No. 23-342

In the Supreme Court of the United States

X CORP., FKA TWITTER, INC., PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

To support classified national security investigations, electronic communication service providers may be required to provide certain user information to the government. See, *e.g.*, 18 U.S.C. 2709; 50 U.S.C. 1805. Providers responding to such requests generally are bound by nondisclosure requirements, which are subject to judicial review. The questions presented are:

1. Whether the nondisclosure requirements violate the First Amendment because they lack heightened procedural safeguards.

2. Whether the First Amendment requires the nondisclosure requirements to satisfy a standard higher than strict scrutiny.

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2023. A petition for rehearing was denied on May 16, 2023 (Pet. App. 118a-119a). On July 31, 2023, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 28, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Bureau of Investigation (FBI) has primary authority for conducting counterintelligence and counterterrorism investigations in the United States. Exec. Order No. 12,333, §§ 1.14(a), 3.4(a), 3 C.F.R. 200, 210, 214 (1981 comp.). Electronic communications play a significant role in advancing terrorist and foreign intelligence activities and operations. To enable the FBI to effectively pursue and disrupt terrorist plots and foreign intelligence operations, Congress authorized the FBI to obtain information relating to the use of electronic communications, including from electronic communication service providers, through legal process. At issue in this case is information regarding two types of national security process: national security letters issued under 18 U.S.C. 2709, and orders or directives issued under the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.*

A national security letter is a type of administrative subpoena that Congress has authorized the FBI to issue to a "wire or electronic communication service provider." 18 U.S.C. 2709(a). A national security letter requires the recipient to provide "subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession" if that information is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. 2709(a) and (b)(1). A national security letter does not, however, impose a duty to provide the contents of any communication. Cf. 18 U.S.C. 2709(a).

Congress enacted FISA to establish a "secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelli-

gence purposes within the context of this Nation's commitment to privacy and individual rights." S. Rep. No. 604, 95th Cong., 1st Sess. Pt. 1, at 15 (1977). FISA provides the FBI with various investigative tools for foreign intelligence and terrorism investigations: Title I authorizes electronic surveillance, 50 U.S.C. 1801 *et seq.*; Title III authorizes physical searches, 50 U.S.C. 1821 *et seq.*; Title IV authorizes the use of "pen registers" and "trap and trace devices," 50 U.S.C. 1841 *et seq.*; Title V authorizes searches of business records, 50 U.S.C. 1861 *et seq.*; and Title VII authorizes the acquisition of foreign intelligence information through the targeting of non-U.S. persons located outside of the United States, 50 U.S.C. 1881 *et seq.* With some limited exceptions, see, *e.g.*, 50 U.S.C. 1802, 1822(a), the statute authorizes searches or surveillance only pursuant to an order of the Foreign Intelligence Surveillance Court (an Article III court), or pursuant to a directive issued by the Attorney General or Director of National Intelligence in accordance with court-approved procedures. See 50 U.S.C. 1805(a), 1824(a), 1842(d), 1862, 1881a, 1881b, 1881c, 1881d; see also 50 U.S.C. 1803(a) (establishing court). FISA orders authorizing electronic surveillance "may compel the production of either content or non-content data." Pet. App. 5a.

b. Secrecy is essential to national security letters and FISA orders. See Unclassified Declaration of Jay S. Tabb, Jr., Executive Assistant Director, FBI National Security Branch (Tabb Decl.) ¶¶ 24-26, C.A. E.R. 494-495. Congress has therefore provided for the confidentiality of information concerning national security legal process.

Section 2709(c) imposes a nondisclosure obligation on recipients of national security letters if a designated

high-level FBI official certifies, before issuance of the national security letter, that disclosure may result in specified harms, including "a danger to the national security of the United States." 18 U.S.C. 2709(c)(1)(B). If such a certification is made, the recipient is prohibited from "disclos[ing] to any person that the [FBI] has sought or obtained access to information or records" pursuant to such a letter. 18 U.S.C. 2709(c)(1)(A). Nondisclosure orders applicable to national security letters are subject to judicial review. See 18 U.S.C. 3511.

