No. 26-461

In the
Supreme Court of the United States

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

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

BRIEF OF *AMICUS CURIAE* THE FREEDOM OF THE PRESS FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Freedom of the Press Foundation ("FPF") is a nonprofit, nonpartisan organization dedicated to defending and protecting public interest journalism. FPF advocates for the rights of journalists nationwide, documenting press freedom violations, developing software tools that help journalists communicate with sources confidentially, and providing digital security training to newsrooms. FPF also frequently files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the journalism community.

FPF has a significant interest in this case. Many sources with newsworthy information can only speak out safely if their names are kept confidential. Journalists thus need to be able to promise their sources confidentiality, including in court proceedings. The States have overwhelmingly recognized this crucial aspect of the freedom of the press. Forty-nine States and the District of Columbia have adopted a reporter's privilege that shields journalists, in one way or another, from having to divulge their sources. But that near consensus provides little reassurance if federal courts fail to afford journalists the same protection. Federal law in this area is in disarray, and this Court's review is needed to ensure predictability and uphold the rights of journalists nationwide.

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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 no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund this brief's preparation or submission. Counsel for all parties received timely notice of the intention to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is a prime candidate for this Court's review. The Circuits have deeply divided over whether and to what extent a reporter can withhold the identity of her confidential sources in response to a civil subpoena. And the decision below falls on the wrong side of the split. It affords no meaningful protection to reporters and their confidential sources in the nation's capital, thereby abridging the freedom of the press in the place where it is needed most.

That decision threatens grave public harm. An "untrammeled press [is] a vital source of public information." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936). And "an informed public is the essence of working democracy." *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). The Framers accordingly resolved through the First Amendment to afford the "liberty of the press" the "broadest scope that could be countenanced in an orderly society." *Bridges v. California*, 314 U.S. 252, 265 (1941). One key component of that liberty is the right to protect confidential sources—a practice that dates back to the Founding. After all, compelling the disclosure of confidential sources threatens the press's ability to gather newsworthy information, thereby restraining the flow of that information to the public.

In addition to curbing the free flow of information, compelled disclosure can endanger other important public interests, including national security. This case makes that clear. The lower courts ordered a reporter to turn over her confidential sources—presumably, one or more American national security officials—to a

former colonel in the Chinese military who was the subject of a counterintelligence probe by the United States.

Despite the importance of a reporter's privilege, the governing law is a mess. This Court has addressed the privilege only once, more than fifty years ago, and only in the context of grand jury proceedings. *See Branzburg v. Hayes*, 408 U.S. 665 (1972). And the Courts of Appeals have found the lessons of that opinion to be "as clear as mud." *United States v. Sterling*, 724 F.3d 482, 523 (4th Cir. 2013) (Gregory, J., dissenting). In a 5-4 decision, *Branzburg* held that "a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof," typically must yield to a "good-faith grand jury investigation." 408 U.S. at 692, 708–09. But the Court recognized that "news gathering" merits some measure of undefined First Amendment protection, which could "pose wholly different issues for resolution" in different contexts. *Id.* at 707. And Justice Powell—who cast the decisive vote—stressed this "limited nature of the Court's holding" in his concurrence, emphasizing that courts must adjudicate reporter-privilege claims "on a case-by-case basis." *Id.* at 709–10 (Powell, J., concurring).

Branzburg ignited a debate in the lower courts over the existence, source, and scope of a reporter's privilege. While most courts recognize the privilege, some do not. *See McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (collecting cases). Among the courts that recognize the privilege, some ground it in the First Amendment. *See, e.g.*, *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980). Others root it in the common law under

Federal Rule of Evidence 501. *See, e.g.*, *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980). At least one court recognizes the privilege but refuses to take a stance on its source. *See Gonzales v. Nat'l Broad. Co., Inc.*, 194 F.3d 29, 35 n.6 (2d Cir. 1999). And the courts that recognize the privilege disagree over its scope. *See McKevitt*, 339 F.3d at 532. The D.C. Circuit, for example, holds that a litigant may overcome the privilege in a civil case by showing that the identity of the confidential source is central to her case and that she has exhausted other avenues of discovery. *See Lee v. Dep't of Just.*, 413 F.3d 53, 59–60 (D.C. Cir. 2005). That test will nearly always be satisfied in a Privacy Act case like this one. *See* Pet.15. Other courts, however, engage in a more rigorous balancing test, asking in a civil case whether the litigant's interest in unmasking the confidential source outweighs the reporter's and public's interests in protecting the source. *See, e.g.*, *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000); *Riley v. City of Chester*, 612 F.2d 708, 715–17 (3d Cir. 1979).

