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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TWITTER, INC., *Plaintiff-Appellant*, v. MERRICK B. GARLAND, Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; CHRISTOPHER WRAY, Director of the Federal Bureau of Investigation; FEDERAL BUREAU OF INVESTIGATION, *Defendants-Appellees*.	No. 20-16174 D.C. No. 4:14-cv-04480-YGR OPINION

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted August 10, 2021
Seattle, Washington

Filed March 6, 2023

Before: Carlos T. Bea, Daniel A. Bress, and Lawrence VanDyke, Circuit Judges.

Opinion by Judge Bress;
Concurrence by Judge VanDyke

OPINION

BRESS, Circuit Judge:

In support of its classified national security investigations, the United States served administrative subpoenas and orders requiring Twitter to provide the government with certain information about Twitter users. In a self-described "Transparency Report," Twitter wishes publicly to disclose certain information about the aggregate numbers of these governmental requests that it received between July and December 2013. The FBI determined that the number of subpoenas and orders and related information was classified, and that Twitter's disclosure of this information would harm national security. As a result, the FBI allowed Twitter to release its Transparency Report only in a partially redacted form.

This dispute over what Twitter can and cannot disclose about information it learned as a recipient of national security legal process raises several important questions that lie at the intersection of national security and the freedom of speech: Does the government's content-based limitation on Twitter's speech violate the First Amendment? Do the relevant national security statutes provide sufficient procedural protections to Twitter, consistent with the First Amendment? And does due process require that Twitter's outside counsel be granted access to the classified materials on which the United States relies in objecting to Twitter's proposed disclosure?

We hold that Twitter's constitutional challenges fail to persuade. Although we acknowledge Twitter's desire to speak on matters of public concern, after a thorough review of the classified and unclassified record, we conclude that the government's restriction on Twitter's speech is narrowly tailored in support of a compelling government interest: our Nation's security. We further hold that the statutory scheme governing the permissible disclosure of aggregate data about the receipt of national security legal process allows for sufficient procedural protections, which Twitter received here. Due process likewise does not require that Twitter's outside counsel receive classified information by virtue of Twitter filing this lawsuit.

Although the interests on both sides of this case are weighty, under law the government prevails. We affirm the district court's grant of summary judgment to the United States.

I

A

It is widely recognized that electronic communications are used by persons who seek to harm the United States through terrorist activities or other misdeeds. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402–06 (2013). To that end, federal law gives the United States the authority to obtain information from electronic communication service providers in support of national security investigations. Two such means of obtaining information are relevant here.

First, under 18 U.S.C. § 2709, the FBI is empowered to issue certain requests to any "wire or electronic communication service provider," such as Twitter. *See id.* §§ 2510(15), 2711(1) (defining "electronic communication service"). These requests are known

as "national security letters," or NSLs. 50 U.S.C. § 1873(e)(3)(A).[1] An NSL directs its recipient to provide the FBI with "subscriber information and toll billing records information, or electronic communication transactional records in [the recipient's] custody or possession." 18 U.S.C. § 2709(a). Such information must be "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." *Id.* § 2709(b)(1); *see also John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876 (2d Cir. 2008). NSLs thus allow the government to collect the aforementioned metadata, but not the actual content of electronic communications. *See* 18 U.S.C. § 2709; David Kris & J. Douglas Wilson, *National Security Investigations and Prosecutions* § 20:6 (Westlaw, Sept. 2021 Update).

To ensure needed secrecy, the FBI may prohibit an NSL recipient from disclosing that it has received an NSL if a sufficiently high-ranking FBI official certifies that the absence of a prohibition on disclosure may result in any one of four enumerated harms. 18 U.S.C. § 2709(c)(1)(A). Those harms consist of: (1) "a danger to the national security of the United States," (2) "interference with a criminal, counterterrorism, or counterintelligence investigation," (3) "interference with diplomatic relations," and (4) "danger to the life or physical safety of any person." *Id.* § 2709(c)(1)(B). When such a certification has been made, the NSL recipient may not "disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section." *Id.* § 2709(c)(1)(A). The prohibition on disclosure is subject to judicial review under 18 U.S.C. § 3511. *See*

[1] We note that Title 50 has not been enacted as positive law.

id. § 2709(d). We will refer to this prohibition as the "NSL nondisclosure requirement" or the "individual NSL nondisclosure requirement."

Second, the FBI can seek surveillance-related orders under the Foreign Intelligence Surveillance Act (FISA). 50 U.S.C. §§ 1801–1885c. Such orders, commonly known as "FISA orders," are issued under one of five "titles" of FISA: Title I authorizes electronic surveillance, *id.* §§ 1801–1813; Title III authorizes physical searches, *id.* §§ 1821–1829; Title IV authorizes the use of "pen registers" and "trap and trace devices," *id.* §§ 1841–46[2]; Title V authorizes the compelled production of "tangible things," such as business records, *id.* §§ 1861–64; and Title VII authorizes acquisition of foreign intelligence through the targeting of non-U.S. persons located outside the United States, *id.* §§ 1881– 1881g. While NSLs provide the government with only non-content data, FISA orders may compel the production of either content or non-content data. *See* Kris & Wilson, *supra*, § 13:5.

With some exceptions, FISA orders relating to domestic surveillance ordinarily require authorization from the Foreign Intelligence Surveillance Court (FISC). *Compare* 50 U.S.C. §§ 1805(a), 1824(a), 1842(a)–(b), 1862(a)–(b), *with id.* §§ 1802(a), 1822(a). FISA orders relating to persons reasonably believed to be abroad may be authorized by directives issued by the Attorney General or the Director of National Intelligence. *See id.* §§ 1881a–1881c. *See* Kris & Wilson, *supra*, § 17:17.

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[2] Pen registers and trap and trace devices, respectively, capture the phone number associated with an outgoing or incoming call (or other communication) on a given communication line. 50 U.S.C. § 1841(2); *see also* 18 U.S.C. § 3127(3)–(4).

Recipients of FISA orders generally are required to "protect [the] secrecy" of the government surveillance. 50 U.S.C. § 1805(c)(2)(B) (Title I); *see also id.* §§ 1824(c)(2)(B) (Title III), 1842(d)(2)(B)(i) (Title IV), 1862(d)(2) (Title V), 1881a(i)(1)(A) (Title VII). Recipients of certain types of FISA orders must also "maintain under security procedures approved by the Attorney General and the Director of Central Intelligence any records concerning the surveillance or the aid furnished that such person wishes to retain." *Id.* § 1805(c)(2)(C) (Title I); *see also id.* §§ 1824(c)(2)(C) (Title III), 1842(d)(2)(B)(ii)(II) (Title IV), 1881a(i)(1)(B) (Title VII). A FISA order recipient may obtain judicial review of a nondisclosure obligation in the FISC. *See, e.g.*, *id.* § 1881a(i)(4). Further review may be sought in the Foreign Intelligence Surveillance Court of Review. 50 U.S.C. § 1881a(i)(6)(A).

B

The government closely guards information relating to NSLs and FISA orders. The President has the "authority to classify and control access to information bearing on national security." *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988). In the exercise of that authority, the President has "prescribe[d] a uniform system for classifying [and] safeguarding" national security information. Classified National Security Information, Exec. Order No. 13,526 pmbl., 75 Fed. Reg. 707, 707 (Dec. 29, 2009), as corrected by 75 Fed. Reg. 1,013 (Dec. 29, 2009).

Information that is classified falls into one of three levels: "Confidential," "Secret," and "Top Secret." *Id.* § 1.2(a), 75 Fed. Reg. at 707–08. Of these levels, "Top Secret" is the highest, reserved for "information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the

national security." *Id.* § 1.2(a)(1), 75 Fed. Reg. at 707. Certain classified information is further designated "sensitive compartmented information," or "SCI." *See* Office of the Director of National Intelligence, Intelligence Community Directive 703, *Protection of Classified National Intelligence, Including Sensitive Compartmented Information* (2013) ("ICD 703"). This information "require[s] special controls and handling within the United States Intelligence Community." *Doe v. Cheney*, 885 F.2d 898, 902 n.2 (D.C. Cir. 1989); *see also* ICD 703. Individuals with a security clearance must be granted additional permission to be allowed access to information designated SCI. *See, e.g.*, ICD 703; *Romero v. Dep't of Def.*, 658 F.3d 1372, 1373–74 (Fed. Circ. 2011).

Access to classified information is further restricted to individuals meeting criteria that the President has identified: "A person may have access to classified information provided that: (1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee; (2) the person has signed an approved nondisclosure agreement; and (3) the person has a need-to-know the information." Exec. Order No. 13,526 § 4.1(a), 75 Fed. Reg. at 720.

"No information may remain classified indefinitely." *Id.* § 1.5(d), 75 Fed. Reg. at 709. The default period during which classified information remains classified is ten years. *Id.* § 1.5(b), 75 Fed. Reg. at 709. However, the classifying official may specify an earlier date (or the occurrence of a certain event) upon which the information is automatically declassified, or he may extend the duration of classification to up to 25 years where necessary. *Id.* § 1.5(a), (c), 75 Fed. Reg. at 709. Agencies must also undertake periodic

reassessments of classified designations upon request. *Id.* § 3.5(a), (d), 75 Fed. Reg. at 717–18. Unauthorized disclosure of classified materials is subject to punishment. *See, e.g.*, 18 U.S.C. § 798(a)(3).

Under this classification system, and prior to 2014, all information about the aggregate number and types of national security legal process received by any recipient was considered classified and therefore barred from public disclosure. But following Edward Snowden's unauthorized disclosure of classified documents in 2013, and in response to requests from electronic service providers, the government made a change in policy to achieve greater transparency.

In early 2014, then-Director of National Intelligence James Clapper issued the "DNI Memorandum," which declassified "certain data related to requests by the United States to communication providers for customer information" made through FISA orders and NSLs. That same day, then-Deputy Attorney General James M. Cole issued a letter ("the DAG Letter") addressed to Facebook, Google, LinkedIn, Microsoft, and Yahoo!, which permitted the same disclosures as the DNI Memorandum.

The following year, Congress enacted the USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (found in scattered sections of Titles 18 and 50 U.S. Code), which enacted into law, and expanded, the categories of information that the DNI Memorandum and DAG Letter allowed to be disclosed. *Id.* §§ 603–604, 129 Stat. 295–97. The relevant provision, now codified at 50 U.S.C. § 1874, allows any "person subject to a nondisclosure requirement accompanying" a FISA order or an NSL publicly to disclose certain limited information about his receipt of national security process using one of four enumerated pathways. *Id.* §

1874(a). A recipient may choose to release information under one of the following four options:

> (1) a semiannual report on the number of NSLs, FISA content orders and FISA non-content orders in bands of 1000, with some breakdowns by authority for non-content information; (2) a semiannual report on the number of NSLs, FISA content orders and FISA non-content orders in bands of 500; (3) a semiannual report on the total national security process received in bands of 250; or (4) an annual report on the total national security process received in bands of 100.

H.R. Rep. No. 114-109, pt. 1, at 27 (2015) (summarizing the statutory provisions); *see also* 50 U.S.C. § 1874(a); Kris & Wilson, *supra*, § 13:5.

These bands are notable not only for their breadth—the tightest band is 100—but for the fact that each of the bands begins with, and includes, zero. For instance, an entity reporting under option two that received one FISA content order and three FISA non-content orders, but no NSLs, would indicate that it received between 0 and 499 FISA content orders, between 0 and 499 FISA non-content orders, and between 0 and 499 NSLs. Under the statute, such an entity could not indicate that it received no NSLs at all. We will refer to this as the "aggregate nondisclosure requirement," so as to distinguish this system from the NSL nondisclosure requirement in 18 U.S.C. § 2709(c), which pertains to disclosing the receipt of individual NSLs.

C

On April 1, 2014, Twitter transmitted to the FBI a two-page draft document that it referred to as a

"Transparency Report." The Report was entitled "Empowering users with more #transparency on national security surveillance." In its Transparency Report, and as described in its operative complaint in this lawsuit, Twitter sought to publish the following information regarding the NSLs and FISA orders that it had received from July 1, 2013 to December 31, 2013:

a. The number of NSLs and FISA orders Twitter received, if any, in actual aggregate numbers (including "zero," to the extent that that number was applicable to an aggregate number of NSLs or FISA orders, or to specific kinds of FISA orders that Twitter may have received);

b. The number of NSLs and FISA orders received, if any, reported separately, in ranges of one hundred, beginning with 1– 99;

c. The combined number of NSLs and FISA orders received, if any, in ranges of twenty-five, beginning with 1–24;

d. A comparison of Twitter's proposed (i.e., smaller) ranges with those authorized by the DAG Letter;

e. A comparison of the aggregate numbers of NSLs and FISA orders received, if any, by Twitter and the five providers to whom the DAG Letter was addressed [Facebook, Google, LinkedIn, Microsoft, and Yahoo!]; and

f. A descriptive statement about Twitter's exposure to national security surveillance, if any, to express the overall degree of government surveillance it is or may be subject to.

In a letter to the FBI accompanying the Report, Twitter requested "a determination as to exactly

which, if any, parts of its Transparency Report are classified or, in the [Department of Justice's] view, otherwise may not lawfully be published online." The Transparency Report sought to educate Twitter users about the extent of the federal government's surveillance requests of Twitter and the degree to which Twitter's platform was safe from secret governmental prying. The draft Transparency Report further expressed Twitter's "inten[t] to make this kind of report on a regular basis."[3]

In a September 9, 2014 response to Twitter, the FBI set forth its "conclu[sion] that information contained in the report is classified and cannot be publicly released." The letter indicated that the Transparency Report was "inconsistent with the [DAG Letter] framework and discloses properly classified information." In particular, the FBI explained that information in the Report "would reveal classified details about the surveillance . . . that go beyond what the government has permitted other companies to report." The FBI specifically objected that the Transparency Report "would disclose specific numbers of orders received, including characterizing the numbers in fractions or percentages, and would break out particular types of process received." This information, the FBI explained, was classified, and its release would harm national security.

But the FBI nonetheless "believe[d] there [was] significant room for Twitter to place the numbers in context" by informing its users that, for instance, "only an infinitesimally small percentage of its total

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[3] Nothing in our opinion quotes or discloses materials that have been deemed classified. Any quotations of Twitter's draft Transparency Report are to unredacted portions only.

number of active users was affected" by government surveillance requests. Twitter would thus be "permitted to *qualify* its description of the total number of accounts affected by all national security legal process it has received but it cannot *quantify* that description with the specific detail" that Twitter desired.

D

After receiving the FBI's letter, Twitter filed this lawsuit in October 2014, challenging the government's suppression of the full Transparency Report and seeking injunctive and declaratory relief. Subsequently, after the USA FREEDOM Act was passed in June 2015, Twitter filed the operative Second Amended Complaint (SAC). In its SAC, Twitter claimed that the redacted information in the Report "was improperly classified" and that the government's prohibition on Twitter's publishing that information violated the First Amendment. Twitter also sought "to disclose that it received 'zero' FISA orders, or 'zero' of a specific *kind* of FISA order, for [the] period [covered by the Report], if either of those circumstances is true."

On November 22, 2016, the government moved for summary judgment. The government's motion relied on the unclassified and classified declarations of Michael B. Steinbach, the then-Executive Assistant Director (EAD) of the FBI's National Security Branch. The EAD is responsible for "overseeing the national security operations of the FBI's Counterintelligence Division, Counterterrorism Division, High-Value Detainee Interrogation Group, Terrorist Screening Center, and Weapons of Mass Destruction Directorate." The EAD has "also been delegated original classification authority by the Director of the FBI." The classified Steinbach declaration, and all future classified

declarations that the government would submit, were filed *ex parte* with the district court for the court's *in camera* review.

The district court denied the government's motion for summary judgment "without prejudice to a renewed motion upon a more fulsome record." The district court held that strict scrutiny applied to the government's attempt to restrict the Transparency Report's full publication and that the Steinbach declarations were insufficient to show that the government's required redactions were narrowly tailored in support of the government's compelling interest in national security.

Twitter had also argued that under *Freedman v. Maryland*, 380 U.S. 51 (1965), neither the government's classification decision nor the USA FREEDOM Act contained sufficient procedural safeguards to ensure the protection of Twitter's First Amendment rights. For applicable prior restraints, *Freedman* requires that "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained," "(2) expeditious judicial review of that decision must be available," and "(3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990) (principal opinion of O'Connor, J.)). In denying summary judgment without prejudice, the district court suggested that the government's classification decision and the governing statutory scheme violated *Freedman*'s commands. In that same order, the district court also directed the government to proceed with granting two of Twitter's outside lawyers,

including Lee H. Rubin, "security clearances that would permit review of relevant classified materials in this matter."

Although Rubin's background investigation was completed and favorably adjudicated, the government refused to provide Rubin access to the classified materials on the ground that Twitter's outside counsel lacked a need to know this information. In support of its refusal to allow Rubin access to classified materials, the government submitted an unclassified declaration from Carl Ghattas, then-EAD of the FBI's National Security Branch. Mr. Ghattas indicated that the classified Steinbach declaration and its exhibits were "classified at the TOP SECRET level and contain Sensitive Compartmented Information." Mr. Ghattas then explained that Twitter's counsel "do[es] not have a need for access to or a need-to-know the classified FBI information at issue in this case." Specifically, Mr. Ghattas concluded, "it does not serve a governmental function . . . to allow plaintiff's counsel access to the classified FBI information at issue in this case to assist in representing the interests of a private plaintiff who has filed this civil suit against the government."

On December 5, 2018, Twitter filed a request that Rubin be given access to the classified Steinbach declaration. In response, the government filed a declaration by then-Attorney General William P. Barr asserting the state secrets privilege over the information contained in the classified Steinbach declaration. Attorney General Barr's declaration relied on a pair of unclassified and classified declarations by Michael C. McGarrity, then-Acting EAD of the FBI's National Security Branch. The government submitted the McGarrity declarations for the district court's review.

On June 21, 2019, and in response to the new declarations, the district court issued an order to show cause why it should not reconsider its denial of summary judgment. The district court indicated that the classified McGarrity declaration "provides an explanation of the Government's basis for restricting the information that can be published in the Draft Transparency Report, and the grave and imminent harm that could reasonably be expected to arise from its disclosure, in far greater detail than the Government provided previously." The court thus indicated its likely view that the government's restrictions on Twitter's speech were narrowly tailored and that Rubin should not receive the classified materials because of "national security concerns."

The parties then filed cross-motions for summary judgment. In support of its motion, the government relied on newly submitted classified and unclassified declarations from Jay S. Tabb, Jr., the new EAD of the FBI's National Security Branch. This time, the district court granted the government's motion for summary judgment.

The district court did not revise its earlier conclusion that "the restrictions on Twitter's speech are subject to strict scrutiny as a content-based restriction and a prior restraint." But it found that based on "the *totality* of the evidence provided in this case," including all three of the classified declarations from EADs Steinbach, McGarrity, and Tabb, that the government had satisfied strict scrutiny. Citing "the specific reasons identified in the classified declarations," the district court found that those declarations "explain the gravity of the risks inherent in disclosure of the information" at issue by providing "a sufficiently specific explanation of the reasons disclosure of mere

aggregate numbers, even years after the relevant time period in the Draft Transparency Report, could be expected to give rise to grave or imminent harm to the national security." The district court determined that the government's supporting declarations sufficiently justified its classification decision, and that "no more narrow tailoring of the restrictions can be made."

