UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA AND NONDISCLOSURE ORDER BEARING USAO CASE #2023401292	**Misc. No. 24-7 (JEB)** **<u>Under Seal</u>**

MEMORANDUM OPINION

As part of a █████ investigation, the Government sought information about the Twitter accounts █████████████████████████. To that end, it served X Corp. — formerly Twitter, Inc. — with a grand-jury subpoena requiring it to furnish information about those accounts. Such subpoena was accompanied by a nondisclosure order prohibiting the company from revealing that subpoena's contents or existence, including to the account holders. Displeased by such constraints, X has filed a Motion to: (1) vacate or modify the NDO, which it contends violates the Stored Communications Act and the First Amendment; (2) stay X's compliance with the subpoena; and (3) force the Government to disclose the *ex parte* application underlying the NDO. The Government, for its part, asks the Court to reject those requests and compel X to comply with the subpoena, whose deadline was January 25, 2024. Because the NDO violates neither the SCA nor the First Amendment, and seeing no reason to require the United States to disclose the full underlying NDO application, the Court will deny X's Motion and grant the Government's. It will, however, require the United States to unredact portions of the NDO application that it has already quoted in briefing shared with X.

I. Background

A. Statutory Background

The Stored Communications Act, 18 U.S.C. § 2701 *et seq.*, creates "procedures for law enforcement officers to obtain evidence from electronic service providers in criminal cases." In re Sealed Case, 77 F.4th 815, 821 (D.C. Cir. 2023). As relevant here, it authorizes the Government to obtain certain basic subscriber information — *e.g.*, a subscriber's name, address, telephone records, length of service, types of service, and means and source of payment — via a grand-jury subpoena. See 18 U.S.C. § 2703(c)(2), (d). When a service provider produces such information in response to a subpoena, it is immunized from liability for such disclosure. Id. § 2703(e).

Although the SCA itself "contains no default sealing or nondisclosure provision," Leopold v. United States, 964 F.3d 1121, 1129 (D.C. Cir. 2020), it permits the Government to seek a so-called "nondisclosure order" directing a service provider that receives a subpoena "not to notify any other person" of its existence "for such period as the court deems appropriate." 18 U.S.C. § 2705(b). A court "shall enter" such an NDO if "it determines that there is reason to believe that notification of the existence of the [subpoena] will result in" one of five enumerated harms:

> (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.

Id.; see also Matter of Application of U.S. of Am., 45 F. Supp. 3d 1, 5–6 (D.D.C. 2014) ("[S]ection 2705(b) make[s] clear that if a court[] finds that there is reason to believe that

notifying the customer or subscriber of the . . . subpoena may lead to one of the deleterious outcomes listed under § 2705(b), the court must enter an order commanding a service provider to delay notice to a customer for a period of time that the court determines is appropriate.").

B. Factual Background

In summarizing the factual background of this miscellaneous action, the Court will paint with a broad brush — even though the case is sealed — because the Government submitted parts of its briefing *ex parte*, and the Court maintains that secrecy.

On December 11, 2023, the Government filed an application for an NDO pursuant to Section 2705(b) of the SCA. See ECF No. 10-1 at 12–23 (*Ex Parte* NDO App.); see also In re Application of USA for a 2705(b) Nondisclosure Ord. for Grand Jury Subpoenas Bearing USAO Case # 2023R01292, No. 23-sc-2631, ECF No. 1. In the Application, the Government described an ongoing grand-jury investigation into [redacted] See *Ex Parte* NDO App. at 3–4; ECF No. 4 (Redacted Gov't Mot.) at 1. It requested an "omnibus" NDO — *i.e.*, a multi-subpoena, multi-provider NDO — that would apply to any grand-jury subpoenas meeting certain criteria. See *Ex Parte* NDO App. at 2, 7–8, 12. More specifically, the NDO would apply to subpoenas that: (1) were issued as part of that investigation, (2) were addressed to an electronic-communications service (ECS) or remote-computer-service (RCS) provider, (3) sought only basic subscriber information, (4) were issued within one year of the date of the NDO, and (5) shared a factual justification for nondisclosure as set forth in the Application. Id. at 7–8. The fifth criterion, the United States explained, would ensure that if during the investigation the Government issued a subpoena that the facts proffered in the Application did not apply to, then it would have to seek a separate NDO specific to that subpoena. Id. at 2.

