No 23-1264

In the Supreme Court of the United States

X CORP., FKA TWITTER, INC., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court was required to resolve a service provider's First Amendment challenge to a nondisclosure order—which prohibited it from notifying its user about a warrant seeking the user's communications—before directing the provider to comply with the warrant.

2. Whether the district court's order prohibiting petitioner from disclosing the existence or contents of a warrant for information associated with the @realDonaldTrump Twitter account satisfied strict scrutiny under the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 77 F.4th 815. The opinion of the district court (Pet. App. 35a-73a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2023. A petition for rehearing was denied on January 16, 2024 (Pet. App. 81a-82a). On April 2, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 30, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Pursuant to 28 U.S.C. 518(a), and in accordance with 28 C.F.R. 600.4(a), 600.7(a), and Office of the Att'y Gen., U.S. Dep't of Justice Order No. 5559-2022 (Nov. 18, 2022), the Special Counsel has been authorized to conduct litigation before this Court on behalf of the United States in this matter.

STATEMENT

On January 17, 2023, the government applied for a warrant under the Stored Communications Act (SCA or Act), 18 U.S.C. 2701 *et seq.*, seeking information associated with the Twitter account "@realDonaldTrump," as part of the government's investigation into efforts to interfere with the lawful transfer of power following the 2020 presidential election. The district court found probable cause for the warrant and required petitioner to produce the requested materials. The court also issued an order prohibiting petitioner from disclosing the warrant for 180 days to "any other person," based on its finding that the government had shown reasonable grounds to believe that notifying the user of the account would jeopardize the government's investigation and produce other harms enumerated in the statute. See 18 U.S.C. 2705(b). The court rejected petitioner's contention that enforcement of the warrant should be deferred until after the court ruled on petitioner's First Amendment challenge to the nondisclosure order. Petitioner did not fully comply with the warrant until after the court's deadline, and the court ordered petitioner to pay a civil contempt sanction of $350,000. In the same opinion, the court rejected petitioner's First Amendment challenge to the nondisclosure order, finding it valid after applying strict scrutiny. The court of appeals affirmed. Pet. App. 1a-33a.

1. a. Petitioner, formerly known as Twitter, is a private company that allows its users to post short public messages known as "tweets." See Gov't Pet. at 2, *Trump* v. *Knight First Am. Inst. at Columbia Univ.*, No. 20-197 (filed Aug. 20, 2020) (Knight Pet.). Each Twitter user creates a unique identifier (called a "handle") and is given a webpage that records the user's tweets and,

by default, makes them visible to everyone with internet access, including those who are not Twitter users. *Ibid.* Twitter also permits users to communicate privately with other users through so-called "direct messages." See X Corp., *About Direct Messages*, https://help.twitter.com/en/using-x/direct-messages#basics.

b. In March 2009, Donald J. Trump established a personal Twitter account under the handle @realDonaldTrump, using it to tweet about a variety of topics. After he became President on January 20, 2017, former President Trump continued to use the account for personal purposes as well as to communicate with the public about official actions and policies of his administration. Knight Pet. at 4-5. Former President Trump's term in office ended on January 20, 2021.

2. a. As part of its investigation into whether any laws were violated in efforts to interfere with the lawful transfer of power after the 2020 presidential election, the government applied for a warrant pursuant to the SCA for data and records in petitioner's possession related to the Twitter account @realDonaldTrump and simultaneously sought a nondisclosure order barring petitioner from disclosing receipt of the warrant or its contents. Pet. App. 4a, 40a-41a. The SCA permits the government to obtain a warrant requiring a provider of electronic communications services, such as petitioner, to produce information about a user. 18 U.S.C. 2703. The Act further provides that the government can apply for an order requiring the service provider, "for such period as the court deems appropriate, not to notify any other person of the existence of the warrant." 18 U.S.C. 2705(b). The court "shall enter such an order if it determines that there is reason to believe that notification of

the existence of the warrant * * * will result in" (1) "endangering the life or physical safety of an individual," (2) "flight from prosecution," (3) "destruction of or tampering with evidence," (4) "intimidation of potential witnesses," or (5) "otherwise seriously jeopardizing an investigation or unduly delaying a trial." *Ibid.*

In support of its request for the nondisclosure order, the government "proffered facts showing reasonable grounds to believe that notifying [former President Trump] of the existence of the Warrant would result in destruction of or tampering with evidence, intimidation of potential witnesses, or other serious jeopardy to [the] investigation." Pet. App. 41a (internal quotation marks omitted).

b. The district court found probable cause that the @realDonaldTrump account would contain evidence of criminal activity and accordingly issued the warrant, requiring petitioner's compliance within ten days. Pet. App. 4a, 40a-42a. The court also entered a nondisclosure order prohibiting petitioner from disclosing the existence or contents of the warrant to any person for 180 days. *Id.* at 4a, 41a. The court "found that there were 'reasonable grounds to believe' that disclosing the warrant to former President Trump 'would seriously jeopardize the ongoing investigation' by giving him 'an opportunity to destroy evidence, change patterns of behavior, [or] notify confederates.'" *Id.* at 4a (citation omitted).[2]

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[2] The government's proposed nondisclosure order erroneously listed flight from prosecution as a basis for nondisclosure, and the risk-of-flight language initially remained in the nondisclosure order entered by the district court, but the government's application to the court did not mention flight from prosecution as a reason for

Petitioner initially informed the government that it would have difficulty complying by the January 27, 2023, deadline. Pet. App. 5a, 43a. On January 31, however, after the deadline had passed, petitioner informed the government that it did not intend to comply with the warrant. *Id.* at 5a, 44a. Petitioner did not challenge the warrant itself but claimed that the nondisclosure order impinged on its First Amendment interests, which, according to petitioner, were heightened because the warrant purportedly could implicate issues of executive privilege. *Id.* at 5a; C.A. App. 53.[3] Petitioner stated that

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nondisclosure, and the court did not rely on risk of flight in its ultimate analysis. See Pet. App. 4a n.2, 41a n.3.