The district court also denied Twitter relief under the procedural requirements of *Freedman*, but only on the basis that "Twitter's SAC d[id] not allege a challenge, facial or otherwise, based upon the principles in *Freedman*." The district court reasoned that "nothing in the SAC challenges a 'system of prior restraints' as in *Freedman*." Accordingly, the court did not "reach the question of whether the Government's decision here satisfied those procedural safeguards." In a footnote, however, the district court noted that "[t]he sort of pre-disclosure review and approval process that restricts speech about metadata compiled by a recipient closely resembles the censorship systems raised in *Freedman* and its progeny." The district court further opined that the government had "offered no applicable procedural protections similar to those cited with approval in" *In re National Security Letter*, 863 F.3d 1110, 1128 (9th Cir. 2017), and *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 875 (2d Cir. 2008), two cases that we discuss further below. Finally, the district court denied Twitter's request that its counsel receive access to the classified Tabb declaration. That declaration could not "be disclosed to counsel for Twitter based upon the national security concerns it raises, despite counsel's clearance approval."

Twitter timely appealed. We have jurisdiction under 28 U.S.C. § 1291 and review the grant of summary judgment de novo. *Butcher v. Knudsen*, 38 F.4th 1163,

1168 (9th Cir. 2022). On appeal, we were provided with classified information, which was made available for our review using specialized procedures that ensured its protection. *See generally* Robert Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (Federal Judicial Center, 2d ed. 2013) [hereinafter Reagan, *Keeping Government Secrets*].

II

We turn first to the question of whether the government's restriction on Twitter's speech violates the First Amendment. We hold that under our case law, strict scrutiny applies to that inquiry. We acknowledge that Twitter has a First Amendment interest in commenting on matters of public concern involving national security subpoenas. Nevertheless, based on our careful review of classified and unclassified information, we hold that the government's redactions of Twitter's Transparency Report were narrowly tailored in support of the compelling government interest in national security.

A

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "When enforcing this prohibition, [courts] distinguish between content-based and content-neutral regulations of speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Content-based restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

"A regulation of speech is facially content based under the First Amendment if it targets speech based on its communicative content—that is, if it applies to particular speech because of the topic discussed or the idea or message expressed." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (quotations and alteration omitted). "Regulations draw such a distinction if they 'target speech based on its communicative content,' prohibit 'public discussion of an entire topic,' or 'single[] out specific subject matter for differential treatment.'" *In re Nat'l Sec. Letter ("NSL")*, 33 F.4th 1058, 1072 (9th Cir. 2022) (amended opinion) (alteration in original) (quoting *Reed*, 576 U.S. at 163, 169).

In *NSL*, we considered a First Amendment challenge to 18 U.S.C. § 2709(c), which, as we discussed above, generally prohibits the recipient of a national security letter from disclosing the fact of its receipt. *Id.* at 1063. *NSL* recognized that § 2709(c) "prohibits speech about one specific issue: the recipient may not 'disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records' by means of an NSL." *Id.* at 1072 (quoting 18 U.S.C. § 2709(c)). We therefore recognized that the restriction § 2709(c) imposes was content based because it "target[ed] speech based on its communicative content,' and restricts speech based on its 'function or purpose.'" *Id.* (quoting *Reed*, 576 U.S. at 163). And "[w]hen the government restricts speech based on its content, a court will subject the restriction to strict scrutiny." *Id.* at 1070.

NSL requires strict scrutiny here because the restriction on Twitter's speech is content based. Twitter is subject to a series of statutory nondisclosure obligations based on its receipt of NSLs and FISA orders.

See 18 U.S.C. § 2709(c); 50 U.S.C. §§ 1805(c)(2)(B), 1824(c)(2)(B), 1842(d)(2)(B)(i), 1862(d)(2), 1881a(i)(1). The USA FREEDOM Act effectively created an exception to these prohibitions for certain disclosures about the aggregate receipt of national security process, within the predefined numerical bands explained above. *See* 50 U.S.C. § 1874(a); H.R. Rep. No. 114-109, pt. 1, at 27; Kris & Wilson, *supra*, § 13:5. But Twitter's Transparency Report seeks to provide more detail than the USA FREEDOM Act allows to be disclosed. The nature of the government's restriction on Twitter therefore necessarily arises from the content of Twitter's proposed disclosure. Indeed, the government's entire basis for seeking to limit Twitter's disclosure is that public release of the *classified* content will harm national security. Thus, we are confronted with a content-based restriction, just as we were in *NSL*.

Under circuit precedent, we review the government's restriction on Twitter's speech under the traditional First Amendment strict scrutiny framework. *NSL* was clear on this point, holding that strict scrutiny applied to the nondisclosure requirement in 18 U.S.C. § 2709(c) applicable to the receipt of individual NSLs. *NSL*, 33 F.4th at 1071–73. *NSL* governs us; there is no basis in law or logic to apply a different tier of scrutiny to the speech restriction now before us. The nondisclosure requirements imposed on recipients of national security legal process at issue here are effectively identical to those we considered in *NSL*, just aggregated—instead of being prohibited from disclosing the receipt of one letter, the recipient is prohibited from disclosing the receipt of a certain number of letters or orders.

Both sides in this case ask for something other than strict scrutiny, but their arguments are

foreclosed by our holding in *NSL*. The government suggests that some lesser form of scrutiny should apply, but *NSL* is directly contrary on this point. *See id.* at 1071–73. And while Twitter maintains that an even higher standard of "extraordinarily exacting" scrutiny should apply, *NSL* specifically rejected that argument. *See id.* at 1076 n.21 (holding that a request to apply "a higher standard than strict scrutiny" was "meritless," and that *New York Times Co. v. United States* (*Pentagon Papers*), 403 U.S. 713 (1971) (per curiam), did not require otherwise). Thus, under circuit precedent, the restriction on Twitter's speech is a content-based limitation that we review under the strict scrutiny framework.

B

To satisfy strict scrutiny, a restriction on speech is justified only if the government demonstrates that it is narrowly tailored to serve a compelling state interest. *Reed*, 576 U.S. at 163; *NSL*, 33 F.4th at 1070. There is no dispute about the government's compelling interest here. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). It follows that "keeping sensitive information confidential in order to protect national security is a compelling government interest," too. *NSL*, 33 F.4th at 1072 (citing *Egan*, 484 U.S. at 527; *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980)).

This case thus turns on the narrow-tailoring prong of the strict scrutiny framework. To be narrowly drawn, a "curtailment of free speech must be actually necessary to the solution." *Brown v. Ent. Merchs.*

Ass'n, 564 U.S. 786, 799 (2011). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000). But while a "restriction is not narrowly tailored if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve," we have previously observed in this same general context that strict scrutiny does not require the content-based restriction to be "perfectly tailored." *NSL*, 33 F.4th at 1073 (first quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997); and then quoting *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015)). The government is entitled deference when it comes to factual judgments bearing on national security. *See Humanitarian Law Project*, 561 U.S. at 33–34 (explaining that in the area of national security and foreign affairs, the "evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference"). But at the same time, "[w]e do not defer to the Government's reading of the First Amendment, even when" national security interests are at stake. *Id.* at 34.

Our decision in *NSL*, which is the most closely analogous precedent, demonstrates the type of careful review that strict scrutiny requires in this context. In *NSL*, we considered and rejected an as-applied challenge to the statutory provisions governing the nondisclosure requirements attached to individual NSLs. *See NSL*, 33 F.4th at 1073–76; 18 U.S.C. § 2709(c). "Analyzing the statute as a whole," we held that the statutory scheme was narrowly tailored to the government's compelling national security interest in protecting the details of its intelligence investigations. *NSL*, 33 F.4th at 1074. In particular, we emphasized the statutory requirement that the government must

make an "individualized analysis of each [NSL] recipient" when imposing nondisclosure restrictions—an analysis that "may include consideration of the size of the recipient's customer base." *Id.* This mandatory, focused inquiry ensured that the government would not exercise unfettered discretion but rather guaranteed that it would have to substantiate each nondisclosure requirement based on the individual circumstances. *Id.*

The required means-end connection between the restriction imposed and the government's national security interest was also established through the "narrow, objective, and definite" statutory standards that defined the contours of the government's authority to impose nondisclosure restrictions. *Id.* The statute confined the imposition of individual NSL nondisclosure obligations to particular situations, such as when disclosure threatened ongoing counterintelligence operations or would endanger the lives of others. *Id.* (citing 18 U.S.C. § 2709(c)). This supported a sufficiently close fit between the government's speech restriction and its national security goals. *Id.*

We also noted that the statute ameliorated concerns that a change in circumstances could render the continued imposition of the nondisclosure obligations unnecessary. *Id.* at 1075. We highlighted the ready availability of judicial review in which the government had the burden of demonstrating the "continued necessity" of the restriction, which ensured that the limitation on speech was not "in place longer than [wa]s necessary to serve the government's compelling interest." *Id.* at 1075–76.

Considered as a whole, *NSL* instructs that under the narrow tailoring prong of the strict scrutiny analysis, we must guarantee that the means by which the

government is limiting Twitter's speech—here, redacting portions of the Transparency Report—is sufficiently calibrated toward protecting the government's proffered national security interest. And to guarantee that fit, we must satisfy ourselves that the government made a sufficiently particularized inquiry that substantiates the need for the redactions in the specific context in which Twitter operates. *See id.* at 1073– 76. Against this legal backdrop, we now turn to whether the government's restriction on Twitter's speech is narrowly tailored.

To meet its burden under strict scrutiny, the government in the district court submitted three rounds of classified and unclassified declarations to support its position that information in Twitter's Transparency Report was classified and could not be publicly disclosed without endangering national security. These declarations culminated in the classified and unclassified declarations of Jay S. Tabb, Jr., the EAD of the FBI's National Security Branch. After an extended review of these materials, the district court found that based on "the totality of the evidence provided in this case, including the classified declarations," the government had satisfied strict scrutiny and "no more narrow tailoring of the restrictions can be made."

In a case such as this involving information that the government contends is classified, we may review the classified materials *ex parte* and *in camera*. *See, e.g.*, *Kashem v. Barr*, 941 F.3d 358, 385 (9th Cir. 2019); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1086 (9th Cir. 2010) (en banc); *Kasza v. Whitman*, 325 F.3d 1178, 1180 (9th Cir. 2003); *Kasza v. Browner*, 133 F.3d 1159, 1168–69 (9th Cir. 1998). Having intently studied the classified and unclassified materials in

the record, we agree with the district court's considered assessment.

While we are not at liberty to disclose the contents of the classified materials that we reviewed, our analysis under the narrow tailoring prong depends principally on the knowledge we gleaned from our review of that material. The classified materials provided granular details regarding the threat landscape and national security concerns that animated the higher-level conclusions presented in the unclassified declarations. The classified declarations spell out in greater detail the importance of maintaining confidentiality regarding the type of matters as to which intelligence requests are made, as well as the frequency of these requests. Against the fuller backdrop of these explicit illustrations of the threats that exist and the ways in which the government can best protect its intelligence resources, we are able to appreciate why Twitter's proposed disclosure would risk making our foreign adversaries aware of what is being surveilled and what is not being surveilled—if anything at all. Given these concerns and this fuller backdrop, we are willing to accept the main conclusions outlined in the unclassified materials, which express generally why revealing the information Twitter wishes to disclose would significantly harm the government's national security operations by signaling to our adversaries what communication channels to avoid and which to use.

Viewed in light of the classified declarations, Mr. Tabb's Unclassified Declaration thus compellingly explains how the redactions on Twitter's Transparency Report in the specific context of Twitter's operations are well-calibrated to achieving the government's national security goals. Taken as a whole, the government's declarations specifically and persuasively

explain why Twitter's proposed Transparency Report may not be released in fully unredacted form.

Mr. Tabb's Unclassified Declaration explains that "the information about Twitter's receipt of national security process that was redacted from Twitter's draft Transparency Report is properly classified." Unclassified Tabb Decl. ¶ 5. Mr. Tabb also well describes how any "unauthorized disclosure reasonably could be expected to result in serious damage to the national security." *Id.* In particular, "disclosure of the information at issue here would provide international terrorists" and other bad actors with "a roadmap to the existence or extent of Government surveillance and capabilities associated with Twitter." *Id.* More generally, "[d]isclosure of the information Twitter seeks to publish would provide highly valuable insights into where and how the United States is or is not deploying its investigative and intelligence resources." *Id.* at ¶ 7. This "would tend to reveal which communications services may or may not be secure, which types of information may or may not have been collected, and thus whether or to what extent the United States is or is not aware of the activities of these adversaries." *Id.*

Mr. Tabb further explained why the granular nature of the information that Twitter seeks to publish would pose particular problems. Specifically, Mr. Tabb cautioned, "[d]isclosure of the kind of granular data regarding the national security legal process received by Twitter, as set forth in its draft Transparency Report, would reveal such information as:

> (i) incremental increases or decreases in collection over time, which would show whether the Government has a significant presence or investigative focus on a particular platform;

> (ii) the collection of content or non-content information, which would show whether and to what extent the Government is collecting certain types of information on that platform; and
>
> (iii) the fact of whether or when the recipient received a particular type of process at all, which may reflect different collection capabilities and focus on that platform, different types of information collected, and locations of FBI targets.

Unclassified Tabb Decl. ¶ 17. "[B]y detailing the amount, if any, of each particular type of process Twitter had received during a particular period, and over time, this data would reveal the extent to which Twitter was or was not a safe channel of communication for our adversaries." *Id.* ¶ 18. As Mr. Tabb concluded, "[t]he granularity of the data that Twitter seeks to publish would reveal or tend to reveal information about the extent, scope, and reach of the Government's national security collection capabilities and investigative interests—including its limitations and vulnerabilities." *Id.* ¶ 21.

Mr. Tabb also explained that if Twitter were allowed to make its granular disclosures, other recipients of national security process would seek to do the same. And the result would be an even greater exposure of U.S. intelligence capabilities and strategies. As Mr. Tabb wrote, "[i]f the Court were to grant Twitter the relief it seeks in this case, other providers would almost certainly seek to make the same types of disaggregated, granular disclosures regarding their receipt of national security process." *Id.* ¶ 20. If that were allowed, it would "provide a comprehensive

picture of the Government's use of national security process that adversaries would use to evaluate the Government's collection capabilities and vulnerabilities, as well as its investigative practices." *Id.*

Throughout his Unclassified Declaration, Mr. Tabb notes that greater detail and further explanation is provided in his Classified Declaration. Mr. Tabb further incorporates the classified declarations from the other government officials who preceded him in his role. As noted above, we have carefully reviewed the classified declarations *in camera*. And, as we have explained, those declarations provide more particularized reasons why the specific information Twitter seeks to publish would harm national security, reflecting the government's individualized analysis of Twitter's proposed disclosure. Mr. Tabb's Classified Declaration, and the additional classified materials on which it relies, are compelling. His Classified Declaration, in combination with the other classified and unclassified materials, has convinced us that the government's restriction on Twitter's speech is narrowly tailored and survives strict scrutiny.

Twitter's arguments to the contrary are unpersuasive. Twitter argues that the government, prior to preventing the Transparency Report's full disclosure, should have conducted an "individualized" inquiry into whether the publication should be prevented, and that the government failed to do so. Twitter bases this asserted requirement on *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989), in which the Supreme Court held that some "individualized adjudication" was required before a state could impose tort liability upon a newspaper that published the name of a rape victim. But here the record indicates that the FBI did conduct an individualized analysis of the harms that would be

caused by Twitter's disclosure of the unredacted Report. Our review of the record, including the classified materials, confirms that Twitter's allegation is not correct.

Twitter also argues that the government's consideration of how other companies might disclose similar information violates the "individualized" inquiry requirement. But Twitter conflates two separate issues. The government could conduct an individualized inquiry into the harm that Twitter's disclosure would make, including the harm that would be caused if an adversary considered the information Twitter disclosed alongside similar information from other companies. The government's inquiry is no less "individualized" simply because it took into account the fact that if Twitter were allowed to publish the information in question, many other companies would do the same, leading to serious national security consequences. Twitter points to no contrary authority. And again, we conclude that the government's review was sufficiently individualized, particularly in view of the Classified Tabb Declaration.

In sum, the classified and unclassified materials in this case confirm that the government's restrictions on Twitter's speech survive strict scrutiny. We hold that the government's redactions of Twitter's Transparency Report do not violate the First Amendment.

III

We turn next to Twitter's claim that the procedures associated with the government's restriction on Twitter's speech failed to comport with *Freedman v. Maryland*, 380 U.S. 51 (1965). We hold that the specific procedural requirements of *Freedman* do not apply here. And we further conclude that the procedures that were followed— which were robust and which

resembled the *Freedman* requirements in key respects—were sufficient to withstand any broader procedural challenge that Twitter has raised.[4]

A

In First Amendment law, a prior restraint is an order "forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis and quotations omitted). In *Freedman* and its progeny, the Supreme Court developed a set of procedural safeguards for censorship regimes involving content-based prior restraints: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *Thomas*, 534 U.S. at 321 (quoting *FW/PBS*, 493 U.S. at 227 (principal opinion of O'Connor, J.)).

Some background on the *Freedman* line of cases helps explicate these procedural requirements and demonstrates why the law imposes them in some

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[4] In its decision granting summary judgment to the government, the district court concluded that Twitter had not raised a challenge under *Freedman*. The parties agree this determination was mistaken. The record reflects that Twitter raised *Freedman* at various points in the litigation. The government thus concedes that it "had adequate notice of Twitter's claims concerning [the *Freedman*] procedural safeguards." The *Freedman* issue has been fully briefed on appeal, and the district court has already offered its tentative conclusions that *Freedman* may be implicated here. As Twitter itself argues, judicial economy counsels in favor of resolving the *Freedman* issue rather than remanding for further consideration.

situations. In *Freedman*, a Maryland "motion picture censorship statute" made it "unlawful to sell, lease, lend, exhibit or use" any film unless it was submitted to and approved by the state's "Board of Censors." 380 U.S. at 52 & n.1. That board had the authority to "license such films . . . which are moral and proper," and to refuse to permit films that, "in the judgment of the Board," are "obscene," or that tend "to debase or corrupt morals or incite to crimes." *Id.* at 52 & n.2.

Recognizing that "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," the Supreme Court held that the Maryland scheme was an unconstitutional prior restraint. *Id.* at 57–60 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). In particular, the Court concluded that "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58. Although the Supreme Court would later crystallize the *Freedman* procedures into the three-part formulation that we set forth above, *see Thomas*, 534 U.S. at 321, *Freedman* outlined those same basic procedural features and explained why they were constitutionally mandated in the censorship context.

Freedman first explained that because of the "transcendent value of speech," as a matter of "due process," the "burden of proving that the film is unprotected expression must rest on the censor." 380 U.S. at 58 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Second, it was constitutionally necessary to have ready access to judicial review "because only a judicial determination in an adversary proceeding

ensures the necessary sensitivity to freedom of expression," and "only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Id.* Because "the censor's business is to censor," the Court concluded that a censor "may well be less responsive than a court . . . to the constitutionally protected interests in free expression." *Id.* at 57–58. And "[i]f it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." *Id.* at 58. Thus, "[a]ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Id.* at 59. Finally, *Freedman* explained, "the procedure must also assure a prompt final judicial decision" because of the potential that the temporary and "possibly erroneous" denial of a license could have a "deterrent effect" against speech. *Id.* That said, the Court made clear that it did "not mean to lay down rigid time limits or procedures, but to suggest considerations" in devising a legislative scheme that would "avoid the potentially chilling effect of the Maryland statute on protected expression." *Id.* at 61.

