No. 23-342

IN THE

Supreme Court of the United States

TWITTER, INC.,

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 OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PETITIONER TWITTER, INC.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Electronic Frontier Foundation ("EFF") is a member-supported, nonprofit civil liberties organization that has worked for more than 30 years to protect innovation, free expression, and civil liberties in the digital world. On behalf of its more than 39,000 dues-paying members, EFF ensures that users' interests are presented to courts considering crucial online free speech issues, including their right to transmit and receive information online. EFF has appeared in this Court as amicus in cases involving constitutional challenges to government surveillance and other restrictions on free expression. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018) (citing EFF's amicus brief); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (same).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from Twitter's attempt to publish a transparency report that would have disclosed the aggregate number of government surveillance orders it received during a six-month period in 2013. Before publication, however, the FBI reviewed a draft of the report and forbade Twitter from publishing it.

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1. Pursuant to Sup. Ct. R. 37.2, EFF notified the counsel of record for the parties that it intended to file this brief at least 10 days before its filing. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, or its counsel, made a monetary contribution intended to fund its preparation or submission.

In barring Twitter from engaging in speech before that speech occurred, the government imposed a quintessential prior restraint, "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (cleaned up). Unlike the "threat of criminal or civil sanctions after publication," which "chills" speech, prior restraints entirely "freeze" speech for their duration, *Nebraska Press*, 427 U.S. at 559—in this case, more than nine years and counting.

The Ninth Circuit broke from this Court's bedrock First Amendment jurisprudence in several respects. First, despite clear direction from this Court that prior restraints are "the least tolerable" infringement on speech and thus subject to the "most exacting" scrutiny, the opinion applied a lesser version of strict scrutiny accorded to post-publication punishment of speech. *See Twitter, Inc. v. Garland*, 61 F.4th 686, 707 (9th Cir. 2023). Second, the Ninth Circuit held that the government's prohibition on Twitter's speech was not entitled to the procedural protections historically accorded prior restraints set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965). Instead, it announced a vast new category, unsupported by precedent, to which *Freedman* is purportedly inapplicable: "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." 61 F.4th at 707. Moreover, the court ignored numerous cases applying *Freedman*

outside of traditional "censorship and licensing schemes." *Id.* at 704 (quoting *In re NSL*, 33 F.4th 1058, 1066–77 (9th Cir. 2022)).

These errors undermine at least one hundred years of this Court's precedent subjecting prior restraints to unique—and uniquely demanding—First Amendment scrutiny. Hence, amicus urges the Court to grant certiorari so it can fully consider whether to approve such a drastic rewriting of First Amendment law, one that is directly counter to precedent from this Court.

The consequences of the lower court's decision are severe and far-reaching. It carves out, for the first time, a whole category of prior restraints that receive no more scrutiny than subsequent punishments for speech—expanding officials' power to gag virtually anyone who interacts with a government agency and wishes to speak publicly about that interaction. These are matters of exceptional importance and public concern that further merit this Court's consideration.

ARGUMENT

I. THE NINTH CIRCUIT'S TREATMENT OF PRIOR RESTRAINTS DEFIES THIS COURT'S LONGSTANDING FIRST AMENDMENT PRECEDENT.

A. Prior Restraints Are Uniquely Disfavored Under Longstanding First Amendment Precedent.

The Ninth Circuit's decision below runs counter to what was previously one of the most undisputed and "deeply

etched" precepts in First Amendment law: that prior restraints are the "essence of censorship." *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *Nebraska Press*, 427 U.S. at 557 (quoting *Near v. Minnesota*, 283 U.S. 697, 713 (1931)). Indeed, as this Court recognized 116 years ago, "the main purpose of the First Amendment is to prevent all such Previous restraints upon publications as had been practiced by other governments." *Nebraska Press*, 427 U.S. at 557 (quoting *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)) (cleaned up) (distinguishing prior restraints from subsequent punishment of speech).

