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11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**  
13 **OAKLAND DIVISION**

14 TWITTER, INC.,

15  
16 Plaintiff,

17 v.

18  
19 WILLIAM P. BARR, United States Attorney  
General, *et al.*,

20  
21 Defendants.

Case No. 14-cv-4480-YGR

**TWITTER'S NOTICE OF CROSS-  
MOTION & CROSS-MOTION FOR  
SUMMARY JUDGMENT;  
ALTERNATIVE MOTION FOR AN  
ORDER GRANTING CLEARED  
COUNSEL ACCESS TO THE  
CLASSIFIED TABB DECLARATION**

Date: January 7, 2020

Time: 2:00 PM

Courtroom 1, Fourth Floor

Judge: Hon. Yvonne Gonzalez Rogers

**NOTICE OF CROSS-MOTION AND CROSS-MOTION**

PLEASE TAKE NOTICE that, on January 7, 2020 at 2:00 p.m., or as soon thereafter as counsel may be heard, at 1301 Clay Street, Oakland, CA 94612, in the Oakland Courthouse, Courtroom 1 – Fourth Floor, before Judge Yvonne Gonzalez Rogers, Plaintiff Twitter, Inc. (“Twitter”) will, and hereby does, move for an order granting summary judgment to Twitter on claims set forth in the Second Amended Complaint or, in the alternative, granting Twitter access to the Classified Declaration of Jay S. Tabb, Jr. (Dkt. No. 310), submitted in support of the Government’s Renewed Motion for Summary Judgment (Dkt. No. 309). This motion is based on this Notice of Motion and Motion, Twitter’s Memorandum of Points and Authorities, the Declaration of Lee Rubin in Support thereof, Twitter’s Separate Statement of Undisputed Facts, and Twitter’s Request for Judicial Notice, the pleadings on file with the Court, and any further argument or briefing that may be presented prior to the Court’s decision on the Motion.

Dated: October 25, 2019

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16 Plaintiff,

17 v.

18 WILLIAM P. BARR, United States Attorney  
19 General, *et al.*,

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21 Defendants.

Case No. 14-cv-4480-YGR

**TWITTER’S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANTS’  
MOTION FOR SUMMARY JUDGMENT,  
AND IN SUPPORT OF (1) ITS CROSS-  
MOTION FOR SUMMARY JUDGMENT  
& (2) ITS RENEWED MOTION FOR  
ACCESS TO CLASSIFIED MATERIALS**

Date: January 7, 2020

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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **STATEMENT OF ISSUES TO BE DECIDED**

3 A. Is Twitter entitled to summary judgment on its First Amendment claims, because  
4 the Government cannot justify its censorship of Twitter’s 2014 draft Transparency Report under  
5 strict scrutiny?

6 B. Alternatively, is Twitter entitled to summary judgment because the restriction on  
7 its speech was a prior restraint, yet neither the Government’s classification criteria, nor the  
8 USAFA provision authorizing such discretionary classification, comports with *Freedman v.*  
9 *Maryland*?

10 C. At minimum, should the Government’s motion for summary judgment be denied  
11 under Federal Rule of Civil Procedure 56(d), in order to provide Twitter’s cleared counsel access  
12 and a meaningful opportunity to respond to the classified evidence the Government claims is  
13 dispositive of Twitter’s claims?

14 **INTRODUCTION**

15 The Government’s ongoing censorship of now *six-year-old aggregate* data in Twitter’s  
16 2014 Transparency Report is constitutionally unsustainable. The Government cannot show—as  
17 it must under strict scrutiny—that those limited disclosures would cause any harm whatsoever to  
18 national security, much less the kind of “grave or imminent risk” that is necessary to justify a  
19 content-based prior restraint on speech about the operation of government. Unable to show any  
20 harm that could result from the specific disclosures contained in Twitter’s Transparency Report,  
21 the Government resorts to sweeping assertions about national security harms that could flow  
22 from hypothetical, future disclosures by Twitter and *other* communications providers, over an  
23 extended period of time.

24 The Government’s exaggerated claims do not justify suppression of Twitter’s proposed  
25 speech. Most fundamentally, they ignore the governing First Amendment standard—which  
26 requires an “individualized” assessment of the speaker and speech at issue. The Government  
27 cannot carry its burden of showing that *the speech in Twitter’s 2014 Transparency Report* would  
28 harm national security by relying on harms that might result from *other* hypothetical future



1 disclosures. Additionally, the Court should not credit the Government’s mere speculation that a  
2 ruling authorizing publication of the 2014 Transparency Report would necessarily lead to broad-  
3 scale disclosures about other companies’ receipt of national security process. Even if other  
4 companies sought to make similar disclosures, courts would not necessarily grant those requests;  
5 numerous attributes potentially distinguish the speech here from future publication requests—  
6 including Twitter’s size, its unique role in society, the age of the data Twitter seeks to publish,  
7 and other information about the Government’s use (and Twitter’s receipt) of national security  
8 process that is already in the public domain.

9         Independently, Twitter is entitled to summary judgment on its claims because the  
10 Government does not (and cannot) meaningfully dispute that its discretionary classification of  
11 Twitter’s speech occurred without the procedural safeguards required by *Freedman v. Maryland*.  
12 Neither the classification guidelines that the Government applied, nor the statutory authority  
13 under which that classification review was conducted (50 U.S.C. § 1874(c)), provides a  
14 mechanism for a recipient of national security process to obtain expedited, government-initiated  
15 judicial review of a restraint on aggregate reporting, as required by *Freedman*.

16         The Government’s attempts to avoid *Freedman* are unavailing. It is bedrock law that in  
17 considering a First Amendment challenge to a Government-imposed prior restraint, a Court must  
18 apply strict scrutiny and consider both the substantive and procedural constitutionality of the  
19 Government’s censorship. Twitter’s claims that the Government’s classification decision was an  
20 “unconstitutional prior restraint” (Counts I and II) thus incorporated its challenge to the absence  
21 of procedural safeguards (under *Freedman*) as a matter of law. Consistent with this legal  
22 principle, the Court specifically addressed the Government’s lack of adherence to *Freedman* in  
23 its original order denying summary judgment and in its order denying reconsideration. And the  
24 Government’s attempts to avoid hornbook law by arguing that *Freedman* does not apply to its  
25 censorship of Twitter here are similarly unpersuasive.

26         Both these defects—substantive and procedural—independently render the Government’s  
27 censorship of Twitter’s 2014 Transparency Report unconstitutional. Twitter’s motion for  
28 summary judgment should be granted on this basis. At absolute minimum, though, the

1 Government’s competing motion should be denied under Federal Rule of Civil Procedure 56(d).  
2 The Government has at every turn sought to thwart Twitter’s access to key discovery—including  
3 the opportunity for Twitter to respond (through cleared counsel) to the classified evidence on  
4 which the Government now relies in seeking judgment on Twitter’s claims.

### 5 **FACTUAL AND PROCEDURAL HISTORY**

6 The speech restriction at issue in this case dates back to April 1, 2014, when Twitter  
7 submitted to the FBI for review a draft Transparency Report describing the amount of national  
8 security process Twitter had received in 2012 and 2013 (the “Transparency Report”). In  
9 particular, the Transparency Report sought to disclose the *total* number of National Security  
10 Letters (“NSLs”) and orders issued pursuant to the Foreign Intelligence Surveillance Act of 1978  
11 (the “FISA”) that Twitter had received in the second half of 2013—now more than six years ago.  
12 Rubin Decl. ¶ 2, Ex. 4 (“unclassified” version). Twitter also sought permission to disclose that it  
13 had received “zero” of a particular kind of request, whenever that might be the case. *Id.* Twitter  
14 sought in publishing the Transparency Report to participate in a public debate and respond to  
15 concerns regarding then-recent revelations about the scope of NSA surveillance.