Finding "reasonable grounds to believe" that disclosure of grand-jury subpoenas meeting the aforementioned criteria would "result in flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, and serious jeopardy to the investigation," a magistrate judge entered the requested NDO the same day. See ECF No. 1-2 at 15 (NDO); see also In re Application of USA for a 2705(b) Nondisclosure Ord. for Grand Jury Subpoenas Bearing USAO Case # 2023R01292, No. 23-sc-2631, ECF Nos. 2 & 3. (The Government has since abandoned the "flight from prosecution" rationale because it believes that the NDO is "amply supported on the other asserted grounds." ECF No. 10 (*Ex Parte* Gov't Mot.) at 2 n.1.) The magistrate judge set the nondisclosure period as one year. See NDO.

Some three weeks later, on January 5, 2024, the United States served X with a grand-jury subpoena, requiring disclosure under 18 U.S.C. § 2703 of basic subscriber information for two Twitter accounts: [redacted]

[redacted]

[redacted]

The subpoena that the Government served on X required it to produce records associated with [redacted] to the grand jury by January 25, 2024. See Subpoena. The accompanying NDO ordered the company not to disclose the subpoena's existence for one year. See NDO. Dissatisfied that it could not inform [redacted] about this probe, X reached out to the Government in the week leading up to the compliance deadline. See X Mot. at 8; see also ECF No. 1-2 at 2 (Email from Twitter Counsel to Gov't). The company raised several concerns, including that the NDO would prevent it from following its "policy [of]

notify[ing] users of government legal process whenever possible." See Email from Twitter Counsel to Gov't. Notification was "paramount" here, it said, because [redacted] [redacted] Those issues notwithstanding, the United States declined to modify or withdraw the NDO. See X Mot. at 8.

C. Procedural Background

One day before the subpoena's compliance deadline, X filed a Motion asking the Court to vacate or modify the NDO and to permit X to review the Government's *ex parte* Application underlying the NDO. Id. at 16–26. Although the company does not challenge the validity of the subpoena itself, it also requested that the Court stay its compliance deadline pending resolution of those issues. Id. at 9–16. The Government has filed an Opposition and its own Motion to Compel X to comply with the subpoena, which it has shared with the company in redacted form and filed in full *ex parte*. See Redacted Gov't Mot; *Ex Parte* Gov't Mot. To date, X has not complied with the subpoena. The Motions are now ripe for resolution.

II. Legal Standard

"Magistrate judge orders issued under the SCA in unassigned criminal matters are subject to *de novo* review." In re U.S. for an Ord. Pursuant to 18 U.S.C. § 2705(b), 289 F. Supp. 3d 201, 206 (D.D.C. 2018); see In re Search of Info. Associated with [redacted]@gmail.com That Is Stored at Premises Controlled by Google, Inc., 2017 WL 3445634, at *3 n.3 (D.D.C. July 31, 2017) (similar); see also LCvR 59.3(a)–(b) (directing "*de novo* review by the Chief Judge" of a "magistrate judge's . . . order for which review is requested" and that arises from "a criminal matter not assigned to a district judge").

III. Analysis

The Court begins with the heart of X's Motion — its contention that the NDO must be vacated or modified because it is unlawful — before turning to the company's request that the Government be required to produce the *ex parte* NDO Application. It last addresses the United States's argument that X should be compelled to comply with the subpoena.

A. Validity of NDO

According to X, the NDO complies with neither the SCA nor the First Amendment. The Court evaluates these positions in turn.

