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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5044

IN RE: SEALED CASE

Appeal from the United States District Court
for the District of Columbia
(No. 1:23-sc-00031)

Argued May 19, 2023
Decided July 18, 2023
Reissued August 9, 2023

* * *

Before: PILLARD, CHILDS and PAN, *Circuit Judges*.
Opinion for the Court filed by *Circuit Judge* PAN.

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PAN, *Circuit Judge*:[*] The district court issued a search warrant in a criminal case, directing appellant Twitter, Inc. ("Twitter") to produce information to the government related to the Twitter account "@real-DonaldTrump."[1] The search warrant was served along

[*] **NOTE:** Portions of this opinion contain **Sealed Information**, which has been redacted.

[1] During the pendency of this appeal, Twitter, Inc. merged into a privately held company named X Corp. Opening Br. iii. For ease

with a nondisclosure order that prohibited Twitter from notifying anyone about the existence or contents of the warrant. Twitter initially delayed production of the materials required by the search warrant while it unsuccessfully litigated objections to the nondisclosure order. Although Twitter ultimately complied with the warrant, the company did not fully produce the requested information until three days after a court-ordered deadline. The district court thus held Twitter in contempt and imposed a $350,000 sanction for its delay.

In this appeal, Twitter argues that the nondisclosure order violated the First Amendment and the Stored Communications Act; that the district court should have stayed its enforcement of the search warrant until after Twitter's objections to the nondisclosure order were resolved; and that the district court abused its discretion by holding Twitter in contempt and imposing the sanction. We affirm the district court in all respects.

I.

A.

The Stored Communications Act (the "Act"), 18 U.S.C. § 2701 *et seq.*, establishes procedures for law enforcement officers to obtain evidence from electronic service providers in criminal cases. The Act permits the government to obtain a search warrant or court order that directs the service provider to turn over "the contents of [a subscriber's] wire or electronic communication" or "a record or other information pertaining to a subscriber." 18 U.S.C. § 2703(b)(1), (c)(1). A service provider that receives an order to produce subscriber data can move to quash or modify the order by showing that

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of reference, we refer to appellant as "Twitter" throughout this opinion.

the information requested is "unusually voluminous" or that compliance "would cause an undue burden." *Id.* § 2703(d). Service providers that give information to the government under the procedures prescribed by the Act are immunized from liability. *Id.* § 2703(e).

The Act allows the government to seek a nondisclosure order, which directs service providers "not to notify any other person" of a warrant or order's existence "for such period as the court deems appropriate." *Id.* § 2705(b). A court "shall enter" such a nondisclosure order if "there is reason to believe that notification of the existence of the warrant" or order will result in one of five enumerated harms: "(1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction of or tampering with evidence; (4) intimidation of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial." *Id.*

B.

Since November 18, 2022, Special Counsel Jack Smith has overseen an ongoing criminal investigation into potential interference with the peaceful transfer of power following the 2020 presidential election. The investigation encompasses events related to the riot that took place on January 6, 2021, at the United States Capitol. *See In re NY Times Co.*, No. 1:22-mc-100 (BAH), 2023 WL 2185826, at *4 (D.D.C. Feb. 23, 2023); U.S. DEP'T OF JUSTICE, APPOINTMENT OF A SPECIAL COUNSEL (Nov. 18, 2022), https://perma.cc/34GU-BESD. "Despite the intense media attention" surrounding that investigation, it "proceeds behind doors that remain closed to the public." *In re Press Application for Access to Jud. Recs. Ancillary to Certain Grand Jury Proc. Concerning Former Vice President Pence*, No. 1:23-mc-35 (JEB),

2023 WL 3931384, at *1 (D.D.C. June 9, 2023). The instant case arises from the Special Counsel's investigation.

On January 17, 2023, the government applied for, and obtained, a search warrant that directed Twitter to produce data and records related to the "@realDonaldTrump" Twitter account. At the same time, the government applied for, and obtained, a nondisclosure order, which prohibited Twitter from disclosing the existence or contents of the search warrant to any person. Based on *ex parte* affidavits, the district court found probable cause to search the Twitter account for evidence of criminal offenses. Moreover, the district court found that there were "reasonable grounds to believe" that disclosing the warrant to former President Trump "would seriously jeopardize the ongoing investigation" by giving him "an opportunity to destroy evidence, change patterns of behavior, [or] notify confederates." J.A. 1; *see* 18 U.S.C. § 2705(b).[2] The warrant required Twitter to turn over all requested information by January 27, 2023. The nondisclosure order was to remain in effect for 180 days after its issuance.

The government faced difficulties when it first attempted to serve Twitter with the warrant and nondisclosure order. On January 17, 2023, the government tried to submit the papers through Twitter's website for legal requests, only to find out that the website was inoperative. Two days later, on January 19, 2023, the

[2] The district court also found reason to believe that the former President would "flee from prosecution." J.A. 1. The government later acknowledged, however, that it had "errantly included flight from prosecution as a predicate" in its application. J.A. 281 n.1. The district court did not rely on risk of flight in its ultimate analysis. *See* J.A. 195.

government successfully served Twitter through that website. On January 25, 2023, however, when the government contacted Twitter's counsel to check on the status of Twitter's compliance, Twitter's counsel stated that she "had not heard anything about [the] [w]arrant." J.A. 50. She informed the government that an on-time production "would be a very tight turnaround," but she confirmed that the account's available data was preserved. *Id.* at 50-51.

On February 1, 2023—four days after the compliance deadline—Twitter objected to producing any of the account information. Although the company did not question the validity of the search warrant, it asserted that the nondisclosure order was facially invalid under the First Amendment. Twitter informed the government that it would not comply with the warrant until the district court assessed the legality of the nondisclosure order.

On February 2, 2023, Twitter filed a motion to vacate or modify the nondisclosure order; meanwhile, the government moved for an order to show cause as to why Twitter should not be held in contempt of court for its noncompliance with the warrant.

In its motion challenging the nondisclosure order, Twitter argued that the order violated the company's First Amendment right to communicate with its subscriber, former President Trump. The company asserted that compliance with the warrant before resolution of the motion to vacate or modify the nondisclosure order would preclude the former President from asserting executive privilege to shield communications made using his Twitter account. Although Twitter acknowledged that it "may not have standing to raise [executive privilege] issues," and took "no position on the

applicability of executive privilege," the company asserted that prompt compliance with the warrant would nevertheless "impede its ability to effect its First Amendment rights to provide meaningful notice to its user." J.A. 15, 17-18. Citing *Freedman v. Maryland*, 380 U.S. 51 (1965), and *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), Twitter argued that the district court was obligated to maintain the status quo and "stay any production obligation" while the parties litigated the constitutionality of the nondisclosure order. J.A. 18.

The government raised two counterarguments in its motion for an order to show cause. First, it asserted that the warrant and nondisclosure order "are different court orders, imposing different obligations." J.A. 24. Thus, it reasoned, Twitter's compliance with the warrant should not depend on how the court resolved any issues related to the nondisclosure order. Second, the government insisted that neither the warrant nor the Act "provide for intervention by a third party [such as Twitter] before compliance with" a warrant. *Id.* Accordingly, Twitter's obligation to promptly produce account information in response to the warrant was clear, and the government requested a hearing for Twitter to show cause why it should not be held in contempt. *Id.*

The district court set distinct schedules for resolving each of the two outstanding motions. The district court set a hearing on February 7, 2023, on the government's show-cause motion; but it put Twitter's motion challenging the nondisclosure order on a slower track, ordering the government to file a response to that motion by February 16, 2023, with Twitter's reply due on February 23, 2023.

C.

At the February 7 hearing, the district court heard arguments from both parties about Twitter's noncompliance with the search warrant. Although Twitter requested that the court stay its enforcement of the warrant until after it adjudicated Twitter's motion to vacate or modify the nondisclosure order, the court denied that request and found Twitter in contempt of court.

In an oral ruling, the court rejected Twitter's argument that the First Amendment required adjudication of the nondisclosure order before enforcement of the warrant. Adopting Twitter's requested approach would "invite intervention by Twitter—let alone every other electronic communications provider—to delay execution of any [warrant] … issued under the [Act]" while it litigated challenges based on "slivers of knowledge" of an investigation's scope. J.A. 212. Because "any challenge to a [nondisclosure order] is separate from a challenge to a search warrant" and additional delays would "increase[] the risk that evidence will be lost or destroyed, heighten[] the chance the targets will learn of the investigation, and jeopardize[] the government's ability to bring any prosecution in a timely fashion," the court refused to stay its enforcement of the warrant. *Id.* at 213 (citing *Google LLC v. United States*, 443 F. Supp. 3d 447,455 (S.D.N.Y. 2020)).

The district court further determined that "the government ha[d] satisfied … [the] requirements for finding [Twitter in] contempt" for failing to comply with the warrant. J.A. 211. It found that the search warrant "was an unambiguous court order requiring Twitter to comply with production of the specified records … by January [27], 2023," and that Twitter violated the court's order by failing to turn over the records. *Id.* at 211-12.

Nonetheless, the district court gave Twitter an opportunity to purge its contempt by producing the account information. When the court asked Twitter's counsel whether the company could produce the required materials by 5:00 p.m. that evening, counsel answered: "I believe we are prepared to do that. Yes, Your Honor." *Id.* at 210. The court also asked the government what sanctions it would request if Twitter failed to comply. The government suggested sanctions that would accrue at a geometric rate: $50,000 per day, to double every day that Twitter did not comply. The court adopted that suggestion, noting that Twitter was sold for over $40 billion and that its owner's net worth was over $180 billion. Twitter did not object to the sanctions formula. Accordingly, the district court ordered Twitter to produce the records specified by the warrant by 5:00 p.m. on February 7, 2023. If Twitter did not purge its contempt by that time, the district court ordered "escalating daily fines" that were "designed to ensure Twitter complies with the search warrant." *Id.* at 213-14.

Twitter missed the 5:00 p.m. deadline. Although Twitter timely produced some records, its production was incomplete. After a follow-up call with the government on the next day, Twitter produced supplemental information in the early hours of February 9, 2023. The district court held a second hearing on February 9, 2023, during which the court meticulously reviewed the requirements of the warrant and resolved any remaining disputes. At that hearing, Twitter made several new representations related to its production of responsive materials. *See, e.g.*, J.A. 242 ("[Government Counsel]: This is the first time I have heard a complaint about a date limitation on 1H."); *id.* at 254 ("This is the first time we are hearing about another preservation between January 3rd and January 9."); *id.* at 254-55 ("I have never

heard of 'fleets' in part of any discussion that we have had… . It still will be relevant, it still will be responsive."). Twitter completed its production at 8:06 p.m. on February 9, 2023.

The parties subsequently submitted papers regarding the applicability of sanctions. The government suggested that Twitter's three days of noncompliance after the deadline had passed merited a $350,000 sanction, under the sanctions formula that the court previously had adopted and announced. *See* Gov't Notice Regarding Accrued Sanction 2, ECF No. 19. Twitter denied that any penalty was "appropriate," arguing that it had acted in good faith and had substantially complied with the February 7 deadline. J.A. 274. Twitter further argued that an incremental $200,000 sanction for the last day of noncompliance was unjustified, in light of "new search terms provided by the government" shortly before 4:00 p.m. on February 9 and Twitter's production of the required information "just hours" after the February 9 hearing. *Id.* at 277-78. Notably, Twitter still did not object to the sanctions formula.

On March 3, 2023, the district court issued an opinion and order denying Twitter's motion to vacate or modify the nondisclosure order, finding Twitter in civil contempt, and imposing a $350,000 contempt sanction. The district court assumed without deciding that Twitter's First Amendment challenge to the nondisclosure order should be analyzed under the exacting standard of strict scrutiny. The district court determined that the order, which prohibited speech about a particular warrant for a 180-day period, was a narrowly tailored means to protect the compelling interest of safeguarding the integrity and secrecy of an ongoing criminal investigation. The court further held Twitter in contempt for its three days of noncompliance with the production order and

rejected the good faith and substantial compliance defense that Twitter had asserted.[3]

Twitter filed a timely notice of appeal. It moved both the district court and this Court to stay the $350,000 sanctions payment pending appeal. Both courts denied Twitter's motions. Twitter subsequently paid the $350,000 sanction into an escrow account maintained by the district court clerk's office.

On June 20, 2023, during the pendency of this appeal, the government filed an *ex parte* motion in the district court, requesting a modification and extension of the nondisclosure order. The government proposed to permit Twitter to notify the former President of the existence and contents of the warrant. The only limitation on the disclosure would be to withhold the identity of the case agent assigned to the investigation. Gov't Mot. to Modify & Extend 1, ECF No. 45. The government changed its position due to the additional information "about investigations of the former President [that became] publicly available" after the nondisclosure order was issued and after the district court denied Twitter's motion to vacate or modify the order. Gov't Mot. to Modify & Extend 6, ECF No. 45. The government also requested that the amended nondisclosure order remain in effect for an additional 180 days. The district court

[3] The district court ordered Twitter to comply with the warrant by 5:00 p.m. on February 7, 2023. J.A. 216. Twitter did not complete its production of account information until 8:06 p.m. on February 9, 2023. J.A. 276. Thus, Twitter delayed its production for a 51-hour period. The district court's order increased the sanction amount "every day," so it reasoned that additional fines "accrued as soon as 12:00 [a.m.]" at the beginning of each new day. J.A. 389. The 51-hour period, therefore, constituted three days of noncompliance. *See id.*

granted the government's motion on the same day it was filed. *See* Order, ECF No. 46.

II.

Twitter claims that the district court: (1) imposed an unlawful nondisclosure order that violated the First Amendment; (2) erred by refusing to stay its enforcement of the warrant while the parties litigated Twitter's constitutional challenge to the nondisclosure order, thereby failing to implement procedural safeguards required by *Freedman*; (3) erred in its application of § 2705(b) of the Act because, Twitter asserts, there was no reason to believe disclosure would harm the investigation; and (4) abused its discretion by finding Twitter in contempt, discounting Twitter's good faith and substantial compliance, and levying an unduly coercive sanction.

We have jurisdiction to review the final contempt adjudication under 28 U.S.C. § 1291. *See Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 436 (D.C. Cir. 2010). We also have jurisdiction to review the district court's order denying Twitter's motion to vacate or modify the nondisclosure order under the collateral-order doctrine. The collateral-order doctrine permits appeals from "decisions [1] that are conclusive, [2] that resolve important questions separate from the merits, and [3] that are effectively unreviewable on appeal from the final judgment in the underlying action." *Oglala Sioux Tribe v. US. Nuclear Regul. Comm'n*, 896 F.3d 520, 528 (D.C. Cir. 2018) (alterations in original) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009)). The district court's order conclusively rejected Twitter's challenges to the nondisclosure order. It resolved important questions unrelated to the underlying investigation, including whether the nondisclosure order survived

strict scrutiny. If we declined to exercise jurisdiction over the instant appeal, the district court's order would be effectively unreviewable because it concerns Twitter's rights, not the rights of any individual targeted by the grand jury: The issues raised by Twitter cannot be reviewed in an appeal of the final judgment in the underlying criminal case. *See In re Application of Subpoena 2018R00776*, 947 F.3d 148, 154 (3d Cir. 2020) (*In re Subpoena*). With all three elements of the collateral-order doctrine met, we are satisfied that we have appellate jurisdiction.

But each of Twitter's arguments implicates an additional jurisdictional or procedural issue. The government argues that Twitter's claims based on the First Amendment and *Freedman* are moot; and that Twitter forfeited its statutory argument by first raising it in a reply brief in the district court. Furthermore, Twitter's payment of the contempt sanction raises the question of whether its appeal of the sanction is moot. We conclude that we may review all of Twitter's claims except for the statutory argument, which was forfeited.

A.

Article III of the Constitution grants the federal courts power to resolve "actual, ongoing controversies," meaning that "we lose jurisdiction if a pending case becomes moot." *Trump v. Mazars USA, LLP*, 39 F.4th 774, 785 (D.C. Cir. 2022) (quoting *Planned Parenthood of Wis., Inc. v. Azar*, 942 F.3d 512, 516 (D.C. Cir. 2019)). Accordingly, we may not decide a case if "events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *J.T. v. District of Columbia*, 983 F.3d 516, 522 (D.C. Cir. 2020) (quoting

Clarke v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc)).

Nevertheless, "[a] court can decide an otherwise-moot matter if the dispute is capable of repetition yet evading review." *Mazars USA*, 39 F.4th at 786. This exception applies if: (1) "the challenged action [i]s … too short to be fully litigated prior to its cessation or expiration"; and (2) "there [i]s a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). The alleged wrong "must be defined in terms of the precise controversy it spawns." *People for Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416,422 (D.C. Cir. 2005).

1.

The government asserts that Twitter's First Amendment argument is moot because the nondisclosure order has been modified to remove the provision that Twitter challenges—*i.e.*, the prohibition against Twitter communicating about the warrant with the account holder. Gov't Rule 28(j) Letter (June 21, 2023). In response, Twitter argues that the dispute over the originally issued nondisclosure order is capable of repetition yet evading review. Twitter Rule 28(j) Letter (June 22, 2023). We think Twitter has the better of this argument.

When considering whether a dispute is capable of repetition, we focus not on "the precise historical facts that spawned the [litigant's] claims," but "whether the legal wrong complained of … is reasonably likely to recur." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009). We have emphasized that this test should not "be applied with excessive 'stringency,'" *Ralls Corp. v. Comm. on Foreign, Inv. in U.S.*, 758 F.3d 296, 324 (D.C. Cir. 2014) (quoting *Honig v. Doe*,

484 U.S. 305, 318 n.6 (1988)), as it is a "functional approach," *Del Monte*, 570 F.3d at 323.

The legal issue Twitter raises is whether its First Amendment rights are violated by a § 2705(b) nondisclosure order that prohibits Twitter from revealing the existence or contents of a search warrant to its customer, who is a suspect in a criminal investigation. That dispute is reasonably likely to recur. "In estimating the likelihood of an event's occurring in the future, a natural starting point is how often it has occurred in the past." *Clarke*, 915 F.2d at 704. Twitter previously has received, and challenged, nondisclosure orders attached to subpoenas, warrants, and other requests for user information. *See* J.A. 217-22 (listing challenges); *cf Twitter, Inc. v. Garland*, 61 F.4th 686, 692-94 (9th Cir. 2023). And Twitter avers that it will continue to resist complying with nondisclosure orders that it believes are "facially invalid." Twitter Rule 28(j) Letter 2 (June 22, 2023). We think it is reasonably likely that the government will seek subscriber information from Twitter in future criminal cases, and that the government therefore will serve more search warrants and nondisclosure orders on Twitter. At some point, Twitter "will again be confronted by an order of this sort" raising a similar First Amendment issue. *In re Reps. Comm. for Freedom of the Press*, 773 F.2d 1325, 1329 (D.C. Cir. 1985).

We are unpersuaded by the government's narrow framing of Twitter's claims. The government asserts that it will not seek additional information about the former President's Twitter account, and that Twitter's expressed interest in communicating with the former President so that he may assert executive privilege is case-specific. *See* Gov't Rule 28(j) Letter (June 21, 2023); *cf* Gov't Br. 39 n.11. But, as the district court noted, "Twitter's interests here are purely about its right to speak to

the [account user]," J.A. 379, and such interests do not depend on the user's identity. Twitter has claimed that it has a First Amendment right to meaningfully communicate with its users, and other account holders may hold other privileges, such as the attorney-client privilege, that could be asserted in response to a warrant issued under the Act. Twitter therefore could again claim that a nondisclosure order "impede[s] its ability to effect its First Amendment rights to provide meaningful notice to its user." J.A. 17-18. We therefore view Twitter's claim as capable of repetition.

We have no trouble holding that a challenge to a nondisclosure order also "evades review." Such an order typically has a limited duration—the instant nondisclosure order was to remain in effect for 180 days and was extended on June 20, 2023 for a period of 180 days. *See* J.A. 2; Order, ECF No. 46; *see also* DEPUTY ATT'Y GEN. ROD J. ROSENSTEIN, U.S. DEP'T OF JUSTICE, POLICY REGARDING APPLICATIONS FOR PROTECTIVE ORDERS PURSUANT TO 18 U.S.C. § 2705(B), at 2 (Oct. 19, 2017), https://perma.cc/MN34-QMNW (advising a one-year maximum for nondisclosure orders). As a "rule of thumb," we have considered an order of less than two years' duration "too short" to be fully litigated before it expires. *See Ralls Corp.*, 758 F.3d at 321 (applying two-year rule of thumb in the context of agency actions of short duration); *accord Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016). Nondisclosure orders under§ 2705(b) fall comfortably within that timeframe. *Ralls Corp.*, 758 F.3d at 321; *see also Del Monte*, 570 F.3d at 322 ("[T]he short duration [must be] typical of the challenged action.").

Moreover, we have reasoned in an analogous context that "contempt issues" that arise during a grand jury investigation "could not or probably would not be able to

be adjudicated while fully live." *In re Sealed Case*, 877 F.2d 976, 981 n.6 (D.C. Cir. 1989) (quoting *In re Grand Jury Proc.*, 785 F.2d 629, 631 (8th Cir. 1986)). After all, "a grand jury's term and its investigations are by their very nature of limited and relatively short duration." *Id.* at 981 n.6; *accord In re Grand Jury Proc.*, 971 F.3d 40, 53 (2d Cir. 2020) ("[T]he relatively short duration of the grand jury has made it practically impossible to fully litigate … challenges to [a grand jury] subpoena."). The instant nondisclosure order was issued by the district court in connection with a criminal investigation by a grand jury, and the order's date of expiration necessarily bears some relationship to the limited duration of the grand jury's work. We find that reasoning relevant here and conclude that the originally issued nondisclosure order evades review.[4]

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[4] Twitter has not argued that the district court did not have jurisdiction to modify the nondisclosure order. But "[a]n appeal, including an interlocutory appeal, 'divests the district court of its control over those aspects of the case involved in the appeal.'" *Coinbase, Inc. v. Bielski*, No. 22-105, slip op. at 3 (U.S. June 23, 2023) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)); accord *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir. 1978). This rule prevents the trial court and the appellate court from "step[ping] on each other's toes," for "[i]t would interfere with the appellate court's review of an order if the district court modified that order mid-appeal." *Coinbase*, slip op. at 8 (Jackson, J., dissenting). In the instant case, the district court modified the nondisclosure order mid-appeal, and it appears that the district court may not have had jurisdiction to make that modification. Nevertheless, any such error does not affect our review of the nondisclosure order as it existed when Twitter filed the instant appeal. One purpose of the rule that may have divested the district court of jurisdiction is to allow us to proceed with our consideration of the appeal without interference; and our determination that Twitter's First Amendment claim is capable of repetition yet evading review gets us to the same place.

2.

Faced with competing motions from the parties, the district court chose to grant the government's motion to enforce the warrant before ruling on Twitter's motion to amend or vacate the nondisclosure order. Twitter argues that the district court should have decided its motion first. The government argues with some force that Twitter's argument about the timing of the district court's rulings became moot once Twitter produced the information that was the subject of the warrant. After all, we cannot now require the district court to consider Twitter's First Amendment claims before enforcing a warrant that has already been enforced and complied with. *Cf United States v. Griffin*, 816 F.2d 1, 7 n.4 (D.C. Cir. 1987); *In re Grand Jury Subpoena Duces Tecum*, 91-02922, 955 F.2d 670, 672 (11th Cir. 1992).

Although we agree that this dispute is moot, we also believe that it is capable of repetition yet evading review. Time is of the essence when the government seeks evidence needed in a criminal case, so there may be little opportunity to fully litigate a substantial constitutional claim while holding in abeyance the execution of a search warrant. And, despite the government's promise that it "does not intend to seek another search warrant and nondisclosure order for the former President's Twitter account," Gov't Br. 39 n.11, Twitter can reasonably expect to receive (and be ordered to comply with) more search warrants for other accounts, accompanied by nondisclosure orders that could implicate the account holders' privileges and Twitter's asserted First Amendment rights.

B.

We decline to consider Twitter's argument that the district court misapplied the Act because that claim was

forfeited. Twitter contends that the district court erroneously found that disclosure of the warrant's existence or contents would result in one of § 2705(b)'s enumerated harms. *See* 18 U.S.C. § 2705(b) (requiring government to demonstrate "reason to believe" that disclosure of the warrant will "seriously jeopardiz[e] an investigation" or result in another enumerated harm). That argument, however, first appeared in Twitter's reply brief in support of its motion to vacate the nondisclosure order. It is well established that an argument first presented in a reply brief before the district court is forfeited. *Schindler Elevator Corp. v. Wash. Metro. Area Transit Auth.*, 16 F.4th 294, 302 n.3 (D.C. Cir. 2021) (citing *Solomon v. Vilsack*, 763 F.3d 1, 13 (D.C. Cir. 2014)).

C.

Finally, we agree with the parties that Twitter's challenge to the contempt sanction is not moot. Because Twitter conditionally paid the sanction and its funds are held by the district court in escrow, we may remedy any asserted error by ordering the district court to return Twitter's funds. *See, e.g.*, *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1057 (7th Cir. 1998) (holding that conditional payment "does not moot the appeal because the appellate court can fashion effective relief … by ordering that the sum paid … be returned"); *R.I. Hosp. Tr. Nat'l Bank v. Howard Commc'ns Corp.*, 980 F.2d 823, 829 n.9 (1st Cir. 1992) (reviewing an appeal of a contempt sanction on the merits where the contemnor expressed an intent "to escrow the funds pending resolution of any appeal"). The availability of a remedy "is sufficient to prevent this case from being moot." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992).

III.
A.

On the merits, we begin with Twitter's First Amendment challenge. Twitter argues that the nondisclosure order is a content-based prior restraint on speech. *See* Opening Br. 1. Because that argument presents a question of law, we review the district court's decision de novo. *See United States v. Popa*, 187 F.3d 672, 674 (D.C. Cir. 1999); *In re Subpoena*, 947 F.3d at 154.