16 Five months later, the FBI informed Twitter that the Transparency “[R]eport was  
17 “classified” to the extent it contained the “specific numbers of orders received, including  
18 characterizing the numbers in fractions or percentages” and to the extent it “br[oke] out  
19 particular types of process received” (*i.e.*, FISA orders versus NSLs). *Id.* Ex. 3. As justification,  
20 the FBI’s letter stated only that such data was “inconsistent with the January 27th framework”—  
21 referring to the reporting framework adopted by the Director of National Intelligence (“DNI”) on  
22 January 27, 2014, which authorized Electronic Communications Service Providers (“ECSPs”)  
23 like Twitter to disclose the amount of national security process they received in certain broad  
24 bands (*e.g.*, 0-250 or 0-500). *Id.* The FBI later issued an “unclassified” version of Twitter’s  
25 report with all numerical data (and narrative descriptions of that data) redacted. *Id.* Ex. 4.  
26 Twitter filed suit in late 2014.

27 In 2015 and while this case was pending, Congress passed the Uniting and Strengthening  
28 America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015

1 (“USAFA”). The USAFA confirmed that recipients of individual FISA orders and NSLs could  
2 lawfully disclose *aggregate* data about their receipt of those orders in the broad reporting bands  
3 codified in 50 U.S.C. § 1874(a) (part of the FISA).<sup>1</sup> However, the USAFA makes clear that the  
4 bands are permissive—nothing prohibits the Executive from “agreeing to the publication of  
5 information” about an ECSP’s receipt of national security process in a “form” other than the  
6 safe-harbor bands. *Id.* § 1874(c).

7 Twitter filed its currently operative complaint (“SAC”) on May 24, 2016. Dkt. No. 114.  
8 The SAC alleged, in pertinent part, that the Government’s “decision to censor Twitter’s  
9 transparency report” was unconstitutional—because it imposed both a “content-based restriction  
10 on [Twitter’s] speech” and a “prior restraint.” *See* SAC pp. 17–21. The SAC sought, *inter alia*,  
11 a declaratory judgment that “Twitter has a First Amendment right to release the entire report  
12 publicly in unredacted form.” Prayer for Relief ¶ A(ii).

13 In November 2016, the Government moved for summary judgment. Dkt. No. 145. In an  
14 order dated July 6, 2017 (Dkt. No. 172), the Court denied that motion, ruling, in pertinent part,  
15 that: (1) the speech restriction here is a content-based, prior restraint on the modern equivalent of  
16 a public square (*id.* at 2, 14); (2) the restraint was subject to the *Pentagon Papers* strict scrutiny  
17 standard, which requires the Government to show that Twitter’s proposed disclosures “would  
18 pose a clear and present danger or imminent harm to national security” (*id.* at 2, 14–15, 21); (3)  
19 the Classified Declaration of Executive Assistant Director Michael Steinbach (“Classified  
20 Steinbach Declaration”) failed to carry the Government’s burden (*id.* at 17); and (4) “[n]either  
21 the Government’s classification decision” nor any other specified statutory provisions provide  
22 “any procedural safeguards to ensure that the decision [to restrict speech] is one that comports  
23 with the appropriate high level of scrutiny warranted by such prior restraints.” *Id.* at 18–19.

24 The Government thereafter moved for reconsideration of the Court’s denial of its  
25 summary judgment motion on the basis of the Ninth Circuit’s intervening *In re NSL* decision.

26 \_\_\_\_\_  
27 <sup>1</sup> The USAFA also ended the NSA’s bulk collection of Americans’ telephone data, revised the  
28 NSL law to incorporate a mechanism for expeditious, government-initiated judicial review of  
individual NSL nondisclosure obligations, and added annual public reporting obligations about  
the Executive’s use of national security process.

1 On November 28, 2017, the Court denied that motion, too, finding that *In re NSL* only confirmed  
2 the Court’s bases for its prior summary judgment ruling. Dkt. No. 186.

3 Now, nearly three years later, the Government has renewed its motion for summary  
4 judgment. That motion is as insupportable today as it was three years ago—if not more so, given  
5 that the information at issue is now even older and thus the Government’s claim that its  
6 disclosure would harm national security is even more untenable.

7 The Court should accordingly resolve this case once and for all by denying the  
8 Government’s Renewed Motion for Summary Judgment, and granting Twitter’s Cross-Motion  
9 for the same. In particular, Twitter is entitled to a ruling (1) authorizing publication of the 2014  
10 Transparency Report and (2) enjoining the Government from restraining Twitter’s disclosure of  
11 the aggregate amount of national security process it has received until the Government adopts  
12 procedural safeguards for the censorship of this information that comport with *Freedman v.*  
13 *Maryland*.

## 14 ARGUMENT

### 15 **A. Twitter Is Entitled to Summary Judgment (and the Government’s Motion Should 16 Be Denied) Because the Government Has Not Satisfied Strict Scrutiny.**

17 The Government cannot carry its burden under strict scrutiny of showing that Twitter  
18 may constitutionally be prohibited from publishing *aggregate* data about the amount of national  
19 security process it received more than *six years ago*.

#### 20 **1. As a Content-Based Prior Restraint, the Government’s Censorship Is Subject to 21 the *Pentagon Papers* Strict Scrutiny Standard.**

22 The Government’s Motion takes issue with both this Court’s and the Ninth Circuit’s  
23 application of strict scrutiny to restraints on speech about the Government’s use of NSLs and  
24 FISA orders. Mot. at 14. But a long line of precedent requires strict scrutiny of the speech  
25 restrictions here—not only because they are content-based,<sup>2</sup> but also because they impose a

26 <sup>2</sup> “The Government’s restrictions on Twitter’s speech are [indisputably] content-based.” Dkt.  
27 No. 172, at 2. They “target[]” Twitter’s speech specifically “because of the topic discussed or  
28 the idea or message expressed,” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); *Berger v.*  
*City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc)—namely, aggregate numerical  
data about Twitter’s receipt of compulsory national security process that does not conform with  
the Government’s preapproved reporting bands in 50 U.S.C. § 1874(a).

1 viewpoint-based prior restraint on Twitter’s ability to contribute to public debate about the  
2 Government’s use of national security process. Accordingly, as the Court has already correctly  
3 recognized, the Government’s prior restraint is “presumptively unconstitutional and may be  
4 justified only if the [G]overnment” can show that Twitter’s proposed speech “would pose a clear  
5 and present danger or imminent harm to national security.” Dkt. No. 172, at 2, 7; *N.Y. Times Co.*  
6 *v. United States*, 403 U.S. 713, 714 (1971) [hereinafter “*Pentagon Papers*”]; *Nebraska Press*  
7 *Assn. v. Stuart*, 427 U.S. 539, 589 (1976) (prior restraints are “the essence of censorship”).

8 The Government cannot carry that burden simply by asserting that the information was  
9 properly “classified under the Executive Order.” Dkt. No. 172, at 16; *Al-Haramain Islamic*  
10 *Found. Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (“Simply saying ‘military secret,’  
11 ‘national security,’ . . . ‘terrorist threat’ or invoking an ethereal fear that disclosure will threaten  
12 our nation is insufficient” to justify a content-based restraint). Rather, narrow tailoring requires  
13 the Government to show—based on “an individualized analysis of” the speaker and speech at  
14 issue (*In re Nat’l Sec. Letter*, 863 F.3d 1110, 1125 (9th Cir. 2017))—that the “disclosure . . . will  
15 surely result in direct, immediate, and irreparable damage to our Nation or its people.” *Pentagon*  
16 *Papers*, 403 U.S. at 730 (Stewart. J, concurring).<sup>3</sup>

17 Applying that standard in *Pentagon Papers*, the Supreme Court held that the government  
18 failed to carry that burden with respect to a far more detailed “study” on the United States’  
19 engagement in Vietnam. *Id.* at 714. The Court found the restraint on publication  
20 unconstitutional, even though the United States was still engaged in Vietnam at the time of  
21 publication, and the study involved material that had been classified as “Top Secret” and  
22 “Secret.” *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 326 (S.D.N.Y. 1971).

