No. 23-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Months after publicly announcing investigations into former President Donald Trump, the government served Twitter, Inc. with a warrant seeking private communications sent and received by the former President during his presidency. The government also served a nondisclosure order barring Twitter from notifying the former President or a representative about the warrant. The courts below rejected Twitter's First Amendment challenge to the nondisclosure order after ordering Twitter to produce the communications without affording the former President an opportunity to assert privilege over them. As a result, "for the first time in American history," a court "ordered disclosure of presidential communications without notice to the President and without any adjudication of executive privilege." App.83a, 88a (Rao, J., statement respecting denial of rehearing petition). The questions presented are:

1. Whether an electronic communications service provider can be compelled to produce potentially privileged user communications before adjudication of the provider's First Amendment challenge to a nondisclosure order that prohibits it from notifying the user and before the user had notice and an opportunity to assert privilege, including executive privilege.

2. Whether the First Amendment permits gagging a provider in a highly public investigation where the government does not (a) demonstrate that disclosure would jeopardize the investigation's integrity; or (b) disprove the workability of a less-restrictive alternative, such as disclosure to a representative designated by a former President to assert executive privilege on his behalf.

PARTIES TO THE PROCEEDING

Petitioner is X Corp., successor in interest to Twitter, Inc. Twitter, Inc. was movant/respondent in the district court and appellant in the court of appeals.

Respondent is the United States. The United States was movant/respondent in the district court and appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner X Corp., as successor in interest to Twitter, Inc., discloses that Twitter, Inc. has been merged into X Corp. and no longer exists. X Corp. is a privately held company. Its parent corporation is X Holdings Corp. No publicly held corporation owns 10 percent or more of X Corp. or X Holdings Corp.

DIRECTLY RELATED PROCEEDINGS

In re: The Search of Information Stored at Premises Controlled by Twitter, Inc., No. 23-5044 (D.C. Cir.) (opinion and judgment issued on July 18, 2023; opinion and judgment reissued on August 9, 2023; rehearing denied on January 16, 2024).

In the Matter of the Search of: Information that is Stored at Premises Controlled by Twitter Inc. Identified In Attachment A, No. 1:23-sc-00031-BAH (D.D.C.) (order granting application for nondisclosure order issued on January 17, 2023; order and memorandum opinion denying motion to vacate or modify issued on March 3, 2023).

In re Press Application for Access to Judicial Records in Case No. 23-sc-31, In the Matter of the Search of Information That is Stored at Premises Controlled by Twitter, Inc., Misc. No. 23-00084-JEB (D.D.C.) (order denying application to unseal records issued on November 29, 2023).

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

In an unprecedented end-run around executive privilege, Special Counsel Jack Smith obtained a nondisclosure order preventing Twitter from notifying former President Trump of a warrant for private communications that he sent and received during his presidency. Although Twitter had provided these communications to the National Archives and Records Administration (NARA), the government informed Twitter and the district court that it "did not want to obtain data from NARA, as it would require notification [to the former President] pursuant to the Presidential Records Act." C.A.J.A.53; *see also* App.115a-116a. The district court nonetheless ordered Twitter to produce these private

communications before considering Twitter's First Amendment challenge to the nondisclosure order or permitting former President Trump any opportunity to assert privilege. As four D.C. Circuit judges concluded, the D.C. Circuit "should not have endorsed this gambit" to "bypass[] any assertion of executive privilege." App.83a.

Executive privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U.S. 683, 708 (1974). To implement these constitutional protections, the Presidential Records Act (PRA) establishes a procedural framework that requires—before disclosure of potentially privileged presidential records for "any civil or criminal investigation"—notice to the former President or his designated representative, an opportunity to assert executive privilege, and judicial review of any claims of executive privilege. *See* 44 U.S.C. §§2204(c), 2205(2)(A), 2206(3); 36 C.F.R. §1270.44(a)(1), (c).

Twitter had reason to believe both that the nondisclosure order was invalid because the investigation was highly public, and that the warrant demanded potentially privileged presidential records. It challenged the nondisclosure order on First Amendment grounds, as it has other nondisclosure orders. Twitter argued the order was a prior restraint on speech subject to the procedural safeguards of *Freedman* v. *Maryland*, 380 U.S. 51 (1965), which requires that challenges to prior restraints be resolved in time to preserve the status quo. Twitter requested that the district court either vacate the order or modify it to permit limited disclosure to one of the representatives whom former President Trump had designated to act on his behalf "in all respects that pertain to the records of [his] Presidency" ("PRA-designated

representatives"). C.A.J.A.16-17. Twitter also requested a stay of production until after expedited resolution of its challenge to the nondisclosure order and, if notice were permitted, 7 days after such notice. C.A.J.A.18. That is, Twitter sought to notify former President Trump in a manner that, like the PRA, protected potential constitutional privileges while accommodating any legitimate interest the government had in nondisclosure.

Dismissing these requests, the courts below diminished the constitutional interests at stake. The D.C. Circuit held that *Freedman* categorically does not apply to nondisclosure orders and ordered production before notice or any opportunity to assert privilege, deepening one circuit split and creating another. And the D.C. Circuit adopted a novel test for nondisclosure orders that is strict in name only and will be satisfied nearly any time the government seeks nondisclosure of new legal process.

The implications are far-reaching. In cases involving executive privilege, which typically arise in the D.C. Circuit, the government can now circumvent the PRA and deny privilege-holders their opportunity to assert privilege by seeking communications from, and gagging, third parties. And in the tens of thousands of other cases where the government obtains nondisclosure orders, the government can invade other privileges—including attorney-client, journalist-source, and doctor-patient—without notice. Meanwhile, the First Amendment rights of service providers like Twitter to notify users in time for them to assert privileges can be irreparably injured.

This case is an ideal vehicle to resolve these significant and recurring issues. Nondisclosure orders can rarely be reviewed by courts of appeals, let alone this

Court. This appeal, unlike most involving nondisclosure orders, does not require expedition because the order has largely been lifted. Also unlike most challenges to nondisclosure orders, this one is not under seal: Because the former President has been indicted, the record is now nearly all public. This case therefore presents a unique opportunity for review of these important questions.

OPINIONS BELOW

The court of appeals' opinion (App.1a-33a) is published at 77 F.4th 815. The court's en banc order and statement (App.81a-95a) is unpublished but available at 2024 WL 158766.

The district court's opinion (App.35a-73a) is unpublished but available at No. 23-sc-31 (D.D.C. Mar. 3, 2023).

JURISDICTION

The D.C. Circuit entered judgment on July 18, 2023, and denied rehearing en banc on January 16, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Pertinent provisions of the Stored Communications Act and Presidential Records Act are reproduced in the appendix. App.163a-184a.

