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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The decision below provides a roadmap for every subject of an investigative exposé to compel the disclosure of the confidential sources involved. Under the decision below, any disgraced official could file a Privacy Act lawsuit and compel the identification of a modern-day Deep Throat. Protection for reporters and their confidential sources should be at its zenith in the Nation's capital, but the D.C. Circuit's "arid two-factor test allows the exigencies of even the most trivial litigation to trump core First Amendment values." *Lee v. DOJ*, 428 F.3d 299, 301 (D.C. Cir. 2005) (Tatel, J., dissenting from the denial of rehearing en banc). The D.C. Circuit's approach defies common sense and conflicts with decisions from multiple courts of appeals.

The brief in opposition only underscores the need for this Court's intervention. Respondent does not seriously dispute the implications of the D.C. Circuit's underprotective two-factor test, and her efforts to explain away the entrenched division in the courts of appeals are unpersuasive. The federal courts are in disarray over how to interpret this Court's 5-4 decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), in the civil context, which is why lower courts have repeatedly called on this Court to provide clarity. This Court's guidance is overdue given the dramatic changes to the legal landscape since this Court last weighed in more than 50 years ago.

Respondent insists that this case is a poor vehicle because she thinks she will eventually defeat whatever privilege this Court might recognize. But that is wishful thinking given the relative stakes, as

any privilege worthy of the name would protect a national-security reporter under the circumstances here. In fact, as the multiple amici supporting the petition attest, this is the rare clean vehicle for the Court to provide clarity in this critically important area of the law, in a context where the stakes could not be higher. As the Fourth Circuit just recognized, maintaining the "[c]onfidentiality of sources is the lifeblood of a free press." *In re United States*, 2026 WL 3399358, at *7 (4th Cir. 2026). If the reporter's privilege protects anything, it protects against the forced disclosure of a national-security source to a suspected foreign agent of the Chinese Communist Party in a low-stakes Privacy Act suit. This Court should grant the petition and reverse.

I. The Circuits Are Divided Over The Existence And Scope Of A Federal Reporter's Privilege.

Respondent dismisses the conflict among the circuits as mere disagreement over "verbal formulations of the same underlying legal rule." BIO.16. That claim is unsustainable. The difference between "[t]here isn't … a reporter's privilege," *Dep't of Educ. v. NCAA*, 481 F.3d 936, 938 (7th Cir. 2007), "courts must apply a balancing test," *Cusumano v. Microsoft*, 162 F.3d 708, 716 (1st Cir. 1998), and a district court need not conduct "any broader balancing of public and private interests," App.12, is not just semantics. The different approaches among the circuits are irreconcilable and outcome-determinative, which is why Judge Posner, reviewing the same cases, concluded that courts "do not agree on [the] scope" of the privilege, whether to even "recognize the

privilege," or whether "there might be a federal common law privilege … not based on the First Amendment." *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003). The confusion has only worsened in the ensuing decades.

Respondent avoids that reality by rewriting the cases. Respondent insists that the First Circuit merely "evaluat[es] the three factors that the D.C. Circuit also relied on." BIO.12. But the First Circuit has repeatedly explained that courts assessing a claim of reporter's privilege "must apply a balancing test." *Cusumano*, 162 F.3d at 716. That "balancing test" is hardly the mirror-image of the D.C. Circuit's two-factor centrality-and-exhaustion approach. Instead, it "contemplates consideration of a myriad of factors, often uniquely drawn out of the factual circumstances of the particular case." *Id.* That test would allow the courts to consider, *inter alia*, the nature of the plaintiff's claim and the national-security context. *Id.* That is the kind of balancing test the D.C. Circuit rejected.