23 As this Court has recognized, that standard applies here because, with respect to Twitter’s  
24 publication of its Transparency Report, Twitter is akin to the “speakers in public fora,  
25 distributors of literature, or exhibitors of movies” to whom courts have historically conferred the  
26

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27 <sup>3</sup> This standard, which derives from Justice Stewart’s concurrence, is controlling because Justice  
28 Stewart’s rationale offered the narrowest grounds (*i.e.*, the least expansive view of the First  
Amendment) that still supported the majority holding.

1 highest First Amendment protection. Dkt. No. 172, at 14–15; *see, e.g., Pentagon Papers*, 403  
2 U.S. at 725–26 (Brennan, J., concurring) (“[T]he First Amendment tolerates absolutely no prior  
3 judicial restraints of the press predicated upon surmise or conjecture that untoward consequences  
4 may result.”); *In re Washington Post Co.*, 807 F.2d 383, 391–92 (4th Cir. 1986). The same  
5 interests are implicated here, where “Twitter acts as the modern, electronic equivalent of a public  
6 square.” Dkt. No. 172, at 14. Furthermore, the content of Twitter’s speech implicates a matter  
7 of significant public concern: “[D]isclosure of the existence and number of surveillance orders is  
8 important to an informed public” since suppression of this information tends to “conceal from  
9 the public the actual degree of government intrusion that current legislation authorizes.” Dkt.  
10 No. 172, at 16 & n.7 (quoting *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562  
11 F. Supp. 2d 876, 882 (S.D. Tex. 2008)); *see also Pentagon Papers*, 403 U.S. at 717 (Black, J.,  
12 joined by Douglas, J., concurring) (First Amendment was intended to prevent the government  
13 from suppressing newsworthy speech that “reveal[s] the workings of government” and to  
14 “prevent[] ... the government from deceiving the people.”); *Garcia v. Google, Inc.*, 786 F.3d  
15 727, 730 (9th Cir. 2015). And finally, suppression of Twitter’s ability to speak about this topic  
16 has the practical effect of suppressing “a particular point of view”—“the view that certain  
17 federal investigative powers impose profoundly on individual civil liberties to the point that they  
18 violate our constitution.” *Doe v. Gonzales*, 386 F. Supp. 2d 66, 75 (D. Conn. 2005) (quoting  
19 *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130–31 (1992)); *R.A.V. v. City of St. Paul*,  
20 505 U.S. 377, 392 (1992).

21 All of these factors amplify Twitter’s (and the public’s) First Amendment interests in the  
22 speech the Government seeks to restrict, and confirm the need for the most exacting standard of  
23 review here. Accordingly, the more robust *Pentagon Papers* standard applies.

## 24 **2. The Government Cannot Satisfy Strict Scrutiny.**

25 The Government cannot carry its heavy burden of showing, based on “an individualized  
26 analysis” of Twitter and the restricted speech, that disclosure will “surely result in direct,  
27 immediate, and irreparable damage to our Nation or its people.” *Pentagon Papers*, 403 U.S. at  
28 730. To prove that, the Government would have to show that even taking into account key

1 factual considerations including the “size of [Twitter’s] customer base,” *In re NSL*, 863 F.3d at  
2 1125, the age and aggregated nature of the proposed numerical reporting, and other quantitative  
3 information already in the public domain about the Government’s use of national security  
4 process, the disclosure of the specific information in the Transparency Report would cause  
5 “imminent harm to national security,” Dkt. No. 172, at 2.

6         Though Twitter has yet to be given access to the Classified Declaration of Jay S. Tabb, Jr.  
7 (“Classified Tabb Declaration”) submitted with the Government’s current motion (yet another  
8 factor requiring denial of that motion, *see infra*, pp. 23–25), the reasons offered in the  
9 Unclassified Tabb Declaration fall well short of that demanding standard and strongly suggest  
10 that the classified submission does too.

11         To start, the Unclassified Tabb Declaration makes clear that the Government’s proffered  
12 justifications are not tethered to *Twitter’s* proposed disclosures, and that they ignore the  
13 information already in the public domain about *Twitter’s* receipt of national security process.  
14 The Government claims, for example, that “disclosure of the information Twitter seeks to  
15 publish”—aggregate statistics about its receipt of national security process in 2012 and 2013—  
16 would provide “highly valuable insights into where and how the United States is or is not  
17 deploying its investigative and intelligence resources” and whether Twitter is a “secure”  
18 platform. Dkt. No. 309-1, ¶ 7. But it is hard to see how that could be so. Not only is the  
19 information at issue over six years old, but adversaries certainly know (because it is a matter of  
20 public record) that Twitter receives national security process, as well as the types of information  
21 that the Government seeks with that process.

22         As of April 2019, Twitter had published 14 individual NSLs dating back to 2009,  
23 samples of which were introduced into evidence in connection with the parties’ briefing on the  
24 Government’s state secrets claim. *See* Rubin Decl. Ex. 13. Those disclosures were far more  
25 comprehensive than the aggregate data here—revealing not only the *fact* that the NSLs had been  
26 received, but also their *content*. *Id.* For example, the NSLs disclosed the “types of information”  
27 the Government sought from Twitter with respect to particular accounts, such as the date the  
28 account was opened, associated email and physical addresses, billing information, Internet



1 Protocol (“IP”) address and Uniform Resource Locator (“URL”) information, and the names of  
2 all “upstream and downstream providers facilitating th[e] account’s communications.” *See, e.g.,*  
3 *id.* Ex. 13 (Islay Decl., Exs. A–C, at 3).

4 Disclosure of the *total* number of NSLs and FISA orders Twitter received more than six  
5 years ago would tell the public far less about the extent to which Twitter is (or was) a “safe”  
6 platform and the “extent, scope, and reach of the Government’s national security collection  
7 capabilities” than the public already knows.

8 Nor could disclosure of the mere *fact* of whether Twitter received any *FISA* process  
9 during 2012 and 2013 tell adversaries anything meaningful about the Government’s national  
10 security collection capabilities (*i.e.*, to the extent the Government claims that fact would permit  
11 adversaries to piece together harmful, nonpublic information about its collection capabilities as  
12 to Twitter). The Government’s arguments are premised on the notion that the type of  
13 information that it can obtain under each FISA title is a secret; it is not. The statutes themselves  
14 indicate whether the Government can collect content or non-content information, as well as the  
15 types of records it may target. Moreover, as the Government has observed, the FISA is not  
16 monolithic: Title I permits electronic surveillance; Title III permits physical searches; Title IV  
17 permits the use of pen register and trap and trace devices; and Title V permits the collection of  
18 business records, including call detail records. Thus, Twitter’s proposed disclosure of the *total*  
19 number of FISA orders it has received across *all* titles would not, in fact, permit adversaries to  
20 identify the type of information that was sought in those orders (if any).