We assume without deciding that strict scrutiny should govern our review of the instant nondisclosure order. *See In re Subpoena*, 947 F.3d at 155-56; *In re Search of Info. Associated with E-Mail Accts.*, 468 F. Supp. 3d 556, 560 (E.D.N.Y. 2020) (*E-Mail Accounts*); *cf In re Nat'l Sec. Letter*, 33 F.4th 1058, 1063 (9th Cir. 2022). Nondisclosure orders implicate two disfavored types of speech restrictions: prior restraints and content-based restrictions. Prior restraints include "court orders that actually forbid speech activities" in advance of the speech occurring. *Alexander v. United States*, 509 U.S. 544, 550 (1993). Content-based restrictions target "particular speech because of the topic discussed or the idea or message expressed." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). Both types of restrictions are presumptively unconstitutional, and generally call for strict scrutiny. *See Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). Assuming that strict scrutiny

applies, we hold that the instant nondisclosure order, on this record, meets that demanding standard.[5]

Strict scrutiny requires the government to demonstrate that a speech restriction: (1) serves a compelling government interest; and (2) is narrowly tailored to further that interest. *See Reed, 576 U.S. at 163; Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 508 (D.C. Cir. 2016). A restriction is narrowly tailored if "'less restrictive alternatives' … would not 'accomplish the government's goals equally or almost equally effectively.'" *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 19 (D.C. Cir. 2009) (NAM) (quoting *Blount v. SEC*, 61 F.3d 938, 944 (D.C. Cir. 1995)).

The government proffered two compelling interests that supported nondisclosure of the search warrant: preserving the integrity and maintaining the secrecy of its ongoing criminal investigation of the events surrounding January 6, 2021. Gov't Br. 20. Those interests are "particularly acute where, as here, the investigation is ongoing." *In re Subpoena*, 947 F.3d at 156. Investigating criminal activity is a "core government function that secures the safety of people and property." *Google*

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[5] We note, however, the Second Circuit's conclusion that a nondisclosure order "is not a typical prior restraint or a typical content-based restriction warranting the most rigorous First Amendment scrutiny." *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 877 (2d Cir. 2008). That court reasoned that such orders do not restrict "those who customarily wish to exercise rights of free expression, such as speakers in public fora, distributors of literature, or exhibitors of movies," as with typical prior restraints. *Id.* at 876. And while a nondisclosure order "is triggered by the content of a category of information," suggesting it is content-based, the *John Doe* court deemed it "far more limited than the broad categories of information that have been at issue with respect to typical content-based restrictions." *Id.*

LLC, 443 F. Supp. 3d at 452. In addition, the government's interest is heightened where an investigation has national security implications, for "no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). Thus, the government's interest was particularly strong here because its ongoing investigation aimed to "[f]erret[] out activity intended to alter the outcome of a valid national election for the leadership of the Executive Branch of the federal government … and [to assess] whether that activity crossed lines into criminal culpability." J.A. 372-73. Moreover, secrecy is paramount to ensuring that ongoing investigations can proceed without interference from targets or interested parties. *See Google LLC*, 443 F. Supp. 3d at 453. Breaching the investigation's confidentiality could open the door to evidence-tampering, witness intimidation, or other obstructive acts. *See* 18 U.S.C. § 2705(6); *see also In re Subpoena*, 947 F.3d at 156 ("[P]rotecting the secrecy of an investigation" is a compelling government interest.). Here, the district court specifically found reason to believe that disclosure of the warrant would jeopardize the criminal investigation. *See* J.A. 1. We therefore conclude that the government's asserted interests were unquestionably compelling.

The nondisclosure order was also "narrowly tailored to advance the State's compelling interest through the least restrictive means." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 452 (2015). It bears emphasis that, under the strict-scrutiny standard, a restriction must be narrowly tailored, not "perfectly tailored." *Id.* at 454 (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992)). Here, the nondisclosure order was initially limited in duration to 180 days. Thus, any concerns associated with indefinite nondisclosure orders are of no moment here. *Cf, e.g.*, *United States v. Apollomedia Corp.*, No. 99-20849,

2000 WL 34524449, at *3 (5th Cir. June 2, 2000) (recognizing the "substantial constitutional questions raised by a nondisclosure order without any limitation as to time"); *In re Grand Jury Subpoena for: [Redacted]@yahoo.com*, 79 F. Supp. 3d 1091, 1093 (N.D. Cal. 2015) (positing that § 2705(b) restricts nondisclosure orders' duration to "some limit less than infinity"). Moreover, the speech restricted—disclosure of the existence or contents of the warrant—was limited to information that Twitter obtained only by virtue of its involvement in the government's investigation. Courts have suggested that such information, procured from the government itself or pursuant to a court-ordered procedure, is entitled to less protection than information a speaker possesses independently. *See Butterworth v. Smith*, 494 U.S. 624, 636 (1990) (Scalia, J., concurring) (distinguishing constitutional protection of what grand jury witnesses know beforehand from what they learn "only by virtue of being made a witness"); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) ("[A]n order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny."). Importantly, Twitter remained free to raise general concerns about warrants or nondisclosure orders, and to speak publicly about the January 6 investigation.

Twitter's contrary arguments are unpersuasive. First, Twitter claimed that the government's interest in maintaining the confidentiality of the criminal investigations was undermined by information already in the public sphere. Twitter asserted that "the cat [was] out of the bag: the public … already [knew] that the Special Counsel [was] investigating the former President and collecting his private electronic communications." Opening Br. 25. We disagree. At the time of Twitter's

challenge to the nondisclosure order, some information about grand jury subpoenas or visitors to the federal courthouse was public. But Twitter sought to disclose a different category of information, *i.e.*, the existence of a search warrant, which was issued by the district court upon a finding of probable cause that evidence of a crime might be found in the former President's Twitter account. *See* J.A. 295. In any event, the publicly available information that Twitter cited did not present the full story. *Ex parte* submissions reviewed by this court supported the district court's finding that disclosure would have harmed the integrity and secrecy of the ongoing grand jury investigation, despite public knowledge of the broader investigation.[6]

Second, Twitter proposed two less restrictive alternatives to the nondisclosure order that it contended could address the government's concerns "while still enabling it to meaningfully exercise its First Amendment rights." Opening Br. 31. Those proposals involved revealing parts of the warrant to the former President or to his representatives. At the time that Twitter made its motion, those suggested alternatives were nonstarters because they would not have maintained the confidentiality of the criminal investigation and therefore risked jeopardizing it. To the extent that Twitter proposed revealing parts of the warrant package—the warrant and Attachment A—to the former President, that argument was forfeited because Twitter did not raise it when moving to vacate the nondisclosure order. See J.A. 16-17. In any event, such action would not have safeguarded the security and integrity of the investigation, as the whole point of the nondisclosure order was to avoid tipping off the former President about the

[6] *See, e.g.*, [REDACTED].

warrant's existence. Moreover, courts have rejected as "unworkable" proposals similar to Twitter's idea of notifying the former President's lawyers or representatives about the warrant, while expecting them to maintain the warrant's secrecy. *In re Subpoena*, 947 F.3d at 159. Such an approach would have required the district court to take on the unpalatable job of "assess[ing] the trustworthiness of a would-be confidante chosen by a service provider." *Id.*; *see also E-Mail Accounts*, 468 F. Supp. 3d at 562 (holding that a proposal "to notify someone at the [targeted] company, like a senior official or a lawyer in its United States office, of the warrant … was not as effective as the nondisclosure order" in protecting an investigation). Twitter thus failed to proffer any alternative to the nondisclosure order that "accomplish[ed] the government's goals equally or almost equally effectively." *NAM*, 582 F.3d at 19 (quoting *Blount*, 61 F.3d at 944).

Because the nondisclosure order was a narrowly tailored means of achieving compelling government interests, it withstood strict scrutiny.

B.

Twitter asserts that the district court erred by declining to stay the enforcement of the warrant pending the court's adjudication of Twitter's First Amendment challenge to the nondisclosure order. Twitter argues that the court's approach violated Twitter's constitutional rights and contradicted the Supreme Court's mandated safeguards in First Amendment cases, as prescribed in *Freedman*. We find Twitter's arguments unconvincing.

The sequence in which a district court considers pending motions is a docket-management decision that is reviewed for abuse of discretion. *See Banner Health*

v. Price, 867 F.3d 1323, 1334 (D.C. Cir. 2017). But "we review de novo any errors of law upon which the court relied in exercising its discretion." *Ameziane v. Obama*, 620 F.3d 1, 5 (D.C. Cir. 2010). In our view, the district court did not exceed the bounds of its discretion when it ordered Twitter to comply with the warrant before it resolved the company's challenge to the nondisclosure order. Although the district court could have resolved the First Amendment issues simultaneously with the show-cause order, *see, e.g.*, *Google LLC*, 443 F. Supp. 3d at 455, it was not required to do so. "[D]istrict courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases." *Dietz v. Bouldin*, 579 U.S. 40, 47 (2016). Here, the district court reasonably concluded that the warrant and nondisclosure order were "wholly separate order[s]" governed by different legal standards, and that the criminal investigation should not be delayed while Twitter's motion was litigated. J.A. 366. Because the court weighed the government's need for the evidence at issue in "an important ongoing criminal investigation," *id.* at 387, and chose not to delay execution of the warrant under the particular circumstances presented, "the district court acted within the range of permissible alternatives that were available to it," *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150 (D.C. Cir. 1996).

We reject Twitter's underdeveloped argument that the district court erred by denying it constitutionally required procedural safeguards, including maintaining the status quo until its First Amendment challenge could be adjudicated. *See* Opening Br. 37; *see also* J.A. 9. To support that claim, Twitter relies on *Freedman*, which addressed a very different "noncriminal process"—*i.e.*, "the prior submission of a film to a censor." *Freedman*,

380 U.S. at 58. The "scheme" in *Freedman* "condition[ed] expression on a licensing body's prior approval of content," which "presents peculiar dangers to constitutionally protected speech." *Thomas*, 534 U.S. at 321 (quoting *Freedman*, 380 U.S. at 57).

In that readily distinguishable context, the Supreme Court held that a censorship system "avoids constitutional infirmity only if it takes place under procedural safeguards." *Freedman*, 380 U.S. at 58. Those safeguards are: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *Thomas*, 534 U.S. at 321 (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990) (principal opinion of O'Connor, J., joined by Stevens and Kennedy, J.J.)). The Supreme Court extended those safeguards to other censorship and licensing schemes in the years following *Freedman*. *See, e.g.*, *Se. Promotions, Ltd.*, 420 U.S. at 554, 559-61 (censorship board for theater productions); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 776 (2004) (licensing for adult- entertainment businesses); *Riley v. Nat'l Fed'n of Blind of NC., Inc.*, 487 U.S. 781, 802 (1988) (licensing for professional fundraisers).

Twitter asserts that *Freedman* obligated the district court to maintain the status quo—*i.e.*, forbear from enforcing the warrant—while Twitter's objections to the nondisclosure order were litigated. *See* Opening Br. 35-37. But the *Freedman* safeguards applied by the Supreme Court to censorship and licensing schemes are a poor fit in this case. Whereas *Freedman* expressly

addressed a "noncriminal" scheme and imposed protective measures designed to ensure prompt access to judicial review, *Freedman*, 380 U.S. at 58-59, the instant warrant and nondisclosure order were issued directly by a court in connection with a criminal investigation. Twitter received the full judicial process contemplated by § 2705(b)—a neutral and detached judge considered statutory factors and made specific findings that supported the issuance of the nondisclosure order. *See* 18 U.S.C. § 2705(b); *see also* J.A. 1-2. Thus, there was no need in this case to maintain the status quo until a court could review Twitter's arguments because judicial review of statutory requirements had already occurred before the nondisclosure order was even served on Twitter. *Freedman* is inapplicable in this case.

The more analogous Supreme Court cases are those in which the Court upheld confidentiality requirements with respect to information obtained in connection with court processes. In *Rhinehart*, the Court sustained a protective order that prohibited a party from disseminating information learned through pretrial discovery. *Rhinehart*, 467 U.S. at 37. Because the information did not arise from "a traditionally public source of information," it "[did] not raise the … specter of government censorship." *Id.* at 32-33. And in *Butterworth*, the Court recognized that while a grand jury witness generally had a right to disclose his own testimony, that right did not extend to information that the witness gleaned from participating in the investigation. *Butterworth*, 494 U.S. at 626, 633 (holding state confidentiality law unconstitutional "insofar as [it] prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended," but leaving in place "that part of the … statute which prohibit[ed] the witness from disclosing the testimony of another witness" (emphasis omitted)).

Thus, the district court was not obligated to implement *Freedman*-style procedures while considering a motion to vacate an order that merely precluded "disclosure of a single, specific piece of information that was generated by the government"—*i.e.*, that the government obtained a court order compelling production of a user's data. *In re Nat'l Sec. Letter*, 33 F.4th at 1077. A nondisclosure order is not the type of "classic prior restraint" addressed by Freedman, and Twitter received considerable process before the warrant and nondisclosure order were even issued. *See In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, 855 F.3d 53, 56 (2d Cir. 2017) (Camey, J., concurring in denial of reh'g en banc) (observing that a warrant "issued by a neutral magistrate judge upon a showing of probable cause … satisfie[s] the most stringent privacy protections our legal system affords").

C.

Finally, we affirm the district court's contempt sanction. A civil-contempt proceeding requires: "(1) issuance of an order; (2) following disobedience of that order, issuance of a conditional order finding the recalcitrant party in contempt and threatening to impose a specified penalty unless the recalcitrant party purges itself of contempt by complying with prescribed purgation conditions; and (3) exaction of the threatened penalty if the purgation conditions are not fulfilled." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981). The violation must be proven by clear and convincing evidence. *Broderick v. Donaldson*, 437 F.3d 1226, 1234 (D.C. Cir. 2006). We review both a contempt finding and a contempt sanction for abuse of discretion. *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 818 (D.C. Cir. 2009).

1.

The district court followed the procedure we have prescribed for imposing a contempt sanction. Faced with Twitter's alleged noncompliance with the warrant, the district court issued a show-cause order and held a hearing at which Twitter had an opportunity to be heard. At that hearing, the district court found that Twitter had disobeyed a "clear and unambiguous court order"—*i.e.*, the warrant—that "requir[ed] Twitter to comply with production of the specified records … by January [27], 2023." J.A. 211. Because the government proved that Twitter stood in contempt of the warrant, the district court threatened to impose "escalating daily fines" unless Twitter purged the contempt by turning over the records by 5:00 p.m. on February 7. *Id.* at 213; *see id.* at 211, 216. Before setting that deadline, the district court confirmed that Twitter could meet it. When Twitter failed to timely purge its contempt, the district court appropriately issued another order that "exact[ed] … the threatened penalty"—a $350,000 sanction. *Blevins Popcorn*, 569 F.2d at 1184; *see* J.A. 216, 354-55.

The district court properly rejected Twitter's assertion that no sanction was warranted because it substantially complied with the warrant and acted in good faith. We have not decided whether a contemnor may rely on its good faith and substantial compliance to avoid a civil-contempt sanction. *Food Lion, Inc. v. United Food & Com. Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1017 (D.C. Cir. 1997). Assuming such a defense is available, it requires a contemnor to "demonstrate that it 'took all reasonable steps within [its] power to comply with the court's order.'" *Id.* (quoting *Glover v. Johnson*, 934 F.2d 703, 708 (6th Cir. 1991)). Good faith "may be a factor in determining whether substantial compliance

occurred," but "is not sufficient to excuse contempt." *Id* at 1017-18.

Twitter contends that it "substantially complied with the [w]arrant" because "there was nothing [it] could have done to comply faster" after the court issued the February 7 order. Opening Br. 47. Twitter also blames the government for failing to clarify the warrant's obligations. *Id.* at 47-48. We are unpersuaded. The district court noted that Twitter complied with the warrant "only *after* it had already delayed production since January 27, the original deadline." J.A. 387 (emphasis in original). The court opined that, had Twitter "been diligent and serious in its good faith intention to comply with the [w]arrant," it would have brought any issues to the government's attention "on January 19, 2023, or subsequently upon review by in-house counsel on January 25 and 26, 2023, or even during ongoing conversations with the government through February 1, 2023." *Id.* at 388. Instead, the court found that Twitter repeatedly represented to the court that it stood ready to comply, even as Twitter waited until after the February 7 deadline "to raise, *for the first time*, multiple questions about the [w]arrant's document demands." *Id.* at 387 (emphasis in original). Under those circumstances, the district court was on firm footing when it ruled that Twitter had not substantially and in good faith complied with the warrant. *See Food Lion*, 103 F.3d at 1019 (concluding that a company did not substantially comply when it "did not seek a clarification" of an order requiring production or "ask for an extension" before the production deadline).

Twitter argues that the district court erred by considering Twitter's conduct between January 19 (when it received the warrant) and February 7 (when the court ordered it to comply with the warrant by 5:00 p.m.).

According to Twitter, the district court could find it in contempt based only on actions taken after the February 7 order issued. Opening Br. 49. That argument fails because it appears to assert good faith, substantial compliance with the February 7 order instead of the warrant. At the February 7 hearing, the district court found Twitter conditionally in contempt for violating the warrant, but the court provided Twitter with an opportunity to purge that contempt and avoid sanctions by producing the warrant returns by 5:00 p.m. that day. *See* J.A. 211-15. When Twitter failed to timely purge, the court found the company in contempt for disobeying the warrant and imposed the threatened sanctions. *See id.* at 211, 354-55. Thus, Twitter's assertions of good faith and substantial compliance should have addressed all of its efforts to comply with the warrant, not just its efforts to purge its contempt by the 5:00-p.m. deadline. Twitter cites no authority supporting the proposition that a district court must limit its review of a putative contemnor's good faith and substantial compliance to a specific timeframe. Although we have reversed a district court that "limited its inquiries about [a contemnor's] compliance efforts to events that occurred before [a] fine started to accrue," we did so in part because that court "did not consider good faith for any purpose." *Wash. Metro. Area Transit Auth. v. Amalgamated Transit Union, Nat'l Cap. Loc. Div. 689*, 531 F.2d 617, 621 (D.C. Cir. 1976). It does not follow that a district court must avoid considering the overall picture of a party's efforts to comply with a court order.

Accordingly, the district court did not abuse its discretion by finding Twitter in contempt and rejecting its purported defense of good faith and substantial compliance.

2.

The district court did not abuse its discretion in imposing a $350,000 sanction. Civil-contempt sanctions "may not be punitive" and "must be calibrated to coerce compliance." *In re Fannie Mae Sec. Litig.*, 552 F.3d at 823. The district court here imposed a geometric sanctions schedule that would apply if Twitter failed to complete its production by 5:00 p.m. on February 7: penalties began at $50,000 per day, to double every day. J.A. 216. To be sure, that schedule was highly coercive. As Twitter belatedly points out, after roughly one month of noncompliance, it would have required Twitter to pay a sanction greater than "the entire world's gross domestic product." Opening Br. 56.

While a geometric schedule is unusual and generally would be improper without an upper limit on the daily fine, we nonetheless uphold the district court's sanctions order based on the particular facts of this case. Twitter never raised any objection to the sanctions formula, despite having several opportunities to do so (at the February 7 and February 9 hearings, and in its papers opposing sanctions). The company thus appeared to acquiesce to the formula. Moreover, the $350,000 sanction ultimately imposed was not unreasonable, given Twitter's $40-billion valuation and the court's goal of coercing Twitter's compliance. *Cf In re Grand Jury Subpoena*, 912 F.3d 623, 626 (D.C. Cir. 2019) ($50,000 per day fine against a state-owned corporation); *In re Grand Jury Investigation of Possible Violations of 18 US.C. § 1956 & 50 US.C. § 1705*, Nos. 1:18-mc-175, 1:18-mc-176, 1:18-mc-177 (BAH), 2019 WL 2182436, at *5 (D.D.C. Apr. 10, 2019) ($50,000 per day fine against "multi-billion-dollar banks"); *United States v. Philip Morris USA Inc.*, 287 F. Supp. 2d 5, 15 & n.11 (D.D.C. 2003) ($25,000 per day fine against company with $190 million annual profits).

Finally, we note that Twitter assured the court that it would comply with the warrant by 5:00 p.m. on February 7, and never raised the possibility that it would defy the order for a month and end up owing the court "the entire world's gross domestic product." Opening Br. 56. Under these case-specific circumstances, the district court acted reasonably and did not abuse its discretion by imposing the $350,000 sanction.

* * *

In sum, we affirm the district court's rulings in all respects. The district court properly rejected Twitter's First Amendment challenge to the nondisclosure order. Moreover, the district court acted within the bounds of its discretion to manage its docket when it declined to stay its enforcement of the warrant while the First Amendment claim was litigated. Finally, the district court followed the appropriate procedures before finding Twitter in contempt of court—including giving Twitter an opportunity to be heard and a chance to purge its contempt to avoid sanctions. Under the circumstances, the court did not abuse its discretion when it ultimately held Twitter in contempt and imposed a $350,000 sanction.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 23-SC-31

IN THE MATTER OF THE SEARCH OF:
INFORMATION THAT IS STORED AT PREMISES
CONTROLLED BY TWITTER INC. IDENTIFIED
IN ATTACHMENT A,

Filed March 3, 2023
Under Seal and Ex Parte to Government
Chief Judge Beryl A. Howell

MEMORANDUM OPINION

For what appears to be the first time in their nearly seventeen-year existence as a company, *see generally* Letter from Counsel for Twitter, Inc. (SEALED), ECF No. 14, Twitter Inc. ("Twitter") seeks to vacate or modify an order, issued under the Stored Communications Act of 1986 ("SCA"), 18 U.S.C. § 2701 *et seq.*, commanding that the company not disclose the existence of a search warrant for a user's Twitter account, and further seeks to condition any compliance by the company with that search warrant on the user (or user's representatives) first being notified about the warrant and given an opportunity to stop or otherwise intervene in execution of the warrant. *See* Twitter's Mot. to Vacate or Mod. NDO and Stay Twitter's Compl. with Warrant ("Twitter's Motion") (SEALED), ECF No. 7; *see also* Twitter's Mem. Supp. Twitter Mot. ("Twitter Mem.") (SEALED),

ECF No. 7-1. This is an extraordinary request. Twitter denies that this action is being taken by the company due to the identity of the targeted Twitter account ("Target Account") or its user, suggesting instead that Twitter regularly engages in challenging SCA nondisclosure orders ("NDOs")—though concededly never before regarding a covert search warrant—and assuring the Court that the fact that the user of the Target Account ("the User") is a high-profile public figure is merely coincidence. *See* Feb. 7, 2023 Hrg. Tr. at 60:9-22 (SEALED) (Twitter's counsel declaiming that the company "has no interest other than litigating its constitutional rights").[1]

Twitter justifies initiating this dispute on grounds that the NDO violates the First Amendment as a content-based prior restraint on speech the company wants to have with a customer that fails to satisfy the exacting requirements of strict scrutiny. Twitter Mem. at 2. Specifically, Twitter is not satisfied with the government's proffered reasons for nondisclosure, based upon what the company has read in media reports, *id.*, notwithstanding that both the warrant and the NDO were issued by this Court after being apprised of extensive reasons sufficient to establish probable cause for issuance of

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[1] The Twitter account at issue is @realDonaldTnunp, which is the recently reinstated account of former President Donald J. Trump. *See* Claire Duffy and Paul LeBlanc, "Elon Musk restores Donald Trump's Twitter account," CNN (Nov. 20, 2022), available at https://www.cnn.com/2022/11/19/business/twitter-musk-trump-preinstate/index html (last visited on Mar. 1, 2023) ("The much-anticipated decision from the new owner sets the stage for the former president's return to the social media platform, where he was previously its most influential, if controversial, user. With almost 90 million followers, his tweets often moved the markets, set the news cycle and drove the agenda in Washington.").

the warrant and to meet the statutory requirements for an NDO, to which reasons Twitter is neither privy nor entitled to be privy. The government opposes Twitter's motion, arguing that disclosure of the warrant's existence would result in statutorily cognizable harms, under 18 U.S.C. § 2705(b), *see* Gov't's *Ex Parte* Opp'n to Twitter's Mot. at 1 ("Gov't's *Ex Parte* Opp'n") (SEALED), ECF No. 22, and such harms provide compelling reasons for the NDO, even under the exacting requirements of strict scrutiny review, assuming that standard should apply here, *id.* at 13.[2]

Separately, the parties also dispute whether monetary sanctions are warranted against Twitter because, while focusing on intervening in this criminal investigation and obtaining permission to alert the User about the search warrant, the company failed fully and timely to comply with the Warrant, in violation of two court orders.

As explained below, the government has established that, even if strict scrutiny analysis applies—which the Court assumes without deciding—the compelling interests of avoiding the harms to the criminal investigation, as authorized in § 2705(b), warrant Twitter's continued nondisclosure of the warrant's existence, and the NDO is the narrowest possible way available to protect those compelling government interests. Accordingly, Twitter's motion to vacate or modify the NDO is denied. Moreover, Twitter must pay $350,000 in contempt fines

[2] The government's opposition summarizes extensive evidence of the User's conduct, and those of his associates raising legitimate concerns [REDACTED]. *See* Gov't's *Ex Parte* Opp'n at 3-9; *see infra* nn.4, 6.

for failing to comply with the warrant in a timely manner, a delay for which Twitter bears full responsibility.

I. BACKGROUND

The relevant statutory, factual and procedural background is summarized below.

A. Statutory Framework

The SCA governs how providers of "electronic communications service[s] ["ECS"]," as defined in 18 U.S.C. § 2510(15), and "remote computing service ["RCS"]" providers, as defined in 18 U.S.C. § 2711(2), may be compelled to supply records related to that service in response to a subpoena, court order, or search warrant. As relevant here, the SCA's §§ 2703(a), (b)(1)(A), and (c) provide that the government may obtain contents of communications, as well as non-content information and records or other information, about a subscriber or customer of such service, via a search warrant. *See Id.* § 2703(a)-(c). Twitter enables account holders to share and interact with electronic content and to send and receive electronic communications with other users, publicly or privately, and is indisputably an ECS and RCS provider. *See* NDO Appl. ¶ 3.

The SCA is silent as to any obligation of ECS/RCS providers to notify subscribers about the providers' production of records in response to subpoenas, court orders, or search warrants, implicitly allowing such notification on a voluntarily basis. Indeed, Twitter promotes a policy of "notify[ing] its users of any requests from law enforcement for account information, particularly requests for contents of communications, unless prohibited from doing so." Twitter Mem. at 1. The SCA is explicit, however, in authorizing "governmental entit[ies]," which includes federal "department[s] or agenc[ies]" and

those of "any State or political subdivision thereof," 18 U.S.C. § 2711(4), to apply for and obtain a judicial order "commanding" a provider of ECS or RCS "to whom a warrant, subpoena, or court order is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order." *Id.* § 2705(b). Upon receipt of such an application, the SCA requires that "[t]he court *shall* enter such an order if it determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in" any of five enumerated harms. *Id.* (emphasis added). These enumerated harms broadly cover: "(1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction of or tampering with evidence; (4) intimidation of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial." *Id.* "The explicit terms of section 2705(b) make clear that if a court[] finds that there is reason to believe that notifying the customer or subscriber of the court order or subpoena may lead to one of the deleterious outcomes listed under § 2705(b), the court must enter an order commanding a service provider to delay notice to a customer for a period of time that the court determines is appropriate." *Matter of Application of U.S. of Am.*, 45 F. Supp. 3d 1, 5 (D.D.C. 2014).