Equally important, the First Circuit requires a plaintiff seeking disclosure to show that he "can establish jury issues on the essential elements of [his] case not the subject of the contested discovery." *Bruno & Stillman v. Globe Newspaper*, 633 F.2d 583, 597 (1st Cir. 1980). That avoids forcing disclosure when the claim is doomed to fail on the merits. Respondent insists that the First Circuit was simply repeating its requirement that the "claim is not frivolous," BIO.13, but that gloss does not survive even a quick reading of the decision. The First Circuit made clear conjunctively that courts must ensure that "the case

does not appear frivolous, that [there] appears to be a jury issue, and that the desired information appears more than remotely relevant" before even assessing whether "there is a need for confidentiality." *Bruno*, 633 F.2d at 597. In fact, the First Circuit expressly contemplated that courts consider summary judgment *before* ordering disclosure, explaining that courts may "defer disclosure … until more discovery has taken place with the possibility that summary judgment would be appropriate." *Id.* at 598. Postponing disclosure until elements of Respondent's case could be tested on summary judgment is precisely the source-protecting option the D.C. Circuit refused to contemplate.

Respondent's efforts to explain away *Ashcraft v. Conoco*, 218 F.3d 282 (4th Cir. 2000), are similarly unpersuasive. According to Respondent, the Fourth Circuit merely adopted the Fifth Circuit's three-part test from *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir. 1980). But while the Fourth Circuit cited *Miller* for the "three-part test," *Ashcraft*, 218 F.3d at 287, it explained that in applying the "third prong," the "compelling nature of the interest" asserted must be "balanced against the reporter's interest in protecting the confidentiality of his sources." *Id.* at 288 & n.12. That approach is irreconcilable with the Fifth Circuit's less-protective approach to that prong, which asks only whether the informant's identity is necessary to the party's claim and whether there is "other proof reasonably available." *Miller*, 621 F.2d at 726.

Respondent's characterization of the law in the Ninth and Tenth Circuits is similarly unpersuasive.

BIO.14-15. Respondent again points to language in those decisions discussing centrality and exhaustion, but ignores that those two factors do not stand alone and that courts in both circuits may engage in more comprehensive balancing. In *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993), for instance, the court explained that the "First Amendment privilege and the opposing need for disclosure [must] be judicially weighed in light of the surrounding facts, and a balance struck to determine where lies the paramount interest." *Id.* at 1292-93. While the Ninth Circuit ultimately concluded that the plaintiffs did not exhaust other means for obtaining the information, it expressly contemplated that courts may consider additional factors that affect "the journalist's, and the public's, interest in non-disclosure" in the balancing analysis. *Id.* at 1295; *see Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975).

As for the Tenth Circuit, "the nature of the evidence sought," "the effort to obtain it from other sources," "the necessity for [the movant] to have it," and "its relevance" are "highly important criteria." *Silkwood v. Kerr-McGee*, 563 F.2d 433, 438 (10th Cir. 1977). But the Tenth Circuit does not treat those criteria as exclusive. Instead, the Tenth Circuit makes clear that those considerations are "among the factors that the trial court must consider." *Compare Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987), *with* BIO.15 (omitting word "among"). In addition to those factors, courts in the Tenth Circuit consider the "serious[ness]" of the "violations alleged" and whether plaintiffs seek "only statutory damages" or "actual damages." *Amaya v. Bregman*, 2016 WL 10296798, at *8 (D.N.M. 2016). None of those

considerations has any relevance under the D.C. Circuit's approach.

Respondent does not dispute that the Third Circuit recognizes a reporter's privilege under Rule 501, in direct conflict with the D.C. Circuit's refusal to recognize such a privilege under the Rule. She nevertheless insists that "[t]he Third Circuit's test is the same." BIO.14. But unlike the D.C. Circuit, the Third Circuit requires courts to "balance on one hand the policies which give rise to the privilege and their applicability to the facts at hand against the need for the evidence sought to be obtained." *Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979). Parties seeking disclosure must demonstrate centrality and exhaustion as part of that balance. BIO.14. But consistent with Congress' instruction "not to freeze the law of privilege" under Rule 501, *Trammel v. United States*, 445 U.S. 40, 47 (1980), the Third Circuit expressly leaves open the possibility that parties must make "additional showing[s]" beyond centrality and exhaustion "to overcome the privilege," *United States v. Cuthbertson*, 630 F.2d 139, 149 (3d Cir. 1980). That is why district courts within the Third Circuit recognize that "[o]ther factors affect the kind of showing necessary to overcome the qualified privilege." *Parsons v. Watson*, 778 F.Supp. 214, 217 (D. Del. 1991). And those other factors include (among other things) the "strong public policy considerations of promoting the free communication to the public." *Smith v. Borough of Dunmore*, 2011 WL 2115841, at *4 (M.D. Pa. 2011).