STATEMENT

A. Statutory Background

1. The Stored Communications Act (SCA) generally prohibits providers of electronic communication services

like Twitter, Gmail, and WhatsApp from disclosing customer communications. *See* 18 U.S.C. §§2701, 2702. It reflects Congress's judgment that users "should be afforded a level of confidence" that their records "will not be disclosed or obtained by the government, unless certain exceptions apply or if the government has used appropriate legal process with the subscribers or customers being given an opportunity to protect their rights." H.R. Rep. No. 99-647, at 73 (1986).

The SCA permits the government to compel providers to disclose customer communications in limited circumstances. 18 U.S.C. §2703(a), (b)(1)(A), (c). These government demands are presumptively public: The Act "contains no default sealing or nondisclosure provisions." *In re Leopold to Unseal Certain Electronic Surveillance Applications & Orders*, 964 F.3d 1121, 1129 (D.C. Cir. 2020) (quotation marks omitted). Instead, when the government wants to "displace[] the usual presumption in favor of [disclosure]" of legal process, it must seek a nondisclosure order under Section 2705(b). *Id.* at 1130.

Nondisclosure orders "command[] a provider … for such period as the court deems appropriate, not to notify any other person of the existence of the" legal process. 18 U.S.C. §2705(b). The court may authorize a §2705(b) order only if "there is reason to believe that notification of the existence of the" legal process "will result in" one of five harms, including "destruction of or tampering with evidence" and "otherwise seriously jeopardizing an investigation or unduly delaying a trial." *Id.*

Justice Department policy instructs a nondisclosure order "should be sought only after a … case- and fact-specific analysis." DOJ, *Supplemental Policy Regarding Applications for Protective Orders Pursuant to 18*

U.S.C. §2705(b), at 2 (May 27, 2022), https://www.justice.gov/d9/pages/attachments/2022/05/31/section_2705b_supplemental_policy_-_dag_memo_-_05.27.22_005.pdf ("2022 DOJ §2705(b) Policy"). DOJ advises such an order may not be warranted once "investigations progress or become public." *Id.*

2. The PRA governs the preservation of, and public access to, "presidential records." 44 U.S.C. §2201(2). Presidential records are documents "created or received by" the president or executive staff that "relate[] to or have an effect upon" the president's duties. *Id.* The PRA applies across media, *id.* §2201(1), including social media, *see Knight First Amendment Institute* v. *Trump*, 928 F.3d 226, 232 (2d Cir. 2019), *judgment vacated on other grounds sub nom. Biden* v. *Knight First Amendment Institute*, 141 S.Ct. 1220 (2021).

While presidential records are presumptively public, the PRA restricts access to sensitive and potentially privileged material, including "confidential communications requesting or submitting advice, between the President and the President's advisors." 44 U.S.C. §§2203(g)(1), 2204(a)(1)(A)(5). Before disclosure of documents that "may adversely affect any rights or privileges which the former President may have," *id.* §2206(3), the PRA requires notice to the former president "or their representative." 36 C.F.R. §1270.44(c). The PRA's implementing regulations permit a "former President" to "designate one or more representatives to exercise" all of the "discretion and authority over Presidential records" granted to the former president under the Act. *Id.* §1270.22(a). That aligns with *Nixon* v. *Administrator of General Services* ("*GSA*"), which upheld the constitutionality of an earlier presidential records statute in part because it required "meaningful notice" to the former president or his designated representative

of decisions to disclose potentially privileged material. *See* 433 U.S. 425, 444 n.7 (1977).

The PRA and its implementing regulations specifically require the NARA archivist to "promptly notif[y]" a former president or PRA-designated representative if his restricted records are sought for "any … criminal investigation." 36 C.F.R. §1270.44(a)(1), (c); 44 U.S.C. §2205(2)(A). The former president may then assert privilege. 36 C.F.R. §1270.44(d). If he does, the archivist consults with the incumbent president and executive counsel. *Id.* §1270.44(f). If the incumbent president upholds the privilege claim, the archivist may not release the documents except by court order or withdrawal of privilege. *Id.* §1270.44(f)(2). If the incumbent does not uphold the claim, the former President can file an action challenging the archivist's decision. The archivist can disclose the record 60 days after notification of the privilege claim if no court order directs otherwise. *Id.* §1270.44(f)(3); 44 U.S.C. §2204(e).

B. Twitter's Commitment To User Privacy

Twitter (now X Corp.) operates a global social media platform that fosters conversations among hundreds of millions of users. Twitter has long sought to safeguard the privacy of those users, including by, when possible, disclosing government efforts to obtain users' information. Twitter's policy is to notify users about law enforcement requests "prior to disclosure of account information" unless legally "prohibited from doing so." X Corp., *Guidelines for law enforcement*, https://help.twitter.com/en/rules-and-policies/x-law-enforcement-support#10 (visited May 29, 2024). But thousands of times a year, the government obtains §2705(b) nondisclosure orders prohibiting Twitter from notifying users that the government is compelling production of their

communications. Twitter regularly negotiates informally with law enforcement to modify these orders. And it has challenged those that appear facially unjustified—particularly when there is reason to believe the user might wish to assert privilege. C.A.J.A.217-222.

Twitter is not alone in its concerns about the government's use of nondisclosure orders to conceal demands for user communications. A House of Representatives report found that "[e]xperts … generally agree that the process to obtain an [order] has become a box-checking exercise" and "'rubber stamp' process." H.R. Rep. No. 117-361, at 6-7 (2022). Courts have, for example, approved thousands of nondisclosure orders annually against Microsoft "without any meaningful analysis of either the need for secrecy or the orders['] compliance with fundamental constitutional rights." *Id.* at 8.

C. Proceedings Below

The Special Counsel served a search warrant on Twitter for data associated with the account @realDonaldTrump, including private communications sent and received from October 2020 to January 2021, during the user's presidency. App.97a-104a. The Special Counsel also served a nondisclosure order prohibiting Twitter from notifying anyone other than its counsel about the warrant. App.77a-78a, 97a-104a. The order rested on the district court's conclusion, based on the government's *ex parte* application, that there were "reasonable grounds to believe" disclosure would result in "destruction of or tampering with evidence, intimidation of potential witnesses, and serious jeopardy to the investigation," and would give the former President "opportunity to … flee from prosecution." App.77a-78a.

Twitter had reason to believe the nondisclosure order was invalid. Informing President Trump of the

warrant would disclose little to no new information. The Attorney General had publicly announced investigations into former President Trump, including concerning January 6. DOJ, *Appointment of a Special Counsel* (Nov. 18, 2022), C.A.J.A.62. Numerous investigatory actions—including seizing electronic communications between the former President and his aides—were already public. *E.g.*, Benen, *DOJ Seizes Team Trump Phones as Part of Intensifying Jan. 6 Probe*, MSNBC (Sept. 13, 2022), C.A.J.A.69-72. There was no risk of destruction of the requested records because Twitter had preserved them. C.A.J.A.51. And flight risk was implausible because the former President already had announced his re-election run.