This case presents the Court with a clean opportunity to extinguish the debate over *Branzburg* and affirm the existence and scope of a federal reporter's privilege in civil cases. The Court should grant certiorari and hold that the First Amendment and Federal Rule of Evidence 501 protect Petitioner from having to disclose her confidential sources.

ARGUMENT

I. The First Amendment Affords Robust Protection Against the Compelled Disclosure of a Reporter's Confidential Sources.

It has long been recognized that "informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean*, 297 U.S. at 250. That was not lost on the Framers. They regarded "the opinion of the people" as the very foundation of a democratic republic. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *in* 11 *The Papers of Thomas* Jefferson 48, 49 (J. Boyd ed. 1955). And they knew that such "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy." 9 *Writings of James Madison* 103 (G. Hunt ed. 1910).

The First Amendment therefore secures a robust freedom of the press. As originally understood, that right includes the liberty of reporters to maintain confidentiality for their sources. But this Court has had little occasion to address the scope of that freedom. This Court should grant review to make clear that, in civil cases, the First Amendment affords reporters far more protection than the lower court believed.

A. The Framers Regarded Anonymity as a Core Part of the Freedom of the Press.

The Framers had learned the importance of a free press from experience. They were all-too "familiar with the English struggle" against government attempts to "abridge the free expression of any opinion which seemed to criticize or exhibit [the government]

in an unfavorable light." *Grosjean*, 297 U.S. at 245, 248. And the people had little recourse from imperial efforts to control the public narrative. "The freedom of the press and rights of conscience, those choicest privileges of the people," were notoriously "unguarded in the British Constitution." 1 *Annals of Congress* 436 (Joseph Gales ed., 1834) (James Madison). And the common law afforded the colonists scant additional protection. *See Bridges*, 314 U.S. at 263–64; *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714–18 (1931).

That lack of protection caused outrage in the Colonies. Indeed, one of the most prominent "objects of the Revolution was to get rid of the English common law on liberty of speech and of the press." *Bridges*, 314 U.S. at 264 (citation omitted). By the Founding, "[t]he conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration." *Near*, 283 U.S. at 716–17. And the demand for a more fulsome protection in the new Republic rang loud in the Anti-Federalist charge. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 364–67 (1995) (Thomas, J., concurring) (collecting sources); Sonja R. West, *The "Press," Then & Now*, 77 Ohio St. L.J. 49, 64 (2016) (same).

The First Amendment provided that overdue guarantee. It specifically forbade the newly established government from "abridging the freedom . . . of the press." U.S. Const. amend. I. And the people understood that language to enshrine an expansive right to freedom from federal interference. "The evils to be prevented were not the censorship of the press merely, but any action of the government by

means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Grosjean*, 297 U.S. at 249–50 (quoting 2 Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 886 (8th ed. 1927)).

As part of this liberty, "anonymity and the freedom of the press" became closely "intertwined in the early American mind." *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring). The infamous 1735 trial of John Peter Zenger—"who refused to reveal the anonymous authors of published attacks on the Crown Governor of New York"—"set the Colonies afire for its example of a jury refusing to convict a defendant of seditious libel against Crown authorities." *Id.* During the Revolution, America's leaders refused "to haul the printer of [a] newspaper before Congress to answer questions" concerning an anonymous author. *Id.* at 361–62. And in the lead up to Ratification, "attempts to suppress the Anti-Federalist press by requiring the disclosure of authors' identities" were met with sharp backlash and a "hasty retreat." *Id.* at 364–65. Founding-era Americans thus repeatedly "opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'" *Id.* at 361.