Although it eschewed imposing rigid formalities on these types of schemes, *Freedman* concluded that the basic procedural safeguards it set forth were constitutionally necessary because without them, "it may prove too burdensome to seek review of the censor's determination." *Id.* at 59. The Court pointed specifically to the nature of the film industry and to the incentives that film exhibitors and distributors would have (or would lack) in this context. As to the exhibitor, its "stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation." *Id.* And the film's distributor might also forgo a costly

challenge if the distributor could show the film freely in most other places. *Id.*

Beyond *Freedman*, the Supreme Court has imposed these procedural protections in other cases as well, but it "has generally focused on two types of government schemes requiring safeguards: censorship schemes and licensing schemes." *NSL*, 33 F.4th at 1076–77. Thus, the Court has applied *Freedman* to customs officials' seizing "obscene or immoral" articles, *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 365 & n.1, 366–68, 373–75 (1971), the postmaster's halting mail that contains "allegedly obscene materials," *Blount v. Rizzi*, 400 U.S. 410, 411–14, 417–19 (1971), a board's requiring permission before showing an allegedly obscene play at a municipal theater, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547–48, 559–62 (1975), and a court's *ex parte* restraining order that prevented a planned rally of offensive "political" speech, *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 176–77, 181–82 (1968); *see also, e.g.*, *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 140– 42 (1968) (per curiam) (invalidating a city's "Motion Picture Censorship Ordinance"); *Bantam Books*, 372 U.S. at 59–62, 71 (invalidating, pre-*Freedman*, a scheme by which a state "Commission to Encourage Morality in Youth" would declare books or magazines objectionable for distribution to young people). In these cases, the Court recognized that "a scheme conditioning expression on a licensing body's prior approval of content 'presents peculiar dangers to constitutionally protected speech.'" *Thomas*, 534 U.S. at 321 (quoting *Freedman*, 380 U.S. at 57).

At the same time, the Supreme Court has emphasized that in some licensing contexts, the required

safeguards "are less extensive than those required in *Freedman* because they do 'not present the grave dangers of a censorship system.'" *NSL*, 33 F.4th at 1077 (quoting *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 783 (2004)). Most relevant here is *City of Littleton*, in which the Court rejected a facial challenge to a municipal licensing scheme for adult businesses. 541 U.S. at 776. The city ordinance at issue there established certain circumstances that required the city to deny a license to operate an adult business, such as if the applicant were underage or had not timely paid taxes. *Id.* at 783.

The Court concluded that specially expedited time frames for judicial review were not required in that context. *Id.* at 782–84. As the Court explained, where "the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria, and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type." *Id.* at 784 (citations omitted). In such cases, the state's "ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms." *Id.* at 781. And "whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge." *Id.* at 782; *see also FW/PBS*, 493 U.S. at 228 (principal opinion of O'Connor, J.) ("Because the licensing scheme at issue in these cases does not present the grave 'dangers of a censorship system,' we conclude that the full procedural protections set forth in *Freedman* are not required." (quoting *Freedman*, 380 U.S. at 58)).

In addition to not insisting on compliance with inflexible procedures even within the contexts in which

Freedman might otherwise apply, the Supreme Court has not held that compliance with *Freedman*'s safeguards is required in every instance in which expression is restrained in advance because of its content. In particular, the Court "has not held that . . . [certain] government confidentiality restrictions must have the sorts of procedural safeguards required for censorship and licensing schemes." *NSL*, 33 F.4th at 1078.

Two precedents are most relevant in this regard. In *Seattle Times Company v. Rhinehart*, 467 U.S. 20, 27–28 (1984), a newspaper company challenged a protective order preventing it from disseminating information it acquired through pretrial discovery. Although the order restricted the newspaper's ability to share information of significant public interest, the Court concluded that the order was "not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Id.* at 33. The newspaper company had received the information it sought to publish only as "a matter of legislative grace" through the mechanisms of civil discovery. *Id.* at 32. Information obtained through discovery requests in litigation does not come from "a traditionally public source of information." *Id.* at 33. Limitations on the disclosure of such information thus "do[] not raise the same specter of government censorship that such control might suggest in other situations." *Id.* at 32. The Court ultimately affirmed that the protective order satisfied the First Amendment without discussing *Freedman*. *Id.* at 37.

Nor did the Court mention *Freedman* in *Butterworth v. Smith*, 494 U.S. 624 (1990). In *Butterworth*, the Court considered a state law preventing grand jury witnesses from disclosing the testimony that they gave before the grand jury. *Id.* at 626–27. The Court

held the restriction unconstitutional "insofar as [it] prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended." *Id.* at 626. In support of its conclusion, the Court emphasized that the statute's effect was "dramatic." *Id.* at 635. Before the witness was called to testify, he "possessed [] information on matters of admitted public concern about which he was free to speak at will." *Id.* But after testifying, the statute restrained his speech. *Id.* The state's interest in preserving the secrecy of grand jury proceedings did not overcome the witness's "First Amendment right to make a truthful statement of information *he acquired on his own*." *Id.* at 636 (emphasis added).

Critically, however, *Butterworth* left intact "that part of the Florida statute which prohibit[ed] the witness from disclosing the testimony of *another* witness." *Id.* at 633; *see also id.* at 632 (distinguishing *Seattle Times* because "[h]ere, by contrast, we deal only with respondent's right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury"); *id.* at 636 (Scalia, J., concurring) (expressing "considerable doubt" over the state's ability to restrain a witness from disclosing information that he already knew before he entered the grand jury room, but noting that it would present "[q]uite a different question" to restrict the witness from disclosing what he learned from others, "which is in a way information of the State's own creation"); *NSL*, 33 F.4th at 1078.

As it stands, therefore, *Freedman* applies to some speech restrictions, but the Supreme Court has not held that *Freedman*'s specific procedures apply to

every limitation that restricts speech in advance of its disclosure.

B

With the *Freedman* doctrine set forth, we now turn to the question of whether the government was required to comply with *Freedman*'s exact procedures in restricting Twitter's publication of its Transparency Report. We also consider whether, as a general matter, *Freedman* applies when the government prohibits the publication of information that exceeds the limited aggregate disclosures that the USA FREEDOM Act allows.

These are largely issues of first impression, although they bear similarities to the First Amendment challenge to the individual NSL nondisclosure requirement that we considered in *NSL*. That case likewise involved the post-USA FREEDOM Act version of the statute. *NSL*, 33 F.4th at 1068–69. As we explained above, the relevant provision at issue in *NSL*, 18 U.S.C. § 2709(c), generally prohibits the recipient of a national security letter from disclosing the fact of its receipt. *NSL*, 33 F.4th at 1063. Among the issues posed in *NSL* was whether *Freedman* applied to § 2709(c)'s speech restriction.

We concluded in *NSL* that we did not need to answer that question because even if the procedural safeguards of *Freedman* were required, the statute "in fact provides all of them." *Id.* at 1079. But although it was unnecessary to reach the question, we provided several reasons in *NSL* why we were skeptical that *Freedman* applied to the individual NSL nondisclosure obligations at issue. *Id.* at 1076–78. We noted that the NSL nondisclosure requirement "does not resemble the[] government censorship and licensing schemes" to which *Freedman* traditionally applies

because the NSL law "neither requires a speaker to submit proposed speech for review and approval, nor does it require a speaker to obtain a license before engaging in business." *Id.* at 1077. "Rather," we continued, the statute "prohibits the disclosure of a single, specific piece of information that was generated by the government: the fact that the government has requested information to assist in an investigation addressing sensitive national security concerns." *Id.* Citing *Seattle Times* and *Butterworth*, we opined that a restriction on the dissemination of this type of information was "more similar to government confidentiality requirements that have been upheld by courts"—requirements to which *Freedman* has not been extended. *Id.* at 1078. That is, *Seattle Times* and *Butterworth* demonstrated that the Supreme Court "ha[d] not held that these sorts of confidentiality restrictions must have the sorts of procedural safeguards required for censorship and licensing schemes." *Id.* As we have noted, however, these comments in *NSL* were dicta and thus do not bind us here.

Unlike *NSL*, this case does require us to pass upon whether *Freedman* applies to the government's restriction on Twitter's dissemination of classified information. Having undertaken our own independent review of the issue, we conclude that *Freedman*'s specific procedures do not apply in this case. *Freedman* established constitutionally mandated "procedural safeguards designed to obviate the dangers of a censorship system." 380 U.S. at 58. These procedures were founded on the recognition that "a scheme conditioning expression on a licensing body's prior approval of content 'presents peculiar dangers to constitutionally protected speech.'" *Thomas*, 534 U.S. at 321 (quoting *Freedman*, 380 U.S. at 57).

But as the Supreme Court explained in *City of Littleton*, the specific procedural requirements of *Freedman* do not come into play in the case of statutory schemes that "do not present the grave dangers of a censorship system." 541 U.S. at 783 (quoting *FW/PBS*, 493 U.S. at 228 (principal opinion of O'Connor, J.)); *see also FW/PBS*, 493 U.S. at 228 (principal opinion of O'Connor, J.) ("Because the licensing scheme at issue in these cases does not present the grave 'dangers of a censorship system,' we conclude that the full procedural protections set forth in *Freedman* are not required." (quoting *Freedman*, 380 U.S. at 58)). Although the licensing scheme at issue in *City of Littleton* was a different type of regime than what we have here, *City of Littleton* confirms that *Freedman* has not been extended to every regime that may be characterized as an advance restriction on speech.

In this case, a restriction on the disclosure of classified information is not akin to the censorship schemes to which *Freedman* has been applied. As in the context of information obtained in civil discovery subject to a protective order, *see Seattle Times*, 467 U.S. at 32–33, or learned in grand jury proceedings, *see Butterworth*, 494 U.S. at 632–33, 635–36, the recipient of the classified information at issue here is restrained only in speaking about information it received from the government. And that restriction is taking place in an area in which courts have regarded government confidentiality restrictions not as censorship, but as legitimate means of protecting certain government-provided confidential information. *See, e.g.*, *Egan*, 484 U.S. at 527; *Snepp*, 444 U.S. at 509 n.3. As we recognized in *NSL*, courts have upheld certain government confidentiality requirements—regardless of the type of information being quelled—without discussing or considering *Freedman*'s application. 33

F.4th at 1078. *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. *See NSL*, 33 F.4th at 1078 (citing *Seattle Times* and *Butterworth*).

This does not mean, of course, that Twitter is entitled to no procedural protections. As we explain below, the process afforded here was both substantial and sufficient. But the specific procedural framework of *Freedman* is not constitutionally required. What we have here is not "a classic prior restraint," *Seattle Times*, 467 U.S. at 33, and for the reasons we have explained, *Freedman*'s particular procedural framework does not govern.

Twitter's arguments to the contrary are unavailing. Twitter is correct that, as noted above, the Supreme Court has required compliance with *Freedman* in some cases beyond the quintessential film censorship scheme. *See, e.g.*, *Carroll*, 393 U.S. at 176–77, 181–82 (restraining order preventing political rallies); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43–44 (1977) (per curiam) (injunction preventing political party from marching and distributing certain materials); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 309 (1980) (per curiam) (injunction indefinitely preventing display of motion pictures under public nuisance statute). But although these cases may not have involved censorship schemes exactly like that in *Freedman* itself, it is obvious that they presented closely analogous speech restrictions.

We are likewise 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 that the pre-USA FREEDOM Act nondisclosure requirements for individual NSLs must comply with *Freedman*. Just as we have, the Second Circuit in *Doe* recognized that the individual NSL nondisclosure requirement is "not a typical prior restraint" because 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 876–77. But the court then rejected the analogy to the grand jury context on the theory that "[t]he justification for grand jury secrecy inheres in the nature of the proceeding," whereas "secrecy might or might not be warranted" for national security letters. *Id.* The problem with this 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.

C

Even though *Freedman*'s specific procedural framework does not apply here, Twitter received considerable process— including some of the process that *Freedman* envisioned. This is hardly a case in which a would-be speaker was entirely frustrated by an administrative censor. We conclude that the process Twitter received was sufficiently "sensitive to the need to prevent First Amendment harms." *City of Littleton*, 541 U.S. at 781.

When Twitter circulated its proposed publication to the government, the FBI reviewed it and met with Twitter to discuss the issues before ultimately

determining that certain information in Twitter's publication could not be publicly released. We expect that going forward, the government will demonstrate comparable diligence when presented with these kinds of requests to ensure that free speech rights are adequately protected in the national security context. Twitter then filed this lawsuit just four weeks after the government informed Twitter that it could not publish the Transparency Report in full.

Although Twitter shouldered the burden of filing the lawsuit, it had no apparent difficulty bearing that burden, and it was able to ensure that any speech restraint prior to judicial review was relatively brief. *See Thomas*, 534 U.S. at 321. That stands in contrast to the film context, in which *Freedman* concluded that it "may prove too burdensome" for certain speakers "to seek review of the censor's determination" because movie distributors and exhibitors may have too little stake in displaying a single film in a particular location covered by a censorship scheme. 380 U.S. at 59. There was no similar incentive problem here. We have already held that "the *Freedman* burden-of-instituting proceedings safeguard does not apply" in the context of certain zoning and licensing schemes. *Baby Tam & Co., Inc. v. City of Las Vegas*, 247 F.3d 1003, 1008 (9th Cir. 2001); *see also Dream Palace v. County of Maricopa*, 384 F.3d 990, 1001 n.6, 1009–10 (9th Cir. 2004). We similarly conclude here that Twitter has not demonstrated why obligating the government to institute these proceedings was constitutionally mandated, or how it would have materially affected the resolution of this dispute.

Once Twitter's lawsuit was filed, the district court gave the case careful and diligent consideration. As *Freedman* requires, the government bore the burden

of proof in demonstrating that the speech restriction was permissible. *See Thomas*, 534 U.S. at 321; *Freedman*, 380 U.S. at 58. Our review, and that of the district court, was conducted using strict scrutiny, which is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). It is true, of course, that the proceedings in the district court and in this Court took considerable time to resolve. But *Freedman* itself noted that the timetable for judicial review may depend on the context of the restriction. *See* 380 U.S. at 60–61. And, as we held in *NSL*, "[n]either *Freedman* nor any other Supreme Court decision requires that judicial review be completed in a specified time frame." 33 F.4th at 1079.

In this case, we conclude that any delay was warranted and that "ordinary court procedural rules and practices" are generally sufficient "to avoid delay-related First Amendment harm." *City of Littleton*, 541 U.S. at 782, 784; *see also Dream Palace*, 384 F.3d at 1003–04. The district court proceedings in this case required multiple rounds of classified and unclassified declarations. We cannot say that this process was unnecessary. Indeed, it was indispensable to our ultimate review. The specific protocols that govern judicial review of cases involving classified information, *see* Reagan, *Keeping Government Secrets*, *supra*, at 9–20, 22– 23—which here included judicial review and discussion of classified information in secure facilities—similarly led to more protracted proceedings. But this deliberative process was necessary in view of the national security sensitivity of the information at issue. We are also hopeful that having now resolved some of the complex legal issues underlying this dispute, future disputes of this nature may move more quickly, in a manner consistent with the First Amendment and accounting for the unique needs that are

attendant to the consideration of classified information. *See City of Littleton*, 541 U.S. at 782 ("We presume that courts are aware of the constitutional need to avoid 'undue delay result[ing] in the unconstitutional suppression of protected speech.'" (quoting *FW/PBS*, 493 U.S. at 228)); *id.* (describing how "ordinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm"). Future litigants "remain free to raise special problems of undue delay in individual cases." *Id.* at 784.

In sum, although the specific *Freedman* procedures do not apply in these circumstances, Twitter received some *Freedman*-like protections, and it is entitled to due process when it wishes to disclose information like that at issue here—due process that Twitter received in this case.

IV

Twitter lastly argues that the government violated due process by refusing to allow Lee Rubin, Twitter's lead outside counsel, access to the classified Tabb declaration and other classified materials that the government submitted in this case. This argument lacks merit.

There is no general constitutional rule requiring the government to provide classified materials to an adversary in litigation. Nor is there a general constitutional rule allowing a party access to classified information by virtue of its decision to file a lawsuit that implicates that kind of information. That is true even if the party seeking the information has appropriate security clearances. As we have held, the government "might have a legitimate interest in shielding the materials even from someone with the appropriate

security clearance." *Al Haramain Islamic Found., Inc. v. Dep't of the Treasury*, 686 F.3d 965, 983 (9th Cir. 2012) ("*Al Haramain II*").

From a procedural standpoint, our case law establishes that although "the Constitution does require that the government take reasonable measures to ensure basic fairness to the private party," it "certainly does not require that the government take actions that would endanger national security." *Id.* at 980. "[N]or does it require the government to undertake every possible effort to mitigate the risk of erroneous deprivation and the potential harm to the private party." *Id.*; *see also Kashem*, 941 F.3d at 386. Our assessment of the required procedures—including who has access to what information—instead reflects "a case-by-case approach" that accounts for the fact that "the proper measures in any given case will depend on a number of factors." *Al Haramain*, 686 F.3d at 984. As we have held, "the government may withhold classified information that truly implicates national security as long as it undertakes reasonable measures to mitigate the potential unfairness" to the plaintiff. *Kashem*, 941 F.3d at 380.

In this case, the government submitted a declaration from Carl Ghattas, then-EAD of the FBI's National Security Branch, which explained that under Executive Order 13,526, which governs the disclosure of classified information, the United States had determined that Rubin did not have the requisite "need to know" the classified information. The President's Executive Order 13,526 defines "need to know" as "a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a

lawful and authorized governmental function." Exec. Order No. 13,526, § 6.1(dd), 75 Fed. Reg. at 729. Mr. Ghattas concluded that "it does not serve a governmental function . . . to allow plaintiff's counsel access to the classified FBI information at issue in this case to assist in representing the interests of a private plaintiff who has filed this civil suit against the government." Mr. Ghattas contrasted Twitter's outside counsel with federal judges, who are provided with classified information "necessary for the Court to perform its judicial function."

In response, Twitter maintains that Rubin does have a need to know the classified information in this case, so as to allow outside counsel fully to represent Twitter's interests in this litigation. But under our precedents, this argument falls short. *See Al Haramain II*, 686 F.3d at 979 (directing application of the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976)). We have already determined that "the evidence is classified and truly implicates national security." *Kashem*, 941 F.3d at 385. And we conclude that the process followed here mitigates the risk of an erroneous deprivation of Twitter's First Amendment rights, *see Mathews*, 424 U.S. at 335, in a manner consistent with the government's compelling interest in ensuring the confidentiality of classified information. *See Kashem*, 941 F.3d at 377–78, 382; *Al Haramain II*, 686 F.3d at 979–80.