[3] The only strand of executive privilege that petitioner invokes is the presidential-communications privilege. See Pet. 9, 13 n.2, 23. In seeking the warrant, the government was aware that former President Trump had used public tweets for official purposes, which could not implicate executive privilege, but the government had no information suggesting that former President Trump had used Twitter for confidential communications with aides and advisers for purposes of taking official action. See *United States* v. *Nixon*, 418 U.S. 683, 703 (1974) (describing qualified privilege for confidential presidential communications). Only Twitter's direct-message function could theoretically be used for any such confidential communications, and the government had no reason to believe that former President Trump had done so. See Pet. App. 119a-121a (government counsel noting the absence of evidence that former President Trump used the Twitter account for that purpose and citing the legal reasons why executive privilege would not apply to providing information to the government). Petitioner did not point to any information in its possession—such as sender-recipient information—to suggest that former President Trump used the @realDonaldTrump account for direct messaging with presidential advisors. See *id.* at 119a, 121a; see also Gov't C.A. Br. 45-46 ("Twitter offers no reason to conclude that the former President, with the full array of communications technologies available to the head of the Executive

it would not comply with the warrant until the district court ruled on its challenges to the nondisclosure order. Pet. App. 5a.

c. Petitioner then filed a motion to modify or vacate the nondisclosure order, arguing that the order violated its First Amendment right to communicate with former President Trump. Petitioner also argued that the First Amendment required the district court to defer enforcement of the warrant until the court ruled on petitioner's challenge to the nondisclosure order. The government moved for an order to show cause why petitioner should not be held in contempt for failing to comply with the warrant. Pet. App. 5a-6a.

At a hearing, the district court concluded that the First Amendment did not require adjudication of the nondisclosure order before enforcement of the warrant. The court noted that such an approach would permit a service provider to delay execution of any warrant covered by a nondisclosure order, which would, among other things, risk the loss or destruction of evidence and jeopardize the government's ability to bring prosecutions in a timely manner. Pet. App. 7a, 157a-160a.

The district court also found that petitioner was in contempt of court for failing to comply with the warrant by the deadline. The court gave petitioner an opportunity to purge the contempt, however, by complying with the warrant by a new deadline. Petitioner failed to meet the new deadline and did not comply until a few days later. Pet. App. 7a-9a. The materials petitioner produced in compliance with the warrant included just 32 direct-message items connected to @realDonaldTrump, constituting a miniscule proportion of the total production.

Branch, would have used Twitter's direct-message function to carry out confidential communications with Executive Branch advisors.").

Gov't C.A. Br. 46. None has ever been made the subject of a claim of executive privilege.

In a subsequent opinion and order, the district court held that the nondisclosure order was valid under the First Amendment. Pet. App. 50a-67a. The court assumed without deciding that the order should be evaluated under strict scrutiny. *Id.* at 52a-53a. The court accordingly assessed whether the nondisclosure order was narrowly tailored to serve a compelling government interest. *Id.* at 53a-67a.

The district court determined that the nondisclosure order served the government's compelling interest in furthering "the integrity and secrecy of an ongoing criminal investigation," namely the investigation of former President Trump's efforts to overturn the results of the 2020 presidential election. Pet. App. 53a-54a. Public disclosure of the warrant, the court found, "could prompt witnesses, subjects, or targets of the investigation to destroy their communications or records, including on Twitter or other social media platforms, and could lead [former President Trump] to ratchet up public and private pressure on others to refuse to be cooperative with the government, or even to engage in retaliatory attacks on law enforcement and other government officials that have real world and violent consequences." *Id.* at 58a. The court further concluded that the nondisclosure order was narrow in duration and scope and that no less restrictive alternative was available to achieve the government's interests.[4] *Id.* at 63a-67a.

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[4] The district court also imposed $350,000 as civil contempt sanctions for the period that petitioner failed to comply with the warrant after the court's deadline. Pet. App. 67a-73a.

d. Petitioner filed a notice of appeal. While that appeal was pending and in light of developments in the investigation, the government notified the district court that it would be appropriate to modify the nondisclosure order to allow petitioner to disclose the warrant to former President Trump with the name of the case agent assigned to the investigation redacted. The court granted the unopposed modification request. Pet. App. 10a. The government then notified the court of appeals of that development, suggesting that petitioner's challenge to the nondisclosure order had become moot. *Id.* at 13a.

3. The court of appeals affirmed. Pet. App. 1a-33a. The court first concluded that petitioner's First Amendment claims fell within the exception to mootness for disputes that were capable of repetition while evading review. *Id.* at 13a-17a. As relevant here, the court then rejected petitioner's challenges to the nondisclosure order.[5]

First, the court of appeals determined that the nondisclosure order satisfied the First Amendment. Pet. App. 19a-24a. The court assumed without deciding that the nondisclosure order should be evaluated under strict scrutiny. *Id.* at 19a-20a. Applying that "demanding" standard, the court found that the government had a compelling interest in "preserving the integrity and maintaining the secrecy of its ongoing criminal investigation of the events surrounding January 6, 2021." *Id.* at 20a. The court also found that "[*e*]*x parte* submissions reviewed by this court supported the district

[5] The court of appeals also determined that petitioner had forfeited a statutory argument that the district court misapplied the SCA, Pet. App. 17a-18a, and affirmed the contempt sanction, *id.* at 28a-33a. Petitioner does not renew those claims here.

court's finding that disclosure would have harmed the integrity and secrecy of the ongoing grand jury investigation, despite public knowledge of the broader investigation." *Id.* at 23a.

The court of appeals also concluded that the nondisclosure order was narrowly tailored to advance those compelling interests. Pet. App. 21a-24a. The court emphasized that the order was limited to 180 days, petitioner was restricted from speaking only about information it had obtained solely from its involvement in the government's investigation, and petitioner remained free to raise general concerns about warrants and nondisclosure orders and to speak publicly about the investigation into the events on January 6, 2021. *Id.* at 21a-22a. The court also rejected petitioner's proposed less-restrictive alternative of allowing it to reveal parts of the warrant to former President Trump or his representatives. The court explained that those alternatives risked defeating the government's interests in protecting the investigation and would impose unacceptable burdens on the district court to assess the alternative individual's trustworthiness. *Id.* at 23a-24a.

