No.

In the Supreme Court of the United States

X CORP.,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The U.S. Government conducts surveillance of Americans and foreign nationals by issuing "national security process" to electronic communication service providers such as petitioner X Corp., which operates the online platform formerly known as Twitter. The Executive Branch deems information relating to this process classified, making disclosure of such information unlawful unless the disclosure falls within a narrow statutory safe harbor. This scheme precludes the release of much information that is of significant importance and interest to the public. In this case, the Ninth Circuit—expressly rejecting the contrary holding of the Second Circuit—held that restrictions on speech addressing a recipient's receipt of national security process are not subject to the procedural requirements outlined in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), which (among other things) mandates prompt judicial review of government censorship. The Ninth Circuit also declined to subject the censorship scheme to the sort of exacting scrutiny accorded prior restraints on speech in other contexts.

The questions presented are:

1. Whether the Government's prohibition on disclosure of the receipt of national security process is unconstitutional in the absence of the procedural requirements for prior restraints on speech specified in *Freedman*.

2. Whether the Government's prohibition on disclosure of the receipt of national security process should be subjected to the same extraordinarily exacting scrutiny generally applied to content-based prior restraints on speech.

PARTIES TO THE PROCEEDING

Petitioner here, plaintiff-appellant below, is X Corp., formerly known as Twitter, Inc.

Respondents here, defendants-appellees below, are Merrick Garland in his official capacity as Attorney General; the United States Department of Justice; Christopher Wray, in his official capacity as Director of the Federal Bureau of Investigation; and the Federal Bureau of Investigation.

RULE 29.6 STATEMENT

X Corp., as successor in interest to Twitter, Inc., hereby states that Twitter, Inc. has been merged into X Corp. and no longer exists. X Corp. is a privately held corporation. Its parent corporation is X Holdings Corp. No publicly traded corporation owns 10% or more of the stock of X Corp. or X Holdings Corp.

RELATED PROCEEDINGS

No other case is directly related to the present case within the meaning of Rule 14.1(b)(iii).

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The court of appeals' opinion (App., *infra*, 1a-70a) is reported at 61 F.4th 686. The district court's opinion (App., *infra*, 71a-87a) is reported at 445 F. Supp. 3d 295.

JURISDICTION

The Ninth Circuit issued its decision on March 6, 2023, and denied a timely petition for rehearing on May 16, 2023. App., *infra*, 1a, 118a. On July 31, 2023, Justice Kagan extended the time in which to file a petition for writ of certiorari to September 28, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Speech Clause of the First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech * * *."

Pertinent provisions of the USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268, are reproduced at App., *infra*, 120a-124a.

STATEMENT

Petitioner Twitter is an electronic communication service provider (ECSP) that serves as an online communication platform for its users.[1] In 2014, it sought to accurately inform the public about the extent to which the U.S. Government is surveilling its users. To do so, Twitter indicated its intent to disclose the number of times in a prior six-month period that the Government served Twitter with national security

[1] Because petitioner was known as "Twitter" at the time of the events underlying this litigation, it refers to itself throughout as Twitter rather than X Corp.

process—the means by which the Government demands such information. But the Government denied Twitter permission to engage in that proposed speech, first insisting that Twitter submit its speech to the Government for pre-publication review and then denying Twitter permission to disclose the number of interactions it had with the Government over a specific period. Twitter commenced this lawsuit to challenge this pre-publication restraint on its speech.

The Ninth Circuit upheld those speech restrictions. That holding created two conflicts in the circuits, while also departing from this Court's settled approach to judicial review of prior restraints on speech. The result was to substantially erode the procedural and substantive First Amendment protections that this Court and other courts of appeals have found essential, in several respects.

First, the Ninth Circuit held that the procedural requirements of *Freedman* v. *Maryland*, 380 U.S. 51 (1965), do not apply to speech involving national security process. Because "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976), *Freedman* instructs that prior restraints must be subject to prompt judicial review, initiated by the Government; and that any restraint imposed prior to the completion of that judicial review be brief, serving only to maintain the status quo, *Freedman*, 380 U.S. at 58-59. But the Ninth Circuit determined that these protections are not necessary here because, in its view, Twitter is seeking to disclose information that it acquired from the Government. See App., *infra*, 38a-39a. It reached that conclusion even though Twitter, like any recipient of a government request for

information, is seeking to describe its *own interactions* with government officials—in a manner no different than a citizen who reports that law enforcement served a warrant at her home.

That holding departed from this Court's precedent. It also, as the Ninth Circuit acknowledged, created a circuit split: The court below explained that it was "not persuaded by the Second Circuit's decision in *John Doe, Inc.* v. *Mukasey*, 549 F.3d 861, 876-78 (2d Cir. 2008)," which held in materially identical circumstances that *Freedman does* apply to nondisclosure requirements imposed on the recipients of national security process. See App., *infra*, 40a; see also *ibid.* ("The problem with [the Second Circuit's] reasoning is that it fails to recognize that *Freedman* has not been extended to long-accepted confidentiality restrictions concerning government-provided information because of the differences between these types of confidentiality requirements and traditional prior restraints.").