Likewise, "[r]ecipients of FISA orders generally are required to 'protect the secrecy' of the government surveillance." Pet. App. 6a (brackets and citation omitted). Title I provides that an "order approving an electronic surveillance" must "direct" that when the recipient (*e.g.*, a "common carrier" or "custodian") responds to a governmental request for "information, facilities, or technical assistance necessary to accomplish the electronic surveillance," it do so in a "manner as will protect its secrecy." 50 U.S.C. 1805(c)(1) and (2)(B). Title I further provides that recipients must "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." 50 U.S.C. 1805(c)(2)(C). The other titles contain similar provisions with respect to physical searches, pen registers, business records, and foreign surveillance. See, *e.g.*, 50 U.S.C. 1824(c)(2) (Title III), 1842(d)(2)(B) (Title IV), 1862(d) (Title V), 1881a(i)(1) (Title VII). The Foreign Intelligence Surveillance Court generally has the authority to review nondisclosure obligations related to FISA process. See, *e.g.*, 50 U.S.C. 1881a(i)(4).

Information about national security process generally is classified. See Pet. App. 6a-7a. Accordingly, the secrecy provisions set forth above generally prohibit the disclosure of information related to the receipt of national security letters and FISA orders. Cf. 18 U.S.C. 798(a). Before 2014, all information about the aggregate number and types of national security process received by individual companies was classified. See Tabb Decl. ¶ 13, C.A. E.R. 490. But following the "unauthorized disclosures by Edward Snowden of documents that purportedly contained classified national security information," multiple electronic communication service providers sought to "disclose data regarding their receipt of national security process to correct perceived inaccuracies in the press and to address public speculation about the nature and scope of their cooperation with the Government." Tabb Decl. ¶ 12, C.A. E.R. 490.

Although public disclosure of such information continued to pose risks to national security, in 2014 the Director of National Intelligence—citing the "exceptional circumstances" presented by the unauthorized Snowden disclosures and "the impact of secrecy on providers," and "to facilitate transparency"—declassified certain aggregate information concerning receipt of national security process when reported using certain specified formats. Tabb Decl. ¶ 13 & n.3, C.A. E.R. 490. The next year, Congress adopted and expanded that framework to include additional formats, which the Director also declassified. USA FREEDOM Act of 2015, Pub. L. No. 114-23, sec. 603(a), § 604(a), 129 Stat. 295-296 (50 U.S.C. 1874(a)); see Tabb Decl. ¶ 13, C.A. E.R. 490. "A person subject to a nondisclosure requirement accompanying an order or directive under [FISA] or a national security letter may" now "publicly report" in-

formation about the aggregate number and types of national security process received under one of four reporting "structures." 50 U.S.C. 1874(a); see 50 U.S.C. 1874(a)(1)-(4) (describing the four structures).

Each structure permits a recipient of national security process to report information about the numbers of different sorts of national security process received over a specified period of time using "bands" of numbers, such as "bands of 1000 starting with 0-999," rather than specific totals. 50 U.S.C. 1874(a)(1)(A). The statute generally permits the disclosure of more granular information about the *number* of requests received if less detail is disclosed about the *types* of information sought. For example, a recipient may publish a semiannual report disclosing "the number of customer selectors targeted * * * for noncontents" under specific FISA titles if reported in "bands of 1000 starting with 0-999," 50 U.S.C. 1874(a)(1)(F), but may disclose that information in more granular "bands of 500 starting with 0-499" if the report combines customer selectors under all FISA titles without revealing the breakdown among those titles, 50 U.S.C. 1874(a)(2)(F). And the permissible granularity increases to "bands of 250 starting with 0-249" if the report further combines FISA orders and national security letters, 50 U.S.C. 1874(a)(3)(B), and to "bands of 100 starting with 0-99" if that report is published annually instead of semiannually, 50 U.S.C. 1874(a)(4)(B).

If a recipient wishes to disclose information about its receipt of national security process involving one category of information in a structure, it must disclose information about all the categories of information in the structure, even if it received no legal process in that category. See Tabb Decl. ¶ 14, C.A. E.R. 490. Thus, if a

recipient wishes to disclose, under the second structure, "the number of national security letters received, reported in bands of 500 starting with 0-499," 50 U.S.C. 1874(a)(2)(A), the recipient also must report the respective numbers (in the same bands) of "orders or directives received, combined, under [FISA] for contents," 50 U.S.C. 1874(a)(2)(C); "orders received under [FISA] for noncontents," 50 U.S.C. 1874(a)(2)(E); and "customer selectors targeted" under each of those three types of process, 50 U.S.C. 1874(a)(2)(B), (D), and (F). The recipient must report the band for each of those six categories even when the amount of national security process received in any given category is zero. See Tabb Decl. ¶ 14, C.A. E.R. 490.