A service provider is authorized to move "promptly" to quash or modify an order for disclosure of the contents of communications, such as the warrant at issue here, under two specific circumstances: first, "if the information or records requested are unusually voluminous in nature," 18 U.S.C. § 2703(d), or, second, "compliance with such order otherwise would cause an undue burden on such provider," *id.* Twitter does not contend that either of those circumstances are present here. The SCA is

notably silent in providing any statutory authorization for a service provider to challenge an NDO. Instead, in a mechanism designed to encourage compliance with NDOs and minimize litigation, particularly during an ongoing criminal investigation when SCA authorities are employed by law enforcement, the SCA expressly relieves providers from any liability on any claim in any court for disclosing their customer's information in compliance with an SCA order. *See id.* § 2703(e) ("No cause of action shall lie in any court against any provider of wire or [ECS], its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter.").

B. The Search Warrant and NDO At Issue

On November 18, 2022, Attorney General Merrick Garland announced the appointment of Jack Smith to serve as Special Counsel to oversee two ongoing criminal investigations into (1) unlawful interference with the transfer of power following the 2020 presidential election, including certification of the Electoral College vote held on January 6, 2021, ("the January 6th Investigation"), and (2) unlawful retention of classified documents and possible obstruction ("the Classified Documents Investigation"). *See* "Appointment of a Special Counsel," Department of Justice (Nov. 18, 2022), available at https://www.justice.gov/opa/pr/appointment-special-counsel-0 (last visited on Mar. 2, 2023). As part of the January 6th Investigation, on January 17, 2023, the government applied for, and the Court issued, based on an affidavit establishing probable cause to believe the Target Account contains evidence of criminal activity, a search warrant to search the Target Account and seize responsive records [REDACTED]. *See* Search and

Seizure Warrant ("Warrant") (SEALED), ECF No. 4; *see also* Gov't's Appl. And Aff. in Supp. of Appl. for a Search Warrant ("Warrant Affidavit" and "Warrant Application"), ECF No. 1. The Warrant itself has two attachments: Attachment A, describing the "Property to Be Searched," and Attachment B, the "Particular Things to Be Seized," and is separate from both the Warrant Application and the Warrant Affidavit. Warrant at 2.

In addition to the Warrant, the government applied for, and this Court issued, an order sealing the Warrant and related materials, and requiring, under 18 U.S.C. § 2705(b), that Twitter not disclose the contents or existence of the Warrant for a period of 180 days. *See* Order Granting the Gov't's Appl. for an Ord. Pursuant to 18 U.S.C. § 2705(b) as to Twitter, Inc. ("NDO") (SEALED), ECF No. 3. The NDO was granted based on the government's proffered facts showing reasonable grounds to believe that notifying the Target Account's User of the existence of the Warrant "would result in destruction of or tampering with evidence, intimidation of potential witnesses, or other serious jeopardy to this investigation." NDO Appl. ¶ 10; 18 U.S.C. § 2705(b)(3)-(5).[3] The government's accompanying lengthy Warrant Affidavit detailed various actions of the User, and the User's associates, [REDACTED].[4]

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[3] By contrast to the Application for the NDO, the NDO itself also offered as grounds for nondisclosure the basis that the user of the Target Account would "flee from prosecution." NDO at 1. The government has since explained that justification to the NDO was erroneously included. *See* Gov't's *Ex Parte* Opp'n at 3 n.1.

[4] [REDACTED]

C. Procedural History

The Warrant was issued on January 17, 2023, and required Twitter's compliance within ten days of "issuance," Warrant, Att. B. § I, ¶ 5, meaning by January 27, 2023. Twitter's compliance ended up taking over double the amount of time provided in the Warrant.

1. *Service on Twitter of Relevant Part of Warrant and NDO*

On the same day as issuance of the Warrant, the government attempted to serve the Warrant and the NDO on Twitter through the company's Legal Requests Submissions online site. Gov't's Mot. for Ord. Show Cause at 2 ("Gov't's Mot.") (SEALED), ECF No. 5. Specifically, six pages of the Warrant were submitted to Twitter, consisting of the Warrant with Attachment A and part of Attachment B. *See* Gov't's *Ex Parte* Opp'n, Ex. A. (SEALED), ECF No. 22-1; *see also* Feb. 7, 2023 Hrg. Tr. at 9:1-19 (same). Twitter has thus never been privy to the remaining parts of Attachment B to the Warrant, the Warrant Affidavit or Application, nor even the Application for the NDO. Twitter Mem. at 1 (conceding "Twitter has not seen" the *ex parte* application for the NDO); Feb. 7, 2023 Hrg. Tr. at 9:1-19 (government counsel agreeing that Twitter has only seen the warrant, Attachment A, and Part 1 of Attachment B).

The government's initial service attempts on Twitter failed twice, with the government's receipt both times of an automated message indicating that Twitter's "page [was] down." Gov't's Mot. at 2 (alteration in original). On January 19, 2023, the government was finally able to serve Twitter through the company's Legal Requests Submissions site. *Id.*

Twitter, however, somehow did not know of the existence of the Warrant until January 25, 2023—two days before the Warrant returns were due. That day, the government contacted Twitter about the status of the company's compliance with the Warrant, and Twitter's Senior Director of Legal, [REDACTED], "indicated she was not aware of the Warrant but would consider it a priority." *Id.*; *see also* Decl. of [REDACTED], Senior Director of Legal for Twitter ("[REDACTED] Decl.") ¶ 2 (SEALED), ECF No. 9-1. The government indicated that "they were looking for an on time production, in two days[,]" to which [REDACTED] responded, "without knowing more or taking any position that would be a very tight turnaround for us." [REDACTED] Decl. ¶ 2. The government sent the six pages of the Warrant and the NDO directly to [REDACTED] later that evening. Meanwhile, [REDACTED] directed Twitter's personnel to preserve data available in its production environment associated with the Target Account, and "have confirmed that the available data was preserved." *Id.* ¶ 4.

Twitter notified the government in the evening of January 26, 2023, that the company would not comply with the Warrant by the next day, *id.* ¶ 5, and responded to the government's request for more specific compliance information, by indicating that "the company was prioritizing the matter and taking it very seriously" but that [REDACTED] had the Warrant and NDO only "for two days," *id.* ¶ 8, even though the government had tried to submit the Warrant and NDO through Twitter's Legal Requests Submissions site nine days earlier. The Warrant's deadline for compliance makes no exception for the provider's failure to have a fully operational and functioning system for the timely processing of court orders.

On January 31, 2023, Twitter indicated for the first time that the company would not comply with the Warrant without changes to the NDO, stressing as "essential to Twitter's business model (including [its] commitment to privacy, transparency, and neutrality) that [Twitter] communicate with users about law enforcement efforts to access their data." *Id.* ¶ 10. Referencing that "on occasion, [Twitter has] challenged nondisclosure orders," [REDACTED] asserted that the NDO "did not … meet[] the factors outlined in § 2705(b), given the intense publicity around the investigation." *Id.* In a subsequent conversation with government counsel, [REDACTED] made clear that "Twitter's position would be that we should not produce until we resolved our questions as to the NDO." *Id.* ¶ 12.

2. *Government and Twitter's Cross Motions*

Given Twitter's refusal to comply with the Warrant unless and until its condition was met allowing disclosure of the Warrant to the Target Account user (or user's representatives), on February 2, 2023, the government moved for an Order to Show Cause "why Twitter Inc. should not be held in contempt for its failure to comply with the Warrant." Gov't's Mot. at 1. The government explained Twitter had no basis for refusing to comply with the Warrant, pointing out that the Warrant and NDO were different court orders, so Twitter could "not delay, to an unknown future date, compliance with the Warrant by challenging the NDO," *id.* at 3, and arguing that neither "the Warrant itself nor Section 2703 provide for intervention by a third party before compliance with the Warrant is required," *id.*

The same day, Twitter filed its motion to vacate or modify the NDO and stay compliance with the Warrant,

arguing that the requested stay was required to "(1) prevent irreparable injury to Twitter's interests that would occur if production under the Warrant were required prior to resolution, and (2) to preserve the status quo as to the user's interest in potentially seeking to assert privilege or otherwise curtail derivative use of potentially privileged communications." Twitter Mem. at 3. Twitter highlighted that the Target Account's User could, in theory, exert a privilege over his private communications on Twitter (through direct messages with other users), and should have the opportunity to exert privilege prior to Twitter turning over the information to the government. *Id*. at 12-14

The parties were directed to confer and propose a briefing schedule for the pending motions, Min. Order (Feb. 2, 2023) (SEALED), and the schedule proposed by the government was ultimately adopted, see Min. Order (Feb. 3, 2023) (SEALED).

3. *Hearing on and Resolution of Government's Motion For Order To Show Cause*

At a hearing held on February 7, 2023 on the government's motion, *see* Minute Entry (Feb. 7, 2023) (SEALED), Twitter conceded that: (1) the company had no standing to assert any privilege by any of its users, including the Target Account's User, Feb. 7, 2023 Hrg. Tr. at 66:3-4; *accord* Twitter Opp'n Mot. Ord. Show Cause at 3 ("Twitter Opp'n") (SEALED) (same), ECF No. 9 (SEALED); (2) the company had no confirmation that the Target Account's User wanted or would seize on any opportunity to assert any privilege if such opportunity were provided, *see* Feb. 7, 2023 Hrg. Tr. at 54:11-25; and (3) the company was operating on a mere sliver of the information presented to the Court in support of

issuance of the Warrant and the NDO, *see id.* at 48:15-19.

Nevertheless, Twitter argued that "producing the requested information prior to allowing it the opportunity to alert the [Target Account's User] would irreparably injure its First Amendment rights." *Id.* at 65:10-14. This argument was rejected for both practical and logistical reasons as well as legal grounds. If accepted, Twitter's argument would invite repeated litigation by Twitter and other ECS providers to challenge NDOs in order to alert users to SCA orders, particularly for high profile, highly placed users, such as current or former government officials, with whom the providers might want to curry favor, with concomitant and inevitable delays in execution of SCA orders and resultant frustration in expeditiously conducting criminal investigations. *See id.* at 65:14-20. As a legal matter, the NDO was a wholly separate order from the Warrant, with different standards applicable to issuance of each.

These concerns had been well articulated by another court in a similar situation of being confronted with a government motion to compel compliance with an SCA warrant and an ECS provider simultaneously seeking to challenge an NDO, and capsulized this Court's decision to grant the government's motion because the "public interest is served by prompt compliance with the [W]arrant" because "any challenge to a NDO is separate from a challenge to a search warrant [since] any further delay on the production of the materials responsive to the Warrant increases the risk that evidence will be lost or destroyed, heightens the chance the targets will learn of the investigation, and jeopardizes the government's ability to bring any prosecution in a timely fashion." *Id.* at 66:11-17 (paraphrasing *Google v. United States*, 443 F. Supp. 3d 447, 455 (S.D.N.Y. 2020)).

In response to the Court's direct question, Twitter's counsel represented that the company was prepared to and could comply with the Warrant by 5:00 PM that day. *See* Feb. 7, 2023 Hrg. Tr. at 63:16-19 (THE COURT: Okay. Can Twitter produce the [W]arrant returns by 5 p.m. today? MR. VARGHESE: I believe we are prepared to do that. Yes, Your Honor."). The government requested that if Twitter failed to comply with the Warrant by 5:00 PM that day, an escalating sanction should be imposed, starting at a sanction of $50,000, an amount that should "double each day thereafter." *Id.* at 33:6-22; *see also id.* at 33:2-5 (the Court noting that the company "was bought for $40 billion, and the CEO, sole owner is worth … over $180 billion"); Gov't's Reply Supp. Mot. Order Show Cause ("Gov't's Reply") at 10 (SEALED), ECF No. 11 (requesting "escalating daily fines" for continued noncompliance by Twitter with the Warrant, at an amount "commensurate with the gravity of Twitter's non-compliance and Twitter's ability to pay"). With Twitter's assurance of full compliance by close of business that day, and given Twitter's already tardy compliance with the Warrant, the Court ordered Twitter to comply with the Warrant by 5:00 p.m. that day or be held in contempt and subject to a fine of $50,000, to double every day of continued non-compliance with the Warrant. *See* Min. Order (Feb. 7, 2023) ("Show Cause Order") (SEALED).

4. *Twitter Fails To Comply Timely With Court's Show Cause Order*

Despite representing that the company would and could comply with the Warrant by 5:00 p.m. on February 7, 2023—by that point, nearly two weeks late—Twitter failed timely to comply with the Show Cause Order. Gov't's Notice Re. Twitter's Non-Compliance with the Warrant (SEALED), ECF No. 25. The government

explained that prior to 5:00 PM on February 7, "Twitter made a production to the [g]overnment," but "[i]n a follow up call on February 8, counsel for Twitter identified certain information that may (or may not) exist in their holdings and that had not been produced to the [g]overnment." *Id.* Twitter made another production on February 9, and in a subsequent call, alerted the government that further productions were expected, though the company could not provide a timeframe when "all materials responsive to the Warrant would be produced." *Id.* The government accordingly requested a prompt in-person hearing that day regarding Twitter's continued failure to fully comply with the Warrant. *Id.*

At a hearing held later on February 9, 2023, *see* Minute Entry (Feb. 9, 2023); Feb. 9, 2023 Hrg. Tr. 4:1-5 (SEALED), the Court reviewed with Twitter each part of Part I of Attachment B to the Warrant to assess the extent of compliance and noncompliance by identifying the responsive records Twitter had yet to produce. *See* Feb. 9, 2023 Hrg. Tr. at 6:1-48:20. During this process, Twitter raised questions for the first time about certain requests, demonstrating that the company had failed to confer effectively with the government. *See*, *e.g.*, Feb. 9, 2023 Hrg. Tr. at 5:1-7 (government counsel commenting about Twitter "attempting to cabin one of the requests in the warrant," during a call earlier on February 9); *id.* at 18:25-19:4 (government counsel explaining that "[t]his is the first time I have heard a complaint about a date limitation on 1H"); *id.* at 31:21-24 (government counsel, stating, "What [the government was] told was that there was one preservation done of the entire history of the account on January 11th. This is the first time we are hearing about another preservation between January 3rd and January 9."); *id.* at 30:2-22, 31:25-32:3 (after Twitter counsel explained that they were collecting data

on potentially responsive "fleets," *i.e.* "vanishing tweets," government counsel responded, "I have never heard of 'fleets' in part of any discussion that we have had. I don't know if that is information in this account; it may or may not be. It still will be relevant, it still will be responsive.").

After a line-by-line review of Twitter's responsive and not yet completed productions to the Warrant, Twitter promised to provide an update to the government, by 4:00 PM that day, explaining what responsive records were left to produce and when production would be completed. *Id.* at 48:21-24. At the end of the hearing, the Court instructed the government to calculate the total penalty for Twitter's failure to comply with the Show Cause Order by the 5:00 p.m. deadline on February 7, and submit notice of the same to the Court. *Id.* at 49:5-14.

The government supplied notice, on February 13, 2023, *see* Gov't's Not. Re. Accrued Sanction ("Government Notice") (SEALED), ECF No. 19, that Twitter advised the government, at 8:28 p.m. on February 9, 2023, that "it believed 'Twitter's obligations under the Warrant and the Court's order were complete.'" *Id.* at 1-2. With respect to the fine amount, the government calculated that Twitter owed "$350,000, payable to the Clerk of the Court." *Id.* at 2 ("By the terms of the Court's order, Twitter was in contempt as of 5:00 p.m. on February 7, 2023, at which point a $50,000 sanction came into effect. An additional amount of $100,000 accrued at 5:00 p.m. on February 8, 2023, since Twitter still had not fully complied with the Warrant as of that time. And at 5:00 p.m. on February 9, 2023, an additional amount of $200,000 accrued.").

Twitter disputes that any sanction is appropriate, *see* Twitter Not. Re. Appl. Of Sanctions at 1 ("Twitter Notice") (SEALED), ECF No. 18, because the company acted in good faith to comply speedily after the February 7 hearing, and the government bears the fault for production delays due to the government's nonstandard requests combined with the government delaying clarifying the scope of the Warrant's requirements. *See generally id.*

II. DISCUSSION

Twitter's motion asserts that the NDO violates its First Amendment right to inform the Target Account's User of the existence of the Warrant, and accordingly requests the NDO be modified to allow notification to that User (or his authorized representatives). *See* Twitter Mem. at 2-3. The government opposes Twitter's motion, with both a sealed opposition shared with Twitter and in an *ex parte* filing. *See* Gov't's *Ex Parte* Opp'n; Gov't's Sealed Opp'n Twitter's Mot. to Vacate or Modify NDO (SEALED), ECF No. 22. As discussed below, Twitter's motion is denied and sanctions are appropriately levied here.

A. Twitter's Challenge to the NDO Is Without Merit

Twitter asserts that the NDO "constitutes a content-based prior restraint on [its] speech," and the government's interests in keeping the Warrant secret cannot "satisfy strict scrutiny in light of the significant publicity surrounding the Department of Justice's criminal investigation into the" January 6th Investigation and the Classified Documents Investigation. Twitter Mem. at 2. Claims under the Free Speech Clause of the First Amendment, U.S. CONST. AMEND. I, are analyzed in three steps: (1) "whether the activity at issue is

protected by the First Amendment[;]" (2) "whether the regulation at issue is content based or content neutral, *i.e.*, if it applies to particular speech because of the topic discussed or the idea or message expressed[;]" and (3) whether the government's justifications for restricting the plaintiff's speech satisfy the relevant standard, *i.e.*, strict or intermediate scrutiny. *Green v. United States Dep't of Just.*, 54 F.4th 738, 745 (D.C. Cir. 2022) (cleaned up). Strict scrutiny requires that the government show its restriction on speech is "narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

As to the first step, Twitter correctly points out that "the government does not seriously contest that Twitter has a First Amendment interest in informing its user of the Warrant, nor that the Non-Disclosure Order operates as a prior restraint on such speech[.]" Twitter Reply Supp. Mot. to Vacate or Modify NDO ("Twitter Reply") at 1 (SEALED), ECF No. 27. Other courts have concluded, and this Court so finds here, that a nondisclosure orders issued under the authority of the SCA's § 2705(b) "implicate First Amendment rights because they restrict a service provider's speech" and "also constitute[] prior restraint, a characterization typically used to describe 'judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Matter of Subpoena 2018R00776*, 947 F.3d 148, 155 (3d Cir. 2020) ("*Matter of Subpoena*") (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)); *see also Google*, 443 F. Supp. 3d at 452; *In re Info. Associated with E-Mail Accts.*, 468 F. Supp. 3d 556, 560 (E.D.N.Y. 2020) ("*In re E-Mail*

Accounts"); *Matter of Search Warrant for [redacted].com*, 248 F. Supp. 3d 970, 980 (C.D. Cal. 2017) (collecting cases).

With respect to the second step, no decision from this Court, the D.C. Circuit, or the Supreme Court has established whether strict scrutiny or intermediate scrutiny applies when an ECS provider challenges a nondisclosure order issued pursuant to the SCA's § 2705(b). On the one hand, a nondisclosure order is a content-based restriction on speech, and content-based restrictions are normally evaluated under strict scrutiny. *Green*, 54 F.4th at 745 ("[W]e apply … strict scrutiny for content-based statutes[.]"); *see also In re Nat'l Sec. Letter*, 33 F.4th 1058, 1072 (9th Cir. 2022) (applying strict scrutiny to a nondisclosure requirement because it "is content based on its face" since "the nondisclosure requirement prohibits speech about one specific issue"). At the same time, in this context, a "nondisclosure requirement" is "not a typical example of such a restriction for it is not a restraint imposed on those who customarily wish to exercise rights of free expression, such as speakers in public fora, distributors of literature, or exhibitors of movies." *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876 (2d Cir. 2008). Indeed, considering that nondisclosure orders tend to be narrow in scope, limited to their accompanying orders or warrants and the facts surrounding them, good reasons exist to subject such orders only to intermediate scrutiny instead of the exacting requirements of strict scrutiny. *See id.* at 876 ("[T]he nondisclosure requirement is triggered by the content of a category of information … is far more limited than the broad categories of information that have been at issue with respect to typical content-based restrictions.").

The strict-scrutiny debate need not be resolved here. Assuming, without deciding, that strict scrutiny

applies to nondisclosure orders, the NDO at issue here survives strict scrutiny review as a narrowly tailored restriction for which no less restrictive alternative is available that would be at least as effective in serving the government's compelling interests.

1. *The NDO serves a compelling government interest*

The government says that the NDO safeguards "the integrity and secrecy of an ongoing [criminal] investigation" [REDACTED]. Gov't's *Ex Parte* Opp'n at 14-15. According to the government, these secrecy interests are particularly salient here because [REDACTED] based on the evidence outlined in its *ex parte* opposition. *Id.* at 15; *see also supra* at n. 4, *infra* n.6, and associated text

The government is correct. For starters, "[m]aintaining the integrity of an ongoing criminal investigation is a compelling governmental interest." *In re E-Mail Accounts*, 468 F. Supp. 3d at 560; *see also United States v. Smith*, 985 F. Supp. 2d 506, 545 (S.D.N.Y. 2013) ("[T]he [g]overnment has demonstrated that there is good cause for a protective order because of its compelling interest in ongoing investigations into potentially serious criminal conduct that could be jeopardized by dissemination of the discovery."); *Matter of Subpoena 2018R00776*, 947 F.3d at 156 ("The government's interest is particularly acute where, as here, the investigation is ongoing."). That compelling interest here is magnified by the national import of the January 6th investigation into conduct that culminated in a violent riot at the U.S. Capitol on January 6, 2021, and the disruption of the Joint Session of Congress to certify the results of the 2020 presidential election. Ferreting out activity intended to alter the outcome of a valid national election

for the leadership of the Executive Branch of the federal government, which activity undermines foundational principles of our democracy, and assessing whether that activity crossed lines into criminal culpability, presents as compelling a governmental interest as our very national security. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) (quotation marks omitted) ("It is obvious and inarguable that no governmental interest is more compelling than the security of the Nation."); *see also* Gov't's Opp'n at 14 ("And that interest is all the more compelling where the investigation concerns an effort to overturn the results of an election and thwart the transfer of presidential power—an effort that culminated in a mob attack on the United States Capitol as lawmakers sought to carry out their constitutional and statutory obligation to certify the Electoral College results.").

Additionally, the government has a strong interest in maintaining the "confidentiality of [its] investigative techniques and [not] cause the subjects of other investigations to change their conduct to evade detection and otherwise thwart future investigations of similar allegations." *Cf. In re Los Angeles Times Commc'ns LLC*, No. MC 21-16 (BAH), 2022 WL 3714289, at *8 (D.D.C. Aug. 29, 2022) (quotation marks omitted) (holding that these weighty law enforcement interests, in the context of an application to unseal court records under the common-law right of public access to judicial records, weighed in favor of continued sealing of certain search-warrant materials). Thus, the SCA deems certain factors to be sufficiently compelling to justify issuance of a nondisclosure order based on reason to believe that disclosure otherwise would pose a risk of destruction or tampering with evidence, intimidation of witnesses, or "otherwise seriously jeopardizing an investigation or unduly delaying a trial." 18 U.S.C. § 2705(b)(3)-(5). In short, maintaining

the confidentiality of the government's criminal investigation into any efforts [REDACTED] to overturn the 2020 election to ensure that all those responsible and criminally liable, or not, are identified and that relevant documentary and testimonial evidence is both preserved and collected, without spoliation, alteration or tampering, plainly serves compelling government interests.

Twitter disagrees. In Twitter's view, "the government cannot credibly show that the [NDO] … serves a compelling governmental interest," citing "the voluminous publicly available information about the investigation," Twitter Mem. at 8; *id.* at 9-10 (describing, *inter alia*, media reports about witnesses "subpoenaed to testify before a federal grand jury" and the appointment of Special Counsel Jack Smith); *see also* Twitter Opp'n at 13 (arguing that public revelation of the search and seizure Warrant at issue here would pose "no credible risk" because "the publicity surrounding the investigations" being conducted by Special Counsel Jack Smith "is widespread and unprecedented," making this investigation "wholly distinct from any typical covert law enforcement investigation where the targets are unaware of the government's activities"). With this perception of "no credible investigative reasons to bar disclosure [] of the existence of the Warrant," Twitter urges that the Target Account's User be alerted to the Warrant so he "may raise whatever concerns he has, if any, for determination by this Court in a full adversarial proceeding." Twitter Mem. at 14. While Twitter denies taking any position "on the applicability of [any] privilege or the validity of the Warrant," Twitter Opp'n at 1 ("Twitter is not taking a position …."); *id.* at 7 ("Twitter takes no position on the applicability of [] privilege as to these communications in this circumstance."), Twitter's real objection then is that the government is proceeding covertly with a criminal

investigation when, in the company's view, any privilege issue "should be resolved through a full adversarial process involving the real parties in interest, not through an *ex parte* secret filing." *Id.* at 8; Twitter Mem. at 2 ("Allowing Twitter … to notify the account holder would afford the user … an opportunity to address the legal issues surrounding a demand for [ ] communications in this unique context, and give this Court a full adversarial process in which to evaluate them.").

Twitter makes this demand for an adversarial assessment of privilege issues as a condition of complying with the Warrant, despite not being privy to the full Warrant, [REDACTED], let alone the other proffered evidence presented to the Court in issuing the Warrant and the NDO. *See* Feb. 7, 2023 Hrg. Tr. at 9:20-10:19. Put another way, Twitter is taking the extraordinarily aggressive position as a service provider to demand that a covert step taken in an ongoing grand jury and criminal investigation be made public, at least to the account user, before complying with a court order, notwithstanding the informational void on which it stands.