Twitter also had reason to believe former President Trump had a potential executive privilege claim. The warrant sought private communications from his presidency. The account had been among his "main vehicles for conducting official business." *Knight*, 928 F.3d at 232. Twitter had provided his Twitter communications to NARA in recognition of their status as presidential records under the PRA. C.A.J.A.52; App.137a-138a. And the former President had designated his confidential communications restricted under the PRA. Letter from President Trump to Archivist of the United States (Feb. 16, 2017), https://www.archives.gov/files/foia/pra-notifications/pdf/trump-pra-designation-letter.pdf; *see also* 36 C.F.R. §1270.40(b).

D. Procedural History

Twitter objected to producing the communications before providing the former President notice and an opportunity to assert privilege. The government informed Twitter "they did not want to obtain data from NARA, as it would require notification pursuant to the [PRA]."

C.A.J.A.53. The parties conferred but reached an impasse. Twitter moved to vacate or modify the nondisclosure order. C.A.J.A.3-20. The government moved for an order to show cause why Twitter should not be held in contempt for not producing. C.A.J.A.22-25. Twitter proposed an expedited briefing schedule that would have allowed the court to simultaneously resolve both motions within a week. C.A.J.A.28. The court instead set staggered schedules; the government's motion would be briefed and argued in five days but Twitter's would be briefed on the standard three-week schedule. C.A.J.A.30-31.

At argument on the government's motion, the court held Twitter in contempt. App.47a-49a. The court recognized the nondisclosure order was "boilerplate" and agreed the flight-risk rationale did not "make a lot of sense." App.129a, 144a. The government told the court that, according to NARA's general counsel, the archivist would have had to notify the former President if the government had sought records from NARA. App.115a-116a. But the court nonetheless characterized Twitter as "tak[ing] up my time on what should be a simple processing of a warrant" and asserted Twitter had only challenged the nondisclosure order "because the CEO wants to cozy up with the former President." App.113a, 133a. The court described the PRA as a "rabbit hole" not "worth inquiring about" and stated that, while Twitter might "think" former President Trump's possible executive privilege claims present "difficult and novel issues," "[f]or the others of us in this room"—itself and the government—they did "not." App.118a, 121a.

Nearly a month later, the court denied Twitter's motion. App.50a.[1] It held the nondisclosure order was a content-based prior restraint and assumed strict scrutiny applied. App.50a-53a. But it concluded the order was narrowly tailored and rejected as "preposterous" one of Twitter's proposed less restrictive alternatives—notifying a PRA-designated representative like the PRA provides. The court did not address Twitter's proposal of extending the nondisclosure order to that representative.

The D.C. Circuit affirmed. It first held that modification of the nondisclosure order did not render the case moot. It concluded the dispute is capable of repetition because "it is reasonably likely … the government … will serve more search warrants and nondisclosure orders on Twitter." App.14a-17a. It then had "no trouble holding that a challenge to a nondisclosure order also 'evades review,'" since such orders typically have limited duration. App.15a.

On the merits, the D.C. Circuit agreed the nondisclosure order was a "[c]ontent-based [prior] restriction[] … '[on] speech'" and "[a]ssum[ed] that strict scrutiny applies." App.19a. Relying on the government's then-*ex parte* submissions, the court found the government had a compelling interest in "preserving the integrity and maintaining the secrecy of its ongoing criminal investigation" because "the existence of a search warrant" was "a different category of information." App.20a, 23a.

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[1] The district court sanctioned Twitter $350,000 because it missed its compliance deadline—5:00 pm on the day of the hearing—by 51 hours while seeking clarification on the warrant's scope and supplementing its timely production of standard data with data accessible only outside Twitter's usual processes. Twitter timely paid the sanction under protest. App.75a-76a.

It concluded the order was narrowly tailored and found "unworkable" and "unpalatable" Twitter's proposed less restrictive alternative of informing a PRA-designated representative about the warrant. App.24a. The court did not address Twitter's proposal to extend the nondisclosure order to that representative.

The court next concluded the district court did not violate Twitter's First Amendment rights when it compelled production before addressing Twitter's constitutional claim. The court held that *Freedman*'s procedural safeguards are "inapplicable" to §2705(b) nondisclosure orders. App.27a. And ignoring Twitter's argument that executive privilege questions should be resolved "*before* the confidentiality of presidential communications is breached," C.A.Twitter.Br. 40 (Doc. #1992820), the court did not address executive privilege.

The en banc court declined review, but four members (Judge Rao, joined by Judges Henderson, Katsas, and Walker) wrote separately. These judges recognized that Twitter's First Amendment arguments are "important and may warrant further review." App.85a. They also "highlight[ed] the substantial executive privilege issues implicated by this case," concluding the court "should not have endorsed th[e]" Special Counsel's "unprecedented" "gambit" of "avoid[ing] … notice" to the former President and circumventing his right "to invoke executive privilege before disclosure" through "the simple expediency of a search warrant and nondisclosure order" against Twitter. App.83a-85a, 89a. They further concluded the court undermined constitutional

protections for presidential privilege and "evade[d] the meticulous protections … in the [PRA]." App.89a.[2]

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW—PERMITTING COURTS TO COMPEL PRODUCTION OF USER RECORDS BEFORE RESOLVING A PROVIDER'S CHALLENGE TO A NONDISCLOSURE ORDER AND GIVING THE USER NOTICE AND AN OPPORTUNITY TO ASSERT PRIVILEGE—CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND IS WRONG

The D.C. Circuit held that courts can force online providers to produce user communications before even considering the provider's First Amendment challenge to a nondisclosure order—and thus preclude the user from asserting any privilege. That conflicts with other circuits' decisions and is wrong under this Court's precedents, in two respects.

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[2] Judge Rao suggested the executive privilege issues "[we]re not properly before the en banc court" because former President Trump did not "interven[e] to protect claims of executive privilege" after learning about the search. App.83a. The former President's non-intervention, however, does not bear on the executive privilege issue raised here: Whether Twitter should have been compelled to disclose potentially privileged presidential communications before the former President was given notice and an opportunity to assert executive privilege. Former President Trump received notice months after Twitter had been compelled to produce. By then, his opportunity to prevent disclosure had been irretrievably lost. In any event, this issue is not moot because it is capable of repetition yet evading review, as the panel explained. *See* App.15a-16a. Regardless, if former President Trump's non-intervention rendered the case moot, the D.C. Circuit's opinion must be vacated under *Munsingwear* because mootness would be "due to circumstances unattributable to any of the parties." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 26 (1994).

First, the D.C. Circuit concluded that *Freedman*'s procedural requirements for prior restraints are not required for nondisclosure orders. That deepened a split between the Second and Ninth Circuits over whether *Freedman* applies to nondisclosure orders. Second, in forgoing these safeguards, the D.C. Circuit approved of the Special Counsel's accessing presidential communications before the former President had an opportunity to assert executive privilege. That creates a circuit split over whether investigators are barred from reviewing materials potentially subject to privileges that protect communications from disclosure unless and until the privilege-holder receives notice and an opportunity to raise privilege concerns.

