No. 23-342

IN THE
Supreme Court of the United States

X CORP.,
Petitioner,

v.

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

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

BRIEF AMICUS CURIAE OF ASU COLLEGE OF LAW FIRST AMENDMENT CLINIC IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The First Amendment Clinic of the Arizona State University Sandra Day O'Connor College of Law respectfully submits this brief *amicus curiae* in support of Petitioner X Corp, successor in interest to Twitter ("Twitter").

The First Amendment Clinic is dedicated to defending First Amendment rights and training a new generation of law students to support those rights. The imposition of prior restraints on the release of important information to the public is of great concern to all citizens of this country, especially when the government justifies the use of its censorial power in the name of a broad, yet nebulous, interest in protecting national security. The First Amendment Clinic has an interest in seeing this Court clarify exactly what kind of government action constitutes a prior restraint, and whether such restrictions should be evaluated as such a restraint or as a content-based restriction on speech.

SUMMARY OF ARGUMENT

The Petition in this case seeks review of the Ninth Circuit's holding that the Government's restriction of Twitter's speech regarding the amount and frequency of its receipt of "national security process" is not an improper restriction of Twitter's First Amendment rights. But it is hard to see how the Ninth Circuit decided that the Government's restrictions do not constitute a prior restraint on Twitter's speech,

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[1] Pursuant to Rule 37.6, amicus declares that no counsel for a party authored the brief in whole or in part and that no person other than *amici* made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Rule 37.2 Counsel of record received timely notice of the intent to file this brief.

which would be subject to extraordinarily exacting scrutiny as this Court's previous caselaw requires. The Ninth Circuit employed a lesser standard of scrutiny primarily used for other content-based restrictions of speech. This Court should accept review to reaffirm when an act of government censorship is to be evaluated as a prior restraint on speech.

Even using the lesser strict scrutiny standard employed by the Ninth Circuit, the holding does not properly examine whether the Government has "narrowly tailored" its speech restrictions to further a "compelling interest." Blanket national security concerns in communications generally cannot constitute a compelling governmental interest by itself. The risk of government overreach if this were permitted is too high. Additionally, the Ninth Circuit heavily relied on confidential information to reach its conclusion that the speech restriction was "narrowly tailored" to achieve the Government's interest. These aspects of the Ninth Circuit's opinion also warrant this Court's review.

ARGUMENT

I. The Restriction at Issue Is a Prior Restraint That Requires a Higher Level of Scrutiny Than That Employed by The Ninth Circuit.

The First Amendment to the United States Constitution exists in large part to restrain the government from using its power to prohibit or prevent its citizens from exercising their right of free speech. At the time of the adoption of the First Amendment, the central violation of such principle was the prior restraint. *See Citizens United v. Fed. Election Com'n*,

558 U.S. 310, 430 (2010) (Stevens, J., concurring) (explaining that "many historians believe the Framers were focused on prior restraints on publication . . . .") (citation omitted); *see also* Rodney A. Smolla, 2 *Smolla & Nimmer on Freedom of Speech* §15:2 (2023) (discussing the evolution of the First Amendment's presumption against the validity of prior restraints from the English common law). The Framers knew that this form of suppression was the most oppressive, as it prevented discourse before it even began. *See id*. As this Court has stated, "In determining the extent of the [First Amendment], it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication." *Near v. Minnesota*, 285 U.S. 697, 713 (1931). It follows that any prior restraints on speech imposed by the government should be examined with a highly critical eye by the courts.

Prior restraints are "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) (internal quotation omitted). This Court has held that "[t]he relevant question is whether the challenged regulation authorizes suppression of speech in advance of its expression." *Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989). Because freedom from censorship is integral to knowledge of public affairs, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment

rights." *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 559 (1976).

As constitutional law scholar Alexander Bickel has noted:

> Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss … indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech.

Alexander Bickel, *The Morality of Consent* 61 (1975).

Protection from prior restraint is especially important for speech on matters of public concern. *Nebraska Press*, 427 U.S. at 559 ("The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events."). *See also* Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* 152 (1991) (explaining that the heavy presumption against prior restraint was "designed to facilitate the informed citizen's full participation in the country's government").