That freedom extended to anonymous sources just the same. "Compelled disclosures of such names were deprecated as 'dangerous stretches of power' that threatened liberty of the press." Matthew L. Schafer, *A Third Possibility: The Press Clause at the Founding*,

36 Fordham Intell. Prop. Media & Ent. L.J. 297, 350 (2026) (alteration adopted) (quoting *Mr. Hall*, Newport Mercury, Mar. 18, 1765, at 2)). And rightly so. Without the promise of anonymity for sources, "few would 'care to point out the Mischiefs'" and "'combat the Irregularities and Disorders of Government, or the illegal attempts of wicked Men.'" *Id.* at 351 (quoting *To the Printer of the Pennsylvania Chronicle*, Pennsylvania Chronicle, Feb. 9, 1767, at 1). Journalistic sources naturally fear retribution for blowing the whistle. As a result, "printers continued to claim the right to protect source identities" following ratification, and the sporadic attempts to overcome that privilege were met with hostility and defeat. *Id.* at 353–55.

B. This Court's Review Is Needed to Uphold the Right of Journalists to Maintain Confidentiality for their Sources.

Despite the importance of confidential sources to the Founding Generation, this Court has never clarified the scope of that core freedom of the press. It has recognized that journalists are "entitled to *some* constitutional protection of the confidentiality of [their] sources." *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (emphasis added). But just how much it has never said.

The Court's lone foray into this area was in *Branzburg*. There, the Court acknowledged that "news gathering is not without its First Amendment protections." 408 U.S. at 707. Nevertheless, a bare majority held that the First Amendment did not shield a reporter from answering grand jury questions "directly related to criminal conduct that he had

observed and written about." *Id.* at 708. Nor could another reporter entirely "refuse to appear" before "a good-faith grand jury investigation." *Id.* In so holding, the Court emphasized "the ancient role of the grand jury" and the fact that the grand jury's historic "authority to subpoena witnesses" is "essential to its task." *Id.* at 686–88. Requiring the newsmen in that case to testify also served a "compelling" government interest in "extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders." *Id.* at 700–01. Those weighty interests, in the Court's view, sufficed "to override the consequential . . . burden on news gathering" on the facts before the Court. *Id.* at 690.

The Court's holding was narrow. In explaining his deciding vote, Justice Powell underscored that—even in the context of a grand jury subpoena—courts should evaluate a reporter's claim of privilege on a "case-by-case basis" by "balanc[ing] between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.* at 710 (Powell, J., concurring). Outside the grand jury context, the Court provided no guidance whatsoever. It had no occasion to consider the issue.

Branzburg has thus left the lower courts adrift in the civil setting. In trying to discern whether and to what extent a reporter can protect her confidential sources in civil cases, most, but not all, lower courts have held that the constitutional calculus changes. *See, e.g.*, *Baker v. F & F Inv.*, 470 F.2d 778, 779–80 (2d Cir. 1972) (refusing to extend the "limited principle of *Branzburg*" to a civil case). That majority view is

undoubtedly correct. Grand jury subpoenas are fundamentally different than civil discovery requests, for unlike grand jury proceedings, there is no constitutional mandate for civil discovery. Nor does a civil subpoena play any historic or essential role in the enforcement of our criminal laws. *Cf. Branzburg*, 408 U.S. at 688 (majority op.). As such, "courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure" in civil matters. *Baker*, 470 F.2d at 785.

But the lower courts cannot agree on how to conduct the analysis. Rather than recognize the weighty "First Amendment protections" afforded to "news gathering," *Branzburg*, 408 U.S. at 707, some courts suggest that "[t]here isn't even a reporter's privilege in federal cases," *see U.S. Dep't of Educ. v. NCAA*, 481 F.3d 936, 938 (7th Cir. 2007). Others hold that the privilege exists but can be overcome when the information sought "is 'crucial' to the case" and the litigant could not "obtain it from a 'reasonable alternative source.'" *Chen v. FBI*, 153 F.4th 1289, 1295 (D.C. Cir. 2025) (citation omitted). Other courts more rigorously hold that "disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir. 1982) (per curiam). And still others employ a "balancing approach" once the party seeking disclosure "show[s] that it can establish jury issues on the essential elements of its case not the subject of the contested discovery." *Bruno & Stillman, Inc. v. Globe*

Newspaper Co., 633 F.2d 583, 597–98 (1st Cir. 1980); *see also, e.g.*, *Shoen v. Shoen*, 5 F.3d 1289, 1292–93 (9th Cir. 1993).