The D.C. Circuit was wrong on both counts. First, under *Freedman*, "[a]ny system of prior restraints" "avoids constitutional infirmity only if" certain "procedural safeguards" are in place. 380 U.S. at 57-58. These include "preserv[ing] … the status quo" until *after* the restraint is tested in an "adversary proceeding." *Id.* at 58-59. Here, the district court irreversibly upset the status quo by compelling production *before* resolving Twitter's challenge to the nondisclosure order. That frustrated the purpose of Twitter's desired speech—providing the former President an opportunity to assert executive privilege.

Second, this Court has long held that holders of executive privilege must have notice and an opportunity to assert privilege *before* confidentiality of the potentially privileged documents is breached. *See* App.89a-90a. The decision below departs from that precedent. Because former President Trump was not informed of the warrant before his records were produced, he could not timely assert executive privilege.

A. The Decision Below Conflicts With Decisions Of Other Circuits

1. The decision below deepened a circuit split over whether *Freedman* applies to nondisclosure orders.

In *Freedman*, this Court established procedural safeguards for prior restraints, including adversarial judicial review prompt enough to preserve the status quo. The D.C. Circuit held that "*Freedman* is inapplicable" to §2705(b) nondisclosure orders. App.26a-27a. The court analogized §2705(b) orders (*id.*) to the protective order this Court upheld in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 37 (1984), which prohibited a civil litigant from disclosing information the litigant had obtained through a discovery motion. It also relied (App.27a) on *Butterworth* v. *Smith*, 494 U.S. 624, 626, 633 (1990), which struck down a prohibition on a grand jury witness from disclosing his own testimony, while noting that another unchallenged provision prevented disclosing other witnesses' testimony.

In exempting nondisclosure orders from *Freedman*, the D.C. Circuit joined the Ninth Circuit, which recently held that *Freedman*'s "specific procedural framework … is not constitutionally required" for comparable nondisclosure requirements accompanying national security related administrative subpoenas known as national security letters. *Twitter, Inc.* v. *Garland*, 61 F.4th 686, 707-708 (9th Cir. 2023), *cert. denied*, 144 S.Ct. 556 (2024). Like the D.C. Circuit, the Ninth Circuit believed nondisclosure orders were not "traditional censorship regimes" and instead analogous to the civil discovery protective order upheld in *Rhinehart* and the grand jury rules discussed in *Butterworth*. *See id.* at 707.

The Second Circuit, in contrast, has held that national security nondisclosure orders must comply with

Freedman. *See John Doe, Inc.* v. *Mukasey*, 549 F.3d 861, 876-878 (2d Cir. 2008). The Second Circuit recognized *Freedman* "cannot be disregarded simply because [the prior restraint] does not impose a traditional licensing scheme." 549 F.3d at 880. It rejected the analogy to grand jury secrecy rules. It explained that case-specific nondisclosure orders are imposed "where secrecy might or might not be warranted, depending on the circumstances alleged to justify such secrecy," in contrast to grand juries, where secrecy categorically "inheres in the nature of the proceeding." *Id.* at 876-877. And the Second Circuit rejected "the analogy between the individual[] … seeking disclosure in [*Rhinehart*]," who was prohibited from disclosing information "obtained … through court-ordered discovery," and the plaintiff there, "who had no interaction with the Government until the Government imposed its nondisclosure requirement upon it." *Id.* at 877.

The Ninth Circuit expressly acknowledged that its holding and reasoning directly conflict with that of the Second Circuit: It was "not persuaded by the Second Circuit's decision in *John Doe, Inc.* v. *Mukasey*." *Twitter*, 61 F.4th at 708. The government has disputed the split, *see* C.A.Gov.Rehearing.Opp. (Doc. #2018981), but the decisions are irreconcilable. That §2705(b) nondisclosure orders and national security nondisclosure orders have different statutory prerequisites, *id.* at 15-16, is immaterial. The specific statutory framework may bear on whether the framework satisfies *Freedman*, but it is irrelevant to whether *Freedman* applies in the first place. Similarly, statutory "amendments to the [national security letter] nondisclosure requirements" since *Mukasey*, *id.*, do not change *Mukasey*'s constitutional holding. In the Second Circuit, *Freedman* applies to

nondisclosure orders. In the Ninth and D.C. Circuits, it does not. That conflict warrants this Court's review.

2. The decision below also creates a circuit split over whether holders of privileges against disclosure must have an opportunity to raise privilege before their potentially privileged materials are produced to investigators.

Here, the D.C. Circuit denied former President Trump the opportunity to assert executive privilege before Twitter was compelled to produce his private communications. The panel did so even though this Court has long recognized that executive privilege—which is directed at ensuring candid communication with advisers—is a protection against *disclosure* of information, not merely improper *use* of that information. *See infra* p.19.

The decision below thus creates a split with the Fourth, Sixth, and Eleventh Circuits, all of which have required that holders of attorney-client privilege—another nondisclosure privilege—have some mechanism for judicial review of privilege concerns before their potentially privileged documents are produced to investigators.

The Sixth Circuit rejected an arrangement where a privilege-holder could assert attorney-client privilege only after a filter team did the initial privilege review, submitting documents it deemed not privileged to the grand jury. *In re Grand Jury Subpoenas* ("*Winget*"), 454 F.3d 511, 515, 522-523 (6th Cir. 2006). The court explained that the "obvious flaw in the taint team procedure" is "the government's fox is left in charge of the [privilege-holders'] henhouse, and may err by neglect or malice, as well as by honest differences of opinion." *Id.* at 523. Instead, the court held, the privilege-holders

"themselves must be given an opportunity to conduct their own privilege review" before documents were given to the grand jury. *Id.*

Similarly, the Fourth Circuit rejected a protocol that allowed a filter team to determine whether seized documents were attorney-client privileged and forward materials it deemed not privileged to the investigators. *In re Search Warrant Issued June 13, 2019 ("Baltimore Law Firm")*, 942 F.3d 159 (4th Cir. 2019). Citing *Winget*, the court held the protocol "improperly delegated judicial functions" to the filter team. *Id.* at 176-178. The court also concluded the magistrate judge erred by authorizing the filter-team protocol *ex parte*, rather than allowing the privilege-holders to be heard on the issue of how their privilege should be protected "*before* the Filter Team reviewed any seized materials." *Id.* at 178-179.

