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 REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Amicus curiae Reporters Committee for Freedom of the Press (the "Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.[1]

Because of the vital role that confidential journalistic sources play in the free flow of information to the public, the Reporters Committee has a strong interest in ensuring that journalists can offer credible assurances of confidentiality to their sources. Accordingly, the Reporters Committee respectfully submits this amicus brief in support of Catherine Herridge's petition for a writ of certiorari.

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[1] Pursuant to Supreme Court Rule 37, amicus states that no counsel for any party authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of the brief; and no person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Counsel of record for the parties were given timely notice of the intent to file this brief and have provided written consent to the filing of the brief.

SUMMARY OF THE ARGUMENT

The compelled disclosure of a journalist's confidential sources has a substantial impact on the newsgathering process. It chills investigative reporting, stemming the flow of information to the public and threatening the ability of the press to operate as an independent check on government power.

The reporter's privilege—which protects the identities of such sources—serves as a critical safeguard against these dangers. In the more than five decades since this Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), lower courts have set out to define the contours of the privilege, but that enigmatic opinion remains this Court's last word on the issue in the context of journalistic sources. This case presents the Court with the opportunity to revisit the question and recognize a reporter's privilege that offers robust protection for confidential information obtained in the course of newsgathering. Accordingly, amicus makes two arguments in support of granting certiorari.

First, the Court should grant certiorari to recognize a qualified First Amendment reporter's privilege that weighs the private interest in disclosure against the public interest in protecting a journalist's confidential sources. In order to strike the appropriate balance, courts must consider the chilling effect likely to result from compelled disclosure of sensitive information. Indeed, Privacy Act cases, like this one, in which the subpoenaing party will virtually always be able to demonstrate a need for the

information sought, confirm the necessity of a test that meaningfully accounts for the public interests at stake. As part of this balancing test, courts must also evaluate, at the outset, whether the subpoenaing party's claim would even survive regardless of the requested information. And, as highlighted by the sealing dispute in this case, any materials that are relevant to that analysis should be accessible to the public.

Second, the Court should grant certiorari to recognize a common law reporter's privilege under Rule 501 of the Federal Rules of Evidence ("Rule 501"). An independent and vigorous press "is a public good of transcendent importance," *see Jaffee v. Redmond*, 518 U.S. 1 (1996), and a qualified privilege that protects reporters from compelled disclosure of their confidential sources is necessary to ensure that the press can fulfill its constitutional function.

ARGUMENT

I. The Court should grant certiorari to recognize a First Amendment reporter's privilege that requires courts to balance the private interests in disclosure against the public interest in protecting journalists' confidential sources.

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), this Court addressed the question of whether the First Amendment provides members of the news media a privilege against compelled disclosure of their confidential sources. Though the *Branzburg* majority declined to recognize a general First Amendment

privilege protecting journalists from having to identify sources or disclose newsgathering information before a criminal grand jury, 408 U.S. at 667, Justice Powell's concurrence, which supplied the majority's essential fifth vote, emphasized "the limited nature of the Court's holding," *id.* at 709. Justice Powell advocated a "case-by-case" approach, instructing courts to evaluate "[t]he asserted claim to privilege . . . on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.* at 709–10. "In short," Justice Powell wrote, "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." *Id.* at 710.

In the more than five decades since *Branzburg*, lower courts have read Justice Powell's opinion to "indicate[] that a qualified privilege would be available in some circumstances," *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981), and have developed tests to implement the privilege, *see, e.g.*, *id.* at 712–15; *United States v. LaRouche Campaign*, 841 F.2d 1176, 1179–81 (1st Cir. 1988); *United States v. Burke*, 700 F.2d 70, 76–77 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983); *Riley v. City of Chester*, 612 F.2d 708, 716–17 (3d Cir. 1979); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725–26, *as modified*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Shoen v. Shoen*, 48 F.3d 412, 415–16 (9th Cir. 1995); *Silkwood v. Kerr–McGee Corp.*, 563 F.2d 433, 438 (10th Cir.