Despite the fact that Twitter has been privy to only a sliver of the government documentation underlying the Warrant and NDO, and thus is quite ignorant of details about and the scope of the government's current investigation into unlawful interference with the transfer of power following the 2020 presidential election and [REDACTED] in such illegal activity, the company nonetheless boldly contests any compelling interest the government may have in continuing to conduct its investigation covertly, bolstered by the NDO, for three reasons, each of which is meritless. First, Twitter challenges each of the government's articulated justifications for the NDO under Section 2705(b), arguing that because some aspects of the investigation are publicly

known, it "strains credulity to believe" that providing the Warrant to the Target Account's User will "alter the current balance of public knowledge in any meaningful way" since that disclosure would at most be "incremental." Twitter Mem. at 11.[5] For instance, the company argues that disclosure of the Warrant is not likely to prompt "the destruction of *other* evidence," Twitter Reply at 4 (emphasis in original), because the public and the User know that the User is under investigation for any involvement in interfering "with Congress's certification of the presidential election on January 6," *id.* Nor would it be reasonable, Twitter asserts, "to conclude that disclosure of this Warrant in particular would spur witness intimidation in view of that which is already well known about this investigation's seizure of electronic communications," or that the investigation would be seriously jeopardized because the Attorney General "confirmed the investigation, its scope, and the identity of the target" to the country. *Id.* at 7-8.

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[5] In support, Twitter cites news articles discussing the existence of the government's investigations and certain public steps the government has taken as part of its investigations or courthouse citing of witnesses. Twitter Mem. At 9–11; *see also* Twitter Opp'n, Ex. B (SEALED), ECF No. 9-2 (culling eighty pages of similar articles discussing the investigations); Twitter Reply at 5–6 (identifying several members of former president's administration that have been subpoenaed or compelled to testify, including former vice president Pence, the former president's daughter and advisor Ivanka Trump and her husband Jared Kushner, his former chief of staff Mark Meadows, and others). Twitter also observes that government has itself "confirmed it has seized and is reviewing the email accounts of [the former president's] associates as part of the investigation." Twitter Reply at 9 (citing *In re Application of the N.Y. Times Co. & Charlie Savage*, 2023 WL 2185826 (D.D.C. Feb. 23, 2023) ("*In re N.Y. Times*")).

Twitter misapprehends the risks of disclosure here. For one thing, without being privy to any non-public information about the investigation, including the full Warrant, Warrant Application and Affidavit, and NDO Application submitted to the Court, Twitter is simply in *no position* to assess how much of the media reports and general public information about the investigation are accurate and how limited that information may be compared to what is known to investigators. Put bluntly, Twitter does not know what it does not know.

More importantly, Twitter's argument is unmoored from the realities of what disclosure would mean here. As the government observes, Gov't's *Ex Parte* Opp'n at 16, Attachment B to the Warrant provides significant insight into the type and nature of information that the government requested and targets a key social media account. No public reporting has, thus far, indicated execution of search warrants for the contents of the User's personal electronic communications and records, even if the User is aware of the general contours of the government's investigation. Specific identification of the Warrant could prompt witnesses, subjects, or targets of the investigation to destroy their communications or records, including on Twitter or other social media platforms, and could lead the User to ratchet up public and private pressure on others to refuse to be cooperative with the government, or even to engage in retaliatory attacks on law enforcement and other government officials that have real world and violent consequences. This is not a "conclusory" harm Twitter dismisses out of hand based on its limited information, but rather could "endanger the life or physical safety of" government officers or "otherwise seriously jeopardiz[e]" the government's investigation. *See* 18 U.S.C. §§ 2705(b). Permitting Twitter to alert the Target Account's User of the

Warrant may prompt a response to this new investigative scrutiny of the User's conduct that could very well result in one of the enumerated harms set out in Section 2705(b).

Twitter points to "'the partial unsealing of two judicial decisions resolving filter team motions'" in relation to one of Special Counsel Smith's investigations, Twitter Reply at 9 (quoting *In re N.Y. Times*, 2023 WL 2185826 *15), but this is both unpersuasive and supports maintaining the NDO. The two unsealed judicial decisions addressed review of the contents of email accounts that are not those of the Target Account's User, so the unsealing of those decisions raise entirely different risk assessment contexts than here. Furthermore, this Court's decision in *In re N.Y. Times* makes clear that "reliance on and deference to the government is necessary" when considering whether the release of grand jury materials might harm the government's investigation because "courts are not made aware of the full scope of materials presented to the grand jury and therefore are not best positioned to execute redactions[.]" *Id.* at *9. As Twitter correctly notes, the Warrant exists outside the grand jury context—though Warrant returns may be presented to the grand jury and to that extent become "a matter occurring before the grand jury," subject to secrecy, under FEDERAL RULE OF CRIMINAL PROCEDURE 6(e). Yet, the exact same point made in *In re N Y. Times* supports maintaining the NDO because the government remains, both in the grand jury and covert SCA warrant contexts, in the best position to understand how, when, and whether alerting the user of certain information might impair an ongoing criminal investigation. The government's *ex parte* filing, as well as the Warrant and NDO Application, provide ample good reason to support the NDO here to avoid any enumerated harm under the

SCO's § 2705(b). *See John Doe*, 549 F.3d at 881 (explaining that "the court will normally defer to the Government's considered assessment of why disclosure hi a particular' case may result in an enumerated harm" if the government has "at least indicate[d] the nature of the apprehended harm and provide[d] a court with some basis to assure itself (based on *in camera* presentations where appropriate) that the link between disclosure and risk of harm is substantial").[6] That justification for the

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[6] [REDACTED]

Even though Twitter is not privy to the information contained in the government's *ex parte* filings, Twitter is plainly aware of, and even cites to, former Special Counsel Robert Mueller's investigation into then-President Trump. *See* Twitter Opp'n at 5 n.5 (citing Special Counsel Robert S. Mueller III, *Report on the Investigation Into Russian Interference in the 2016 Presidential Election* ("Mueller Report"), Vol. II at pg. 82 n. 546, Dept. of Justice (March 2019), available at https://www.justice.gov/storage/report_volume2.pdf (last visited on Mar. 2, 2023)). The Mueller Report details extensively how former President Trump engaged in obstructive conduct to thwart the former Special Counsel's investigation into Russian Interference in the 2016 presidential election. *See, e.g.*, Mueller Report, Vol. II at pg. 85-90 (discussing how, in June 2017, the former president directed White House Counsel Don McGahn to order the firing of the Special Counsel after press reports that Mueller was investigating the former for obstruction of justice); *id.* at 109-13 (observing that, in 2017 and 2018, the former president pressed Attorney General Sessions to "un-recuse" himself from the Special Counsel Mueller's inquiry, and a "reasonable inference." could be made that, from those actions, the former president "believed that an unrecused Attorney General would play a protective role and could shield the President from the ongoing Russia Investigation"). Given that Twitter is aware of the former president's prior efforts to obstruct investigative efforts into his and his associates' conduct, it should be no surprise that the government can demonstrate that revealing the existence of the Warrant poses the reasonable risk of resulting in several of the deleterious consequences under the SCA's § 2705(b).

NDO supplies sufficient compelling reason for preventing Twitter from disclosing the Warrant to anyone, including the Target Account's User (or the User's representatives).

Second, Twitter believes that "[u]nique and [i]mportant" privilege issues support the relief it seeks, Twitter Mem. at 12, but that argument is irrelevant to whether the government has a compelling interest in maintaining the NDO.[7] Twitter's interests here are purely about its right to speak to the Target Account's User, not what privileges that User may assert. Indeed, Twitter concededly has no standing to raise any issue as to any privilege the User may hold. *See* Twitter Mern. at 4. As the Court previously explained, the Warrant and the NDO do not travel together "because any further delay on the production of the materials" creates an ongoing harm to the government's investigation, Feb. 7, 2023 Hrg. Tr. at 66:11-17; *see also Google*, 443 F. Supp. at 455, and that harm plainly outweighs a temporary denial of Twitter's ability to speak to its user about the existence of the Warrant. In any event, no matter the privileges the Target Account's User may hold, what

[7] Twitter cites to the Mueller Report as an example of then-President Trump being given advance notice of interviews with witnesses that might implicate the executive privilege to give the former president the opportunity to invoke the privilege in advance of the interviews. Twitter Opp'n at 5 n.5 (citing Mueller Report, Vol. II at pg. 82 n. 546). This example, however, elides the fact that while the former president was given advanced notice to invoke executive privilege for witness interviews, no such representation is made about him being given advance notice to assert privilege as to evidence collected through the issuance of "more than 2,800 subpoenas under the auspices of a grand jury sitting in the District of Columbia ; [] nearly 500 search-and-seizure warrants; [] more than 230 orders for communications records under 18 U.S.C. § 2703(d)," and other covert orders. Mueller Report, Vol. I at pg. 13.

matters for purposes of the First Amendment is whether the government has established that the NDO is narrowly tailored to serve a compelling government interest to keep the Warrant confidential. The government's interests here are plainly compelling. *See supra* at nn. 4, 6, and associated text.

Third, as a last-ditch argument, Twitter says that the government "was required to make the requisite showing prior to the [NDO] being signed[,]" and any new, "secret rationale" should be rejected as a "*post hoc* rationalization[.]" Twitter Reply at 13. Twitter's argument is both factually and legally flawed. The government's argument is not a *post hoc* rationalization because the Warrant Affidavit, which was considered simultaneously with the NDO Application, provides ample reason justifying the NDO. Furthermore, Twitter cites no decision in which an NDO has been vacated because the government offered *additional* evidence to support that order when challenged. *See*, *e.g.*, *John Doe*, 549 F.3d at 881 n. 15 (noting that the court permitted the government "to amplify its grounds for nondisclosure in a classified declaration submitted *ex parte* … and made available for [the court's] *in camera* review").

The case Twitter relies on to assert that the government cannot provide new support for the NDO "that [was] not offered at the time the government first sought the" order, Twitter Reply at 13 (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988) ("*Lakewood*")), is entirely inapposite. *Lakewood* addressed a facial challenge to a city ordinance that gave unbridled discretion to the mayor to issue permits for placement of news racks on public property. *Id.* at 753-54. The Court struck down the ordinance, because, without objective standards for determining whether a permit should issue, impermissible, content-based

rejections could be disguised by "*post hoc* rationalizations, … making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *Id.* at 758. Unlike in *Lakewood*, the government here does not possess unbridled discretion to silence ECS/RCS providers when applying for an NDO. Rather, an NDO may issue when, as here, the government has adduced evidence to demonstrate to the Court that notifying the customer or subscriber of the court order or subpoena may lead to one of the deleterious outcomes listed under § 2705(b).

2. The NDO is narrowly tailored

In the strict-scrutiny context, which is assumed to apply here, the narrow-tailoring requirement is a least restrictive-means test. This test requires that "[i]f a less restrictive alternative for achieving that interest exists, the government 'must use that alternative.'" *Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 510 (D.C. Cir. 2016) (quoting *Playboy Entm't Grp.*, 529 U.S. at 804). The less restrictive alternative must "be at least as effective in achieving the legitimate purpose that the [government action] was [taken] to serve." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997); *see also McCullen v. Coakley*, 573 U.S. 464, 495 (2014) (same). The government explains, correctly, that the NDO is narrowly tailored because: (1) "The scope of speech regulated by the NDO is extremely narrow" since the NDO only "prohibits Twitter from disclosing the existence or contents of the Warrant" and "is limited to 180 days[,]" Gov't's Opp'n at 17-18; and (2) notifying the user or his representatives is untenable because it would be ineffective in maintaining the confidentiality of its investigation, leading to the harms described above, *see id.* at 18-19.

Courts have routinely found that non-disclosure orders satisfy the narrow-tailoring requirement under strict scrutiny so long as the orders are limited in scope and time, and notifying the subject of the investigation, or any other authorized person, would not satisfy the government's compelling interest in maintaining the confidentiality of its investigation. For example, in *Google v. United States*, the court held the nondisclosure order in that case was narrowly tailored because "it prohibit[ed] only the disclosure of the existence of the Warrant and of the investigation[,] … [and it was] also limited to a one-year time period." 443 F. Supp. 3d at 453. The government satisfied the least-restrictive-means requirement by demonstrating that notifying "the person or entity to whom the warrant is directed … would result in at least one of [§ 2705(b)'s] five enumerated harms" based on the government's lengthy *ex parte* "affidavit setting out …why premature disclosure of the warrant and the existence of the investigation could reasonably lead to the destruction of or tampering with evidence and intimidation of potential witnesses, thus making information inaccessible to investigators, and how the disclosure could seriously jeopardize the ongoing investigation." *Id.*; *see also in re E-Mail Accounts*, 468 F. Supp. 3d at 561-62 (rejecting a similar First Amendment challenge to a one-year NDO as to a warrant and existence of the investigation because the government's *ex parte* affidavit showed "there was a risk that other employees, including higher-ups, were involved in the conspiracy[,]" such that notifying the company of the existence of the warrant could lead to one of the numerated harms under Section 2705(b) and "jeopardize [the government's] investigation").

The NDO is narrowly tailored for the same reasons articulated in *Google* and *In re E-mail Accounts*. First,

the NDO here is even more narrow in scope and time duration than those at issue in *Google* and *In re E-mail Accounts*: the subject matter Twitter is barred from speaking about is limited to the Warrant's contents and existence, and does not impinge at all on the company speaking to the public about the general subject of the January 6th Investigation. Plus, the NDO applies for 180 days, which is half the duration of the year-long NDOs at issue in *Google* and *In re E-Mail Accounts*. Second, the NDO presents the least-restrictive means for the government to satisfy its compelling interests here because notifying the User or his representatives of the Warrant's existence would, for the reasons explained above, likely result in the enumerated harms outlined in 2705(b). *See supra* at nn. 4, 6, and associated text; *see also Google*, 443 F. Supp. 3d at 453; *in re E-Mail Accounts*, 468 F. Supp. 3d at 561-62.

Twitter does not dispute that the NDO is narrow in scope and in time. Instead, Twitter posits that purportedly narrower alternatives could be adopted to preserve the company's "[e]ssential First Amendment [r]ights." Twitter Mem. at 14. Twitter's suggestions are untenable, however, and do not come close to satisfying the government's interests in maintaining confidentiality about this covert investigative Warrant. First, Twitter's suggestion that notifying "just its user" plainly fails because this would likely result in the statutory harms outlined in § 2705(b) for the reasons outlined above. *See supra* at nn. 4, 6, and associated text. Second, Twitter suggests notifying certain of the User's representatives, Twitter Mem. at 14-15; Twitter Reply at 16, but that proposal is preposterous since such the suggested representatives not only may themselves be witnesses, subjects, or targets of either the January 6th or Classified Documents

Investigation, but also would be under no bar from immediately alerting the User.[8]

The Third Circuit's decision in *Matter of Subpoena* is instructive here. In challenging an order preventing disclosure of a grand jury subpoena for the data of a customer's employees, the SCA provider that received the grand jury proposed two alternatives, both of which involved notifying the customer's bankruptcy trustee. *Matter of Subpoena*, 947 F.3d at 158. The Third Circuit categorically rejected the proposals as "untenable" and "impractical" because notifying the trustee "would be ineffective in maintaining grand jury secrecy" and would "undermine[] the government's interest in maintaining the confidentiality of an ongoing investigation." *Id.* at 158-59. Similar to Twitter's naive suggestion here that, if not the User, the User's associates should be trusted with the existence of the Warrant, the Third Circuit was invited to "assess the trustworthiness of a would-be confidante chosen by a service provider" for disclosure, but expressly rejected that invitation since neither "courts nor the government can be expected to vet individuals selected by service providers and determine their risk of subverting an ongoing investigation." *Id.* at 159.

For the same reasons articulated in *Matter of Subpoena*, evaluating the viability of Twitter's proposed alternative disclosure tactics is unnecessary since revealing the Warrant to either the User or one of his representatives fall far short of meeting the government's

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[8] Twitter's suggestion that the government obtain the responsive data from NARA, Twitter Mem. at 15, is a nonstarter, both because the Warrant demands more information from Twitter than Twitter provided to NARA about the Target Account, Feb. 7 Hrg. Tr. at 11:7-13, and because this proposal is moot in light of Twitter's representation that it has now fully complied with the Warrant.

compelling interests in maintaining the confidentiality of its investigation for all of the ample reasons presented in support of the NDO. *See supra* at nn. 4, 6, and associated text. In short, "[s]trict scrutiny does not demand that sort of prognostication," *Matter of Subpoena*, 947 F.3d at 159, so Twitter's proposed alternatives lack merit.

For the above reasons, the government has satisfied that the NDO meets the exacting requirements of strict scrutiny review under the First Amendment.

B. Sanctions

The last dispute between the parties is whether Twitter should be sanctioned for failing to comply on a timely basis, first with the Warrant and then with the Show Cause Order, the latter of which required full compliance by February 7 at 5:00 PM. Twitter does not contest—nor could it—that the company was in violation of the Warrant and the Show Cause Order as of February 7 at 5:01 PM. Instead, the company claims a full defense to any sanctions, contending that Twitter substantially, if not fully, complied by the Show Cause Order deadline and acted diligently to finish production in response to the government's nonstandard requests, while accusing the government of being dilatory in responding to Twitter's requests for clarification. *See generally* Twitter Notice.

The D.C. Circuit has described three stages in a civil contempt proceeding: "(1) issuance of an order; (2) following disobedience of that order, issuance of a conditional order finding the recalcitrant party in contempt and threatening to impose a specified penalty unless the recalcitrant party purges itself of contempt by complying with prescribed purgation conditions; and (3) exaction of the threatened penalty if the purgation conditions are not fulfilled." *N.L.R.B. v. Blevins Popcorn Co.*, 659

F.2d 1173, 1184 (D.C. Cir. 1981). "At the second stage[,] the recalcitrant party is put on notice that unless it obeys the court's decree and purges itself of contempt it will be fined or face other sanctions." *Id.* at 1185. "At the third stage the court determines whether the party has fulfilled the purgation conditions. If it has, it escapes the threatened penalty; if it has not, the penalty is imposed." *Id.*

Given that both parties agree that Twitter failed timely and fully to comply with the Warrant and Show Cause Order, which imposed monetary sanctions for failure to do so, stage three of the proceedings must be considered: whether monetary sanctions should be imposed. "Once the [movant has] establish[ed] that the [contemnor] has not complied with the order, the burden shifts to the [contemnor] to justify its noncompliance." *Int'l Painters & Allied Trades Indus. Pension Fund v. ZAK Architectural Metal & Glass LLC*, 736 F. Supp. 2d 35, 39 (D.D.C. 2010). "The contemnor is required to show that it has 'done all within its power' to comply with the court's order." *Id.* at 40. (quoting *Pigford v. Veneman*, 307 F. Supp. 2d 51, 57 (D.D.C. 2004)).

Twitter asserts a good faith and substantial compliance defense to being assessed civil sanctions. The D.C. Circuit has left open the ability of a contemnor to assert a defense of good faith and substantial compliance to avoid a civil sanction. *See Food Lion, Inc. v. United Food and Commercial Workers*, 103 F.3d 1007, 1017 (D.C. Cir. 1997); *see also id.* at n.16 (collecting three district court decisions leaving open the availability of a good faith and substantial compliance defense to avoid civil contempt sanctions); *United States v. Latney's Funeral Home, Inc.*, 41 F. Supp. 3d 24, 30 (D.D.C. 2014) (quotation marks omitted) ("Once the court determines

that the movant has made the above three-part showing, the burden shifts to the defendant to justify the noncompliance by, for example, demonstrating its financial inability to pay the judgment or its good faith attempts to comply."). "Assuming that the defense survives in this circuit, however, the burden of proving good faith and substantial compliance is on the party asserting the defense[.]" *Food Lion*, 103 F.3d at 1017 (footnote omitted). "In order to prove good faith substantial compliance, a party must demonstrate that it took all reasonable steps within its power to comply with the court's order." *Id.* (quotation marks omitted); *see also Latney's Funeral Home*, 41 F. Supp at 30 (quoting *Int'l Painters*, 736 F.Supp.2d at 40) ("At this stage, conclusory statements about the financial inability to comply or good faith substantial compliance are insufficient; instead, [the contemnor] must demonstrate any offered justification 'categorically and in detail.'").

Ultimately, the decision to hold a party in contempt and assess civil sanctions against a party is left up to the discretion of the district court, based on the record evidence concerning that party's efforts to comply with the court order. *See In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 822-23 (D.C. Cir. 2009) ("District judges must have authority to manage their dockets … and we owe deference to their decisions whether and how to enforce the deadlines they impose. Though we recognize [the contemnor's] strenuous efforts to comply, the district court found them to be 'too little too late[.]' … Were we on this record to overturn the district court's fact-bound conclusion that [the contemnor] dragged its feet until the eleventh hour, we would risk undermining the authority of district courts to enforce the deadlines they impose.")

Based on the record above, Twitter's good faith and substantial compliance defense is insufficient to avoid

the sanction imposed because the company's substantial compliance with the Show Cause Order deadline (February 7 at 5:00 PM) occurred only *after* it had already delayed production since January 27, the original deadline for compliance with the Warrant in an important ongoing criminal investigation. Twitter repeatedly represented that the company stood ready to comply promptly with the Warrant soon after in-house counsel was made aware of the Warrant's existence on January 25, 2023. *See* [REDACTED] Decl. ¶ 4 (noting that [REDACTED] directed Twitter's personnel to preserve data available in its production environment associated with the Target Account on January 25, and "have confirmed that the available data was preserved"); Twitter Opp'n at 14 (promising "[a]s a continued demonstration of its good faith efforts to comply with this Court's orders while its First Amendment interests are resolved, … to be willing to produce the requested data and communications from the Target Account to the Court or the government, to be held without review until [its Motion] is resolved"); Feb. 7, 2023 Hrg. Tr. at 63:16-19 (Twitter counsel responding to Court's query whether Twitter could comply with the Warrant by February 7 at 5:00 PM, that Twitter is "prepared to do that."). Yet, Twitter waited until after the Show Cause Order deadline passed on February 7 to raise, *for the first time*, multiple questions about the Warrant's document demands, *see* Feb. 9, 2023 Hrg. Tr. at 6:1-48:20, including the company's inability to produce records responsive to data concerning "associated accounts," *id.* at 7:20-8:7 (discussing Warrant, Att. B, ¶ I.B), and cabining date and scope limitations in another request, *id.* at 20:12-20 (discussing Warrant, Att. B, ¶ I.H).

If Twitter had been diligent and serious in its good faith intention to comply with the Warrant, those

questions should have been identified, raised, and resolved with the government upon receipt of the Warrant on January 19, 2023, or subsequently upon review by in-house counsel on January 25 and 26, 2023, or even during ongoing conversations with the government through February 1, 2023. That did not happen. To be sure, Twitter advised the government on February 1, 2023, about "want[ing] to further discuss … Attachment B and technical issues [it would] need to work through in responding once the issue is resolved." [REDACTED] Decl. ¶ 14. Yet, those issues were not pursued by Twitter and appeared to be dropped in favor of litigating, until raised at the February 9, 2023, hearing under the Court's supervision, with sanctions mounting. That context for raising these issues for the first time does not demonstrate "adequate detailed proof" of good faith and substantial compliance. *See Int'l Painters*, 736 F. Supp. 2d at 38; *cf. Latney's Funeral Home, Inc.*, 41 F. Supp. 3d at 34-35 (citation omitted) (alteration in original) ("Although Defendants maintain that they are 'aggressively working to find monies to pay [their] past due taxes,' their good faith alone does not absolve them of the fact that they remain in substantial violation of the Injunction.").

Moreover, Twitter represented in its opposition to the government's Motion, and at the February 7, 2023 Hearing, that it stood ready promptly to produce responsive records in full, when required, but plainly this was not so. Twitter's good faith and substantial defense fails because it did not attempt to resolve specific questions concerning the Warrant's document demands with the government prior to either the February 7 or February 9, 2023, hearings. *Cf. Food Lion*, 103 F.3d at 1018 (holding that the contemnor "failed to prove that it complied substantially and in good faith with the order"

because the order "clearly directed [the contemnor] to search all of its records[,]" and the contemnor "did not seek a clarification of this order"). In short, Twitter was "too little too late." *In re Fannie Mae Sec. Litig.*, 552 F.3d at 822 (quotation marks omitted).

As a fallback position, Twitter seeks to excuse the incremental $200,000 penalty assessed on February 9, citing the fact that the government did not clarify its position regarding the scope of the Warrant on February 9 until 3:52 PM that day—giving Twitter just 68 minutes to comply before the final $200,000 penalty was purportedly triggered. Twitter Notice at 4. Twitter's argument is rejected for two reasons. For one thing, Twitter incorrectly assumes that the $200,000 fine was triggered at 5:00 PM on February 9. The Show Cause Order did not specify that the subsequent fine would trigger at 5:00 PM the next day, but merely provided that Twitter "shall be fined $50,000, a fine amount that shall double *every day*, for failing to comply with this Order[.]" Minute Order (Feb. 7, 2023) (emphasis added). That means that Twitter's additional fine of $200,000 accrued as soon as 12:00 AM on February 9, not at 5:00 PM. Even if Twitter's last fine were to have accrued at 5:00 PM on February 9, however, the government cannot be blamed for the timeliness of its response on February 9, when Twitter could have resolved all these issues with the government prior to the original return date for the Warrant on January 27, 2023, or even during conversations with Twitter's in-house counsel through February 1, 2023, but Twitter skipped those opportunities. *See Pigford*, 307 F. Supp. 2d at 58 (quoting *Twelve John Does v. District of Columbia*, 855 F.2d 874, 877 (D.C. Cir. 1988)) ("When a district court determines … that a contemnor has 'not done all within its power' to comply with

the court's orders, contempt may be appropriate even where compliance is difficult.").

Accordingly, Twitter's civil sanction for failing to comply with the Warrant and the Show Cause Order stands at $350,000.

III. CONCLUSION

For the foregoing reasons, Twitter's Motion is denied, and the NDO shall remain in effect for 180 days from issuance, until, at least, July 16, 2023. Additionally, Twitter is assessed a $350,000 sanction for failing timely and fully to comply with the Show Cause Order, which sanction is promptly payable to the Clerk of this Court within ten days. Twitter shall file a notice for filing in the docket of this matter upon payment in full of the sanction.

An order consistent with this Memorandum Opinion will be entered contemporaneously.