The First Amendment has always uncontroversially protected against prior restraints. The Founders debated only whether—as Blackstone had earlier claimed—it included other restrictions on speech as well. *Near*, 283 U.S. at 714–15. And although the First Amendment was ultimately interpreted to also protect against post-publication intrusions on the freedoms of speech and the press, prior restraints remained more strongly disfavored. Indeed, the Court observed in 1931 that the use of prior restraints was so far outside our constitutional tradition that "there ha[d] been almost an entire absence of attempts to impose" them—a consistency that reflects "the deep-seated conviction that such restraints would violate constitutional right[s]." *Near*, 283 U.S. at 718. Thereafter, "the principles enunciated in *Near* were so universally accepted that the precise issue did not come before" the Court for another forty years. *Nebraska Press*, 427 U.S. at 557–58 (citing *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971)).

This Court's decision in *Nebraska Press* demonstrates just how well-established these principles were. In that

case, the Court was asked to determine whether the right to a fair trial could justify a broad prior restraint against reporting a criminal defendant's purported confession. 427 U.S. at 541. But the aspect of the trial judge's restrictive order most analogous to the prohibition at issue here—a prohibition on "reporting the exact nature of the restrictive order itself"—was so patently unconstitutional that the Nebraska Supreme Court voided it before the remainder of the publication bar reached this Court. *Id.* at 544. *See also State v. Simants*, 236 N.W.2d 794, 799, 805 (Neb. 1975).

The unbroken line of authority that prior restraints are reserved "for exceptional cases," *Near*, 283 U.S. at 716, has given rise to special substantive and procedural protections, each unique to prior restraints, including a heavy presumption of unconstitutionality that the government must overcome. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Keefe*, 402 U.S. at 419. Even if publication entails the risk of sanctions, "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." *Conrad*, 420 U.S. at 559.

B. The Ninth Circuit Broke from Precedent Requiring That Prior Restraints Be Subject to the "Most Exacting" Scrutiny.

Following this Court's decisions in *New York Times v. United States* (*Pentagon Papers*), 403 U.S. 713 (1971), and *Smith v. Daily Mail*, 443 U.S. 97 (1979), appellate courts around the country have consistently subjected prior restraints to the "most exacting scrutiny." *Smith*, 443 U.S. at 102. *See Sindi v. El-Moslimany*, 896 F.3d 1,

31–32 (1st Cir. 2018) (citing *Nebraska Press*, 427 U.S. at 559); *United States v. Quattrone*, 402 F.3d 304, 310 (2d Cir. 2005); *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 473 (5th Cir. 1980); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 224–225 (6th Cir. 1996) (citing *CBS v. Davis*, 510 U.S. 1315, 1317 (1994)); *CBS v. U.S. Dist. Ct.*, 729 F.2d 1174, 1178 (9th Cir. 1984); *Halperin v. Dep't of State*, 565 F.2d 699, 707 (D.C. Cir. 1977).

Under this "most exacting" standard, both requirements of traditional "strict scrutiny"—that the challenged government action advance a compelling interest, and that the government action is narrowly tailored to achieve that interest—are heightened.

First, to pass constitutional muster, a prior restraint must do more than merely further a compelling interest. It must instead be necessary to further an urgent governmental interest of the highest magnitude. *Landmark Commc'ns Inc. v. Virginia*, 435 U.S. 829, 845 (1978). This is an exceedingly high bar. This standard requires the government to show that the harm it seeks to prevent through the silencing of a speaker is not only extremely serious but "direct, immediate, and irreparable." *Pentagon Papers*, 403 U.S. at 730 (Stewart, J., joined by White, J., concurring); *see id.* at 726–27 (Brennan, J., concurring). The government must also show that such harm is not remote, but essentially imminent. *See Landmark Commc'ns*, 435 U.S. at 845 (requiring that "the degree of imminence" be "extremely high" and substantiated through a "solidity of evidence"). Lower courts have consistently applied these standards. *See Domingo v. New England Fish Co.*, 727 F.2d 1429, 1440 n.9 (9th Cir. 1984); *Levine v. U.S. Dist. Ct.*, 764 F.2d 590,

595 (9th Cir. 1985) (speech must pose "either a clear and present danger or a serious and imminent threat"); *Matter of Providence Journal Co.*, 820 F.2d 1342, 1348–49 (1st Cir. 1986); *Beckerman v. City of Tupelo*, 664 F.2d 502, 514 (5th Cir. 1981).