Second, the Ninth Circuit concluded that it should apply the same level of scrutiny to *prior* restraints that courts apply to *post-publication* punishment of speech—which looks to whether the government interest is compelling and its means narrowly tailored. App., *infra*, 20a-21a. That standard is much less searching than the "extraordinarily exacting" scrutiny mandated for prior restraints under this Court's precedents and those of other circuits, which require a showing that, absent the speech restriction, there would be "direct, immediate, and irreparable damage" to a key governmental interest. *New York Times Co.* v. *United States*, 403 U.S. 713, 730 (1971) (*Pentagon Papers*) (Stewart, J., joined by White, J., concurring); see *Nebraska Press*, 427 U.S. at 556-559; *Procter & Gamble Co.* v. *Bankers Trust Co.*, 78 F.3d 219, 224-

225 (6th Cir. 1996); *Matter of Providence J. Co.*, 820 F.2d 1342, 1348-49 (1st Cir. 1986); *Bernard* v. *Gulf Oil Co.*, 619 F.2d 459, 473 (5th Cir. 1980); *CBS Inc.* v. *Young*, 522 F.2d 234, 238 (6th Cir. 1975). And even so, the Ninth Circuit applied a watered-down version of ordinary strict-scrutiny analysis, requiring only that the restriction on Twitter's speech be "sufficiently calibrated toward protecting the government's proffered national security interest." App., *infra*, 23a.

Third, the Ninth Circuit found it of no constitutional moment that the prior restraint on Twitter's speech may last a quarter of a century. Under the Government's current practice, the fact that Twitter received national security process may remain classified for up to twenty-five years, with no requirement that the Government periodically review the restriction to determine whether it remains necessary. See Exec. Order 13526, 75 Fed. Reg. 707, § 1.5(b) (Jan. 5, 2010). The lack of a temporal restriction without any required periodic review itself raises serious constitutional concerns and should have been addressed by the court when it applied strict scrutiny.

The Ninth Circuit's decision is not just wrong as a matter of law: It will have significant, real-world consequences. If this Court does not intervene, different standards will apply in different circuits when entities like Twitter want to disclose how and how often the Government has demanded information from them. History demonstrates that the surveillance of electronic communications is both a fertile ground for government abuse and a lightning-rod political topic of intense concern to the public.[2] It is critical that the

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[2] *See, e.g.,* H.R. Rep. No. 114-109(I) at 6, 17 (2015) (Congress "expand[ed] existing oversight provisions" after learning, *inter*

standards for when and how entities may speak about the extent of governmental surveillance be clear, settled, and constitutionally adequate. Further review is warranted.

A. Speech Restrictions On National Security Process

1. Electronic communications service providers like Twitter have become critical communication platforms for users, who rely on ECSPs to speak about everything from news and politics to their daily lives. Because of that, these platforms are in possession of a significant range of information about their users—like their IP addresses, email addresses and phone numbers, log-in times, and even the content of their private communications. Sometimes, this confidential information is sought by the U.S Government as part of its intelligence-gathering activities.

The United States uses two kinds of process to obtain user information from private ECSPs that is related to national security investigations: National Security Letters (NSLs) and orders under the Foreign

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alia, that the Government had obtained an order compelling "Verizon Communications, Inc., on an 'ongoing, daily basis,' to provide the NSA with 'all call detail records or telephony metadata' for communications made via its systems, both within the United States and between the U.S. and other countries."); Reauthorizing the USA Patriot Act: Hearing Before S. Comm. on the Judiciary, 111th Cong. 2 (Sept. 23, 2009) (Statement of Glenn Fine, Inspector General, U.S. DOJ), https://oig.justice.gov/node/696 (citing "serious misuse of [national-security administrative subpoena] authorities"); H.R. Rep. No 95-1283 Part I at 21 (1978) ("In the past several years, abuses of domestic national security surveillances have been disclosed. This evidence alone should demonstrate the inappropriateness of relying solely on [E]xecutive branch discretion to safeguard civil liberties.").

Intelligence Surveillance Act (FISA orders) (collectively, "national security process").

NSLs are authorized by the National Security Act of 1947, Pub. L. No. 235, 61 Stat. 496 (1947) (the "NSL Law"). They are a form of administrative subpoena that the Government may use to compel companies to provide a variety of user data, including contact information, log-in data, locational data, and other metadata. Under this provision, however, ECSPs are not compelled to release the content of their users' messages. See 18 U.S.C. § 2709; see also App., *infra*, 3a-4a.

FISA orders permit the Government to obtain similar but more detailed user information—including message content. FISA orders are governed by the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq. Because they permit the collection of more sensitive information, the Government must obtain pre-approval for FISA orders from the Foreign Intelligence Surveillance Court (the "FISC"). See 50 U.S.C. §§ 1801, 1804, 1805. FISC proceedings are conducted based on *ex parte* applications submitted by the Government. *Id.*; see also App., *infra*, 5a-6a.

