No. 23-1264

IN THE

Supreme Court of the United States

X CORP.,

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Special Counsel does not deny the D.C. Circuit created a roadmap for state and federal prosecutors to obtain privileged presidential communications without notice to a former President. He does not deny the Presidential Records Act requires notice when seeking such documents from the Archivist and that he sought them from Twitter instead precisely to avoid notice. And he does not deny prosecutors can use this roadmap to conceal invasions of other privileges, including speech or debate and attorney-client.

Instead, the Special Counsel doubles down, arguing privilege-holders are limited to post-disclosure remedies at trial and embracing a Catch-22 where only Twitter knows the government has potentially invaded privilege but lacks standing to address it. The Special Counsel suggests the Court should not care about these troubling consequences because he is skeptical of any executive privilege claim here. But that skepticism is based on contestable views about executive privilege that should have been addressed in litigation with the rightsholder, and nothing in the decision turns on the strength of the privilege claim. This issue will recur and there will not be a better vehicle. As the Special Counsel does not deny, the government obtains tens of thousands of nondisclosure orders a year; many may shield demands for privileged materials; and challenges will rarely if ever reach this Court.

ARGUMENT

I. THE D.C. CIRCUIT'S HOLDING THAT COURTS CAN COMPEL PRODUCTION OF POTENTIALLY PRIVILEGED DOCUMENTS BEFORE RESOLVING CHALLENGES TO PRIOR RESTRAINTS OR NOTIFYING PRIVILEGE-HOLDERS IS WRONG AND CONFLICTS WITH OTHER CIRCUITS

A. The D.C. Circuit's Decision Is Wrong

1. *Freedman* required resolving Twitter's First Amendment challenge before compelling production. Pet.20-23.

The opposition tries to limit *Freedman* v. *Maryland* to its facts, Opp.12-15, but *Freedman* applies to "[a]ny system of prior restraints." 380 U.S. 51, 57 (1965). This Court did not apply *Freedman* in *Thomas* v. *Chicago Park District*, 534 U.S. 316 (2002) and *City of Littleton, Colorado* v. *Z.J. Gifts D-4, LLC*, 541 U.S. 774 (2004), because the schemes were not prior restraints at all, not because they did not "involve subjective judgments." Opp.13-14. *Thomas* concerned a "content-neutral time, place, and manner regulation of the use of a public forum," 534 U.S. at 322, and *Littleton* involved a business-licensing ordinance that did not seek to "*censor* material." 541 U.S. at 783. Regardless, this case, like *Freedman*, involves a prior restraint based on broad standards that require adversarial testing. Pet.21-22. And the prohibitions in *Butterworth* and *Rhinehart* are not "comparable," Opp.15, as Twitter explained (Pet.22-23) but the opposition ignores. Twitter did not leverage discovery tools to obtain the information the government prevented it from disclosing (unlike the plaintiff in *Rhinehart*) and the nondisclosure order here required a case-specific rationale (unlike the categorical rules discussed in *Butterworth*).

Moreover, *Freedman*'s requirements were not met because Twitter received adversarial judicial review only after its First Amendment rights were irreparably injured. *See* Opp.15-16. Contrary to the opposition (at 16 n.6), *Freedman* held that "any restraint prior to judicial review can be imposed only for a specified *brief period during which the status quo must be maintained.*" *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 227 (1990) (emphasis added), *holding modified on other grounds by Littleton*, 541 U.S. 774. And as *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam) held, but the Special Counsel wrongly disputes, *ex parte* scrutiny is insufficient. In *Vance*, as here, the prior restraint could be imposed after preliminary, *ex parte* judicial review; that was inadequate without further "prompt" adversarial review. *Id.* at 309.

Neither *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978) nor *United States* v. *Grubbs*, 547 U.S. 90 (2006), describe "basic investigatory principles" that override *Freedman*'s protections for prior restraints. Opp.12. To the contrary, *Zurcher* indicated that if the case had involved a prior restraint, any First Amendment claim would need to be heard before compelling production under the warrant. *See* 436 U.S. at 566-567. And *Grubbs* held the Fourth Amendment does not require *ex ante* opportunities to challenge warrants because its protections are *ex post*. 547 U.S. at 99. The First Amendment, in contrast, requires review of prior restraints *before* irreparably harming speech interests. *See Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175, 181-183 (1968) (avoiding "delay" especially "compelling" for "speech in which the element of timeliness may be important").