Second, the court of appeals found that the district court acted within its discretion when it decided to rule on the government's contempt motion and enforce the warrant before ruling on petitioner's challenge to the nondisclosure order. Pet. App. 24a-25a. The district court "reasonably concluded that the warrant and nondisclosure order were 'wholly separate order[s]' governed by different legal standards, and that the criminal investigation should not be delayed while [petitioner's] motion was litigated." *Id.* at 25a (citation omitted).

The court of appeals rejected petitioner's First Amendment argument that, under *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the district court was required "to maintain the status quo—*i.e.*, forebear from enforcing the warrant—while [petitioner's] objections to the nondisclosure order were litigated." Pet. App. 25a-26a. The court of appeals noted that *Freedman* arose in a "readily distinguishable context" of censorship and licensing schemes, while "the instant warrant and nondisclosure order were issued directly by a court in connection with a criminal investigation" pursuant to the "judicial process contemplated by" the SCA. *Id.* at 26a-27a. "[T]here was no need in this case to maintain the status quo until a court could review [petitioner's] arguments," the court explained, "because judicial review of statutory requirements had already occurred before the nondisclosure order was even served on [petitioner]." *Ibid.*

4. The court of appeals denied rehearing en banc. Pet. App. 81a-82a. Judge Rao, joined by three other judges, filed a statement respecting the denial of rehearing en banc. *Id.* at 83a-95a. In her view, "looming in the background" of this case were "consequential and novel questions about executive privilege and the balance of power between the President, Congress, and the courts." *Id.* at 83a. Judge Rao believed that the former President should have been afforded an opportunity to assert claims of executive privilege before petitioner produced materials to the government pursuant to the warrant. *Id.* at 91a. Judge Rao found, however, that "these issues are not properly before the en banc court" because "[o]nce informed of the search, President Trump could have intervened to protect claims of executive privilege, but did not." *Id.* at 83a.

ARGUMENT

Petitioner contends (Pet. 13-24) that review is warranted to determine whether a court must resolve a First Amendment challenge to a nondisclosure order before requiring compliance with an SCA warrant. Petitioner also contends (Pet. 24-32) that the court of appeals misapplied strict-scrutiny analysis in upholding the nondisclosure order in this case. Those contentions lack merit and warrant no further review. The first claim misapprehends the requirements of the SCA and the First Amendment; erroneously seeks to inject unfounded executive-privilege claims into its argument; and wrongly asserts a circuit conflict. The second claim presents a factbound and meritless objection to the ruling of both courts below upholding the nondisclosure order. Even if the issues petitioner raises otherwise warranted review, this case would not be an appropriate vehicle: the underlying dispute is moot and no executive-privilege issue actually existed in this case. If review of the underlying legal issues were ever warranted, the Court should await a live case in which the issues are concretely presented. The petition for a writ of certiorari should therefore be denied.

1. Petitioner contends (Pet. 13-24) that courts must rule on First Amendment challenges to nondisclosure orders before compelling production under an SCA warrant. Petitioner claims (Pet. 15-20) that the court of appeals' decision conflicts with decisions from other courts of appeals. Those arguments lack merit.

a. The First Amendment did not justify petitioner's refusal to comply with an SCA warrant before litigating its separate challenge to the nondisclosure order. Petitioner seemingly ties its claimed right to immediate resolution of its First Amendment claim to interests

belonging to potential privilege holders whose communications are at issue. But petitioner has no standing to raise such potential privilege claims, and its sequencing argument contradicts basic investigatory principles.

The Fourth Amendment permits the government to obtain a warrant to search property belonging to an innocent third party as long as the warrant is supported by probable cause that "evidence of a crime will be found." *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 554 (1978). The warrant in *Zurcher* was directed at a newspaper, raising the possibility that it could result in seizure of materials protected under the First Amendment. *Id.* at 563-564. The Court nevertheless rejected the argument that "that the press should be afforded opportunity to litigate the [government's] entitlement to the material it seeks before it is turned over or seized." *Id.* at 566.

Consistent with *Zurcher*, the court of appeals correctly determined that the district court had discretion to compel petitioner to comply with a warrant for criminal evidence in its possession before the district court ruled on petitioner's separate challenge to the nondisclosure order. Petitioner was not permitted to withhold materials responsive to a warrant validly issued under the Fourth Amendment while mounting a First Amendment challenge to a separate nondisclosure order issued pursuant to 18 U.S.C. 2705(b). See *United States* v. *Grubbs*, 547 U.S. 90, 99 (2006) (endorsing post-search protections for improperly obtained evidence).

b. Petitioner's reliance on *Freedman* v. *Maryland*, 380 U.S. 51 (1965), for a different rule is misplaced. *Freedman* addressed a state statute prohibiting theaters from showing films without prior approval by a state board of censors. *Id.* at 52. The Court held that

"a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58. Those safeguards were: (1) the censor must bear the burden of obtaining judicial review and of establishing that the speech may be restricted; (2) any restraint on speech prior to judicial review must be for only a brief period; and (3) judicial review must be prompt. *Id.* at 58-59; see *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 321 (2002).

The court of appeals correctly determined that "*Freedman* is inapplicable in this case." Pet. App. 27a. The nondisclosure framework in 18 U.S.C. 2705(b) is not a prior-restraint regime akin to a censorship or licensing scheme where the First Amendment requires heightened procedural protections. This Court has explained that *Freedman*'s procedural safeguards apply to prior-restraint "scheme[s] with rather subjective standards * * * where a denial likely mean[s] complete censorship," *City of Littleton* v. *Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 782 (2004), and to such schemes that "delegate overly broad licensing discretion to a government official," *Forsyth County.* v. *Nationalist Movement*, 505 U.S. 123, 130 (1992). The Court has applied those safeguards in cases involving the use of municipal facilities to perform a controversial musical, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), the seizure of allegedly obscene photographs by customs officials, *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971), and the use of the mail to send allegedly obscene material, *Blount* v. *Rizzi*, 400 U.S. 410 (1971). In contrast, the Court has not required *Freedman*'s safeguards for prior restrictions on speech that do not

involve subjective judgments or broad delegations of discretion. For example, in *Littleton*, the Court held that "ordinary judicial review procedures" are sufficient for First Amendment challenges to licensing schemes that "appl[y] reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials." 541 U.S. at 781, 783; see *Thomas*, 534 U.S. at 322 (upholding a municipality's time, place, and manner regulations that did not provide any heightened procedural safeguards).