Both the NSL law and FISA authorize the Government, at its sole discretion, to include a non-disclosure order with any national security process that bars the recipient from disclosing information about the particular national security process received. See, *e.g.*, 50 U.S.C. § 1881a(i)(1)(B) (FISA); 18 U.S.C. § 2709(c)(1)(A) (NSL); see also App., *infra*, 4a-6a. As a practical matter, every NSL and FISA order includes such a nondisclosure provision. These nondisclosure orders relating to the receipt and contents of an individual NSL or FISA order are subject to judicial

review. See, *e.g.*, 50 U.S.C. § 1881a(i)(4) (FISA); 18 U.S.C. § 3511 (NSL); see also App., *infra*, 4a-6a.[3]

2. The Government has imposed separate speech restrictions on reporting the aggregate amount of national security process that an ECSP receives. This case addresses the prohibitions on the disclosure of aggregate reporting of national security process received, as opposed to the speech restrictions on individual NSLs and FISA orders described above.

Until 2014, the Government deemed all information about its use of national security process to be classified. But in response to the public outcry and legal challenges that followed the revelations in 2013 of the Government's bulk collection of Americans' phone records, in a January 2014 memorandum the Director of National Intelligence (DNI) declassified certain limited aggregate information about the Government's use of national security process. See App., *infra*, 8a. Although allowing limited disclosures under government-imposed parameters, the DNI memorandum still imposed significant speech restrictions on recipients of national security process.

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[3] The NSL statute did not always have this provision for judicial review. Congress added the requirement after courts held that speech restrictions preventing recipients from disclosing that they had received an individual NSL violated the First Amendment. See *In re Nat'l Sec. Letter*, 33 F.4th 1058, 1063-1068 (9th Cir. 2022) (describing amendments to 18 U.S.C. § 3511); *Mukasey*, 549 F.3d at 876-883 (imposing *Freedman* protections on earlier version of Section 3511); *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1081 (N.D. Cal. 2013) (finding nondisclosure requirement unconstitutional); *Doe* v. *Gonzales*, 386 F. Supp. 2d 66, 73-82 (D. Conn. 2005) (same); *Doe* v. *Ashcroft*, 334 F. Supp. 2d 471, 511-526 (S.D.N.Y. 2004) (same).

The next year, Congress in large part adopted the speech restrictions appearing in the DNI memorandum by enacting the USA Freedom Act (USAFA), Pub. Law No. 114-23, 129 Stat. 268 (2015). The USAFA provides that any recipient of national security process may disclose, on a semi-annual basis, its aggregate receipt of NSLs and FISA orders over a six-month or one-year period, from periods dating back eighteen months to one year before the disclosure (depending on the kind of process being disclosed), but only in preset bands that begin with zero and end with numbers 99 to 999—the precise band depends on the time period and the kind and combination of NSLs and FISA orders being disclosed. See 50 U.S.C. § 1874(a); see also App., *infra*, 8a-9a. For example, if an entity received three FISA orders and two NSLs during the year 2021, it could disclose at the beginning of 2023 only that it received such process between 0 and 99 times in that year. The USAFA also authorizes the Government to permit more specific disclosures on a case-by-case basis, but gives the Government complete discretion on whether to do so. See 50 U.S.C. § 1874(c). Absent such permission, disclosure of this information would subject the speaker to significant penalties for revealing information that had been deemed classified. See 18 U.S.C. § 798(a)(3) (disclosing classified information "concerning the communication intelligence activities of the United States" will result in a fine and/or up to ten years' imprisonment).

There is no statutory or administrative provision requiring judicial approval of the Government's denial of an ECSP's request to make a more detailed disclosure than that permitted by the USAFA. Nor is there any requirement that the Government periodically review whether the aggregate nondisclosure scheme, or the aggregate limits as they apply to particular

national security process, remains necessary as a matter of national security. The Government classifies information for ten years by default, but if, at the time of classification, the Government determines that the "sensitivity" of the information requires a longer period of secrecy, the classification may last up to twenty-five years. See Exec. Order. 13526, 75 Fed. Reg. 707, § 1.5(b). As a result, the aggregate nondisclosure requirement may remain in place for up to a quarter of a century unless the ECSP takes on the burden of challenging the restriction, and the only means to obtain judicial review is by filing a lawsuit. If the ECSP's challenge is unsuccessful, the ECSP would need to bring successive challenges to determine whether, after the passage of additional time, the Government can justify the continued nondisclosure requirement.

B. Twitter's Transparency Report

Transparency is a key principle in Twitter's mission to protect the freedom of expression and privacy rights of the people who use its service. To that end, since 2012, Twitter has published a semi-annual Transparency Report about its receipt of legal process from governments around the globe.

On April 1, 2014, at the U.S. Government's insistence, Twitter submitted a draft Transparency Report for pre-publication review. See App., *infra*, 9a-10a. In its report, Twitter sought to disclose the total number of NSLs and FISA orders that it had received for the period July 1 to December 31, 2013, in absolute figures or, alternatively, in bands of 1-99 (with NSLs and FISA orders reported separately) and 1-24 (reported together). See App., *infra*, 10a. Twitter also sought to disclose that it had received "zero" of a particular type

of FISA order, whenever that might be the case. See App., *infra*, 10a.