21 The Government’s argument further ignores the detailed information *already in the*  
22 *public domain* as a result of annual reporting by the Administrative Office of the United States  
23 Courts (“AOUSC”), the U.S. Department of Justice Office of Legal Affairs (“OLA”) and the  
24 Office of the Director of National Intelligence (“ODNI”). *See* RJN, Exs. A–N.<sup>4</sup> These reports,  
25

26 \_\_\_\_\_  
27 <sup>4</sup> These annual government reports are judicially noticeable. *See* Twitter’s Request for Judicial  
28 Notice (“RJN”) filed concurrently herewith. And as government documents, they are self-  
authenticating as a “publication purporting to be issued by a public authority.” Fed. R. Evid.  
902(5). Independently, the Government’s reports are admissible as opposing party admissions



1 both individually and collectively, already tell adversaries far more about the Government’s  
 2 collection capabilities and *how* the Government uses its authority under various *specific* FISA  
 3 titles than Twitter’s far higher-level disclosures could. For example, for *each year* since at least  
 4 2014,<sup>5</sup> the AOUSC has disclosed the exact number of DOJ applications made, and how many of  
 5 those applications were granted, modified, denied in part, or denied in full—both in the  
 6 aggregate and broken down by specific sections of the FISA. *See, e.g.*, RJN Ex A. at 3, Exs. B–  
 7 D, at 4 (AOUSC reporting charts). The ODNI’s reporting further discloses—again, for *specific*  
 8 sections of the FISA—the total number of orders issued, as well as the exact number of *targets*  
 9 covered by those orders, the number of unique identifiers used to collect information about those  
 10 targets, and (in the context of business records sought under FISA Title V) the number of call  
 11 detail records collected and stored by the NSA. *See, e.g.*, RJN Exs. E–I. The ODNI reporting  
 12 also provides details about how collection works under different FISA provisions and the types  
 13 of information that is targeted. *See, e.g.*, RJN Ex. H, at 4–12; Ex. E, at 1–2, Ex. F, at 1–2.<sup>6</sup>

14 In sum, a highly generalized disclosure that Twitter received over six years ago a  
 15 specified number of orders under the *entire FISA statutory scheme*—which does not identify the  
 16 precise authority the orders (if any) were issued under—could not possibly tell adversaries  
 17 anything beyond what they can already discern from public information about the Government’s  
 18 collection capabilities.

19 The Government’s remaining efforts to justify its suppression of Twitter’s speech rest on  
 20 the straw man that Twitter’s claim constitutes a facial attack on the USAFA safe-harbor bands.

21 \_\_\_\_\_  
 22 under Federal Rule of Evidence 801(d)(2), and as “[a] record or statement of a public office” that  
 “sets out ... the office’s activities” under Rule 803(8).

23 <sup>5</sup> Much of this reporting is required by the USAFA, and therefore began to be published in 2015  
 24 (covering the year 2014). However, the DOJ has been publicly reporting regarding its foreign  
 surveillance activities since 1996. *See* <https://www.justice.gov/nsd/nsd-foia-library> .

25 <sup>6</sup> For example, FISC orders typically authorize surveillance of specific “targets,” which may be  
 26 “an individual person, a group, or an entity ... or a foreign power that possesses or is likely to  
 27 communicate foreign intelligence information.” RJN Ex. E, at 2. “Under Section 702,”  
 28 however, “the FISC issues a single order approving certifications that describe *categories* of  
 foreign intelligence information to be acquired,” *id.* Ex. F, at 1–2 (emphasis in original), through  
 the “‘tasking’ [of] selectors.... [*i.e.*] specific communications facilities assessed to be used by a  
 target (*e.g.*, an email address or telephone number).” *Id.* Ex. E, at 2.

1 In particular, the Government contends that Twitter’s proposed disclosures over time would  
2 permit adversaries to glean valuable macro trends regarding the Government’s overall use of  
3 national security surveillance—including about “incremental increases or decreases in collection  
4 over time” (Dkt. No. 309-1, ¶ 17). This argument has nothing to do with the aggregate reporting  
5 in the Transparency Report and, in any event, suffers from multiple defects.

6 Perhaps most fundamentally, those arguments ask the Court to consider the potential  
7 national security implications of *all* ECSPs publishing similar data over an extended period of  
8 time. But the question before the Court in this motion is far narrower—whether publication of  
9 one set of data from 2012 and 2013 by Twitter would result in grave and imminent harm to the  
10 United States, given the unique attributes of Twitter and its speech, and the information already  
11 in the public domain.<sup>7</sup> On that discrete issue, the Government cannot carry its burden.

12 The Government seeks to justify its restraint on Twitter’s speech by pointing to harm that  
13 could result from hypothetical aggregate disclosures in the future by all ECSPs. But that entirely  
14 ignores that governing law requires an “individualized assessment” of any proposed disclosure  
15 about a provider’s receipt of national security process. It also incorrectly speculates that an order  
16 permitting publication of the now six- to seven-year-old information in Twitter’s Transparency  
17 Report would trigger an avalanche of requests by other providers to publish similar information,  
18 *and* that courts would necessarily grant all those requests. However, the Government has offered  
19 no evidence whatsoever (and there is no reason to believe) that either assumption is correct.

20 Even if the Government were to be inundated with publication requests (a doubtful  
21 proposition),<sup>8</sup> the speech before the Court bears numerous unique attributes that could readily

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22  
23 <sup>7</sup> To be sure, the SAC *also* seeks a declaration that similar restrictions on reporting in later  
24 transparency reports would be unconstitutional. But presently, Twitter is opposing and seeking  
25 summary judgment on the basis that the Government’s prior restraint of its 2014 Transparency  
26 Report is unconstitutional, as the Government cannot show that each of the redactions therein  
27 would result in “direct, immediate, and irreparable damage to our Nation,” and because they  
28 were imposed without the procedural safeguards required for systems of prior restraint.

<sup>8</sup> The Government’s speculation (Dkt. No. 309-1, ¶ 20) also ignores the significant expense to an  
ECSP of challenging nondisclosure obligations, even if the Government were to adopt—as  
Twitter contends it must—a *Freedman*-compliant method to bring such a challenge.

1 distinguish it from a future publication request—including, but not limited to, the size of  
2 Twitter’s user base, Twitter’s unique role in publishing its reports, and the age of the data Twitter  
3 seeks to publish. If, for example, an ECSP was lesser known, had not already revealed itself to  
4 be a recipient of national security process, or had a materially smaller user base, the Government  
5 might be able to show that disclosures similar to those Twitter seeks to make here could reveal  
6 harmful information (*e.g.*, that a platform that adversaries thought was safe was in fact a target of  
7 surveillance, or that a significant portion of the users on that platform were under surveillance).  
8 Alternatively, if a speaker sought to publish more recent or more granular information—such as  
9 total orders received, broken down by specific FISA provisions—those factors, too, might permit  
10 the Government to show harm to national security in another case. It is even possible that a  
11 court could consider the impact of any prior approved disclosures to determine whether, when  
12 combined with the proposed new disclosures, that new information would result in grave and  
13 imminent harm to national security. But none of these hypothetical considerations about what  
14 may or may not be restricted in the future should impact the Court’s individualized assessment of  
15 the harm that would result from the disclosure of the Transparency Report.

16         Second, the Government’s arguments that the revelation of macro trends would harm  
17 national security ignores that multiple government entities already publish far more up-to-date,  
18 annual data about the Executive’s use of the FISA and NSLs. RJN, Ex. I (2018 ODNI Report);  
19 *see also* RJN Exs. E–H. As discussed above, the ODNI since 2015 has been publicly reporting  
20 about the estimated total number of orders issued and targets targeted, respectively, under *each*  
21 Title of the FISA. *See generally id.* These reports—both individually and collectively—*already*  
22 show the kinds of changes in the Government’s enforcement priorities over time that the  
23 Government claims cannot be revealed without serious harm to national security. For example,  
24 the total number of orders issued under FISA Title IV (authorizing pen registers and trap and  
25 trace devices) has fallen from 319 targets in 2013 to only 29 targets in 2018. *Id.* Ex. I, at 24.  
26 Over the same time period, the number of persons targeted under FISA Section 702, which  
27 broadly authorizes surveillance of non-U.S. targets by “‘tasking’ selectors (*e.g.*, telephone  
28 numbers and email addresses),” *id.* at 10, has risen from 89,138 in 2013 to 164,770 in 2018, *id.*

1 at 13. In assessing the Government’s claim that any disclosures which reveal macro trends about  
2 its use of national security process cause grave and imminent harm to national security, the Court  
3 should take into account the macro trends the Government itself has already disclosed (in  
4 addition to the unique attributes of Twitter’s speech).

5 At bottom, the Government’s current attempt to justify its restraint by reference to the  
6 harm that might occur if *all* companies abandoned the USAFA reporting bands is but a  
7 repackaged version of the Government’s original reliance on the reporting bands. That argument  
8 fails because it effectively reads 50 U.S.C. § 1874(c) out of the statute.

