No. A-_____

In the Supreme Court of the United States

TWITTER, INC.,

Applicant,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL; UNITED STATES DEPARTMENT OF JUSTICE; CHRISTOPHER WRAY, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; FEDERAL BUREAU OF INVESTIGATION,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Elena Kagan, Associate Justice of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Twitter, Inc.* respectfully requests a 45-day extension of time, to and including Thursday, September 28, 2023, within which to file a petition for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

A panel of the Ninth Circuit issued its opinion on March 6, 2023. The court denied rehearing en banc on May 16, 2023. Unless extended, the time to file a petition for a writ of certiorari will expire on August 14, 2023 by operation of Rules 13.1 and

* Twitter Inc. has been merged into X Corp. and no longer exists. Twitter, the online social media platform, has been re-branded as "X." This application continues to refer to "Twitter" throughout for ease of understanding.

13.3 of the Rules of this Court. This application is being filed at least 10 days prior to that date. See S. Ct. R. 13.5. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). A copy of the panel opinion and judgment is attached.

1. The Federal Bureau of Investigation is empowered by statute to seek information from electronic communication service providers, such as Twitter, about the users of those services. App., *infra*, 7. The FBI has two methods to obtain that information. First, it can issue national security letters (NSLs), pursuant to 18 U.S.C. § 2709. Second, the FBI can seek an order under the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801-1885c. Recipients of NSLs and FISA orders typically may not disclose the receipt of (or the content of) this national security process, see, *e.g.*, 18 U.S.C. § 2709(c)(1); 50 U.S.C. § 1805(c)(2)(B), but the prohibition on disclosure related to an *individual* NSL or of certain *individual* FISA order is subject to judicial review, see, *e.g.*, 18 U.S.C. § 3511; 50 U.S.C. § 1881a(i)(4).

Recipients are additionally prohibited by the Government from disclosing the aggregate amount of national security process they receive, including the total number of NSLs and the total number of FISA orders they receive in a specified period. To facilitate this prohibition, 50 U.S.C. § 1874 outlines complex limitations on recipients' speech, including the restriction that recipients only may disclose the aggregate amount of national security process they receive in preset reporting bands that begin with zero and end with numbers 99 to 999 (the precise band depends on the time period and the kind and combination of NSLs and FISA orders being disclosed). For example, if an entity hypothetically received three FISA orders and

two NSLs in a year, it may disclose only that it received such process between zero and 99 times in that year. There is no federal statute that provides for judicial review of these restrictions.

This case addresses the Government's prior restraint on Twitter's speech seeking to disclose the aggregate amount of national security process that it received. As part of its commitment to user privacy, Twitter releases periodic transparency reports that describe the volume of legal process it receives from governments around the world. In April 2014, at the U.S. Government's insistence, Twitter submitted a draft transparency report for pre-publication review. App., *infra*, 14. The Government deemed substantial portions of the report—which did no more than reflect Twitter's own experiences as the recipient of legal process—to be classified and prohibited Twitter from publishing it without redactions. App., *infra*, 15-16. There is no requirement that the Government periodically review this speech restriction to determine whether it remains necessary.

In October 2014, Twitter filed this lawsuit, asserting that the aggregate nondisclosure requirement violates the First Amendment in two ways. First, Twitter maintained that the restriction is a prior restraint on speech and therefore should be subject to the procedural requirements outlined in *Freedman* v. *Maryland*, 380 U.S. 51 (1965). Second, Twitter contended that the restriction does not satisfy the extraordinarily exacting scrutiny applied to prior restraints. After initially denying the Government's motion for summary judgment, the district court reconsidered its

order and granted the motion. See *Twitter, Inc.* v. *Barr*, 445 F. Supp. 3d 295, 305 (N.D. Cal. 2020).

The Ninth Circuit affirmed. Relying largely on this Court's decisions in *Seattle Times Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), and *Butterworth* v. *Smith*, 494 U.S. 624 (1990), the Ninth Circuit determined that *Freedman* "has not been extended to long-accepted confidentiality restrictions concerning government-provided information" and that *Freedman*'s protections are unnecessary in this context because the Government's speech restrictions "do not pose the same dangers to speech rights as do traditional censorship regimes." App., *infra*, 43.

That reasoning resulted in a circuit split, because the Second Circuit evaluated speech restrictions on NSL recipients in a materially identical case and determined that *Freedman* fully applies. See *John Doe, Inc.* v. *Mukasey*, 549 F.3d 861, 876-78 (2d Cir. 2008). In contrast with the Ninth Circuit, the Second Circuit rejected the Government's analogies to *Seattle Times* and *Butterworth*—where this Court upheld speech restrictions on "information obtained in civil discovery subject to a protective order" and information "learned" from another witness at "grand jury proceedings" *See Mukasey*, 549 F.3d at 876-77. In *Seattle Times*, the Second Circuit reasoned, the plaintiff received confidential information only because of "participation" in a government process—there, civil discovery subject to court control. But the "governmental interaction" rationale "has no application to an [NSL recipient] with no relevant governmental interaction prior to receipt of an NSL." *Mukasey*, 549 F.3d at 880. This is because, the court explained, the "recipient's 'participation'"—such as

it is—"is entirely the result of the Government's action." As for *Butterworth*, the Second Circuit explained that the "justification for grand jury secrecy inheres in the nature of the proceeding," but with NSLs, the secrecy is "imposed at the demand of the Executive Branch under circumstances where secrecy might or might not be warranted," depending on what the Government seeks to hide. *Id.* at 877. The Second Circuit thus reasoned that the plaintiff "ha[d] been restrained from publicly expressing a category of information" that "is relevant to intended criticism of a governmental activity," and fully imposed *Freedman*'s requirements. *Id.* at 878.