After five months, the FBI denied Twitter's request, stating that Twitter's Transparency Report "is classified and cannot be publicly released" because its proposed disclosures were "inconsistent with the * * * framework" laid out in the DNI Memorandum—that is, they did not comply with the pre-set bands described by the Memorandum and later adopted by Congress in the USAFA. See App., *infra*, 11a.

C. Proceedings Below

1. Twitter filed suit in the District Court for the Northern District of California challenging the Government's censorship of the Transparency Report as unconstitutional. Twitter asserted both that it did not receive the procedural requirements mandated for prior restraints on speech by *Freedman* v. *Maryland*, 380 U.S. 51 (1965), and that the aggregate nondisclosure requirement failed to satisfy the exacting scrutiny applied to pre-publication restrictions on speech.

The district court initially denied the Government's motion for summary judgment. Applying this Court's decision in *Pentagon Papers*, the district court explained that the "Government's restrictions on Twitter's speech are content-based prior restraints subject to the highest level of scrutiny under the First Amendment." App., *infra*, 90a-91a. The Government had failed to "me[et] its high burden to overcome the strong presumption of unconstitutionality" because it "offer[ed] no evidence that Congress's decision to adopt the disclosure framework" from the DNI memorandum "was based upon a determination that disclosure of any more granular information would be, in all cases, a clear and present danger or a serious and

imminent threat to a compelling government interest." App., *infra*, 90a, 116a-117a. The district court also explained that "restrictions of this type require procedural safeguards to ensure that they are imposed for a limited time and subject to review at the earliest juncture," citing *Freedman*, but the USAFA fails to "provide such safeguards." App., *infra*, 113a. In response to additional classified evidence from the Government, however, the district court sua sponte reconsidered its summary judgment order and received additional briefing. App., *infra*, 76a-77a. The court then granted summary judgment to the Government, reaffirming that the Government's pre-publication speech restrictions are subject to strict scrutiny but determining that the Government had met that hurdle with the additional classified evidence. App., *infra*, 80a-82a. The district court also opined that Twitter did not properly raise its *Freedman* challenge. App., *infra*, 84a-86a.

2. The Ninth Circuit affirmed. App., *infra*, 1a-70a.

The court of appeals and the parties agreed that the district court "mistaken[ly]" held that Twitter's *Freedman* challenge was not raised below. App., *infra*, 29a. The court went on, however, to hold that Twitter was not entitled to *Freedman's* procedural safeguards of prompt judicial review and time constraints on unreviewed speech restrictions. The court recognized that this Court has "generally" applied *Freedman* to "censorship schemes and licensing schemes," but thought *Freedman* protections unnecessary for pre-publication restraints that "do not present the grave dangers of a censorship system." App., *infra*, 32a-33a (internal quotation marks omitted). As examples of what it had in mind as speech restrictions that fall into this category, the court pointed to three decisions

where this Court did not require *Freedman* protections: *City of Littleton* v. *Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 783 (2004), which involved a licensing scheme for adult businesses that did not serve as a content-based speech restriction; *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 33-34 (1984), which involved speech restrictions (in the form of a protective order) on information learned through civil discovery; and *Butterworth* v. *Smith*, 494 U.S. 624, 632 (1990), which involved speech restrictions on the disclosure of information learned from other witnesses during grand-jury proceedings. See App., *infra*, 32a-35a.

In the court of appeals' view, the aggregate national security process nondisclosure requirement is similar to the speech restrictions at issue in *Littleton*, *Rhinehart*, and *Butterworth*, and is "not akin to the censorship schemes to which *Freedman* has been applied." App., *infra*, 38a-39a. That is so, in the Ninth Circuit's view, because an ECSP that has received national security process "is restrained only in speaking about information *it received from the government*" in an "area"—that is, national-security-related intelligence gathering—"in which courts have regarded government confidentiality restrictions * * * as legitimate means of protecting certain *government-provided confidential information*." App., *infra*, 38a (emphases added). The court concluded that "*Freedman*'s procedures, which were designed to curb traditional censorship regimes, are not required in the context of government restrictions on the disclosure of information transmitted confidentially as part of a legitimate government process, because such restrictions do not pose the same dangers to speech rights as do traditional censorship regimes." *Id.* at 43a. In reaching that conclusion, the Ninth Circuit expressly rejected the Second Circuit's contrary decision in *John Doe, Inc.* v.

Mukasey, 549 F.3d 861 (2d Cir. 2008), which applied *Freedman* to the nondisclosure requirements imposed on NSLs and which the court below condemned as "not persua[sive]" because it "fails to recognize that *Freedman* has not been extended to long-accepted confidentiality restrictions concerning government-provided information." App., *infra*, 40a.

