No. 23-342

In the Supreme Court of the United States

X CORP.,

Petitioner,

v.

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

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The Rule 29.6 statement in the petition remains accurate.

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The Government's Opposition demands extraordinary power to censor speech, free of the usual protections afforded by the First Amendment. Its arguments against review are wrong.

First, the Government seeks exemption from the procedural requirements mandated by *Freedman* v. *Maryland*, 380 U.S. 51 (1965), on the ground that the speech restriction here is not the product of subjective, discretion-based censorship, but instead follows from mechanical application of the USAFA reporting bands. It is wrong: As the Government expressly acknowledged below, it performed an *individualized* assessment of Twitter's speech to decide whether Twitter could publish aggregate data outside the reporting bands. Moreover, the USAFA itself grants discretionary authority to the Government to allow publication by ECSPs of data outside the bands, which the Government here consciously chose to deny. The Government's decision to silence Twitter was thus precisely the type of content-based, intentional censorship that requires *Freedman*'s protections.

Second, the Government denies a conflict between the decision below and *John Doe, Inc.* v. *Mukasey*, 549 F.3d 861, 876-878 (2d Cir. 2008), where the Second Circuit applied *Freedman* to a materially identical nondisclosure requirement. Wrong again: The Ninth Circuit itself candidly and expressly acknowledged rejecting *Mukasey* and its reasoning, which the court below recognized cannot be distinguished factually or legally from this case.

Third, the Government denies that this Court and other courts of appeals apply extraordinarily exacting scrutiny to prior restraints on speech. Wrong for a third time: It is a "distinction * * * deeply etched in our law" that "[t]he presumption against prior

restraints is heavier" than that against post-publication restrictions. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558-559 (1975). This Court and other courts of appeals will uphold a prior restraint only upon a showing that the restraint is needed to prevent imminent, serious harm—a standard the Ninth Circuit here admittedly did not apply.

Fourth, the Government offers an opaque word salad to obscure the serious threat to free speech posed by its conduct. At bottom, the Government's argument against review reduces to the proposition that, because national security is serious business, government censors should receive boundless discretion. But "trust us, we're the Government," is not the controlling constitutional principle. In fact, the rule of *Freedman* and the related First Amendment protections sought by Twitter—and rejected by the Ninth Circuit—are of *special* importance in cases like this, where the Government is trying to block disclosure of its own interactions with the citizenry. The issue here arises in an area of profound importance to the public, and one where official misconduct is not unknown; the Government seeks the authority to suppress speech routinely and without any meaningful oversight. Further review is warranted.

I. The Ninth Circuit Departed From This Court's Precedents And Created A Circuit Conflict.

A. The Ninth Circuit Misunderstood *Freedman*.

1. The Government acknowledges that *Freedman*'s procedural protections apply to "prior-restraint 'scheme[s] with rather subjective standards * * * where a denial likely mean[s] complete censorship.'"

Opp. 13 (quoting *City of Littleton* v. *Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 782 (2004)); see also Opp. 18 (*Freedman* applies when "the regime for review employs subjective standards or grants overly broad discretion to censors"). But it argues that *Freedman* is inapplicable here because "[t]he FBI's redaction of [Twitter's] draft transparency report was based on *objective criteria*, now codified by statute"—the reporting bands in 50 U.S.C. 1874(a). Opp. 15 (emphasis added). The Government's only justification for discounting *Freedman* is the contention that its censors did not exercise discretion.

But that is false. In fact, before the trial court the Government sought to establish that its censorship of Twitter's Transparency Report was narrowly tailored by asserting that censors *did* perform an "individualized analysis" of the aggregate amount of national security process that Twitter had received and sought to disclose, restricting Twitter's speech "in light of the particular information and speaker at issue." Gov't D. Ct. Opp. 4, 7, ECF No. 321; see also *id*. at 1 (explaining how the Government "assessed the particular information that Plaintiff seeks to disclose"). Far from mechanically applying the objective limitations in the reporting bands, the Government made the discretionary decision to engage in censorship. This makes *Freedman* directly applicable, even on the Government's terms.