"Information at a more granular level" than permitted by the reporting structures "remains classified" because it "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." Tabb Decl. ¶¶ 15, 21, C.A. E.R. 491, 493. That in turn "would provide a roadmap to adversaries revealing the existence of or extent to which Government surveillance may be occurring" at a given electronic communications service provider. Tabb Decl. ¶ 15, C.A. E.R. 491. Nevertheless, Congress has provided that the government and the recipient of national security process may, in specific cases, "jointly agree[] to the publication of information" in a "time, form, or manner other than as described in" the statute. 50 U.S.C. 1874(c).

2. Petitioner is an electronic communications service provider. Pet. App. 3a. In April 2014, petitioner submitted for the FBI's review a draft "Transparency Report" that would disclose aggregate information

about the national security process it claimed to have received between July 1, 2013, and December 31, 2013.[1] See Pet. App. 9a-11a. Petitioner sought "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." *Id.* at 10a-11a (brackets omitted).

The FBI determined that some of the information contained in the draft report is classified and could not be disclosed. Pet. App. 11a; see C.A. E.R. 64-65. The draft report sought to disclose "data regarding any process [petitioner] may have received under FISA in ways that would reveal classified details about the surveillance and that go beyond" the aggregate reporting that the Director of National Intelligence had declassified at that time. C.A. E.R. 64. Petitioner's draft 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." *Ibid.* The FBI explained that "[t]he aggregation of FISA numbers, the requirement to report in bands, and the prohibition on breaking out the numbers by type of [FISA] authority are important ways the framework mitigates the risks to sources and methods posed by disclosing FISA statistics." *Ibid.* The FBI returned the draft transparency report to Twitter with the classified information redacted. *Id.* at 67-68.

Petitioner filed this suit to challenge the FBI's redactions. As relevant here, the operative complaint alleges that the FBI's action violated procedural and substantive requirements of the First Amendment. See C.A. E.R. 764-768.

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[1] Nothing in this brief confirms or denies petitioner's receipt of legal process under FISA.

3. The district court granted the government's renewed motion for summary judgment. Pet. App. 71a-87a; cf. *id.* at 89a-117a (order denying government's initial summary judgment motion).

The district court concluded that the FBI's redaction of petitioner's draft transparency report satisfied strict scrutiny. Pet. App. 80a-87a. The court explained that the government's filings, including multiple classified declarations, established that petitioner's disclosure of the classified information in petitioner's draft transparency report "would be likely to lead to grave or imminent harm to the national security," and "no more narrow tailoring of the restrictions can be made." *Id.* at 82a. Petitioner separately argued that it was entitled to but did not receive the heightened procedural protections this Court has required for certain prior-restraint schemes that censor or license speech. *Ibid.*; see *Freedman* v. *Maryland*, 380 U.S. 51 (1965). The district court determined that the operative complaint did not sufficiently raise such a challenge, and so the court did not reach that issue. Pet. App. 84a-86a.[2]

4. The court of appeals affirmed. Pet. App. 1a-70a.

a. As relevant here, the court of appeals held that the FBI's redaction of petitioner's draft transparency report complies with the First Amendment's substantive requirements. Pet. App. 17a-28a. The court deter-

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[2] The district court also denied petitioner's motion for an order compelling the government to provide petitioner's counsel access to classified material in the record. C.A. E.R. 1 n.2. After substantial briefing on the issue, the Attorney General asserted the state secrets privilege to the extent the litigation would require disclosure of the classified declarations to petitioner's counsel. See *id.* at 508-514. Petitioner no longer seeks access for its counsel to the classified record, so the Attorney General's assertion is no longer relevant to this matter.

mined that the band reporting framework reflected a content-based restriction on speech subject to strict scrutiny. *Id.* at 18a-20a. The court explained that binding circuit precedent foreclosed petitioner's request for an even higher standard of scrutiny. *Id.* at 19a-20a (citing *In re National Security Letter*, 863 F.3d 1110 (9th Cir. 2017), amended and superseded, 33 F.4th 1058 (9th Cir. 2022)). The court then held that the band reporting framework satisfies strict scrutiny because "it is narrowly tailored to serve a compelling [governmental] interest." *Id.* at 20a (citing *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015)).