The Ninth Circuit also rejected Twitter's argument that, as a prior restraint on speech, the aggregate nondisclosure requirement is subject to extraordinarily exacting scrutiny. App., *infra*, 19a-20a. The court reasoned that, under circuit precedent, it was obliged to apply only a lesser version of strict scrutiny, rather than the heightened scrutiny endorsed in *Pentagon Papers*. App., *infra*, 20a. And even so, the court's application of strict scrutiny—in which the Government's interest must be compelling and its means narrowly tailored—was itself limited, as the Ninth Circuit required only that the aggregate disclosure requirement be "well-calibrated to achieving the government's national security goals." App., *infra*, 24a. In applying this relaxed version of strict scrutiny, the court did not address that the aggregate nondisclosure requirement may remain in place for up to a quarter century with no review. See App., *infra*, 20a-28a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Creation Of An Exception To Long-Established First Amendment Protections Has Resulted In Two Circuit Splits And Departs From This Court's Doctrine.

The Ninth Circuit rejected the holdings of other circuits—and departed from this Court's precedents—

in two respects. *First*, it determined that *Freedman*'s procedural protections, which ensure that Government censorship receives prompt judicial review, do not apply when the Government served legal process and then ordered the recipient not to disclose its receipt of that process. In doing so, it expressly rejected the Second Circuit's holding that *Freedman* applied to a materially identical nondisclosure requirement. App., *infra*, 40a (citing *Mukasey*, 549 F.3d at 876-878). *Second*, the Ninth Circuit refused to apply the decades-old and well-established principle that prior restraint of speech faces more exacting scrutiny than does post-publication punishment of speech—and certainly greater scrutiny than the requirement that a speech restriction be no more than "sufficiently calibrated toward protecting the government's proffered national security interest." App., *infra*, 23a. Both of these holdings are incorrect and dangerous. They warrant this Court's attention.

A. By Declining To Apply *Freedman*, The Ninth Circuit Expressly Departed From This Court's First Amendment Jurisprudence And Split With The Second Circuit.

1. The Ninth Circuit created an exception to Freedman *with no basis in this Court's precedents.*

a. *Freedman* holds that a prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." 380 U.S. at 58. Those safeguards are, first, that "the burden of instituting judicial proceedings, and of proving that the material is [substantively] unprotected, must rest on the censor." *Southeastern Promotions, Ltd.* v. *Conrad*, 420

U.S. 546, 560 (1975). Second, "any restraint prior to judicial review [must] be imposed only for a specified brief period and only for the purpose of preserving the status quo." *Ibid.* And third, "a prompt final judicial determination must be assured." *Ibid.* It is undisputed that none of these protections was applied to the prior restraint here.

Instead, the Ninth Circuit limited *Freedman* to "traditional censorship regimes," such as "licensing schemes" and "classic prior restraint[s]," pointing to the fact that *Freedman* itself involved government censorship of a film. App., *infra*, 32a, 39a (internal quotation marks omitted).

But this Court has applied *Freedman* to a wide range of non-traditional prior restraints, covering the full gamut of speech: a mayor's discretion over the placement of news racks, *City of Lakewood* v. *Plain Dealer Publishing Co.,* 486 U.S. 750, 771-772 (1988); the Postmaster's discretion to censor mail, *Blount* v. *Rizzi,* 400 U.S. 410, 418-419 (1971); a state's licensing requirements on professional fundraisers, *Riley* v. *National Fed'n of the Blind of N.C., Inc,* 487 U.S. 781, 801 (1988); the denial of a request to stay an injunction pending appeal, *National Socialist Party of Am.* v. *Village of Skokie,* 432 U.S. 43, 43 (1977) (per curiam); a restraining order that precluded political rallies, *Carroll* v. *President & Comm'rs. of Princess Anne,* 393 U.S. 175, 181 (1968); and judicial restraints under a nuisance statute, *Vance* v. *Universal Amusement Co.,* 445 U.S. 308, 317 (1980). The Ninth Circuit's assertion that *Freedman* is limited to "traditional censorship regimes," such as the film censorship addressed by *Freedman* itself, is just wrong.

Instead, the unifying theme running through these decisions is that prior restraints on speech,

particularly content-based prior restraints, are highly dangerous and require prompt judicial oversight—necessitating *Freedman*'s protections. Whether *Freedman* applies thus depends not on the *method* of the speech restriction (*i.e.*, licensing scheme versus court-issued restraining order), but on whether the Government is seeking to impose a prior restraint based on the *content* of the speech. As this Court has explained, "[i]nsistence on rigorous procedural safeguards under these circumstances is 'but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.'" *Southeastern Promotions*, 420 U.S. at 561 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963)).

In fact, the manner in which the Ninth Circuit limited *Freedman* is, if anything, particularly dangerous because the court authorized the Executive Branch to make discretionary judgments to impose prior restraints on people's ability to disclose their *own interactions with government officials and processes*. The Ninth Circuit suggested that *Freedman* does not apply in this setting because the aggregate nondisclosure requirement "restrain[s]" the "recipient" of national security process "only in speaking about information it received from the government." App., *infra*, 38a-39a. But that is a very peculiar way to characterize the circumstances here: When a recipient of national security process seeks to disclose the aggregate amount of process it has received, it means to reveal only the recipient's own experiences interacting with government officials, not *information* it received *from* the Government. If Twitter had wanted to disclose the *contents* of the national security process (including the identity of the user to whom it was directed)—which it is not seeking to do here—that properly could be characterized as "government-

provided" information. But it is a fundamentally different matter for a private entity to describe its own encounter with the Government, which is hardly "government-provided" information in any meaningful sense. Twitter's desire to state the number of times it received various types of national security process is no different than a private citizen seeking to tell the media that the police served a warrant at her home—or, more precisely, the number of warrants that the police served on her in the last year.