The Court's intervention is necessary to bring clarity to this chaotic area of the law. The Court "has allowed this confusion to percolate in the lower federal courts" for decades. Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 Hofstra L. Rev. 39, 45 (2005). And that uncertainty has itself cast a cloud over the freedom of the press. "The current state of affairs leaves sources, journalists, prosecutors, and lower federal courts without any clear guidance," while "the scope of the First Amendment-based journalist-source privilege differs significantly from one part of the nation to another." *Id.*

The Court should take this opportunity to elucidate the robust protections for confidential sources that the Free Press Clause requires. "[H]eightened First Amendment scrutiny" is needed because of the "deterrent effect on the exercise of First Amendment rights" that compelled disclosure would create. *First Choice Women's Res. Ctrs., Inc. v. Davenport*, 608 U.S. 174, 186 (2026) (quotation marks omitted). Even the threat of such disclosure will inevitably dissuade sources from speaking to reporters, thereby depriving the public of valuable information. *See* Stone, *supra*, at 41–42.

The context of this case is also nothing like that of *Branzburg*. Unlike the grand jury proceedings in that case, there is no compelling public interest overriding the burden imposed on newsgathering. Just the opposite. Far from promoting the enforcement of our criminal laws, disclosure in this case potentially

threatens our nation's security. Allowing the decision below to stand will force Petitioner to hand over confidential government information to a former military officer of a foreign adversary.

The lower court's mechanical test failed to examine these important public interests. Instead, it looked solely to the interests of an individual plaintiff. And that produced an outcome eerily similar to the one that Justice Powell expressly said the Court in *Branzburg* rejected. That is, by refusing to recognize a reporter's privilege in this civil discovery dispute, the court below allowed another party to annex the news media to serve as an investigator for the party's benefit. *See Branzburg*, 408 U.S. at 709 (Powell, J., concurring). Such a result is antithetical to "[t]he solicitude repeatedly shown by this Court for First Amendment freedoms." *Id.* History and *Branzburg* make clear that the First Amendment demands more.

II. This Court Should Alternatively Recognize a Reporter's Privilege Under Federal Rule of Evidence 501.

Federal Rule of Evidence 501 offers another direct path to protecting Petitioner's confidential sources. Three years after *Branzburg*, Congress enacted Rule 501, which says the "common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege." Fed. R. Evid. 501. Rule 501 did not trap the law of privilege in amber. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990). Rather, it authorized federal courts to "[recognize] rules of privilege on a case-by-case basis." *Id.* Thus, the "language of [R]ule 501"—as one of its drafters said—"permits the courts to develop a

privilege for newspaperpeople." 120 Cong. Rec. 40891 (1974) (statement of Rep. William Hungate).

This Court has considered two factors in deciding whether to recognize an evidentiary privilege under Rule 501: (1) whether the privilege serves important private and public interests that outweigh the privilege's burden on truth-seeking; and (2) whether the States widely recognize the privilege. *See Jaffee v. Redmond*, 518 U.S. 1, 10–15 (1996). Both considerations confirm that this Court should recognize a privilege to prevent the discovery of a reporter's confidential sources.

A. Recognizing a Reporter's Privilege Would Serve Vital Private and Public Interests.

Start with the private interests at stake. Like any other privilege, the reporter's privilege is "rooted in the imperative need for confidence and trust." *Trammel v. United States*, 445 U.S. 40, 51 (1980); *see In re Petroleum Prods. Antitrust Litig.*, 680 F.2d at 8. Sources frequently provide information of public importance to reporters only on the condition of anonymity, because they fear the personal or professional consequences that could result from disclosure of their identity. *See The Newspaper: Its Making and Its Meaning* 45 (Robert E. Garst ed., 1945). Assurances of confidentiality thus permit reporters to collect information "from officeholders fearful of superiors, from businessmen fearful of competitors, from informers operating at the edge of law who are in danger of reprisal," from "people afraid of the law and of government," and "from men in all fields anxious not to incur censure for unorthodox or unpopular views." Alexander M. Bickel, *The Morality*

of Consent 84 (1975). Recognizing a federal reporter's privilege would protect those assurances. And that would "serve[] important private interests" in guarding "confidential communications" from compelled disclosure. *Jaffee*, 518 U.S. at 11.

A federal reporter's privilege would similarly "serve[] the public interest." *Id.* Like the informer's privilege, which protects the identity of a person who reports criminal activity to the government, the reporter's privilege "encourages" citizens to share matters of public importance with journalists, who can then use that information in their reporting. *Roviaro v. United States*, 353 U.S. 53, 59 (1957); *see Anderson v. Nixon*, 444 F. Supp. 1195, 1200 (D.D.C. 1978) (stating that the "informer's privilege" provides the "clearest comparison" for the "newsman's privilege").