Twitter was provided with unclassified versions of the various declarations, which we have relied upon throughout this opinion. *See Kashem*, 941 F.3d at 385 (explaining that reasonable mitigation measures "may include disclosing the classified evidence to cleared counsel subject to a protective order *or* providing the complainant an unclassified summary of the

classified evidence" (emphasis added)). The unclassified declarations provided Twitter with sufficient information by which to advance Twitter's interests before this Court. The record amply demonstrates that Twitter's capable counsel has vigorously advocated on behalf of its client. And although we appreciate Twitter's concern that it cannot respond to what it does not know, Twitter's interest in the classified information does not rise to the level of constitutional imperative. As we have made clear, "there is no general rule requiring both an unclassified summary *and* disclosure to cleared counsel." *Id.* at 386 (citing *Al Haramain II*, 683 F.3d at 980); *see also Al Haramain II*, 683 F.3d at 983 ("We recognize that disclosure may not always be possible.").

The risk of erroneous deprivation is further mitigated by the extensive litigation process in this case, which involved multiple rounds of proceedings in the district court, multiple rounds of government submissions, and extensive *in camera* review of classified declarations in both the district court and this Court. In deciding Twitter's challenge, we have "thoroughly and critically reviewed the government's public and classified declarations," *Mohamed*, 614 F.3d at 1086, under the demanding strict scrutiny framework. Our process here was not unusual. In the context of other similar judicial processes, we have conducted *ex parte* review of classified materials without finding a due process concern, even when those materials were critical to our resolution of the case. *See, e.g.*, *Kashem*, 941 F.3d at 385; *Mohamed*, 614 F.3d at 1086.[5]

[5] Because we conclude that due process does not require the government to provide Twitter's counsel with classified information, we do not reach the government's argument that this

Twitter protests that this case is different because "[u]nlike some of the litigants that have sought access to classified evidence over the years, Twitter is not a designated terrorist organization or foreign national whose access (even through cleared counsel) might legitimately raise national security concerns." This argument fails. Twitter confuses whether the government could have allowed Twitter access to classified information with whether due process mandates that result. For the reasons we have explained, it does not. The process afforded to Twitter was constitutionally sufficient, even without its having received classified materials. Under these circumstances, the government was not required to draw distinctions among different types of litigants, as Twitter suggests, which could require potentially fraught predictions as to whether disclosure of classified materials to one group as opposed to another posed greater risks.

Nor is this selective differentiation among litigants a task that is proper for the judiciary to undertake. *See United States v. Ott*, 827 F.2d 473, 477 (9th Cir. 1987) ("Congress has a legitimate interest in authorizing the Attorney General to invoke procedures designed to ensure that sensitive security information is not unnecessarily disseminated to *anyone* not involved in the surveillance operation in question, whether or not she happens for unrelated reasons to enjoy security clearance. We reject the notion that a defendant's due process right to disclosure of FISA materials turns on the qualifications of his counsel."); *see also Al Haramain II*, 683 F.3d at 983. In a case such as this, requiring courts to evaluate the perceived trustworthiness of individual litigants in their

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information would be protected from disclosure under the state secrets privilege.

receipt of classified information would invite a weighing of interests that is beyond our role. That is not an inquiry we have undertaken before, and we do not do so now.

* * *

The government may not fend off every First Amendment challenge by invoking national security. But we must apply the First Amendment with due regard for the government's compelling interest in securing the safety of our country and its people. We hold here that, both as a matter of substance and procedure, the government's restriction on Twitter's speech did not violate the First Amendment. The judgment of the district court is

AFFIRMED.

VANDYKE, Circuit Judge, concurring in the judgment:

I agree with the majority's conclusion in this case, and most aspects of its analysis, with our only significant disagreement being whether we need to rely on classified materials to resolve this case. I conclude that the unclassified materials are sufficient to meet the government's burden. Rather than attempt to parse how that difference might change the analysis, I simply provide my own analysis below.

I. DISCUSSION

"[O]ne of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our nation's security on the one hand, and the preservation of basic human rights on the other." S. Rep. No. 95-604, pt. 1, at 4 (1977)

(quoting former United States President Jimmy Carter). It's a longstanding legal axiom that a government can safeguard liberty only if it has some latitude to narrowly restrict speech that endangers national security. *See, e.g.*, 1 William Blackstone, *Commentaries* *126; 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1874, 1878, at 731–33, 735–37 (1833). But it is as well-recognized that the First Amendment's protection to speak freely about matters of public concern is "an opportunity essential to the security of the Republic," and "a fundamental principle of our constitutional system." *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (quotation marks and citations omitted).

This case requires us to address the intersection of those two weighty concerns: free speech and national security. More specifically, Twitter has brought an as-applied constitutional challenge asking whether the Government can constitutionally prevent it from disclosing in its Report classified information it obtained only through its involvement in the Government's national security investigations. The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. Const. amend. I. But "the Supreme Court has concluded that some restrictions on speech are constitutional, provided they survive the appropriate level of scrutiny." *In re National Security Letter*, 33 F.4th 1058, 1070 (9th Cir. 2022) ("*NSL*").

Our court analyzes nondisclosure requirements pertaining to national security in three steps. *See id.* at 1071 (evaluating18 U.S.C. § 2709(c)'s nondisclosure requirement). First, we "determine whether the nondisclosure requirement is content based or content neutral." *Id.* Second, "[i]f the nondisclosure

requirement is content based, we then consider whether it survives strict scrutiny." *Id.* Third, we "determine whether the nondisclosure requirement constitutes the type of restraint for which the procedural safeguards are required and, if so, whether it provides those safeguards." *Id.*

A. The Government's Restrictions Result from the Statutory Framework.

At the outset, it is important to first define the precise speech restrictions at issue here. On appeal, Twitter argues that "the origin of the restraint on [its] aggregate reporting is the FBI's discretionary 'classification' of [its] ... Report ... and its continued assertion of that classification under Executive Order 13526 and 50 U.S.C. § 1874." In contrast, the Government argues that "[t]he obligation of the recipients of national security process to protect the secrecy of classified information relating to that process stems from their *statutory* nondisclosure obligations" (emphasis added).

The Government is right. It is the statutory nondisclosure requirements pertaining to electronic communication service providers' (ECSPs') receipt of national security process that prevent Twitter from disclosing the information it seeks to publish. The text of the statutory nondisclosure provisions at issue requires ECSPs to "protect [the] secrecy" of the investigation. 50 U.S.C. §§ 1805(c)(2)(B) (electronic surveillance), 1824(c)(2)(B) (physical searches), 1842(d)(2)(B)(i) (pen registers or trap and trace devices), 1881a(i)(1)(A) (persons abroad); *see also* 18 U.S.C. § 1862(d)(2) (mandating that appropriate recipients of a request for records not "disclose to any person ... that the [FBI] has sought or obtained records pursuant to an order under this section"); 18

U.S.C. § 2709(c)(1)(A) (containing the NSL nondisclosure requirement mandating that "no [ECSP] ... shall disclose to any person that the [FBI] has sought or obtained access to information or records under this section"). Disclosing *any* information about a particular national security investigation, including aggregated information that incorporates the occurrence of that investigation, directly undermines its "secrecy" by, at the very least, revealing its existence.

Moreover, the only provision that permits the disclosure of *any* information pertaining to the receipt of national security process whatsoever, 50 U.S.C. § 1874, presents itself as an *exception* to the nondisclosure requirements accompanying the receipt of individual orders and subpoenas. *See* § 1874(a) ("A person subject to a nondisclosure requirement accompanying *an order or directive* under this chapter or *a national security letter* may, with respect to such order, directive, or national security letter, publicly report the following information using one of the [provided] structures ...." (emphases added)). Section 1874's explicit incorporation of the nondisclosure requirements pertaining to the receipt of individual orders and subpoenas further enforces the statutory requirement to generally prohibit the disclosure of any information pertaining to the receipt of national security process, whether individualized or in the aggregate, except for information falling within the limited boundaries articulated in § 1874.

Reading the nondisclosure requirements together, as one must, these provisions prohibit the disclosure of aggregate information pertaining to the receipt of national security process that falls outside of the limited bounds articulated in § 1874. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529

U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (citation and internal quotation marks omitted)). Because the information Twitter seeks to disclose undisputedly falls outside of § 1874's permissible boundaries, the statutory nondisclosure requirements prohibit the disclosure of the information Twitter seek to publish here.[6]

B. Traditional Strict Scrutiny Applies.

Returning to our court's tripartite analysis, I easily conclude that the Government's restrictions are content based and warrant the application of strict scrutiny. "A government's restriction on speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *NSL*, 33 F.4th at 1071 (citation and internal quotations omitted). "[A] regulation or law that restricts speech based on its topic, idea, message, or content is 'content based' on its face, and is accordingly subject to strict scrutiny." *Id.* at 1071–72. And when a nondisclosure requirement, "[b]y its terms ... prohibits speech about one specific issue," then "[s]uch a restriction targets speech based on its communicative content." *Id.* at 1072 (citation, internal alterations, and quotation marks omitted).

In this case, the Government's restrictions are clearly content based. The unclassified FBI

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[6] Moreover, the logical extension of Twitter's argument is that *no* statutory nondisclosure requirement exists for the disclosure of aggregate information pertaining to the receipt of national security process, which effectively renders the *exceptions* for amounts of aggregate reporting articulated in 50 U.S.C. § 1874(a) meaningless.

declarations reveal that the Government redacted certain information in Twitter's Report because the "message expressed," if published, would reasonably be expected to endanger national security. *See id.*; *see also* Unclassified Tabb Decl. ¶ 5 (concluding that the redactions are "properly classified, and that its unauthorized disclosure reasonably could be expected to result in serious damage to the national security"); Unclassified Steinbach Decl. ¶ 5 (same). For example, in the Unclassified Tabb Declaration, Tabb testified that disclosure of the redacted information "would allow adversaries of the United States ... significant insight into the U.S. Government's counterterrorism and counterintelligence efforts and capabilities, or, significantly, the lack thereof, and into particular intelligence sources and methods." Unclassified Tabb Decl. ¶ 16. By the FBI's own attestations, therefore, it was precisely the *content* of the redacted information that could endanger national security if disclosed and accordingly justified the classification of that information.

In addition to the executive branch's own characterization of its classification of the redacted information in Twitter's Report as content based, our court has already determined that at least part of the statutory nondisclosure framework at issue here is content based. *NSL*, 33 F.4th at 1063. In *NSL*, the panel reasoned that 18 U.S.C. § 2709(c) "prohibits speech about one specific issue: the recipient may not disclose to any person that the [FBI] has sought or obtained access to information or records by means of an NSL." *Id.* at 1072 (citation and internal quotation marks omitted). "Such a restriction targets speech based on its communicative content, and restricts speech based on its function or purpose." *Id.* (citation and internal quotation marks and alterations omitted). The panel

therefore concluded that 18 U.S.C. § 2709(c) was content based on its face. *Id.*

NSL controls the analysis of the statutory nondisclosure framework at issue here. As to the NSL nondisclosure requirement, *NSL* explicitly dictates that 18 U.S.C. § 2709(c) is content based. *Id.* And as to the other nondisclosure requirements pertaining to FISA orders, *NSL*'s rationale leads to the same conclusion: just like 18 U.S.C. § 2709(c), the nondisclosure requirements for FISA orders "prohibit[] speech about one specific issue: the recipient may not disclose to any person that the [government] has sought or obtained access to information or records by means of" a FISA order. *Id.* (citation and internal quotation marks omitted); *see also* 50 U.S.C. §§ 1805(c)(2)(B), 1824(c)(2)(B), 1842(d)(2)(B)(i), 1862(d)(2), 1881a(i)(1)(A). The statutory nondisclosure requirements at issue here are nearly identical to those the panel considered in *NSL*, just at a higher level of generality. But this is largely a distinction without a difference. Because both the executive branch's classification of the redacted information in Twitter's Report and the statutory nondisclosure requirements at issue "target speech based on its communicative content," strict scrutiny applies. *NSL*, 33 F.4th at 1072 (citation and internal quotation marks omitted).

Neither party disputes that the Government's restrictions are content based. But they both nonetheless argue that a standard other than strict scrutiny governs. The Government argues that a standard of review more akin to intermediate scrutiny applies,[7]

[7] Specifically, the Government argues that a standard more akin to intermediate scrutiny applies because the redacted information in Twitter's report concerns information obtained solely

whereas Twitter argues that some extra-strict form of strict scrutiny articulated in *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) ("*Pentagon Papers*"), applies. But both parties ignore *NSL*'s application of the traditional form of strict scrutiny to materially similar nondisclosure requirements. *NSL* even went so far as to determine that the same argument Twitter raises—that *Pentagon Papers* instructs the application of a more demanding form of strict scrutiny when evaluating nondisclosure requirements—is "meritless":

> The recipients argue that the NSL law should be held to a higher standard than strict scrutiny. According to the recipients, a content-based restriction imposed by a system of prior restraint is permissible only if (1) the harm to the governmental interest is highly likely to occur; (2) the harm will be irreparable; (3) no alternative exists for preventing the harm; and (4) the restriction will actually prevent the harm. This argument is meritless. No Supreme Court or Ninth Circuit opinion has articulated such a test, nor do the three cases cited by the recipients support it. The brief per curiam opinion in [*Pentagon Papers*] did not specify a test that should be applied to prior restraints.

NSL, 33 F.4th at 1076 n.21. Given that not even the *Pentagon Papers* per curiam majority clearly

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through Twitter's participation in confidential government activities. But in *NSL*, we evaluated constitutional challenges to the nondisclosure requirement in 18 U.S.C. § 2709(c) under strict scrutiny, even though the plaintiffs in that case also received the information at issue only from their involvement in confidential government investigations. *NSL*, 33 F.4th at 1071–72.

established the test advocated by Twitter, and given the material similarities between the nondisclosure requirements at issue in *NSL* and this case, the traditional form of strict scrutiny is the correct standard for evaluating the Government's restrictions.

1. The Government's Restrictions Satisfy Strict Scrutiny.

Having determined that the traditional form of strict scrutiny applies, the next step is to determine whether the Government's restrictions satisfy this heightened standard. "Under strict scrutiny, restrictions may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 1070 (citation and internal quotation marks omitted). Both requirements are met here.

First, the restrictions serve a compelling state interest. Both the regulatory and statutory nondisclosure frameworks at issue undisputedly operate to prevent the disclosure of the redacted information in Twitter's Report for the purpose of national security. *See* E.O. 13,526; *NSL*, 33 F.4th at 1073 ("Here, the recipients do not dispute that the nondisclosure requirement directly serves the compelling state interest of national security ...."). Our court has "readily conclude[d] that national security is a compelling government interest. Indeed, ... everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order." *NSL*, 33 F.4th at 1072 (citation, internal alterations, and quotation marks omitted). "By the same token," our court also has determined that "keeping sensitive information confidential in order to protect national security is a compelling government interest." *Id.* Given that the Government's restrictions undisputedly rest on

national security interests, strict scrutiny's first requirement is met here.

The next step, therefore, is to "turn to the question [of] whether the [Government's restrictions are] narrowly tailored." *Id.* Even though a "restriction is not narrowly tailored if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve," our court has observed in this very context that strict scrutiny does not require the content-based restriction to be "perfectly tailored." *Id.* (citation and internal quotation marks omitted). "Accordingly, a reviewing court should decline to wade into the swamp of calibrating the individual mechanisms of a restriction." *Id.* (citation, internal quotation marks, and alterations omitted).

My review is particularly informed in this context by the Supreme Court's frequent admonition that courts must provide the "utmost deference" to Congress's and the executive branch's factual judgments pertaining to national security matters. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34, 36 (2010) (determining that Congress's and the executive branch's judgments on national security matters are "entitled to significant weight"); *see also Dep't of Navy v. Egan*, 484 U.S. 518, 529– 30 (1988) (observing that "the courts have traditionally shown the utmost deference to Presidential responsibilities" regarding military and national affairs (internal quotations mark omitted)); *CIA v. Sims*, 471 U.S. 159, 180 (1985) ("[I]t is the responsibility of the [executive branch], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to [national security harm]."). In justifying its restrictions on speech in the

national security context, the Government must provide "reasonable specificity" and "demonstrat[e] a logical connection between the deleted information and the reasons for classification." *Wilson v. CIA*, 586 F.3d 171, 185 (2d Cir. 2009) (citation omitted). It need not, however, provide "detail, specific facts, and specific evidence," nor "conclusively link all the pieces in the puzzle before [courts] grant weight to its empirical conclusions." *Humanitarian Law Project*, 561 U.S. at 34–35 (citation internal quotation marks omitted) (rejecting as "dangerous" the dissent's proposed requirement that the Government justify constraints on speech with detailed factual explanations).

Given the "significant weight" a court must afford to the Government's national security factual findings, I would hold that the Government's unclassified declarations— specifically, the Unclassified Tabb Declaration— sufficiently demonstrate that the Government's restrictions on Twitter's speech are narrowly tailored. *See Dep't of Navy*, 484 U.S. at 527. As discussed at length in that declaration, the Government only redacted various pieces of information that the USA FREEDOM Act did *not* exempt from preexisting non-disclosure requirements, that "would disclose specific numbers of orders received, including characterizing the numbers in fractions or percentages, and would break out particular types of process received." "Information at a more granular level than described in the USA FREEDOM Act remains classified, because it would provide a roadmap to adversaries revealing the existence of or extent to which Government surveillance may be occurring at Twitter or providers like Twitter." Unclassified Tabb Decl., ¶ 15; *see also Sims*, 471 U.S. at 176–77 ("A foreign government can learn a great deal about the [executive branch]'s activities by knowing the public sources of

information that interest the [executive branch]. The inquiries pursued by the [executive branch] can often tell our adversaries something that is of value to them."). Specifically, disclosure of the "granular aggregate data" that Twitter seeks to publish "would assist adversaries in avoiding detection by and in carrying out hostile actions against the United States and its interests." Unclassified Tabb Decl. ¶¶ 8 n.2, 9.

Tabb further averred that the three restrictions to which Twitter objects—(1) no disclosure beyond permitted ranges; (2) beginning the lowest band with zero; and (3) reporting a band for every type of process received—"were designed specifically to minimize the harms that could reasonably be expected to result from disclosure" of aggregate national security process data. *Id.* at ¶ 17. As Tabb explained, limiting the disclosure of information to the reporting bands permitted by the Act allows the Government to conceal trends in collection over time, which prevents foreign adversaries from knowing which platforms are "safe" for use and obscures the Government's evolving intelligence collection capabilities. *See id.* at ¶¶ 16–18. And starting the lowest bands at zero instead of one prevents foreign adversaries from ascertaining with any certainty whether the Government was, or has recently started, collecting from a given platform. Reporting at least the lowest band for all types of national security process similarly conceals the types of collection in which the Government is engaged on a given platform, from which adversaries can deduce information about the capabilities and limitations of the Government's collection abilities. *Id.* at ¶¶ 17–23. If "[a]rmed with the kind of detailed information about Twitter's receipt of national security process contained in Twitter's draft ... Report," Tabb explained, "adversaries reasonably can be expected to take

operational security measures to conceal their activities, alter their methods of communication to exploit secure channels of communication, or otherwise counter, thwart or frustrate efforts by the Government to collect foreign intelligence and to detect, obtain information about, or prevent or protect against threats to the national security." *Id.* at ¶ 19.