9 Likewise, the limited evidence available to Twitter belies the Government’s attempt to  
10 recast its reliance on the bands as any sort of individualized inquiry. Despite Twitter’s claim that  
11 it was not “similarly situated” to other ECSPs, Rubin Decl., Ex. 2, the FBI justified its  
12 classification decision in September 2014 based solely on the grounds that Twitter’s proposed  
13 disclosures were “inconsistent” with the governing reporting bands and would “go beyond what  
14 the government has permitted other companies to report,” *id.* Ex. 3. And the Government  
15 offered materially identical reasons for denying similar requests by Facebook, Microsoft, Apple,  
16 AOL, and Yahoo in 2013. *Id.* Exs. 6–10. Indeed, a letter sent to AOL in June 2013 still includes  
17 placeholders for “X Company” and “ADDRESS,” further underscoring that the Government was  
18 sending the same boilerplate letter to all ECSPs, with only the company name changed. *See id.*  
19 Ex. 9. That treatment of the USAFA bands as a rigid ceiling confirms that the Government has  
20 never engaged in the kind of individualized analysis of proposed aggregate reporting that strict  
21 scrutiny demands. Nor does EAD Tabb’s Unclassified Declaration contain even a hint that the  
22 Government is conducting an individualized assessment of Twitter’s Transparency Report—  
23 indeed, the declaration contains no analysis of how the addition of this six- to seven-year-old  
24 aggregate data into the public domain would place the country’s security in grave danger.

25 Finally, the absence of any durational limitation on the Government’s restraint  
26 underscores the lack of narrow tailoring here. Indeed, in upholding restraints on disclosure of  
27 NSLs as narrowly tailored, the Ninth Circuit highlighted that NSLs were subject to the  
28 Government’s “Termination Procedures”—which require periodic Government re-review of the

1 necessity of nondisclosure—and those procedures were further “supplemented by the availability  
2 of [*Freedman*-compliant] judicial review.” *In re NSL*, 863 F.3d at 1126–27. As this Court has  
3 recognized, no similar limitations on the duration of aggregate reporting exist. Dkt. No. 186, at  
4 9. Moreover, the Government has conceded that it has discretion to limit the temporal scope of  
5 prohibitions on public aggregate reporting on a case-by-case basis, but that it has never exercised  
6 that discretion to limit the temporal scope of its restrictions on aggregate reporting outside of the  
7 USAFA bands. Rubin Decl. Ex. 5 (Responses to Interrogatory Nos. 9–11).

8 For all of these reasons, the Government has not carried its burden of showing that—  
9 under an “individualized analysis” of Twitter, the speech at issue, and the information already in  
10 the public domain—disclosure of the aggregate numerical data in the Transparency Report  
11 would pose a grave or imminent risk of harm to national security.

12 **B. Independently, Twitter Is Entitled to Summary Judgment Because the**  
13 **Government’s Prior Restraint Lacked All of *Freedman*’s Procedural Safeguards.**

14 Separate and apart from the Government’s inability to justify its prior restraint of  
15 Twitter’s 2014 Transparency Report under strict scrutiny, that restraint as applied to Twitter is  
16 still procedurally unconstitutional under *Freedman v. Maryland*, 380 U.S. 51, 58–60 (1965). *See*  
17 Dkt. No. 186, at 4–5; *In re NSL*, 863 F.3d at 1129–30 (separately assessing the substantive  
18 constitutionality (under strict scrutiny) and procedural constitutionality (under *Freedman v.*  
19 *Maryland*) of non-disclosure obligations imposed under the NSL regime); *Microsoft Corp. v.*  
20 *U.S. Dep’t of Justice*, 233 F. Supp. 3d 887, 905–07 (W.D. Wash. 2017) (same).

21 It is well “settled . . . that a system of prior restraint ‘avoids constitutional infirmity only  
22 if it takes place under procedural safeguards designed to obviate the dangers of a censorship  
23 system.’” *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (quoting *Freedman*, 380  
24 U.S. at 58) (collecting authorities). These procedural safeguards include that (1) “the burden of  
25 instituting judicial proceedings, and of proving that the material is unprotected, must rest on the  
26 censor”; (2) “any restraint prior to judicial review [must] be imposed only for a specified brief  
27 period and only for the purpose of preserving the status quo”; and (3) “a prompt final judicial  
28 determination must be assured.” *Id.* at 560; *see also* Dkt. No. 186, at 5.

1 As this Court has previously found, the prior restraint on Twitter’s Transparency Report  
2 was imposed without these procedural safeguards. Neither the Government’s classification  
3 guidelines, nor the USAFA safe-harbor bands that the Government treats as the effective line  
4 between classified and unclassified speech, provide a mechanism for expeditious, Government-  
5 initiated judicial review of restrictions on disclosures of “aggregate volume data.” Dkt. No. 172,  
6 at 18. Notably, 50 U.S.C. § 1874(c) explicitly contemplates that the Government may authorize  
7 reporting outside of the USAFA’s safe-harbor bands. But the statute “offers no procedure to  
8 petition for [the] exercise of discretion.” Dkt. No. 172, at 18. Nor does it provide any  
9 mechanism for a speaker like Twitter to obtain prompt judicial “review of any Government  
10 decisions under [§ 1874(c)], or [of any] classification decision in connection with such  
11 [aggregate] disclosures generally.” *Id.* This defect is perhaps best exemplified by this extended  
12 litigation, which Twitter was forced to initiate in order to obtain judicial review of the  
13 Government’s classification of aggregate data in its 2014 Transparency Report.

14 **1. Twitter Adequately Pled that the Government’s Censorship of Its 2014**  
15 **Transparency Report Was an Unconstitutional Prior Restraint.**

16 The Government’s argument that Twitter failed to plead that the censorship of its  
17 Transparency Report was an unconstitutional prior restraint rests on a misconception of  
18 governing First Amendment law and an overly cramped reading of the SAC.

19 Counts I and II of the SAC specifically plead that “the government’s prior restraint on  
20 Twitter’s speech violates the First Amendment.” SAC pp. 17, 21. In Count II, Twitter further  
21 pled that Twitter was challenging “Defendants’ decision to censor Twitter’s transparency report”  
22 as unconstitutional. *Id.* ¶ 88; *see also id.* ¶ 84. This pleading was more than sufficient to put the  
23 Government on notice that the First Amendment-mandated procedural requirements under  
24 *Freedman* are at play here. “A party need not plead specific legal theories in the complaint, so  
25 long as the other side receives notice as to what is at issue in the case.” *Am. Timber & Trading*  
26 *Co. v. First Nat. Bank of Or.*, 690 F.2d 781, 786 (9th Cir. 1982). And it is hornbook law that  
27 “prior restraints on speech will pass constitutional muster” only if they comply with both  
28 *Freedman*’s “procedural safeguards and substantive strict scrutiny requirements.” Dkt. No. 172,



1 at 8. Thus, by alleging that the Government’s “[censor]ship” decision was an “unconstitutional  
 2 prior restraint” (*see* Counts I and II), Twitter has adequately pled a challenge to “both the  
 3 procedural safeguards and substantive strict scrutiny requirements” associated with the prior  
 4 restraints at issue in this case. *See Rother v. Lupenko*, 515 F. App’x. 672, 674 (9th Cir. 2013)  
 5 (affirming ruling allowing the plaintiff’s claim to proceed because “[a]lthough Plaintiff’s Second  
 6 Amended Complaint did not spell out their unpaid break claims in so many words, Defendants  
 7 nonetheless had sufficient notice of those claims by the summary judgment stage.”); *Crull v.*  
 8 *GEM Ins. Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995). Indeed, the Court explicitly addressed  
 9 whether the Government’s restraint here satisfied *Freedman*’s procedural safeguards in denying  
 10 the Government’s initial motion for summary judgment. Dkt. No. 172, at 8.<sup>9</sup>

11 **2. *Freedman* Applies to the Executive’s Discretionary Classification of Speech**  
 12 **about the Receipt of National Security Process.**

13 The Court was correct to hold that the Government’s prior restraint in this case must  
 14 include *Freedman*’s procedural safeguards in order to be constitutional. Dkt. No. 172, at 8, 18;  
 15 Dkt. No. 186, at 4–5. Contrary to the Government’s claim (*see* Dkt. No. 309, at 18), its  
 16 discretionary classification of the aggregate data in Twitter’s draft Transparency Report was a  
 17 prior restraint that bears all the “dangers of a censorship system” that the Supreme Court sought  
 18 in *Freedman* to “obviate” by requiring certain procedural safeguards.

