No. 23-1264

IN THE

Supreme Court of the United States

X CORP., FKA TWITTER, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PETITIONER

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Electronic Frontier Foundation ("EFF") is a member-supported, nonprofit civil liberties organization that has worked for more than 30 years to protect innovation, free expression, and civil liberties in the digital world. On behalf of its over 30,000 dues-paying members, EFF ensures that users' interests are presented to courts considering crucial online free speech issues, including their right to transmit and receive information online. EFF has appeared in this Court as amicus in cases involving constitutional challenges to government surveillance and other restrictions on free expression. *See*, *e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018) (citing EFF's amicus brief); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (same).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from Twitter's[2] attempts to modify a nondisclosure order issued under 18 U.S.C. § 2705, preventing Twitter from notifying anyone about a

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1. Pursuant to Sup. Ct. R. 37.2, EFF notified the counsel of record for the parties that it intended to file this brief at least 10 days before its filing. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, or its counsel, made a monetary contribution intended to fund its preparation or submission.

2. We follow the D.C. Circuit's use of "Twitter" to refer to X Corp. *In re Sealed Case*, 77 F.4th 815, 821 n.1 (D.C. Cir. 2023).

search warrant for data related to the user account @RealDonaldTrump.

In barring Twitter from speaking before that speech occurred, the nondisclosure order acted as a quintessential prior restraint, "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (cleaned up). Unlike the "threat of criminal or civil sanctions after publication," which "chills" speech, prior restraints entirely "freeze" speech for their duration, *Nebraska Press*, 427 U.S. at 559.

Breaking with bedrock First Amendment precedent from this Court and prior rulings of the Courts of Appeals, including its own precedent, the D.C. Circuit made two doctrinal errors. First, although the D.C. Circuit held that strict scrutiny applied to the nondisclosure order, its application did not resemble the "most exacting scrutiny" accorded to prior restraints. *Smith v. Daily Mail*, 443 U.S. 97, 102 (1979). In particular, the court's analysis of narrow tailoring was unduly limited by its assertion that Twitter's speech on information "obtained only by virtue of its involvement in the government's investigation" was not entitled to the highest protection. *In re Sealed Case*, 77 F.4th at 831. Second, in considering Twitter's procedural challenge based on *Freedman v. Maryland*, 380 U.S. 51 (1965), the court held that *Freedman* applies only to "licensing and censorship regimes," once again improperly distinguishing prior restraints imposed on

private individuals unwillingly forced to participate in government investigations. *In re Sealed Case*, 77 F.4th at 833.

These errors undermine at least a century of jurisprudence subjecting prior restraints to unique—and uniquely demanding—First Amendment scrutiny. The petition should be granted so this Court can fully consider whether to approve a drastic rewriting of the prior restraint doctrine and First Amendment law more broadly.

ARGUMENT

I. THE D.C. CIRCUIT'S FIRST AMENDMENT ANALYSIS DEFIES PRECEDENT FROM THIS COURT AND OTHER CIRCUITS

A. Prior Restraints Are Uniquely Disfavored Under Longstanding First Amendment Precedent.

The D.C. Circuit's decision runs counter to what was previously one of the most uncontroversial and "deeply etched" precepts in First Amendment law: that prior restraints are the "essence of censorship," *Southeastern Promotions Ltd. V. Conrad*, 420 U.S. 546, 559 (1975); *Near v. Minnesota*, 283 U.S. 697, 713 (1931), and "'a dramatic departure from our national heritage and constitutional tradition." *United States v. American Library Association*, 539 U.S. 194, 225 (2003) (quoting *Watchtower Bible & Tract Soc. Of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002)).

As this Court recognized 117 years ago, "the main purpose of [the First Amendment] is to prevent all such Previous restraints upon publications as had been practiced by other governments." *Nebraska Press*, 427 U.S. at 557 (quoting *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (cleaned up) (distinguishing prior restraints from subsequent punishment of speech)). Indeed, the First Amendment has always uncontroversially protected against prior restraints. The Founders debated only whether—as Blackstone had earlier claimed—it included other restrictions on speech as well. *Near*, 283 U.S. at 714–15.[3]

And although the First Amendment was ultimately interpreted to also protect against post-publication intrusions on the freedoms of speech and the press, prior restraints remained more strongly disfavored. As this Court has explained, "prior restraints are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press*, 427 U.S. at 559. Unlike the "threat of criminal or civil sanctions after publication," which "chills" speech, prior restraints entirely "freeze" speech for their duration. *Id*. The First Amendment thus "historically provides greater protection from prior restraints than after-the-fact penalties." *BE&K Construction Co. v. N.L.R.B.*, 536 U.S. 516, 530 (2002). Thus, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979), this Court explained that while attempts to punish speech after the publication must be shown to

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3. As this Court has noted, it did not consider the application of the First Amendment to speech restrictions *other than prior restraints* until 1919. *Citizens United v. Federal Election Commission*, 558 U.S. 310, 389 n.5 (2010).

be necessary to further the asserted state interests, prior restraints are subject to "the most exacting scrutiny," with both requiring "the highest form of state interest to sustain its validity." *See also Alexander v. United States*, 509 U.S. 544, 554 (1993) (contrasting prior restraint analysis with "normal First Amendment standards").