1977); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

This case presents an opportunity for the Court to recognize and define the contours of that First Amendment privilege. In the proceedings below, the district court focused primarily on two factors in evaluating Petitioner's reporter's privilege claim—namely, whether the identity of her sources goes "to the heart of" Respondent's claim ("centrality") and whether Respondent had exhausted "every reasonable alternative source of information" ("exhaustion"). *See* App-26 (quoting *Lee v. Dep't of Just.*, 413 F.3d 53, 59 (D.C. Cir. 2005)). This kind of "arid two-factor test," which accounts only for the subpoenaing party's need for the information and not for the harms that compelled disclosure will work, fails to accommodate the First Amendment interests of reporters and the public's interest in the free flow of information. *See Lee v. Dep't of Just.*, 428 F.3d 299, 301 (D.C. Cir. 2005) (Tatel, J., joined by Garland, J., dissenting from denial of rehearing en banc). Indeed, such a test is particularly ill-suited to Privacy Act cases, where the centrality prong will always be met and where "exhaustion" is not difficult to meet.

Accordingly, amicus urges the Court to recognize a First Amendment reporter's privilege that balances the subpoenaing party's private interest in disclosure against the public interest in protecting journalists' confidential sources.

A. The balancing-of-interests analysis must account for the chilling effect that compelled disclosure will have on investigative reporting.

In order to strike the "proper balance between freedom of the press and the obligation of all citizens to give relevant testimony," *Branzburg*, 408 U.S. at 710 (Powell, J., concurring), this Court should recognize a reporter's privilege that considers the public interest in the information reported on and the likelihood that compelling disclosure will chill similar reporting in the future. The ability of journalists to promise their sources confidentiality is crucial to preserving the press's structural role as a check on government, particularly in the national security sphere, where information provided by confidential sources is often unavailable through other channels and where sources face possible loss of their clearance, employment, and liberty if their identities are disclosed. *See* Michael Farrell, *Anonymous Sources*, Soc'y Pro. Journalists, https://perma.cc/5BQBSRA3 ("Anonymous sources are sometimes the only key to unlocking that big story, throwing back the curtain on corruption, fulfilling the journalistic missions of watchdog on the government and informant to the citizens."). When sources stop talking to journalists because they fear their identities cannot be protected, that loss stems the flow of information to the public and impairs the electorate's ability to make informed political, social, and economic decisions.

The need to consider the chilling effect of compelled disclosure of source identities is particularly salient in Privacy Act cases like this one,

where the plaintiff will nearly always "be able to satisfy the centrality and exhaustion requirements." *Lee*, 428 F.3d at 302 (Garland, J., joined by Tatel, J., dissenting from denial of rehearing en banc). In such cases, the identity of the alleged leaker will be central to the plaintiff's claims, because without the "identities of the leakers," the plaintiff's ability "to show the other elements of the Privacy Act claim, such as willfulness and intent, will be compromised." *Lee*, 413 F.3d at 60; *see also* 5 U.S.C. § 552a(g)(4) (requiring an "intentional and willful" disclosure for actual damages). Likewise, "[b]arring an unexpected confession by the leaker," the reporter who received the information will often be the plaintiff's only source for uncovering the leaker's identity. *Lee*, 428 F.3d at 302 (Garland, J., joined by Tatel, J., dissenting from denial of rehearing en banc).

At the same time, the information reported on in Privacy Act cases will necessarily involve government actions and government actors—information at "the core of the First Amendment." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838–39 (1978) (confidentially leaked information "lies near the core of the First Amendment" because it concerns "public scrutiny and discussion of government affairs which the First Amendment was adopted to protect"). Accordingly, if the "privilege is limited to those [two] requirements, it is effectively no privilege at all," *Lee*, 428 F.3d at 302 (Garland, J., joined by Tatel, J., dissenting from denial of rehearing en banc), and "the exigencies of even the most trivial litigation" will be permitted "to trump core First Amendment values," *id.* at 301 (Tatel, J., joined by

Garland, J., dissenting from denial of rehearing en banc).