19 First, the Government’s classification decision—like any “censorship proceeding”—  
 20 “puts the initial burden on the [speaker]” to seek permission to speak. *Freedman*, 380 U.S. at 57.  
 21 The Government forbids recipients of individual FISA orders and NSLs from disclosing the  
 22 aggregate number of orders they have received. Though Congress has carved out a narrow safe  
 23 harbor for aggregate reporting made in conformity with the bands in 50 U.S.C. § 1874(a),<sup>10</sup> any

24 \_\_\_\_\_  
 25 <sup>9</sup> The Government’s position also fails because it has repeatedly addressed the application of  
 26 *Freedman* to this case without ever suggesting this claim was not adequately pled or not a legal  
 theory at issue in the case. *See, e.g.*, Dkt. Nos. 180, 184 (Motion for Reconsideration briefing).

27 <sup>10</sup> Section 1874(a) permits “person[s] subject to a nondisclosure requirement accompanying an  
 28 order or directive under [the FISA] or a national security letter” to “publicly report” information  
 “with respect to such order, directive, or national security letter” if they do so in accordance with  
 one or more of the large bands set forth therein. 50 U.S.C. § 1874(a).

1 speaker who wishes to publish more granular data about its receipt of national security process  
2 still bears the initial burden of seeking permission from the Executive under § 1874(c).<sup>11</sup>

3 The second “danger” of a censorship system is that, “[b]ecause a censor’s business is to  
4 censor, there inheres the danger that he may well be less responsive than a court—part of an  
5 independent branch of government—to the constitutionally protected interests in free  
6 expression.” *Freedman*, 380 U.S. at 57–58. The Government’s discretionary authority to  
7 classify information under Executive Order (“EO”) 13526 about its use of national security  
8 process shares this attribute of a classic censorship regime as well. Indeed, even more so than  
9 the typical censor, the FBI faces a strong incentive to overclassify (or overcensor) speech about  
10 its use of national security process—both because the national security interests at stake will lead  
11 classifying authorities to err on the side of censorship *and* because the information at issue is  
12 about the FBI’s (the censor’s) own activities. Indeed, the overclassification of information in the  
13 Department of Justice is well documented. Rubin Decl. Ex. 11, at 13 (OIG audit finding  
14 evidence of overclassification and “persistent misunderstanding and lack of knowledge of certain  
15 classification processes by officials within various DOJ components”).

16 For these reasons, the Government’s broad discretion to classify data about its use of  
17 national security process carries both of the “dangers” of censorship that have consistently  
18 prompted the Court to require prior restraints to comply with *Freedman*. *See, e.g., Vance v.*  
19 *Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (statute authorizing prior restraint on movie  
20 exhibitors of indefinite duration failed to comply with *Freedman*); *Conrad*, 420 U.S. at 559–60  
21 (denial of facility use permit to procedures of a play under scheme lacking *Freedman*’s  
22 procedural safeguards was unconstitutional).

23 **a. The Ninth Circuit’s *Dictum* Is Neither Controlling Nor Consistent with**  
24 **Supreme Court Authority.**

25 The Government quotes *dicta* in *In re NSL* suggesting that the law authorizing  
26 nondisclosure obligations in individual NSLs “is more similar to governmental confidentiality

27 \_\_\_\_\_  
28 <sup>11</sup> Section 1874(c) authorizes “the Government” to permit “the publication of information”  
related to NSLs and FISA Orders in any other “form.” *Id.* § 1874(c).



1 requirements that have been upheld by the courts” (referring to two cases, *Butterworth* and  
2 *Seattle Times*, discussed *infra*). Mot. at 20 (quoting *In re NSL*, 863 F.3d at 1129).

3 That *dicta* is not controlling or persuasive here. First, it is in tension with the Ninth  
4 Circuit’s actual *holding*—which examined the NSL statute at length and held that it “in fact  
5 provides all of [*Freedman*’s procedural safeguards].” *Id.* at 1129–30. As important, the Ninth  
6 Circuit’s statement was made in the context of a wholly different statutory scheme which, unlike  
7 Section 1874(c),<sup>12</sup> did not specifically contemplate pre-publication submission and review of  
8 publication requests for government censorship. *See id.* at 1127–29 (“The NSL law . . . neither  
9 require[d] [the plaintiffs] to submit proposed speech for review and approval, nor . . . to obtain a  
10 license before engaging in business.”).

11 Moreover, the court’s suggested analogy to *Butterworth* and *Seattle Times* ignores the  
12 principal rationales behind those decisions. In *Butterworth v. Smith*, 494 U.S. 624 (1990), the  
13 Supreme Court found a Florida statute substantively unconstitutional to the extent it prohibited  
14 the plaintiff, a grand jury witness, from disclosing his own testimony after the conclusion of  
15 grand jury proceedings. *Id.* at 628, 632–36. The Court reasoned that the restriction was not  
16 justified by any of the state’s proffered interests (*e.g.*, in preventing flight by the accused,  
17 avoiding public ridicule of exonerated persons and encouraging witnesses to testify freely  
18 without fear of retribution). *Id.* at 632. However, the Court affirmed that prohibitions on  
19 disclosure of *other* witnesses’ testimony were justified by the state’s interest in “enhancing the  
20 integrity of the grand jury system.” *Smith v. Butterworth*, 866 F.2d 1318, 1320–21 (11th Cir.  
21 1989), *aff’d*, 494 U.S. 624 (1990) (“effectiveness of the grand jury system itself would be  
22 impaired if jurors were not completely assured that their identities would remain unknown”).

23 To the extent *Butterworth* has any relevance here at all, it cuts in Twitter’s favor. The  
24 restriction on Twitter’s ability to disclose information about its *own* experience as the recipient  
25

26  
27 <sup>12</sup> The Government has applied its classification guidelines (in EO 13526), pursuant to its  
28 authority under 50 U.S.C. § 1874(c), to consider publication requests more granular than those  
permitted under the safe-harbor bands in § 1874(a).

1 of coercive national security process is far more akin to the restrictions on disclosure of one’s  
2 *own* testimony that the Court *struck down*.<sup>13</sup>

3 The second case, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), held that protective  
4 orders prohibiting civil plaintiffs from disclosing sensitive information they had compelled  
5 defendants to turn over in discovery did “not offend the First Amendment.” *Id.* at 37. The Court  
6 reasoned that the orders were justified by the “[t]he unique character of the discovery process,”  
7 through which litigants may compel disclosure of “damaging” information about adversaries. *Id.*  
8 at 35–36. The Court further observed that, because the purpose of a protective order is to  
9 “prevent[] . . . the abuse that can attend the coerced production of information,” *id.* at 35, it “does  
10 not raise the same specter of government censorship that such control might suggest in other  
11 situations,” *id.* at 32.