Date: March 3, 2023

[Signature]
BERYL A. HOWELL
Chief Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 23-SC-31

IN THE MATTER OF THE SEARCH OF:
INFORMATION THAT IS STORED AT PREMISES
CONTROLLED BY TWITTER INC. IDENTIFIED
IN ATTACHMENT A,

Filed March 3, 2023
Under Seal
Chief Judge Beryl A. Howell

ORDER

Upon consideration of Twitter, Inc.'s ("Twitter") motion to modify or vacate the non-disclosure order in this matter; the government's sealed and *ex parte* oppositions; the government's notice for accrued sanctions; Twitter's notice regarding the applicability of sanctions; the exhibits attached thereto; and the underlying record, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby:

ORDERED that Twitter's Motion to Vacate or Modify the Non-Disclosure Order and Stay Twitter's Compliance with the Search Warrant, ECF No. 7, is **DENIED**; it is further

ORDERED that the Non-Disclosure Order, ECF No. 3, shall remain in effect until, at least, July 16, 2023; it is further

ORDERED that the government submit to the Court, by March 3, 2023, at 2:00 P.M, any proposed redactions to the accompanying Memorandum Opinion that are necessary before disclosure of the Opinion to Twitter and its counsel; it is further

ORDERED that the parties shall submit a joint status report by March 10, 2023 at noon, advising the Court whether this Order and the Opinion may be unsealed, in whole or in part with redactions; it is further

ORDERED that Twitter is held in civil contempt for failing to comply with the Court's February 7, 2023, Minute Order, which ordered that Twitter would be held in contempt if it did not comply with the Search and Seizure Warrant, ECF No. 1, by 5:00 PM that day, and that Twitter "shall be fined $50,000, a fine amount that shall double every day, for failing to comply[;]" it is further

ORDERED that Twitter is assessed a $350,000 sanction for failing to comply with the February 7, 2023 Minute Order, which sanction is promptly payable to the Clerk of this Court no later than March 13, 2023.

SO ORDERED.

Date: March 3, 2023

This is a final and appealable order.

[Signature]
BERYL A. HOWELL
Chief Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 23-SC-31

IN THE MATTER OF THE SEARCH OF:
INFORMATION THAT IS STORED AT PREMISES
CONTROLLED BY TWITTER INC. IDENTIFIED
IN ATTACHMENT A,

Under Seal
Filed January 17, 2023

ORDER

This matter having come before the Court pursuant to the application of the United States to seal the above-captioned warrant and related documents, including the application and affidavit in support thereof and all attachments thereto and other related materials (collectively the "Warrant"), and to Twitter Inc. ("PROVIDER"), an electronic communication service provider and/or a remote computing service provider located in San Francisco, California, not to disclose the existence or contents of the Warrant pursuant to 18 U.S.C. § 2705(b), and to authorize the government to delay disclosure of the Warrant to the owners of the emails identified in Attachment A, ("TARGET ACCOUNT(S)") pursuant to 18 U.S.C. § 3101(a).

The Court finds reasonable grounds to believe that such disclosure will result in destruction of or tampering with evidence, intimidation of potential witnesses, and

serious jeopardy to the investigation, as defined in 18 U.S.C. § 2705(b).

The Court further finds that the government has also provided facts giving good cause to believe that providing immediate notification of the warrant may have an adverse result, as defined in 18 U.S.C. § 2705(a)(2). Specifically, the Court finds that immediate notification to the customer or subscriber of the TARGET ACCOUNT(S) would seriously jeopardize the ongoing investigation, as such a disclosure would give that person an opportunity to destroy evidence, change patterns of behavior, notify confederates, and flee from prosecution. *See* 18 U.S.C. § 3103a(b)(1).

The Court further finds that, because of such reasonable grounds to believe the disclosure will so impact the investigation, the United States has established that a compelling governmental interest exists to justify the requested sealing.

1. IT IS THEREFORE ORDERED that, pursuant to 18 U.S.C. § 2705(b), PROVIDER and its employees shall not disclose the existence or content of the Warrant to any other person (except attorneys for PROVIDER for the purpose of receiving legal advice) for a period of 180 days (commencing on the date of this Order), unless the period of nondisclosure is later modified by the Court.

2. IT IS FURTHER ORDERED that the application is hereby GRANTED, and that the warrant, the application and affidavit in support thereof, all attachments thereto and other related materials, the instant application to seal, and this Order are sealed until otherwise ordered by the Court.

3. IT IS FURTHER ORDERED that the Clerk's office shall not make any entry on the public docket of the Warrant until further order of the Court.

Date: January 17, 2023

HON. BERYL A. HOWELL
CHIEF JUDGE

cc: GREGORY BERNSTEIN
Assistant Special Counsel

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5044

IN RE: THE SEARCH OF INFORMATION STORED AT PREMISES CONTROLLED BY TWITTER, INC.,

Appeal from the United States District Court
for the District of Columbia
(No. 1:23-sc-00031)
On Petition for Rehearing En Banc
Filed January 16, 2024

Before: SRINVISAN, *Chief Judge*; HENDERSON**, MILLETT, PILLARD, WILKINS, KATSAS*, RAO*, WALKER*, CHILDS, PAN, and GARCIA, *Circuit Judges*.

O R D E R

Upon consideration of appellant's petition for rehearing en banc, the response thereto, the amicus curiae brief filed by Electronic Frontier Foundation in support of rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

* A statement by Circuit Judge Rao, joined by Circuit Judges Henderson, Katsas, and Walker, respecting the denial of the petition for rehearing en banc, is attached.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

RAO, *Circuit Judge*, statement respecting the denial of rehearing en banc, joined by HENDERSON, KATSAS, and WALKER, *Circuit Judges*: This case turned on the First Amendment rights of a social media company, but looming in the background are consequential and novel questions about executive privilege and the balance of power between the President, Congress, and the courts.

Seeking access to former President Donald Trump's Twitter/X account, Special Counsel Jack Smith directed a search warrant at Twitter and obtained a nondisclosure order that prevented Twitter from informing President Trump about the search. The Special Counsel's approach obscured and bypassed any assertion of executive privilege and dodged the careful balance Congress struck in the Presidential Records Act. The district court and this court permitted this arrangement without any consideration of the consequential executive privilege issues raised by this unprecedented search.

We should not have endorsed this gambit. "[A]ny court completely in the dark as to what Presidential files contain is duty bound to respect the singularly unique role under Art. II of a President's communications and activities" by affording such communications a presumptive privilege. *United States v. Haldeman*, 559 F.2d 31, 76 (D.C. Cir. 1976) (en banc) (cleaned up). Rather than follow established precedent, for the first time in American history, a court allowed access to presidential communications before any scrutiny of executive privilege.

The options at this juncture are limited. Once informed of the search, President Trump could have intervened to protect claims of executive privilege, but did not, and so these issues are not properly before the en banc court. Nonetheless, executive privilege is vital to the energetic and independent exercise of the

President's Article II authority and to the separation of powers. While the privilege *may* yield to the needs of a criminal investigation, in making this determination, the Supreme Court and this circuit have always carefully balanced executive privilege against other constitutional interests. By contrast, the court here permitted a special prosecutor to avoid even the assertion of executive privilege by allowing a warrant for presidential communications from a third party and then imposing a nondisclosure order. Because these issues are likely to recur, I write separately to explain how the decisions in this case break with longstanding precedent and gut the constitutional protections for executive privilege.

I.

As part of the criminal investigation into President Trump's alleged efforts to interfere with the peaceful transfer of power after the 2020 presidential election, the Special Counsel obtained a search warrant for the President's Twitter account. After President Trump left office, the contents of his Twitter account from his time in office were deposited with the National Archives and Records Administration. Although an Executive Branch agency held the account data, the Special Counsel admitted he did not seek the account from the Archives because a request to the Archives "would trigger notice to the former President under" the Presidential Records Act, Pub. L. No. 95-591, 92 Stat. 2523 (1978) (codified at 44 U.S.C. §§ 2201 *et seq.*). To avoid the notice required by law, the Special Counsel instead directed a search warrant at Twitter and obtained an order prohibiting Twitter from disclosing the warrant to anyone, including President Trump or his agents. Twitter ultimately complied with the warrant, releasing the requested information. *See In re Sealed Case* ("*Twitter*"), 77 F.4th 815, 821 (D.C. Cir. 2023). The release included

32 direct messages sent by President Trump. He was informed of the warrant and disclosure only months later. *See id.* at 825.

The district court rejected Twitter's First Amendment challenge to the nondisclosure order. The court held the order was a narrowly tailored means to serve the compelling government interest in maintaining the secrecy of the Special Counsel's investigation. The court reasoned that disclosing the search warrant to President Trump or his representatives would jeopardize the criminal investigation. A panel of this court affirmed the district court in full. *Id.* at 836.

The First Amendment and other arguments Twitter advances in seeking rehearing en banc are important and may warrant further review. I write, however, to highlight the substantial executive privilege issues implicated by this case. While a Twitter account primarily consists of public tweets, it may also include some private material, such as direct messages between users, drafts, and personal metadata. In fact, the material produced by Twitter included several dozen direct messages written by a sitting President. The district court afforded no opportunity for the former President to invoke executive privilege before disclosure, and this court made no mention of the privilege concerns entangled in a third-party search of a President's social media account. This approach directly contravenes the principles and procedures long used to adjudicate claims of executive privilege.

II.

Executive privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon* ("*Nixon*"), 418 U.S. 683, 708 (1974). The

privilege flows from the vesting of all executive power in a single President and "derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibilities." *Nixon v. Adm'r of Gen. Servs.* ("*GSA*"), 433 U.S. 425, 447 (1977). The confidentiality of presidential communications is critical to the energetic exercise of executive power and to the independence of the Executive Branch. It is well established that such privilege extends beyond a President's time in office. *Id.* at 448–49.

When exercising the judicial obligation to determine the validity and scope of executive privilege, the Supreme Court and this circuit have recognized certain implementing rules for adjudicating privilege claims. *See Nixon*, 418 U.S. at 713–14; *Nixon v. Sirica*, 487 F.2d 700, 714–18 (D.C. Cir. 1973) (en banc). Faced with a subpoena or other request for documents, the President may invoke executive privilege, and upon such invocation, the documents become "presumptively privileged." Nixon, 418 U.S. at 713; *see also In re Sealed Case* ("*Espy*"), 121 F.3d 729, 744 (D.C. Cir. 1997). Courts must afford presidential materials this presumption even in the absence of an assertion of executive privilege. *See Haldeman*, 559 F.2d at 76–77; *cf. Cheney v. U.S. District Court for D.C.*, 542 U.S. 367, 391 (2004) (correcting the lower court's "mistaken assumption that the assertion of executive privilege is a necessary precondition to" considering separation of powers objections).

While the privilege is not absolute, it may "be defeated only by a strong showing of need." *Senate Select Comm. on Presidential Campaign Activities v. Nixon* ("*Senate Select*"), 498 F.2d 725, 730 (D.C. Cir. 1974) (en banc). For example, when the special prosecutor sought President Nixon's tapes for a criminal investigation, the

Court required the prosecutor to show a "demonstrated, specific need for evidence" and to prove that the material was "essential to the justice of the [pending criminal] case." *Nixon*, 418 U.S. at 713 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (Marshall, C.J.)). And while the privilege yielded in that case, we held that a congressional committee subpoenaing a set of President Nixon's tapes had failed to show the material was "demonstrably critical to the responsible fulfillment of [its] functions." *Senate Select*, 498 F.2d at 731.

Moreover, as a practical matter, we have emphasized that determinations regarding executive privilege must occur case-by-case and with careful attention to each document. While the privilege may yield to other important constitutional interests, any disclosure must be limited to the materials relevant to those needs. *See Espy*, 121 F.3d at 761 (requiring the district court to specifically identify the privileged information required to meet the demonstrated need and limiting disclosure only to those documents or parts of documents); *Nixon*, 418 U.S. at 714–16 (authorizing the release of only relevant and admissible portions of President Nixon's tapes and emphasizing the rest "must be excised" and "restored to its privileged status").

Our established procedures for evaluating executive privilege comport with Chief Justice Marshall's admonition that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." *Burr*, 25 F. Cas. at 192. When presidential privileges are implicated, the Supreme Court and this court have recognized the important and delicate constitutional interests at stake and carefully weighed the privilege against other governmental interests.

A.

In every case involving access to presidential communications, the President has been able to litigate claims of executive privilege, or the court has denied access to the materials. I can find no precedent for what occurred here, namely the court-ordered disclosure of presidential communications without notice to the President and without any adjudication of executive privilege. Approval of the Special Counsel's search warrant and nondisclosure order, with no consideration for the confidentiality of presidential materials, constitutes a "significant departure from historical practice."[1] *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020). This unprecedented approach is mistaken for at least three reasons.

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[1] The Supreme Court has twice in recent years repudiated a decision of this court for failing to recognize serious separation of powers concerns implicated by novel intrusions on the presidency. When a committee of the House of Representatives subpoenaed President Trump's accountants for his tax returns, the Court explained the unprecedented nature of the dispute, identified the threats it posed to the Office of the President, and held that our court "did not take adequate account of" the "special concerns regarding the separation of powers." *Mazars*, 140 S. Ct. at 2036. And when this court suggested that a sitting President may override the executive privilege claims of a former President, the Supreme Court stated that this was "nonbinding dicta" because the "circumstances [in which] a former President may obtain a court order preventing disclosure of privileged records from his tenure in office, in the face of a determination by the incumbent President to waive the privilege, are unprecedented and raise serious and substantial concerns." *Trump v. Thompson*, 142 S. Ct. 680, 680 (2022) (denial of application for stay of mandate and injunction pending review); *see also id.* at 680–81 (Kavanaugh, J., statement respecting denial of application for stay).

First, neither the district court nor this court explained why presidential privilege may be circumvented with the simple expediency of a search warrant and nondisclosure order. Indeed, this extraordinary approach cannot be squared with the vital constitutional protection for executive privilege. In every prior case involving materials that might be covered by presidential privilege, the President has been allowed to raise the privilege claim *before* disclosure. *See, e.g.*, *Nixon*, 418 U.S. at 714–16 & n.21 (requiring the President have an opportunity to raise privilege before enforcement of a subpoena); *Dellums v. Powell*, 642 F.2d 1351, 1364 (D.C. Cir. 1980) (holding the former President "must be given an opportunity to present his particularized claims of Presidential privilege"); *see also United States v. Reynolds*, 345 U.S. 1, 8 (1953) (emphasizing the court's duty to determine the appropriateness of an executive privilege claim "without forcing a disclosure of the very thing the privilege is designed to protect"). By contrast, here the former President was not given an opportunity to assert privilege over communications made during his time in office. The warrant and nondisclosure order were an end-run around executive privilege, ignoring the need to "afford Presidential confidentiality the greatest protection consistent with the fair administration of justice." *Nixon*, 418 U.S. at 715.

Second, the process employed by the Special Counsel and sanctioned by the district court evades the meticulous protections for presidential privilege established by Congress in the Presidential Records Act and reflected in traditional Executive Branch practice. The Act requires notice to a former President before the disclosure of any potentially privileged material. *See* 44 U.S.C. § 2206(3). The Archivist must "promptly notif[y]" a former President if his records are subpoenaed

or otherwise sought for "any civil or criminal investigation." 36 C.F.R. § 1270.44(a)(1), (c); *cf. GSA*, 433 U.S. at 444 (upholding the constitutionality of an earlier presidential records statute in part because the statute provided an opportunity to assert executive privilege). After notice, the former President may assert privilege, and if the Archivist decides to release material over such a claim, the former President may seek judicial review of his "rights or privileges." 44 U.S.C. § 2204(e). Moreover, by Executive Order, when a former President raises a privilege claim, the Archivist must consult with the Executive Branch and "abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order." Exec. Order No. 13,489, 74 Fed. Reg. 4669, 4670 (Jan. 21, 2009). And before disclosing any presidential records, the Archivist must provide 30-day notice to the former President, allowing him to seek judicial review. *Id.*

Both the Presidential Records Act and longstanding Executive Branch practice include: (1) notice to a former President before disclosure of presidential records; (2) an opportunity to assert executive privilege; (3) consideration by the incumbent President of privilege issues; and (4) judicial review of claims of executive privilege *before* disclosure. These procedures effectuate the President's constitutional privilege—they are part of the "traditional way[s] of conducting government" between the branches. *Mazars*, 140 S. Ct. at 2035 (cleaned up).

Nonetheless, the Special Counsel acknowledged deliberately circumventing notice to the former President by going to Twitter for the communications, rather than to the National Archives. But as the Supreme Court has admonished, we cannot "sidestep constitutional requirements any time a President's information is entrusted to a third party[.] … The Constitution does not tolerate

such ready evasion; it deals with substance, not shadows." *Id.* (cleaned up).

Third, the judicial decisions here provide less protection to executive privilege claims than to privilege claims raised by Members of Congress under the Speech or Debate Clause. When the Executive searches a place where legislative materials are likely to exist—such as a Member's office or cell phone—a Member must be able to assert the Clause's protections before any materials are disclosed. *See United States v. Rayburn House Off. Bldg.*, 497 F.3d 654, 662–63 (D.C. Cir. 2007); *see also In re Sealed Case* ("*Perry*"), 80 F.4th 355, 366 (D.C. Cir. 2023). By contrast, the district court allowed disclosure of presidential communications to the Special Counsel without notice to the former President or any opportunity to assert executive privilege. This disparity makes little sense given the constitutional foundation of executive privilege, which derives from the "President's unique powers and profound responsibilities." *Espy*, 121 F.3d at 749; *see also Nixon*, 418 U.S. at 711–12.

The warrant and nondisclosure order sought private presidential communications within President Trump's Twitter account. In these circumstances, the district court should have recognized that such material was "presumptively privileged," allowed the former President an opportunity to assert claims of executive privilege, and assessed any privilege claim against the needs of the Special Counsel's investigation.

B.

To bypass the procedures established by Congress, longstanding Executive Branch practice, and Supreme Court precedent, the Special Counsel asserted that the search warrant had to be executed without notice to the former President because notice would endanger the

secrecy of the Special Counsel's investigation and give President Trump an opportunity to destroy evidence and intimidate witnesses. The interests of a criminal investigation may ultimately override a President's claim of executive privilege, but the clear throughline of our cases is that presidential communications are "presumptively privileged," and the court must balance any countervailing constitutional interests. *Cf. Nixon*, 418 U.S. at 708–13; *Haldeman*, 559 F.2d at 76–77. Neither the Supreme Court nor this court has ever suggested that the interests of criminal justice can thwart even the consideration of presidential privilege.

The Special Counsel rebutted Twitter's efforts to raise executive privilege concerns by arguing that there was "no plausible reason to conclude that the former President … would have used Twitter's direct-message function to carry out confidential communications." But it is widely known that President Trump used his Twitter account to conduct official business. This is precisely why the contents of the account were deposited with the National Archives. Because some functions of a Twitter account, such as direct messages, are private and confidential, it is entirely plausible that the President's account may have contained privileged material. In fact, Twitter vigorously maintained this possibility. The district court dismissed the concerns about executive privilege and also questioned the company's motives in raising claims on behalf of President Trump.[2] Under longstanding precedent, however, the Special Counsel should not have been allowed to evade an assertion of presidential privilege simply by issuing the warrant to a

[2] In just one of several examples, the district court asked Twitter's lawyers if they were litigating the case only because "the CEO wants to cozy up with the former President."

third party—"it is, after all, the President's information." *Mazars*, 140 S. Ct. at 2035.

Furthermore, the Special Counsel maintained that there was not even a colorable claim of executive privilege because the warrant for President Trump's Twitter account came from the Executive Branch and therefore could not implicate the separation of powers. This claim flies in the face of Supreme Court and circuit precedent. To begin with, the Court has held that a former President may assert executive privilege, including against disclosure within the Executive Branch. *See GSA*, 433 U.S. at 448–49. In addition, there is no suggestion that the incumbent President waived executive privilege for this investigation, and the Special Counsel maintains a studied "independence" from the Department of Justice, the Attorney General, and the President.[3] And finally, the Supreme Court has recently recognized that a conflict between a former and incumbent President over executive privilege raises "serious and substantial concerns." *Trump v. Thompson*, 142 S. Ct. 680, 680 (2022) (denial of application for stay of mandate and injunction pending review). The Court's statement forecloses the Special Counsel's claim that, in effect, any Executive Branch official can dodge a former President's claim of executive privilege without judicial review.

Nothing in the foregoing precludes the possibility that, if the former President had asserted executive

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[3] *See* Press Release No. 22-1238, U.S. Dep't of Just., Statement of Special Counsel Jack Smith (Nov. 18, 2022) (stating "I intend to conduct the assigned investigations, and any prosecutions that may result from them, independently"); *see also* Press Release No. 22-1237, U.S. Dep't of Just., Appointment of a Special Counsel (Nov. 18, 2022) ("[T]he Special Counsel will not be subject to the day-to-day supervision of any [DOJ] official.").

privilege, the Special Counsel could have surmounted it by demonstrating a "specific need for evidence in a pending criminal trial." *Nixon*, 418 U.S. at 713. But the Court and this circuit have always undertaken that balance with meticulous attention to the constitutional privilege protecting the President and his Office.

* * *

Before this case, presidential materials were presumptively privileged, even in the absence of an assertion of privilege. Such presumption recognized the importance of confidentiality to the effective and energetic discharge of the President's duties. The presumption also limited the role of the courts when called on to balance executive privilege against other constitutional interests. Without a word, the district court and our court have flipped the presumption.

The absence of a presumptive privilege particularly threatens the Chief Executive when, as here, a third party holds presidential communications. *See Mazars*, 140 S. Ct. at 2035. And to be sure it aggrandizes the courts, which will have the power to determine whether executive privilege will be considered before its breach. Without a presumption for executive privilege, new questions will invariably arise, particularly because nothing in the panel's opinion is limited to a *former* President. What if, in the course of a criminal investigation, a special counsel sought a warrant for the *incumbent* President's communications from a private email or phone provider? Under this court's decision, executive privilege isn't even on the table, so long as the special counsel makes a showing that a warrant and nondisclosure order are necessary to the prosecution. And following the Special Counsel's roadmap, what would prevent a *state* prosecutor from using a search warrant and

nondisclosure order to obtain presidential communications from a third-party messaging application? And how might Congress benefit from this precedent when it seeks to subpoena presidential materials from third parties in an investigation or impeachment inquiry?

Not every "wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Perhaps the threat here was hard to spot. Nevertheless, judicial disregard of executive privilege undermines the Presidency, not just the former President being investigated in this case.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 23-SC-31

IN THE MATTER OF THE SEARCH OF:
(*Briefly describe the property to be searched or identify the person by name and address*)
INFORMATION THAT IS STORED AT PREMISES CONTROLLED BY TWITTER INC. IDENTIFIED IN ATTACHMENT A

WARRANT BY TELEPHONE OR OTHER RELIABLE ELECTRONIC MEANS

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search and seizure of the following person or property located within the jurisdiction of the District of Columbia. *(identify the person or describe the property to be searched and give its location):*

See Attachment A (incorporated by reference).

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property described above, and that such search will reveal (*identify the person or describe the property to be seized*):

See Attachment B (incorporated by reference).

YOU ARE COMMANDED to execute this warrant on or before January 31, 2023 *(not to exceed 14 days)* ☐ in the daytime 6:00 a.m. to 10:00 p.m. ☑at any time in the day or night because good cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to Chief Judge Beryl A. Howell.
(United States Chief Judge)

☐ Pursuant to 18 U.S.C. § 3103a(b), I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized *(check the appropriate box)*

☐ for ____ days (*not to exceed 30*) ☐ until, the facts justifying, the later specific date of _____.

Date and time issued:	1/17/2023 at 1:31 PM	[Signature] *Chief Judge's signature*
City and state:	Washington, D.C.	Chief Judge Beryl A. Howell United States Chief Judge

<table>
<tr><th colspan="3">Return</th></tr>
<tr><td>Case No.:
23-SC-31</td><td>Date and time warrant executed:</td><td>Copy of warrant and inventory left with:</td></tr>
<tr><td colspan="3">Inventory made in the presence of:</td></tr>
<tr><td colspan="3">Inventory of the property taken and name(s) of any person(s) seized:</td></tr>
<tr><th colspan="3">Certification</th></tr>
<tr><td colspan="3">I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.</td></tr>
<tr><td>Date:</td><td colspan="2">_____
Executing officer's signature
_____
Printed name and title</td></tr>
</table>

ATTACHMENT A
Property to Be Searched

This warrant applies to information associated with the Twitter account "@realDonaldTrump" ("**SUBJECT ACCOUNT**") that is stored at premises owned, maintained, controlled, or operated by Twitter Inc. ("Twitter"), a company headquartered at 1355 Market Street, Suite 900, San Francisco, California.

ATTACHMENT B
Particular Things to be Seized

I. Information to be disclosed by Twitter Inc. ("Twitter" or the "provider")

To the extent that the information described in Attachment A is within the possession, custody, or control of Twitter, regardless of whether such information is located within or outside of the United States, and including any emails, records, files, logs, or information that has been deleted but is still available to Twitter, or has been preserved pursuant to a request made under 18 U.S.C. § 2703(f), Twitter is required to disclose the following information to the Government for each account or identifier listed in Attachment A:

1. All business records and subscriber information, in any form kept, pertaining to the **SUBJECT ACCOUNT**, including:

a. Identity and contact information (past and current), including full name, email address, physical address, date of birth, phone number, gender, and other personal identifiers,

b. All usernames (past and current) and the date and time each username was active, all associated accounts (including those linked by machine cookie, IP address, email address, or any other account or device identifier), and all records or other information about connections with third-party websites and mobile apps (whether active, expired, or removed),

c. Length of service (including start date), types of services utilized, purchases, and means and sources of payment (including any credit card or bank account number) and billing records,

d. Devices used to login to or access the account, including all device identifiers, attributes, user agent strings, and information about networks and connections, cookies, operating systems, and apps and web browsers,

e. All advertising information, including advertising IDs, ad activity, and ad topic preferences,

f. Internet Protocol ("IP") addresses used to create, login, and use the account, including associated dates, times, and port numbers, from October 2020 to January 2021,

g. Privacy and account settings, including change history, and

h. Communications between Twitter and any person regarding the account, including contacts with support services and records of actions taken,

2. All content, records, and other information relating to communications sent from or received by the **SUBJECT ACCOUNT** from October 2020 to January 2021 including but not limited to:

a. The content of all tweets created, drafted, favorited/liked, or retweeted by the **SUBJECT ACCOUNT** (including all such deleted tweets), and all associated multimedia, metadata, and logs,

b. The content of all direct messages sent from, received by, stored in draft form in, or otherwise associated with the **SUBJECT ACCOUNT,** including all attachments, multimedia, header information, metadata, and logs,

3. All other content, records, and other information relating to all other interactions between the **SUBJECT ACCOUNT** and other Twitter users from

October 2020 to January 2021, including but not limited to:

a. All users the **SUBJECT ACCOUNT** has followed, unfollowed, muted, unmuted, blocked, or unblocked, and all users who have followed, unfollowed, muted, unmuted, blocked, or unblocked the **SUBJECT ACCOUNT**,

b. All information from the "Connect" or "Notifications" tab for the account, including all lists of Twitter users who have favorited or retweeted tweets posted by the account, as well as all tweets that include the username associated with the account (i.e., "mentions" or "replies"),

c. All contacts and related sync information, and

d. All associated logs and metadata,

4. All other content, records, and other information relating to the use of the **SUBJECT ACCOUNT**, including but not limited to:

a. All data and information associated with the profile page, including photographs, "bios," and profile backgrounds and themes,

b. All multimedia uploaded to, or otherwise associated with, the **SUBJECT ACCOUNT**,

c. All records of searches performed by the **SUBJECT ACCOUNT** from October 2020 to January 2021,

d. All location information, including all location data collected by any plugins, widgets, or the "tweet With Location" service, from October 2020 to January 2021, and

e. All information about the **SUBJECT ACCOUNT**'s use of Twitter's link service, including all longer website links that were shortened by the service, all resulting shortened links, and all information about the number of times that a link posted by the **SUBJECT ACCOUNT** was clicked.