The court of appeals observed that "[t]here is no dispute" that "'keeping sensitive information confidential in order to protect national security is a compelling government interest.'" Pet. App. 20a (citations omitted). The court then held that the band reporting framework was the least restrictive means of serving that interest. *Id.* at 24a-28a. The court explained that, "[h]aving intently studied the classified and unclassified materials in the record," it agreed with the district court that a more granular disclosure regime, as petitioner was urging, "would significantly harm the government's national security operations by signaling to our adversaries what communication channels to avoid and which to use." *Id.* at 23a-24a; see *id.* at 25a-26a (citing Tabb Decl.). The court also observed that allowing petitioner to make more granular disclosures almost certainly would lead "other recipients of national security process" to seek to do the same, which "would [cause] an even greater exposure of U.S. intelligence capabilities and strategies." *Id.* at 26a.

The court of appeals also rejected petitioner's argument that more stringent procedural safeguards were

required. Pet. App. 28a-43a. The court observed that this Court has required such measures only when needed to "obviate the dangers of a censorship system." *Id.* at 37a (quoting *Freedman*, 380 U.S. at 58); see *id.* at 32a. The court of appeals explained that those "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."'" *Id.* at 37a (citation omitted).

But the court of appeals further observed that "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.'" Pet. App. 38a (citation omitted); see *ibid.* ("*Freedman* has not been extended to every regime that may be characterized as an advance restriction on speech."). For example, the court observed that in *City of Littleton* v. *Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), this Court held that heightened procedural safeguards were not required for a municipal licensing scheme for adult businesses. Pet. App. 38a; see *id.* at 33a. The court of appeals thus reasoned that "*Freedman*'s procedures, which were designed to curb traditional censorship regimes, are not required in the context of government restrictions on the disclosure of information transmitted confidentially as part of a legitimate government process, because such restrictions do not pose the same dangers to speech rights as do traditional censorship regimes." *Id.* at 39a.

b. Judge VanDyke concurred in the judgment. Pet. App. 48a-70a. He agreed with "most aspects of [the majority's] analysis," but "conclude[d] that the unclassified materials are sufficient to" affirm the district

court's judgment, *id.* at 48a, in light of "the 'significant weight' a court must afford to the Government's national security factual findings" contained in "the Government's unclassified declarations," *id.* at 58a.

ARGUMENT

Petitioner renews its contention (Pet. 13-23) that the granularity restrictions on the disclosure of classified information relating to national security investigations are unconstitutional because they do not contain certain heightened procedural safeguards. Petitioner further contends (Pet. 23-26) that those restrictions must survive a standard even higher than strict scrutiny in order to comport with the First Amendment. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The court of appeals correctly held that the First Amendment does not demand the heightened procedural measures petitioner seeks in this context, and that ordinary judicial review of a nondisclosure order satisfies the Constitution.

a. This Court has explained that a legal regime conditioning expression on a licensing body's prior approval of content—a so-called "prior restraint"—may be permissible under the First Amendment only if certain procedural safeguards are provided. In *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the Court addressed a state statute prohibiting theaters from showing films without prior approval by a state board of censors. *Id.* at 52. The Court explained that the preapproval scheme posed a "peculiar danger[] to constitutionally protected speech" because neither the theater nor the film distributor had sufficient incentive to challenge any re-

striction, so "it may take very little to deter exhibition in a given locality." *Id.* at 57, 59. Accordingly, the Court held 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. Those safeguards were: (1) the censor must bear the burden of obtaining judicial review and of establishing that the speech may be restricted; (2) any restraint on speech prior to judicial review must be for only a brief period; and (3) judicial review must be prompt. *Id.* at 58-59; see *Thomas* v. *Chicago Park District*, 534 U.S. 316, 321 (2002).

The Court later explained that *Freedman*'s heightened procedural safeguards apply to prior-restraint "scheme[s] with rather subjective standards * * * where a denial likely mean[s] complete censorship," *City of Littleton* v. *Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 782 (2004), and to such schemes that "delegate overly broad licensing discretion to a government official," *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 130 (1992). Accordingly, the Court has found such measures to be required in cases involving the use of municipal facilities to perform a controversial musical, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), the seizure of allegedly obscene photographs by customs officials, *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971), and the use of the mail to send allegedly obscene material, *Blount* v. *Rizzi*, 400 U.S. 410 (1971). The Court also has required heightened procedural safeguards where an indefinite restriction on speech is imposed by a state court under a general nuisance statute. *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam); cf. *National Socialist*

Party v. *Village of Skokie*, 432 U.S. 43 (1977) (per curiam) (similar).