Second, when analyzing prior restraints, the Court has imposed an especially demanding form of the narrow-tailoring requirement, explaining that prior restraints must be "couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). The government must also show that the prior restraint will actually prevent the harm, and that it has no alternative to the prior restraint to prevent such harm. *Nebraska Press*, 427 U.S. at 562, 565, 569–70.

Relevant here, this exacting scrutiny applies even when the government asserts an interest in protecting national security. *See, e.g.*, *Ground Zero Ctr. For Non-Violent Action v. U.S. Dep't of Navy*, 860 F.3d 1244, 1259–60 (9th Cir. 2017) ("national security interests . . . are generally insufficient to overcome the First Amendment's 'heavy presumption' against the constitutionality of prior restraints" (citing *Pentagon Papers*, 403 U.S. at 714)); *Nebraska Press*, 427 U.S. at 591–94 (Brennan, J., concurring). That should not be surprising, as prior restraint precedents frequently involve the clash between the First Amendment and interests of "the first importance," such as the Sixth Amendment right to a fair trial. *CBS v. U.S. Dist. Ct.*, 729 F.2d at 1178 (citing *Nebraska Press*, 427 U.S. at 562). But even then, the First

Amendment prevails in all but the most "exceptional cases." *Nebraska Press*, 427 U.S. at 590.

Regardless of the nature of the government's asserted interest in imposing a prior restraint, long-standing precedent required the Ninth Circuit to subject the gag order to the "most exacting" scrutiny. But the court deemed Twitter's request to apply this heightened scrutiny "meritless." 61 F.4th at 698 (quoting *In re NSL*, 33 F.4th at 1076 n.21). The Ninth Circuit's decision means that the same scrutiny applies to all content-based restrictions on speech, be they prior restraints or after-the-fact punishments, thus jeopardizing bedrock First Amendment protections against unconstitutional prior restraints.

C. The Ninth Circuit Erred in Holding That *Freedman*'s Procedural Protections Do Not Apply.

In those rare circumstances where the government's interest in a prior restraint overcomes the heavy presumption of unconstitutionality, would-be speakers subject to the prior restraint are also accorded the crucial procedural protections set forth by this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965).

Under *Freedman*, (1) the burden of justifying the prior restraint always remains with the government; (2) the government will seek judicial approval of the prior restraint within a specified brief period; (3) any temporary restraint imposed pending the judicial determination shall be only for the purposes of preserving the status quo for the shortest fixed period compatible with sound

judicial determination; and (4) the procedure must assure a prompt final judicial determination. *Id.* at 58–59; *see also Se. Promotions*, 420 U.S. at 559; *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002). The purpose of these protections is to promptly ensure exacting judicial oversight to minimize the duration of improperly issued restrictions. *Freedman*, 360 U.S. at 58 ("[O]nly a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint").

Once the Ninth Circuit eliminated the heightened substantive scrutiny previously accorded prior restraints, these procedures were the only special protections left. But rather than ensuring that *Freedman* was followed, the lower court sharply limited *Freedman* only to speech restrictions that are "closely analogous" to the "film censorship scheme" at issue in *Freedman* itself. 61 F.4th at 707–08. This leaves a vast array of other prior restraints with no special protection at all in the Ninth Circuit, again despite the ample authority from this Court requiring it.

1. The Ninth Circuit wrongly excluded information "generated by the government" from prior restraint protections.

Freedman's protections apply to all extrajudicial prior restraints because they are designed to involve the judiciary as quickly as possible, with a "prompt final judicial determination" as the ultimate goal. 380 U.S. at 59. There is no precedential support for the Ninth Circuit's decision to exempt "government restrictions on the disclosure of information transmitted confidentially

as part of a legitimate government process" from these requirements. 61 F.4th at 707.

