

A plaintiff seeking damages under the Privacy Act must show that the disclosure was intentional or willful. 5 U.S.C. § 552a(g)(4). That is undoubtedly difficult without identifying the source. *See Lee*, 413 F.3d at 60. Because a confidential exchange rarely leaves a paper trail, a plaintiff will often exhaust their discovery alternatives. But that does not mean the entire burden should rest on the reporter and, consequently, the public without first considering their interests.

Four members of the *en banc* court would have reheard *Lee*; three wrote to explain why. *Lee*, 428 F.3d at 300 n.1. Judge Rogers recognized that "[t]he important First Amendment protections implicated in

these cases are obvious" and would have granted rehearing to address "the comprehensiveness of the necessary balancing analysis." *Id.* at 300, 301 (Rogers, J., dissenting from denial of rehearing en banc). Judge Tatel explained that, in most cases, a diligent litigant can discover "information that goes 'to the heart of the matter'" as the journalist did. *Id.* at 301–02 (Tatel, J., dissenting from denial of rehearing en banc). But where the identity of the leaker is at the heart of the matter, a test "focused only on need and exhaustion will . . . almost always be satisfied, leaving the reporter's source unprotected regardless of the information's importance to the public." *Id.* at 302. It would turn "any run-of-the-mill leak case . . . into a 'most exceptional case[ ]' in which . . . the reporter's interest must give way." *Id.* (quoting *Zerilli*, 656 F.2d at 712).

Judge Garland warned that the "significance of the court's decision . . . should not be underestimated." *Id.* at 302 (Garland, J., dissenting from denial of rehearing en banc). Limited to need and exhaustion, he concluded, the privilege "is effectively no privilege at all." *Id.*

B. The D.C. Circuit's Test Weighs Only the Plaintiff's Interests, Putting it at Odds with Other Circuits

The D.C. Circuit's test treats the Privacy Act as a mechanical math problem. In essence, because the statute requires plaintiffs to prove a government official leaked their information, their identity is automatically central and the privilege collapses.

1. This Case Clearly Illustrates the Weaknesses Inherent in the D.C. Circuit's Approach

This case illustrates the test's weaknesses. The panel acknowledged Herridge's argument that Chen may recover "only a small amount of damages," but held that did not affect whether the privilege was overcome. *Chen v. Fed. Bureau of Investigation*, 153 F.4th 1289, 1294 (D.C. Cir. 2025). Nothing in the analysis measured the value of the reporting to the public, the reporter's interest, or the effect on future newsgathering. The only thing weighed was the plaintiff's diligence.

Respondent's own brief confirms the point. She concedes that "the centrality factor generally will be satisfied in most Privacy Act cases." Br. in Opp. 21. That leaves exhaustion, which she describes as a question of whether a plaintiff has the "fortitude" and "financial resources" to keep going for years. *Id.* at 20–21. She is not wrong. But that illustrates the central flaw in the test: there is no room to balance anyone's interests. Whether a source stays protected should not depend on how much the plaintiff can spend. If a test means that a well-funded plaintiff can overcome the privilege while others cannot, that serves no one's interest. It certainly is not a rule a reporter can explain when a source is concerned about confidentiality.

2. Under the D.C. Circuit's Test, Whistleblower Names Could be Handed to the Wrongdoers They Expose, Jeopardizing Reporting in the Public Interest.

Among the interests the D.C. Circuit's test fails to balance is that of the reporter's sources, including those who might reasonably fear reprisal. The same test applies whether the reporter's source was a whistleblower who revealed misconduct or a wrongdoer in their own right. This logic also extends to the private sector: the source could have revealed corporate executive misconduct, including risks to the public. The subject could sue over the disclosure, then subpoena the reporter to learn who was behind it. The individual's need for the source's name would be just as "central," and exhaustion just as easy to show, despite the public good from the reporting.

Exhaustion is also not entirely in the plaintiff's hands. The sources a plaintiff must exhaust, such as an agency's employees or a company's records, are often controlled by the very institution whose conduct the reporting exposed. An agency or company that would rather avoid further exposure may simply let those sources come up empty, and the two-factor test has no way to tell the difference. It cannot distinguish a dead end from a locked door.[3] That risk is inherent in a test that treats a failed search as license to unmask the reporter's source. The *Zerilli* court itself refused to let the plaintiffs rely on the Justice Department's statement that its internal

[3] For clarity, Amicus does not suggest that occurred here.

investigation had found no wrongdoing: "Permitting this kind of gamesmanship would poorly serve the First Amendment values at stake here." 656 F.2d at 715.