By way of the detailed Unclassified Tabb Declaration, I conclude that the Government has sufficiently "indicate[d] the nature of the apprehended harm" and provided ample bases demonstrating that "the link between disclosure and risk of harm is substantial" in the unclassified record before us. *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 881 (2d Cir. 2008). While these bases may not "link all the pieces in the puzzle," they are commensurate with the level of detail provided in affidavits that the Supreme Court has determined, in the national security context to suffice in supporting strict scrutiny. *See Humanitarian Law Project*, 561 U.S. at 29–33, 35. The Government's restrictions also fall squarely within its pursuit of national security: the redactions are neither overinclusive, because they only target precisely the type of aggregate information that both the executive branch and Congress have deemed to pose a harm to national security if disclosed, nor underinclusive, because the statutory framework prevents any disclosure of national security process outside of 50 U.S.C. § 1874's aggregate reporting bands. In other words, Twitter remains free to disclose anything it wants other than precisely the national security process information—including most (but not all) aggregate national security process data—that Congress and the executive branch have authoritatively concluded will compromise important national security interests. Our court must give strong deference to the Government's

factual findings on national security. Doing so, it is evident that the restrictions on Twitter's speech are narrowly tailored to the compelling interest of protecting national security and safeguarding classified information. *See Dep't of Navy*, 484 U.S. at 527.

Twitter's contrary arguments are unpersuasive. Relying on *The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989), it argues that the redactions do not satisfy strict scrutiny because the Government failed to conduct an "individualized inquiry" as to whether the redacted information should be disclosed. But the record reveals that the Government did, in fact, individually assess the harms that reasonably could result from the disclosure of the classified information. Indeed, in the Unclassified Tabb Declaration, Tabb repeatedly referred to the specific information redacted in Twitter's Report when he concluded that the disclosure of *that specific* information would provide foreign adversaries "a clear picture not only of where the Government's surveillance efforts are directed ... but also of how its surveillance activities change over time, including when the Government initiates or expands surveillance capabilities or efforts involving providers or services that adversaries previously considered 'safe.'" Unclassified Tabb Decl. ¶ 7. The record fatally undercuts this argument.

Twitter's remaining arguments lack merit. Twitter argues that the Government's restrictions are not narrowly tailored because they lack "durational limitation." But as already described, the statutory nondisclosure frameworks provide for judicial review, which includes a review of any durational limitations (or lack thereof). *See* 18 U.S.C. § 3511(b)(1)(C); 50 U.S.C. § 1881a(i)(4). The EO also provides that classification determinations automatically expire by

default after 10 years. *See* EO §§ 1.5(a)–(d), 3.1(a), 3.5(a)–(c). Twitter also proffers various disagreements with the Government's assessment that the disclosure of the redacted information in the Report would harm national security. But "[a]t bottom, [Twitter] simply disagree[s] with the considered judgment of Congress and the Executive" on their assessments regarding national security. *Humanitarian Law Project*, 561 U.S. at 36. "That judgment, however, is entitled to significant weight, and we have persuasive evidence before us to sustain it." *Id.* Twitter's factual disagreements with the Government's national security assessments fail under the significant deference we must provide to the Government's factual claims about national security risks.

In sum, the Unclassified Tabb Declaration provides a sufficient rationale to determine that the Government's restrictions survive strict scrutiny.

2. Freedman Does Not Apply.

Having determined that the Government's restrictions survive strict scrutiny, the majority then rightly considers Twitter's argument that the Government's restrictions present "the sort of content-based restriction on speech which must have the procedural safeguards identified by the Supreme Court in *Freedman*." *NSL*, 33 F.4th at 1076 (citation omitted).

In *Freedman*, the Supreme Court held that a statute prohibiting the exhibition of films prior to a censorship board's approval constituted an invalid prior restraint. 380 U.S. at 60. In doing so, the Court established three "procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58. These safeguards include:

> 1. any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained;
>
> 2. expeditious judicial review of that decision must be available; and
>
> 3. the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

NSL, 33 F.4th at 1071 (citing *Freedman* and other cases applying *Freedman*).

Since *Freedman*, our court has recognized that "[t]he Supreme Court has generally focused on two types of government schemes requiring [*Freedman*'s procedural] safeguards: censorship schemes and licensing schemes." *Id.* at 1076. In *NSL* our court also observed that the same statutory nondisclosure requirement that comprises part of the same nondisclosure framework at issue in this case "does not resemble [the] government censorship and licensing schemes" that triggered *Freedman*'s procedural safeguards. *Id.* at 1077. Unlike the censorship scheme addressed in *Freedman*, 18 U.S.C. § 2709(c)—the statutory provision that prevents NSL recipients from disclosing the fact that they received such a request—only "prohibits the disclosure of a single, specific piece of information that was *generated by the government*: the fact that the government has requested information to assist in an investigation addressing sensitive national security concerns." *Id.* (emphasis added).

I'm not the first to observe that the concerns that animated *Freedman* arose in a very different context: the Second Circuit has similarly acknowledged that "§ 2709(c) limits certain speech in advance but is not a

typical example of a regulation for which procedural safeguards are required." *Id.* at 1076 (discussing *John Doe, Inc.*, 549 F.3d at 876) (internal quotation marks omitted). Building on that thought, the *NSL* panel explained that, "unlike an exhibitor of movies, the recipient of a nondisclosure requirement did not intend to speak and was not subject to any administrative restraint on speaking *prior to the Government's issuance of an NSL*." *Id.* at 1077 (emphasis added) (citation, internal alterations, and quotation marks omitted). "Rather than resembling a censorship or licensing scheme, [18 U.S.C. § 2709(c)] is more similar to governmental confidentiality requirements that have been upheld by the courts." *Id.* at 1078 (citing *Butterworth v. Smith*, 494 U.S. 624, 634–36 (1990) (upholding in part a law requiring witnesses to maintain the confidentiality of the grand jury process); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984) (upholding a restriction on disclosure of information obtained through pretrial discovery).[8] But the *NSL* panel stopped short of explicitly deciding "whether [18 U.S.C. § 2709(c)] *must* provide procedural safeguards," because in that case the panel determined that the government had satisfied all the requisite procedural safeguards regardless of whether *Freedman* applied. *NSL*, 33 F.4th at 1079.

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[8] In *Butterworth*, the Supreme Court declined to invalidate part of a state statute that prohibited a witness from disclosing the testimony of another witness—which the former witness only learned of through her participation in confidential government legal processes. *See* 494 U.S. at 632–36. Similarly, in *Seattle Times Co.*, the Supreme Court upheld a restriction on the disclosure of information obtained through pretrial discovery—which, again, it only obtained through its participation in confidential procedures. 467 U.S. at 37.

NSL's discussion regarding the inapplicability of *Freedman*'s procedural safeguards is well-reasoned, and it must govern here. Just like the nondisclosure provision at issue in *NSL*, and similar to the confidentiality requirements at issue in *Butterworth* and *Seattle Times*, the Government's restrictions only prevent "the disclosure of ... specific piece[s] of information ... generated by the government: the fact that the government has requested information to assist in an investigation addressing sensitive national security concerns." *Id.* at 1077. Specifically, in this case, the Government prevented the disclosure of information pertaining to whether and how often the *Government* compelled Twitter to produce various types of information about its users. *See* Unclassified Tabb Decl. ¶ 7. The nature of this Government-generated information is likely far *more sensitive* than information disclosed during civil discovery or grand jury proceedings. *See Butterworth*, 494 U.S. at 634–36; *Seattle Times Co.*, 467 U.S. at 37. That neither *Butterworth* nor *Seattle Times* applied *Freedman* makes sense, given that confidentiality requirements pertaining to information gathered solely through participation in confidential government procedures do not pose the risk of "freewheeling censorship" that *Freedman* was designed to prevent. *See NSL*, 33 F.4th at 1077 (citation omitted); *see also Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

Moreover, "unlike [the] exhibitor of movies" considered in *Freedman*, Twitter "'did not intend to speak and was not subject to any administrative restraint on speaking *prior* to the Government's issuance of [the national security process].'" *NSL*, 33 F.4th at 1077 (internal alterations omitted) (emphasis in original) (quoting *John Doe, Inc.*, 549 F.3d at 880). This distinction holds true for the Supreme Court cases Twitter

relies on in support of its argument that *Freedman* applies here. *See, e.g.*, *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (per curiam) (determining that "the absence of any special safeguards governing the entry and review of orders *restraining the exhibition of named or unnamed motion pictures* ... precludes the enforcement of these nuisance statutes against motion picture exhibitors" (emphasis added)); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43–44 (1977) (per curiam) (determining that *Freedman* applied to an injunction prohibiting the "marching, walking or parading in the uniform of the National Socialist Party of America" (internal alterations omitted)); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61– 62, 71 (1963) (determining that the procedures of a state commission, whereby it notified book distributors that certain books were "objectionable for sale, distribution or display to youths under 18 years of age" and reminded them of the commission's "duty to recommend to the Attorney General prosecution of purveyors of obscenity," were "radically deficient").

Twitter identifies no decision, and I am aware of none, where a court held that the Government may not prohibit the disclosure of classified information—let alone classified information obtained solely through participation in confidential government investigations—in the absence of *Freedman*'s procedures. Instead, "[r]ather than resembling a censorship or licensing scheme, [the Government restrictions here are] more similar to governmental confidentiality requirements that have been upheld by the courts." *NSL*, 33 F.4th at 1078. In accordance with *NSL*'s well-reasoned rationale, I would conclude that *Freedman*'s procedural requirements do not apply here.

Even if some process similar to that required by *Freedman* was required, the process Twitter received is not far removed from *Freedman*'s framework. Although Twitter initiated this lawsuit, nothing prevented it from seeking prompt judicial review in federal court of the Government's decision prohibiting it from disclosing certain information about national security process. *Cf. id.* at 1080 ("*Freedman* focused on minimizing the burden to the film exhibitor to 'seek judicial review' of the state's denial of a license; it did not focus on which party bore the initial burden. Here, the burden on a recipient is de minimis, as the recipient may seek judicial review simply by notifying the government that it so desires." (internal citation omitted)). As in *NSL*, the judicial process available to Twitter, which it has apparently been able to utilize without too much difficulty, satisfies any *Freedman*-type requirements that might properly apply here. *See id.* at 1079–80 (concluding that various provisions of 18 U.S.C. § 3511 provided for the requisite "specified," "brief," and "expeditious" period of judicial review contemplated by *Freedman*); *see also* 50 U.S.C. § 1881a(i)(4) (permitting review of FISA orders by the Foreign Intelligence Surveillance Court).

At the end of the day, even if *Freedman*'s procedural protections had applied to the Government's restrictions and the parties had operated under that framework, it would not have materially changed the outcome of this case. The parties would still have become embroiled in a lawsuit regardless of who initiated it; they would still have raised the same legal arguments on the merits; intervening statutory developments would still have altered those arguments and delayed a final resolution; and the parties would still have proceeded to dispositive motions.

3. Due Process Does Not Entitle Twitter's Counsel to Classified Declarations.

Lastly, I would conclude that procedural due process does not require that Twitter's counsel be provided access to classified information. When assessing due process challenges that implicate national security interests, a court must "apply the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)." *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 979 (9th Cir. 2012) (partial citation omitted); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004) (plurality) (determining that the *Mathews* balancing test provides the "ordinary mechanism that we use for balancing such serious competing interests" as due process rights and national security). "[T]o determine whether administrative procedures provided to protect a liberty or property interest are constitutionally sufficient," *Mathews* instructs us to consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Kashem v. Barr, 941 F.3d 358, 377–78 (9th Cir. 2019) (internal quotation marks omitted). And when due process claims implicate classified information:

> Courts should adopt a case-by-case approach [in] determining what disclosure of classified

> information is required, considering, at a minimum, the nature and extent of the classified information, the nature and extent of the threat to national security, and the possible avenues available to allow the designated person to respond more effectively to the charges.

Id. at 382 (citation and internal quotation marks omitted)

Applying the *Mathews* factors, Twitter asserts a general interest in adversarial proceedings "in order to effectively vindicate its First Amendment rights." But Twitter's private expressive interest here is relatively weak because, as I note above, Twitter seeks to disclose classified information the Government shared only as a necessary part of conducting national security investigations. When balanced against the Government's compelling interest in national security, the relatively low risk of erroneous suppression under the carefully tailored nondisclosure regime, and the heavy burden of providing access to classified information to Twitter's counsel, the due process balance weighs against disclosure here. *Cf. Al Haramain Islamic Found., Inc.*, 686 F.3d at 979–80; *Kashem*, 941 F.3d at 378. Moreover, "even assuming cleared counsel were available to the plaintiffs and that it was error not to disclose the additional reasons to such counsel, [Twitter] ha[s] not shown that [it was] prejudiced." *Kashem*, 941 F.3d at 383. And any prejudice argument would face a particularly steep uphill battle, given that I believe we easily could have, and indeed should have, decided this case on the unclassified record alone. No due process violation arises here.

II. CONCLUSION

The Government's prevention of Twitter from publishing classified, redacted information satisfies strict scrutiny, and *Freedman*'s procedural protections do not apply in this case. Due process also does not demand that Twitter's counsel obtained access to classified information. I therefore agree with the majority to affirm the district court.

APPENDIX B

TWITTER, INC., Plaintiff, v. **WILLIAM P. BARR, *ET AL.***, Defendants.	Case No. 14-cv-04480-YGR **ORDER GRANTING GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT; DENYING TWITTER'S CROSS-MOTION FOR SUMMARY JUDGMENT** **DKT. NOS. 309, 311**

This long-pending case has morphed through myriad iterations and legislative changes. That plaintiff has continued to pursue the action merely underscores the tension between the First Amendment and national security and the future impact of the proceedings. The Court now addresses the cross-motions of plaintiff Twitter, Inc. ("Twitter") and defendants William P. Barr, *et al.* ("the Government") for summary judgment. (Dkt. Nos. 309, 311.) The Court having considered the parties' briefing in support of and in opposition to the cross-motions, the admissible

evidence[1] (including evidence presented in *camera*[2]), and the prior proceedings and arguments in this matter, and for the reasons stated herein, **ORDERS** that the Government's motion for summary judgment is **GRANTED** and Twitter's cross-motion for summary judgment is **DENIED**.

III. BACKGROUND

A. Allegations of the Operative Complaint

Twitter's Second Amended Complaint (Dkt. No. 114, "SAC") is the operative pleading in this action. The SAC seeks declaratory and injunctive relief based upon the Government's alleged "prohibitions on

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[1] Twitter requests judicial notice of publicly available reports prepared by the Director of the Administrative Office of the U.S. Courts, Office of the Director of National Intelligence, and the U.S. Department of Justice Office of Legislative Affairs (Dkt. No. 315) in support of Twitter's cross-motion and opposition. In connection with its reply briefing, Twitter also filed a supplemental request for judicial notice of transparency reports published by five companies (Adobe, Cisco, Automattic, Wickr, and Nest) and that such reports include statements that they [sic] companies have received zero national security process requests during one or more reporting periods. (Dkt. No. 327.) The Government did not oppose either request. The Court finds that it is proper to take judicial notice of the fact of these reports and their contents, not the truth of any statements therein. The requests for judicial notice are **GRANTED**.

[2] Twitter argues that the Government's motion should be denied for the further reason that it needs access to the Classified Tabb Declaration in order to meaningfully counter the Government's claim that the restrictions it has imposed on the Draft Transparency Report pass constitutional muster. The Court finds that the classified declaration of EAD Tabb cannot be disclosed to counsel for Twitter based upon the national security concerns it raises, despite counsel's clearance approval. Thus, Twitter's motion for summary judgment on these alternative grounds, as well as its motion for access of cleared counsel, are **DENIED**.

[Twitter's] speech in violation of the First Amendment," specifically the Government's prohibition on publishing its Draft Transparency Report "describing the *amount* of national security legal process[3] it received, if any for the period July 1 to December 31, 2013." (SAC ¶ 1, 4, emphasis in original.) Twitter further alleges that it "seeks to disclose that it received 'zero' FISA orders, or 'zero' of a specific *kind* of FISA order, for that period, if either of those circumstances is true." (*Id.* ¶ 4, emphasis in original.) More particularly, Twitter alleges that it seeks to publish a report disclosing the following categories of quantitative data to its users for the relevant period:

a. The number of NSLs and FISA orders Twitter received, if any, in actual aggregate numbers (including "zero," to the extent that that number was applicable to an aggregate number of NSLs or FISA orders or to specific *kinds* of FISA orders that Twitter may have received);

b. The number of NSLs and FISA orders received, if any, reported separately, in ranges of one hundred, beginning with 1–99;

c. The combined number of NSLs and FISA orders received, if any, in ranges of twenty-five, beginning with 1–24;

d. A comparison of Twitter's proposed (i.e., smaller) ranges with those authorized by the [Government in its earlier communication from then-Deputy Attorney General James M. Cole to the General

[3] Those national security legal process requests include national security letters ("NSLs") and other orders under the Foreign Intelligence Surveillance Act ("FISA").

Counsels for Facebook, Google, LinkedIn, Microsoft and Yahoo!, referred to as the] DAG Letter;

e. A comparison of the aggregate numbers of NSLs and FISA orders received, if any, by Twitter and the five providers to whom the DAG Letter was addressed; and

f. A descriptive statement about Twitter's exposure to national security surveillance, if any, to express the overall degree of government surveillance it is or may be subject to.

(*Id.* ¶ 56, emphasis in original.)

The Government has prohibited publication of that Draft Transparency Report since Twitter submitted it for review on April 1, 2014, asserting that certain portions of the report contained classified information. (*Id.* ¶¶ 55, 57, 58.) In two counts of the SAC, Twitter alleges that the Government has classified information in the Draft Transparency Report improperly and therefore put unlawful prior restraints on its speech in violation of the First Amendment. Twitter alleges that these actions are both violations of the First Amendment and "final agency action" subject to challenge under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (SAC at ¶¶ 71-86 and 87-91.)[4]

B. Procedural History

The lengthy procedural history of this case is detailed in the Court's prior orders. (See October 14, 2015 Order Denying Motion to Dismiss as Moot (Dkt. No. 85); May 2, 2016 Order Granting In Part and

[4] Twitter alleges a third count seeking injunctive relief barring Government prosecution under the Espionage Act, 18 U.S.C. § 793(d) should Twitter disclose information in the Draft Transparency Report. (SAC ¶¶ 92-96.)

Denying In Part Motion to Dismiss Amended Complaint (Dkt. No. 113); July 6, 2017 Order Denying Government's Motion for Summary Judgment Without Prejudice; Granting Twitter's Motion for Order Directing Defendants to Expedite Security Clearance (Dkt. No. 172)); November 27, 2017 Order Denying Motion for Reconsideration (Dkt. No. 186). The Court sets forth herein an abbreviated summary of the history as relevant to the instant motions.

The Government previously moved for summary judgment (Dkt. No. 145) based upon a classified and a redacted declaration of Michael Steinbach, Executive Assistant Director ("EAD") of the National Security Branch of the Federal Bureau of Investigation ("FBI"). (*See* Notice of Lodging of Classified Declaration of Michael Steinbach for *In Camera*, *Ex Parte* Review, Dkt. No. 144.) The Court reviewed the Classified Steinbach Declaration *in camera* and, based upon that review, denied the Government's motion without prejudice. The Court found that, under the applicable constitutional standards, the Classified Steinbach declaration was inadequate to meet the Government's burden to overcome the strong presumption of unconstitutionality of its content-based prior restrictions on Twitter's speech. (Dkt. No. 172 at 17-18.) The Court found:

> The Government's restrictions on Twitter's speech are content-based prior restraints subject to the highest level of scrutiny under the First Amendment. The restrictions are not narrowly tailored to prohibit only speech that would pose a clear and present danger or imminent harm to national security. The Government argues that the limitations imposed on Twitter are necessary because disclosure of data concerning the number and type of

> national security legal process that it received in a time period would impair national security interests and is properly classified. However, the Government has not presented evidence, beyond a generalized explanation, to demonstrate that disclosure of the information in the Draft Transparency Report would present such a grave and serious threat of damage to national security as to meet the applicable strict scrutiny standard.