2. The former President should have had an opportunity to protect executive privilege before production.

a. The Special Counsel wrongly claims privilege is adequately safeguarded by using filter teams with *ex parte* judicial review and "suppression or other remedies at trial." Opp.17-18 & n.7. Neither case he cites (Opp.18) supports him. They addressed suppression motions, not whether the defendants should have been able to raise privilege before investigators reviewed their communications. *See United States* v. *Squillacote*, 221 F.3d 542 (4th Cir. 2000); *United States* v. *Haynes*, 216 F.3d 789 (9th Cir. 2000).

The Fourth, Sixth, and Eleventh Circuits have rejected the Special Counsel's position. They require that holders of nondisclosure privileges have an opportunity to protect privilege before investigators review their documents—even when using filter teams—because "an adverse party's review of privileged materials seriously injures the privilege holder," *In re Search Warrant Issued June 13, 2019* ("*Baltimore Law Firm*"), 942 F.3d 159, 175 (4th Cir. 2019); *see also* Pet.17-18. And "suppression is not an adequate remedy for any violations": "[E]ven if [privilege-holders] are charged and may seek suppression, suppression does not redress the government's intrusion into the [privilege-holders'] personal and privileged affairs." *In re Sealed Search Warrant & Application*, 11 F.4th 1235, 1247 (11th Cir. 2021) (per curiam). Such "prosaic tools" are particularly "inadequate safeguard[s] against the peculiar constitutional concerns implicated in the prosecution of a former President." *Trump* v. *United States*, 144 S. Ct. 2312, 2341 (2024).

b. The Special Counsel's main tack is to try to diminish the privilege issues here, but his doubts are based on disputable claims about executive privilege the former President should have had an opportunity to contest: that the privilege can never be invoked to prevent disclosure within the Executive Branch and especially

not disclosure to law-enforcement personnel (Opp.19-20); that a warrant always establishes a demonstrated, specific need sufficient to override the privilege (Opp.21, 26); and that the privilege applies only to communications made "for purposes of taking official action" (Opp.5 n.3, 18). Indeed, this Court just rejected the Special Counsel's contentions—in this same investigation—that "the President's motives" are relevant "[i]n dividing official from unofficial conduct" and that courts may "deem an action unofficial merely because it allegedly violates a generally applicable law." *Trump*, 144 S. Ct. at 2333-2334; *see also id.* at 2330 (whether Trump's Tweets and "other communications on January 6 involve official conduct may depend on the content and context of each").

Moreover, Twitter had good reason to think the documents could be privileged. "[A] 'presumptive privilege' protects Presidential communications." *Trump*, 144 S. Ct. at 2330. As the opposition admits, the former President "had used public tweets for official purposes" and could have used Twitter's direct-message function for the same purpose. Opp.5 n.3. Twitter had provided the communications to NARA and if the government had sought them from NARA, NARA would have notified the former President, as the PRA requires when the government seeks potentially privileged materials. Pet.2, 10; *see also* Opp.31.

While the courts below and the Special Counsel may have been confident this case implicates no serious executive privilege claims, *see, e.g.*, Pet.App.118a, 121a, Judges Rao, Henderson, Katsas, and Walker were not, noting "[t]he Supreme Court has twice in recent years repudiated a decision of th[e D.C. Circuit] for failing to recognize serious separation of powers concerns implicated by novel intrusions on the presidency." App.88a n.1; *see also Trump*, 144 S. Ct. 2312. Moreover, the

decision below did not turn on the strength of the privilege claim, and pre-disclosure notice was required regardless of whether executive privilege ultimately applied. *See* Pet.23-24. As Judge Rao explained, "[i]n every prior case involving materials that *might* be covered by presidential privilege, the President has been allowed to raise the privilege claim *before* disclosure." Pet.App.89a (emphases added).

c. The opposition overstates the consequences of Twitter's position (Opp.16-17, 18-19). The Fourth, Sixth, and Eleventh Circuit cases demonstrate courts can account for any legitimate investigatory concerns while protecting privilege. *See infra* 7-8. For example, the Sixth Circuit accommodated concerns about grand-jury secrecy by employing a special master and concerns about delay by ordering rolling production. *In re Grand Jury Subpoenas* ("*Winget*"), 454 F.3d 511, 523-524 (6th Cir. 2006).

d. This question is properly presented. It is "relevan[t]" (Opp.16) to Twitter's First Amendment claim; the purpose of Twitter's intended speech was to provide notice in time for the former President to effectively assert any privilege. And that Twitter might lack standing to adjudicate executive-privilege claims (Opp.12, 16) is irrelevant because Twitter was seeking merely to provide notice. Regardless, there is nothing unusual about a third party protecting a privilege-holder's rights when the privilege-holder cannot. Attorneys can invoke privilege on their clients' behalf, *see Baltimore Law Firm*, 942 F.3d at 173, and doctors can object to searches of patient records where only they are "in a position to protect those patients' privacy rights," *In re Search Warrant (Sealed)*, 810 F.2d 67, 69 (3d Cir. 1987).