In contrast, the Court has not required *Freedman*'s heightened procedural measures for prior restrictions on speech that do not involve those sorts of subjective judgments or broad delegations of discretion. For example, in *Littleton*, the Court held that "ordinary judicial review procedures" are sufficient for First Amendment challenges to licensing schemes that "appl[y] reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials." 541 U.S. at 781, 783. And in *Thomas*, the Court upheld a municipality's time, place, and manner regulations that did not provide any heightened procedural safeguards. 534 U.S. at 322.

This Court additionally has upheld against First Amendment challenges various prohibitions on the public disclosure of information the government itself has made available, where the prohibitions were enforced without *Freedman*'s heightened procedural requirements. For example, in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), the Court held that a protective order prohibiting a party's dissemination of information obtained through pretrial discovery is "not the kind of classic prior restraint" that is presumptively unlawful, because such information does not come from "a traditionally public source of information," and disclosure restrictions "do[] not raise the same specter of government censorship that such control might suggest in other situations." *Id.* at 32-33. Similarly, in *Butterworth* v. *Smith*, 494 U.S. 624 (1990), the Court found no constitutional infirmity with a state restriction on a grand jury witness's disclosure of the testimony of *other* grand jury witnesses; the Court observed that such in-

formation was obtained only "as a result of his participation in the proceedings of the grand jury." *Id.* at 632; see *id.* at 636 (Scalia, J., concurring) (distinguishing a witness's disclosure of his own testimony from his "disclosure of the grand jury proceedings, which is knowledge he acquires not 'on his own' but only by virtue of being made a witness").

b. The court of appeals correctly held that the band reporting framework is not the sort of prior-restraint regime for which the First Amendment imposes heightened procedural requirements. The FBI's redaction of petitioner's draft transparency report was based on objective criteria, now codified by statute. Those criteria permit recipients of national security process to publicly disclose certain aggregate information about their receipt of such process under well-defined bands that leave no room for subjective standards or overly broad discretion. See 18 U.S.C. 1874(a)(1)-(4). And as the government has explained, information at a more granular level remains classified because disclosure of that information "reasonably could be expected to result in serious damage to the national security." Tabb Decl. ¶ 5, C.A. E.R. 487; see *id.* ¶¶ 16-26, C.A. E.R. 491-495; Pet. App. 24a-27a, 58a-59a. Given those circumstances, *Freedman*'s heightened procedural requirements are unnecessary because the objective band reporting framework, and its protection of classified information, "does not raise the same specter of government censorship that such control might suggest in other situations." *Seattle Times*, 467 U.S. at 32.

To the extent petitioner's challenge is to the criteria used to classify such information in the first place, see Pet. 17, that challenge is misplaced. Classification decisions are governed by the standards articulated in

Executive Order No. 13,526, 3 C.F.R. 298 (2009 comp.), which reflects the President's constitutional authority as Commander-in-Chief to classify information. Applying those standards, the Director of National Intelligence determined that information about the receipt of national security process was "properly classified" and ordinarily "would require continued protection." C.A. E.R. 728. The Director simply concluded that "the present circumstances" (meaning the Snowden disclosures) created "an exceptional case that outweighs the need to continue to protect" that information *if* disclosed within the band reporting framework. C.A. E.R. 728; see *id.* at 711-713.

In recognition of the serious separation-of-powers concerns that would be raised by judicial interference with such decisions, "courts have traditionally shown the utmost deference" to Executive Branch classification determinations. *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988) (citation omitted); see *id.* at 529 ("[T]he protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it."); see also *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010); *Central Intelligence Agency* v. *Sims*, 471 U.S. 159, 180 (1985). In light of that deference and the objective criteria for permissible disclosures contained in 50 U.S.C. 1874(a), ordinary judicial review is sufficient to permit a party to challenge the government's classification decisions without the need for heightened procedural requirements. See *Littleton*, 541 U.S. at 784.

Nor is this a statutory scheme that gives unbounded, standardless discretion to government officials or otherwise creates a risk of "freewheeling censorship."