(*Id.* at 2.) The Court denied the motion without prejudice, offering the Government leave to submit additional evidence to support its restrictions. (*See, e.g.*, Dkt. No. 182, Transcript of Case Management Conference, at 4:3-23.) The Government declined to do so. (*Id.*)

Following a formal request by Twitter (Dkt. No. 250), the Court issued an Order to Show Cause ("OSC") why the Classified Steinbach Declaration should not be disclosed to Twitter's counsel who had been granted a security clearance. (Dkt. No. 261.) The Government filed a response to the OSC which included a motion to dismiss the action based on an assertion of the state secrets privilege. (Dkt. No. 281.) In connection with that response, the Government submitted *in camera* the Classified Declaration of Acting EAD Michael C. McGarrity. (*See* Dkt. No. 282, Notice of Lodging of Classified Declaration of Michael C. McGarrity for *Ex Parte In Camera* Review.) Drafted in support of the Government's assertion of the state secrets privilege, the Classified Declaration of EAD McGarrity provided a more complete explanation and justification of the Government's basis for restricting the information that may be published in the Draft Transparency Report, and the grave and imminent

harm that could reasonably be expected to arise from its disclosure, in far greater detail than the Government provided previously.

After considering McGarrity's declaration provided *in camera*, the Court, on June 21, 2019, issued an OSC indicating it was inclined to reconsider its prior order denying the Government's summary judgment motion (Dkt. No. 301), stating:

> The Court is inclined to find that classified McGarrity Declaration meets the Government's burden under strict scrutiny to justify classification and restrict disclosure of information in the Draft Transparency Report, based upon a reasonable expectation that its disclosure would pose grave or imminent harm to national security, and that no more narrow tailoring of the restrictions can be made. Further, the Court is inclined to conclude that the classified McGarrity Declaration cannot be disclosed to counsel for Twitter based upon the national security concerns it raises.

(*Id.* at 2.) On August 23, 2019, the parties jointly responded to the June 21, 2019 Order to Show Cause and asked that the classified McGarrity declaration not be used to inform the Court's reconsideration of the Government's motion for summary judgment. Instead, the Government requested to submit a new summary judgment motion supported by a new declaration, which would incorporate aspects of the information proffered in the Classified McGarrity Declaration germane to the merits of the case. (Dkt. No. 306 at 2– 3.) The Court granted the Government's request as well as Twitter's request to file a cross-motion for summary judgment.

C. The Instant Cross-Motions

The Government filed its motion seeking summary judgment on all claims in Twitter's SAC on the grounds that the newly submitted classified and unclassified declarations of Jay S. Tabb, Jr., EAD of the National Security Branch of the FBI to establish that disclosure of the data contained in Twitter's 2014 Draft Transparency Report reasonably could be expected to result in national security harms such that the Government's restrictions on the report are constitutionally valid. Twitter's cross-motion contests the Government's arguments and seeks summary judgment on the grounds that: (1) the Government has not satisfied strict scrutiny under the *Pentagon Papers*[5] standard; (2) the Government's decision to restrict the disclosures in Twitter's 2014 Draft Transparency Report lacked any of the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965); and (3) Twitter's cleared counsel[6] must be given access to the classified version of the Tabb Declaration in order for it to respond fully to the Government's arguments.

IV. LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[W]hen parties submit cross-motions for summary judgment, each motion must be considered on its own merits." *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136

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[5] *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971), commonly referred to as the *Pentagon Papers* case.

[6] Twitter's lead counsel Lee H. Rubin has had his security clearance "favorably adjudicated" by the FBI as of September 17, 2018. (Dkt. No. 250-1, Rubin Decl. Exh. A.)

(9th Cir. 2001) (alteration and internal quotation marks omitted). Thus, "[t]he court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." *Id.* (quoting Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 2720, at 335–36 (3d ed. 1998)). However, the court must consider the evidence proffered by both sets of motions before ruling on either one. *Riverside Two*, 249 F.3d at 1135–36; *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 960 (9th Cir. 2011) ("Because the parties filed cross-motions for summary judgment, we consider each party's evidence to evaluate whether summary judgment was appropriate.") "[C]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions, not those of a judge." *George v. Edholm*, 752 F.3d 1206, 1214 (9th Cir. 2014) (alteration in original) (quotation omitted).

As a general matter, where the party moving for summary judgment would bear the burden of proof at trial, that moving party bears the initial burden of proof at summary judgment as to each material fact to be established in the complaint and must show that no reasonable jury could find other than for the moving party. *See S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (*citing* William W Schwarzer, et al., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL (Rutter Group) § 14:124–127 (2001)). Where the moving party would not bear the burden at trial, the motion need only specify the basis for summary judgment and identify those portions of the record, if any, which it believes demonstrate the absence of a genuine issue of material fact on some essential element of the claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, (1986). The

burden then shifts to the opposing party to establish the existence of material disputes of fact that may affect the outcome of the case under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In the context of a First Amendment challenge, however, the ultimate burdens of proof are placed upon the Government. When the Government restricts speech, it bears the burden of proving the constitutionality of its actions. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816–17 (2000) (citing *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 183 (1999); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 879 (1997)). "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded [to its actions] is reversed." *Playboy*, 529 U.S. at 816–17. Because "[c]ontent-based regulations are presumptively invalid," *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992), "the Government bears the burden to rebut that presumption." *Playboy*, 529 U.S. at 817. "When First Amendment compliance is the point to be proved, the risk of nonpersuasion— operative in all trials—must rest with the Government, not with the citizen." *Id.* at 818 (internal citation omitted).

V. DISCUSSION

A. Strict Scrutiny Standard

1. Strict Scrutiny Applies

The Government argues that it is entitled to summary judgment on several grounds. First, it argues that, although it disagrees with the Court on the applicable constitutional standard, it nevertheless has met the strict scrutiny standard since its restrictions on Twitter's speech are sufficiently "narrowly tailored

to serve a compelling state interest" (quoting *In re NSL*, 863 F.3d 1110, 1123 (9th Cir. 2017) and *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)). Twitter counters that this Court previously decided the applicable standard is strict scrutiny, and the Government has not met it.

In denying the Government's original motion for summary judgment, the Court determined that the restrictions on Twitter's speech are subject to strict scrutiny as a content-based restriction and a prior restraint. (Dkt. No. 172 at 15, citing numerous cases.) That is the law of the case and the Government provides no substantive reason to revisit that determination.

2. The Declarations In the Record Satisfy the Government's Substantive Burden Under Strict Scrutiny

The Court applies the strict scrutiny standard to the challenged restrictions and finds that the Government's restrictions on the information Twitter may report are, in fact, narrowly tailored in substance. The Court bases its decision on the *totality* of the evidence provided in this case, including the classified declarations of EAD Steinbach, Acting EAD McGarrity and EAD Tabb. Each built on the same basis for the Government's position, and each bring a perspective to the Court's analysis to resolve this action. The Court sees no reason to disregard any of the previously submitted declarations. The declarations explain the gravity of the risks inherent in disclosure of the information that the Government has prohibited Twitter from stating in its Draft Transparency Report, including a sufficiently specific explanation of the reasons disclosure of mere aggregate numbers, even years after the relevant time period in the Draft Transparency

Report, could be expected to give rise to grave or imminent harm to the national security. The Court finds that the declarations contain sufficient factual detail to justify the Government's classification of the aggregate information in Twitter's 2014 Draft Transparency Report on the grounds that the information would be likely to lead to grave or imminent harm to the national security, and that no more narrow tailoring of the restrictions can be made.

B. *Freedman's* Procedural Safeguards

Twitter argues that, in the alternative, it is entitled to summary judgment because the procedures under which portions of its 2014 Draft Transparency Report were classified and restricted do not satisfy the procedural safeguards required for such a prior restraint of speech under *Freedman v. Maryland* and its progeny. More specifically, Twitter argues that *Freedman* requires an expedited, government-initiated judicial review of a restraint on aggregate reporting, and that such requirements are not met by the classification guidelines that the Government applied nor the "statutory authority under which that classification review was conducted." (Twitter's Cross-Motion for Summary Judgment, Dkt. No. 311, at 2:12-13, citing 50 U.S.C. § 1874(c)).[7]

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[7] Twitter's characterization of the section 1874(c) is incorrect. The Government's classification authority under Executive Order 13526 is completely distinct from its authority under section 1874(c) to allow persons subject to nondisclosure provisions to report legal process and orders received in a different manner than the numerical bands scheme set forth in section 1874(a) and (b). *See* 50 U.S.C. § 1874(c) ("Nothing in this section prohibits the Government and any person from jointly agreeing to the publication of information referred to in this subsection in a time, form, or manner other than as described in this section.").

The Government counters on two grounds. First, it contends that Twitter has not alleged a challenge under *Freedman* in the SAC. Further, the Government argues the procedural protections required by *Freedman* do not apply to its decision that the information in the Draft Transparency Report was national security information properly classified under Executive Order 13526.

As a general matter, and as the Court previously determined, even if a particular content-based restriction is permitted under the strict scrutiny standard, "the government does not have unfettered freedom to implement such a restriction through 'a system of prior administrative restraints.'" *In re NSL*, 863 F.3d at 1122 (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 (1963)). The government's restrictions must have "narrow, objective, and definite standards to guide" them, as well as procedural safeguards to reduce the dangers of excessive restriction. *See Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002) (citing *Freedman*, 380 U.S. at 58–60). With respect to such a system of prior restraints, *Freedman* requires that: (1) any restraint imposed prior to judicial review must be limited to "a specified brief period"; (2) any further restraint prior to a final judicial determination must be limited to "the shortest fixed period compatible with sound judicial resolution"; and (3) the burden of going to court to suppress speech and the burden of proof in court must be placed on the government. *See Freedman*, 380 U.S. at 58–59; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990)); *Thomas v. Chicago Park District*, 534 U.S. 316, 321 (2002); *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008), *as modified* (Mar. 26, 2009).

Thus, in *In re Nat'l Sec. Letter*, the Ninth Circuit considered whether nondisclosure requirements as to specific national security process requests were constitutional. The *In re Nat'l Sec. Letter* case was a facial challenge to the NSL statutes.[8] The Ninth Circuit held that the NSL law met all the procedural safeguard requirements of *Freedman* because the 2015 revisions implemented a system of judicial review of a nondisclosure decision on an expedited basis, and required the government to initiate the review and carry the burden of substantiating the nondisclosure at the request of a contesting party. *In re Nat'l Sec. Letter*, 863 F.3d at 1129-31 (questioning whether *Freedman* applied to individuals who did not "intend to speak" before receiving the government's prohibition, but nevertheless finding procedural protections satisfied *Freedman*).

Here, Twitter's SAC does not allege a challenge, facial or otherwise, based upon the principles in *Freedman*. Count 1 of the SAC alleges that the information in the Draft Transparency Report was not properly classified under Executive Order No. 13526, and that the Government cannot demonstrate that the information poses a threat to national security. (SAC ¶¶ 76, 79.) Count 2 of the SAC alleges that the Government's decision regarding the Draft Transparency Report was a "final agency action" that violated the First Amendment. Nowhere in the SAC does Twitter seek declaratory or injunctive relief requiring the Government to comply with any procedural safeguards, such as temporal limitations on prohibition orders, or government-initiated judicial review,

[8] The Ninth Circuit held that plaintiffs were raising a facial challenge to the NSL law, rather than an as-applied challenge to a particular application of the law to their speech. *Id.* at 1121.

required by *Freedman*. The SAC does not direct a challenge to lack of procedural safeguards in Executive Order 13526 itself, nor does it challenge the lack of process with respect to the specific application of Executive Order 13526 to the Draft Transparency Report.[9] Likewise, to the extent Twitter asserts that any restrictions on it emanate from the statutory reporting scheme set forth in 50 U.S.C. section 1874, the SAC does not challenge the lack of procedural safeguards therein. In short, nothing in the SAC challenges a "system of prior restraints" as in *Freedman*. Consequently, the Court cannot grant Twitter affirmative relief based upon lack of compliance with the procedural protections in *Freedman*.[10]

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[9] The Court notes that Section 1.8 of Executive Order 13526 provides that "[a]uthorized holders of information who, in good faith, believe that its classification status is improper are encouraged and expected to challenge the classification status of the information in accordance with agency procedures established under paragraph (b) of this section." Executive Order 13526 § 1.8(a). Those procedures should cover all authorized holders of information "including authorized holders outside the classifying agency." *Id.* § 1.8(b). Neither party has cited to or argued for application of any regulations governing a challenge to the classification here. However, the Court notes that federal regulations implementing Executive Order 13526 have been enacted at 6 C.F.R., Chapter I, Part 7, subpart B; *see, e.g.*, 6 C.F.R. § 7.31(a) ("Authorized holders may submit classification challenges in writing to the original classification authority with jurisdiction over the information in question. If an original classification authority cannot be determined, the challenge shall be submitted to the Office of the Chief Security Officer, Administrative Security Division").

[10] The SAC alleges a facial constitutional challenge to FISA's secrecy provisions to the extent they categorically prohibit the reporting of aggregate data. The Court does not find that they do so restrict the aggregate data at issue here. The Government has,

Because the Court finds that Twitter has not alleged an affirmative claim for relief based upon *Freedman*, it need not reach the question of whether the Government's decision here satisfied those procedural safeguards.[11]

VI. CONCLUSION

In sum, given the specific reasons identified in the classified declarations submitted, the Court finds that strict scrutiny is satisfied both substantively and

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in part, argued that FISA's statutory nondisclosure provisions, applicable to the existence and contents of individual orders, logically prohibit reporting of aggregate data about the number of such orders. The Court has never found the Government's logic persuasive on this point. The requirement not to disclose a *particular* order is completely distinct from disclosing the aggregate number of orders. And, indeed, that logic is contradicted by the statutory provision for aggregate data reporting set forth in 50 U.S.C. § 1874, which permits "a person *subject to a nondisclosure requirement* accompanying an order . . . or a national security letter" to report publicly the aggregate number of such orders or letters within certain numerical bands. 50 U.S.C. § 1874(a) (emphasis supplied). Regardless, these allegations are not directed at a lack of procedural safeguards as required by *Freedman*.

[11] The Court notes that the Ninth Circuit in *In re Nat'l Sec. Letter* emphasized that *Freedman's* procedural safeguards have been extended to a variety of situations in which the government "requires a speaker to submit proposed speech for review and approval" before publicizing it. *In re Nat'l Sec. Letter*, 863 F.3d 1110, 1128 (9th Cir. 2017); *see also John Doe, Inc. v. Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008) ("Where expression is conditioned on governmental permission . . . the First Amendment generally requires procedural protections to guard against impermissible censorship."). The sort of pre-disclosure review and approval process that restricts speech about metadata compiled by a recipient closely resembles the censorship systems raised in *Freedman* and its progeny. The Government here offered no applicable procedural protections similar to those cited with approval in *In re Nat'l Security Letter or Doe v. Mukaskey*.

procedurally. The Government's motion for summary judgment is **GRANTED** and Twitter's motion for summary judgment is **DENIED**.[12]

The Court leaves for another action whether the procedural safeguards—if any—applicable to a system of prior constraints premised upon deeming information "classified" pursuant to Executive Order 13526 meets the standards set forth in Freedman.

This terminates Docket Nos. 309, 311.

IT IS SO ORDERED.

Dated: April 17, 2020

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT JUDGE

[12] In light of this Order, the third count is dismissed as moot.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TWITTER, INC., Plaintiff, v. **WILLIAM P. BARR**, et al., Defendants.	Case No. 14-cv-4480-YGR **JUDGMENT** Re: Dkt. No. 46

Pursuant to the Order Granting Government's Motion for Summary Judgment; Denying Twitter's Cross-Motion for Summary Judgment, entered this date, it is **ORDERED** that judgment is entered in favor of defendants William P. Barr, et al. and against plaintiff Twitter, Inc. Plaintiff shall obtain no relief by way of its complaint.

IT IS SO ORDERED, ADJUDGED, AND DECREED.

Dated: April 17, 2020

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TWITTER, INC., Plaintiff, v. **JEFFERSON B. SESSIONS, III, *ET AL.***, Defendants.	Case No. 14-cv-04480-YGR **ORDER DENYING GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT WITHOUT PREJUDICE; GRANTING TWITTER'S MOTION FOR ORDER DIRECTING DEFENDANTS TO EXPEDITE SECURITY CLEARANCE** Re: Dkt. Nos. 124, 145

Defendants Jefferson B. Sessions, III,[21] the United States Department of Justice, and the Federal Bureau of Investigation ("the Government") filed a motion for summary judgment on the claims in Plaintiff Twitter, Inc.'s second amended complaint. (Dkt. No. 145.) Twitter filed a motion for an order directing the Government to expedite a security clearance process for lead counsel in this matter to review materials relevant to this litigation. (Dkt. No. 124.)

[21] Mr. Sessions has been substituted as the Attorney General of the United States by automatic operation of Fed. R. Civ. P. 25(d).

Having carefully considered the papers submitted, the admissible evidence[22], and the pleadings in this action, and for the reasons set forth below, the Court DENIES the motion for summary judgment **WITHOUT PREJUDICE**. The Court finds the Government has not met its high burden to overcome the strong presumption of unconstitutionality on the record before the Court. The Government's restrictions on Twitter's speech are content-based prior restraints subject to the highest level of scrutiny under the First Amendment. The restrictions are not narrowly tailored to prohibit only speech that would pose a clear and present danger or imminent harm to national security. The Government argues that the limitations imposed on Twitter are necessary because disclosure of data concerning the number and type of national security legal process that it received in a time period would impair national security interests and is properly classified. However, the Government has not presented evidence, beyond a generalized explanation, to demonstrate that disclosure of the information in the Draft Transparency Report would present such a grave and serious threat of damage to

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[22] Twitter seeks judicial notice of documents obtained on the internet, purporting to be transparency reports and annual reports of various companies. Twitter offers them to show that such reports and data are publicly available and accessible to foreign enemies of the United States. "The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(b)(2). Further, any evidence considered by the Court must be relevant evidence. Here, the documents neither appear to be relevant to any matter at issue nor do they appear to be from a source the accuracy of which cannot be questioned. The request for judicial notice is therefore **DENIED**.

national security as to meet the applicable strict scrutiny standard.

The Court **GRANTS** the motion for an order directing the Government to expedite the appropriate national security clearances for lead counsel, Andrew J. Pincus and Lee H. Rubin.

I. BACKGROUND

The procedural history of this case is lengthy and is detailed in the Court's prior orders. (*See* October 14, 2015 Order Denying Motion To Dismiss As Moot (Dkt. No. 85); May 2, 2016 Order Granting In Part and Denying In Part Motion to Dismiss Amended Complaint (Dkt. No. 113).) The Court offers an abbreviated summary of the history relevant here.