1. *SCA*

X's Motion asserts that the NDO violates the SCA because the Government failed to show that disclosing the subpoena's existence would result in any of the harms enumerated in Section 2705(b). See X Mot. at 16–20; see also ECF No. 9 (X Reply) at 11–14. Its Reply also advances a broader argument: the SCA prohibits omnibus NDOs full stop. See X Reply at 2–6. These issues will be addressed *seriatim*.

a. Statutory Showing

Recall that under Section 2705(b), a court "shall enter" an NDO if "it determines that there is reason to believe that notification of the existence of the [subpoena] 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." X offers three reasons why it thinks that the United States has not made the requisite showing here. None persuades.

First, the company says, the Government "cannot demonstrate that notice to the user[s] will seriously jeopardize an investigation" because

Second, X posits that "there is nothing publicly known about the two users that would support the conclusion that either of them is likely to flee prosecution, tamper with evidence, intimidate potential witnesses, or otherwise seriously jeopardize any investigation." X Mot. at 18. Interesting, but not true. The Court's review of the *Ex Parte* NDO Application confirms that it offered a more-than-adequate showing — based on what is publicly known about the investigation's targets — that disclosure of subpoenas meeting the specified criteria will result in destruction of or tampering with evidence, intimidation of potential witnesses, and serious jeopardy to the investigation. See *Ex Parte* NDO App. at 3–4, 6.

Third, the company suggests that the very fact that the Government has "offer[ed] supplementary evidence in its Opposition confirms that its initial application was insufficient to justify the [NDO] under Section 2705(b)." X Reply at 13 (citing Redacted Gov't Mot. at 4–5). But X "cites no decision in which an NDO has been vacated because the government offered additional evidence to support that order when challenged." In the Matter of the Search of Info. That Is Stored at Premises Controlled by Twitter Inc. Identified in Attachment A, No. 23-sc-31, ECF No. 30 at 25 (D.D.C. Mar. 3, 2023) (In the Matter of the Search); see also John Doe, Inc. v. Mukasey, 549 F.3d 861, 881 n.15 (2d Cir. 2008) (noting that court permitted government "to amplify its grounds for nondisclosure in a classified declaration submitted *ex parte* . . . and made available for [the court's] *in camera* review"). The Court will not infer from the fact that the Government has bolstered its evidence that its initial offering was insufficient.

b. Omnibus Nature

That brings us to X's broader argument: the SCA prohibits omnibus NDOs — like this one — in all circumstances. See X Reply at 4–6. Before delving in, there is one housekeeping matter to attend to: the United States believes that X waived this argument by raising it for the first time in its Reply. See ECF No. 7 (Gov't Surreply) at 1. The Court is not convinced. Although the company did not use the label "omnibus" in its Motion — ostensibly because it did not have access to the *Ex Parte* NDO Application at that time and was therefore unaware that the Government had sought an "omnibus" NDO — it nonetheless argued that the NDO was unlawful because "the Court did not tie the issuance of the [NDO] under Section 2705(b) to the requisite showing that the statutory harms would result from disclosure of the specific Subpoena served on X." X Mot. at 19–20. That is, in essence, an argument challenging the omnibus nature of the NDO. Even if X's Reply did raise a new argument, however, the United States is not prejudiced

because it filed a Surreply, which this Court considers. See Zuza v. Off. of High Representative, 107 F. Supp. 3d 90, 95 n.3 (D.D.C. 2015), aff'd, 857 F.3d 935 (D.C. Cir. 2017) (no prejudice where opposing party "has filed a sur-reply thoroughly addressing" new argument raised in reply); Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 36 (D.D.C. 2010) (similar).

The Court will thus consider — and reject — X's argument that the SCA bars all omnibus NDOs, a species that is by no means novel. See Gov't Surreply at 3 n.1 ("Dating back years, numerous courts around the country have properly and regularly issued such omnibus NDOs pursuant to the SCA — without requiring the government to identify the specific provider(s) nor the specific account(s) subject to grand jury subpoenas where the government's application identifies with sufficient detail the basis for such an omnibus order under Section 2705(d).") (citing example NDOs). In so doing, the Court also finds that this omnibus NDO comports with that statute and leaves questions about other omnibus NDOs for another day.