Southeastern Promotions, 420 U.S. at 559; see *Littleton*, 541 U.S. at 782. Instead, the scheme is one involving a business entity's required participation in governmental activity, the "proper functioning" of which "depends upon * * * secrecy." *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218 (1979) (describing grand juries). National security investigations—perhaps more than any other activity the government undertakes—vitally depend on secrecy. Cf. *FBI* v. *Fazaga*, 595 U.S. 344, 356-357 (2022); *United States* v. *Zubaydah*, 595 U.S. 195, 204-205 (2022). Given that the First Amendment does not require heightened procedural safeguards as a precondition of enforcing restrictions on the disclosure of certain information learned through the grand jury process or through civil discovery, such measures should not be required as a precondition of imposing the objective and tailored restrictions in 50 U.S.C. 1874(a) on the disclosure of classified information obtained solely through a party's participation in the government's national-security investigations.

Moreover, recipients of national security process do not have the often merely evanescent incentives of film exhibitors or play producers to challenge the statutory restrictions on their speech. Cf. *Freedman*, 380 U.S. at 59; *Southeastern Promotions*, 420 U.S. at 560-561. As petitioner's brief in the court of appeals observed, many of the Nation's largest electronic communications service providers have sought FBI authorization to publicly disclose information concerning receipt of national security process in more detail than that permitted by the statutory band reporting framework. Pet. C.A. Br. 51; cf. 50 U.S.C. 1874(c). And petitioner itself has indicated its desire to publish "similar information in future

Transparency Reports." Second Am. Compl. ¶¶ 86, 91. Heightened procedural requirements are therefore unnecessary to ensure that challenges to the band restrictions will be brought under the available avenues of judicial review. See, *e.g.*, 50 U.S.C. 1881a(i)(4) (providing for judicial review of secrecy obligations attendant to certain FISA orders); 18 U.S.C. 3511 (providing for judicial review of secrecy obligations attendant to National Security Letters).

c. Petitioner's contention (Pet. 16) that the heightened *Freedman* measures apply to all "content-based prior restraints" is incorrect. As *Seattle Times* and *Butterworth* make clear, a "content based" restriction on the disclosure of information can comport with the First Amendment even without heightened procedural safeguards. See *Seattle Times*, 467 U.S. at 32-33; *Butterworth*, 494 U.S. at 632. Moreover, "[t]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. * * * 'The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.'" *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441-442 (1957) (citation omitted). Here, that particularistic analysis requires determining whether the regime for review employs subjective standards or grants overly broad discretion to censors, such that ordinary judicial review "may be too little and too late" to avoid chilling protected speech. *Freedman*, 380 U.S. at 57. As explained above, the band reporting scheme employs objective criteria to determine what information may permissibly be disclosed, and ordinary judicial review has in fact provided ample incentives and opportunities for an electronic communication service provider like peti-

tioner to raise First Amendment challenges to its nondisclosure obligations.

The only decisions petitioner identifies (Pet. 15) in which this Court has required heighted procedural safeguards are ones involving schemes with subjective standards giving the censor quite broad discretion. See, *e.g.*, *Freedman*, 380 U.S. at 59; *Blount*, 400 U.S. at 419; cf. *Vance*, 445 U.S. at 316-317. And still other cases on which petitioner relies (Pet. 15) did not address heightened procedural requirements at all, but instead resolved First Amendment challenges on different grounds. See *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 802 (1988) (holding unconstitutional a licensing scheme that "permits a delay without limit"); *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (holding that a licensing scheme for news racks was subject to facial challenge and that the scheme violated substantive First Amendment standards); *Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175 (1968) (holding that an order restraining a demonstration was an unconstitutional infringement of speech because it was obtained ex parte).

Petitioner also asserts that the court of appeals' decision here is "particularly dangerous" because it supposedly "authorized the Executive Branch to make discretionary judgments to impose prior restraints on people's ability to disclose their own interactions with government officials and processes." Pet. 16 (emphasis omitted); see Pet. 16-17. But the decision below simply upheld the enforcement of restrictions on disclosure that applied purely objective criteria promulgated by the Executive Branch officers with authority to classify information. Moreover, Congress has now codified those criteria, further ameliorating the risk of un-

bounded discretionary judgments. To be sure, Congress has also authorized the disclosure of information in a "time, form, or manner other than as described" in the statute if the person seeking to make the disclosure and the government "jointly agree[]" on the terms. 50 U.S.C. 1874(c). But petitioner has not challenged that provision of the statute; and in any event the statute neither purports to require the government to enter such agreements nor provides judicially manageable standards for determining when or on what terms the government should make such an agreement in light of its assessment of harms to the national security. Thus, the government's choice not to enter such an agreement to allow more disclosure than allowed under the band reporting framework, and instead to enforce the standard objective restrictions (now codified by statute) without modification, does not qualify as the type of overbroad grant of discretion to a censor that would warrant *Freedman*'s heightened procedural safeguards.