Finally, Respondent resists the conclusion that there is no reporter's privilege in the Seventh Circuit

because *McKevitt*, 339 F.3d at 530, involved a non-confidential source. But Respondent's interpretation of *McKevitt* defies the Seventh Circuit's (and *McKevitt*'s author's) own understanding of the case. In *NCAA*, the court cited *McKevitt* for the proposition that "[t]here isn't even a reporter's privilege in federal cases." 481 F.3d at 938. "The news media," the court explained, "conduct investigations, and their ability to do so would be enhanced if they were permitted to conceal the identity of their sources from the government. But they are not." *Id.* Given those instructions, district courts in the Seventh Circuit refuse to recognize a federal reporter's privilege, including in confidential-source cases. *See Beverly v. Watson*, 2016 WL 3633316, at *6 (N.D. Ill. 2016) (rejecting effort to limit *McKevitt* to disclosures of non-confidential sources).

II. The Panel Below Erred In Adopting An Excessively Narrow Understanding Of The Reporter's Privilege.

1. Respondent spends the bulk of her merits discussion insisting that the D.C. Circuit's test is actually "pro-reporter." BIO.18-19. That would come as a surprise to a host of pro-reporter amici and to multiple D.C. Circuit judges, who have described the D.C. Circuit's "arid two-factor test," *Lee*, 428 F.3d at 301 (Tatel, J., dissenting), as "effectively no privilege at all," *id.* at 302 (Garland, J., dissenting from the denial of rehearing en banc). The latter assessment is spot on. As Respondent concedes elsewhere in her brief, "the centrality factor generally will be satisfied in most Privacy Act cases," BIO.21, turning the D.C. Circuit's two-factor test into a one-factor exhaustion

requirement. While Respondent insists that "'[v]igilant application' of the exhaustion factor" helps "ensure that compelled disclosure will [remain] the exception, not the rule," BIO.21, that logic does not work "where the identity of the leaker is itself 'the heart of the matter,'" *Lee*, 428 F.3d at 301-02 (Tatel, J. dissenting). Because "the great majority of leaks will likely be unprovable without evidence from either leaker or leakee," a "litigant's efforts, however exhaustive, are unlikely to identify the reporter's source." *Id.* at 302. A "test focused only on need and exhaustion will therefore almost always be satisfied, leaving the reporter's source unprotected regardless of the information's importance to the public." *Id.*

That approach is especially problematic in the context of civil litigation, where the government interest in effective law enforcement is absent, and where there has been no assessment by a prosecutor that pursuit of a reporter and her sources is appropriate under the circumstances of the case. Law enforcement officials must "strike the proper balance" between "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" before deciding whether to seek disclosure of a reporter's confidential sources. 28 C.F.R. §50.10(a)(2); *see also* M. Grynbaum, *U.S. Withdraws Subpoenas Issued to New York Times Journalists*, N.Y. Times (July 23, 2026), https://perma.cc/JAG9-AHKE. Yet under the D.C. Circuit's approach, federal courts are forbidden from conducting the same sort of balancing when a civil plaintiff seeks the same information. *See also* Cruz.Br.9-10. Under the decision below, it would not

matter that the forced disclosure of a source could threaten an ongoing national security investigation. Nor would it matter that the public has a significant interest in the subject of the reporting, or that the plaintiff's claim might fail at summary judgment for a dozen other reasons. Courts in the D.C. Circuit must compel disclosure regardless.