The SCA does not authorize restriction of speech based on broad, subjective standards. The statute permits a court to enter a nondisclosure order only if it finds that there is a reasonable basis to conclude that disclosure of the existence of a lawful search warrant will result in (1) "endangering the life or physical safety of an individual," (2) "flight from prosecution," (3) "destruction of or tampering with evidence," (4) "intimidation of potential witnesses," or (5) "otherwise seriously jeopardizing an investigation or unduly delaying a trial." 18 U.S.C. 2705(b). That statutory scheme is "readily distinguishable" from the censorship scheme in *Freedman*, Pet. App. 26a, and does not give unbounded, standardless discretion to government officials or otherwise create a risk of "freewheeling censorship." *Southeastern Promotions*, 420 U.S. at 559; see *Littleton*, 541 U.S. at 782.

As the court of appeals further concluded, the nondisclosure scheme in 18 U.S.C. 2705(b) is distinguishable from *Freedman* because it "merely preclude[s] 'disclosure of a single, specific piece of information that was generated by the government'—*i.e.*, that the government obtained a court order compelling production of a user's data." Pet. App. 28a (quoting *In re National Sec.*

Letter, 33 F.4th 1058, 1077 (9th Cir. 2022)). Contrary to petitioner's contentions (Pet. 22-23), this Court has upheld comparable prohibitions on the public disclosure of information the government itself has made available, without imposing *Freedman*'s heightened procedural requirements. See *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984) (protective order prohibiting a party's dissemination of information obtained through pretrial discovery); *Butterworth* v. *Smith*, 494 U.S. 624 (1990) (state restriction on a grand jury witness's disclosure of the testimony of other grand jury witnesses).

Petitioner's reliance (Pet. 21-22) on *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam), is misplaced. In *Vance*, a Texas statute authorized courts to enter indefinite restrictions on the exhibition of films that had not yet been finally found obscene. *Id.* at 311-312. The judge therefore did not engage in the prompt judicial review contemplated by *Freedman*. See *id.* at 316-317. In contrast, under 18 U.S.C. 2705(b), before a nondisclosure order goes into effect, a court must scrutinize a specific restriction on speech by a particular party and conclude that disclosure is reasonably likely to result in one of the dangers listed in Section 2705(b).

Indeed, although the procedural safeguards that *Freedman* requires in the context of censorship and licensing schemes are not needed for nondisclosure orders entered under 18 U.S.C. 2705(b), the statute nonetheless provides comparable safeguards. The government can obtain a nondisclosure order only after it demonstrates to a court that disclosure will result in one of the harms specified in Section 2705(b). A "neutral and detached judge" must "consider[] [the] statutory factors and ma[ke] specific findings." Pet. App. 27a. And because "judicial review of statutory requirements

ha[s] already occurred" before a nondisclosure order goes into effect, *ibid.*, no restriction on speech is imposed before judicial review. The nondisclosure scheme in Section 2705(b) therefore contains each of the three heightened procedural protections in *Freedman*, appropriately tailored to the context of a confidential criminal investigation. See *National Sec. Letter*, 33 F.4th at 1077 (concluding that the similar judicial-review procedures in 18 U.S.C. 3511 for orders prohibiting disclosure of national security letters contain the procedural safeguards required by *Freedman*).[6]

c. Petitioner suggests (Pet. 23-24) that the court of appeals erred because former President Trump should have had an opportunity to assert executive privilege before petitioner complied with the warrant. That privilege claim is not properly presented here and has no relevance to petitioner's First Amendment rights. Petitioner is not the proper party to advance executive-privilege claims: it concedes that it lacks standing to do so. Pet. App. 61a; *id.* at 83a (Rao, J.) (recognizing that executive privilege claims "are not properly before the en banc court"). And taken to its logical limit, petitioner's claim—that it has a constitutional right to safeguard its user's purported privileges by giving them

[6] Petitioner misreads (Pet. 14) *Freedman*'s reference to preserving "the status quo" until after the judicial hearing by suggesting that the relevant status quo related to its obligation to produce records. That is wrong: *Freedman* clearly refers to the "status quo" as the restraint on speech—here, the nondisclosure order. 380 U.S. at 59 ("Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution."). Petitioner had no right under *Freedman* to avoid complying with the warrant until its free-expression claim was resolved.

notice before complying with a warrant—would mean that *no* SCA warrant could be enforced without disclosure to a potential privilege holder, regardless of the dangers to the integrity of the investigation. Even petitioner does not go that far: it seems to concede that a district court could enter a nondisclosure order prohibiting disclosure to former President Trump if the order satisfied strict scrutiny. See Pet. 24-28; see also *In re Application of Subpoena 2018R00776*, 947 F.3d 148, 153-154 (3d Cir. 2020) (upholding SCA nondisclosure order under strict scrutiny despite provider's claimed interest in disclosing the subpoena to subscriber's trustee who "controlled the debtor's assertion of attorney-client privilege"). Those threshold flaws are fatal to petitioner's argument, but even setting them aside, petitioner is wrong in contending that privilege issues need to be adjudicated before a court can enforce compliance with a warrant.

i. As a general matter, in appropriate cases when a warrant may result in production of materials subject to legitimate privilege claims, the government uses filter teams and other precautions to review the materials and screen investigators from possibly privileged materials.[7] If a later disagreement arises about whether