12 Again though, this case presents precisely the *opposite* issue: While *Seattle Times*  
13 expressed a concern that a *would-be speaker* might “abuse” its access to “coerc[ive]” discovery  
14 tools, Twitter (the would-be speaker here) is the *subject or target* of the coercive action. To be  
15 sure, Twitter knows how many national security process requests it has received because of its  
16 interaction with the Government. But it was the Government—not Twitter—that unilaterally  
17 initiated all of those interactions. Indeed, the Second Circuit in *Doe v. Mukasey* (a case from  
18 which the Government selectively and misleadingly quotes (Mot. at 20)) specifically *rejected* the  
19 government’s analogy to *Seattle Times* on these precise grounds. *See* 549 F.3d 861, 877 (2d. Cir.  
20 2008) (“We fail to appreciate the analogy between the individuals or the entity seeking  
21 disclosure in [*Seattle Times*] and [plaintiff], who had no interaction with the Government until  
22 the Government imposed its nondisclosure requirement upon it.”).<sup>14</sup>

23 \_\_\_\_\_  
24 <sup>13</sup> Further, *Butterworth* made no mention of *Freedman*.

25 <sup>14</sup> Because of this important difference, *Seattle Times* cuts in favor of applying *Freedman* to the  
26 Government’s prior restraint here (to the extent applicable here at all). As the Supreme Court  
27 has recognized, the best defense against Executive abuses is an informed public. *See Pentagon*  
28 *Papers*, 403 U.S. at 723–24 (Douglas, J., concurring) (“immunity” “from previous restraint” in  
speaking about “the administration of government” is “vital to our national health”). Requiring  
the Executive’s classification of aggregate data to comport with *Freedman* advances that interest  
by mitigating the inherent risk that, because its “business is to censor,” the Executive will  
overclassify and thereby keep out of public view information necessary to hold it accountable.

1 For the same reason, the Second Circuit distinguished the Government’s cases (Mot. at  
 2 21) involving nondisclosure obligations imposed on *former employees* as a condition of their  
 3 *voluntary* employment relationship with the government. *See Mukasey*, 549 F.3d at 877 (citing  
 4 *United States v. Snepp*, 897 F.2d 138 (4th Cir. 1990) and *United States v. Marchetti*, 466 F.2d  
 5 1309 (4th Cir.1972)). And the court in *Mukasey* ultimately held that, notwithstanding some  
 6 (immaterial) differences between the NSL law and other censorship schemes, *Freedman’s*  
 7 safeguards “must be observed.” 549 F.3d at 881.

8 In sum, Section 1874 and the Government’s discretionary classification scheme bear far  
 9 greater resemblance to the classic censorship scheme that *Freedman’s* safeguards were designed  
 10 to address than to the unique restraints on grand jury testimony and civil discovery that were  
 11 addressed in *Butterworth* and *Seattle Times*. In the latter cases, the justifications for secrecy  
 12 “inhere[d] in the nature of the proceeding[s]” themselves. *Mukasey*, 549 F.3d at 876. In neither  
 13 did the speech restriction turn on an administrative censor’s discretionary application of criteria  
 14 that may or may not, in fact, justify restriction under the First Amendment.

15 **b. The FISA Process Does Not Save the Government’s Prior Restraint on**  
 16 **Aggregate Reporting from Constitutional Infirmity.**

17 The Government next argues that it would not make sense to apply *Freedman* here  
 18 because individual FISA Orders and NSLs may be challenged in proceedings that comport with  
 19 *Freedman* (Mot. at 21). Regardless of whether that is accurate in all cases,<sup>15</sup> the “Government  
 20 offers no similar provisions applicable to the [aggregate] reporting restrictions in the statutory  
 21 scheme here.” Dkt. No. 186, at 9 (“The argument that each of the underlying orders comprising  
 22 the aggregate number is subject to individual judicial review does not address ... whether the  
 23 Government’s prohibition on publication of *a completely different set of information—the*  
 24 *aggregate numbers* ... requires judicial review be provided.”) (emphasis added).

25 Relatedly, the Government argues that *some* of the orders included in Twitter’s aggregate  
 26 disclosures *may* have emanated from “the FISA process” that included judicial review. Mot. at

27 \_\_\_\_\_  
 28 <sup>15</sup> The Government itself has repeatedly emphasized the disparities across FISA Titles. *See, e.g.*,  
 Dkt. No. 290, at 3; Dkt. No. 309, at 22–23.

1 21. The Government claims that the involvement of the FISC in issuing orders obviates  
 2 *Freedman*'s concerns about government censorship, and therefore *Freedman* should not apply to  
 3 restraints on aggregate reporting. This is wrong for several reasons.

4 As a threshold matter, that argument ignores that at least some of the orders encompassed  
 5 in Twitter's aggregate reporting emanated from the NSL regime—not the FISA. But more  
 6 fundamentally, the Government's suggestion that FISC judges review *the Executive's censorship*  
 7 *decisions* is contrary to the plain text of the FISA, which shows that the FISC has no role in  
 8 approving the nondisclosure obligations that accompany FISA directives. The FISA (like the  
 9 NSL regime) consistently vests authority to define the contours of any "security procedures"  
 10 (which include the applicable nondisclosure obligations) in "the Attorney General and the  
 11 Director of National Intelligence." *E.g.*, 50 U.S.C. § 1881a(i)(1)(B) (authorizing the "Attorney  
 12 General and the Director of National Intelligence" to "direct" an ECSP to "maintain under  
 13 security procedures *approved by the Attorney General and the Director of National Intelligence*  
 14 any records concerning the acquisition or the aid furnished" by the ECSP); *id.* § 1805(c)(2)(C)  
 15 ("An order approving an electronic surveillance under this section shall direct . . . that such  
 16 [ECSP] maintain [any records] under *security procedures approved by the Attorney General and*  
 17 *the Director of National Intelligence*") (emphases added); *id.* § 1824(c)(2)(C) (same language).

18 Likewise, the provisions governing the FISC's review of the Executive's FISA  
 19 applications do not permit the FISC judge to consider the necessity or scope of the Executive's  
 20 security procedures. Section 1805, for example, provides that a FISC judge "**shall** enter an ex  
 21 parte order" authorizing electronic surveillance "if he finds that" certain conditions are met (none  
 22 of which require review of any nondisclosure provisions). *See, e.g.*, 50 U.S.C. §§ 1805(a),  
 23 1824(a) (emphasis added).<sup>16</sup> Indeed, it is telling that the Government's argument fails to cite a  
 24 single statutory provision. *See Mot.* at 21.

25 \_\_\_\_\_  
 26 <sup>16</sup> The conditions for FISC approval are: (1) the application has been made by the appropriate  
 27 authorities; (2) "there is probable cause to believe that . . . the target of the electronic surveillance  
 28 is a foreign power"; (3) the government's "proposed minimization procedures" meet the  
 statutory requirements (meaning they are designed "to minimize the acquisition and retention" of  
 nonpublic information about "United States persons," 50 U.S.C. § 1801(h)); and (4) the  
 application "contains all the statements and certifications required."

1           Moreover, the Government’s argument that “no case” requires the Government to initiate  
2 expedited judicial review in order to protect classified information is incorrect. That is precisely  
3 the holding of *Doe v. Mukasey*, which found that *Freedman* applies to restrictions on disclosure  
4 of individual NSLs (which are also “classified”). *Mukasey*, 549 F.3d at 879–81.

5           Finally, the Government’s discussion of other sources of censorship authority is a red  
6 herring. Dkt. No. 309, at 22–24. Twitter is presently seeking only a declaration that the  
7 Government’s censorship of the redacted portions of the Transparency Report violates the First  
8 Amendment and an injunction against classification of aggregate data under 50 U.S.C. § 1874  
9 and EO 13526 without *Freedman*’s procedural safeguards. Likewise, the Government has  
10 consistently identified the reporting bands and its classification authority under EO 13526 as the  
11 basis for the Government’s discretionary censorship (authorized by 50 U.S.C. § 1874(c)) of  
12 Twitter’s speech. *See* Tabb Decl., Dkt. No. 309-1, ¶¶ 27–30; Rubin Decl. Ex. 3.