On April 1, 2014, Twitter submitted to the Government a draft transparency report containing information and discussion about the aggregate numbers of national security letters ("NSLs") and court orders pursuant to the Foreign Intelligence Surveillance Act of 1978 ("FISA"), if any, it received in the second half of 2013. Twitter requested "a determination as to exactly which, if any, parts of its Transparency Report are classified or, in the [government's] view, may not lawfully be published online." (Second Amended Complaint, Dkt. No. 114, ¶ 55.) Several months later, the Government notified Twitter that "information contained in the report is classified and cannot be publicly released," because it did not comply with the government's approved framework for reporting data about FISA orders and NSLs, as set forth in a letter from then-Deputy Attorney General James M. Cole ("the DAG Letter"). (*Id.* ¶¶ 49, 57.) The framework set forth in the DAG Letter was abrogated subsequently by the USA FREEDOM Act, which codified and

broadened the scope of the reporting bands. However, the essentials of the dispute continue unchanged.

II. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). Any party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Material facts are those that might affect the outcome of the case. *Anderson v. Liberty Lobby. Inc.,* 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for the finder of fact to return a verdict for the nonmoving party. *Id.*

If the moving party meets its initial burden, the opposing party must then set out specific facts showing a genuine issue for trial in order to defeat the motion. *Anderson*, 477 U.S. 242, 250; *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *see also* Fed. R. Civ. P. 56(c), (e). A court may only consider admissible evidence in ruling on a motion for summary judgment. *See* Fed.R.Civ.P. 56(c)(2); *Beyene v. Coleman Sec. Servs., Inc.,* 854 F.2d 1179, 1181 (9th Cir.1988) ("It is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment."). However, when deciding a summary judgment motion, "the court does not make credibility determinations or weigh conflicting evidence." *Soremekun,* 509 F.3d at 984. Instead, the court must view the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in its favor. *Anderson,* 477 U.S. at 255;

Hunt v. City of Los Angeles, 638 F.3d 703, 709 (9th Cir.2011).

Rule 56(d) provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). The non-moving party should set forth the particular facts it expects to obtain and why it cannot provide those facts at the time for opposition. *See Mackey v. Pioneer Nat. Bank*, 867 F.2d 520, 524 (9th Cir. 1989) (citing former Rule 56(f)).

III. DISCUSSION

A. Overview of Issues

The Government moves for summary judgment on the grounds that the information Twitter seeks to publish in its Draft Transparency Report is all properly classified information that would harm national security if disclosed, and therefore the First Amendment does not prohibit the Government's restrictions on Twitter's publication of the Draft Transparency Report. Twitter contends that the Government's restrictions violate the First Amendment both as prior restraints on speech and content-based limitations. Twitter asserts that more granular data on the volume of process cannot be considered properly classified information under Executive Order 13526, since the Government offers no specific evidence to demonstrate that the disclosure of this information would pose a threat to national security, let alone one that is serious or exceptionally grave. Twitter further argues that the motion is not ripe for consideration

because it is entitled to complete discovery pursuant to Rule 56(d) before the Court makes a determination on summary judgment.

As the moving party, the burden is on the Government to show that Twitter's constitutional challenges have no merit. The Government's basis for prohibiting disclosure relies on three interrelated arguments: (1) the aggregate data is classified under Executive Order 13526; (2) the USA FREEDOM Act, at 50 U.S.C. section 1874, limits disclosure of aggregate data about the volume national security process to reporting within certain numerical bands; and (3) the underlying FISA statutes permit the FBI to restrict disclosure about the existence of FISA process. While the Government relies primarily on the first argument here, it intertwines the statutory bases as further support for its classification decision.

The Government submits an unclassified declaration of Michael B. Steinbach, Executive Assistant Director of the National Security Branch of the Federal Bureau of Investigation. (Dkt. No. 147-1, Steinbach Decl.)[23] Steinbach attests that "[d]isclosure of the more detailed and disaggregated information at issue in Twitter's report reasonably could be expected to result in damage to the national security, and it pertains to intelligence activities [section l.4(c)]; foreign relations or foreign activities of the United States [section l.4(d)]; and vulnerabilities or capabilities of systems, installations, infrastructures, project, plans, or protection services relating to the national security [section 1.4(g)]." (Steinbach Decl. at ¶ 29). Steinbach

[23] Steinbach also submitted a declaration for the Court's review *in camera*. Citations to the Steinbach Declaration in this Order refer only to the unclassified, publicly filed declaration.

concludes that the information "Twitter seeks to publish—data reflecting its receipt of national security process with a level of specificity that is far more granular than has been declassified by the DNI and allowed by the USA Freedom Act—was properly classified at the time that Twitter's draft transparency report was received by the FBI in 2014 and continues to be properly classified at this time." (*Id.*) The Government contends that Steinbach's declarations specifically address the proposed disclosure that Twitter seeks to make, rather than simply addressing the classification of all materials generally under the bands prescribed in the USA FREEDOM Act. The Government urges that Steinbach's determination should be given the "utmost deference" by this Court, given his expertise in national security matters.

In opposition, Twitter argues that the Government's restrictions on its ability to report more granular data regarding national security legal process requests it receives hinder its ability communicate truthful information to users of the online information platform, and potentially chill those users' speech. Twitter seeks "to dispel . . . users' [well-documented] fears" about the privacy of the information they share with Twitter by providing more precise (but aggregate) data about "the limited scope of U.S. surveillance on its platform." (Notice Regarding Classified Document, Dkt. No. 21–1, Exh. 1 Unclassified, Redacted Version of Twitter's Draft Transparency Report ["Draft Transparency Report"] at 2.) The Government's restrictions not only prevent Twitter from conveying this message, but also compel Twitter "to mislead [its] users by reporting overly broad ranges of requests." *Id.* Because social media users express concerns about government surveillance, Twitter's inability to report more detailed information about government legal process

seeking information about Twitter's users could have a chilling effect on users' speech. More broadly, Twitter argues that restricting information about the scope of a government surveillance program will prevent the public from being able to scrutinize the program or hold government officials accountable for their conduct.

Whether the restriction here on Twitter's speech is viewed as a product of the FBI's classification decision, the underlying FISA statutes permitting the FBI to restrict disclosure about the existence of FISA process, or the FISA public disclosure statute, 50 U.S.C. section 1874, the fact remains that the Government has limited Twitter's ability to speak on the subject of the number of orders it may have received. For the reasons set forth below, the Court finds that such limitations are subject to strict scrutiny under the First Amendment.

B. First Amendment Framework

"The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 [*Pentagon Papers*] (1964)). "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983).

At the same time, First Amendment rights are not absolute and do not automatically override all other constitutional values. *See Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 570 (1976) ("We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact."). Government limitations on speech are subject to varying levels of scrutiny depending upon such factors as substance of the speech and limitations involved. Strict scrutiny is reserved for speech implicating core concerns of the First Amendment. *Republican Party of Minn. v. White,* 536 U.S. 765, 774–75 (2002). Our Supreme Court has held repeatedly that both prior restraints and content-based restrictions are subject to strict scrutiny.

Prior restraints on speech are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559; *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) ("chief purpose of the (First Amendment's) guaranty [is] to prevent previous restraints upon publication"). The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993)

("Temporary restraining orders and permanent injunctions—*i.e.,* court orders that actually forbid speech activities—are classic examples of prior restraints.") A system of prior restraints "bear[s] a heavy presumption against its constitutional validity," and the Government "carries a heavy burden of showing justification for the imposition of such a

restraint." *Capital Cities Media, Inc. v. Toole,* 463 U.S. 1303, 1305 (1983) (citation omitted). In order to justify a prior restraint, the government must demonstrate that the restraint is justified without reference to the content of the speech, and is narrowly tailored to serve a compelling governmental interest. *See Nebraska Press Ass'n,* 427 U.S. at 571; *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989).

Similarly, "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, __ U.S.__, 135 S.Ct. 2218, 2226 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *Id.* at 2227 (citing *Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 564 (2011)); *Consol. Edison Co. of New York v. Pub. Serv. Comm'n,* 447 U.S. 530, 536 (1980) (government regulation "may not be based upon either the content or subject matter of speech."); *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (*en banc*) (restriction "is content-based if either the underlying purpose of the regulation is to suppress particular ideas or if the regulation, by its very terms, singles out particular content for differential treatment."). Even if facially content-neutral, restrictions will be considered content-based if they cannot be "justified without reference to the content of the regulated speech," and must likewise satisfy strict scrutiny. *Reed,* 1135 S.Ct. at 2227, quoting *Ward,* 491 U.S. at 791; *see also Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 997, 1001 (9th Cir. 2012) ("*Al Haramain v. Treasury*") (applying strict scrutiny and

finding content-based prior restraints unconstitutional despite government's stated justification of preventing terrorism); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 75 (D. Conn. 2005) (finding FISA restriction on ability to disclose receipt of NSL was content-based and subject to strict scrutiny because disclosure could be a means of expressing a particular view about the reach of federal investigative powers).

In addition to substantive concerns warranting heightened scrutiny, courts also consider whether the First Amendment requires procedural safeguards to minimize the extent of any government restrictions on speech. *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008), *as modified* (Mar. 26, 2009) ["*Doe v. Mukasey*"] ("Where expression is conditioned on governmental permission, such as a licensing system for movies, the First Amendment generally requires procedural protections to guard against impermissible censorship.") (citing *Freedman v. State of Md.*, 380 U.S. 51, 58 (1965)). Such procedural protections include: (1) restraints prior to judicial review may be imposed "only for a specified brief period during which the status quo must be maintained;" (2) availability of "expeditious judicial review;" and (3) the government entity seeking to restrain the speech bears the burden seeking judicial review and the burden of proof in court. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002) (citing *Freedman*, 380 U.S. 58-60). Courts considering whether content-based governmental restrictions or prior restraints on speech will pass constitutional muster take into account both the procedural safeguards and substantive strict scrutiny requirements. *See Microsoft Corp. v. United States Dep't of Justice*, No. C16-0538JLR, 2017 WL 530353, at *11 (W.D. Wash. Feb. 8, 2017) ("even if the procedural safeguards outlined in *Freedman* are met, the

Government must show that the statute in question meets strict scrutiny"); *In re Nat'l Sec. Letter*, 930 F.Supp.2d 1064, 1071 (N.D. Cal. 2013) ["*In re NSL*"] (government must "meet the heightened justifications for sustaining prior-restraints" in *Freedman* and "must be narrowly tailored to serve a compelling government interest"); *Admiral Theatre v. City of Chi.*, 832 F.Supp. 1195, 1203 (N.D. Ill. 1993) (noting that even if procedural safeguards are met "the system is still subject to 'least restrictive means' scrutiny to determine its constitutionality").

C. Constitutional Analysis of Restrictions on Twitter's Transparency Report

1. Application of Strict Scrutiny Standard

The Government argues its decision to preclude Twitter from disclosing and publishing in its Draft Transparency Report information the Government deemed classified should be subject to no greater First Amendment scrutiny than simply ascertaining whether the classification determination was made "with reasonable specificity, demonstrat[ing] a logical connection between the detailed information [at issue] and the reasons for classification." Shaffer v. D.I.A., 102 F. Supp. 3d 1, 11 (D.D.C. 2015) (citing McGehee v. Casey, 718 F.2d 1137, 1148 (D.C. Cir. 1983)); see Stillman v. C.I.A., 319 F.3d 546, 549 (D.C. Cir. 2003). The Government contends that the Court should not "second guess" its classification determinations so long as it has provided a reasonably specific explanation of the logical connection between the information classified and its reasons for doing so, citing Shaffer, 102 F. Supp. 3d at 11, and Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir.

2007) ("Al-Haramain v. Bush").[24] Further, the Government argues that the judgment of Congress, as reflected in the USA FREEDOM Act's adoption of the disclosure band framework espoused by the

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[24] Executive Order 13526 stated four conditions for classifying information:

(1) the information must be classified by an "original classification authority";

(2) the information must be "owned by, produced by or for, or [be] under the control of" the Government;

(3) the information must fall within one of the authorized classification categories listed in section 1.4 of the Executive Order; and

(4) the original classification authority must "determine[ ] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and must be "able to identify or describe the damage."

(Exec. Order 13526, § 1.1.) For classification at the "Secret" and "Top Secret" levels, the classifying entity must expect "serious" and "exceptionally grave" damage, respectively. (Id. § 1.2.) In addition to the categories listed in Executive Order 13526, the Federal Bureau of Investigation National Security Information Classification Guide ("NSICG") provides guidance concerning the classification of national security information, advising that information should be classified as "Secret" if it pertains to "investigative methods or techniques used in counterterrorism or national security (cont'd . . .) investigations, including the use of national security legal process, where disclosure of that method or technique would, if made public, reduce the effectiveness of that technique." (Id.) (Steinbach Decl. ¶ 27 n.10.)

Steinbach indicates that specific aggregate data concerning NSLs and FISA orders reported in Department of Justice annual reports to Congress is classified as "Secret," and that a 2013 order containing aggregate numbers of NSLs and FISA orders by type, issued in 2013, was initially classified as Top Secret, but declassified by the Director of National Intelligence on June 23, 2014. (Steinbach Decl. ¶¶ 15 n. 7, 17.) He does not indicate any aggregate data is classified as "Top Secret."

Department of Justice, provides further reason to give deference to the Executive's determination that the more granular information cannot be disclosed without incurring unacceptable risk to national security. The Government's position, however, ignores the important First Amendment safeguards that would be imperiled by such extreme deference to the Executive's classification decisions.

The Court previously determined that the First Amendment does not allow individuals subject to secrecy obligations to disclose classified national security information. However, the Court does not agree with the Government's position that simply determining information meets the requirements for classification under Executive Order 13526 ends the Constitutional analysis. That the information is classified is not, in itself, a sufficient basis for the Government's prohibition on its disclosure in the absence of the sorts of secrecy obligations on government employees and contractors present in *Snepp*, *Wilson*, and *Stillman*. *See Stillman*, 319 F.3d at 548 (citing longstanding principles of judicial restraint to avoid reaching constitutional questions where it is unnecessary, court determined propriety of classification decision first because proper restrictions on employee meant he had not First Amendment right to publish information); *cf. Snepp v. United States,* 444 U.S. 507 (1980) (former CIA employee sought prepublication review of confidential information in book draft); *Wilson v. C.I.A.*, 586 F.3d 171 (2d Cir. 2009) (CIA employee brought action against her employer).

The First Amendment requires strict scrutiny of content-based restrictions and prior restraints, regardless of the Government's basis for nondisclosure. Even in the context of classified information, as the

Supreme Court held in *Pentagon Papers*, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity and the Government thus carries a heavy burden of showing justification for the imposition of such a restraint." *Pentagon Papers*, 403 U.S. at 714 (internal citations omitted); *see also Nebraska Press Ass'n*, 427 U.S. at 591 (Brennan, J., concurring) (while *Near* and *Pentagon Papers* cases contemplated that there might be an exception to the near-complete ban on prior restraints of speech due to countervailing interests such as national security, such an exception "has only been adverted to in dictum and has never served as the basis for [the Supreme Court] actually upholding a prior restraint against the publication of constitutionally protected materials"); *In re Washington Post Co.*, 807 F.2d 383, 391–92 (4th Cir. 1986) ("[T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present.")

In *Pentagon Papers*, while certain justices acknowledged their concern that disclosure of the classified information at issue might be harmful to the national interest, the Supreme Court nevertheless held that the Government had not met its burden under the First Amendment to justify enjoining publication of that classified information. *Pentagon Papers*, 403 U.S. at 714.[25] As Justice Stewart stated in his concurrence

[25] At the time of publication in the *Pentagon Papers* case, the United States was still engaged in a war in Vietnam, and the information at issue contained material about the war that had

to the *per curiam* opinion, the government had not shown that publication would result in "direct, immediate, and irreparable damage to our Nation or its people" so as to support an injunction. *Id*. at 729 (Stewart, J. concurring). "[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *Id.* at 725–26 (Brennan, J., concurring). Such restraints are only permitted in an extremely narrow class of cases such as in times of war to prevent disclosure of such information as troop locations and movements. *Id.* In the words of Justice Black, "[t]he guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic." *Id.* at 719. Thus, while observing that the Executive branch is charged with great power in the areas of national defense and international relations, the Supreme Court nevertheless found that it could not obstruct the flow of information to its citizenry based solely on a statement that the matters were classified. *Id.* at 727-28.[26]

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been classified as "Top Secret" and "Secret." *See United States v. N.Y. Times Co.*, 328 F. Supp. 324, 326 (S.D.N.Y. 1971).

[26] As stated by Justice Stewart, to simply rely on a classification decision to justify a prior restraint would risk overuse of the classification authority:

> For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.

Pentagon Papers, 403 U.S. at 729. (Stewart, J., concurring).

The Court finds the most closely analogous cases have applied a high degree of scrutiny in the context of constitutional challenges to restrictions on disclosure of information with national security implications, though stopping short of unequivocally adopting the *Pentagon Papers* standard. In *Doe v. Mukasey,* the plaintiff was an internet service provider upon which the FBI had served an NSL seeking certain information about electronic communication records in furtherance of an investigation, pursuant to 18 U.S.C. section 2709. *Doe v. Mukasey*, 549 F.3d at 864. Section 2709 permits the FBI to seek records relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. If the Director of the FBI or his designee certifies that disclosure of the request may result in "a danger to the national security of the United States; interference with a criminal, counterterrorism, or counterintelligence investigation; interference with diplomatic relations; or danger to the life or physical safety of any person," section 2709(c) prohibits the recipient of an NSL from disclosing that such a request has been received. The Second Circuit, in considering the appropriate level of scrutiny to apply to a constitutional challenge to section 2709(c)'s nondisclosure requirement, found that "[a]lthough the nondisclosure requirement is in some sense a prior restraint . . . it is not a typical example of such a restriction for it is not a restraint imposed on those who customarily wish to exercise rights of free expression, such as speakers in public fora, distributors of literature, or exhibitors of movies." *Id.* at 876. The court held that the nondisclosure requirement in the statute was "not a typical prior restraint or a typical content-based restriction warranting the most rigorous First Amendment scrutiny," but at the same time was not a context which

warranted "a significantly diminished standard of review." *Id.* at 877.

Though the context was narrow and limited to a single nondisclosure order, the corporate plaintiff nonetheless had been restrained from public expression of information relevant to and critical of a government activity, a core concern of the First Amendment. *Id.* at 877–78, citing *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1034 (1991) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."); *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 citation and quotation marks omitted). While the panel could not agree on whether to apply traditional strict scrutiny or something slightly less than that, it ultimately determined that the distinction would not have changed the outcome. *Doe v. Mukasey*, 549 F.3d at 878.