The harm to the ability of journalists to investigate and report newsworthy information to the public would be immense. Confidential sources have enabled journalists to tell some of the most important stories of the last half-century, from investigations into organized crime to, perhaps most famously, the Watergate scandal. *See* Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 Mo. L. Rev. 1, 13 (1986). As Carl Berstein recalled, "Almost all of the articles I co-authored with [Bob] Woodward on Watergate could not have been reported or published without the assistance of our confidential sources and without the ability to grant them anonymity, including the individual known as Deep Throat." David Kravets, *Reporters Challenge Bonds' Leaks Subpoena*, Associated Press (May 31, 2006), https://perma.cc/2JS6-5N7C.

Confidential sources have been equally important to national security reporting, where state secrecy is at its zenith and investigative newsgathering is often the only way that newsworthy information about government activities reaches the public. The Iran-Contra scandal, the My Lai massacre, the Aldrich Ames spy scandal, the "enhanced interrogation" tactics employed by intelligence agencies post-9/11, and detainee abuse at Abu Ghraib prison in Iraq were all brought to light through disclosures made by confidential sources. Br. of Amici Curiae Newsgathering Organizations and Reporters' Groups in Supp. of Appellants Urging

Reversal at *3, *Lee v. Dep't of Just.*, 413 F.3d 53 (D.C. Cir. 2005) (No. 04-5301(L)), 2005 WL 319711; Eric Umansky, How American Journalists Covered Torture After 9/11, Colum. Journalism Rev. (Sept./Oct. 2006), https://perma.cc/GU5N-D54D. Indeed, information provided by confidential sources is doubly crucial in the national security context because of the universally acknowledged problem of government overclassification. *See* Brief of Amici Curiae, 2005 WL 319711, at *4–5 ("Since virtually everything is classified, the verification of something as mundane as a press briefing involves talking to scores of sources who are not authorized to add further detail and could be subject to sanctions for doing so." (internal quotation marks omitted)).

These disclosures directly inform important public policy debates and give the electorate visibility into secret government actions that would otherwise go unexamined. In 2005, for instance, The New York Times relied on confidential sources to break the news that the National Security Agency had been monitoring, without a warrant, communications in and out of the country involving suspected foreign terrorists. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16, 2005), https://perma.cc/5RK3-2V3T. That revelation led Congress to hold hearings and ultimately to pass Section 702 of the Foreign Intelligence Surveillance Act, which authorized the program under the oversight of the Foreign Intelligence Surveillance Court. *See* Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 Harv. J.L. & Pub. Pol'y 117, 124–42 (2015) (surveying

history of Section 702, including the public debate facilitated by the 2005 news coverage). Indeed, because of the public controversy over the disclosures, Congress only authorized the collection program subject to reconsideration and reauthorization every five years. *See id.* at 125.

Much of this reporting would have been impossible were reporters unable to assure sources that they have a strong legal basis to keep the sources' identities confidential. Put simply, if the information that confidential sources provide is likely to lead to a lawsuit and, ultimately, the identification of those sources publicly, they will not provide it, and the public will not receive it. Courts cannot strike the "proper balance between freedom of the press and the obligation of all citizens to give relevant testimony" without adding this chilling effect to the scales. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

B. Courts should fully analyze whether the claim survives regardless of the reporter's testimony, and the public has an interest in access to every document bearing on that question.

In evaluating reporter's privilege claims, this Court should weigh the likely chilling effect of compelling disclosure against the other public and private interests at stake, including the subpoenaing party's need for the information. While centrality and exhaustion are, no doubt, important factors in this analysis, they should not be the end of the inquiry. At a minimum, this Court should instruct lower courts to consider as well whether the subpoenaing party's

claim would even survive regardless of the information from the journalist.