For this reason, *Littleton*, which the Government invokes repeatedly (Opp. 13-14, 16), has no application here. *Littleton* addressed a city licensing scheme for adult businesses. This Court held that *Freedman* procedures were unnecessary because the city "applie[d] reasonably objective, nondiscretionary criteria *unrelated to the content of the expressive*

materials that an adult business may sell or display." 541 U.S. at 783 (emphasis added). Those objective criteria included whether the adult-business owner had "not timely paid taxes" or recently had their "license revoked." *Id.* at 783. Such "simple" requirements did "not seek to *censor* material" at all, and were "unlikely in practice to suppress totally the presence of any specific item of adult material" because some adult businesses in Littleton would satisfy all the requirements. *Id.* at 782-783.

Here, in contrast, the Government applied criteria that are directly "[]related to the content of the expressive materials" at issue, assessing the particular speech that Twitter sought to publish and deciding to censor Twitter's speech *only* because of the speech's content. What's more, there is no other avenue of publication for this speech; no other speaker will publicize the amount of national security process Twitter received. Indeed, even if the Government were slavishly applying objective, non-content-based standards to Twitter's speech—which it is not—*Freedman* procedures would still be required because the Government's "denial likely mean[s] complete censorship" of Twitter's speech for a minimum of 25 years. *Littleton*, 541 U.S. at 782; Pet. 4. *Freedman* fully applies; the Ninth Circuit erred in holding otherwise.

And our disagreement here with the Government is not a case-specific factual dispute about the nature of its censorship practices in cases of this sort (although the Government's bait-and-switch argument change between the courts below and this Court also militates in favor of review). The Government contends that its censorship of information relating to national security process is not subject to *Freedman*,

evidently as a matter of law. That is a recurring issue of nationwide, fundamental importance.

2. The Government also is wrong when it sees no First Amendment problem in its refusal to exercise what it concedes to be available discretion. Opp. 19-20. Under 50 U.S.C. 1874(c), the reporting bands in Section 1874(a) do not "prohibit[] the Government and any person from jointly agreeing to the publication of information" about national security process "in a time, form, or manner other than" the approved reporting bands. As the district court explained, Section 1874(c) is a "grant of discretion" to the Government "to permit greater detail in reporting." Pet. App. 113a. The Government now asserts that Section 1874(c) is not "the type of overbroad grant of discretion to a censor that would warrant *Freedman*'s heightened procedural safeguards" because it does not "require" the government to allow additional disclosure and, in any event, does not "provide[] judicially manageable standards for determining when or on what terms the government should make such an agreement." Opp. 20. But the Government has it backwards—it is precisely because Section 1874(c) imposes no requirements on the Government, procedural or substantive, in assessing a speaker's proposed disclosure that *Freedman*'s protections are essential.[1]

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[1] The Government complains that Twitter "has not challenged" Section 1874(c). Opp. 20. But as the district court recognized, see Pet. App. 82a, this case is not a facial challenge to the reporting bands; Twitter challenges the aggregate nondisclosure requirement as applied through the Government's decision to censor the Transparency Report after pre-publication review. See Pet. 9-10.

B. The Ninth Circuit's *Freedman* Analysis Conflicts With That Of The Second Circuit.

The Government is equally wrong in denying a conflict with *Mukasey*. Opp. 21.

First, the Ninth Circuit expressly rejected the Second Circuit's holding and reasoning. The court below declared itself "not persuaded" by the Second Circuit's reasoning, accusing the Second Circuit of "fail[ing] to recognize that *Freedman* has not been extended to long-accepted confidentiality restrictions concerning government-provided information." Pet. App. 40a. Indeed, in limiting *Freedman*'s reach, the Ninth Circuit analogized to *Seattle Times* v. *Rhinehart*, 467 U.S. 20 (1984), and *Butterworth* v. *Smith*, 494 U.S. 624 (1990), comparisons that the Second Circuit expressly rejected. Pet. 3, 22; *Mukasey*, 549 F.3d at 877. The Government makes no attempt to explain why the Ninth Circuit thought itself to be departing from the Second Circuit if it actually wasn't.