Most recently, the Eleventh Circuit upheld a filter-team protocol precisely because it complied with the "exacting requirements" *Winget* and *Baltimore Law Firm* imposed. *In re Sealed Search Warrant & Application*, 11 F.4th 1235, 1252 (11th Cir. 2021) (per curiam). That protocol gave holders of attorney-client privilege "the first opportunity to identify potentially privileged materials" and required approval from either the privilege-holders or the court "before any of those items may be provided to the investigative team." *Id.* at 1251. Moreover, the protocol was adopted only *after* the district court held an "adversarial hearing" and "consider[ed] the [privilege-holders'] concerns." *Id.* That is, like the Fourth and Sixth Circuits, the Eleventh Circuit held privilege-holders must play a role in protecting their privilege.

The decision below also creates a disparity in treatment of legislative and executive privilege. The D.C.

Circuit has held that legislators must have an opportunity to assert the speech or debate privilege before disclosure because that privilege is a nondisclosure privilege. In *United States* v. *Rayburn House Office Building*, 497 F.3d 654 (D.C. Cir. 2007), the D.C. Circuit explained that warrant procedures that "denied [a] Congressman any opportunity to identify and assert the [speech or debate] privilege with respect to legislative materials before their compelled disclosure to Executive agents" were unconstitutional, *id.* at 662. Going even further, the court struck down any "search that allows agents of the Executive to review privileged materials without the Member's consent." *Id.* at 663. The D.C. Circuit recently reaffirmed that holding, explaining the opportunity to assert privilege before disclosure is part of the "constitutional privilege" itself. *In re Sealed Case*, 80 F.4th 355, 366 & n.6 (D.C. Cir. 2023). The "disparity" between executive and legislative privilege created by the decision below "makes little sense given the constitutional foundation of executive privilege, which derives from the 'President's unique powers and profound responsibilities.'" App.91a.[3]

[3] The Third and Ninth Circuits both departed from *Rayburn*, holding investigators may review legislative materials without first considering the speech or debate privilege—but only because they, unlike the D.C. Circuit, believed the privilege was a privilege against only *use* of information. *See In re Fattah*, 802 F.3d 516, 525 (3d Cir. 2015); *United States* v. *Renzi*, 651 F.3d 1012, 1039 (9th Cir. 2011). Indeed, the Third Circuit acknowledged the privilege-holder could have viable challenges based on attorney-client privilege because that *is* a nondisclosure privilege. *Fattah*, 802 F.3d at 529-530.

Thus, whereas in the Fourth, Sixth, and Eleventh Circuits, holders of nondisclosure privileges will have notice and opportunity to defend those privileges before their potentially privileged documents are produced to prosecutors, in the D.C. Circuit, holders of the speech or debate privilege will have that opportunity but holders of executive privilege will not.

B. The D.C. Circuit's Holding Is Wrong

The D.C. Circuit should not have approved the district court's decision to compel Twitter to produce the former President's private communications before resolving Twitter's challenge to the nondisclosure order and giving the former President—or a PRA-designated representative—notice and an opportunity to assert executive privilege.

1. The D.C. Circuit's categorical holding that *Freedman* is "inapplicable" to §2705(b) nondisclosure orders, App.27a, conflicts with this Court's precedents.

Freedman broadly held that "[a]ny system of prior restraints" "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." 380 U.S. at 57-58. It therefore invalidated a state statute that empowered a censorship board to restrain any film it determined to be obscene before judicial review. *See id.* at 52 n.2. As this Court explained, "only a judicial determination in an adversary proceeding" has "the necessary sensitivity to freedom of expression" for prior restraints where—as in *Freedman*—justification for the prior restraint depends on a case-specific showing about the particular speech at issue. *Id.* at 58.

This Court thus has extended *Freedman* to a wide range of such prior restraints, including court orders

preventing parades displaying certain political messages, *National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam), *Carroll* v. *President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968); statutes permitting the executive to block mail related to the sale of materials deemed obscene, *Blount* v. *Rizzi*, 400 U.S. 410, 421-422 (1971); and judicial restraints on films under a nuisance statute, *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (per curiam).

Contrary to the D.C. Circuit, *Freedman* is not limited to "noncriminal" schemes or prior restraints not issued or approved by a court. *See* App.25a-28a. First, connection to a criminal investigation does not render *Freedman* inapplicable. To the contrary, the risks posed by prior restraints on speech, and the concomitant need for due process protections, are, if anything, greater in the criminal context. As the cases above elucidate, *Freedman*'s protections apply whenever "secrecy might or might not be warranted, depending on the circumstances alleged to justify such secrecy." *Mukasey*, 549 F.3d at 877. That this was a criminal proceeding may bear on whether secrecy was warranted, but it does not determine whether *Freedman*'s protections are necessary in the first place.

Second, the district court's *ex parte* consideration of the "statutory requirements" when issuing the nondisclosure order is not "[effective] judicial review" that renders *Freedman*'s "protective measures" unnecessary. *See* App.26a-27a. "[T]he fact that the [] prior restraint is entered by a … judge rather than an administrative censor" does not "distinguish th[e] case from *Freedman*," *Vance*, 445 U.S. at 317. This case exemplifies why: It was only because of Twitter's challenge that the court recognized, and the government conceded, that the

flight-risk justification did not "make a lot of sense." *See supra* p.10. That a restraint was imposed by a judge "does not change the unconstitutional character of the restraint if erroneously entered." *Vance*, 445 U.S. at 317.

Finally, the D.C. Circuit's reliance on *Rhinehart* and *Butterworth* was wrong. In *Rhinehart*, a newspaper was prohibited from publishing information about a foundation's donors obtained through court-ordered civil discovery. 467 U.S. at 25. The newspaper "voluntarily assumed a duty of confidentiality" by leveraging the government's civil discovery tools to obtain that information. *United States* v. *Aguilar*, 515 U.S. 593, 606 (1995). There thus was no concern that the newspaper was involuntarily silenced—unlike Twitter, which was coerced to produce information while simultaneously forbidden to speak about it. As the Second Circuit explained, distinguishing *Rhinehart*, a party like Twitter's "'participation' in the investigation is entirely the result of the Government's action." *Mukasey*, 549 F.3d at 880.

Butterworth is even further afield. It did not need to address *Freedman* because it found a law preventing grand jury witnesses from disclosing their own grand jury testimony facially unconstitutional. 494 U.S. at 624-625. And contrary to the panel's suggestion that *Butterworth* "recognized" that a grand jury witness's right to "disclose his own testimony … did not extend to information that the witness gleaned from participating in the investigation," App.27a, that question was not before the Court, *see* 494 U.S. at 629 n.2. Regardless, *Butterworth* is inapposite. Because "[t]he justification for grand jury secrecy inheres in the nature of the proceeding," *Butterworth* does not present the concern *Freedman* addresses: ensuring the case-specific rationale that

purportedly justifies a particular prior restraint actually has been established. *See Mukasey*, 549 F.3d at 876.