Like centrality and exhaustion, a preliminary analysis of the merits of the underlying case is critical to assessing the subpoenaing party's need for the information. Put simply, if the subpoenaing party's claims are "frivolous," *see Zerilli*, 656 F.2d at 714, or if that party could not make out a prima facie case even with the information sought, the strong public interest in protecting confidential sources should outweigh the requesting party's need for that information. Before compelling disclosure, courts can, and routinely do, test the strength of the subpoenaing party's claims through a summary judgment-like procedure that requires that party to make out a prima facie showing. *See, e.g.*, *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980) (considering, "[a]s a threshold matter," whether plaintiff can "establish jury issues on the essential elements of its case not the subject of the contested discovery"); *Mitchell v. Superior Ct.*, 37 Cal. 3d 268, 283 (1984) (requiring libel plaintiff "to make a prima facie showing that the alleged defamatory statements are false before requiring disclosure" of reporter's confidential sources); *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 181 (Ga. Ct. App. 2001) (instructing trial court to conduct analysis "similar to, perhaps even identical to, that required in ruling upon a motion for summary judgment" before deciding whether to compel disclosure). In short, "[i]f the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information." *State ex rel.*

Classic III, Inc. v. Ely, 954 S.W.2d 650, 659 (Mo. Ct. App. 1997).

The courts below should have engaged in this quasi-summary judgment exercise, and, moreover, the public should be able to see the material that would be relevant to that analysis. Ms. Herridge has argued that two documents that "memorialize the decision of the Department of Defense . . . to terminate the University of Management and Technology . . . from participation in the Department's Tuition Assistance Program 'on national security grounds'" are relevant to testing the strength of Plaintiff's Privacy Act claim, "including the fact that any injury she claimed from the loss of funding from the Tuition Assistance Program was caused by an independent decision by the [Department of Defense] based on detailed national security findings set out in" these documents, rather than on the alleged Privacy Act violations. Herridge Mem. Supp. Mot. to Unseal Docs. 1, 3, *Chen v. FBI*, 1:18-cv-03074 (D.D.C.), ECF No. 174-1. Yet, the crucial portion of these documents—the factual basis for the Defense Department's findings—remains redacted. Order 3–4, *Chen v. FBI*, 1:18-cv-03074 (D.D.C.), ECF No. 216. The public must have access to the entirety of these documents because Ms. Herridge argues they are relevant to whether Plaintiff's injury was in fact caused by the alleged Privacy Act violations, and therefore whether Plaintiff's claim would fail even with Herridge's compelled testimony. Access to judicial proceedings and documents "permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-

government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

C. Courts should also weigh other factors that go to the private and public interests at stake.

There are additional factors that may bear on the strength of the private and public interests at stake in cases involving efforts to compel disclosures from journalists and news organizations.

For example, courts should consider whether the subpoenaed journalist is a party to the underlying suit. To be sure, the qualified privilege should remain available to media defendants called to produce confidential information. *See, e.g.*, *Condit v. Nat'l Enquirer*, 289 F. Supp. 2d 1175, 1180 (E.D. Cal. 2003) (noting that the reporter's privilege does not "go[] away merely because a publisher or a journalist is named in a civil action"). But, as courts have recognized, the balance of interests may tip toward disclosure in "civil cases in which the reporter is a party, as in a libel action," such that "successful assertion of the privilege will effectively shield him from liability." *Zerilli*, 656 F.2d at 714; *see also Riley*, 612 F.2d at 716 (distinguishing libel cases where subpoenaed journalist is a defendant).

Whether the underlying litigation is civil or criminal may likewise bear on the weight of the interests at stake. Though courts have correctly found the privilege to apply in both civil and criminal cases, *see, e.g.*, *Riley*, 612 F.2d at 715; *Burke*, 700 F.2d at 77, they have also acknowledged that "the public's

interest in casting a protective shroud over the newsmen's sources and information warrants an even greater weight" in civil cases than in criminal ones, where the public's interest in effective law enforcement and the defendant's own constitutional rights are also implicated, *Riley*, 612 F.2d at 716. By the same token, courts may consider whether the litigant's claims implicate broader societal or constitutional interests or, by contrast, implicate only the litigant's personal interests. *See, e.g.*, *Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 335–36 (D.D.C. 1994) (explaining that plaintiff's private interest in damages for "public humiliation" and "public embarrassment" carry less weight than claims implicating public interests, such as "election fraud, or governmental corruption, or any other issue that affects the fundamental validity of the electoral process").