It would be profoundly dangerous to democratic governance if the Government, without first (or promptly) having to justify the speech restrictions before a court, could prevent citizens from reporting their encounters with government officials. Indeed, the dangers to free speech imposed by such a regime would be at least as great, if not greater, than those posed by the film censorship at issue in *Freedman*. As the Second Circuit recognized when addressing speech restrictions on NSLs, the secrecy at issue in this setting is "imposed at the demand of the Executive Branch under circumstances where secrecy might or might not be warranted, depending on the circumstances alleged to justify such secrecy." *Mukasey*, 549 F.3d at 877. The restriction "restrain[s persons] from publicly expressing a category of information" that "is relevant to intended criticism of a governmental activity." *Id*. at 878. And "[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1034 (1991); see also *Landmark Commc'ns, Inc.* v. *Virginia*, 435 U.S. 829, 838 (1978) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of

governmental affairs.") (internal quotation marks omitted).

b. The Ninth Circuit relied on this Court's decisions in *City of Littleton*, *Seattle Times*, and *Butterworth*, but none of those decisions supports the Ninth Circuit's view that *Freedman*'s protections are unnecessary here.

The court of appeals first pointed to *City of Littleton* for the proposition that *Freedman* is unnecessary even in licensing contexts if the licensing system at issue does "not present the grave dangers of a censorship system." App., *infra*, 33a (internal quotation marks omitted). But the ordinance at issue in *Littleton* did not prohibit the publication of material based on its content; the ordinance applied "reasonably objective, nondiscretionary criteria" to issuance of a license to run an adult business—such as whether the applicant was of age or had timely paid taxes. *Freedman*'s protections were not needed because there the government was not acting as a content-based censor, restricting material it deemed inappropriate for public consumption. *Littleton*'s holding that *Freedman* procedures are unnecessary to test a government scheme that does not target content is unremarkable, and it does not support the Ninth Circuit's conclusion that the aggregate nondisclosure requirement—which unquestionably *is* directly aimed at restricting content, as the Ninth Circuit itself held, App., *infra*, 20a ("the restriction on Twitter's speech is a content-based limitation")—may similarly avoid *Freedman*'s limitations.

The court of appeals' reliance on *Seattle Times* and *Butterworth* was similarly misplaced. The Ninth Circuit relied on both decisions for the proposition that the Government may restrict a person from

disseminating information that they receive from the Government. At the most basic level, that principle has no application here because, as described above, the aggregate nondisclosure requirement restricts Twitter's ability to describe its own encounters with government officials, not Twitter's ability to share information provided *to* it by the Government. But *Seattle Times* and *Butterworth* differ from the circumstances here for other fundamental reasons, as well.

Seattle Times involved speech restrictions imposed by a protective order on information obtained in civil discovery. 467 U.S. at 32. This Court recognized that imposing nondisclosure requirements as a condition for accessing the judicial power to compel the production of otherwise-inaccessible information does not resemble a content-based restraint on the public's speech. *Id.* at 32-33. That is because "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit," so "continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." *Id.* at 32; see also *id.* at 34 (because the "protective order prevents a party from disseminating only that information obtained through use of the discovery process," while allowing a party to disseminate that very same information if "gained through means independent of the court's processes," the restriction "implicates the First Amendment rights of the restricted party to a far lesser extent"). That limit on the ability to *obtain* information has nothing in common with this case.

As for *Butterworth*, that decision involved a restriction on grand-jury witnesses revealing other witnesses' testimony, while striking down as

unconstitutional restrictions on the witness disclosing "his own testimony" after the close of the grand-jury investigation, including the fact that the witness had testified before the grand jury. 494 U.S. at 632. This Court therefore protected a witness's ability to disclose his own interaction and experience with a government investigation. Indeed, the Court recognized that the gag order at issue, which extended "into the indefinite future," was of particular concern because of the "potential for abuse" that the speech restraint would be "employ[ed] as a device to silence those who know of unlawful conduct or irregularities on the part of public officials." *Id.* at 635-636. Nothing in *Butterworth*, therefore, supports the view that the Government may issue process to individuals, demand their compliance with that process, and then prohibit the recipients from merely disclosing that they were compelled to be part of a government investigation—all without timely and meaningful judicial review.

The Ninth Circuit has thus created an exception to *Freedman* for content-based prior-restraints on speech when the Government seeks to keep secret its interactions with the speaker. Such an exception is wholly unsupported by this Court's precedents.

2. Under the decision below, recipients of government national security process now have different First Amendment rights in the Ninth and Second Circuits.

The Ninth Circuit also created a conflict with the Second Circuit, stating expressly that it was "not persuaded" by the Second Circuit's reasoning. App., *infra*, 40a.