That in turn results in "the free flow of information to the public." *In re Madden*, 151 F.3d 125, 128 (3d Cir. 1998). This is a "paramount public interest." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). For "liberty cannot be preserved without a general knowledge among the people, who have a right . . . and a desire to know." John Adams, *A Dissertation on the Canon and Feudal Law* (1765), *in* 3 *The Works of John Adams* 447, 456 (Charles Francis Adams ed., 1851).

Reporters and confidential sources play a critical role in maintaining this "essence of working democracy." *Minneapolis Star & Trib. Co.*, 460 U.S. at 585. "The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of

publicity." *Grosjean*, 297 U.S. at 250. And confidential sources are "essential to the workings of the press." *In re Grand Jury Subpoena (Miller)*, 438 F.3d 1141, 1183 (D.C. Cir. 2006) (Tatel, J., concurring); *see* Margaret Sherwood, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 Cal. L. Rev. 1198, 1204 (1970) ("Newsmen unanimously stress the importance of [confidential sources] to their work.").

But sources "avoid revealing information that could get them in trouble." *In re Grand Jury Subpoena (Miller)*, 438 F.3d at 1168 (Tatel, J., concurring). If a reporter is forced to disclose her confidential source, others "will be significantly deterred from furnishing . . . information to the press." *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 508 (E.D. Va. 1976). And "[i]nformation lost to the press is information lost to the public." *Id.* Compelled disclosure of reporters' confidential sources thus "dam[s]" 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. In short, without the reporter's privilege, the "essential role played by the press in the dissemination of information and matters of interest and concern to the public" would be "seriously erode[d]." *Riley*, 612 F.2d at 714.

"In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the [reporter's] privilege is modest." *Jaffee*, 518 U.S. at 11. Most people who speak to journalists

do not require anonymity. And, for those that do, they would "surely be chilled" from speaking if they knew that their confidential communications could be exposed in litigation. *Id.* at 12. Given that chilling effect, "much of the desirable evidence to which litigants such as [Respondent] seek access" is "unlikely to come into being" in the first place. *Id.* "This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged." *Id.*

B. The States Have Overwhelmingly Adopted a Reporter's Privilege.

Were that not enough, the uniform judgment of the States confirms that this Court should recognize a privilege protecting a reporter's confidential sources. *See Jaffee*, 518 U.S. at 12. Forty-nine States and the District of Columbia have recognized such a privilege through legislative or judicial action. *See Reporter's Privilege Compendium*, Reporters Committee for Freedom of the Press (Nov. 5, 2021), https://bit.ly/3UrNM8I.[2] These States agree that compelling reporters to "disclose a source of information" is "contrary to the public interest and inhibits the free flow of information to the public." Neb. Rev. Stat. Ann. § 20-144(3); *see also, e.g.*, Minn.

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[2] The lone exception, Wyoming, "has no statutory or reported case law in this area" because of "[t]he infrequent use of subpoenas on news organizations" in the State. Bruce T. Moats, *Wyoming – Reporter's Privilege Compendium*, Reporters Committee for Freedom of the Press, https://bit.ly/3UkUi0Z (last visited Nov. 6, 2026). Were the issue to ever present itself, there is no reason to think that Wyoming would break from the consensus of its sister States.

Stat. Ann. § 595.022 (recognizing that a reporter's privilege protects the "free flow of information" to the public); *In re Paul*, 513 S.E.2d 219, 221 (Ga. 1999) (explaining that the "rationale" for a reporter's privilege is that compelled disclosure of a reporter's confidential sources "chills the free flow of information to the public" (citation omitted)).

This "existence of a consensus among the States indicates that 'reason and experience' support recognition of the [reporter's] privilege." *Jaffee*, 518 U.S. at 13. At the same time, rejecting a federal reporter's privilege would "frustrate the purposes" of state law by exposing, in federal court, confidential sources protected under state law. *Id.* In other words, the States' "promise[s] of confidentiality" for anonymous sources will have "little value" if reporters and sources cannot rely on federal courts to also honor the privilege. *Id.* The Court should grant review and hold that federal courts provide at least as much protection—whether that be through the First Amendment or the common law.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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