* * *

In short, the "arid two-factor test" deployed by the lower courts insufficiently captured all the interests at stake. The Court should accept this case to recognize that courts should also consider the chilling effect on investigative reporting and the strength of the subpoenaing party's claim independent of the information sought, among other factors.

II. The Court should grant certiorari to recognize a common law reporter's privilege against compelled disclosure of confidential sources.

Amicus further urges the Court to grant certiorari to recognize a common law reporter's privilege under Federal Rule of Evidence 501. Though the *Branzburg* majority remarked that the reporter's privilege had not yet been recognized "[a]t common law," *Branzburg*, 408 U.S. at 685–86, 698, the case—which addressed only "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment," *id.* at 667—did not squarely address the existence of a common law privilege. In any event, Congress's enactment of Rule 501 in 1975—three years after *Branzburg*—militates in favor of this Court considering the question anew.

Rule 501 authorizes courts to recognize evidentiary privileges in federal-question cases according to "the principles of the common law as they may be interpreted . . . in the light of reason and experience." Fed. R. Evid. 501 advisory committee's note. As this Court has explained, in enacting Rule 501, "Congress manifested an affirmative intention not to freeze the law of privilege." *Trammel v. United States*, 445 U.S. 40, 47 (1980). In line with this Court's recognition that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions," *Funk v. United States*, 290 U.S. 371, 383 (1933), Rule 501 "should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship . . . should be

determined on a case-by-case basis," *Jaffee*, 518 U.S. at 8 (quoting S. Rep. No. 93-1277, at 13 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7059).

Under Rule 501, courts ask whether the proposed privilege "promotes sufficiently important interests to outweigh the need for probative evidence," *Jaffee*, 518 U.S. at 9–10, looking, as the Rule instructs, to the twin guideposts of "reason and experience," Fed. R. Evid. 501. *Jaffee*, in which this Court recognized a new psychotherapist-patient privilege, is instructive. *See* 518 U.S. at 10. First, the Court enumerated the private and public interests calling for such a privilege, noting that "[t]he mental health of our citizenry . . . is a public good of transcendent importance" and that "[e]ffective psychotherapy," in turn, "depends upon an atmosphere of confidence and trust." *Id.* at 10–11. On the other side of the ledger, the Court observed that the "likely evidentiary benefit that would result from denial of the privilege is modest," as rejection of the privilege would chill "confidential conversations between psychotherapists and their patients" and, thus, "much of the desirable evidence to which litigants . . . seek access" would be "unlikely to come into being." *Id.* at 11–12. Second, the Court reasoned that the "uniform judgment of the States" supported recognition of the privilege, as "all 50 States and the District of Columbia [had] enacted into law some form of psychotherapist privilege." *Id.* at 12. "Denial of the federal privilege," the Court observed, "would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id.* at 13.

The factors that weighed in favor of a psychotherapist-patient privilege weigh just as vigorously in favor of a privilege protecting reporters' confidential sources. A free press, no less than "[t]he mental health of our citizenry," "is a public good of transcendent importance." *See Jaffee*, 518 U.S. at 11. Time and again this Court has recognized the profoundly important role the press plays in our democratic system. *See, e.g.*, *Estes v. Texas*, 381 U.S. 532, 539 (1965) ("The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . ."); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) ("Without the information provided by the press[,] most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."). Indeed, "the First Amendment's express protection for 'freedom . . . of the press' forecloses any debate about that institution's 'important role in the discussion of public affairs.'" *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1168 (D.C. Cir. 2006) (Tatel, J., concurring) (quoting *Mills v. Alabama*, 384 U.S. 214, 219 (1966)).