Moreover, the Government conceded strict scrutiny was the appropriate standard. *Id.*

In another closely aligned case, *In re NSL,* the district court stated that it was adopting the analysis in *Doe v. Mukasey*, but nevertheless hesitated to apply the "extraordinarily rigorous *Pentagon Papers* test." *In re NSL*, 930 F. Supp. 2d at 1071. There, an electronic communication service provider petitioned the court to set aside an NSL received from the FBI under section 2709, as well as the associated nondisclosure requirement, seeking subscriber information. *Id.* at 1066. The court found that "while section 2709(c) may not be a

'classic prior restraint' or a 'typical' content-based restriction on speech, the nondisclosure provision clearly restrains speech of a particular content—significantly, speech about government conduct." *Id.* at 1071. The court determined that the *Pentagon Papers* standard would be "too exacting" given the "text and function of the NSL statute." *Id.* However, the court found that the government was required to offer "heightened justifications for sustaining prior restraints on speech," as required by *Freeman*, and to demonstrate that its restrictions were "narrowly tailored to serve a compelling governmental interest." *Id.* at 1071; *see also Microsoft v. DOJ,* 2017 WL 530353, at *10-12 (W.D. Wash. Feb. 8, 2017) (plaintiff stated a constitutional challenge to statutory provisions indefinitely restraining communication about the existence of electronic surveillance orders whether strict scrutiny or some standard short of that, applied).

Both *In re NSL* and *Doe v. Mukasey* counsel application of a heightened level of scrutiny in the case at bar. At the same time, they are distinguishable from the present case in ways that suggest the Supreme Court's usual strict scrutiny standard, rather than some modified version, should apply here. *In re NSL* and *Doe v. Mukasey* concerned challenges to nondisclosure provisions in *individual* orders, implicating different concerns from those attending the dissemination of abstracted data about the volume of requests at issue here. The relative balance of jeopardy to an investigation, or to national security generally, as compared to the public's need for information about the functioning of its government weighs very differently when the disclosure concerns the details of a single, particular FBI request as compared to data about the mere quantity of requests without touching upon the specifics of any of them.

Further, both *In re NSL* and *Doe v. Mukasey* were focused on the circumstance where the recipient of the NSL or other legal process was a telephone or internet service provider, not a social media outlet that functions as an information broadcast medium more akin to a newspaper or television network. The challenges in those cases arose from nondisclosure restrictions on entities which arguably do not occupy the same sort of communicative role as Twitter does. In some ways, Twitter acts as the modern, electronic equivalent of a public square. The court in *Doe v. Mukasey* determined it should apply something other than strict scrutiny because, "[a]lthough the nondisclosure requirement is in some sense a prior restraint . . . it is not a typical example of such a restriction for it is not a restraint imposed on those who customarily wish to exercise rights of free expression, such as speakers in public fora, distributors of literature, or exhibitors of movies." *Doe v. Mukasey*, 549 F.3d at 876 (analogizing to *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), where prohibitions on disclosure of pretrial discovery was held not to be a "class prior restraint" subject to strict scrutiny). Here, restrictions on Twitter's ability to disclose information relevant to its own functioning as a social media outlet appear much more like the kind of restraints on "speakers in public fora, distributors of literature, or exhibitors of movies" that would not permit an exception to strict scrutiny. *Doe v. Mukasey*, 549 F.3d at 876; *see also Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013), *as amended* (Sept. 23, 2013) ("liking a political candidate's campaign page [on Facebook] communicates the user's approval of the candidate and . . . is the Internet equivalent of displaying a political sign in one's front yard," implicating First Amendment protections).

Thus, the Court finds the Government's decision to restrict the information in Twitter's Draft Transparency Report is based upon its content and a prior restraint of publication. Accordingly, Supreme Court authority requires that such restrictions be subject to strict scrutiny. *See, e.g., Pentagon Papers*, 403 U.S. at 714 (prior restraints bear "a heavy presumption against [their] constitutional validity" and are subject to strict scrutiny, regardless of assertions of national security); *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971); *Nebraska Press Assn.,* 427 U.S. at 589 (prior restraints are "the essence of censorship" and accorded greater First Amendment protection than subsequent punishments for particular speech); *Forsyth County*, 505 U.S. at 130 (permitting regulation on free speech cannot be based upon content and must be narrowly tailored with objective and definite standards for abridgment); *Reed*, 135 S. Ct. at 2227 (content-based regulations subject to strict scrutiny).

Even where courts have hesitated to apply the highest level of scrutiny due to competing secrecy and national security concerns, they have nevertheless held that heightened or rigorous scrutiny of such restrictions on speech is required. *Doe v. Mukasey*, 549 F.3d at 876; *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010) (applying "rigorous scrutiny," and rejecting "intermediate scrutiny," in context of statute that criminalized knowing provision of material support to terrorist organizations standard, and distinguishing facts from a prior restraint restriction on "pure political speech" which would be even less likely to survive review); *see also Matter of Grand Jury Subpoena for: [Redacted]@yahoo.com*, 79 F.Supp.3d 1091, 1091 (N.D. Cal. 2015) (striking down gag order under Stored Communications Act because

"an indefinite order would amount to an undue prior restraint of Yahoo!'s First Amendment right to inform the public of its role in searching and seizing its information."); *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 882 (S.D. Tex. 2008) (nondisclosure requirements in connection with FBI surveillance orders were subject to "rigorous scrutiny")[27]; *cf. Defense Distributed v. United States Dep't of State*, 838 F.3d 451, 466 (5th Cir. 2016) (holding, under strict scrutiny analysis, that regulation on export of technical data related to prohibited munitions via publication on the internet of instructions for 3-D printing of firearms violated plaintiff's First Amendment as an unconstitutional prior restraint and content-based regulation, despite State Department's national security concerns). Though it has been classified by the FBI as information that "reasonably could be expected to result in damage to the national security," that fact alone does not exempt the restriction from rigorous scrutiny. Simply asserting that information is classified under the Executive Order does not meet the Government's burden to justify the disclosure in the face of such rigorous scrutiny. *See Pentagon Papers*, 403 U.S. at 714; *see also Al-Haramain v. Bush*, 507 F.3d at 1203

[27] As the district court in *In re Sealing* aptly noted, disclosure of the existence and numbers of surveillance orders is important to an informed public since, "[c]umulatively considered, these secret orders, issued by the thousands year after year by court after court around the country, may conceal from the public the actual degree of government intrusion that current legislation authorizes." *In re Sealing*, 562 F. Supp. 2d at 886. "It may very well be that, given full disclosure of the frequency and extent of these orders, the people and their elected representatives would heartily approve without a second thought. But then again, they might not." *Id.*

("[s]imply saying 'military secret,' 'national security,' . . . 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient" to justify a content-based restraint on speech)[28].

Here, the declarations of Steinbach, both *in camera* and public, fail to provide sufficient details indicating that the decision to classify the information in the Draft Transparency Report was based on anything more specific than the reporting bands in section 1874 and the FBI's position that more granular information "could be expected to harm national security." The declarations do not provide an indication of grave or imminent harm arising from the disclosures in the Draft Transparency Report. Rather, the concerns raised to relate to the overall concern from one or more of *any* electronic communication service regardless of the specific provider or circumstance. Merely declaring a view that more granular reporting would create an unacceptable risk does not make it so, especially in light of the Government's acknowledgement of the strong public interest in the information.

The Government has not sufficiently explained how a restriction on reporting, beyond the bands in

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[28] The Ninth Circuit's decision in *Al-Haramain v. Bush*, although not a constitutional challenge, is instructive. The Ninth Circuit reached its conclusion there only after "spen[ding] considerable time examining the government's declarations (both publicly filed and those filed under seal)," and (*cont'd . . .*)

finding that the government's assertions were "*exceptionally* well documented." *Id.* at 1203 (emphasis added). While the court "acknowledge[d]" the need for some "defer[ence] to the Executive on matters of foreign policy and national security," it nonetheless insisted that the Government produce "sufficient detail" to permit "meaningful examination" of its state secrets privilege claim. *Id.* at 1203.

section 1874, could be characterized as narrowly tailored to prevent a national security risk of sufficient gravity to justify the restraint, either in general or with respect to Twitter specifically. Steinbach does not indicate that the classification decision reflected any narrow tailoring of the decision to take into consideration, for instance, the nature of the provider, the volume of any requests involved or the number of users on the platform. These considerations are significant, since Twitter, by recent estimation, had users numbering in the hundreds of millions. Despite it being over three years since the decision, Steinbach stands by the continued classification of the information therein. (Steinbach Decl. at ¶ 29.)[29] Rather, the declaration largely relies on a generic, and seemingly boilerplate, description of the mosaic theory and a broad brush concern that the information at issue will make more difficult the complications associated with intelligence gathering in the internet age. *Cf. Detroit Free Press v. Ashcroft*, 303 F.3d 681, 709–10 (6th Cir. 2002) (seemingly unlimited logic of mosaic theory would permit the government to "operate in virtual secrecy in all matters dealing, even remotely, with 'national security,' resulting in a wholesale suspension of First Amendment rights.") Without some more specific articulation of the inference the Government

[29] The Government concedes that it previously classified its own report summarizing the aggregate number of NSLs and FISA orders issued in 2013 as "Top Secret," reflecting an assessment that public disclosure was "expected to cause exceptionally grave damage to the national security." (Steinbach Decl. ¶ 17.) That report was declassified on June 23, 2014—within six months—and is now available to public. (*Id.*) The Government does not indicate that "exceptionally grave damage" to national security resulted from disclosure of that report or other subsequently declassified material.

believes can be drawn from the information Twitter itself seeks to publish, even years later, the Court cannot find that the Government has met the high burden to overcome a presumption that its restrictions are unconstitutional.

Moreover, the Supreme Court has held 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. *Freedman*, 380 U.S. at 58-60. Neither the Government's classification decision nor the disclosure reporting statute provide such safeguards, nor do the FISA nondisclosure provisions at issue provide for review that would encompass just the aggregate volume data. Indeed, the ban on disclosure of this aggregate data, relying as it does on section 1874, does not appear to have a limit to the duration of nondisclosure, only a narrowing of the disclosure bands after one year. 50 U.S.C. § 1874(a)(4). Despite section 1874(c)'s grant of discretion to permit greater detail in reporting, the statute offers no procedure to petition for such exercise of discretion. It does not provide a mechanism for review of any Government decisions under that exception, or classification decisions in connection with such disclosures generally. Further, as noted it does not distinguish in any way between large and small providers, the nature of the provider itself, and the levels of information they may report.

In short, the Government's restrictions here are not the product of an individualized inquiry or narrow tailoring. They impose a prior restraint on Twitter's speech, not based on an actual finding that permitting the speech would seriously damage national security, but because Twitter's proposed disclosure was more precise than the permissive band structure in the USA

FREEDOM Act and its predecessor DAG Letter. Finally, they do not include any procedural safeguards to ensure that the decision is one that comports with the appropriate high level of scrutiny warranted by such prior restraints.

2. Government's Authorities Espousing Deferential Review Are Not Applicable

The Government relies on *Stillman*, *Wilson,* and *Shaffer*, in which employees or contractors of the Government were prohibited from publishing classified information. These cases do not persuade. As the Supreme Court has held, a government employee "voluntarily assume[s] a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." *United States v. Aguilar,* 515 U.S. 593, 606 (1995); *see United States v. Nat'l Treasury Employees Union,* 513 U.S. 454, 465-66 (1995) ("Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large."). *Stillman* concerned restrictions on a government employee, and the court there specifically held that "[o]nce a government employee signs an agreement not to disclose information properly classified pursuant to executive order, that employee 'simply has no first amendment right to publish' such information. *Stillman* 319 F.3d at 548, *citing Snepp,* 444 U.S. at 510 n. 3 ("When Snepp accepted employment with the CIA [Central Intelligence Agency], he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review"). *Stillman* held that the CIA, as the employer had the power to "impos[e] reasonable restrictions on employee activities that in other

contexts might be protected by the First Amendment." *Id.* Similarly, the court in *Wilson* very specifically stated that the "CIA's requirement that current and former employees obtain Agency clearance before disseminating any material related to their employment is not, however, a 'system of prior restraints' in the classic sense." *Wilson,* 586 F.3d at 183-84 (citing *McGehee,* 718 F.2d at 1147-48); *accord Doe v. Mukasey,* 549 F.3d at 871, 876 n. 12, 877 (distinguishing between former CIA employees and entities that "had no interaction with the Government until the Government imposed its nondisclosure requirement upon [them]"). The courts in these cases subject the Government agency's censorship to a minimal and deferential review: "if the Agency censors a manuscript because it contains classified information, the author is entitled to judicial review of that decision to ensure that the information in question is, in fact, properly classified under the standards set forth in the applicable executive order," not more. *Wilson*, 586 F.3d at 185-86; *see also Shaffer*, 102 F.Supp.3d at 14-15 (conducting review of classification decision precluding former military officer's request to publish information in his memoir under *Stillman*). Here, the caselaw offers no basis to treat restraints on speech by Twitter the same as "reasonable restrictions on employee activities," worthy of less than the full panoply of rights under the First Amendment.

3. Government's efforts to distinguish Pentagon Papers fail

The Government seeks a lower level of scrutiny contending that *Pentagon Papers* is distinguishable because the *New York Times* and *Washington Post* had obtained the classified information at issue through an apparent leak of information while here

the information at issue arises from Twitter's "participation" in judicial proceedings. Thus, the Government argues that, like a party in discovery or a grand jury witness, Twitter can be restricted from disclosing information.

The Government's analogies are not particularly apt. Restrictions on disclosure of grand jury testimony have only been upheld when they were limited in duration, allowed for broad judicial review, and did not preclude an individual from disclosing information known outside of their direct participation in the proceedings. *See Butterworth v Smith*, 494 U.S. 624, 632 (1990). Further, the justification for limitations on disclosure of information learned in pre-trial civil litigation yields when the information bears on public proceedings or concerns. *Cf. Seattle Times*, 467 U.S. at 33 (distinguishing restrictions on pretrial discovery disclosure from information admitted into evidence).

The Government also distinguishes *Pentagon Papers* on the ground that it concerned an injunction against publication rather than a statutory limitation on publication or a Court-ordered limitation imposed pursuant to a statute permitting the Executive to request nondisclosure. These distinctions lack substance. Whether a Government restriction is imposed as a flat-out injunction or a nondisclosure order by a court, it still constitutes a prior restraint based upon the content of the message. Similarly, regardless of whether the Executive's decision to limit the scope of the disclosure arises out of a statutory framework enacted by Congress or a request made to the Court, the Executive's exercise of discretion results in the same prohibition on speech.

The Government offers no evidence that Congress's decision to adopt the disclosure framework,

first applied in the DAG letter, 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 such that less restrictive, more narrowly tailored means to protect that interest did not exist. *See generally Nebraska Press Ass'n*, 427 U.S. at 565; *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d at 882. Thus, while evidence may exist, the Government has not yet made a sufficient showing.

CONCLUSION

The motion for summary judgment is **DENIED WITHOUT PREJUDICE** to a renewed motion upon a more fulsome record. Twitter has sought a security clearance to be permitted to review any *in camera* filing by the Government.

The Government is **ORDERED** to move forward on granting Twitter's lead counsel, Andrew J. Pincus and Lee H. Rubin, security clearances that would permit review of relevant classified materials in this matter.

IT IS SO ORDERED.

This terminates Docket Nos. 124 and 145.

Dated: July 6, 2017

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YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TWITTER, INC., Plaintiff-Appellant, v. MERRICK B. GARLAND, Attorney General; et al., Defendants-Appellees.	No. 20-16174 D.C. No. 4:14-cv-04480-YGR Northern District of California, Oakland ORDER

Before: BEA, BRESS, and VANDYKE, Circuit Judges.

Judges Bress and VanDyke voted to deny the petition for rehearing en banc, and Judge Bea so recommended. The petition for rehearing en banc was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App.

P. 35. The petition for rehearing en banc, Dkt. No. 57, is **DENIED**.

APPENDIX F

50 U.S.C. § 1874

Public reporting by persons subject to orders

Effective: January 19, 2018

(a) Reporting

A person subject to a nondisclosure requirement accompanying an order or directive under this chapter or a national security letter may, with respect to such order, directive, or national security letter, publicly report the following information using one of the following structures:

(1) A semiannual report that aggregates the number of orders, directives, or national security letters with which the person was required to comply into separate categories of--

(A) the number of national security letters received, reported in bands of 1000 starting with 0-999;

(B) the number of customer selectors targeted by national security letters, reported in bands of 1000 starting with 0-999;

(C) the number of orders or directives received, combined, under this chapter for contents, reported in bands of 1000 starting with 0-999;

(D) the number of customer selectors targeted under orders or directives received, combined, under this chapter for contents, reported in bands of 1000 starting with 0-999;

(E) the number of orders received under this chapter for noncontents, reported in bands of 1000 starting with 0-999; and

(F) the number of customer selectors targeted under orders under this chapter for noncontents, reported in bands of 1000 starting with 0-999, pursuant to--

(i) subchapter III;

(ii) subchapter IV with respect to applications described in section 1861(b)(2)(B) of this title; and

(iii) subchapter IV with respect to applications described in section 1861(b)(2)(C) of this title.

(2) A semiannual report that aggregates the number of orders, directives, or national security letters with which the person was required to comply into separate categories of--

(A) the number of national security letters received, reported in bands of 500 starting with 0-499;

(B) the number of customer selectors targeted by national security letters, reported in bands of 500 starting with 0-499;

(C) the number of orders or directives received, combined, under this chapter for contents, reported in bands of 500 starting with 0-499;

(D) the number of customer selectors targeted under orders or directives received, combined, under this chapter for contents, reported in bands of 500 starting with 0-499;

(E) the number of orders received under this chapter for noncontents, reported in bands of 500 starting with 0-499; and

(F) the number of customer selectors targeted under orders received under this chapter for noncontents, reported in bands of 500 starting with 0-499.

(3) A semiannual report that aggregates the number of orders, directives, or national security letters with which the person was required to comply into separate categories of--

(A) the total number of all national security process received, including all national security letters, and orders or directives under this chapter, combined, reported in bands of 250 starting with 0-249; and

(B) the total number of customer selectors targeted under all national security process received, including all national security letters, and orders or directives under this chapter, combined, reported in bands of 250 starting with 0-249.

(4) An annual report that aggregates the number of orders, directives, and national security letters the person was required to comply with into separate categories of--

(A) the total number of all national security process received, including all national security letters, and orders or directives under this chapter, combined, reported in bands of 100 starting with 0-99; and

(B) the total number of customer selectors targeted under all national security process received, including all national security letters, and orders or directives under this chapter, combined, reported in bands of 100 starting with 0-99.

(b) Period of time covered by reports

(1) A report described in paragraph (1) or (2) of subsection (a) shall include only information--

(A) relating to national security letters for the previous 180 days; and

(B) relating to authorities under this chapter for the 180-day period of time ending on the date that is not less than 180 days prior to the date of the publication of such report, except that with respect to a platform, product, or service for which a person did not previously receive an order or directive (not including an enhancement to or iteration of an existing publicly available platform, product, or service) such report shall not include any information relating to such new order or directive until 540 days after the date on which such new order or directive is received.

(2) A report described in paragraph (3) of subsection (a) shall include only information relating to the previous 180 days.

(3) A report described in paragraph (4) of subsection (a) shall include only information for the 1-year period of time ending on the date that is not less than 1 year prior to the date of the publication of such report.

(c) Other forms of agreed to publication

Nothing in this section prohibits the Government and any person from jointly agreeing to the publication of information referred to in this subsection in a time, form, or manner other than as described in this section.

(d) Definitions

In this section:

(1) Contents

The term "contents" has the meaning given that term under section 2510 of Title 18.

(2) National security letter

The term "national security letter" has the meaning given that term under section 1873 of this title.