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[7] A filter team is composed of attorneys and agents "who have not and will not be involved in the investigation or prosecution of the" individuals or entities under suspicion. 2 Wayne R. LaFave et al., *Search and Seizure: A Treatise on the Fourth Amendment* § 4.1(h), at 594 (6th ed. 2020). The filter team conducts an initial review of seized materials to separate those that have potentially privileged content from those that do not. *Ibid.* The filter team can then submit materials to a court, *ex parte* if necessary, to obtain judicial approval before providing them to the investigators. See, *e.g.*, *In re Search Of Info. Associated With Two Accounts Stored At Premises*

materials obtained pursuant to a warrant are privileged, a defendant can seek suppression or other remedies at trial. See, *e.g.*, *United States* v. *Squillacote*, 221 F.3d 542, 558-560 (4th Cir. 2000), cert. denied, 532 U.S. 971 (2001); *United States* v. *Haynes*, 216 F.3d 789, 794 (9th Cir. 2000), cert. denied, 531 U.S. 1078 (2001). But a claim that a valid warrant may result in seizure of potentially privileged materials does not provide a basis to object to a search, to withhold materials covered by the warrant, or to litigate privilege before execution of the warrant.

ii. Deferring petitioner's compliance with the warrant until former President Trump had the opportunity to invoke the presidential-communications privilege would have been particularly inapt here. The warrant did not seek potentially privileged materials from Twitter. Although it was theoretically possible that former President Trump used his Twitter account to communicate confidentially with presidential advisors concerning official matters—a necessary predicate for invoking the privilege—the government had no reason to believe that any such communications existed. See p. 5 n.3, *supra*. Petitioner cites no authority suggesting that whenever the possibility exists that execution of a search warrant could yield privileged materials, the government must notify the putative privilege holder, permit the putative holder to assert claims of privilege, and defer execution of the warrant until those privilege claims are resolved. That approach would stymie legitimate investigative techniques and unduly stall criminal investigations—as well as frustrate covert investigatory

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Controlled By Google LLC, No. 22-GJ-28, 2022 WL 18673694 (D.D.C. June 27, 2022).

techniques. See *Dalia* v. *United States*, 441 U.S. 238, 247-248 (1979).

iii. Here, moreover, former President Trump had no basis to invoke privilege to avoid disclosure to the government under the warrant, and indeed has never even attempted to assert the privilege here. Executive privilege, including the presidential-communications privilege that petitioner adverts to, exists "not for the benefit of the President as an individual, but for the benefit of the Republic." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 449 (1977) (*GSA*). That privilege protects the "legitimate governmental interest in the confidentiality of communications between high Government officials," because "'those who expect public dissemination of their remarks may well temper candor.'" *Id.* at 446 n.10 (quoting *United States* v. *Nixon*, 418 U.S. 683, 705 (1974)). Consistent with the privilege's function of protecting the Executive Branch's institutional interests, the privilege may be invoked in certain instances to prevent the dissemination of materials outside the Executive Branch. *E.g.*, *Trump* v. *Thompson*, 142 S. Ct. 680, 680 (2022) (per curiam) (materials requested by a Congressional committee). But petitioner has cited no instance in which the privilege was successfully invoked to prohibit the sharing of records or information within the Executive Branch itself.

To the contrary, this Court rejected former President Nixon's claim that he could assert the presidential-communications privilege "against the very Executive Branch in whose name the privilege is invoked." *GSA*, 433 U.S. at 447-448. The Court thus upheld a statutory requirement that personnel in the General Services Administration review documents and recordings created during Nixon's presidency. Although the Court stated that a former President can invoke the presidential-communications

privilege after the conclusion of his tenure in office, see *id.* at 448-449, it "readily" rejected the argument that the privilege could bar review of records by "personnel in the Executive Branch sensitive to executive concerns." *Id.* at 451. Likewise here, any assertion of the presidential-communications privilege for documents from former President Trump's Twitter account would similarly have been made against "the very Executive Branch in whose name the privilege is invoked," *id.* at 447-448, and it would have been invalid for the same reasons. In *GSA*, the review involved the "screen[ing] and catalogu[ing]" of presidential materials "by professional archivists" to "preserve the materials for legitimate historical and governmental purposes." *Id.* at 450, 452. That the documents here were to be reviewed by law-enforcement personnel as part of an ongoing criminal investigation further weakens any claim of privilege. The execution of criminal laws is a core Executive Branch responsibility, see U.S. Const. Art. II, § 3, and restricting the Executive Branch's access to information needed to carry out that function would have served neither the purposes of executive privilege nor the public interest.

That is especially true because the protection of the President's generalized confidentiality interests creates a qualified, not an absolute, privilege that "must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Nixon*, 418 U.S. at 713. That "demonstrated, specific need" standard has since been applied in the context of investigative proceedings as well. *In re Sealed Case*, 121 F.3d 729, 753-757 (D.C. Cir. 1997) (grand-jury subpoena) (quoting *Nixon*, 418 U.S. at 709); see *Trump* v. *Vance*, 591 U.S. 786, 812 (2020) (Kavanaugh, J., concurring) (describing the *Nixon* test as applying to "federal criminal subpoenas" and citing *Sealed Case*).

Here, even if the warrant called for documents arguably subject to the presidential-communications privilege, the government had a "demonstrated, specific need" for responsive materials by virtue of the judicially issued warrant based on a finding of probable cause to believe that the Twitter materials provided evidence of crimes.

d. Petitioner contends (Pet. 15-20) that the court of appeals' decision conflicts with decisions from other courts of appeals. Petitioner is incorrect.

First, petitioner contends (Pet. 15) that the court of appeals' decision "deepened" a purported conflict between *John Doe, Inc.* v. *Mukasey*, 549 F.3d 861 (2d Cir. 2008), and *Twitter, Inc.* v. *Garland*, 61 F.4th 686 (9th Cir. 2023), cert. denied, 144 S. Ct. 556 (2024), over the applicability of *Freedman* to nondisclosure orders. But those cases involved different statutory schemes covering different classes of information, and no conflict exists.