Where the information came from government sources, the Privacy Act supplies the vehicle, as Judge Garland anticipated. Evoking Watergate, he wrote that the Privacy Act "is equally available to public officials—and to former public officials—whether they have been accused of corruption or merely of incompetence. It would, for example, be available to former officials seeking to learn who leaked the information that forced them to resign." *Lee*, 428 F.3d at 302 (Garland, J., dissenting from denial of rehearing en banc). "[W]here former officials have themselves been indicted, they may find that issuing third-party subpoenas to reporters in Privacy Act suits usefully supplements criminal discovery." *Id.* at 303. Even *Branzburg* recognized the difference between sources "implicated in crime" and those "not engaged in criminal conduct but [with] information suggesting illegal conduct by others." 408 U.S. at 691, 693.

Need and exhaustion would hand over the whistleblower's name and expose them to potential retaliation, public unmasking, or worse. Under the D.C. Circuit's rule, the source who exposed the misconduct would be no safer than the official who committed it. A test weighing the public interest could take account of who is asking, and why: need and exhaustion cannot.

3. Most Circuits Also Weigh the Public Interest.

Most circuits weigh the public's interest in the free flow of information when determining whether to recognize the reporter's privilege. *See* Pet. 14–23. While at least five circuits engage in some form of balancing, other circuits apply a fixed list of requirements that focus on the litigant's need without considering countervailing interests. *See* Pet. 15–16. The Seventh Circuit questions whether the privilege exists at all. *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003). Despite the earlier holding in *Zerilli*, which would have placed the D.C. Circuit in the first group, it currently falls in the second.

Respondent argues there is no split because other circuits also look at need and exhaustion. Br. in Opp. 12–17. But what matters to reporters and their sources is whether a court also weighs the public's interest, and that is where the circuits split. This case presents a strong vehicle to resolve that split.

C. Whether a Reporter Can Keep a Source Confidential Often Depends on Factors Outside of the Reporter's Control

Amicus represents over 10,000 journalists and media professionals who gather and report the news in every part of the country. For them, the circuit split is not abstract. It determines whether the promise of confidentiality they make to a source can be kept. As this case illustrates, that promise is often made years before any subpoena issues. A reporter giving her word to a source cannot know who might later sue, under what law, in what court, or even where she will be living and working when the subpoena arrives.

Each of those variables potentially impacts which court decides whether the privilege holds. Privacy Act plaintiffs may sue where they reside, their principal place of business, where the agency records are located, or in the District of Columbia. 5 U.S.C. § 552a(g)(5). The subpoena issues from the court where the case is pending. Fed. R. Civ. P. 45(a)(2). But non-party reporters can be compelled to testify only within 100 miles of where they live, work, or regularly do business in person. Fed. R. Civ. P. 45(c)(1)(A), (d)(3)(A), (f). For many journalists, where they live, work, or regularly do business might be different places, sometimes in different parts of the country, and they might not be the same as where the promise of confidentiality was made. If circuits disagree about the governing standard, the protection afforded to the reporter and their source may turn on facts they cannot predict, let alone control, at the time of the promise.

For one group of journalists, the answer is predictable, and it is the worst one. The federal government, together with much of the press corps that covers it, is within the coverage of the D.C. Circuit. Reporters based there can be compelled to testify there, and their objections will be decided by courts bound by the D.C. Circuit's rule. Reporting on the federal government, particularly reporting that covers national security, law enforcement, and the internal workings of federal agencies, depends on confidential sources but occurs where there is the least protection.

Protection also depends more on what claims a plaintiff pleads than on what the journalist may have

reported. The District of Columbia's own shield law gives reporters absolute protection against compelled disclosure of their sources. D.C. Code § 16-4702(1). But in federal court, state law privilege applies only to a claim or defense for which state law supplies the rule of decision. Fed. R. Evid. 501. Had Chen brought her claims under D.C. law instead, Herridge's source would be absolutely privileged. No reporter can plan around a privilege that depends on the plaintiff's choice of claim.