The Ninth Circuit's chief authority for its exception, *Butterworth v. Smith*, 494 U.S. 624 (1990), actually supports the application of *Freedman* to the censorship of Twitter's transparency report. *See* 61 F.4th at 705, 708. In *Butterworth*, this Court struck down part of a Florida law that prohibited grand jury witnesses from disclosing their own testimony even after the grand jury was discharged. *See* 494 U.S. at 632. That voided prohibition is more closely analogous to the speech restriction in this case. *See* 61 F.4th at 705 ("The state's interest in preserving the secrecy of grand jury proceedings did not overcome the witness's 'First Amendment right to make a truthful statement of information *he acquired on his own*.'" (emphasis in original) (quoting *Butterworth*, 494 U.S. at 636)). Although *Butterworth* left a portion of the statute in place, that portion did not authorize prior restraints because it concerned punishment *after* publication; it did not gag speech before it occurred.[2]

The Ninth Circuit also erred in relying on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), for the proposition that *Freedman* does not apply here. *See* 61 F.4th at 705. In *Seattle Times*, this Court held that a newspaper had to comply with a protective order (to which it had agreed) prohibiting the disclosure of discovery material. 467 U.S. at 24–27, 36. In declining to apply

2. Statutes that criminalize the publication of certain information are not considered prior restraints because unlike judicial and executive orders, they are not self-executing. *Landmark Commc'ns*, 435 U.S. at 833, 838 (statute that allowed for punishment after publication not a prior restraint).

the "exacting First Amendment scrutiny" accorded to a "classic prior restraint," the Court emphasized that the newspaper previously agreed to follow the protective order to obtain the information in the first place, therefore distinguishing it from prior restraint cases in which a speaker is involuntarily gagged. *Id.* at 32–34. *See also Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (recognizing that *Seattle Times* applies narrowly and only to restraints on parties to civil litigation who have gained access to information by agreeing to a protective order as part of the discovery process). This case, of course, does not involve any such agreed-upon restrictions.

Moreover, there are many cases in which this Court applied the special scrutiny due to prior restraints where the ultimate *source* of the information the government seeks to control was the government itself. *See, e.g.*, *Nebraska Press,* 427 U.S. at 543 (press heard confession and other evidence while attending pretrial hearing); *Oklahoma Publ'g Co. v. Dist. Ct.*, 430 U.S. 308, 309 (1977) (reporters obtained juvenile's name by attending court hearing which by law was supposed to be closed); *Pentagon Papers*, 403 U.S. at 713 (Pentagon Papers generated by a Defense Department contractor). *See also CBS v. U.S. Dist. Ct.*, 729 F.2d at 1176 (temporary restraining order preventing CBS from broadcasting surveillance tapes created by the government).

The Ninth Circuit opinion also creates a split with the Second Circuit in *Doe v. Mukasey*, 549 F.3d 861, 877 (2d Cir. 2008), which applied *Freedman* and rejected the government's attempts to rely on *Butterworth* and *Seattle Times*. The Ninth Circuit attempted to distinguish

Mukasey as "fail[ing] to recognize that *Freedman* has not been extended to long-accepted confidentiality restrictions concerning government-provided information because of the differences between these types of confidentiality requirements and traditional prior restraints." 61 F.4th at 708. But this case does not involve the kinds of "government confidentiality agreements" that "court have upheld" in the past "without discussing or considering *Freedman*'s application." *See* 61 F.4th at 707 (citing *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980)). Cases like *Snepp* involve confidentiality agreements with people who *elected* to work for the government and were thus granted access to the government's classified information. *See Snepp*, 444 U.S. at 509 n.3; *see also McGehee v. Casey*, 718 F.2d 1137, 1147–48 & n.22 (D.C. Cir. 1983) (upholding CIA's prepublication determination based on pre-existing secrecy agreement signed by former employee, but noting that "if the CIA did seek judicial action to restrain publication [on national security grounds], it would bear a much heavier burden" (citing *Pentagon Papers*, 403 U.S. at 714; *Bantam Books*, 372 U.S. at 70; *Near*, 283 U.S. at 713)).

Twitter's case is nothing like those: it is a private company operating a publicly available service, *forced* into interactions with the government through the government's unilateral imposition of surveillance demands for data about Twitter's users and the government's unilateral classification decisions. *See Mukasey,* 549 F.3d at 877 (rejecting analogy to *Snepp* in case where Internet service provider "had no interaction with the Government until the Government imposed its nondisclosure requirement upon it"). What's more, the classification here does not merely concern the substance of the government's demands but extends to the fact that the government made any demands at all.