2. The decision below is also wrong because this Court has long held that holders of executive privilege must have an opportunity to assert privilege *before* it is breached. Thus, in *United States* v. *Reynolds*, 345 U.S. 1, 8 (1953), this Court emphasized the court's duty to assess an executive privilege claim "without forcing a disclosure of the very thing the privilege is designed to protect." Likewise, in *United States* v. *Nixon*, 418 U.S. at 683, 714-716 & n.21, this Court required that the President have an opportunity to raise privilege before a subpoena could be enforced. And in *GSA*, this Court upheld the constitutionality of a PRA predecessor in part because it provided an opportunity to assert executive privilege. 433 U.S. at 444 & n.7.

Without this procedural protection, executive privilege could not serve its purpose: of ensuring the President receives from his advisers the "full and frank submissions of facts and opinions upon which effective discharge of his duties depends." *GSA*, 433 U.S. at 449. That is not possible if the President knows that prosecutors from an opposing administration may access those communications without even an opportunity to object. Far from a "very limited intrusion by personnel in the Executive Branch sensitive to executive concerns" consistent with "historical practice," *id.* at 451-452, it is a significant intrusion. Knowledge of the possibility would "temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Nixon*, 418 U.S. at 705.

The PRA and longstanding Executive Branch practice "effectuate the President's constitutional privilege" by requiring "(1) notice to a former President before

disclosure of presidential records; (2) an opportunity to assert executive privilege; (3) consideration by the incumbent President of privilege issues; and (4) judicial review of claims of executive privilege *before* disclosure." App.90a. The procedure the courts below approved discards these requirements. The former President had no notice, no opportunity to consider or assert executive privilege, and no judicial review of executive privilege before disclosure.

As four D.C. Circuit judges recognized, avoiding the PRA's notice requirement was the point: "To avoid the notice required by law, the Special Counsel instead directed a search warrant at Twitter." App.84a. "The warrant and nondisclosure order were an end-run around executive privilege, ignoring the need to 'afford Presidential confidentiality the greatest protection consistent with the fair administration of justice.'" App.89a (quoting *Nixon*, 418 U.S. at 715). That privilege was no less important because the records were held by a third party. "Were it otherwise, Congress could sidestep constitutional requirements any time a President's information is entrusted to a third party." *Trump* v. *Mazars USA, LLP*, 591 U.S. 848, 868 (2020). "The Constitution does not tolerate such ready evasion." *Id.*

II. REVIEW IS REQUIRED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S STRICT SCRUTINY DECISIONS

A. The D.C. Circuit Erroneously Adopted Strict-In-Name-Only Scrutiny For Nondisclosure Orders

The D.C. Circuit purported to apply strict scrutiny, App.19a, but did not. Under the court's test, a compelling government interest justifies a nondisclosure order whenever the order covers legal process whose

existence is new information—a test nearly every nondisclosure order will satisfy. *See Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011). And the test relieves the government of its burden to demonstrate that nondisclosure orders are narrowly tailored because a court will not even consider the alternative of disclosure to a trusted representative. *See United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000).

This Court's precedent does not condone such lax scrutiny of content-based prior restraints of speech. As "court orders" that "forbid" speech "in advance," nondisclosure orders are "classic examples of prior restraints." *See Alexander* v. *United States*, 509 U.S. 544, 550 (1993). Because they forbid "particular speech because of the topic discussed," nondisclosure orders are also "a paradigmatic example of content-based discrimination." *See Reed* v. *Town of Gilbert*, 576 U.S. 155, 163, 169 (2015). Nondisclosure orders are therefore presumptively unconstitutional and can be upheld only if they satisfy strict scrutiny.

To meet its burden under strict scrutiny, the government must demonstrate "a direct causal link between the restriction imposed and the injury to be prevented." *United States* v. *Alvarez*, 567 U.S. 709, 725 (2012). The government first must demonstrate an "actual problem," and that its speech restraint is "actually necessary" to solve it. *Brown*, 564 U.S. at 799-800. "[T]he link between disclosure and risk of harm" must be "substantial." *Mukasey*, 549 F.3d at 881. The government cannot justify a content-based prior restraint simply because it might "provide[] only the most limited incremental support for the" government's asserted interests. *Bolger* v. *Young Drug Products Corp.*, 463 U.S. 60, 73 (1983). "[T]he government does not have a compelling interest

in each marginal percentage point by which its goals are advanced." *Brown*, 564 U.S. at 803 n.9.

Second, the government must demonstrate narrow tailoring. When a party offers a less restrictive alternative, the burden to prove unworkability "must rest with the government, not with the citizen." *Playboy*, 529 U.S. at 818. The government must present "hard evidence," not "anecdote and supposition," *id.* at 819, 822, and the court's examination of that evidence must be "exacting." *Alvarez*, 567 U.S. at 729. A court may not assume "that [less-restrictive] measures might not be adequate," where "the record is lacking in evidence to support such a finding." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 565 (1976).

The D.C. Circuit abandoned these demanding requirements for nondisclosure orders. It held that the government has a compelling interest in "secrecy" that a nondisclosure order serves whenever a new warrant would disclose a slightly "different" piece of information from what was previously publicly available, "i.e., the existence of a search warrant." App.23a. It held that is true even when there is "public knowledge of the broader investigation" and of "information about grand jury subpoenas." *Id.* Under that circular logic, the government almost always can obtain a nondisclosure order for a new warrant—no matter how public the investigation—because the warrant itself will always be new and "different" information. This renders strict scrutiny "strict in theory but feeble in fact." *Fisher* v. *University of Texas at Austin*, 570 U.S. 297, 314 (2013).

The Court likewise relieved the government of its burden to prove that a less-restrictive alternative would not serve its interests. Twitter proposed disclosing the warrant to one of the former President's PRA-

designated representatives. *See* C.A.J.A.135 (designating then-Assistant Attorney General Steven Engel, among others). The court refused to even evaluate this alternative. Instead, it held the district court was not required to "take on the unpalatable job of 'assessing the trustworthiness of a would-be confidante.'" App.24a (quoting *Matter of Subpoena 2018R00776*, 947 F.3d 148, 159 (3d Cir. 2020)). Going forward, the government will never have to prove it could avoid seriously jeopardizing its investigation by disclosing a warrant to only a trusted representative—a common alternative to nondisclosure orders. *See infra* pp.30-31.

The D.C. Circuit's watered-down test reflects its erroneous skepticism that strict scrutiny applies to nondisclosure orders. The court suggested nondisclosure orders may not warrant the "most rigorous First Amendment scrutiny" because they are not "typical prior restraint[s]" or "content-based restriction[s]." *See* App.20a n.5 (quoting *Mukasey*, 549 F.3d at 876-877); *see also* App.28a. But even if prior restraints typically restrict "speakers in public fora, distributors of literature, or exhibitors of movies," App.20a n.5, "the First Amendment's protections … belong to all," *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 595 (2023). Nor are nondisclosure orders any less content-based because they restrict a specific category of speech. *See* App.20a n.5, 28a. "[A] paradigmatic example of content-based discrimination" "singles out specific subject matter for differential treatment." *Reed*, 576 U.S. at 169.