For a solid century, this Court has repeatedly held that because prior restraints present such unique dangers, they are permissible only in the rarest cases. In 1931, this Court observed that the use of prior restraints was so far outside our constitutional tradition that "there ha[d] been almost an entire absence of attempts to impose" them—a consistency that reflects "the deep-seated conviction that such restraints would violate constitutional right[s]." *Near*, 283 U.S. at 718. Thereafter, "the principles enunciated in *Near* were so universally accepted that the precise issue did not come before" this Court for another 40 years. *Nebraska Press*, 427 U.S. at 557–58 (citing *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971)).

This Court's decision in *Nebraska Press* demonstrates just how well-established this principle was. In that case, this Court determined whether the right to a fair trial could justify a broad prior restraint against pre-trial publicity. 427 U.S. at 542. But the aspect of the trial judge's restrictive order most analogous to the gag order at issue here—a prohibition on "reporting the exact nature of the restrictive order itself"—was so patently unconstitutional that the Nebraska Supreme Court voided it before the remainder of the publication ban reached this Court. *Id.* at 544. *See also State v. Simants*, 236 N.W.2d 794, 799, 805 (Neb. 1975).

Importantly, and contrary to the D.C. Circuit's decision, this Court has not confined prior restraints to their "classic" or formal boundaries. In *Citizens United v. Federal Election Commission*, 558 U.S. 310, 335 (2010), this Court held that the FEC's regulatory restrictions "function as the equivalent of a prior restraint by giving the FEC power analogous to licensing laws" even though the regulatory scheme was "not a prior restraint in the strict sense of that term."

This unbroken line of authority that prior restraints, defined broadly, are reserved for "exceptional cases," *Near*, 283 U.S. at 716, has created a heavy presumption of unconstitutionality that the government must overcome. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Keefe*, 402 U.S. at 419. Even if publication entails the risk of sanctions, "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Conrad*, 420 U.S. at 559.

This precedent has given rise to rigorous substantive and procedural protections, each unique to prior restraints.

B. The D.C. Circuit Did Not Apply the "Most Exacting" Strict Scrutiny Due to Prior Restraints.

Nondisclosure orders issued under 18 U.S.C. § 2705 are prior restraints because they prohibit recipients from speaking about the subject matter of the underlying requests in advance of that speech. *See Matter of Subpoena 2018R00776*, 947 F.3d 148, 155 (3d Cir. 2020) (treating Section 2705 nondisclosure order as a prior

restraint); *Matter of Search Warrant for [redacted].com*, 248 F. Supp. 3d 970, 980 (C.D. Cal. 2017) (Section 2705 nondisclosure orders "almost uniformly" treated as prior restraints) (collecting cases).

The Courts of Appeals have consistently subjected prior restraints to the "most exacting scrutiny," a standard derived from this Court's decisions in *New York Times v. United States*, 403 U.S. 713, 714 (1971), and *Daily Mail*, 443 U.S. at 102. *See Halperin v. Dep't of State*, 565 F.2d 699, 707 (D.C. Cir. 1977); *Columbia Broad. Sys., Inc. v. U.S. Dist. Ct. (CBS)*, 729 F.2d 1174, 1178 (9th Cir. 1984); *United States v. Quattrone*, 402 F.3d 304, 310 (2d Cir. 2005); *Sindi v. El-Moslimany*, 896 F.3d 1, 32 (1st Cir. 2018).

Relevant here, this Court has imposed an especially demanding form of the narrow-tailoring requirement, explaining that prior restraints must be "couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968).

Although the D.C. Circuit purported to apply strict scrutiny, it was unduly dismissive of the arguments Twitter raised about the necessity of the government's prior restraint and the possibility of more narrowly tailored alternatives. The court supported its conclusion on the grounds that a prior restraint "limited to information that Twitter obtained only by virtue of its involvement in the government's investigation . . . is entitled to less protection than information a speaker possesses independently." *In re Sealed Case*, 77 F.4th at 831 (citing *Butterworth v.*

Smith, 494 U.S. 624, 636 (1990) (Scalia, J., concurring) and *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984)).