In arguing that the SCA prohibits omnibus NDOs *tout court*, X homes in on the plain text of Section 2705(b):

> A governmental entity acting under section 2703 . . . may apply to a court for an order commanding a provider of electronic communications service or remote computing service to whom a warrant, subpoena, or court order is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order. The court shall enter such an order if it determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in [a statutorily enumerated harm].

(Emphasis added).

X starts by focusing on the word "the" in the second sentence. As the company sees it, Section 2705(b)'s use of that word "fatally undermines" the Government's claim that the statute permits omnibus NDOs like the one at issue here. See X Reply at 4. That is because the definite article "the" — in contrast to an indefinite article like "a" — "particularizes the subject which it

precedes." Id. (quoting American Bus. Ass'n v. Slater, 231 F.3d 1, 4–5 (D.C. Cir. 2000)); see also Work v. U.S. ex rel. McAlester-Edwards Coal Co., 262 U.S. 200, 208 (1923); Nielsen v. Preap, 139 S. Ct. 954, 965 (2019). As a result, a court must determine that disclosure of a single warrant, subpoena, or court order — *i.e.*, "the warrant, subpoena, or court order" — will result in statutory harm; *ergo*, the Government must obtain a separate NDO for each subpoena.

Unfortunately for X, that asks too much of three letters. True, the word "the" is "a function word . . . indicat[ing] that a following noun or noun equivalent is definite or has been previously specified by context." Nielsen, 139 S. Ct. at 965 (quoting Merriam-Webster's Collegiate Dictionary 1294 (11th ed. 2005)); Work, 262 U.S. at 208 (Congress's "use of the definite article [in a reference to 'the appraisement'] means an appraisement specifically provided for"). And that means the phrase following "the" in the SCA — *viz.*, "warrant, subpoena, or court order" — must be "definite or ha[ve] been previously specified by context." Nielsen, 139 S. Ct. at 965 (citation omitted).

One need not search the U.S. Code far and wide, however, to realize that Section 2705(b) itself specifies in the immediately preceding sentence "the warrant, subpoena, or court order" to which it is referring. See 18 U.S.C. § 2705(b) (government may apply for NDO commanding provider "to whom a warrant, subpoena, or court order is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order") (emphasis added). Which "warrant, subpoena, or court order," then, does the SCA refer to in the second sentence of Section 2705(b)? The "warrant, subpoena, or court order" specified in the first sentence of the statute — that is, "a" warrant, subpoena, or court order for which the Government is seeking an NDO. Cf. Gov't Surreply at 2 (pointing out that Section 2705(b) similarly "specifically contemplates applications to 'a court' and authorizes 'the court'

to issue an NDO") (quoting 18 U.S.C. § 2705(b)) (emphasis added). The word "the" thus does not mandate that NDO applications seek a subpoena-specific, provider-specific NDO. Nor does the term "a" in "a warrant, subpoena, or court order," for that matter. Cf. Dictionary Act, 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise[,] . . . words importing the singular include and apply to several persons, parties, or things[.]"); Niz-Chavez v. Garland, 593 U.S. 155, 164 (2021) (Dictionary Act "tells us . . . that a statute using the singular 'a' can apply to multiple persons, parties, or things").

Next, X turns to the statutory requirement that the Government show that disclosure of "the subpoena . . . will result in" an enumerated harm. See X Reply at 5 (quoting 18 U.S.C. § 2705(b)) (emphasis added). A court cannot assess whether such a harm "will result," the company says, unless the United States identifies the single, specific subpoena to be covered by the requested NDO and explains why disclosing that particular subpoena will cause specific harm. Id. For support, X points to the Department of Justice's own guidance advising that an NDO "should be sought only after a prosecutor engages in a case- and fact-specific analysis," and "[a] prosecutor must provide a court with sufficient facts to permit the court to conduct the same case- and fact-specific analysis." Memorandum from Lisa Monaco, U.S. Deputy Att'y Gen., Dep't of Just., Supplemental Policy Regarding Applications for Protective Order Pursuant to 18 U.S.C. § 2705(b) at 2 (May 27, 2022), https://perma.cc/AYP6-F9H7; see X Reply at 5.