Like "[e]ffective psychotherapy," the work of the press "depends upon an atmosphere of confidence and trust." *See Jaffee*, 518 U.S. at 10. As discussed at length *supra*, reporters routinely rely on sources providing information on the condition of anonymity. Professor Alexander Bickel, writing in the wake of *Branzburg*, observed:

> Indispensable information comes in confidence from officeholders fearful of superiors . . . from informers operating at the edge of the law who are in danger of reprisal from criminal associates, from people afraid of the law and of government—sometimes rightly afraid, but as often from an excess of caution—and from men in all fields anxious not to incur censure for unorthodox or unpopular views[.]

Alexander M. Bickel, THE MORALITY OF CONSENT 57, 84 (1975).

Compelling journalists to disclose the identities of these confidential sources—and thereby breaking the promise of anonymity on which those sources relied—would chill vital investigative reporting and impair "the press's truth-seeking function." *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d at 1168 (Tatel, J., concurring). Without access to firsthand, insider accounts, "[r]eporters could reprint government statements, but not ferret out underlying disagreements among officials; they could cover public governmental actions, but would have great difficulty getting potential whistleblowers to talk about government misdeeds; they could report arrest statistics, but not garner first-hand information about the criminal underworld." *Id.*

The result would be immense harm to the "paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over

controversial matters." *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 180 (2d Cir. 2006) (Sack, J., dissenting) (internal quotations omitted). "Forcing reporters to divulge such confidences would dam the flow to the press, and through it to the people, of the most valuable sort of information: not the press release, not the handout, but the firsthand story based on the candid talk of a primary news source." Bickel, *supra* at 84. After all, "[t]he reporter's access *is* the public's access." *Id.* at 85. Meanwhile, "the likely evidentiary benefit that would result from denial of the privilege is modest," as the chilling effects of compelling disclosure would prevent "much of the desirable evidence to which litigants . . . seek access" from "com[ing] into being" in the first instance. *See Jaffee*, 518 U.S. at 11–12. Simply put, without a strong legal basis for preserving their anonymity, many would-be sources would not come forward.

Crucially, as in *Jaffee*, the "uniform judgment of the States" likewise supports recognition of a privilege protecting reporters' confidential sources. *See Jaffee*, 518 U.S. at 14. Like the psychotherapist-patient privilege, the reporter's privilege—in one form or another—has been widely adopted since *Branzburg*: Forty-nine states and the District of Columbia offer some form of protection for reporters' confidential sources. Forty-four states and the District of Columbia have codified the reporter's privilege in shield statutes or evidentiary rules.[2] In

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[2] These include Alabama (ALA. CODE § 12-21-142 (1975)); Alaska (ALASKA STAT. ANN. § 09.25.300–.390 (West 1967)); Arizona (ARIZ. REV. STAT. ANN. §§ 12-2214 (1982), 12-2237 (1960)); Arkansas (ARK. CODE ANN. § 16-85-510 (West 2011)); California (CAL. EVID. CODE § 1070 (West 1974)); Colorado