Respondent nevertheless insists that the D.C. Circuit's test "strikes the appropriate balance" because without forced disclosure, her ability to win her Privacy Act claim would be frustrated. But that is "the price of every privilege, and the law pays it without hesitation for lawyers, spouses, and psychotherapists, among others." Cruz.Br.13. While the importance of maintaining confidence between a psychotherapist and her patient is important, the importance of maintaining confidence between a reporter and her source is far more vital given the First Amendment interests at stake. Respondent might find the implications of that position "deleterious." BIO.22. But "we have staked upon it our all." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Respondent next insists that an interest-balancing approach would be "[u]nworkable." BIO.23. But courts in other circuits routinely conduct the type of balancing the D.C. Circuit refused to do. *See supra* 3-6. State courts do likewise under state reporter-shield laws. *See, e.g.*, *California v. Charles*, 349 P.3d 990, 1004 (Cal. 2015). Federal courts do so in assessing other qualified privileges. *See, e.g.*, *In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997) (deliberative process privilege); *Roviaro v. United*

States, 353 U.S. 53, 60-62 (1957) (criminal informant's privilege). And there is nothing unadministrable about ensuring that a plaintiff's claim can survive summary judgment so that a forced disclosure would not end up being needless.

2. Respondent's half-hearted defense of the D.C. Circuit's Rule 501 holding is similarly unpersuasive. Respondent's principal contention is that *Branzburg* held in 1972 "that there is no 'common law' reporter's privilege." BIO.29. But much has changed since then, including the enactment (in 1975) of Rule 501. In interpreting that Rule, this Court recognized that "Congress manifested an affirmative intention not to freeze the law of privilege," but rather to "leave the door open to change," and to "continue the evolutionary development of testimonial privileges." *Trammel*, 445 U.S. at 47. And while only 17 states recognized a statutory reporter's privilege in 1972, *see Branzburg*, 408 U.S. at 689 n.27, virtually every state recognizes some sort of reporters' privilege today. That emerging consensus "indicates that 'reason and experience' support recognition of the privilege." *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996).

Respondent is thus left insisting that the states have not coalesced around one conception of the privilege. BIO.30. But *Jaffee* undermines her attempt to flyspeck minor variations among the states. The Court in *Jaffee* recognized an evidentiary privilege despite disagreement among the states over whether there was a "balancing component [to] the privilege." 518 U.S. at 17; Pet.31. Respondent does not even try

to explain how her minor-variation argument can be squared with *Jaffee*.

III. The Issues Are Important And This Case Is An Ideal Vehicle To Address Them.

1. The compelled disclosure of confidential sources endangers the press's role as "a powerful antidote to any abuses of power by governmental officials," and its ability to "keep[] officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *see also* Freedom.of.Press.Found.Br.14-15; Reporters.Comm.Br.8-9. Respondent does not even try to dispute that under the D.C. Circuit's approach, any modern-day Watergate suspect could file a Privacy Act lawsuit and compel the disclosure of confidential sources. Respondent seeks to diminish the importance of the decision by insisting that "orders requiring disclosure of a source are rare." BIO.21. But efforts by civil plaintiffs to compel disclosure of confidential sources via the Privacy Act are far from unprecedented and will become more commonplace if the decision below is left in place. *See, e.g.*, *Lee*, 428 F.3d at 302-03 (Garland, J., dissenting) ("The more such strategies succeed, the more they will be employed."). And *contra* App.40, there is no need for an avalanche of Privacy Act lawsuits to threaten First Amendment values. The mere possibility that forced disclosure is one Privacy-Act lawsuit away will chill the free flow of information by discouraging sources from stepping forward. *See* Cruz.Br.12-14.

2. This case is an ideal vehicle to provide the lower courts with guidance on the reporter's privilege, as the numerous amicus briefs attest. Respondent insists

otherwise on the theory that the district court already "evaluated all of Herridge's arguments and concluded that she would be required to disclose the identity of her source(s) even under her preferred test." BIO.30. True, the district court suggested "for the sake of completeness," that considering other factors in the balance "*likely* would not change the outcome." Stay.App.22 (emphasis added); *see* App.35. But the court made clear that its "prediction was far from conclusive," and "[i]t thus remains possible that any refinement of the applicable test … on appeal would alter the result." *Chen v. FBI*, 2023 WL 6461011, at *1 (D.D.C. 2023).

That makes sense, as any privilege worthy of its name would prevent disclosure here. Chen's Privacy Act claim is likely to fail for a host of other reasons. Pet.20-21. Even if she could establish jury issues on the other elements of her claim, there is no world in which any serious balancing of the interests can force the disclosure of a national-security whistleblower to a suspected agent of a foreign nation pursuing a low-stakes Privacy Act claim.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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