In *John Doe, Inc.* v. *Mukasey*, 549 F.3d 861 (2d Cir. 2008), the Second Circuit reviewed the restraint

on the disclosure of individual NSLs that existed prior to passage of the USAFA. Under the statutory scheme reviewed by the Second Circuit, the Government could impose a gag order on recipients of NSLs if a senior FBI official certified that certain harms "may result" from disclosure. *Id*. at 866 (internal quotation marks omitted). The statute required the NSL recipient to file a petition with a U.S. district court to challenge the nondisclosure requirement after the gag order was imposed. *Ibid*. The Second Circuit struck down the speech restriction because it did not comply with *Freedman*. *Id*. at 883.

In doing so, the Second Circuit disagreed with the bases of the Ninth Circuit's holding in this case on multiple key points:

First, the Second Circuit held that "*Freedman* * * * cannot be disregarded simply because [the nondisclosure requirement at issue] does not impose a traditional licensing scheme." 549 F.3d at 880. The court acknowledged that the individual nondisclosure requirement "is not a typical example of [a prior restraint] 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." *Id*. at 876. Further, "although the nondisclosure requirement is triggered by the content of a category of information, that category, consisting of the fact of receipt of an NSL and some related details, is far more limited than the broad categories of information that have been at issue with respect to typical content-based restrictions." *Ibid*. Nevertheless, the Second Circuit concluded that the restriction remained a content-based prior restraint subject to *Freedman*. *Id*. at 880.

Second, the Second Circuit expressly rejected analogies to *Seattle Times* and *Butterworth*. Regarding *Seattle Times*, the Second Circuit explained, the speech restriction (there, a protective order in a civil suit) was imposed because of a pre-existing interaction with the government—the civil litigant's invocation of court-ordered discovery. But the recipient of NSLs, the Second Circuit continued, "had no interaction with the Government until the Government imposed its nondisclosure requirement upon it." 549 F.3d at 877; see also *id*. at 880 ("Although the governmental interaction distinction has validity with respect to the litigant obtaining discovery material in *Seattle Times* * * *, we think it has no application to an ECSP with no relevant governmental interaction prior to receipt of an NSL. The [NSL] recipient's 'participation' in the investigation is entirely the result of the Government's action."). As for *Butterworth*, which affirmed that a grand-jury witness had a First Amendment right to discuss his own testimony but not that of other witnesses, the Second Circuit remarked that the "interests in secrecy arise from the nature of the [grand-jury] proceeding," but the requirement not to disclose receipt of NSLs "is imposed at the demand of the Executive Branch under circumstances where secrecy might or might not be warranted" because the Executive may be seeking to conceal its own conduct. *Id*. at 877.

Third, the Second Circuit recognized that, far from being a benign restriction, the nondisclosure requirement on NSLs had stymied discussion of "information [that] is relevant to intended criticism of governmental activity." 549 F.3d at 878. Because protecting people's ability to criticize the government is at the core of the First Amendment, the court regarded it as essential that *Freedman*'s protections be

available to safeguard the NSL recipient's speech. *Id.* at 880. Precisely the same thing is true in this case.

In sum, in finding that *Freedman* safeguards applied to the Government's nondisclosure orders directed to national security process recipients, the Second Circuit expressly rejected the reasoning subsequently embraced by the Ninth Circuit here. As a result, people served with government process in the Second Circuit have First Amendment procedural rights—specifically the right to *Freedman* safeguards—that are unavailable in the Ninth Circuit. This Court should resolve that conflict.

B. The Ninth Circuit's Watered-Down "Strict Scrutiny" Analysis Puts It At Odds With This Court And Other Courts Of Appeals, Which Apply Heightened Scrutiny To Prior Restraints On Speech

The Ninth Circuit also rejected the long-held principle that prior restraints on speech are subject to more exacting scrutiny than post-publication restraints, putting it at odds with this Court and other courts of appeals.

This Court has explained that because "prior restraints on speech and publication are * * * the least tolerable infringement on First Amendment rights," *Nebraska Press*, 427 U.S. at 559, it will allow prior speech restraints "only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures," *CBS v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J.). In other words, to justify a prior restraint, the government must establish that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

Landmark Commc'ns, Inc. v. *Virginia,* 435 U.S. 829, 845 (1978). The disclosure must "surely result in direct, immediate, and irreparable damage to our Nation or its people." *Pentagon Papers*, 403 U.S. at 730 (Stewart, J., joined by White, J., concurring). This standard is significantly more difficult to satisfy than that applied to post-publication restrictions on speech, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed* v. *Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015) (internal quotation marks omitted).

Following this Court's precedents, numerous courts of appeals have imposed "the most exacting scrutiny" in determining whether a prior restraint is compatible with the First Amendment. *Sindi* v. *El-Moslimany*, 896 F.3d 1, 31-32 (1st Cir. 2018); see also *In re Goode*, 821 F.3d 553, 559 (5th Cir. 2016) ("Generally, a prior restraint is constitutional only if the Government can establish that the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest.") (internal quotation marks omitted); *Procter & Gamble Co.* v. *Bankers Trust Co.*, 78 F.3d 219, 224-225 (6th Cir. 1996) (similar); *Matter of Providence J. Co.*, 820 F.2d 1342, 1348-1349 (1st Cir. 1986) (similar); *Bernard* v. *Gulf Oil Co.*, 619 F.2d 459, 473 (5th Cir. 1980) (similar); *CBS Inc.* v. *Young*, 522 F.2d 234, 238 (6th Cir. 1975) (similar). As the First Circuit has noted, this exceptionally exacting scrutiny is so difficult to overcome as to mandate that "the New York Times and other newspapers could not be restrained even during wartime from publishing documents that had been classified top secret and obtained without

authorization." *Matter of Providence*, 820 F.2d at 1348 (describing *Pentagon Papers*).