Doe involved the constitutionality of a nondisclosure provision, since amended, that applied to a national security letter issued to a particular service provider. See 549 F.3d at 865-868. National security letters are a type of administrative subpoena that Congress has authorized the Federal Bureau of Investigation to issue to an electronic communication service provider requiring production of certain types of information. See 18 U.S.C. 2709. No prior judicial review existed under that scheme, either for the issuance of the letter or the nondisclosure order. Rather, the nondisclosure requirement applied when specified senior government officials certified that disclosure may endanger national security or interfere with foreign relations. *Doe*, 549 F.3d at 868; see 18 U.S.C. 3511(b) (2006). The Second Circuit applied the third *Freedman* procedural safeguard—

requiring the government to initiate judicial review—because the nondisclosure requirement was imposed by the government alone. *Doe*, 549 F.3d at 878-881. The court of appeals' decision here, involving the SCA's requirement of judicial approval *before* the nondisclosure requirement applies, does not conflict with that holding.

Twitter addressed the constitutionality of rules that governed the extent to which a service provider could disclose aggregate information about its receipt of national security letters, as well as orders or directives under the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 *et seq*. See *Twitter*, 61 F.4th at 690-694. The Ninth Circuit held that the nondisclosure rules governing aggregate information did not have to comport with *Freedman*'s heightened procedural requirements. See *id.* at 706-708. That holding is consistent with the decision below and does not conflict with *Doe*. The Second Circuit did not address the disclosure rules for aggregate information that the Ninth Circuit evaluated in *Twitter*, and nothing in *Doe* suggests that if the Second Circuit were to address the constitutionality of those aggregate disclosure rules, it would conclude, contrary to the Ninth Circuit, that the *Freedman* framework applies. Twitter's petition for a writ of certiorari in *Twitter* relied on the same claim of a conflict with *Doe*. See Gov't Br. in Opp. at 21-22, *X Corp.* v. *Garland*, No. 23-342 (filed Dec. 6, 2023). This Court denied review. *X Corp.* v. *Garland*, 144 S. Ct. 556 (2024). The claimed conflict provides even less basis for review here.

Indeed, *Doe* provides a particularly weak basis for a conflict claim because the decision itself has no prospective importance. In 2015, after the Second Circuit's decision finding deficiencies under *Freedman* in the process of judicial review, Congress amended the

applicable judicial-review provision and largely added the procedural safeguards that *Doe* said would satisfy *Freedman* but that were lacking in the statute at that time. The Ninth Circuit subsequently concluded that the amended judicial-review provision, 18 U.S.C. 3511, now "provides all" of *Freedman*'s "procedural safeguards." *National Sec. Letter*, 33 F.4th at 1079. As a result, it is highly likely that the Second and Ninth Circuits would both uphold the constitutionality of the judicial-review provision for nondisclosure orders under the SCA, 18 U.S.C. 2705(b). And nothing suggests that any divergence in the past analytical frameworks used by either court in different contexts would affect the outcomes of future cases.

Second, petitioner contends (Pet. 17-18) that the decision below conflicts with decisions from the Fourth, Sixth, and Eleventh Circuits. According to petitioner, those cases require that a privilege holder "have some mechanism for judicial review of privilege concerns before their potentially privileged documents are produced to investigators." Pet. 17. None of the cases cited by petitioner, however, involved a nondisclosure order that prohibited disclosure of a warrant to a theoretical privilege holder. And, critically, none involved a First Amendment claim. Each of the decisions arose in the entirely different context of overt investigatory steps. Petitioner's claimed conflict is unfounded.

The Sixth Circuit case involved a motion to modify a grand jury subpoena, see Fed. R. Crim. P. 17, to allow a privilege holder to review responsive documents. See *In re Grand Jury Subpoenas*, 454 F.3d 511, 515 (6th Cir. 2006). The court upheld that claim while distinguishing searches conducted under a warrant, noting that when "government officials have already obtained the

physical control of potentially-privileged documents through the exercise of a search warrant," "the potentially-privileged documents are already in the government's possession, and so the use of the taint team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege." *Id.* at 522-523; see *Zurcher*, 436 U.S. at 560-561 (rejecting a "rule denying search warrants against third parties and insisting on subpoenas," because, among other things, a subpoena would involve the potential for the recipient to notify the target and "delay" the investigation by virtue of "the opportunity to litigate its validity"). That Sixth Circuit precedent does not conflict with the court's decision to uphold the SCA procedure here, let alone support petitioner's theory that a service provider has a constitutional right to disclose the warrant and thereby jeopardize a covert investigative step.

The decisions by the Fourth and Eleventh Circuit cases cited by petitioner, *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019), and *In re Sealed Search Warrant & Application*, 11 F.4th 1235, 1252 (11th Cir. 2021) (per curiam), cert. denied, 143 S. Ct. 88 (2022), are likewise distinguishable. In those cases, the government executed warrants to search a law office and a business and seized documents covered by the warrant. Putative privilege holders who were aware of the overt physical search then intervened to challenge the particular filter-team protocols that the government intended to use to protect potential privileges. Neither court concluded that the party in possession of the documents at the time of the search could prohibit the government from executing the warrant until the putative privilege holder had been notified and

provided an opportunity to assert privilege. See *Sealed Search Warrant & Application*, 11 F.4th at 1249-1250 ("[T]he Intervenors cite no cases for the broad remedy they seek: a holding that government agents 'should never . . . review documents that are designated by their possessors as attorney-client or work product privileged' until after a court has ruled on the privilege assertion."); *id.* at 1251 n.10 (declining to address "other filter protocols that are not before us"). Again, neither the Fourth nor the Eleventh Circuit was confronted with a nondisclosure order or a First Amendment claim.

e. Finally, citing *United States* v. *Rayburn House Office Building*, 497 F.3d 654 (2007), cert. denied, 552 U.S. 1295 (2008), petitioner contends (Pet. 18) that the decision below creates "a disparity in treatment of legislative and executive privilege" within the D.C. Circuit. This Court, however, does not grant review to resolve purported intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Regardless, *Rayburn* is consistent with the decision of the court of appeals here. In *Rayburn*, the D.C. Circuit held that the Speech or Debate Clause contains a non-disclosure privilege that requires notice to a member of Congress when the government executes a search warrant at "a location where legislative materials [a]re inevitably to be found." 497 F.3d at 661.[8] Under *Rayburn*, the member must be

[8] *Rayburn* stands alone; the Third and Ninth Circuits have correctly rejected the view that the Speech or Debate Clause creates a non-disclosure privilege. See *In re Search Of Elec. Commc'ns (Both Sent & Received) In The Account Of Chakafattah@gmail.com At Internet Serv. Provider Google, Inc.*, 802 F.3d 516, 525 (3d Cir.

provided with an opportunity to assert the Speech or Debate privilege before the government can access the seized documents. *Id.* at 661-663.