However, the authorities the court relied on to reject consideration of more narrowly tailored alternatives actually support the application of the "most exacting" strict scrutiny. In *Butterworth*, this Court *struck down* the part of a Florida law prohibiting grand jury witnesses from disclosing their own testimony even after the grand jury was discharged. *See* 494 U.S. at 632. That voided prohibition is more closely analogous to the speech restriction here: the witness was barred from revealing in the first instance the contents of a government process. The portion of the statute *Butterworth* left in place did not authorize prior restraints, but rather only punishment *after* publication.[4] Similarly, in *Seattle Times*, this Court held that a newspaper had to comply with a protective order, to which it had agreed, prohibiting the disclosure of discovery material. 467 U.S. at 24–27. In declining to apply "exacting First Amendment scrutiny" accorded to a "classic prior restraint," this Court emphasized that the newspaper agreed to follow the protective order to obtain the information in the first place, thereby distinguishing it from prior restraint cases in which a speaker is involuntarily gagged. 467 U.S. at 32–34. *See also Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (recognizing that *Seattle Times* applies narrowly and only to restraints on parties to civil litigation who have gained access to information by

4. Statutes criminalizing publication of certain information are not considered prior restraints because unlike judicial and executive orders, they are not self-executing. *Landmark Comms. v. Virginia*, 435 U.S. 829, 838 (1978) (statute allowing for punishment after publication not a prior restraint).

agreeing to a protective order as part of the discovery process). This case, of course, does not involve any such agreed-upon restrictions.

Moreover, there are many cases in which courts applied exacting scrutiny to the prior restraints where the *source* of the information the government sought to control was the government itself. *See*, *e.g.*, *Nebraska Press*, 427 U.S. at 543 (press heard confession and other evidence while attending pretrial hearing); *Oklahoma Publ'g Co. v. Dist. Ct.*, 430 U.S. 308, 309 (1977) (reporters obtained juvenile's name by attending court hearing which by law was supposed to be closed); *New York Times*, 403 U.S. at 713 (Pentagon Papers generated by a Defense Department contractor); *CBS*, 729 F.2d at 1176 (temporary restraining order preventing CBS from broadcasting government surveillance tapes).

By rejecting Twitter's proposed alternatives as categorically "unworkable" and "unpalatable," *In re Sealed Case*, 77 F.4th 815, 832 (D.C. Cir. 2023), the D.C. Circuit failed to apply exacting scrutiny, relieving the government of its burden to actually demonstrate, with evidence, that these alternatives would be ineffective.

C. The D.C. Circuit Erred in Holding That *Freedman*'s Procedural Protections Do Not Apply.

The D.C. Circuit's cramped view of the speech restrained by the nondisclosure order here led it to make an additional error, holding that the *Freedman* procedural protections applied to "censorship and licensing schemes are a poor fit in this case" because the nondisclosure order

was not a "classic prior restraint." *In re Sealed Case*, 77 F.4th at 831, 834.

This holding created a split with the Second Circuit in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). Although the *Mukasey* court questioned whether government nondisclosure orders issued under the national security letter statute, 18 U.S.C. § 2709, were "typical prior restraint[s]," it nevertheless applied *Freedman*. *Id.* at 871, 877. It also specifically rejected analogies between national security letters and the restrictions in *Butterworth* and *Seattle Times*. *Id.* at 877.

Indeed, *Freedman*'s procedural protections have been applied to a variety of government speech bans beyond permitting and licensing schemes.

In *Vance v. Universal Amusement Co.*, 445 U.S. 308, 310, 316 (1980), for example, a Texas statute empowered the state to obtain an ex parte temporary restraining order, which could be converted into a much longer temporary injunction, against exhibiting films if the distributor had previously demonstrated a habitual "commercial exhibition of obscenity." A court ultimately decided whether an injunction was warranted. The scheme in *Vance* was not a permitting scheme, and there was no pre- or post-exhibition review of enjoined films at all. Instead, injunctions were based on past exhibitions. *Vance*, 445 U.S. at 316 & nn.4, 5. Nevertheless, this Court approved the lower court's finding that the schemes were "procedurally deficient, and that they authorize prior restraints that are more onerous than is permissible under" *Freedman* and its progeny. *Id*. at 317.

Likewise, the Ninth Circuit applied *Freedman* to a speech injunction, as opposed to a pre-exhibition review scheme, in *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980). The court held that preliminary and permanent injunctions authorized by a public nuisance statute were an unconstitutional prior restraint. 631 F.2d at 138. Emphasizing that "'the burden of supporting an injunction against future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication,'" it found the statute failed to satisfy *Freedman*. *Id.* (quoting *Vance*, 445 U.S. at 315).