Petitioner's concern (Pet. 17) that the decision below could permit the government to prevent "a private citizen [from] seeking to tell the media * * * the number of warrants that the police served on her in the last year" is misplaced. The restrictions on disclosure at issue here do not apply to the population generally, but only to persons who are under nondisclosure obligations related to their roles in confidential national security investigations, such as electronic service providers and other custodians of electronic data (like petitioner). 50 U.S.C. 1874(a). And in any event, the issue is not whether the restrictions in petitioner's hypothetical would satisfy the First Amendment, but whether ordinary judicial review is sufficient to vindicate petitioner's

alleged First Amendment interests here. As explained above, it is.

d. Petitioner incorrectly contends (Pet. 20-23) that the decision below conflicts with the Second Circuit's decision in *John Doe, Inc.* v. *Mukasey*, 549 F.3d 861 (2008). *Doe* involved a statute, since amended, that restricted the recipient of certain governmental requests for information—including not just national security letters, but also certain requests under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, and the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.*—from disclosing receipt of the request when specified senior government officials certified that disclosure may endanger national security or interfere with foreign relations. *Doe*, 549 F.3d at 868; see 18 U.S.C. 3511(b) (2006). In holding that the scheme required heightened procedural safeguards, the Second Circuit reasoned that the nondisclosure requirement was imposed by "the Executive Branch under circumstances where secrecy might or might not be warranted, depending on the circumstances alleged to justify such secrecy." 549 F.3d at 877. The court found the scheme to be "[u]nlike the grand jury proceeding, as to which interests in secrecy arise from the nature of the proceeding." *Ibid.*

Here, "interests in secrecy arise from the nature of the" government's national security investigations, including its surveillance activities pursuant to FISA orders and national security letters. *Doe*, 549 F.3d at 877. And the information subject to the nondisclosure requirement here—namely, information about the receipt of FISA process and national security letters at a more granular level than that permitted by the band reporting framework adopted by Congress—is classified.

Tabb Decl. ¶ 15, C.A. E.R. 491. It follows that "secrecy" is necessarily "warranted" because "the circumstances alleged to justify such secrecy," *Doe*, 549 F.3d at 877, are that the information petitioner seeks to disclose is classified—and classified information obviously must be kept secret. Cf. 18 U.S.C. 798(a). Accordingly, no sound basis exists to conclude that the Second Circuit would have found that enforcement of the band reporting framework based on its objective criteria must be conditioned on heightened procedural safeguards.

In any event, Congress substantially amended the statute at issue in *Doe*—in the same Act in which it enacted the band reporting framework, see USA FREEDOM Act of 2015, sec. 502(g), 129 Stat. 288-289—so the holding in *Doe* is of little to no prospective importance. Any tension between the holdings in *Doe* and the decision below thus does not warrant this Court's review.

2. a. Petitioner further contends (Pet. 23-26) that the court of appeals erred in evaluating petitioner's First Amendment challenge to the band reporting framework under strict scrutiny rather than an even higher level of scrutiny—what petitioner describes as "extraordinarily exacting scrutiny," Pet. i. The court correctly rejected that contention.

Petitioner cites no majority decision of this Court supporting its claim that content-based prior restraints must be evaluated under a higher level of scrutiny than strict scrutiny. To the contrary, this Court has described strict scrutiny as "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997). Petitioner's reliance (Pet. 23-24) on *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), is misplaced. The Court there addressed "[t]he narrow and limited question * * *

whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission." *Id.* at 837.

Indeed, it does not appear that this Court has ever used "extraordinarily exacting scrutiny" or any similar phrase in addressing the standard applicable to prior restraints. Petitioner purports (Pet. 23-24) to derive its proposed standard from statements in a single-Justice order granting an emergency stay and in a concurring opinion. See *CBS, Inc.* v. *Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (stating that "the gagging of publication" is justified "only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures"); *New York Times Co.* v. *United States*, 403 U.S. 713, 730 (1971) (per curiam) (Stewart, J., concurring) ("I cannot say that disclosure of any of [the Pentagon Papers] will surely result in direct, immediate, and irreparable damage to our Nation or its people."). Neither statement purported to set forth a standard of review; indeed, both are consistent with an application of strict scrutiny. Cf. *Americans for Prosperity Foundation* v. *Bonta*, 141 S. Ct. 2373, 2383 (2021) (plurality opinion) ("Under strict scrutiny, the government must adopt 'the least restrictive means of achieving a compelling state interest.'") (citation omitted). And in any event, stray statements in separate writings cannot support the creation of a new tier of constitutional scrutiny.