The Speech or Debate privilege at issue in *Rayburn*, however, is an absolute constitutional guarantee to avoid "instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum." *United States* v. *Johnson*, 383 U.S. 169, 182 (1966). The presidential-communications privilege, in contrast, is a qualified privilege protecting the "confidentiality of high-level communications" to facilitate presidential decision-making and policymaking. *Nixon*, 418 U.S. at 705-706. Those interests are not in play (or are overcome by a showing of demonstrated need) when the Executive Branch itself obtains documents through a search warrant supported by probable cause. See pp. 18-20, *supra*. Moreover, while legislative materials may inevitably be found in a member's congressional offices or personal cell phone, see *In re Sealed Case*, 80 F.4th 355, 366 n.6 (D.C. Cir. 2023), the same is not true for the former President's Twitter account. Given the array of official channels for communications available to the President, the government had no reason to believe that confidential presidential communications would be found in former President Trump's Twitter account. Gov't C.A. Br. 45-46. No tension exists between *Rayburn* and the decision below, let alone tension that warrants this Court's review.

2. Petitioner contends (Pet. 24-35) that the court of appeals erroneously held that the nondisclosure order satisfies strict scrutiny. Petitioner agrees (Pet. 27-28) that strict scrutiny was the correct standard for

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2015); *United States* v. *Renzi*, 651 F.3d 1012, 1034 (9th Cir. 2011), cert. denied, 565 U.S. 1157 (2012).

determining the constitutionality of the nondisclosure order. He argues only (Pet. 24-28) that while the court purported to apply strict scrutiny, it instead incorrectly applied a less demanding form of review. Petitioner's arguments are without merit. The court of appeals—and the district court—correctly applied the familiar strict-scrutiny standard. The factbound determination by both courts below that the order satisfies strict scrutiny does not warrant this Court's review. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

a. In the context of the First Amendment, a restriction on speech "passes strict scrutiny" if it "is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown* v. *Entertainment Merchs. Ass'n*, 564 U.S. 786, 799 (2011); see *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015). The court of appeals correctly applied that standard here.

First, the court of appeals correctly concluded that the nondisclosure order was justified by a compelling government interest, namely its interest in preserving the integrity and maintaining the secrecy of investigative steps in an ongoing criminal investigation. Pet. App. 20a-21a. Among other things, secrecy avoids evidence tampering and promotes cooperation by prospective witnesses, free from improper interference or influence. See *Douglas Oil Co.* v. *Petrol Stops Nw.*, 441 U.S. 211, 219 & n.10 (1979) (discussing secrecy in grand jury investigations). In addition, as the SCA itself recognizes, secrecy may protect the life and safety of individuals, avoid evidence destruction or tampering, and protect potential witnesses from intimidation. See 18 U.S.C. 2705(b). The nondisclosure order here advanced the government's interest in protecting the

integrity of the investigation into potential crimes aimed to overturn the result of the 2020 presidential election, an investigation of substantial public importance. See Pet. App. 21a, 23a. The government's *ex parte* submissions to the district court supported the court's findings that disclosure of the warrant for former President Trump's Twitter account "would jeopardize the criminal investigation," *id.* at 21a, and "would have harmed the integrity and secrecy of the ongoing" investigation, *id.* at 23a.

Second, the court of appeals correctly concluded that the temporary nondisclosure order was narrowly tailored to serve the government's compelling interest in preserving the integrity and maintaining the secrecy of steps taken in its ongoing investigation. Pet. App. 21a-22a. The nondisclosure order was set to last for a finite period, 180 days, and it prohibited petitioner from disclosing only information that it had obtained from the government "by virtue of its involvement in the government's investigation." *Id.* at 22a. Petitioner could disclose any information it possessed independently of the warrant, including speaking publicly about former President Trump's Twitter account, the 2020 presidential election, or its views about the investigation, warrants, or nondisclosure orders generally. The only prohibited topics were the existence and contents of the warrant. That narrow restriction was targeted at a specific potential harm: dangers to the integrity of the government's investigation that could result from dissemination of the fact that the government had obtained a probable-cause warrant for the contents of former President Trump's Twitter account. No narrower prohibition would have avoided those potential dangers.

Petitioner argues (Pet. 28-30) that the nondisclosure order could not serve the government's interests in preserving the secrecy and integrity of its criminal investigation because the existence of the investigation was public and the media had reported that former President Trump's family and associates had received subpoenas. Petitioner alludes (Pet. 29) to what the government "appeared to" or "apparently" relied on to obtain the nondisclosure order, implicitly recognizing that petitioner did not know the full extent of the government presentation to the district court or the court of appeals. But as the court of appeals explained, "the publicly available information that [petitioner] cited did not present the full story," and the "[*e*]*x parte* submissions reviewed by [the court of appeals] supported the district court's finding that disclosure would have harmed the integrity and secrecy of the ongoing grand jury investigation, despite public knowledge of the broader investigation." Pet. App. 23a. And petitioner now knows from partial unsealing that the government provided information that, among other things, former President Trump had publicly criticized participants in the government's investigation; he had taken steps to undermine or otherwise influence the separate investigation into his potential mishandling of classified information; and violence had taken place after he publicized the warrant to search Mar-a-Lago in connection with that investigation. Gov't C.A. Br. 22-23, 27. Petitioner's suggestion (Pet. 29-30) that the government relied only on general allegations is incorrect.

Petitioner also argues (Pet. 30-32) that the government did not demonstrate narrow tailoring because it allegedly did not refute the alternatives proposed by petitioner. Petitioner suggests (Pet. 30) that the district

court could have allowed petitioner to disclose the warrant to one of former President Trump's "designated representative[s]" under the Presidential Records Act of 1978 (PRA), 44 U.S.C. 2201, *et seq.*, and then barred that representative from any "further disclosure," including disclosure to former President Trump.[9] According to petitioner, that proposal would have allowed a PRA representative to "assert privilege" without disclosure to former President Trump, Pet. 30, and would have "protected potential constitutional privileges while accommodating any legitimate interest the government had in nondisclosure," Pet. 3.