Yet here, the Ninth Circuit departed from this Court's and other courts of appeals' precedent in expressly rejecting that highest level of scrutiny for prior restraints, purporting to apply only the level of strict scrutiny governing post-publication restraints on speech. App., *infra*, 20a-21a. And even then, when the Ninth Circuit applied this less-searching test, it required only that the Government's restriction on Twitter's speech be "sufficiently calibrated toward protecting the government's proffered national security interest." App., *infra*, 23a. As a result, the Ninth Circuit improperly allowed a prior restraint on speech without any showing of imminent or irreparable harm.

What's more, the Ninth Circuit allowed the prior restraint without imposing a temporal restriction on that restraint. A restraint on speech should not survive constitutional scrutiny if it lasts longer than necessary to protect the governmental interests at stake. But the Ninth Circuit approved the prior restraint on Twitter's speech here, even though there is no requirement that the Government periodically review whether the limits on Twitter's speech remain necessary. So for a quarter of a century, the prior restraint on Twitter's speech will remain in force, until and unless Twitter itself initiates and successfully pursues a proceeding to challenge the restriction. This Court has never before accepted such a boundless prior restraint on speech.

There was no justification for the Ninth Circuit's decision to abandon the exacting scrutiny applied to prior restraints on speech. That decision runs contrary to the decades-long course of decisions in which

this Court recognized the need for heightened requirements cabining prior restraints. See*, e.g.*, *Southeastern Promotions*, 420 U.S. at 558-559 ("The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties."). As this Court has recognized, "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." *Id*. at 559 (emphasis added); *Nebraska Press*, 427 U.S. at 559 (First Amendment affords "special protection" against prior restraints because, while the "threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it."). The Court should step in to reassert the critical importance of the exacting standard of scrutiny for prior restraint on speech.

II. The Questions Presented Are Fundamentally Important And Cleanly Presented.

The First Amendment exists, perhaps most importantly, to protect the public's ability to criticize and freely comment on government conduct. See *Gentile*, 501 U.S. at 1034 ("speech critical of the exercise of the State's power lies at the very center of the First Amendment."); *Landmark Commc'ns*, 435 U.S. at 838 ("a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.") (internal quotation marks omitted). Thus, the ability to publish "information relating to alleged governmental misconduct" "has traditionally been recognized as lying at the core of the First Amendment." *Butterworth*, 494 U.S. at 632. And because "[i]t is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them," *Carroll*, 393 U.S. at 182 (internal

quotation marks omitted), prior restraints on speech are subject to both exacting substantive scrutiny and *Freedman*'s procedural protections.

The Ninth Circuit's decision has effectively curtailed Twitter's—and others'—ability to publicly discuss and comment on a crucially important facet of government conduct, and one already proved amenable to government *mis*conduct. See note 2, *supra*. Government surveillance programs are a highly controversial topic and the subject of intense political debate. It is critical that Americans have access to the facts about the extent of government surveillance—such as how often the online platforms they use every day are the subject of that surveillance—so that they can appropriately petition their political leaders. The Ninth Circuit's rule precludes that debate

Nor can the Ninth Circuit's errors be dismissed as merely academic, with no real-world impact. Far weightier evidence is needed to persuade a court that nondisclosure of an aggregate amount of national security process is necessary to prevent "imminent" harm as opposed to merely being "sufficiently calibrated" to protecting national security. Had the Ninth Circuit, for example, applied the most exacting scrutiny to the lack of a temporal restriction on the aggregate nondisclosure requirement, it doubtless would have mandated that the Government periodically revisit the need for Twitter's silence; it is hard even to imagine how such a requirement is inconsistent with the national interest. See p. 26, *supra*; *In re Nat'l Security Letter*, 33 F.4th 1058, 1076 (9th Cir. 2022) (citing cases imposing periodic review requirements on speech restrictions).

Indeed, Twitter's own experience with the procedures now available for the disclosure of individual

NSLs—thanks to the USAFA—demonstrate that mandatory review procedures make a material difference. Applying those procedures, Twitter has been authorized to publish the receipt of 14 individual NSLs. Although many factors bear on any Government or court decision to permit disclosure of an NSL, that Twitter itself has been permitted to disclose multiple NSLs since the imposition on the Government of periodic review requirements suggests that those safeguards serve as a critical bulwark against unjustified prior restraints.

This case cleanly presents critical questions that merit the Court's review. The Court should intervene to restore uniformity in the law regarding the *Freedman* procedures and the exacting scrutiny given prepublication restrictions on speech, in a factual context of pressing importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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