Second, *Mukasey* involved a materially identical speech restriction on national security letters (NSLs). Prior to passage of the USAFA, the Government could impose a gag order on NSL recipients if a senior FBI official certified that certain harms "may result" from the NSLs' disclosure. 549 F.3d at 866 (quotation marks omitted). There was no judicial review of this discretionary decision prior to the imposition of the prior restraint. The Second Circuit held that this regime violated *Freedman*. *Id*. at 878-879. That situation is on all fours with the aggregate nondisclosure requirement at issue in this case. Here too, government officials exercise discretion to silence recipients of national security process—including the very same type of process that *Mukasey* addressed, NSLs. And

here too, the nondisclosure requirement does not receive judicial review unless the recipient challenges the gag order after it is imposed. The Ninth Circuit's decision not to impose *Freedman*'s protections cannot be reconciled with *Mukasey*.

Third, the Government says that *Mukasey* is different from this case because there 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,'" while here the "'interests in secrecy arise from the nature of the' government's national security investigations." Opp. 21 (quoting *Mukasey*, 549 F.3d at 877). But that is no distinction at all. *Mukasey* involved NSLs just like those at issue in this case, so the Government's interest in secrecy was exactly the same—and the Second Circuit applied *Freedman*. The Government offers nothing about its treatment of national security information in *Mukasey* that, for *Freedman* purposes, differs from its treatment of the censored material here.. The Ninth Circuit reasoned that *Freedman* is inapplicable to speech restrictions on "information transmitted confidentially as part of a legitimate government process" (Pet. App. 39a), but that does not distinguish *Mukasey*, which held *Freedman*'s protections necessary in just that circumstance.

Fourth, the Government argues that *Mukasey* "is of little to no prospective importance" because the statute there was amended by the USAFA. Opp. 22. But *Mukasey*'s constitutional holding remains good law in the Second Circuit, stating a rule regarding national security surveillance that is at odds with the Ninth Circuit's approach. There is no doubt that, under the rule of *Mukasey*, this case would have come

out differently in the Second Circuit. That conflict warrants this Court's review; fundamental constitutional protections should not apply differently in different parts of the country.

II. The Ninth Circuit Erred When It Refused To Apply Extraordinarily Exacting Scrutiny To A Prior Restraint On Speech.

1. The Government denies that prior restraints on speech are subject to more exacting review than post-publication punishment, rejecting the holding of the *Pentagon Papers* case (*New York Times Co.* v. *United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring)) and claiming that Twitter "does not identify any court that has adopted" this heightened standard. Opp. 23-24. That is wrong.

This Court acknowledged that it imposes heightened requirements for prior restraints on speech in *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975) (see Pet. 26), where it explained that "[t]he presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Id.* at 558-559. This "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." *Id.* at 559; see also *Neb. Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976) ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"). The Government dismisses this longstanding distinction between prior and post-publication restraints.

The Court described the extraordinarily exacting review of prior restraints in *Landmark*

Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978) (see Pet. 23-24). The Government oddly asserts (Opp. 22-23) that *Landmark* did not address prior restraints at all. In truth, the decision determined the constitutionality of a Virginia statute that prohibited the media from reporting on proceedings about judicial misconduct—a flagrant prior restraint. 435 U.S. at 830. The *Landmark* Court explained that prior restraints are permissible only when needed to avoid an imminent "substantive evil" that is "extremely serious." *Id.* at 845. Further, "[t]he danger must not be remote or even probable; it must immediately imperil." *Ibid.* (quotation marks omitted). This analysis is different from regular strict scrutiny, where the government needs a compelling interest and its means of achieving that interest must be narrowly tailored. See *Reed* v. *Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015). In contrast, to justify a prior restraint, the Government must show that the restraint is needed to avoid an imminent and serious danger.