The Ninth Circuit was incorrect that both of these types of "government-provided information" are identical for purposes of the First Amendment. 61 F.4th at 708. The government unilaterally gagging a private entity is eminently distinguishable from an arms-length contractual agreement conditioning access to confidential information on a future obligation to seek permission before publishing that information. And for the government to gag that private party without the protections that have applied to executive prior restraints for more than a century is nothing short of radical.

2. *Freedman*'s procedural protections are not limited to permitting or licensing schemes.

Also contrary to the Ninth Circuit's opinion, 61 F.4th at 707, this Court and lower courts have consistently applied *Freedman*'s procedural protections to government speech bans that are not part of a permitting or licensing schemes.

In *Vance v. Universal Amusement Co.*, 445 U.S. 308, 310, 316 (1980), for example, a Texas statute empowered the state to obtain an ex parte temporary restraining order lasting as long as ten days, which could be converted into a much longer temporary injunction, against exhibiting films if the distributor had demonstrated a habitual "commercial exhibition of obscenity" in the past. A court ultimately decided whether an injunction was warranted. The scheme in *Vance* was not a permitting scheme, and there was no pre-exhibition review of enjoined films. Indeed, films that were actually enjoined were not reviewed at all. Instead, injunctions were based on past exhibitions. *Vance*, 445 U.S. at 316 & nn.4 & 5.

Nevertheless, the Supreme Court approved the lower court's finding that the schemes were "procedurally deficient, and that they authorize prior restraints that are more onerous than is permissible under *Freedman*" and its progeny. *Id.* at 317. *See also Carroll*, 393 U.S. at 181–82 (no permitting scheme involved in ex parte restraining order against rally); *Nat'l Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam) (denial of stay of broad, content-based injunction against rally).

Likewise, the Ninth Circuit itself previously applied *Freedman* to a speech injunction, as opposed to a pre-exhibition review scheme, in *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980). The court held that preliminary and permanent injunctions authorized by a public nuisance statute were an unconstitutional prior restraint. 631 F.2d at 138. Emphasizing that "the burden of supporting an injunction against future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication," the court found the statute failed to satisfy *Freedman*. *Id.* (quoting *Vance*, 445 U.S. at 315).

Even if *Freedman* were limited to permitting or licensing schemes, which it is not, the government's actions here impose a de facto licensing scheme. A "licensing scheme" is any regime that forbids individuals from publishing without obtaining government permission in advance. *See Alexander*, 509 U.S. at 550. Classic licensing schemes include municipal requirements that the public obtain permits to protest on public streets, *see Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969); local ordinances prohibiting public assembly in city parks without government sign-off, *see Hague*

v. CIO, 307 U.S. 496, 516 (1939); state laws proscribing the solicitation of money absent an official's say-so, *see Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940); and laws regulating adult entertainment businesses, *see City of Littleton v. Z.J. Gifts D-4*, 541 U.S. 774, 776, 780 (2004).

The government's requirement that Twitter seek permission before publication and then the resulting determination that Twitter could not publish its proposed transparency report fit comfortably into this group. Like other extrajudicial licensing schemes, this prepublication review shared the "special vice" of all prior restraints: it suppressed speech "before an adequate determination that it is unprotected," rather than punishing unprotected speech after it is uttered. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973). Agency censors were "empowered to determine whether the applicant should be granted permission—in effect, a license or permit—on the basis of [their] review of the content of the proposed [speech]." *Conrad*, 420 U.S. at 554. And these censors imposed these restrictions without a "prior judicial determination" that their judgment was correct. *Alexander*, 509 U.S. at 551.

II. THE NINTH CIRCUIT'S DECISION LEAVES A WIDE RANGE OF VITALLY IMPORTANT SPEECH SUBJECT TO UNCERTAIN FIRST AMENDMENT PROTECTION.