Indeed, this Court has consistently held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *See also Southeastern Promotions, Ltd. V. Conrad*, 420 U.S. 546, 558 (1975); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419

(1971); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968). The result of this presumption is that prior restraints on speech are only acceptable in "exceptional cases," such as for "the publication of the sailing dates of transports or the number and location of troops." *Near,* 283 U. S. at 716.

It is well established under this Court's jurisprudence that these highly suspect systems of restraint should be subject to a more exacting scrutiny than post hoc speech regulations. In *Southeastern Promotions*, this Court explained,

> The presumption against prior restraints is *heavier*—and *the degree of protection broader*—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

Southeastern Promotions, 420 U.S. at 558-59 (emphasis added). Accordingly, the typical standard of strict scrutiny would not be appropriate. The Court has held that systems of prior restraint should be upheld "only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive means." *CBS, Inc. v. Davis,* 510 U.S. 1315,

1317 (1994). This is a heightened level of scrutiny from the typical "narrowly tailored to achieve a compelling government interest" test.

The Government's restriction in this case is a clear example of a prior restraint on publication. Twitter would like to share information with the public about its own interactions with the government by informing its users about the frequency with which it is served NSLs and other demand letters. The Government is preventing this speech before it occurs.

Rather than applying the exacting scrutiny on such a prior restraint in accordance with this Court's jurisprudence, the Ninth Circuit determined that the Government's restriction in this case is a "content based" restriction and therefore subject to the lesser strict scrutiny. The Ninth Circuit relies heavily on its decision in *In re Nat'l Sec. Letter v. Sessions*, 33 F.4th 1058 (9th Cir. 2017). In that case, the Ninth Circuit responded to the plaintiff's argument for a higher level of scrutiny in a footnote, stating;

> 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.

Id. at 1076 n. Such conclusion in *In re NSL* conflicts with several opinions from this Court which have held that a more exacting scrutiny is required when evaluating prior restraints. *See infra* at p. 9. Many other federal circuit courts have reached the same conclusion. *See* Twitter's Petition at 24-25.

Prior restraints should only be permitted "where the evil that would result from the reportage is both *great and certain and cannot be mitigated by less intrusive measures*." *CBS Inc. v. Davis,* 510 U.S. 1315, 1317 (1994) (emphasis added). By declining to adhere to these standards, the Ninth Circuit has established its own precedent where prior restraints are given the same weight as post hoc speech restrictions. Given that First Amendment jurisprudence has consistently found prior restraints to be a greater encroachment than regular content-based restrictions, this ruling should not be allowed to stand.

II. Even Under Strict Scrutiny, The Ninth Circuit's Analysis Did Not Consider the Competing Interests in Establishing the Government's Compelling Interest.

Following the Ninth Circuit's conclusion that strict scrutiny applied, it still found that the Government met its burden of showing that there was a "compelling government interest" and that the solution was narrowly tailored to fit that interest. The Government's restriction should not be upheld even under this lesser strict scrutiny framework. The Ninth Circuit concluded that the Government has a "compelling interest" in national security and related "sensitive

communications." *Twitter, Inc. v. Garland*, 61 F.4th 686, 698 (9th Cir. 2023). But a blanket claim of national security cannot be enough to constitute a "compelling government interest" that allows the government to infringe on rights, particularly when the court does not consider the competing interests jeopardized by such a holding, as this Court has done.

A blanket claim of national security on its own cannot be enough to constitute a compelling government interest. While national security is an important interest that the government must protect, historically there have been instances where the government oversteps its bounds in the name of national security. *See e.g., New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (commonly referred to as *Pentagon Papers*) (finding that the federal government's attempt to restrain publication of a study on United States decision making on Viet Nam policy under the guise of national security was unconstitutional). If courts were to allow infringements of the First Amendment every time the government proclaimed the infringement was in the interest of national security, the First Amendment might as well not exist. Government affairs are at the core of the First Amendment. "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." *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (quoting *Mills v. Alabama,* 384 U. S. 214 (1966)).

In fact, the right to speak freely is especially important when it comes to speaking on issues of national security. *See New York Times Co.*, 403 U.S. at

716-17 (Black, J., concurring). In his concurrence, Justice Black states that "[t]he word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic." *Id*. at 719.