In the context of "*compelled* disclosure," this Court has "settled on a standard referred to as 'exacting scru-

tiny,'" which is less demanding than strict scrutiny. *Americans for Prosperity*, 141 S. Ct. at 2383 (plurality opinion) (emphasis added; citation omitted); cf. *id.* at 2391 (Alito, J., concurring in part and in the judgment). It is unclear why the standard for *prohibited* disclosure—especially in the context of classified national security information—should be any higher, much less higher than strict scrutiny. Cf. *Seattle Times*, 467 U.S. at 32 (upholding protective order after considering whether the restriction "'furthers an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular government interest involved'") (brackets and citation omitted).

b. Petitioner does not identify any court that has adopted its proposed "extraordinarily exacting scrutiny" standard. To the contrary, in *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976), cited by petitioner (Pet. 23), this Court employed a test no more stringent than strict scrutiny in evaluating a court's protective order prohibiting the press from publishing certain information about a criminal proceeding until the jury was empaneled. See *id.* at 543-544. The Court balanced the defendant's Sixth Amendment right to a fair trial against the press's First Amendment right to report, including on matters occurring during public hearings. See *id.* at 561, 567-568. The Court also considered whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 562 (citation omitted). Because there were "alternative measures" that would have protected the defendant's rights, and

because the efficacy of the protective order was "far from clear," the Court held that the order violated the First Amendment. *Id.* at 565, 567.

The courts of appeals are similarly attuned to context and speaker in determining the appropriate standard of review to evaluate prior restraints, and they generally employ strict scrutiny.[3] In fact, in *Doe* v. *Mukasey*, *supra*—the most closely analogous decision, on which petitioner extensively relies for other purposes—the Second Circuit explained that the panel disagreed about whether the court should evaluate the nondisclosure requirement at issue there "under a standard of traditional strict scrutiny or under a standard that, in view of the context, is not quite as 'exacting' a form of strict scrutiny." 549 F.3d at 878 (quoting *Seattle Times*, 467

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[3] See, *e.g.*, *Sindi* v. *El-Moslimany*, 896 F.3d 1, 35-36 (1st Cir. 2018) (injunction restraining private parties from defaming another private party "cannot survive the strict scrutiny that the First Amendment demands of prior restraints on speech" because "less intrusive remedies" were available to address wrongful conduct); *In re Subpoena 2018R00776*, 947 F.3d 148, 156 (3d Cir. 2020) (holding that orders prohibiting grand jury witnesses from disclosing their receipt of service "are content-based restrictions and presumptively unconstitutional prior restraints[subject to] strict scrutiny"); *Beckerman* v. *City of Tupelo*, 664 F.2d 502, 509 (5th Cir. 1981) (ordinance requiring parade license was "an impermissible prior restraint upon free speech because it is not narrowly drawn to relate to health, safety, and welfare interests"); *Milwaukee Police Association* v. *Jones*, 192 F.3d 742, 749 (7th Cir. 1999) ("[I]n cases of a prior restraint on speech, the context in which the restriction occurs can affect the level of scrutiny applied."); *Burk* v. *Augusta-Richmond County*, 365 F.3d 1247, 1251 (11th Cir. 2004) ("Prior restraints are presumptively unconstitutional and face strict scrutiny."); *In re Sealed Case*, 77 F.4th 815, 829 (D.C. Cir. 2023) ("Both types of restrictions [(content-based and prior restraints)] are presumptively unconstitutional, and generally call for strict scrutiny.").

U.S. at 33). The court did not resolve the issue, but it is clear that the Second Circuit did not believe that the nondisclosure requirement compelled something *more* than strict scrutiny. And petitioner's passing suggestion (Pet. 25) that the court of appeals here applied something less than strict scrutiny is belied by the record. See Pet. App. 20a ("There is no dispute about the government's compelling interest here."); *id.* at 23a-24a ("Having intently studied the classified and unclassified materials in the record, we agree with the district court's considered assessment" that "no more narrow tailoring of the restrictions can be made."); see generally *id.* at 24a-27a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2023