In today's connected world, that is an unworkable rule. Journalists speak with sources around the country, even the world, about issues, events, and people all over. They may not be able to predict at the time they gather information where an aggrieved subject of an unflattering report might choose to sue. Consequently, the reporter cannot tell their source to what extent they are protected. Only this Court can supply the necessary uniform answer that the courts of appeals have not.

III. For Most Journalists, the Burden of Protecting Sources Falls on Their Own Shoulders

Journalism today ranges from some of the largest media companies in the country, perhaps the world, to individual reporters working entirely on their own. At one end are multi-billion-dollar station groups with large legal departments and the resources to support their subpoenaed journalists, should they choose. At the other are freelancers, independent newsletter writers, and podcast reporters, many of whom have no employer, no legal department, and no newsroom behind them. Most working journalists are somewhere

in between, at local stations, small papers, and digital outlets whose budgets are tight and getting tighter.

Branzburg recognized that "liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." 408 U.S. at 704. The Court invoked that principle as a reason not to sort reporters into categories. *Id.* at 703–04. The D.C. Circuit's rule ends up sorting them anyway. Because the test turns on the plaintiff's diligence rather than on the value of the reporting, a reporter's real protection lies in whether she can hold out under contempt, and that depends on whether someone is able and willing to pay for the fight. For a staff reporter, then, the D.C. Circuit's rule makes personal liability for doing the job a working condition, softened only to the extent that an employer chooses to stand behind her and a court allows it. The reporter is the one held in contempt, and she may not work there anymore when the subpoena arrives.

Whether anyone else can help the reporter pay the fines is up to the court. In *Hatfill v. Mukasey*, a Privacy Act case arising from leaks about the government's anthrax investigation, the district court held former *USA Today* reporter Toni Locy in contempt and imposed fines that escalated to $5,000 per day. 539 F. Supp. 2d 96, 99 n.5 (D.D.C. 2008). By then Locy had left the newspaper and was teaching at a university. *Id.* at 98 n.4. The court barred her from accepting reimbursement, reasoning that because she was "the only person who has the ability to comply with the Court's order, she alone should be required to

bear the financial burden of her choice not to do so." *Id.* at 107. Unlike Locy, Herridge has so far been permitted to accept help, though that permission can be withdrawn. Pet. App. 48–49.

The forms of news reporting have also changed since 1972. Some of the most important investigative journalism of the past decade has come in formats that did not exist when *Branzburg* was decided.[4] For example, APM Reports' podcast *In the Dark* spent a season on the case of Curtis Flowers, who had been tried six times for the same crime. Its reporters' analyses found that the prosecutor's office had removed Black prospective jurors at nearly four and a half times the rate of white ones, and two of the State's key witnesses told the reporters that they had lied on the stand.[5] Briefs in this Court cited the podcast's analysis, *see supra* note 5, and the Court reversed Flowers' conviction. *Flowers v. Mississippi*, 588 U.S. 284 (2019). The State dismissed the charges the following year. APM Reports, *supra* note 5. That kind of reporting depends on the same thing all reporting does: people willing to tell a journalist what they know. And that often requires a degree of trust that they will be protected.

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[4] Amicus does not ask the Court to decide who counts as a journalist. Rather, Amicus notes that many of the people doing this work are doing it without an institution behind them, and the D.C. Circuit's rule leaves them particularly exposed.

[5] APM Reports, It's Over: *Charges Against Curtis Flowers Are Dropped* (Sept. 4, 2020), https://www.apmreports.org/episode/2020/09/04/charges-against-curtis-flowers-are-dropped.

The economics of the profession make all of this worse. The newspaper industry has lost more than three-quarters of its jobs since 2005, and the number of "news desert" counties reached 213 in 2025.[6] Local television news is shrinking too. Full-time local TV news employment fell for the second year in a row in 2025, to 26,458, and the number of stations producing local news fell to 689.[7] A privilege that, in practice, depends on an institution able and willing to fund a contempt fight is a privilege a growing number of working journalists do not have.

IV. Most Cases End in Settlement or Capitulation, Masking the True Harms of Denying Reporters the Ability to Protect Their Sources

The fact that this Court has not heard many cases relating to the reporter's privilege might make the harm seem limited or even illusory. The rule itself is the reason why few cases rise to this Court. A reporter facing open-ended daily fines has three options: reveal the source, stop promising confidentiality, or hold out and hope the underlying case ends before their resources do. When a case does reach contempt, it

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[6] Medill Local News Initiative, *News Deserts Hit New High and 50 Million Have Limited Access to Local News, Study Finds* [Press Release] (Oct. 20, 2025), https://www.medill.northwestern.edu/news/2025/news-deserts-hit-new-high-and-50-million-have-limited-access-to-local-news-study-finds.html.