II. IF LEFT UNDISTURBED, THE D.C. CIRCUIT'S DECISION PRESENTS A THREAT TO FIRST AMENDMENT RIGHTS BROADLY.

Regardless of the resolution of this case, the doctrinal errors described above risk granting the government far too much authority to shield its activities from public scrutiny. By characterizing the speech restrained by the nondisclosure order as merely information Twitter obtained by "virtue of its involvement in the government's investigation," the D.C. Circuit enabled prior restraints on speech involving a variety of matters of public concern, while restricting recipients' ability to meaningfully test these gag orders in court.

Under the D.C. Circuit's reasoning, officials can restrain a wide variety of speech about information "obtained from the government" without full access to timely, searching judicial review required by the First Amendment. This thwarts the very purpose of the

Freedman procedures—to minimize abridgement of speech caused by even temporary gag orders. Even a meritless gag order that is ultimately voided by a court causes great harm while it is in effect. Importantly, the *Freedman* procedures do not disable the government from suppressing the dissemination of confidential information when suppression can be justified—but the government must justify it, promptly, to a court, and the government must bear the burden of review, including narrow tailoring. *Freedman*, 380 U.S. at 58.

Every day, Americans obtain information that is a matter of great public concern "only by virtue of [their] involvement" in governmental and judicial processes. Incarcerated persons receive information from government agencies that control virtually every facet of their lives—from living conditions to medical care. Other individuals routinely receive information by interacting with law enforcement, border officials, the Internal Revenue Service, the U.S. Postal Service, and the courts.

III. THE D.C. CIRCUIT'S PERMISSIVE VIEW OF GAG ORDERS ALSO UNDERMINES IMPORTANT TRANSPARENCY VALUES THAT BENEFIT INTERNET USERS BROADLY AND MAY BE CRUCIAL FOR TARGETED USERS TO ASSERT THEIR RIGHTS.

It is important that full First Amendment protections be applied here because Internet users strongly benefit from greater transparency from the online intermediaries on which they rely, both for users to generally understand how their online speech is controlled, and also to give

those who are personally targeted the opportunity to protect their own speech rights. In this way, The First Amendment buttresses broader First Amendment and freedom of expression values.

As many regulators around the world have recognized, transparency by online services strongly bolsters users' rights and their confidence in the integrity of the services. Yet transparency reporting is another example of speech that the government may more easily gag under the panel's reasoning. Especially following government declassifications accompanying the Snowden revelations in 2013, the public and the media have raised serious questions about the role played by tech companies, and transparency reporting has been a key tool for companies to provide much-needed data on government surveillance activity and clarify how they respond to requests.[5]

This speech, which is essential to public oversight and accountability for government surveillance, lies at the heart of the First Amendment's protections. There is no basis for subjecting it to lesser constitutional protection.

Moreover, as X argues in its petition, disclosure also ensures that individuals whose information is searched have an opportunity to defend their privacy

5. *See*, *e.g.*, Claire Cain Miller, *Tech Companies Concede to Surveillance Program*, N.Y. Times (June 7, 2013), https://www.nytimes.com/2013/06/08/technology/tech-companies-bristling-concede-to-government-surveillance-efforts.html; *Who Has Your Back*, EFF (2014) (detailing which companies published transparency reports), https://www.eff.org/who-has-your-back-2014.

from unwarranted and unlawful government intrusions, including by remedying unjustified invasions and seeking the return of property or information unlawfully held. In most instances, no one has a stronger interest in vindicating users' privacy interests than the users themselves. *See generally* S. Rep. 90-1097, 1968 U.S.C.C.A.N. 2112, 2194 (pursuant to Title III's notice requirement, "all authorized interception must eventually become known at least to the subject," so that he "can then seek appropriate redress for example, under [18 U.S.C. § 2250], if he feels that his privacy has been unlawfully invaded"). Without disclosure, Internet users are unable to assert their particular constitutional interests and privileges if providers are gagged from notifying them of the government's request, be it journalists, medical professionals, clergy, spouses, and so on. *See Microsoft v. DOJ*, 233 F. Supp. 3d 887, 916 (W.D. Wash. 2017). And given the widespread reliance on third-party Internet services such as email, file storage and social media and the frequency with which nondisclosure orders are issued, individuals are certainly and very commonly being denied their ability to assert their privacy protections.

CONCLUSION

For the reasons above, the petition for a writ of certiorari should be granted.

Dated: July 2, 2024

Respectfully submitted,

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