13           And irrespective of the statutory or regulatory source of the speech restrictions here, the  
14 substantive First Amendment standard is the same: The Government must show that  
15 nondisclosure is necessary to prevent grave and imminent risk to national security. Nor does it  
16 matter, for purposes of *Freedman*, that the Government may in other circumstances impose  
17 nondisclosure obligations under other statutes. As the Court has previously observed, the  
18 Government has not pointed to any provision in *any* statute which permits recipients of national  
19 security process to challenge restrictions on aggregate reporting under the procedures  
20 contemplated in *Freedman*. Dkt. No. 172, at 9.

21           **3. Twitter Is Entitled to an Injunction Against Enforcement of the Government’s**  
22           **Procedurally Unconstitutional Censorship Authority.**

23           In sum, Twitter is entitled to summary judgment on its claim that the Government’s  
24 classification of the 2014 Transparency Report was an “unconstitutional prior restraint,” because  
25 it was imposed pursuant to a system of censorship that lacks *Freedman*’s procedural safeguards.  
26 First, none of the Government’s proffered bases for its censorship here—including its  
27 classification guidelines in EO 13526 (nor 50 U.S.C. § 1874) require that any pre-judicial review  
28 restraints be “brief.” *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002). This stands in sharp

1 contrast to the procedures upheld by the Ninth Circuit in *In re NSL*, which guaranteed that the  
 2 government would “‘go to court’ within 30 days of receiving notice” from a recipient. 863 F.3d  
 3 at 1129 (quoting 18 U.S.C. § 3511(b)(1)(B)). *Freedman*’s second requirement is also lacking:  
 4 As this Court previously noted, “[Section 1874(c)] does not provide a mechanism for  
 5 [expeditious] review of any Government decisions under that exception, or classification  
 6 decisions in connection with such disclosures generally.” Dkt. No. 172, at 18; *compare In re*  
 7 *NSL*, 863 F.3d at 1129 (quoting 18 U.S.C. § 3511(b)(1)(C) (specifically requiring courts to “rule  
 8 expeditiously” on challenges to non-disclosure of individual NSLs)). And third, the framework  
 9 applied here does not require *the Government* to initiate those judicial proceedings, upon receipt  
 10 of notice of a legal challenge from the recipient. *Compare In re NSL*, 863 F.3d at 1129.

11 Given these defects, Twitter is entitled to a declaratory judgment that the Government’s  
 12 censorship of the 2014 Transparency Report was procedurally unconstitutional because the  
 13 system of censorship applied failed to comport with *Freedman*. The Government’s restriction on  
 14 Twitter’s aggregate reporting should accordingly be *enjoined* until the Government adopts  
 15 procedures by which Twitter can obtain *Freedman*-compliant judicial review of aggregate  
 16 reporting restrictions. *See In re Nat’l Sec. Letter*, 930 F. Supp. 2d 1064, 1081 (N.D. Cal. 2013)  
 17 (adopting such remedy).<sup>17</sup>

18 **C. Independently, the Government’s Motion for Summary Judgment Should Be**  
 19 **Denied Under Federal Rule of Civil Procedure 56(d).**

20 Independently, the Government’s Renewed Motion for Summary Judgment should be  
 21 denied because Twitter has been precluded at every turn from obtaining discovery into “facts  
 22 essential to justify its opposition.” Fed. R. Civ. P. 56(d). For the past three years (since  
 23 November 2016), Twitter has sought exhaustively to obtain basic discovery of information  
 24 highly relevant to its claims. The Government first asserted groundless relevance objections, and  
 25 then went through the motions of discovery while asserting privilege over virtually all  
 26 substantive, non-public information.

27 <sup>17</sup> Should the Court deem it appropriate, Twitter would not object to a stay of the Court’s  
 28 judgment pending appeal or, if no appeal is filed, for 90 days—consistent with the Northern  
 District’s opinion in *In re NSL*. *Id.* at 1081.



1           The Government has also prevented Twitter’s access (through its cleared counsel) to the  
2 classified declaration on which the Government originally relied in moving for judgment (the  
3 Classified Steinbach Declaration). Though the Court directed the Government to initiate  
4 expedited security clearance for Twitter’s lead counsel, Lee H. Rubin (Dkt. No. 172), and Mr.  
5 Rubin’s application was “favorably adjudicated,” Rubin Decl. ¶ 17, Ex. 12, the Government  
6 ultimately refused to issue a security clearance.<sup>18</sup> The Government claimed that Mr. Rubin, as  
7 private counsel in civil litigation against the Government, had no “need to know” classified  
8 evidence submitted in this case. *Id.* ¶ 17; Dkt. No. 244, at 9. The Government then opposed  
9 Twitter’s request to the Court for access to the Classified Steinbach Declaration (Dkt. No. 250)  
10 on the dual grounds that (1) the Court had no authority to compel discovery of classified  
11 information over its need-to-know objection (Dkt. Nos. 256, 264), and (2) the declaration was a  
12 “state secret” (Dkt. No. 281). Twitter has vigorously contested both objections as insufficient to  
13 justify the Government’s refusal to disclose classified information to cleared counsel, *see* Dkt.  
14 Nos. 265, 292; this dispute remains live.

15           Now, in connection with its Renewed Motion for Summary Judgment, the Government  
16 has submitted the Classified Tabb Declaration, which it again claims constitutionally justifies its  
17 restrictions on Twitter’s Transparency Report. Just as with the Classified Steinbach Declaration,  
18 Twitter needs access to the Classified Tabb Declaration—the core of the Government’s  
19 defense—in order to meaningfully counter the Government’s claim that its prior restraint is  
20 constitutional. As Twitter previously explained, such access would occur only through cleared  
21 counsel and under any security procedures the Government deems appropriate. Twitter’s request  
22 is supported by fundamental principles of due process and fully consistent with the Court’s broad  
23 inherent authority to control discovery. *See id.* Simultaneously, the Government has articulated  
24 no valid basis to believe that the nation’s security would be endangered by permitting one  
25 cleared counsel access to one classified document—subject to whatever security protocols the  
26 Government may require. *Id.*

27 \_\_\_\_\_  
28 <sup>18</sup> For simplicity, Twitter uses the term “cleared counsel” to refer to this favorable suitability  
determination.

1 The Court’s recent Order to Show Cause (Dkt. No. 301) only underscores Twitter’s need  
 2 for such discovery. The Court has indicated that it is inclined to hold that evidence contained in  
 3 the Classified Declaration of Michael C. McGarrity (submitted in support of the Government’s  
 4 state secrets briefing) “meets the Government’s burden under strict scrutiny to justify  
 5 classification ... of information in the Draft Transparency Report.” Dkt. No. 301, at 2. The  
 6 Government objected to the Court’s consideration of the Classified McGarrity Declaration for  
 7 purposes of summary judgment, but requested an opportunity to submit that evidence through a  
 8 “new motion[] for summary judgment and supporting declarations.” Dkt. No. 306, at 2 n.1. That  
 9 evidence is now presumably contained in the Classified Tabb Declaration, submitted in support  
 10 of the Government’s Renewed Motion for Summary Judgment.

11 The Court’s stated inclination to uphold a presumptively unconstitutional prior restraint  
 12 on the basis of classified evidence only heightens the need for adversarial testing of that  
 13 evidence. Thus, even if the Court were to conclude that discrete portions of the Classified Tabb  
 14 Declaration could not be disclosed to cleared counsel without serious risk of harm to national  
 15 security, the Court should at least permit access to those portions of the declaration the Court  
 16 finds potentially dispositive (subject, of course, to reasonable security protocols).

17 Simply put, Twitter needs access to the Government’s most critical evidence to vindicate  
 18 its First Amendment rights. This provides yet another basis for denying the Government’s  
 19 Motion for Summary Judgment.

### 20 CONCLUSION

21 For the reasons set forth herein, the Court should *grant* Twitter’s Cross-Motion for  
 22 Summary Judgment and *deny* the Government’s Motion. Specifically, Twitter seeks judgment in  
 23 its favor on the portions of Counts I and II discussed herein, as well as on Count III to the extent  
 24 derivative of any relief granted under Twitter’s Counts I and II.

25 Dated: October 25, 2019

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