5. Twitter is ordered to disclose the above information to the government within 10 days of issuance of this warrant to:

[REDACTED]

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 23-SC-31

In the Matter of The Search of Information That is Stored at Premises Controlled by Twitter, Inc.

UNITED STATES OF AMERICA,
Interested Party,

v.

TWITTER,
Interested Party.

February 7, 2023
1:32pm
Washington, DC

Filed September 15, 2023

Before The Honorable Beryl A. Howell,
United States District Court Chief Judge

SEALED
TRANSCRIPT OF HEARING

* * *

[2] P R O C E E D I N G S

THE COURTROOM DEPUTY: Matter before the Court, Case No. 23-SC-31, In the matter of the search of

information that is stored at premises controlled by Twitter, Inc. Interested parties: United States of America and Twitter, Inc.

Counsel, please come forward and state your names for the record, starting with the government.

MR. BERNSTEIN: Good afternoon, Your Honor. Greg Bernstein, Thomas Windom, Mary Dohrmann, and James Pearce for the United States.

THE COURT: All right. Just so you all know, if you are feeling okay today, and you are fully vaccinated, when you are speaking you can remove your masks so we can all hear you better.

During the pandemic, I guess, it was nice that I have so much strong air conditioning in my courtroom, but it does create a lot of white noise. It's a lot easier to understand you if you are speaking without your mask.

For Twitter.

MR. VARGHESE: Good afternoon, Your Honor. My name is George Varghese on behalf of Twitter. I am joined today by my colleagues, Ari Holtzblatt, Ben Powell—

THE COURT: Okay, wait. Slow down.

So you are Mr. Varghese. Are you going to be **[3]** mostly speaking today, Mr. Varghese.

MR. VARGHESE: Yes, Your Honor.

THE COURT: Who else is there?

MR. VARGHESE: Ari Holtzblatt.

THE COURT: Ari Holtzblatt. Which one of you is that?

MR. HOLTZBLATT: I am, Your Honor.

MR. VARGHESE: Ben Powell.

THE COURT: Ben Powell. P—Powell with a "P"?

MR. POWELL: Yes, Your Honor.

THE COURT: Got it.

MR. VARGHESE: And Whitney Russell.

THE COURT: All right. Who is the personal representative from Twitter?

MR. VARGHESE: We don't have a personal representative from Twitter.

THE COURT: I thought my order directed that there be a personal representative from Twitter here.

MR. VARGHESE: I don't believe the minute order did, Your Honor.

THE COURT: Okay. Maybe the government wanted a personal representative?

MR. VARGHESE: That's correct, Your Honor. I believe their draft order did. But, in the minute order, the Court did not—

[4] THE COURT: Okay. So I only have the attorneys—outside counsel attorneys for Twitter sitting at counsel table?

MR. VARGHESE: Yes, Your Honor.

THE COURT: Okay. Just so I know who is who.

All right. So we're here, first, on the government's motion for issuance of the order to show cause why Twitter should not be held in contempt; although, I know that we have this other pending motion filed by Twitter, and some of the conversation today will probably address both.

And even though I gave briefing—a briefing schedule for the First Amendment challenge to the NDO, that doesn't require briefing to be done until the end of February—towards the end of February. So I would like to focus on the order to show cause for contempt first; although, there is not that much difference between a motion for an order to show cause why a party should be held in contempt and a contempt hearing itself.

So let me just point out that under our local Criminal Rule 6.1: All hearings affecting a grand jury proceeding shall be closed, except for contempt proceedings in which the alleged contemnor requests a public hearing.

I am confident the government is not requesting a public hearing.

Is Twitter requesting a public hearing today?

[5] MR. VARGHESE: No, Your Honor.

THE COURT: Okay. Perfect. Because that would have been denied, but that saves me time.

All right. So let me just put on the table some of the issues that I want to discuss today so you all—we're all lawyers. None of us like to be surprised. Let me just tell you the things that I am puzzling over, generally.

The precise deadline for the search warrant's compliance given the back and forth between the parties, the formal or informal extensions that the government gave.

Second, I need to be clear about what Twitter has seen of the warrant package. I don't know how many of you at Twitter's table have ever been prosecutors; but you know the warrant is a very thin little part—important part, critical part, it is a court order—a thin part of a warrant package. I am not clear from this record what Twitter has seen and what it hasn't. It doesn't

know very much at all, although it thinks it does, about the government's investigation; but it certainly doesn't know, I don't think, very much about the warrant that I signed and all of its parts. But I need to be clear about what it does and doesn't know about that.

Third, Twitter's thrown up "NARA," and I need to know where there is an overlap or not between what the search warrant is demanding and requiring Twitter to turn **[6]** over, and what NARA holds now or potentially in the future.

Not that that's all relevant here. But I actually want to be clear in my own mind in addressing, if not today, with respect to the NDO challenge—the merits of Twitter's arguments.

Fourth, Twitter's standing here to raise any issues as to the NDO or the warrant and the account user's privileges, and whether those concerns—even if Twitter doesn't have standing—warrant, on consideration, a rewrite of the Court order, which is what Twitter is actually demanding here, which is a rewrite of the warrant.

And then, finally, whether Twitter has acted in good faith, and what is necessary for enforcement and compliance with the Court ordered warrant.

Those are, generally, the topics I plan to discuss.

Who is arguing on behalf of the government?

MR. BERNSTEIN: Greg Bernstein, Your Honor.

THE COURT: Okay. Mr. Bernstein, step forward to the podium.

Okay. So the warrant, by its terms, is pretty explicit about saying that the warrant issued on January 17th gave ten days for the warrant returns to be delivered to the government, which brings us to—if my math is right,

and I am a mere J.D., January 27th—which **[7]** is—again, if my math is right—about ten days ago; ten days—

MR. BERNSTEIN: Yes, Your Honor.

THE COURT: —in a matter of national importance pending before the special counsel's office.

MR. BERNSTEIN: Yes, Your Honor.

THE COURT: Okay. But then, when I look at these negotiations going back and forth between Twitter and the government—I guess it was you on the other end of the communications with the Twitter general counsel or counsel?

MR. BERNSTEIN: Yes, Your Honor. I was the one speaking with [REDACTED] who identified [REDACTED] as the most senior counsel for Twitter.

THE COURT: Okay. By my review back and forth of this, you gave Twitter an extension—almost until February 1—for Twitter to provide authority, I guess, for refusing to comply with the warrant on a timely basis. But it seemed like the government was giving little extensions back and forth.

So when is it that the government expected this warrant, given that back and forth with Twitter's counsel—when did the government expect Twitter to comply?

MR. BERNSTEIN: So, Your Honor, just to be clear, the order itself, which I don't think the government has any authority to modify unilaterally—just as Twitter **[8]** doesn't—ordered the production of these records by January 27th. The negotiations to which Your Honor refers—

THE COURT: Yes. But in terms of fairness and equity and bad-faith measurements, I am looking at compliance here, in terms of and assessing what the contempt penalty should be; I look at the amount of the delay.

MR. BERNSTEIN: Yes, Your Honor.

THE COURT: Ten days is a long time. But I am not sure that ten days is the right assessment of that delay.

MR. BERNSTEIN: I can give Your Honor a timeline of the discussions—

THE COURT: Don't. Don't. The back and forth is ridiculous. What's the government—I mean, I don't have time for that, and I have read it—between the declaration and the government's papers, and the back and forth.

What is the bottom line? When did the government expect, as a final drop dead date, for the warrant returns to be put in your hands?

MR. BERNSTEIN: It's January 27th.

And the request for authority by February 1 was not to say: We are extending the deadline of the warrant which, of course, is Your Honor's order. It was to say: Give us authority for your position by this time or we intend to pursue court intervention.

[9] THE COURT: All right. Now let's turn to the warrant package. Okay.

So the warrant package consisted of an incredibly lengthy affidavit, the warrant itself. The warrant itself had Attachment A, property to be searched; it had Attachment B, particular things to be searched; and Attachment B had different parts.

Now, certainly, Twitter hasn't seen the application part of the package; it hasn't seen the affidavit part of the package. Is that right?

MR. BERNSTEIN: Yes, Your Honor.

THE COURT: That's correct?

MR. BERNSTEIN: That's correct, Your Honor.

THE COURT: Certainly, Twitter has seen the warrant and Attachment A; is that correct?

MR. BERNSTEIN: That's correct, Your Honor.

THE COURT: And out of Attachment B, has Twitter seen any part other than Part 1?

MR. BERNSTEIN: No, Your Honor.

THE COURT: Okay. Well, that's sort of what I thought, but I wanted to make sure.

So Twitter, as it sits here, has zero idea and zero affirmation about whatever filter protocol or procedure there is attached to this warrant in terms of processing any warrant returns; is that correct?

[10] MR. BERNSTEIN: That's correct, Your Honor.

THE COURT: And if they know, it's not from the government.

MR. BERNSTEIN: I'm sorry. Can you repeat the question, Your Honor?

THE COURT: They wouldn't know from the government.

MR. BERNSTEIN: They would not know from the government, Your Honor, that's correct.

THE COURT: All right. So to the extent that Twitter is standing here, as I understand their position, trying to protect any privilege of the account user with this solution of providing prior notice to the account user, they are taking no account because they can't—because they haven't seen it and they don't know anything about any filter protocol that might be attached to this warrant.

MR. BERNSTEIN: That's correct, Your Honor. They do not know about any filter protocol that could or could not be attached to the warrant.

THE COURT: Got it. Okay.

I just want to make it clear, when providers step in here and take up my time on what should be a simple processing of a warrant, exactly how much in the dark they are. Okay.

Now let's turn to what came up in your discussions **[11]** with the Twitter lawyer, in-house lawyer, and was also put in the lawyer's declaration. I also saw in Twitter's papers, here, that Twitter believes that the government could obtain all of the information it's seeking in the search warrant from NARA, the good old archivist of the United States.

So does the government know whether NARA has all of the information sought by this search warrant directly from Twitter?

MR. BERNSTEIN: We have spoken to NARA after we had these communications with Twitter. And they represented to us that there is not complete overlap between the Attachment B and the records in their possession.

THE COURT: Okay. Do you know what they have versus what the warrant is seeking?

MR. BERNSTEIN: Could I have one moment to confirm with co-counsel, Your Honor?

THE COURT: Yes.

And let me just say, it may be that Twitter has better information on that because Twitter supposedly provided the information to NARA. But go ahead.

(Whereupon, government counsel confer.)

MR. BERNSTEIN: Thank you, Your Honor.

So, in the preliminary conversation we had with counsel for NARA, their representation was more, on a **[12]** general level, that the data that NARA had in its possession was not a complete overlap with what we would have in the Attachment B. And I believe that Twitter's opposition also makes reference to much of the data being in there as—

THE COURT: I know. I am going to talk to them about that. I saw that too. It was pretty clear. Not a complete overlap—not the briefing. The briefing was a little bit more vague about that but, certainly, the declaration was more precise; that they said much of the information required under the warrant was turned over to NARA without saying a complete overlap.

MR. BERNSTEIN: That's correct, Your Honor.

THE COURT: But do you know what is missing from NARA?

MR. BERNSTEIN: We are not in a position ourselves, at this moment, to make a representation—

THE COURT: So, Twitter, you be ready to answer that.

Okay. So, now, the Presidential Records Act—I am going to read you part of this—provides, in relevant

part, quote: When the archivist determines under this chapter to make available to the public any presidential record that has not previously been made available to the public, the Archivist shall promptly provide notice of such determination to the former President during whose term of **[13]** office the record was created. That's at 44 U.S.C. Section 2208(a)(1)(A)(i).

Is that provision the basis for the government's belief—and I think you made the representation to the Twitter counsel—that the government would have to inform the former President before they were able to get this information from NARA? You couldn't do it covertly.

Is that the specific provision that you are relying on?

MR. BERNSTEIN: I am not sure that's the specific provision. But I do know that—having spoken to NARA counsel, they have made it clear to us that there will be notice to the President if we attempt to obtain this evidence from them directly.

THE COURT: And you heard that from whom?

MR. BERNSTEIN: That's Gary Stern, the general counsel of NARA, Your Honor.

THE COURT: But you didn't find out from Gary Stern what provision of the Presidential Records Act he was relying on, and whether it was this one in particular?

MR. BERNSTEIN: No, Your Honor.

THE COURT: Well, I mean, Gary Stern is a great lawyer, but I would still ask him for a citation.

Because, if it's this provision, I really am puzzled—when there is a request to NARA on a covert basis **[14]** pursuant to a warrant or a subpoena to produce information, that's not producing it to the public. So I am not

sure why that would require notice—an advance notice to the privilege—to the former President, whose records they are.

MR. BERNSTEIN: We will go back with Gary Stern and hash that out, Your Honor.

As a practical matter, that has been the process thus far; that, when we have made these requests for information in the possession of NARA, that there's been notification, and the President has had—the former President's had some opportunity to challenge that process.

THE COURT: Okay. Even when the government is serving a subpoena? So not for public dissemination?

MR. BERNSTEIN: Yes, Your Honor.

THE COURT: All right. Well, I am sort of curious. Maybe, when you are litigating the rest of this, you can talk to Mr. Stern who knows the Presidential Records Act, I know, inside and out. He can educate all of us because, as I look at the PRA, I am not sure where he is getting that.

MR. BERNSTEIN: We'll find out, Your Honor.

THE COURT: Okay. But neither here nor there, in some ways.

But—and also, I actually have a question about whether this Twitter account used by the former President **[15]** and his staff, I guess, is even subject to the Presidential Records Act.

I mean, the Presidential Records Act says: The President may not create or send a presidential record using a nonofficial electronic message account unless the President copies an official electronic messaging account of the President, in the original creation or transmission of the presidential record; or forwards a complete copy

of the presidential record to an official electronic messaging account of the President not later than 20 days after the original creation or transmission of the presidential record. That's under 44 U.S.C. Section 2209(a)(1) through (2).

So if that provision of the Presidential Records Act wasn't complied with by the former President with respect to his Twitter account activity, does this mean that this Twitter account activity falls outside the protection of the Presidential Records Act, doesn't even qualify as a presidential record, which, of course, would also have an impact on any assessment of whether any contents of his Twitter account are entitled to any executive privilege.

So have you conferred with NARA about whether the Twitter account is even subject to the Presidential Records Act?

MR. BERNSTEIN: I can confirm with co-counsel whether we have had conversations with NARA about that.

[16] The representation that we received from Twitter—and they can speak more about this—is that—I believe is that the White House made some effort to designate part or all of the Twitter account as a presidential record and turn it over to NARA. But I think that counsel for Twitter might be in a better position to talk about what happened with respect to the President's—the former President's Twitter account and how it ended up going into the possession of NARA.

THE COURT: Let me step back for a minute.

What constitutes a presidential record subject to the PRA is pretty defined. And that's helpful when you're defining what a presidential record is and it's, certainly,

helpful when you are making an assessment of a presidential privilege.

So do you think this is a rabbit hole or worth inquiring about?

MR. BERNSTEIN: Well, I wouldn't necessarily characterize it as a "rabbit hole." But I think, for purposes of today's hearing, whether there was an alternative route for the government to obtain these records, yes or no—

THE COURT: Is beside the point, I agree.

But as I said, part of this hearing is going to be—as you saw in my scheduling order, I am only going to **[17]** have a hearing on the NDO if it's necessary; and I am trying to make it not necessary by doing that hearing now. And actually, you know, in some ways, it's a constructive way to hold a hearing; have the hearing so you can see what I am puzzling over so you can address it in your briefing.

MR. BERNSTEIN: Then that's fair, Your Honor. I think for the purpose of today—perhaps beside the point. For the purpose of the NDO briefing, it's helpful to hear Your Honor's thoughts on this so that we can address them before that hearing actually comes up.

THE COURT: And you are welcome to tell me in your briefing that this is a rabbit hole, not relevant, or whatever. But, I mean, I am just looking at this and puzzling over how the PRA serves as any kind of valid defense to compliance with a search warrant and trying to figure out what the basis of that is at all when, you know, I am not confident that the PRA—that whatever was turned over to NARA is what is being called for in the warrant. I am not confident that the Twitter account is even subject to the PRA, let alone is a presidential

record. So I'd just invite the government to help me figure that out. Maybe you will do it in your briefing.

Okay. So now let's turn to more specific executive privilege concerns, which is why Twitter wants to rewrite the warrant to turn it from a covert warrant to an **[18]** advance notice warrant and, basically, not disclose any information to the government until, I guess, the former President's had an opportunity—or the account user's had an opportunity to decide whether he wants to challenge the warrant and then, if so, to challenge the warrant, and then assert whatever privileges he has.

Part of the reason Twitter says they're doing that here is because—they call the issues concerning executive privilege difficult and novel questions.

Does the government find these issues difficult and novel or is that just Twitter's take on these questions, because it hasn't been living with them for as long as the government has been?

MR. BERNSTEIN: I have a few responses to that, Your Honor, and I will be succinct here.

First—one factual, one legal. First, for factual context, Twitter has proffered no evidence—and I don't think the government is aware of any evidence—that the former President used his private Twitter account to engage in communications with his senior advisors about matters that were vital to presidential decisionmaking.

There is no evidence in the record whatsoever—and I don't think Twitter is going to proffer any evidence—to show that there is a serious possibility that we are going to find executive privileged communications on **[19]** his private Twitter account.

As a legal matter, the case law—and I am referring to *GSA versus Nixon* right now—makes it clear that it's not the same as, say, an attorney—client issue where communications that are protected by the attorney—client privilege don't belong to the government or don't belong to the executive branch. In this case, the assertion here is that these are communications that are privileged that belong to the executive branch. Of course, we are the executive branch. So there can't be any unlawful disclosure of communications that are protected by the executive privilege to the executive branch itself.

That aside, Your Honor—again, I think this is what Your Honor was alluding to at the beginning of the hearing. The issuing judge, which is Your Honor, the Chief Judge in this district already considered these issues, already hashed these issues out when Your Honor issued a warrant, a clear order to Twitter to produce the Attachment B records within ten days.

THE COURT: A clear order. They haven't seen the full order. They haven't seen the full order but—

MR. BERNSTEIN: But they have seen the order to produce the records—

THE COURT: Correct.

MR. BERNSTEIN: —the unambiguous order to **[20]** produce the records.

THE COURT: They have seen the only part of it for which they're responsible?

MR. BERNSTEIN: That's correct.

And the response to that has been, "Thank you, no thank you." We have decided, on our own timetable, one that we are—seem to be implementing for what they consider to be a quote-unquote unique client.

THE COURT: Right. Well, it's my view, just so, Twitter, you are clear: You may think these are difficult and novel issues. For the others of us in this room, they are not.

All right. On your last point, that it's hard to imagine—to paraphrase you—it's hard to imagine that the President would use a Twitter account to engage in the types of confidential presidential decisionmaking issues that are subject to executive privilege.

But Twitter apparently has these communications mechanisms for direct messaging, and so on. So is it remotely possible that the former President could have communicated with his closest advisors about presidential decisionmaking on Twitter?

MR. BERNSTEIN: Is it theoretically possible that the President sent a direct message to, say, National Security Advisor Robert O'Brien about invading Iran over a **[21]** direct message over Twitter? It's theoretically possibly. I am aware of no evidence in the record or from the investigation that would even remotely support that assertion.

THE COURT: So it's your view that should—that the mere fact that these were presidential communications on Twitter, which—from Twitter's perspective means: Hey, it could be subject to executive privilege. From the government's perspective means: You have got to be kidding; it's most likely nothing there is executive privilege.

MR. BERNSTEIN: That would—

THE COURT: We just have two different perspectives on how important the Twitter activity was to the conduct of presidential decisionmaking.

MR. BERNSTEIN: That there were communications between the President and senior advisors that were vital to presidential decision—making, that was our reaction.

And, again, Twitter has this data in its possession, and they haven't made any kind of representation that they have specifically seen a communication that would fit that bill.

THE COURT: Although it would be pretty ironic, isn't it, if Twitter, which is trying to stand up and protect the privacy and executive privilege of a former President, went scouring through it to find that evidence? **[22]** But I guess it could, which also is something that one could take into account—

MR. BERNSTEIN: Well, Your Honor—

THE COURT: —in assessing the viability of an executive privilege defense on Twitter's part to delay in executing a warrant.

MR. BERNSTEIN: Well, that is true. But, Your Honor, they have inserted themselves in this process in contravention of Your Honor's order.

They have decided that they will not comply with the order even though they understand it and they are not challenging the validity of the warrant itself. And they have come to this argument without any ammunition to suggest that there is any potential for this Twitter account to contain communications that are protected by the executive privilege. That is the problem here, that this is an order to show cause. And they are not coming forth with any evidence to show that they are unable to comply, that they have substantially complied, or that the foundation of their argument for why they're not complying has any basis, in fact, whatsoever.

THE COURT: Twitter has also raised what they call—and I quote: The issue of executive privilege in this context, including what limitations might need to be imposed on derivative use of private presidential **[23]** communications. That's in the Twitter motion, at 12 through 13.

What does the government make of this term "derivative use" and this whole argument?

MR. BERNSTEIN: I think what they're trying to say is that from their point of view—and there is no citation to authority for this. But, from their point of view, communications covered by the executive privilege are the same as communications covered by something like attorney—client privilege, where you could actually have prosecutors being tainted off the prosecution team so that no derivative use could be made of those communications.

My understanding of the case law surrounding executive privilege is that is distinctly not the case. There is no executive privilege, for example—or no case that says that—one, there is no case that says that the executive branch or another part of the executive branch can't be exposed to these communications. And there is certainly no case to my knowledge that says that if another part of the executive branch were exposed to the communications then, all of a sudden, the prosecutors and agents would be tainted off because of the mere possibility of derivative use.

So, in other words, I think they're saying that communications in the possession of the Department of **[24]** Justice that potentially could be covered by executive privilege carry with them the same concerns as attorney-client privilege communications; but there is no

authority for that proposition, Your Honor, and they have not cited any.

THE COURT: So, interestingly, having lived through Special Counsel Robert Mueller's investigation as chief judge—it was interesting to me to see that Twitter cites Special Counsel Mueller's report on the investigation into Russian interference in the 2020 election and uses that as—cites an example where it says: The White House was given notice in advance of interviews regarding statements made by the President, quote: To give the White House an opportunity to invoke the executive privilege in advance of the interviews.

And it is certainly the practice, often, that a privilege holder is given notice of a motion to compel testimony, as the example from the Mueller report indicates, from another person about potentially privileged communications. But that same advance notice to a privilege holder is not given before the government obtains covertly potentially privileged records because, obviously, obtaining testimony from a person is not covert. And if that testimony is obtained from a person before the grand jury, grand jury secrecy rules, under Federal Rule of Criminal **[25]** Procedure 6(e), expressly do not subject a grand jury witness to grand jury secrecy.

So having—Twitter having pointed out what are, to most of us—not novel, not difficult—but obvious differences between the Mueller report example of giving advance notice to a privilege holder before obtaining potentially privileged testimony from a third person before the grand jury because that's not going to be—it's not going to be covert. That grand jury witness can go talk about it to the privilege holder; compared to the obvious difference, as I said, of a covert warrant.

Does the government have any other reasons for the difference in procedures between giving advance notice to a privilege holder before obtaining potentially privileged testimony from a person, third party, and not giving such advance notice in connection with covertly obtaining a privilege holder's records pursuant to a Stored Communications Act warrant?

MR. BERNSTEIN: Well, it's just that, Your Honor. It's the fact that if we speak to a witness, that's not a covert step. Again, the witness can go speak with the President himself or herself, and that often can be the case. In this case, we're asking for Twitter to simply comply with the unambiguous order that this order issued to produce these records; "these records," being communications **[26]** and materials related to the former President, that there is no legal bar to us possessing it in the first place.

THE COURT: Well, are there other reasons for not giving advance notice in connection with a covert warrant to a potential privilege holder that might be incorporated into a nondisclosure order?

MR. BERNSTEIN: In this case, the specific reasons for why we sought the nondisclosure order—I think if we get into the granular facts, that will be part of an *ex parte* submission. But I can say now that we expect to prevail on the litigation related to the NDO. And the basis for that—there actually are concrete cognizable reasons to think that: If the former President had notice of these covert investigative steps, there would be actual harm and concern for the investigation, for the witnesses going forward.

THE COURT: And that's based on your own investigation here, and not Volume II—Volume II of the Mueller report which lays out, in hundreds of pages, the

number of obstructive actions taken by the same person who was the user of the account at issue?

MR. BERNSTEIN: So, Your Honor, yes.

In our *ex parte* submission, we intend to lay out a number of validated concrete facts independent of what is in the Mueller report that make out a relatively clear case of **[27]** the President being someone who will take obstructive action if he is notified of this warrant.

THE COURT: All right. So Twitter says that producing the warrant returns prior to allowing the company to alert the former President of the warrant would irreparably injure its First Amendment rights, eliminate any potential remedy for the former President. And the government's response is to turn to *Google*—the *Google* case from the Southern District of New York from 2020, as standing for the uncontroversial principle that the warrant and NDO do not travel together.

So is the government construing Twitter's First Amendment concerns as tied only to the NDO and not to both the NDO and the warrant?

MR. BERNSTEIN: Yes, Your Honor. And they are construing it the same way, their First Amendment challenge—the only remedy they are seeking is to an entirely separate order. They are seeking, under the First Amendment, to modify or vacate the nondisclosure order.