This imminent-danger requirement is reflected in decisions from numerous courts of appeals. See, *e.g.*, *Sindi* v. *El-Moslimany*, 896 F.3d 1, 31-32 (1st Cir. 2018) ("a prior restraint on speech must survive the most exacting scrutiny demanded by our First Amendment jurisprudence," which means that "a party who seeks a remedy in the form of a prior restraint must establish that the evil that would result from the offending publication is both great and certain and cannot be mitigated by less intrusive measures") (quotation marks omitted); *In re Goode*, 821 F.3d 553, 559 (5th Cir. 2016) ("Generally, a prior restraint is constitutional only if the Government can establish that the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest.") (quotation

marks omitted); *Procter & Gamble Co.* v. *Bankers Trust Co.*, 78 F.3d 219, 224-225 (6th Cir. 1996) (similar); *Rodgers* v. *U.S. Steel Corp.*, 536 F.2d 1001, 1008 (3d Cir. 1976) (similar).

The Ninth Circuit approved the prior restraint on Twitter's speech without any finding of imminent harm. Its decision to reject a longstanding feature of this Court's First Amendment jurisprudence deserves this Court's attention.

2. In fact, the Government's showing is so deficient that it could not satisfy even the scrutiny applied to post-publication restrictions on speech—let alone the more exacting review applicable to prior restraints.

First, if the Court credits the Government's revisionist assertion that, rather than perform an individualized assessment of Twitter's Transparency Report, it mechanically applied the reporting bands (which even if robotically applied remain content-based), the speech restriction is not narrowly tailored because the Government never scrutinized whether Twitter's particular speech could be disclosed.

Second, as Twitter argued below, the nondisclosure requirement is not narrowly tailored because it extends for at least 25 years, a period that is further extendable at the Government's option and that the Government is under no obligation to revisit periodically—as the Government confirmed when it stated (Opp. 20) that it feels no obligation to consider additional disclosures under Section 1874(c). Yet a speech restriction that lasts longer than absolutely necessary to achieve the Government's ends is, by definition, not the least restrictive means and thus not narrowly tailored. See *United States* v. *Playboy Ent. Grp. Inc.*, 529

U.S. 803, 813 (2000). The Government offers no defense for this constitutional defect in its censorship regime.

III. The Government Ignores The Critical Free-Speech Issues Raised By This Case.

The Ninth's Circuit's narrow reading of *Freedman* and refusal to apply heightened scrutiny is particularly dangerous because the Government is silencing entities that seek to disclose their own compelled interactions with *it*. See Pet. 16-17, 26-27. This is, as Twitter has explained, analogous to the Government telling a private citizen that she may not disclose to the media the number of warrants the police served on her in the last year. See Pet. 17.

The Government has no real response to this concern. It insists that the nondisclosure requirement "do[es] not apply to the population generally" but "only to persons who are under nondisclosure obligations related to their roles in confidential national security investigations." Opp. 20. But Twitter—and other ECSPs—do not volunteer for these "roles." The Government compels them to participate in investigations under threat of legal sanction. And there is no principled reason why the analysis used below must be limited to national security investigations. Following the roadmap provided by the Ninth Circuit, FBI agents, DHS personnel, and local police officers could force interactions with private citizens, declare those interactions confidential or classified, and effectively silence criticism. The Government offers no limit that would preclude such restrictions on speech. In fact, the Government's argument is alarmingly circular: "[T]he information petitioner seeks to disclose is classified—and classified information obviously must be

kept secret." Opp. 22. That is a recipe for boundless censorship.

"A major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Landmark Commc'ns*, 435 U.S. at 838 (quotation marks omitted). Because recipients of national security process have every right to participate in the national conversation about the scope and extent of government surveillance—a controversial topic of immense significance—they should receive the full protections for speech afforded by this Court's precedents: *Freedman's* procedural requirements and the exacting scrutiny applied to prior restraints on speech. The Court should grant review to resolve the conflict between the Second and Ninth Circuits, correct the Ninth Circuit's departure from this Court's precedents, and affirm the importance of vigorous First Amendment protections for speech on matters of public importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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