Strict scrutiny is necessary to guard against the danger of government censorship presented by nondisclosure orders. Content-based restraints generally raise a "danger of censorship," *Reed*, 576 U.S. at 167, because "[t]o allow a government the choice of permissible subjects for public debate would be to allow that

government control over the search for political truth," *Consolidated Edison Co. of New York, Inc.* v. *Public Service Commission of New York*, 447 U.S. 530, 538 (1980). And "[t]he presumption against prior restraints" recognizes that "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558-559 (1975). The damage can be particularly great when the prior restraint restricts the "fundamental" First Amendment right to "discuss[] … the stewardship of public officials." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 275 (1964). Nondisclosure orders implicate these important First Amendment concerns: They allow the government to entirely remove a weighty topic—the government's exercise of its investigative authority—from public debate.

B. The Nondisclosure Order Would Not Survive True Strict Scrutiny

The nondisclosure order here cannot survive strict scrutiny. The government had no compelling interest in nondisclosure because the investigation's subjects and methods were already widely known. Nor could the government refute that X's proposed alternative would have adequately served the government's interest in avoiding jeopardizing its highly public investigation.

1. Barring disclosure of this particular warrant did not serve the government's proffered interests in "preserving the integrity and maintaining the secrecy of its ongoing criminal investigation." App.20a. The government has no interest in secrecy independent of its interest in the integrity of its investigations. And any threat to the government's investigation was minimal because

the investigation already was highly public. The Attorney General announced the investigations in a televised press conference. C.A.J.A.62. Former President Trump knew not only that he was a target but also that the government was collecting his private communications with family and close associates. The public knew that the government had issued scores of subpoenas for the telephones, personal communications, and testimony of numerous people who communicated with the former President, including his daughter and son-in-law (C.A.J.A.331), the former Vice President (C.A.J.A.336-337), his former Chief of Staff (C.A.J.A.332-335), and personal lawyers (C.A.J.A.350-353). Anyone inclined to destroy "evidence," "intimidat[e]" "witnesses," or otherwise "jeopard[ize]" the investigation, App.77a-78a, already had ample reason to do so. As DOJ itself recognizes, nondisclosure orders may be unwarranted where, as here, an investigation has "become public." 2022 DOJ §2705(b) Policy, at 2.

It is not enough that the "existence of [the] warrant" was a "different category of information." App.23a. Every new warrant in some sense discloses new information—the existence of that warrant. Strict scrutiny requires more: a demonstration that disclosing the particular information would harm the government's interests.

The government appeared to make no such demonstration. Instead, the government apparently relied solely on the former President's general "history of seeking to interfere with and undermine the due process of law[,]" C.A.Gov.Br.13 (Doc. #2017103), rather than anything specific to the warrant. Its argument boiled down to the position that because former President Trump generally has allegedly obstructionist tendencies, disclosure could lead either the former President to

"intimidate" those with whom he exchanged messages or those individuals to "take steps to spoliate evidence." *In re Press Application*, Misc. No. 23-00084-JEB (D.D.C. Oct. 6, 2023), ECF No. 17-3 (Exhibit B 5/19/2023 Tr. 10:6-16). But absent any showing by the government that disclosure of this specific warrant could and would have "imminen[tly]" caused a unique "substantive evil," *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 845 (1978), the government's abstract "predictive judgment[s]" and "ambiguous proof[s]" about the President's future conduct could not meet strict scrutiny's demanding standard. *Brown*, 564 U.S. at 799-800.

2. The government also ignored its burden to refute Twitter's less-restrictive alternative. It had to prove that notice to any PRA-designated representative would harm its investigation. Instead, the government objected in a single sentence that cites nothing in the record and is vague about whether it covers all the representatives. C.A.Gov.Br.28. For example, the government did not, and could not, explain why Steven Engel—a PRA-designated representative who served as Assistant Attorney General for the Office of Legal Counsel and publicly testified about resisting the former President's conduct—could not be trusted to follow a court order forbidding him from further disclosure. C.A.J.A.135.

The court was wrong to reject Twitter's proposal as categorically "unworkable" and "unpalatable." App.24a. That proposal is the precise procedure outlined in the PRA: notice to either the former President or their PRA-designated representative and an opportunity to assert privilege. Other courts have approved of the approach Twitter proposed: modifying nondisclosure orders to permit notice to a trusted representative who could then assert privileges on a target's behalf. For example, a court permitted Google to alert the New York

Times's in-house counsel of a warrant to obtain email logs of journalists to uncover their sources. *See In re Application of USA for 2703(d) Order for Six Email Accounts Serviced by Google LLC*, No. 20-sc-3361 (D.D.C. Mar. 3, 2021), ECF No. 4 at 1; *see also Matter of Search of Info. Associated With Specified E-Mail Accts.*, 470 F. Supp. 3d 285, 288, 292-293 (E.D.N.Y. 2019) (recognizing "recommended practice" of modifying nondisclosure orders to permit notification of representative to "identify documents subject to privilege"). And DOJ generally has encouraged disclosure to a business representative who can raise privilege on behalf of the target business. DOJ, *Seeking Enterprise Customer Data Held by Cloud Service Providers* 2-4 (2017), https://www.justice.gov/criminal/criminal-ccips/file/1017511/dl.

The sole basis for the D.C. Circuit's ruling was a Third Circuit case that is distinguishable and wrong. That case, *Matter of Subpoena 2018R00776*, 947 F.3d 148, did not consider a proposal to extend the nondisclosure order to the representative, making it harder for the court to ensure the "confidante" would not "subvert[]" the investigation. *Id.* at 159. Still, the case was wrongly decided. Relying on *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433 (2015), the Third Circuit said it "cannot and will not assess the trustworthiness of a would-be confidante chosen by a service provider. Simply put, '[w]e decline to wade into this swamp' of unworkable line drawing." *Matter of Subpoena*, 947 F.3d at 159 (quoting *Williams-Yulee*, 575 U.S. at 454). But *Williams-Yulee* confirms a court's duty to ensure the government disproves the efficacy of an identified alternative proposal. After declining to wade into "unworkable" "lines" between permissible and impermissible forms of solicitation, 575 U.S. at 453-454, the Court confirmed that the government had disproven two concrete "less

restrictive means" the plaintiff proposed. *Id.* at 454-455. The D.C. Circuit abandoned strict scrutiny by not doing the same here.

III. THE CONSTITUTIONAL ISSUES IN THIS CASE ARE CRITICALLY IMPORTANT AND RECURRING, AND THIS IS AN IDEAL VEHICLE TO RESOLVE THEM

A. The Decision Below Threatens Executive And Other Privileges

The D.C. Circuit's "judicial disregard of executive privilege undermines the Presidency," App.95a, and provides a blueprint for prosecutors who wish to obtain potentially privileged materials. Going forward, "with the simple expediency of a search warrant and nondisclosure order[,]" App.89a, the government can access and review potentially privileged materials without any opportunity for the user to assert privileges—including constitutional privileges.