(COLO. REV. STAT. §§ 13-90-119, 24-72.5-101–106 (West 1990)); Connecticut (CONN. GEN. STAT. § 52-146t (West 2006)); Delaware (DEL. CODE ANN. TIT. 10, §§ 4320–4326 (West 1995)); the District of Columbia (D.C. CODE ANN. §§ 16-4701–4704 (West 1992)); Florida (FLA. STAT. ANN. § 90.5015 (West 2023)); Georgia (GA. CODE ANN. § 24-5-508 (West 2011)); Hawaii (HAW. REV. STAT. ANN. § 621-31 (West 2023)); Idaho (IDAHO CODE ANN. § 9-714 (West 2025)); Illinois (735 ILL. COMP. STAT. ANN. §§ 5/8-901–909 (West 1985)); Indiana (IND. CODE ANN. §§ 34-46-4-1–2 (West 2025)); Kansas (KAN. STAT. ANN. §§ 60-480–485 (West 2010)); Kentucky (KY. REV. STAT. ANN. § 421.100 (West 1952)); Louisiana (LA. REV. STAT. ANN. §§ 45:1451–1454 (1964)); Maine (ME. REV. STAT. ANN. tit. 16, § 61 (2007)); Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2014)); Michigan (MICH. COMP. LAWS ANN. §§ 767.5a (West 1986), 767A.6(6) (West 1995)); Minnesota (MINN. STAT. ANN. § 595.021–.025 (West 1981)); Montana (MONT. CODE ANN. §§ 26-1-902–903 (West 2015)); Nebraska (NEB. REV. STAT. ANN. §§ 20-144–147 (West 1973)); Nevada (NEV. REV. STAT. ANN. §§ 49.275 (West 1995), 49.385 (West 2023)); New Jersey (N.J. STAT. ANN. §§ 2A:84A-21–21a (West 1977)); New Mexico (N.M. R. EVID. § 11-514 (West 2013)); New York (N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1990)); North Carolina (N.C. GEN. STAT. ANN. § 8-53.11 (West 1999)); North Dakota (N.D. CENT. CODE ANN. § 31-01-06.2 (West 1973)); Ohio (OHIO REV. CODE ANN. §§ 2739.04 (West 1977), 2739.12 (West 1953)); Oklahoma (OKLA. STAT. tit. 12, § 2506 (West 2002)); Oregon (OR. REV. STAT. §§ 44.510–540 (West 1979)); Pennsylvania (42 PA. STAT. AND CONS. STAT. ANN. § 5942 (West 1978)); Rhode Island (R.I. GEN. LAWS ANN. §§ 9-19.1-1–3 (West 1971)); South Carolina (S.C. CODE ANN. § 19-11-100 (1993)); South Dakota (S.D. CODIFIED LAWS § 19-2-15 (2019)); Tennessee (TENN. CODE ANN. § 24-1-208 (West 1988)); Texas (TEX. CIV. PRAC. & REMEDIES CODE ANN. §§ 22.021–27 (West 2009)); Utah (UTAH R. EVID. 509); Vermont (VT. STAT. ANN. tit. 12, § 1615 (West 2017)); Virginia (VA. CODE ANN. § 19.2-271.5 (West 2024)); Washington (WASH. REV. CODE ANN. § 5.68.010 (West 2007)); West Virginia (W. VA. CODE ANN. § 57-3-10 (West 2011)); Wisconsin (WIS. STAT. ANN. § 885.14 (West 2010)).

four of the remaining states—Iowa, Massachusetts, Missouri, and New Hampshire—a reporter's privilege has been recognized by either the state's highest court or an appeals court. *See, e.g.*, *Winegard v. Oxberger*, 258 N.W.2d 847, 849–52 (Iowa 1997), *cert. denied*, 436 U.S. 905 (1978) (recognizing reporter's privilege based on federal and state constitutions); *Petition for Promulgation of Rules Regarding Prot. of Confidential News Sources*, 479 N.E.2d 154, 171–72 (Mass. 1985) (recognizing common law reporter's privilege); *State ex rel. Classic III Inc.*, 954 S.W.2d at 654–55 (recognizing First Amendment reporter's privilege); *New Hampshire v. Siel*, 122 N.H. 254, 259–260 (1982) (finding reporter's privilege based on federal and state constitutions). In Mississippi, a reporter's privilege has been recognized by lower courts. *See, e.g.*, *Brinston v. Dunn*, 919 F. Supp. 240, 242–44 (S.D. Miss. 1996) (applying First Amendment reporter's privilege).[3] Nineteen states plus the District of Columbia provide absolute[4] or near-absolute[5] protection for confidential source information.

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[3] Wyoming is the only state that has not recognized a privilege in any form.