By creating an exception to prior restraint doctrine for "information transmitted confidentially as part of a legitimate government process," and in holding that *Freedman* applies only to certain kinds of censorship and licensing schemes, the Ninth Circuit decision enables the

government to unilaterally impose prior restraints on speech about matters of public concern, while restricting recipients' ability to meaningfully test these gag orders in court. 61 F.4th at 707. This Court must step in to resolve these far-reaching doctrinal errors, or else risk granting the government far too much authority to shield its activities from public scrutiny.

Under the Ninth Circuit's reasoning, the government need only deem a transmission of information "confidential" and its own process "legitimate" to deny the gagged party access to timely judicial review initiated by the government, *id.*, a result that often means no judicial review at all. This thwarts the very purpose of the *Freedman* procedures—to minimize abridgement of speech caused by even temporary gag orders. Even a meritless gag order that is ultimately voided by a court causes great harm while it is in effect. *See Elrod v. Burns,* 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (citing *Pentagon Papers*, 403 U.S. at 713)). Importantly, the *Freedman* procedures do not disable the government from suppressing the dissemination of confidential information when suppression can be justified—but the government must justify it, promptly, to a court. *Freedman*, 380 U.S. at 58.

The Ninth Circuit's new exception to *Freedman* sweeps broadly, and the condition that the restrained information must be "transmitted confidentially" does not meaningfully cabin its reach. The court's holding allows the government to deny timely judicial review to a gagged recipient of information that the government

unilaterally chose to transmit merely by tautologically characterizing the transmission as "confidential." Perhaps in some cases, especially where classified information is involved, the government can justify the gag order to the court. But the legitimacy of that claim of confidentiality is often the very subject of the timely judicial examination required by *Freedman*. *See Mukasey*, 549 F.3d at 881 (national security letter statute vested too much deference in executive determination of need for secrecy). That is precisely what the doctrine is for.

Nor does the Ninth Circuit's doctrinally novel requirement that the restrained individual learn the information "as part of legitimate government process" limit the scope of this exception. 61 F.4th at 707. Americans learn information from processes the government considers "legitimate" every day. Incarcerated persons receive information from government agencies that control virtually every facet of their lives—from living conditions to medical care. Similarly, the exception would seemingly allow suppression of discussion of individuals' interactions with law enforcement, border officials, the Internal Revenue Service, the U.S. Post Office, and the courts. The exception also conceivably applies to state and local governmental processes. Law enforcement would be able to prevent a witness to a crime from telling their family that they were interviewed. A criminal suspect who was beaten by police officers during an otherwise legitimate, confidential interrogation could be more readily gagged from disclosing that interaction. The officers themselves, or the officials covering for them, therefore gain the benefit of the Ninth Circuit's exemption.

Transparency reporting—the very type of disclosure Twitter wanted to make in this case—is yet another example of speech about matters of public concern that the government may more easily gag under the Ninth Circuit's reasoning. Transparency reporting is essential to public oversight of and accountability for government surveillance. It shines much-needed light on the role that online service providers play in surveillance and content takedowns. Especially following the government declassifications accompanying the Snowden revelations in 2013, transparency reporting has been a key tool for service providers to explain and clarify how they treat government requests.[3] As the Ninth Circuit itself acknowledged, Twitter's transparency report arose out of its "desire to speak on matters of public concern." 61 F.4th at 690.

There is no basis for subjecting this speech, which lies at the heart of the First Amendment's protections, to lesser constitutional protection. *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"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values'" (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (First Amendment embodies our "profound

3. *See, e.g.,* Claire Cain Miller, *Tech Companies Concede to Surveillance Program*, N.Y. Times (June 7, 2013), https://www.nytimes.com/2013/06/08/technology/tech-companies-bristling-concede-to-government-surveillance-efforts.html; *Who Has Your Back,* EFF (2014), https://www.eff.org/who-has-your-back-2014 (detailing which companies published transparency reports).

national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

CONCLUSION

The Ninth Circuit's opinion in this case insulates a broad range of potential administrative gag orders from timely judicial review and greatly empowers the government to suppress "publications relating to the malfeasance of public officers," despite "the deep-seated conviction that such restraints would violate" the First Amendment. *Near*, 283 U.S. at 718.

To clarify its prior restraint doctrine and prevent such broad-sweeping and severe consequences, this Court should grant Twitter's petition for certiorari.

Dated: November 1, 2023

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