The Ninth Circuit also determined that the aggregate nondisclosure requirement satisfies strict scrutiny. In doing so, it did not apply the heightened scrutiny applicable to prior restraints, instead requiring only that the speech restriction be "sufficiently calibrated toward protecting the government's proffered national security interest." App., *infra*, 27. The panel later denied rehearing and the full Ninth Circuit denied rehearing en banc. App. *infra*, 75.

2. The certiorari petition will argue, among other things, that review is warranted because the Ninth Circuit's decision to curtail *Freedman* is inconsistent with this Court's precedents and conflicts with the Second Circuit's decision in *John Doe, Inc.* v. *Mukasey*, 549 F.3d 861 (2d Cir. 2008).

This Court has explained that the "chief purpose of the [First Amendment's] guaranty [is] to prevent previous restraints upon publication." *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931). *Freedman* thus instructs that prior restraints on speech must be subject to prompt judicial review, initiated by the government, and

that any restraint imposed prior to the completion of that judicial review be brief, serving only to maintain the status quo. 380 U.S. at 58-59. Although *Freedman* itself addressed a film-censorship statute, this Court has applied *Freedman* to a wide range of non-traditional prior restraints. See, *e.g.*, *City of Lakewood* v. *Plain Dealer Publ'g Co.,* 486 U.S. 750, 771-72 (1988) (mayor's discretion over the placement of news racks); *Blount* v. *Rizzi,* 400 U.S. 410, 418-19 (1971) (postmaster's discretion to censor mail); *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc,* 487 U.S. 781, 801 (1988) (a state's licensing requirements on professional fundraisers). The key thread running through these decisions is that because "[i]t is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them," *Carroll* v. *President & Comm'rs of Princess Anne,* 393 U.S. 175, 182 (1968) (internal quotation marks omitted), prior restraints on speech must be subject to *Freedman*'s procedural protections to ensure that government overreach is quickly checked by judicial oversight.

The Ninth Circuit, however, decided that *Freedman*'s protections are unnecessary because the aggregate nondisclosure requirement "is not 'a classic prior restraint'" in that "the recipient of the classified information at issue here is restrained only in speaking about information it received from the government." App., *infra*, 42-43 (quoting *Seattle Times*, 467 U.S. at 33). That description is just wrong. The Government initiated the contact with Twitter and now wishes to prohibit Twitter from disclosing those encounters. Twitter's desire to speak about the national security process it received is no different than a private citizen seeking to tell the

media that law enforcement officials served a warrant at her home—or, more precisely, the exact number of warrants that they served on her in the last year. Disclosing that knowledge is hardly sharing "information … received from the government," and the Government prohibiting such disclosure bears all the hallmarks of a "classic prior restraint," particularly because the Government seeks to silence public discussion about its own activities. The Ninth Circuit has created an exception to *Freedman* that has no basis in this Court's precedents and that has been rejected by the Second Circuit. *Mukasey*, 549 F.3d at 876-78.

Further, review is needed because the Ninth Circuit failed to apply the heightened scrutiny governing prior restraints on speech, contrary to its own precedents and decisions from this Court and other courts of appeals.

Because "[a]ny system of prior restraints of expression comes … bearing a heavy presumption against its constitutional validity," *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963), this Court imposes extraordinary exacting scrutiny on prior restraints. This standard requires that "the substantive evil must be extremely serious and the degree of imminence extremely high." *Landmark Commc'ns, Inc.* v. *Virginia,* 435 U.S. 829, 845 (1978); *New York Times Co.* v. *United States*, 403 U.S. 713, 730 (1971) (Stewart, J., joined by White, J., concurring) (to justify a prior restraint, the disclosure must "surely result in direct, immediate, and irreparable damage to our Nation or its people"). The Ninth Circuit, however, upheld the aggregate nondisclosure requirement after determining only that it was "sufficiently calibrated toward protecting the government's proffered national

security interest." App., *infra*, 27. As a result, it did not require the Government to show that serious and imminent harm is likely to occur without the prior restraint in place. This result contradicts decades of precedent in which prior restraints on speech were held to a more exacting standard than post-publication restrictions.

3. Applicant requests this extension of time to file its petition for a writ of certiorari because counsel primarily responsible for preparing the petition have had, and will continue to have, responsibility for a number of other matters with proximate due dates, including *Riley* v. *General Motors, LLC*, No. 23-11374 (11th Cir.) (appellant's brief due August 4, 2023); *CSX Transportation, Inc.* v. *Norfolk Southern Railway Co.*, No. 23-4008 (4th Cir.) (appellant's brief due August 31, 2023); and *Meadows* v. *Cebridge Acquisition, LLC*, No. 23-1142 (4th Cir.) (appellant's brief due September 5, 2023), as well as previously scheduled international travel. Accordingly, an extension of time is warranted.

For the foregoing reasons, the application for a 45-day extension of time, to and including September 28, 2023, within which to file a petition for a writ of certiorari in this case should be granted.

Respectfully submitted.

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