B. The Circuits Are Split

1. The D.C. Circuit deepened a split between the Second and Ninth Circuits by holding "*Freedman* is inapplicable" to nondisclosure orders. Pet.App.27a.

That those courts considered "different statutory schemes governing different classes of information," Opp.21, does not matter. The Second Circuit "applied" *Freedman*, Opp.22-23; the D.C. and Ninth Circuits did not. The Second Circuit also required adversarial judicial review, whereas the D.C. Circuit held *ex parte* review suffices. *See Doe* v. *Mukasey*, 549 F.3d 861, 878-881 (2d Cir. 2008). And the Second and Ninth Circuits' disagreement about whether *Freedman* applies to "confidentiality restrictions concerning government-provided information," *Twitter, Inc.* v. *Garland*, 61 F.4th 686, 708 (9th Cir. 2023), does not turn on whether those restrictions apply to "aggregate information," Opp.22; *see Twitter*, 61 F.4th at 698 (rules governing individual and aggregated information "effectively identical"). Because the D.C. Circuit deepened that split, there is more reason for review than there was in *X Corp.* v. *Garland*, No. 23-342.

2. The D.C. Circuit also split with the Fourth, Sixth, and Eleventh Circuits, which have held holders of nondisclosure privileges must have an opportunity to raise privilege issues before investigators review potentially privileged documents.

The opposition's attempt to distinguish these cases (Opp.23-25) elevates form over substance. While those cases involved "overt investigatory steps" (Opp.23), the government still argued that allowing the privilege-holders to assert privilege would interfere with its investigation. Unlike the D.C. Circuit, which gave executive privilege no weight, the Fourth, Sixth, and

Eleventh Circuits balanced privilege with the government's concerns about grand-jury secrecy, delay, and obstruction of the investigation by the privilege-holder. *See Winget*, 454 F.3d at 517-518; *Baltimore Law Firm*, 942 F.3d at 169, 178-179; *In re Sealed Search Warrant*, 11 F.4th at 1241, 1249.

It is irrelevant that the Sixth Circuit case involved a subpoena, and that in the Fourth and Eleventh Circuit cases the privilege-holder intervened after the government had the documents. *See* Opp.23-26. Those Circuits, unlike the D.C. Circuit, guarantee privilege-holders the right to assert privilege at the earliest opportunity. In *Baltimore Law Firm*, 942 F.3d at 166-167, and *In re Sealed Search Warrant*, 11 F.4th at 1239-1240, because the government had seized documents under traditional warrants, the earliest opportunity was after investigators seized the documents but before they reviewed them. So, the courts permitted privilege-holders to intercede after seizure but before review. In *Winget*, the privilege-holders could intervene before production because grand-jury subpoenas, like Stored Communications Act warrants, provide advance notice the government is seeking particular documents. *See* 454 F.3d at 513. The Sixth Circuit therefore allowed the privilege-holders to assert privilege *before* production. *See id.* at 524. In the D.C. Circuit, by contrast, privilege-holders must wait until trial, after disclosure and review, to seek to mitigate potential intrusions upon their privileges.[1]

[1] *In re Application of Subpoena 2018R00776*, 947 F.3d 148 (3d Cir. 2020) (cited at Opp.17) did not address whether privilege-holders are entitled to notice and opportunity to assert privilege.

II. THE D.C. CIRCUIT'S LENIENT SCRUTINY OF NONDISCLOSURE ORDERS WARRANTS REVIEW

1. The D.C. Circuit did not apply this Court's familiar strict scrutiny standard. *See* Opp.27. It announced general rules relieving the government of the burden of satisfying true strict scrutiny for any nondisclosure order.

Without even citing the opinion, the opposition says the court's compelling-interest conclusion was grounded in assessing "the risks of disclosure in the specific circumstances here." Opp.32. But the D.C. Circuit held the government's interest in "maintain[ing] … confidentiality" is advanced by nondisclosure of "a different category of information, i.e., the existence of a search warrant." Pet.App.23a. This circular reasoning allows the government to show a compelling interest whenever seeking nondisclosure of new legal process, which is always "a different category of information."