The Constitution's protection of executive privilege requires adherence to the PRA's procedures wherever potentially privileged executive records are found. While the PRA, by its terms, applies only to NARA, it "effectuate[s] the President's constitutional privilege." App.90a. The Special Counsel admits that it went to Twitter, rather than NARA, in part to avoid triggering the PRA's procedure. C.A.J.A.53; *see* App.84a, 90a.

The D.C. Circuit's opinion allows prosecutors to obtain potentially privileged executive records without following this procedure. The panel below "made no mention of the privilege concerns" that are inherently "entangled in a third-party search of a President's social media account." App.85a. But the opinion below will radically alter the constitutional landscape, "declar[ing] open season on" privileged records as long as the government

can find them on a Twitter (or Microsoft, Google, or Amazon) server. *Mazars*, 591 U.S. at 868. This end-run will not be limited to federal prosecutors; the Act also empowers state prosecutors to demand user communications and obtain nondisclosure orders. *See* 18 U.S.C. §§2703, 2705(b), 2711(4).

The potential consequences are far-reaching. Twitter alone annually receives thousands of nondisclosure orders attached to demands for user information. Indeed, the D.C. Circuit agreed that this issue is likely to recur for Twitter. App.14a. Other platforms, too, receive thousands of requests for user information—many with nondisclosure orders. For instance, between January and June 2023, Google received over 63,000 requests for user information from U.S. authorities. *See* Google Transparency Report, *Global Requests For User Information*, https://transparencyreport.google.com/user-data/overview (visited May 29, 2024). Meta reported that 67% of government requests for user data in 2019 were accompanied by nondisclosure orders. Sonderby, *Our Continuing Commitment to Transparency*, Meta (May 12, 2020), https://about.fb.com/news/2020/05/transparency-report.

These warrants may seek information protected by an array of privileges, from attorney-client to journalist-source. Information of all kinds is stored in the cloud on third-party servers. For example, newsrooms increasingly use cloud-based email platforms operated by third-party providers rather than hosting their own services. *See* Ashkan Soltani (@ashk4n), Twitter (Mar. 24, 2014, 7:32 AM), https://perma.cc/AQ4T-UGVB (showing that nearly half of 25 news sites evaluated, including the Washington Post and Wall Street Journal, used Google or Microsoft to host email). In one high-profile example, the government sought to obtain the email logs of four

New York Times reporters "in a hunt for their sources." Savage & Benner, *U.S. Waged Secret Legal Battle to Obtain Emails of 4 Times Reporters*, N.Y. Times (updated June 9, 2021), https://www.nytimes.com/2021/06/04/us/politics/times-reporter-emails-gag-order-trump-google.html. And as this case also demonstrates, government officials are no exception to this trend. Many government officials use social media to conduct official business. *See Lindke* v. *Freed*, 601 U.S. 187, 197 (2024). Apple recently learned it had "handed over the data of … at least two members of Congress" only after the nondisclosure order on the subpoena expired and Apple notified the subjects of the subpoena. *See* Nicas et al., *In Leak Investigation, Tech Giants are Caught Between Courts and Customers*, N.Y. Times (updated June 16, 2021), https://www.nytimes.com/2021/06/11/technology/apple-google-leak-investigation-data-requests.html.

This technological change should not upend protections for privileges. When enterprises stored communications on their own servers, prosecutors had to obtain records from those entities directly, despite the risk of disclosing the investigation to the subject. *See Seeking Enterprise Customer Data*, *supra* p.31. The government managed that risk by approaching a trusted representative, such as "the general counsel or legal representative." *Id.* at 2. DOJ has advised that, despite the rise of cloud computing, "prosecutors should seek data directly from the enterprise" if possible, permitting the customer to "interpose privilege and other objections to disclosure" on its own behalf. *Id.* When law enforcement nonetheless chooses to obtain data from a cloud provider, secrecy should still be the exception, not the rule. Under the D.C. Circuit's decision, however, the government can obtain information from a cloud provider

without needing to prove there is no trusted representative who could be informed and assert the interests of the target.

B. This Case Is An Ideal And Rare Vehicle

The case is an ideal vehicle to address the executive privilege issues. These issues typically arise within the D.C. Circuit. *E.g.*, *Committee on Judiciary of U.S. House of Representatives* v. *Miers*, 542 F.3d 909, 910 (D.C. Cir. 2008) (per curiam); *In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997) (per curiam); *Nixon* v. *Sirica*, 487 F.2d 700, 713-716 (D.C. Cir. 1973) (en banc) (per curiam). Thus, the D.C. Circuit's holding is likely to be the final word as a practical matter absent review by this Court.

And the case presents a rare opportunity for this Court to address the proper limits on nondisclosure orders. Although the government obtains tens of thousands of nondisclosure orders annually, very few cases challenging them ever reach the courts of appeals, let alone this Court. That reflects the immense hurdles to appellate review of these orders. Only providers can challenge them but the sheer volume that providers receive, combined with these orders' *ex parte* and boilerplate nature, make it difficult for providers to discern which are problematic. When providers do identify problematic orders, the government often agrees to modify or vacate them in informal negotiations. When the government does not so agree, providers may not litigate because litigation is expensive and exposes the provider to criticism and potentially contempt, as this case illustrates.

When providers do challenge nondisclosure orders, any appeal typically is expedited so that providers' interest in disclosing demands for records before

production remains live without unduly delaying government investigations. *E.g.*, Order, *Matter of Subpoena 2018R00776*, No. 19-3124 (3d Cir. Oct. 1, 2019); *United States* v. *Apollomedia Corp.*, No. 99-20849 (5th Cir. Nov. 24, 1999), ECF No. 28. Any review by this Court would likewise have to be expedited, potentially on an emergency application. When appeals are not expedited, courts might dismiss them as moot after the provider produces the records or the nondisclosure order expires, impeding or precluding this Court's review. *E.g.*, Order, *Microsoft*, No. 20-1653 (2d Cir. May 14, 2021), ECF No. 296. And these appeals often remain under seal, such that this Court's adjudication would require sealed briefs, closed argument, and a redacted opinion. *E.g.*, Sealed Brief for Appellant, *Microsoft*, No. 20-1653 (2d Cir. Nov. 30, 2020), ECF No. 102.

This case has none of these problems. It is not expedited. The issues are presented in a petition for certiorari, not an emergency application. The decision below held the appeal is not moot. The underlying opinions, as well as much of the underlying briefing, are unsealed and not heavily redacted. *See* Dist.Ct.Dkt. 47 at 2; Dist.Ct.Dkt. 48. If the Court does not grant this petition, it could be decades (if ever) before it gets another clean vehicle to resolve the important and recurring questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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