[7] Tim Mirabito et al., *Local TV News Employment Continues to Decline*, Radio Television Digital News Ass'n (Sept. 8, 2026), https://www.rtdna.org/news/local-tv-news-employment-continues-to-decline.

tends to end by settlement before this Court can review it.

The two leading Privacy Act cases before this one followed that pattern. As discussed above, in *Lee*, the D.C. Circuit affirmed contempt orders against reporters who would not identify the government sources of leaks that named Dr. Wen Ho Lee as a suspected spy. 413 F.3d at 55, 59–60. The reporters petitioned this Court. Before the Court acted, the case settled: the government paid Dr. Lee $895,000, and five news organizations, none of which he had sued, contributed $750,000.[8] Two years later, the same thing happened in *Hatfill*. After the district court held Locy in contempt and barred her from accepting reimbursement, 539 F. Supp. 2d at 107, Hatfill settled his Privacy Act claims against the government for $5.8 million. The D.C. Circuit then dismissed Locy's appeal and vacated the contempt order without deciding whether her sources were privileged.[9]

Those settlements protected the reporters involved, but they kept the question from this Court. In *Lee*, the settlement came after the D.C. Circuit had ruled; in *Hatfill*, before it could. And for every reporter who litigates to the point of contempt, there is no record at all of the ones who complied, the sources who were never promised confidentiality, or the stories

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[8] *Five Media Groups Settle with Wen Ho Lee*, NPR (June 3, 2006), https://www.npr.org/2006/06/03/5450042/five-media-groups-settle-with-wen-ho-lee.

[9] Order, No. 08-5049 (D.C. Cir. Nov. 17, 2008) (dismissing appeal and vacating contempt order); *see* Reporters Comm. for Freedom of the Press, *Locy Appeal Dismissed, Contempt Order Vacated* (Nov. 17, 2008).

that were never pursued. That silence is not evidence that the D.C. Circuit's rule is harmless. It is what the rule's harm looks like. Justice Stewart made the same point in *Branzburg*: the Court had "never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist." 408 U.S. at 733 (Stewart, J., dissenting).

This case is the rare exception. Herridge was held in contempt, she has not complied, and the district court has stayed the fines through the completion of proceedings in this Court. Order, *Chen v. FBI*, No. 18-cv-3074 (D.D.C. Aug. 7, 2026) (minute order). The question is fully presented by a non-party journalist who has stood in contempt rather than reveal her source. If the Court waits for another vehicle, the history of *Lee* and *Hatfill* suggests that wait might be long. Respondent says the balancing petitioner seeks is "inherently unworkable," Br. in Opp. 23–28, and that the district court has already done it twice, *id.* at 30–32. It cannot be both. What the district court did not have, and what no court in the D.C. Circuit has had since *Lee*, is guidance from this Court on what the public's interest in the reporting is worth.

V. The Chill Lands Hardest Now, and on the Reporters and Communities With the Least Protection

The question arrives at a moment when sources already have reason to be wary. In 2025 and 2026, the Department of Justice reportedly subpoenaed reporters from the *Washington Post*, the *Wall Street Journal*, and the *New York Times* to testify before grand juries about confidential sources. Cong. Rsch.

Serv., LSB11471, *The Reporter's Privilege and Government Employee Confidential Sources* 1 (Aug. 17, 2026). It withdrew the subpoenas in June and July 2026 after the news organizations challenged them. *Id.* Whatever the reasons for that retreat, the D.C. Circuit's rule leaves any private litigant with a Privacy Act claim free to pursue the same kinds of sources in civil discovery, with no showing that the public interest favors disclosure.

That is a strange place to leave the law. As illustrated, none of the safeguards posited in *Branzburg* exist when a private plaintiff issues the subpoena. *See supra* Part II.A. As Judge Tatel observed, it is "hard to imagine" how a private litigant's interest in a civil suit "could outweigh the public's interest in protecting journalists' ability to report without reservation on sensitive issues of national security." *Lee*, 428 F.3d at 302 (Tatel, J., dissenting from denial of rehearing en banc).