On narrow tailoring, the opposition does not dispute the D.C. Circuit adopted a categorical rule that courts need not consider the viability of disclosure to a trusted representative. Instead, it argues the government's acceptance of such disclosures in other circumstances—including nondisclosure orders (*see* Pet.30-31)—"says nothing about whether they would have been appropriate here." Opp.32. But whether the D.C. Circuit would have been right to reject Twitter's proposal if the court had considered it is beside the point. The D.C. Circuit rejected the alternative without assessing whether it was "appropriate." Thus, the government will never have to demonstrate the unworkability of that alternative.

2. These two rules are incompatible with strict scrutiny, which requires the government to demonstrate

that nondisclosure of a *particular* warrant advances the government's interests and to refute less-restrictive alternatives. The Special Counsel could not have satisfied true strict scrutiny. *See* Opp.29-31.

The opposition identifies nothing about this specific warrant that required nondisclosure. Relying on the former President's past obstruction, the opposition cites evidence the "former President … had publicly criticized participants in the government's investigation" and had "taken steps" to "influence" a separate investigation. Opp.29. But it does not explain how that could demonstrate nondisclosure was necessary to "avoid[] evidence tampering," given that Twitter had preserved all the requested records, or "promote[] cooperation by prospective witnesses," Opp.27, given that any potential witnesses likely already knew about the investigation.

The district court did not have "discretion" not to consider Twitter's less-restrictive alternative, which was drawn from the PRA. Opp.31. The Special Counsel agrees with the district court that "it could not know whether those confidantes 'may themselves be witnesses, subjects, or targets[,]'" *id.* (quoting App.65a), but the government could have provided that information. And the Special Counsel still does not explain why disclosing the warrant to, for example, Steven Engel, would have threatened the investigation. *See* Pet.30. It was the Special Counsel's burden to prove disclosure to each representative would be unworkable. As Twitter explained (Pet.31-32) and the opposition nowhere addresses, *Williams-Yulee* refutes the Special Counsel's contrary claim.

The opposition's alternative argument—that disclosure to a PRA representative would have been "ineffective"—was not adopted by either court below and is

wrong. *See* Opp.30-31. In both *Judicial Watch, Inc.* v. *Department of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004) and *In re Sealed Case*, 121 F.3d 729, 744-745 & n.16 (D.C. Cir. 1997) (per curiam), the White House Counsel invoked executive privilege and the court reserved whether a President must personally invoke executive privilege. And regardless, the PRA representative could have taken other steps after receiving the notice that governing PRA regulations specifically require providing to "the President (*or their representative*)." 36 C.F.R. § 1270.44(c) (emphasis added); *see also Nixon* v. *Administrator of General Services*, 433 U.S. 425, 444 n.7 (1977) (envisioning notice to representative). For example, the representative could have evaluated whether any communications were privileged, which Twitter did not do to avoid invading privilege. The representative could then have moved for disclosure to the former President or litigated whether he could invoke privilege for the former President.

III. This Case Is An Ideal Vehicle For The Important Questions Presented

The Special Counsel does not deny this case presents important and recurring questions. He does not deny that state and federal prosecutors yearly obtain tens of thousands of nondisclosure orders and that these orders can prevent, and have prevented, providers from informing users about demands for privileged information. *See* Pet.32-35. And he does not deny the significant practical barriers to cases challenging these orders ever reaching this Court, let alone a case like this one that is not expedited and largely unsealed. Nonetheless, without acknowledging how his own litigation choices and positions in this opposition erect those precise barriers, the Special Counsel urges the Court to await a better vehicle.

The Special Counsel is wrong (Opp.33) that this case is not an "appropriate" vehicle because it is moot. The D.C. Circuit correctly held Twitter's claims are capable of repetition yet evading review. Pet.App.14a-16a. That Twitter "may face other nondisclosure orders involving other potential privileges," as the opposition acknowledges (Opp.33), suffices to trigger the capable-of-repetition exception. That exception does not require "repetition of every 'legally relevant' characteristic." *FEC* v. *Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007).

The Special Counsel also is wrong (Opp.33-34) that the privilege claim is "abstract and unfounded." As discussed, *supra* 5, Twitter had basis to believe the warrant demanded potentially privileged documents, requiring notice to the former President or his representative. Former President Trump's non-intervention does not "deprive[Twitter]'s claim of any concrete force" (Opp.34) because, as the Special Counsel does not deny, he could only have intervened after his opportunity to prevent disclosure had been irretrievably lost. Pet.13 n.2. And even if any privilege claim here turned out to be "unfounded," (Opp.34) the stakes for future cases could not be higher. This Court should not wait until state or federal prosecutors seize and review clearly privileged presidential communications to address the significant constitutional issues raised here.

CONCLUSION

Certiorari should be granted.

Respectfully submitted.

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