[4] S*ee* ALA. CODE § 12-21-142; ARIZ. REV. STAT. ANN. § 12-2237; CAL. EVID. CODE § 1070(a)–(b); D.C. CODE ANN. § 16-4702(1); IND. CODE ANN. § 34-46-4-2; KY. REV. STAT. ANN. § 421.100; MD. CODE ANN., CTS. & JUD. PROC. § 9-112(c)(1); MONT. CODE ANN. § 26-1-902(1); NEB. REV. STAT. ANN. § 20-146(1); NEV. REV. STAT. ANN. § 49.275; N.J. STAT. ANN. § 2A:84A-21; N.Y. CIV. RIGHTS LAW § 79-h(b); OHIO REV. CODE ANN. §§ 2739.04, 2739.12; 42 PA. CONS. STAT. AND CONS. STAT. ANN. § 5942; VT. STAT. ANN. tit. 12, § 1615(b); WASH. REV. CODE ANN. § 5.68.010(1).

[5] S*ee* IDAHO CODE ANN. § 9-714 (protection can be overcome only "in cases involving national security or imminent

These widespread and enduring protections, developed by legislatures and judges "fully aware of the need to protect the integrity of the factfinding functions of their courts," *Jaffee*, 518 U.S. at 13, indicate that recognition of the proposed privilege has not interfered with effective law enforcement at the state level. Moreover, denial of a federal privilege would undermine these existing protections and "frustrate the purposes of the state legislation," as "any State's promise of confidentiality would have little value if the [would-be source] were aware that the privilege would not be honored in a federal court." *See Jaffee*, 518 U.S. at 13.

Federal authorities also favor recognition of a privilege protecting journalists' confidential sources. As noted *supra* pages 4–5, nearly every federal circuit has recognized such a privilege. Some have even done so based on Rule 501. *See Riley*, 612 F.2d at 714–15 (recognizing qualified common law privilege and noting that "[t]he legislative history of Rule 501 manifests that its flexible language was designed to encompass, inter alia, a reporter's privilege not to disclose a source"). Moreover, Department of Justice guidelines on legal demands for the records of journalists have long protected "members of the news media from certain law enforcement tools, whether

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physical harm"); OR. REV. STAT. § 44.530 (protection can be overcome only in defamation actions where defendant asserts defense based on information at issue); UTAH R. EVID. 509(b) (protection can be overcome only by "clear and convincing evidence that disclosure is necessary to prevent substantial injury or death"); W. VA. CODE ANN. § 57-3-10(b)(1) (protection can be overcome only if disclosure "is necessary to prevent imminent death, serious bodily injury or unjust incarceration").

criminal or civil, that might unreasonably impair lawful newsgathering activities." 28 C.F.R. § 50.10(a)(1); *see Gonzales*, 459 F.3d at 175.[6] Denial of the privilege would, thus, undermine federal as well as state policy.

In light of reason and experience, and consistent with Congress's "affirmative intention not to freeze the law of privilege," *see Trammel*, 445 U.S. at 47, amicus urges the Court to recognize a common law reporter's privilege under Rule 501.

CONCLUSION

For the foregoing reasons, amicus respectfully urges the Court to grant the petition for writ of certiorari.

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[6] The guidelines instruct that "the approach in every instance must be to strike the proper balance among several vital interests: protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society." 28 C.F.R. § 50.10(a)(2). To that end, the guidelines require DOJ lawyers to seek authorization from the Attorney General, *id.* § 50.10(c)(1), and to make "all reasonable attempts to obtain the information . . . from alternative sources," *id.* § 50.10(c)(4)(ii), before issuing a subpoena to a member of the news media. Some version of these guidelines has been in place since 1970. *Gonzales*, 459 F.3d at 175. In 2025, DOJ rescinded certain additions to the policy made under the previous administration, *see* OFFICE OF THE ATTORNEY GENERAL, UPDATED POLICY REGARDING OBTAINING INFORMATION FROM, OR RECORDS OF, MEMBERS OF THE NEWS MEDIA (April 25, 2025), https://perma.cc/DA2C-2YYT, but these core protections remain operative.

Respectfully submitted,

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