The reporting here concerned a years-long FBI investigation. The reports described the searches as part of a counterintelligence operation and cited anonymous sources describing a disagreement between the FBI and federal prosecutors over whether to bring charges. Pet. App. 5–6. The U.S. Attorney's Office ultimately decided not to bring charges, Pet. App. 6, and *Amicus* takes no position on the underlying allegations. But the existence and handling of such an investigation are matters of public concern whatever its outcome. Newsworthiness does not depend on guilt.

Amicus recognizes that leaks can harm the people they name. *Amici* supporting Chen below described

how government leaks and press coverage contributed to the mistreatment of Dr. Wen Ho Lee, the plaintiff in *Lee*. Br. of Asian Am. Legal Def. & Educ. Fund et al. as Amici Curiae, *Chen v. FBI*, No. 24-5050 (D.C. Cir. July 29, 2024). Those harms are real. The answer to them is accountability for the leaker, and a privilege test that weighs the plaintiff's injury against the public's interest, not a mechanical test that ignores context. The D.C. Circuit's rule weighs nothing: a plaintiff with a grave injury and a plaintiff with a $1,000 claim get the same result, and so does every reporter, whatever the value of their story. Balancing does not only cut one way: a serious injury, or a strong public interest in exposing the leaker, can and should weigh in favor of disclosure. Whether it does here should be decided under a test that weighs the relative interests involved.

Communities on the receiving end of government overreach also depend on confidential-source reporting to bring it to light. The Associated Press won the 2012 Pulitzer Prize for Investigative Reporting "[f]or [its] spotlighting of the New York Police Department's clandestine spying program," which monitored Muslim communities.[10] The reporting relied on internal documents and on officials who were not authorized to discuss the intelligence programs and, therefore, spoke on condition of anonymity.[11] In

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[10] The Pulitzer Prizes, 2012 Investigative Reporting, https://www.pulitzer.org/winners/matt-apuzzo-adam-goldman-eileen-sullivan-and-chris-hawley.

[11] *Id.* (providing text of the award-winning articles). See, e.g., Adam Goldman & Matt Apuzzo, *With Cameras, Informants, NYPD Eyed Mosques*, Associated Press (Feb. 23, 2012),

later civil-rights litigation, the City itself argued that it was "the Associated Press ('AP'), not the NYPD," that "revealed the Program to the public." *Hassan v. City of New York*, 804 F.3d 277, 292 (3d Cir. 2015). The public learned of the program because people inside government trusted reporters with it. Those are the same kind of sources at issue here.

Confidential sources are how the public learns what people with power would rather keep quiet, whether the power sits in a federal agency, a city hall, a police department, or a corporation. Much of that work is invisible: calls that go nowhere, records requests, sources cultivated over years. The people who take the risk to talk to reporters are usually not wrongdoers: they are employees and officials who see something wrong and decide the public should know. Even the *Branzburg* majority recognized that such sources "may fear that disclosure will threaten their job security or personal safety." 408 U.S. at 693. Justice Stewart described what follows when disclosure can be compelled: "A public-spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing, because he will now know he can subsequently be identified by use of compulsory process." *Id.* at 731 (Stewart, J., dissenting).

Investigative journalism runs on trust. Sources extend trust, one reporter at a time, and the promise of confidentiality is how a reporter earns it. A rule under which that promise is only as good as the

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https://www.ap.org/media-center/ap-in-the-news/2012/with-cameras-informants-nypd-eyed-mosques/.

reporter's ability to fund a contempt fight breaks that trust.

Respondent casts this case as a request for judges to decide which litigants deserve the law's protection. Br. in Opp. 1, 23–27. *Amicus* asks for the opposite. Under the D.C. Circuit's rule, whether a reporter can keep her word already turns on things that have nothing to do with the merits: where they live, which claim the plaintiff pleads, and how much each side can afford to spend. A test that weighs the interests at stake in every case, wherever it arises and whoever the reporter works for, is the logical one. It is what makes a privilege worth having: for reporters, for their sources, and for the public in every community they serve.

CONCLUSION

The First Amendment values "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). As the *Zerilli* Court noted: "Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But 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.

For the foregoing reasons, *Amicus* respectfully requests that the Court grant Petitioner's petition for certiorari.

Respectfully submitted,

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