Justice Brennan, also in a concurrence, stated that infringements on speech in the name of national security should only be allowed when the government can prove that publication will "inevitably, directly, and immediately cause the occurrence of an event" that imperils the safety of this country or its people. *Id.* at 726–27 (Brennan, J., concurring). It is not enough that publication of a particular material "'could,' or 'might,' or 'may' prejudice the national interest in various ways." *Id.* at 725.

Justice Stewart, in another concurrence, rejected a restraint on publication of the Pentagon Papers because "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry… For without an informed and free press there cannot be an enlightened people." *Id.* at 728 (Stewart, J., concurring).

In this case, the Ninth Circuit's nearly complete deference to the government's allegation that national security interests broadly negate any interest in public access to this information is not consistent with this Court's rulings. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) ("[C]oncerns of national security and foreign relations do not warrant

abdication of the judicial role" and courts must "not defer to the Government's reading of the First Amendment, even when such interests are at stake."). The public's interest in receiving communications about government actions is essential in order to fully realize its own political freedoms. *See Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government.").

Since the media first reported on former NSA contractor Edward Snowden's disclosures in June 2013, there has been considerable public interest not just in the NSL program but in the entire U.S. surveillance apparatus. *See, e.g.*, Transcript of President Obama's Press Conference (Aug. 9, 2013), http://1.usa.gov/13pyCLa ("[T]his is how we're going to resolve our differences in the United States – through vigorous public debate, guided by our Constitution, with reverence for our history as a nation of laws, and with respect for the facts.").

Disclosure of basic information about NSLs would give citizens the knowledge to challenge the administration if it is abusing its power. The public has a right to receive information of such important public interest about government surveillance programs.

In stark contrast to these warnings about government overreach and court deference to the executive branch, the Ninth Circuit gave short shrift to the interests at stake, and no mention of the countervail-

ing public interest. The Ninth Circuit's entire "compelling interest" analysis was confined to a single paragraph. The panel states

> 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.' It follows that 'keeping sensitive information confidential in order to protect national security is a compelling government interest,' too.

Twitter, 61 F.4th at 698 (internal citations omitted). This conclusion cannot stand. It does not reconcile with the standard outlined by Justice Brennan in *Pentagon Papers* or with this Court's ruling in *Near*. Thus, the Ninth Circuit should have analyzed whether the national security concerns the Government claimed to have would be "inevitably, directly, and immediately" affected by Twitter's disclosure.

Even the Government acknowledged a greater duty to specify such compelling interest when it addressed the narrow tailoring requirement. The Ninth Circuit should have performed more analysis on the public's interest to be informed about the Government's NSLs to Twitter. Only then could the Ninth Circuit have properly weighed the public's interest against what should have been a much more specific national security interest at stake for this case.

Finally, the fact that the Ninth Circuit came to its conclusion regarding the "narrowly tailored" prong using confidential material further emphasizes that the questionable nature of the government's infringe-

ment. It is impossible for anyone outside of the government to determine the veracity of the government's claims, because all the pertinent evidence is apparently contained within classified documents. Evidence that the government has ensured is unavailable to even so much as one member of Twitter's legal counsel. This in connection with the less than compelling interest leaves a large question mark about whether this speech restriction actually survives strict scrutiny.

By presenting all relevant evidence within a series of classified documents, the government has turned our adversarial legal process into a one-sided exercise of power. The executive branch argues that censorship is necessary for national security, the judicial branch agrees with that argument, and the people have to accept that decision on nothing more than blind trust. Never mind that the same government asking for the people's trust completely prohibited the publication of any and all information regarding the service of national security legal process until 2014. The little information that the public is authorized to receive is only the result of the backlash the government received after information about this censorship program was leaked by Edward Snowden to the public in 2013.

Overall, even under the strict scrutiny framework, the conclusion that the Government's speech restriction is "narrowly tailored" to serve a "compelling government interest" demands a more rigorous analysis, including the consideration of how recognition of a secrecy interest affects freedom of speech and the education of an informed citizenry.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted so that this Court can correct the error in examination of a prior restraint.

In addition, the treatment of a ban on discussion of *mere numbers* of investigative instruments is so clearly a prior restraint that it would be appropriate to grant, vacate and remand this case back to the Ninth Circuit with instruction to treat a clear act of government censorship of a company's own data as a prior restraint on communications, subject to an "extraordinarily exacting scrutiny" and a particularized showing of the asserted national security interest.

Respectfully submitted,

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