Petitioner cites no authority that a PRA representative can invoke the presidential-communications privilege. Historically, the privilege has been asserted by Presidents themselves. See *Sealed Case*, 121 F.3d at 744 n.16; see also *Judicial Watch, Inc.* v. *Department of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004) (reserving whether the President personally must invoke the privilege). And by regulation, PRA representatives are not authorized to invoke executive privilege; "[t]he incumbent or former President must *personally* make any decision to assert a claim of constitutionally based privilege against disclosing a Presidential record," 36 C.F.R. 1270.48(d)(1) (emphasis added). Consequently, while petitioner argued that its proposed alternative was necessary to preserve former President Trump's ability to invoke the presidential-communications privilege, the

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[9] The PRA "grants the President certain discretion and authority over Presidential records" transferred to the National Archives and Records Administration, and under implementing regulations, "[a]n incumbent or former President may designate one or more representatives to exercise this discretion and authority," 36 C.F.R. 1270.22(a).

individuals to whom the warrant would be disclosed under that alternative lack authority to assert that privilege. Narrow tailoring requirements do not require use of ineffective alternatives.

Equally unfounded is petitioner's suggestion (Pet. 1-3) that the government acted improperly by not going through the PRA for Twitter records, but instead seeking an SCA warrant and a nondisclosure order. The National Archives and Records Administration did not possess the entire universe of Twitter records that the government sought. See Pet. App. 113a-115a; see also 44 U.S.C. 2201(3), 2202 (United States retains ownership of Presidential records—not records of a "purely private" character). And nothing in the PRA bars the government from relying on ordinary investigative techniques when necessary and appropriate. That was the case here: The PRA's requirement of notice to former President Trump of a records request would have jeopardized the very interests in safeguarding the investigation's integrity that the nondisclosure order sought to protect. See Pet. App. 20a, 125a.

The district court also had discretion to reject petitioner's proposal as unworkable. The proposal would impose on the court the "job of assess[ing] the trustworthiness of a would-be confidante chosen by a service provider." Pet. App. 24a (citation and internal quotation marks omitted). But as the court recognized, it could not know whether those confidantes "may themselves be witnesses, subjects, or targets." *Id.* at 65a. Strict scrutiny did not require the court to engage in unworkable line drawing. *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 454 (2015).

b. Petitioner contends (Pet. 20-28) that the court of appeals claimed to apply strict scrutiny to the

nondisclosure order but in fact incorrectly applied a lower level of scrutiny. Those claims lack merit and do not warrant this Court's review.

Petitioner inaccurately characterizes the court of appeals' opinion as holding that "the government has a compelling interest in 'secrecy' that a nondisclosure order serves whenever a new warrant would disclose a slightly 'different' piece of information from what was previously publicly available, i.e., the existence of a search warrant." Pet. 26 (citation omitted). The court did not adopt a general rule that disclosure of a warrant will always—or even usually—endanger an ongoing investigation. Rather, the court considered the government's *ex parte* submissions about the risks of disclosure in the specific circumstances here. Based on that review, the court found that even though the investigation's existence was public, and despite media reports about certain aspects of it, the disclosure to former President Trump that the government had obtained a probable-cause warrant to search former President Trump's personal Twitter account posed a risk to the secrecy and integrity of the government's ongoing investigation. Petitioner's challenge (Pet. 24-28) to the court's factbound determination merits no further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (noting that this Court "do[es] not grant a certiorari to review evidence and discuss specific facts").

Petitioner's criticisms (Pet. 31-32) of the court of appeals' narrow-tailoring analysis are likewise misplaced, for the reasons stated above. See pp. 27-31, *supra*. That the government has found it acceptable to make limited disclosures to user representatives in vastly different circumstances (Pet. 30-31) says nothing about whether they would have been appropriate here.

3. Finally, even if review were otherwise warranted, this petition would not be an appropriate vehicle. First, the dispute concerning the nondisclosure order is moot, Pet. App. 13a, and it does not satisfy the exception for disputes that are capable of repetition but evading review. To meet that exception, there must be "a reasonable expectation that the same complaining party will be subjected to the same action again." *United States* v. *Sanchez-Gomez*, 584 U.S. 381, 391 (2018) (citation omitted). Petitioner has no plausible claim that it will again face an SCA warrant with a nondisclosure order seeking account information arguably covered by the presidential-communications privilege. While petitioner may face other nondisclosure orders involving other potential privileges, its heavy reliance on the putative existence of the presidential-communications privilege—a claim that pervades its petition, see Pet. (i), 2-3, 9, 13 n.2, 23-24, 32-33—makes it apparent that to satisfy the "exceptional situations" test for the capable-of-repetition exception, it should show a "reasonable expectation" that it will again face the same circumstances that undergird its constitutional claim. *Kingdomware Tech., Inc.* v. *United States*, 579 U.S. 162, 170 (2016).[10]

Second, petitioner's heavy reliance on claims of executive privilege to justify its First Amendment claim undercuts any basis for review. No plausible claim of privilege ever existed in this case. See pp. 18-20, *supra*. And "[o]nce informed of the search, President Trump could have intervened to protect claims of executive

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[10] And contrary to petitioner's suggestion (Pet. 13 n.2), an order vacating the judgment because of mootness is unwarranted here, given that the case is not otherwise worthy of review. See Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19-28 n.34 (11th ed. 2019).

privilege, but did not" and so privilege issues "are not properly before the * * * court." Pet. App. 83a (Rao, J.). That deprives petitioner's claim of any concrete force. Review of a claim that turns so heavily on claims of privilege, as petitioner frames its arguments, should await a case in which a more prototypical type of privilege claim exists. The Court should not use a case involving an abstract and unfounded privilege claim and idiosyncratic facts to set standards to govern future SCA warrants.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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