Nothing they do under the First Amendment will alter the validity of the warrant itself or negate any element of contempt.

If Your Honor can give me 30 seconds to make another point here. The citation of the First Amendment is, to a certain degree, disingenuous for this reason: If

the **[28]** government—and Twitter has represented this to the government. But if the government were to withdraw the NDO today—which we are not doing, but if we did—Twitter would have all the speech it wanted. It would have no more restrictions on speech; the First Amendment issue would be gone, I think everybody agrees with that.

Even then they have represented that they will not produce the records to the government. They will continue to violate the order because they have decided that they will give this special account holder the opportunity to litigate pre-indictment motions related to executive privilege.

So, again, Your Honor, has ordered Twitter to produce these records within ten days; they have said, "No, thank you." We are going to—whether there is a First Amendment issue or not, we are going to set a different timetable, a special protocol; and we will give this account holder the opportunity to litigate these motions about executive privilege which, again, are frivolous considering that there is no indication in the record that there will be executive privilege communications on this account in the first place. And even if there were, we are the executive, Your Honor.

THE COURT: Okay. So Twitter, in its opposition, had, like, I don't know, I counted like 80 pages of an **[29]** exhibit of all these press reports about the special counsel investigation; I didn't look at it in detail.

But, in sum, Twitter's argument is: Hey, the government's interest in maintaining the NDO isn't compelling because look at all this press. Lots of people know about this investigation going on. The Attorney General has an order on the DOJ website saying: I have

appointed the special counsel to look at the following issues.

Twitter goes on to say that the press has been doing its job, thankfully. And so, as a consequence, we all know that, you know, the government, in aggressively pursuing this investigation, has been looking at the communications of a number of people.

So it sums up by saying: It strains credulity to believe that the incremental disclosures of this warrant could somehow alter the current balance of public knowledge in any meaningful way so as to cause harm to the investigation.

So just like Twitter doesn't know much about the warrant here at all, and has only seen a small sliver of the entire warrant package, do you think that it strains credulity to believe the incremental disclosure of this order would somehow alter the current balance of public knowledge in any meaningful way?

[30] MR. BERNSTEIN: Absolutely not, Your Honor.

There is an incredible difference between the public knowing about the existence of the investigation and the account holder in this case knowing about a concrete, investigative step that the government has taken.

And, again, I have to be careful about what I say in this setting because I don't want to disclose information that's covered by 6(e) or that otherwise would compromise the investigation. With that said, Your Honor, I think when Your Honor gets our *ex parte* filing with respect to the NDO, I think Your Honor will wholeheartedly reject the assertion that it strains credulity to think that there could be serious adverse consequences from the President finding out about this search warrant.

THE COURT: And Twitter goes on—focusing on the NDO—that the government's proffered explanations for needing the NDO appear conclusory and that there is no reason to believe that notification of the warrant would suddenly cause former President Trump or potential confederates to destroy evidence, intimidate witnesses, or flee prosecution, particularly since the former President has announced that he is running in 2024.

And I did look at the NDO just to see is that language just as specific as that, and it is. It doesn't have to be. Under 2705(b), it's not just by the account **[31]** holder, it's by any other person who might flee, might obstruct. And this NDO was written fairly narrowly, to say the least.

I think one thing that I hope the government takes away from this interlude with Twitter is that the boilerplate NDOs—although in the applications are fairly more detailed, and clearly and broadly—the orders themselves, you probably need to look at the more boilerplate orders in the NDOs to make it as broad as the application is requesting.

So do you want to respond to that? —to Twitter's comment that there is no reason to believe notification would suddenly cause Trump or potential confederates to destroy evidence, intimidate witnesses, or to flee prosecution, or are you waiting on that for an *ex parte* submission?

MR. BERNSTEIN: We are waiting. But I can give Your Honor two responses in the meantime.

First, they don't know anything. I mean, they know some stuff. They know what they have read in the newspapers. But they're making these confident factual

assertions without knowing the actual facts of the investigation.

Number two, they have cited a number of news articles. They seem to have a robust understanding of what **[32]** is in the public record. They seem to be ignoring the fact that there is an entirely separate public investigation into the former President for doing just that, for taking obstructive efforts with respect to NARA's request to retrieve classified documents, and then the government—the grand jury's request to subpoena classified documents from the former President, and the steps that he took to obstruct those efforts. So there will be considerably more detail about the basis for the NDO when we brief this issue.

For now, though, the assertion that they're making, one, is not based on any factual foundation that they could possibly be aware of; and then, second, to the extent that they are able to ascertain details from the public record, they seem to be ignoring those details.

THE COURT: Okay. So let me just let me turn to compliance since it's been ten days of delay. I think if Twitter can comply with production by 5 p.m. today—is that what the government is looking for, or are you looking for some other time period?

MR. BERNSTEIN: We are looking for compliance as soon as possible. And we understand that they're prepared to comply, they are just choosing not to.

THE COURT: And the government—consistent with past situations like this, the government has been coy about setting out precisely what it's asking for, in terms of an **[33]** incentive to comply within the time frame of 5 p.m. today of the penalty, given the fact that I am looking at a company that was bought for $44

billion; and the CEO, sole owner of Twitter, is worth—according to some news reports, I guess—over 180 billion.

What is the government asking for in terms of a fine, for failure to comply by 5 p.m. today?

MR. BERNSTEIN: So the marching orders I have, Your Honor, are to take into account—once discussed today, we will go back to the special counsel's office, discuss with the special counsel what actual number and schedule we think is appropriate; and then we can file that by 5 p.m. today.

THE COURT: That's not on my time frame. You need to come prepared for that. $25,000, $50,000 a day, for failure to comply? What's the number?

MR. BERNSTEIN: Could I have 30 seconds to speak with co-counsel?

THE COURT: You can have like ten.

(Whereupon, government counsel confer.)

MR. BERNSTEIN: Your Honor, we're asking for $50,000, and then to double each day thereafter.

THE COURT: All right. Okay. Thank you.

Anything further?

MR. BERNSTEIN: No, Your Honor. Thank you.

[34] THE COURT: All right.

MR. VARGHESE: Good afternoon, Your Honor.

THE COURT: Mr. Varghese.

Twitter says in its opposition that—in its defense, that its ability to communicate with its customers about law enforcement's efforts to access their

communications and data is essential to its business model in fostering trust with its user base.

But, clearly, Twitter does not run to court, as it is here today, in response to court orders for information about Twitter users. So even though a lot of Twitter users probably have potential privileges—marital, priest, clergy, executive, attorney—client—so what is it—is it just lucky me, you know, that you are here?

What is it about this case? The government suggests it's because you are giving special attention to this particular user.

MR. VARGHESE: No. No, Your Honor.

THE COURT: Why are you here?

MR. VARGHESE: Thank you, Your Honor.

So Twitter receives thousands of legal requests every year from law enforcement.

THE COURT: I hope you have your website working better than it was working here.

MR. VARGHESE: I don't know. I think that might **[35]** have been on them, Your Honor. I don't know what the details were about the legal process, but it worked—

THE COURT: I thought legal counsel said: Oh, yeah, our website for handling this was down for a couple of days, or something.

MR. VARGHESE: I don't know the answer for that, Your Honor. I don't know.

THE COURT: Well, that should be a focus for Twitter, rather than trying to delay—

MR. VARGHESE: Your Honor, if I may.

THE COURT: —warrant returns in a case of such national importance as this.

MR. VARGHESE: Your Honor, if I may.

Twitter reviews thousands of pieces in the legal process, including the nondisclosure orders that goes with it; that's what this issue is about. It's about Twitter's First Amendment rights.

When this legal process came in with this nondisclosure order, as this Court noted, it is boilerplate.

THE COURT: Come on. Let's just cut through this.

Twitter gets NDOs a lot—

MR. VARGHESE: Yes, Your Honor.

THE COURT: —so it has to pick and choose: This is where we're going to stand up for our First Amendment rights and challenge a gag order on these particular cases, **[36]** and on these particular cases we're not.

So what is the criteria that Twitter uses?

MR. VARGHESE: It's whether or not they're facially valid, Your Honor.

THE COURT: Is it because the CEO wants to cozy up with the former President, and that's why you are here?

MR. VARGHESE: No, Your Honor. It's whether or not they are facially valid.

In this case, one of the arguments was flee from prosecution. As this Court has already noted, the former President of the United States, who has announced that he is rerunning for President, is not at flight from prosecution. Presumably, with his security detail, he is not fleeing.

Second, Your Honor—

THE COURT: And you didn't accept the other reasons?

MR. VARGHESE: The other reason is destruction of evidence, Your Honor. What we know about destruction of evidence in notifying Confederates is that this is the most publicly announced criminal investigation. The Attorney General of the United States had a press conference to announce Mr. Smith's appointment, as well as his mandate with respect to investigating the former President. It just doesn't ring true, Your Honor.

THE COURT: So the—Twitter's in—house counsel **[37]** states that: On occasion, we, Twitter, have challenged nondisclosure order orders whether in follow-up conversations with prosecutors or government officials or in court filings.

On how many occasions has Twitter challenged NDOs in court?

MR. VARGHESE: I don't know the exact number, Your Honor.

THE COURT: Does somebody at your table know?

MR. VARGHESE: I don't believe we have the exact number, Your Honor.

THE COURT: Okay. By 5 p.m. today, can you provide that list to me?

I want to know how often Twitter has challenged NDOs in court. I want case cites and docket numbers. If those orders are under seal, I would like you to tell me that; and I want to know the results.

MR. VARGHESE: Your Honor, if I may, I personally have called on behalf of Twitter two prosecutors and raised concerns about this.

THE COURT: I am not asking about whether you have had informal conversations. I am asking about court filings.

MR. VARGHESE: Yes, Your Honor.

THE COURT: Okay. So I just want to know **[38]** because—based on those court filings—perhaps I will be able to see what criteria Twitter is using to assert the rights of its users in court.

MR. VARGHESE: If I may, Your Honor.

So we have made informal calls where we had concerns about NDOs. And, oftentimes, prosecutors have agreed either to withdraw the NDO or to modify the NDO. Your Honor, that is the process that we go through.

THE COURT: What modifications did you want here?

As I understand it, your modification was to take out of the NDO "potential risk of flight by the President," although he does have properties overseas that would be probative.

What your demand of the government here was, was to provide advance notice of an otherwise covert warrant.

MR. VARGHESE: Your Honor, if I may, either to the user or to the user's representative, a representative of the user who could assert the user's interest in this issue. And Your Honor—

THE COURT: What user representative, when you are dealing with an individual and not a company, doesn't report directly to the user?

MR. VARGHESE: Well, the former—

THE COURT: So what are you talking about Mr. Varghese?

[39] MR. VARGHESE: The former President has designated certain individuals to act in his capacity with respect to his presidential records.

THE COURT: And they are lawyers who report directly to him, if they're still—to the extent that he designated any, if they're still working for him.

MR. VARGHESE: And so, for example, Your Honor—

THE COURT: There have been a lot of changes.

MR. VARGHESE: For example, Your Honor, this issue came up with Google and a warrant with respect to *The New York Times*. In that case, there was an accommodation made that allowed—that allowed Google to notify *The New York Times* general counsel but not the reporter whose records were being sought.

THE COURT: Because that was a company context here. We're dealing with an individual.

So how is that workable here?

MR. VARGHESE: Well, Your Honor, we would submit that the former President has identified certain individuals in his capacity for the office of the presidency.

THE COURT: Do you know if all of those people who were designated back on January—January 2021, are still working as his representatives vis-à-vis NARA?

MR. VARGHESE: Your Honor, I believe some of them are. There was an updated list that was provided to NARA **[40]** for people who could represent him, Your Honor. We can check on their exact employment status, but—

THE COURT: And you think that you could communicate with them, unlike company counsel, who could preserve secrecy that these are individuals designated by the former President who could preserve secrecy from the former president?

MR. VARGHESE: Well, if this Court ordered that—

THE COURT: And you have confidence, and you think the government should have confidence in that?

MR. VARGHESE: Well, if this Court ordered that representative—like what happened in the Google-New York Times case, if this Court ordered that representative not to disclose the existence of the warrant, but simply to assert whether or not any executive privilege would be at issue, I think it is a workable solution, yes, Your Honor.

THE COURT: Okay. Well, I would like the government to be prepared to respond to that potential alternative.

MR. VARGHESE: And, Your Honor, I have—I apologize.

THE COURT: So let's go to what Twitter's in-house counsel said, in the [REDACTED] declaration at paragraph 10, that NARA has a copy of the target account and much of the information called for in the warrant. So, of course, "much **[41]** of" is not all of the information called for in the warrant.

MR. VARGHESE: Yes, Your Honor.

THE COURT: So what is it that Twitter sent to NARA that—well, has Twitter sent information to NARA already?

MR. VARGHESE: Yes, Your Honor. But—

THE COURT: Okay. And what information is covered—required to be produced in the warrant that has not been produced to NARA?

MR. VARGHESE: Thank you, Your Honor.

The big difference between what is in Attachment B and what NARA has—

THE COURT: Attachment B, Part 1—

MR. VARGHESE: Part 1.

THE COURT: —of multiple parts that you have no idea about.

MR. VARGHESE: Yes, Your Honor.

—and what is being held by NARA currently and safely—the big difference is business records.

So Attachment B asked for the communications with Twitter about any service interruptions. It asked for communications—logs of service, length of service—these kinds of business records that Twitter has; that's not what is being held at NARA.

What is being held at NARA is the user's profile, **[42]** his tweets, including deleted tweets, images, videos, gifts attached to those tweets, his list of followers, direct messages, moments, mentions, replies; there is extensive information. And I will point out, Your Honor, what NARA is holding is from January 17th through

January 2021 [sic], a far longer time period than what the special counsel is offering.

In fact, the volume of information that is being held at NARA is much more significant than what is being requested in Attachment B. But the distinction, Your Honor, to be clear, are those Twitter business records, such as IP records, length of service records, credit card information—those kinds of business records. That's not what NARA was interested in, and that was not what was provided to NARA as part of the records collection, Your Honor.

If I may also take a step back and answer a question—

THE COURT: So you have already produced all of the user names, the date and time each user name was active, all associated accounts including those linked by machine, cookie, IP address, email address, or any of their account or device, records or information about connections with third-party websites and mobile app s whether active, expired, or removed?

[43] MR. VARGHESE: No, Your Honor.

Actually, Twitter doesn't maintain that information.

THE COURT: And in terms of information about devices used to log in or access the account?

MR. VARGHESE: That would not be at NARA, no, Your Honor.

THE COURT: Okay. And internet protocol addresses used to create, log in, or use the account, including dates, times, and port numbers?

MR. VARGHESE: No, Your Honor. That would have been—those are Twitter business records that would not have been produced to—

THE COURT: And privacy account settings, including change history?

MR. VARGHESE: No, Your Honor.

THE COURT: Communications between Twitter and any person regarding the account, including context with support services and records of actions taken?

MR. VARGHESE: No. That would be situations where you would report: My IP is not working, my access is not—

THE COURT: Okay. So in Attachment B, Part 1, nothing in paragraph 1 has been turned over by Twitter to NARA?

MR. VARGHESE: That's not what NARA requested, no, **[44]** Your Honor.

THE COURT: Got it.

And then paragraph 2 is: All content, records, and other information relating to communications, including the content of all tweets created, drafted, favorited, liked, or re-tweeted.

MR. VARGHESE: Yes, Your Honor. I believe most of that information would have been produced to NARA.

THE COURT: Most, or all?

MR. VARGHESE: Well, Your Honor—

THE COURT: If you don't know, you can just let me know, Mr. Varghese.

MR. VARGHESE: I don't know precisely if they're a complete overlap. But that is the type of information that was produced to NARA, so I just don't know if it's 100 percent accurate—complete, Your Honor.

THE COURT: So you don't know, okay.

We have got all of paragraph 1. We have got paragraph 2A, not necessarily produced to NARA.

And then, B: Content of all direct messages sent from, received by, stored in draft form in, or otherwise associated with the subject account including all attachments, multimedia, header information, metadata, and logs.

MR. VARGHESE: Again, Your Honor, direct messages **[45]** were provided to NARA.

THE COURT: And that means drafts also?

MR. VARGHESE: I don't know, Your Honor.

THE COURT: Okay. Well, somebody behind you knows.

(Whereupon, Twitter counsel confer.)

MR. VARGHESE: Everything that Twitter had in January of 2021 was provided to NARA with respect to the draft message.

THE COURT: Yes. But that's not my question.

My question was: Was everything—

MR. VARGHESE: I think to the extent—

THE COURT: —covered in paragraph 2B produced to NARA?

MR. VARGHESE: To the extent that Twitter had it, it was produced to NARA.

THE COURT: All right. In your briefing—I am not going to waste more time going up and down through this whole thing. But, clearly, I think the point has already been established that everything Twitter

produced to NARA is not covered—it's not a complete overlap with what was demanded in the warrant.

Okay. So even if it's correct, although I am not persuaded that the Presidential Records Act would require notice to the former President if the government did seek **[46]** from NARA all of this Twitter account information, why should Twitter be able to dictate to the government where it gets information for its investigation?

MR. VARGHESE: To be clear, Your Honor, Twitter is not trying to dictate to the government where it should get that information.

Twitter engaged in good—faith negotiations with the special counsel's office about the nondisclosure order in Twitter's own First Amendment rights. And as we were having discussions with Mr. Bernstein, we offered an alternative; that was the context in which NARA was raised. It was not saying go somewhere else.

THE COURT: Okay. So let's go right to that.

Twitter concedes it has no standing whatsoever to assert any privilege on behalf of the user of this account, correct?

MR. VARGHESE: That's correct, Your Honor.

THE COURT: All right. And so—but you are saying that you do have standing to assert a First Amendment right here under the—

MR. VARGHESE: That's correct.

THE COURT: —nondisclosure order?

MR. VARGHESE: That's correct, Your Honor. And it's an important First Amendment right. It's the right to communicate with our users that's being

restrained by the **[47]** special counsel's office, and that was the basis for reaching out to them, Your Honor.

THE COURT: But you want to exercise that First Amendment right here, the reason—what is animating your assertion of the First Amendment right here is because you believe that there are these unique constitutional issues associated with this user and this user account because of what Twitter perceives to be an executive privilege, difficult and challenging issue.

So what is it about the executive privilege issues that Twitter sees here that Twitter believes differentiates it from other privileges that any Twitter user might have?

I mean, the government has made what I think is a very accurate statement, that this is—Twitter's intervention here is quite momentous, I think is the word the government used.

So why isn't it momentous if Twitter can pop up—take up all of my time, and every district court judge across the country's time—to intervene, to stop compliance—not just with warrants in investigations of this significance, but even in a request for subscriber information or any other use of Stored Communications Act authorities to say: Whoops, there might be a privilege there, we want to alert the user of that account that we're about to turn over information about the account user to the **[48]** government so that they can have an opportunity to step in?

You are not doing that for everybody.

MR. VARGHESE: No, Your Honor.

THE COURT: And you are not doing it for every privilege.

MR. VARGHESE: No, Your Honor.

THE COURT: So what is it about executive privilege or this user or this user account that makes Twitter stand before me today?

MR. VARGHESE: Your Honor, there's two things that make this case unusual, which is what brought us here. First, we had a facially invalid NDO in our view based on the way that we read it and what we know about this investigation.

THE COURT: Which is not much, to be honest. You don't even know the half about the very warrant you are coming in here to delay execution of.

MR. VARGHESE: Understood, Your Honor. However, we also know—

THE COURT: I hope you do understand.

MR. VARGHESE: Of course, Your Honor. But what we also know is saying: Risk of flight for a former President of the United States doesn't make a lot of sense.

Second, Your Honor—

THE COURT: I would agree with that.

[49] MR. VARGHESE: Thank you, Your Honor. That raises concerns for us.

Then, when we looked at the underlying substantive issue, Your Honor, this is the first time in our knowledge that private presidential communications held by a third party were being demanded by the government through a warrant without any notice to that former occupant. We were not aware of another time ever where that has happened.

THE COURT: Well, you did not read the Mueller report very carefully.

MR. VARGHESE: Yes, Your Honor.

THE COURT: Because the Mueller report talks about the hundreds of Stored Communications Act—let me quote. Let's see.

The Mueller report states that: As part of its investigation, they issued more than 2800 subpoenas under the auspices of the grand jury in the District of Columbia. They executed nearly 500 search and seizure warrants, obtained more than 230 orders for communications records under 18 U.S.C. Section 2703(d); and then it goes on and on and on for all of the other things they did.

And some of those communications included the former President's private and public messages to General Flynn, encouraging him to "Stay strong," and conveying that the President still cared about him, before he began to **[50]** cooperate with the government.

So what makes Twitter think that, before the government obtained and reviewed those Trump—Flynn communications, the government provided prior notice to the former President so that he can assert executive privilege?

MR. VARGHESE: My understanding, Your Honor, is that the Mueller investigators were in contact with the White House counsel's office about executive privilege concerns.

THE COURT: You quoted the one part that said that, and that was for testimony, testimony, where it was not covert.

MR. VARGHESE: Yes, Your Honor.

THE COURT: You need to read the Mueller report a little bit more carefully.

MR. VARGHESE: Yes, Your Honor. Our—

THE COURT: You think that for 230 orders, 2800 subpoenas, and 500 search and seizure warrants the Mueller team gave advance notice to the former President of what they were about?

MR. VARGHESE: I don't know that, Your Honor.

THE COURT: You do not know that.

MR. VARGHESE: But what I believe was that there was consultation with the White House about the scope of executive privilege, that's my understanding.

[51] THE COURT: When it came to testimony for the obvious reason, that that was not covert.

MR. VARGHESE: Yes, Your Honor.

THE COURT: All right.

MR. VARGHESE: So if I may finish your question, though, Your Honor.

THE COURT: Do you understand—

MR. VARGHESE: Yes, Your Honor.

THE COURT: —that it is only with respect to the speech and debate clause privilege that the D.C. Circuit, alone, of all of the circuits, has said that there is a nondisclosure component to that privilege that requires the privilege holder to have the opportunity to review the materials before it is reviewed by prosecutors?

MR. VARGHESE: Yes, Your Honor.

THE COURT: And no such nondisclosure attribute has ever, as government counsel said, been attached to the exercise of executive privilege.

And do you know why it is that the D.C. Circuit in *Rayburn* said that there was a nondisclosure aspect to the speech or debate clause privilege?

MR. VARGHESE: No, Your Honor.

THE COURT: Well, let me advise you.

It was because of separation of powers concerns; Congress being investigated by the executive branch. So **[52]** that before prosecutors sitting in the executive branch could see potentially privileged under speech or debate clause material, they had to give the privilege holder the opportunity to review it all because of separation of powers concerns. And here I have the executive branch looking at executive branch materials; it is not the same thing.

MR. VARGHESE: Your Honor—

THE COURT: So I don't know how it is that you think that the same nondisclosure, advance notice to the privilege holder requirement applies here. It is not looking at the full scope of privilege law as it has developed in this circuit.

And I find it very ironic you are relying on *Nixon v Administrator of General Services*, this 1977 Supreme Court case. But in that case, didn't the Supreme Court—to the point that I was talking about in terms of speech or debate clause and its differences with executive privilege—hold that the GSA administrator could take custody of and review recordings and documents created by President Nixon?

MR. VARGHESE: It did, Your Honor. But it did not accept that principle that: Oh, this is all within the executive branch; that was not the basis for that decision. It was a multifactored fact-intensive inquiry.

What they said was that we feel comfortable that the archivist can review this material.

[53] THE COURT: Yes. Because GSA is himself an official of the executive branch, and that GSA's career archivists are, likewise, executive branch employees.

MR. VARGHESE: But that was not the end of the inquiry, Your Honor. That is a 45-year-old opinion that the special counsel's office is holding on to to make a bright-line rule that says that they are allowed to look at everything in the executive branch, and that is simply—

THE COURT: What Twitter's position here is that the same separation of powers concerns that animated the nondisclosure aspect to the speech or debate clause, meaning the privilege holder needed to obtain advance notice, should apply here—

MR. VARGHESE: No, Your Honor.

THE COURT: —to assertion of executive privilege? And all Twitter is doing here is it's holding up what it views should be the state of the law for executive privilege?

MR. VARGHESE: No, Your Honor.

Twitter does not take a position on what the scope and the contours of executive privilege are. But note that that is not a well-defined space. And all we are asking for—

THE COURT: It's much better defined than you think.

[54] MR. VARGHESE: Your Honor, if I may, one of the things that we don't know about is derivative use. What if the special counsel's office uses that—

THE COURT: What are you talking about with "derivative use"?

MR. VARGHESE: I can explain, Your Honor.

THE COURT: I read that, and I really wanted to know what you are talking about.

MR. VARGHESE: I can explain, Your Honor.

THE COURT: Sure.

MR. VARGHESE: If, for example—assuming for a second there is executive privilege materials in the account—

THE COURT: Which, of course, you have zero idea about.

MR. VARGHESE: I can come back to that question, Your Honor.

THE COURT: No. Deal with it right now.

You have zero idea about executive privilege communications in this Twitter account.

MR. VARGHESE: Twitter does not review the contents of its users' accounts.

THE COURT: You have no idea?

MR. VARGHESE: But I can say there are confidential communications associated with the account.

[55] THE COURT: And how do you know that?

MR. VARGHESE: So, Your Honor, we went back—because this was an important issue for us to compare, whether or not there were potentially confidential communications in the account, and we were able to confirm that.

THE COURT: How?

MR. VARGHESE: So, Your Honor, there was a way that we compared the size of what a storage would be for DMs empty versus the size of storage if there were DMs in the account. And we were able to determine that there was some volume in that for this account. So there are confidential communications. We don't know the context of it, we don't know—

THE COURT: They are direct messages. What makes you think—do you think that everything that a President says, which is generically a presidential communication, is subject to the presidential communications privilege?

MR. VARGHESE: No, Your Honor.

THE COURT: Is that the basis of this? You have a total misunderstanding of what the presidential communications privilege is?

MR. VARGHESE: No, Your Honor. No, Your Honor, that's not my understanding.

THE COURT: So what—I don't understand your **[56]** argument, Mr. Varghese.

MR. VARGHESE: My argument simply, Your Honor, is the user may have an interest in these communications, and asserting that privilege. It's not Twitter's interest.

THE COURT: Having an interest is a very different thing from saying something is privileged—

MR. VARGHESE: It might be.

THE COURT: —under the executive privilege or the presidential communications privilege. Would you concede that?

MR. VARGHESE: Yes, Your Honor. But it's not my privilege to assert. It's not Twitter's privilege to assert. All we're simply trying to do is exercise our First Amendment rights to notify the user so the user may assert that privilege if he chooses.

But getting back to the derivative point, Your Honor, if I may.

THE COURT: Yes.

MR. VARGHESE: The point of the derivative argument is if—the special counsel's office is using these materials before the grand jury, which is an organ of this court, or using them in warrant affidavits—

THE COURT: Well, actually, grand jury is a, actually, a totally independent body from any branch of government.

[57] MR. VARGHESE: But certainly not the executive branch, Your Honor. Also, we would say—

THE COURT: The grand jury is independent of—

MR. VARGHESE: That's right, Your Honor.

THE COURT: —of every branch of government, including the executive branch.

MR. VARGHESE: Yes, Your Honor. And that's precisely why the executive privilege wouldn't be protected in that case, or if the material is put into an affidavit and shown before a judge to get another warrant, that would also vitiate the privilege it would seem. Also, if it was being used in interviews with witnesses—

THE COURT: So what is it about—so this is the confusion here, Mr. Varghese.

MR. VARGHESE: Yes, Your Honor.

THE COURT: That you want to treat the executive privilege like the speech or debate clause without any of the same foundational predicates for that because material obtained covertly by the government that is potentially privileged is, typically, subject to a filter review protocol to identify that and get judicial rulings on that; and that's how it's normally dealt with, use of a filter team.

But what you are saying is executive privilege can't be dealt with that way; it has to, instead, use a **[58]** protocol similar to that required by the D.C. Circuit in my reading. But the D.C. Circuit is going to consider that, I would hope, and say that advance notice has to be given to the privilege holder to debate it.

MR. VARGHESE: No, Your Honor, that is not my position.

THE COURT: That is exactly what you are saying. Why are you fighting that?

MR. VARGHESE: Because, Your Honor, I am not saying what the right way is for executive privilege to be treated.

THE COURT: Aren't you saying that advance notice has to be given to the user of the account here? I thought that was the whole reason we're here.

MR. VARGHESE: Your Honor, if I may, what I am trying to say is that it is ill defined. The contours of how executive privilege works is ill defined. The only case the special counsel's office is looking to is a 45-year-old Supreme Court case.

THE COURT: And, as a consequence, isn't it Twitter's position, yes or no, that advance notice to a privilege holder of the executive privilege must be given before Twitter can turn over the warrant returns?

MR. VARGHESE: Your Honor, our position—

THE COURT: Yes or no? Is that your position or **[59]** not?

MR. VARGHESE: We would like to notify the user as per our First Amendment rights.

THE COURT: So, yes, that's your position?

MR. VARGHESE: We would like to notify the user per our First Amendment rights.

THE COURT: I am interpreting that as a "yes." I don't know why you can't say "yes," it's a puzzle to me.

MR. VARGHESE: Yes, Your Honor.

THE COURT: It's very frustrating.

MR. VARGHESE: I apologize, Your Honor.

THE COURT: I try to be direct, and I don't understand why you are not being direct. But—yes.

And I am telling you—why, for the executive privilege, does Twitter believe that such advance notice is required when, for every other privilege except speech or debate clause, it is not?

MR. VARGHESE: It's because it is ill defined. There is no controlling law in this area, and we believe the user has the right to litigate this issue; that's it, Your Honor.

We have a First Amendment right to notify—

THE COURT: Even though the entire Mueller report, with hundreds of search warrants, thousands of subpoenas—the only time the two-volume Mueller report ever talks about **[60]** ever alerting the White House counsel is where it wasn't covert it was overt, because they were seeking potentially privileged information

from a grand jury witness. But, nonetheless, you think it's never been done before?

MR. VARGHESE: There is no published opinion, Your Honor, that lays out the contours of executive privilege beyond this 45-year-old opinion, which we do not necessarily think is on point.

THE COURT: Okay. It couldn't be that Twitter is trying to make up for the fact that it kicked Donald Trump off Twitter for some period of time that it now is standing up to protect First Amendment rights here, is it?

MR. VARGHESE: No, Your Honor.

THE COURT: Because it's a little bit of an ironic position, don't you think?

MR. VARGHESE: No, Your Honor. This is based on the facially invalid NDO.

THE COURT: Is this to make Donald Trump feel like he is a particularly welcomed new renewed user of Twitter here?

MR. VARGHESE: Twitter has no interest other than litigating its constitutional rights, Your Honor.

THE COURT: And how does requiring compliance with the search warrant here actually implicate Twitter's First Amendment rights which are only at issue with the gag order?

[61] MR. VARGHESE: Your Honor, the issue is about whether or not that speech is meaningful.

We have a right to speak. There is a difference—and timing of that speech is critical, and so we would like to provide meaningful notice to the user prior to the review by the government.

We still have a First Amendment right, to be clear, to speak to the user afterwards; but we think that that message is stronger and more meaningful if we have an opportunity to convey that message beforehand.

THE COURT: So I didn't see it, but this has been on a fairly quick turnaround given the ten-day delay already in compliance with the warrant. But has Twitter found any court decision in which a third-party company, like Twitter, has successfully stayed compliance with a search warrant pending a First Amendment challenge to a nondisclosure order?

MR. VARGHESE: No, Your Honor, not an NDO.

THE COURT: And would Twitter acknowledge that there is an ongoing harm to the government and the public by continued failure to comply with the search warrant? And if Twitter had its way, that would—there would be no execution of this search warrant until after completion of briefing and resolution of its challenge to the NDO. Would you acknowledge that that delay would take us, wow, for a **[62]** month?

MR. VARGHESE: No, Your Honor.

We proposed a briefing schedule that was five days. We were having a briefing schedule that would be done by the end of this week—by the end of next—next week, I believe. And, therefore, Your Honor, we tried to accommodate the government's concerns. It has never been Twitter's position that we are seeking to delay the government's investigation.

We are trying to vindicate our First Amendment right; that is all. So we tried to work around the government's expedited schedule.

I should also note, Your Honor—you mentioned the ten-day delay. Let me just address that for a second.

When Mr. Bernstein talked to [REDACTED], counsel, on January 27th, he acknowledged that we were wrestling through these issues. He said: Can we please talk about realistic dates for completion, for execution? He recognized that we were going through these issues. We thought we were having a good-faith discussion. And to say that we have just been sitting on this and trying to upset both the court and the special counsel's office is factually inaccurate, Your Honor.

We were trying to work through these issues. We have talked to Mr. Bernstein—

[63] THE COURT: Let me just be clear. I really—I take offense when lawyers try and attribute to me certain feelings—

MR. VARGHESE: I apologize, Your Honor.

THE COURT: —that are totally—totally off course. So I am not upset.

I am trying to puzzle over the arguments to make sense of them when there is zero case law and support of Twitter's arguments.

MR. VARGHESE: I apologize, Your Honor. I didn't mean upsetting in the emotion sense. I meant upsetting the Court's deadline or the special counsel's investigation; that is not our goal, Your Honor.

Our goal was to engage in good-faith negotiations, which we thought we were doing with Mr. Bernstein.

THE COURT: Okay. Can Twitter produce the warrant returns by 5 p.m. today?

MR. VARGHESE: I believe we are prepared to do that. Yes, Your Honor.

THE COURT: Good. Anything further?

MR. VARGHESE: Your Honor, we have a draft—we have an order that was issued in the Google case, if you want to observe how they did it, allowing *The New York Times*—

THE COURT: I don't need to look and see what the **[64]** Southern District of New York judge did.

MR. VARGHESE: Thank you, Your Honor.

I have nothing further.

THE COURT: Any reply?

MR. BERNSTEIN: No, Your Honor.

THE COURT: All right. I am going to grant the government's motion for an order to show cause why Twitter should not be held in contempt. I am just going to summarize my reasons here.

When I deal with the nondisclosure order challenge I may elaborate on these reasons more fulsomely. But given the fact that Twitter will have until 5:00 p.m. today to produce the warrant returns to the government, I think I am going to keep my remarks fairly brief.

As an initial matter, the government has satisfied all three requirements for finding contempt here. There was a clear and unambiguous court order in place; that order required certain conduct by the respondent, the respondent failed to comply with the order. *See U.S. v Latney's Funeral Home*, 41 F. Supp. 3d 24, jump cite 30, D.D.C. from 2014.

The search warrant was issued on January 17, 2023. It was an unambiguous court order requiring Twitter to comply with production of the specified records in Attachment B, Part 1, by January 7, 2023. Twitter did not **[65]** comply.

Twitter doesn't contest those findings in its opposition. Instead, it asserts that it has promptly and expeditiously sought to comply with the warrant and has acted in good faith and with alacrity. But Twitter's good faith does not matter for the purpose of finding it in contempt because a finding of bad faith on the part of the contemnor is not required. *See Food Lion, Inc. v United Food and Commercial Workers*, a D.C. Circuit case from 1997.

Twitter's defense is that producing the requested information prior to allowing it the opportunity to alert the former President would irreparably injure its First Amendment rights and eliminate any potential remedy for the former President. If accepted, Twitter's argument would invite intervention by Twitter—let alone every other electronic communications provider—to delay execution of any order, let alone warrants, issued under the Stored Communications Act based on the provider's belief, knowing slivers, slivers of what is required for execution of the warrant—slivers of knowledge of the scope of an investigation. But they would, nonetheless, step forward to frustrate execution of orders across the country based on their perceived view that their user's potential privilege rights at issue.

The government calls the practical consequences of **[66]** adopted Twitter's amorphous standards "momentous," and I agree. There is simply no support for Twitter's position.

Twitter concedes it doesn't have standing to assert President Trump's claims of executive privilege. And any merit to the former President's potential executive privilege claims need not be addressed here because Twitter lacks standing to assert them or fully brief them. Twitter has no defense for its failure to comply with the search warrant.

As the Southern District of New York explained in *Google v United States*, any challenge to a NDO is separate from a challenge to a search warrant because any further delay on the production of the materials responsive to the warrant increases the risk that evidence will be lost or destroyed, heightens the chance the targets will learn of the investigation, and jeopardizes the government's ability to bring any prosecution in a timely fashion. The public interest is served by prompt compliance with the warrant, 443 F. Supp. 3d 447, 455, SDNY, 2020.

Twitter's insistence that its First Amendment challenge to the NDO must be resolved prior to its compliance with the search warrant are rejected.

Twitter is directed to comply with the warrant by 5 p.m. today. Should Twitter fail to comply, I agree with the government that escalating daily fines are appropriate. **[67]** If Twitter fails to comply, the fines are civil, designed to ensure Twitter complies with the search warrant. They are not punitive to punish Twitter for its failure thus far to comply.

Considering that Twitter was purchased for over $40 billion, and the sole owner is worth over $180 billion, a hefty fine is appropriate here. If Twitter does not comply with the warrant by 5 p.m. today, it will be fined $50,000, and that fine will double every day thereafter.

So accordingly—and part of my consideration for the size of the fine and the need to get this moving is because Twitter is delaying a special counsel investigation into whether any person or entity violated the law in connection with efforts to interfere with the lawful transfer of power following the 2020 presidential election or the certification of the Electoral College vote held

on January 6, 2021, and other matters of vital national importance. This delay is going to stop now.

Upon consideration of the government's motion for an order to show cause, docketed at ECF No. 5 in the record herein, it's hereby ordered that the government's motion is granted.

It is further ordered that Twitter comply with the search and seizure warrant, which itself required compliance by January 27, 2023, by today at 5 p.m.

[68] It is further ordered that Twitter shall be held in contempt if it fails to comply with this order by 5 p.m. today.

It is further ordered that Twitter shall be fined $50,000 each day; a fine amount that shall double every day for failure to comply with the order, with that fine payable to the Clerk of this court.

Is there anything further today since we already have a schedule for further briefing on the NDO?

MR. BERNSTEIN: No, Your Honor.

THE COURT: From Twitter?

MR. VARGHESE: No, Your Honor. Thank you.

THE COURT: You are all excused.

(Whereupon, the proceeding concludes, 3:03 p.m.)

* * * * *

CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

This certificate shall be considered null and void if the transcript is disassembled and/or photocopied in any manner by any party without authorization of the signatory below.

Dated this 11th day of February, 2023.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

APPENDIX H

RELEVANT CONSTITUTIONS, STATUTES, REGULATIONS

U.S. CONST. AMEND. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 U.S.C. § 2703

§ 2703. Required disclosure of customer communications or records

(a) Contents of wire or electronic communications in electronic storage.—A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures and, in the case of a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President) by a court of competent jurisdiction. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) Contents of wire or electronic communications in a remote computing service.—(1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection—

> **(A)** without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a

State court, issued using State warrant procedures and, in the case of a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President) by a court of competent jurisdiction; or

(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity—

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.

(2) Paragraph (1) is applicable with respect to any wire or electronic communication that is held or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

(c) Records concerning electronic communication service or remote computing service.—(1) A

governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures and, in the case of a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President) by a court of competent jurisdiction;

(B) obtains a court order for such disclosure under subsection (d) of this section;

(C) has the consent of the subscriber or customer to such disclosure;

(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section 2325 of this title); or

(E) seeks information under paragraph (2).

(2) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the—

(A) name;

(B) address;

(C) local and long distance telephone connection records, or records of session times and durations;

(D) length of service (including start date) and types of service utilized;

(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) means and source of payment for such service (including any credit card or bank account number),

of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1).

(3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

(d) Requirements for court order.—A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such

order otherwise would cause an undue burden on such provider.

(**e) No cause of action against a provider disclosing information under this chapter.**—No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter.

(f) Requirement to preserve evidence.—

(1) In general.—A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.

(2) Period of retention.—Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

(g) Presence of officer not required.—Notwithstanding section 3105 of this title, the presence of an officer shall not be required for service or execution of a search warrant issued in accordance with this chapter requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.

(h) Comity analysis and disclosure of information regarding legal process seeking contents of wire or electronic communication.—

(1) Definitions.—In this subsection—

(A) the term "qualifying foreign government" means a foreign government—

(i) with which the United States has an executive agreement that has entered into force under section 2523; and

(ii) the laws of which provide to electronic communication service providers and remote computing service providers substantive and procedural opportunities similar to those provided under paragraphs (2) and (5); and

(B) the term "United States person" has the meaning given the term in section 2523.

(2) Motions to quash or modify.—(A) A provider of electronic communication service to the public or remote computing service, including a foreign electronic communication service or remote computing service, that is being required to disclose pursuant to legal process issued under this section the contents of a wire or electronic communication of a subscriber or customer, may file a motion to modify or quash the legal process where the provider reasonably believes—

(i) that the customer or subscriber is not a United States person and does not reside in the United States; and

(ii) that the required disclosure would create a material risk that the provider would violate the laws of a qualifying foreign government.

Such a motion shall be filed not later than 14 days after the date on which the provider was served with the legal process, absent agreement with the

government or permission from the court to extend the deadline based on an application made within the 14 days. The right to move to quash is without prejudice to any other grounds to move to quash or defenses thereto, but it shall be the sole basis for moving to quash on the grounds of a conflict of law related to a qualifying foreign government.

(B) Upon receipt of a motion filed pursuant to subparagraph (A), the court shall afford the governmental entity that applied for or issued the legal process under this section the opportunity to respond. The court may modify or quash the legal process, as appropriate, only if the court finds that—

(i) the required disclosure would cause the provider to violate the laws of a qualifying foreign government;

(ii) based on the totality of the circumstances, the interests of justice dictate that the legal process should be modified or quashed; and

(iii) the customer or subscriber is not a United States person and does not reside in the United States.

(3) Comity analysis.—For purposes of making a determination under paragraph (2)(B)(ii), the court shall take into account, as appropriate—

(A) the interests of the United States, including the investigative interests of the governmental entity seeking to require the disclosure;

(B) the interests of the qualifying foreign government in preventing any prohibited disclosure;

(C) the likelihood, extent, and nature of penalties to the provider or any employees of the provider as a

result of inconsistent legal requirements imposed on the provider;

(D) the location and nationality of the subscriber or customer whose communications are being sought, if known, and the nature and extent of the subscriber or customer's connection to the United States, or if the legal process has been sought on behalf of a foreign authority pursuant to section 3512, the nature and extent of the subscriber or customer's connection to the foreign authority's country;

(E) the nature and extent of the provider's ties to and presence in the United States;

(F) the importance to the investigation of the information required to be disclosed;

(G) the likelihood of timely and effective access to the information required to be disclosed through means that would cause less serious negative consequences; and

(H) if the legal process has been sought on behalf of a foreign authority pursuant to section 3512, the investigative interests of the foreign authority making the request for assistance.

(4) Disclosure obligations during pendency of challenge.—A service provider shall preserve, but not be obligated to produce, information sought during the pendency of a motion brought under this subsection, unless the court finds that immediate production is necessary to prevent an adverse result identified in section 2705(a)(2).

(5) Disclosure to qualifying foreign government.—(A) It shall not constitute a violation of a protective

order issued under section 2705 for a provider of electronic communication service to the public or remote computing service to disclose to the entity within a qualifying foreign government, designated in an executive agreement under section 2523, the fact of the existence of legal process issued under this section seeking the contents of a wire or electronic communication of a customer or subscriber who is a national or resident of the qualifying foreign government.

(B) Nothing in this paragraph shall be construed to modify or otherwise affect any other authority to make a motion to modify or quash a protective order issued under section 2705.

18 U.S.C. § 2705

§ 2705. Delayed notice

(a) Delay of notification.—(1) A governmental entity acting under section 2703(b) of this title may—

(A) where a court order is sought, include in the application a request, which the court shall grant, for an order delaying the notification required under section 2703(b) of this title for a period not to exceed ninety days, if the court determines that there is reason to believe that notification of the existence of the court order may have an adverse result described in paragraph (2) of this subsection; or

(B) where an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury subpoena is obtained, delay the notification required under section 2703(b) of this title for a period not to exceed ninety days upon the execution of a written certification of a supervisory official that there is reason to believe that notification of the existence of the subpoena may have an adverse result described in paragraph (2) of this subsection.

(2) An adverse result for the purposes of paragraph (1) of this subsection is—

(A) endangering the life or physical safety of an individual;

(B) flight from prosecution;

(C) destruction of or tampering with evidence;

(D) intimidation of potential witnesses; or

(E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(3) The governmental entity shall maintain a true copy of certification under paragraph (1)(B).

(4) Extensions of the delay of notification provided in section 2703 of up to ninety days each may be granted by the court upon application, or by certification by a governmental entity, but only in accordance with subsection (b) of this section.

(5) Upon expiration of the period of delay of notification under paragraph (1) or (4) of this subsection, the governmental entity shall serve upon, or deliver by registered or first-class mail to, the customer or subscriber a copy of the process or request together with notice that—

(A) states with reasonable specificity the nature of the law enforcement inquiry; and

(B) informs such customer or subscriber—

(i) that information maintained for such customer or subscriber by the service provider named in such process or request was supplied to or requested by that governmental authority and the date on which the supplying or request took place;

(ii) that notification of such customer or subscriber was delayed;

(iii) what governmental entity or court made the certification or determination pursuant to which that delay was made; and

(iv) which provision of this chapter allowed such delay.

(6) As used in this subsection, the term "supervisory official" means the investigative agent in charge or assistant investigative agent in charge or an equivalent of an

investigating agency's headquarters or regional office, or the chief prosecuting attorney or the first assistant prosecuting attorney or an equivalent of a prosecuting attorney's headquarters or regional office.

(b) Preclusion of notice to subject of governmental access.—A governmental entity acting under section 2703, when it is not required to notify the subscriber or customer under section 2703(b)(1), or to the extent that it may delay such notice pursuant to subsection (a) of this section, may apply to a court for an order commanding a provider of electronic communications service or remote computing service to whom a warrant, subpoena, or court order is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order. The court shall enter such an order if it determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in—

(1) endangering the life or physical safety of an individual;

(2) flight from prosecution;

(3) destruction of or tampering with evidence;

(4) intimidation of potential witnesses; or

(5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

44 U.S.C. § 2204

§ 2204. Restrictions on access to Presidential records

(a) Prior to the conclusion of a President's term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record, within one or more of the following categories:

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relating to appointments to Federal office;

(3) specifically exempted from disclosure by statute (other than sections 552 and 552b of title 5, United States Code), provided that such statute (A) requires that the material be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of material to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) confidential communications requesting or submitting advice, between the President and the President's advisers, or between such advisers; or

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(b)(1) Any Presidential record or reasonably segregable portion thereof containing information within a category restricted by the President under subsection (a) shall be so designated by the Archivist and access thereto shall be restricted until the earlier of—

> **(A)(i)** the date on which the former President waives the restriction on disclosure of such record, or
>
> **(ii)** the expiration of the duration specified under subsection (a) for the category of information on the basis of which access to such record has been restricted; or
>
> **(B)** upon a determination by the Archivist that such record or reasonably segregable portion thereof, or of any significant element or aspect of the information contained in such record or reasonably segregable portion thereof, has been placed in the public domain through publication by the former President, or the President's agents.

(2) Any such record which does not contain information within a category restricted by the President under subsection (a), or contains information within such a category for which the duration of restricted access has expired, shall be exempt from the provisions of subsection (c) until the earlier of—

> **(A)** the date which is 5 years after the date on which the Archivist obtains custody of such record pursuant to section 2203(d)(1);[1] or

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[1] So in original. Probably should be "2203(g)(1);".

(B) the date on which the Archivist completes the processing and organization of such records or integral file segment thereof.

(3) During the period of restricted access specified pursuant to subsection (b)(1), the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in the Archivist's discretion, after consultation with the former President, and, during such period, such determinations shall not be subject to judicial review, except as provided in subsection (e) of this section. The Archivist shall establish procedures whereby any person denied access to a Presidential record because such record is restricted pursuant to a determination made under this paragraph, may file an administrative appeal of such determination. Such procedures shall provide for a written determination by the Archivist or the Archivist's designee, within 30 working days after receipt of such an appeal, setting forth the basis for such determination.

(c)(1) Subject to the limitations on access imposed pursuant to subsections (a) and (b), Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of withholding any Presidential record, and for the purposes of such section such records shall be deemed to be records of the National Archives and Records Administration. Access to such records shall be granted on nondiscriminatory terms.

(2) Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.

(d) Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter, except section 2208, shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist.

(e) The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.

(f) The Archivist shall not make available any original Presidential records to any individual claiming access to any Presidential record as a designated representative under section 2205(3) of this title if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives.

44 U.S.C. § 2205

§ 2205. Exceptions to restricted access

Notwithstanding any restrictions on access imposed pursuant to sections 2204 and 2208 of this title—

(1) the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to Presidential records in the custody of the Archivist;

(2) subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available—

(A) pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;

(B) to an incumbent President if such records contain information that is needed for the conduct of current business of the incumbent President's office and that is not otherwise available; and

(C) to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available; and

(3) the Presidential records of a former President shall be available to such former President or the former President's designated representative.

44 U.S.C. § 2206

§ 2206. Regulations

The Archivist shall promulgate in accordance with section 553 of title 5, United States Code, regulations necessary to carry out the provisions of this chapter. Such regulations shall include—

(1) provisions for advance public notice and description of any Presidential records scheduled for disposal pursuant to section 2203(f)(3);

(2) provisions for providing notice to the former President when materials to which access would otherwise be restricted pursuant to section 2204(a) are to be made available in accordance with section 2205(2);

(3) provisions for notice by the Archivist to the former President when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have; and

(4) provisions for establishing procedures for consultation between the Archivist and appropriate Federal agencies regarding materials which may be subject to section 552(b)(7) of title 5, United States Code.

36 C.F.R. § 1270.44

§ 1270.44 Exceptions to restricted access.

(a) Even when a President imposes restrictions on access under § 1270.40, NARA still makes Presidential records of former Presidents available in the following instances, subject to any rights, defenses, or privileges which the United States or any agency or person may invoke:

(1) To a court of competent jurisdiction in response to a properly issued subpoena or other judicial process, for the purposes of any civil or criminal investigation or proceeding;

(2) To an incumbent President if the President seeks records that contain information they need to conduct current Presidential business and the information is not otherwise available;

(3) To either House of Congress, or to a congressional committee or subcommittee, if the congressional entity seeks records that contain information it needs to conduct business within its jurisdiction and the information is not otherwise available; or

(4) To a former President or their designated representative for access to the Presidential records of that President's administration, except that the Archivist does not make any original Presidential records available to a designated representative that has been convicted of a crime that involves reviewing, retaining, removing, or destroying NARA records.

(b) The President, either House of Congress, or a congressional committee or subcommittee must request the records they seek under paragraph (a) of this section

from the Archivist in writing and, where practicable, identify the records with reasonable specificity.

(c) The Archivist promptly notifies the President (or their representative) during whose term of office the record was created, and the incumbent President (or their representative) of a request for records under paragraph (a) of this section.

(d) Once the Archivist notifies the former and incumbent Presidents of the Archivist's intent to disclose records under this section, either President may assert a claim of constitutionally based privilege against disclosing the record or a reasonably segregable portion of it within 30 calendar days after the date of the Archivist's notice. The incumbent or former President must personally make any decision to assert a claim of constitutionally based privilege against disclosing a Presidential record or a reasonably segregable portion of it.

(e) The Archivist does not disclose a Presidential record or reasonably segregable part of a record if it is subject to a privilege claim asserted by the incumbent President unless:

> **(1)** The incumbent President withdraws the privilege claim; or
>
> **(2)** A court of competent jurisdiction directs the Archivist to release the record through a final court order that is not subject to appeal.

(f)(1) If a former President asserts the claim, the Archivist consults with the incumbent President, as soon as practicable and within 30 calendar days from the date that the Archivist receives notice of the claim, to determine whether the incumbent President will uphold the claim.

(2) If the incumbent President upholds the claim asserted by the former President, the Archivist does not disclose the Presidential record or a reasonably segregable portion of the record unless:

(i) The incumbent President withdraws the decision upholding the claim; or

(ii) A court of competent jurisdiction directs the Archivist to disclose the record through a final court order that is not subject to appeal.

(3) If the incumbent President does not uphold the claim asserted by the former President, fails to decide before the end of the 30-day period detailed in paragraph (f)(1) of this section, or withdraws a decision upholding the claim, the Archivist discloses the Presidential record 60 calendar days after the Archivist received notification of the claim (or 60 days after the withdrawal) unless a court order in an action in any Federal court directs the Archivist to withhold the record, including an action initiated by the former President under 44 U.S.C. 2204(e).

(g) The Archivist may adjust any time period or deadline under this subpart, as appropriate, to accommodate records requested under this section.