No doubt the company is correct that a court could not assess whether statutory harm "will result" from certain legal process absent any information whatsoever about that legal process or to whom it is directed. But that will not always be the case when the Government seeks an omnibus NDO. In fact, it is not what happened here. Rather, in its NDO Application, the Government identified a specific category of providers (ECS or RCS providers) and a

specific category of subpoenas (those that are issued as part of the investigation into within one year of the NDO's issuance date, seek only basic subscriber information, and share a factual justification for nondisclosure). That is, it identified criteria describing particular legal process and sought an NDO only for those subpoenas with "the same set of core facts set forth in its application and meeting the specific enumerated parameters of the types of subpoenas for which the NDO may be used." Gov't Surreply at 4.

The Government explained in its Application, moreover, why disclosing any legal process meeting those narrow criteria will cause specific harm, considering the targets' backgrounds and the nature of the offenses for which they are under investigation. See *Ex Parte* NDO App. In so doing, it provided the magistrate judge with sufficient facts to permit her to conduct a case- and fact-specific analysis limited to this investigation and subpoenas meeting the aforementioned criteria. The magistrate judge indeed determined that disclosure of such subpoenas would result in harm, consistent with the SCA — a determination with which this Court does not cavil. Contra X Resp. at 2.

All that to say, nothing in the plain text of Section 2705(b) creates X's imagined categorical prohibition on omnibus NDOs. To find such a ban in the SCA, furthermore, would be to exalt form over substance. X declines to explain what would be gained by "requir[ing] dozens of separate, virtually identical applications where, as here, the material underlying facts are the same" — a requirement that would surely "be wasteful, unnecessary, burdensome for the court, and delay the investigation." Gov't Surreply at 5. In contrast, the United States forcefully asserts that "[o]mnibus NDOs advance this Court's interest in the efficient and orderly administration of justice." Id. at 4; see also id. at 3 ("[E]xact account identifiers unique to each specific subpoena are immaterial to [the Section 2705(b)] assessment. Waiting for such specific

identifiers for each subpoena would only create a structural delay and hinder law enforcement's ability to conduct its investigation, without resulting in any additional information material to the question presented of whether an NDO is warranted.").

The Court therefore concludes that the challenged NDO comports with the statute — notwithstanding its omnibus nature — because the United States adequately showed under Section 2705(b) that nondisclosure was warranted for grand-jury subpoenas meeting its narrowly defined criteria for the particular investigation at issue. The Government is not home yet, however, as the question of whether the NDO is constitutional remains.

2. *First Amendment*

The company next claims that the NDO violates its rights under the Free Speech Clause of the First Amendment — *i.e.*, its right to inform the target users of the subpoena. Such claims are analyzed in three steps: (1) "whether the activity at issue is speech protected by the First Amendment"; (2) "whether the [restriction] at issue is content based or content neutral, *i.e.*, if it applies to particular speech because of the topic discussed or the idea or message expressed"; and (3) whether the government's justifications for the speech restriction satisfy the relevant standard — *i.e.*, "strict scrutiny for content-based statutes and intermediate scrutiny for content-neutral statutes." Green v. U.S. Dep't of Just., 54 F.4th 738, 745 (D.C. Cir. 2022) (cleaned up).

Here, the first two steps are undisputed. With respect to step one, the Government does not contest that Twitter has a First Amendment interest in informing the target users of the subpoena. And for good reason: many courts have concluded that NDOs issued under the authority of Section 2705(b) "implicate First Amendment rights because they restrict a service provider's speech" and "also constitute[] prior restraint[s], a characterization typically used to describe 'judicial orders forbidding certain communications when issued in advance of the time

that such communications are to occur.'" In re Application of Subpoena 2018R00776, 947 F.3d 148, 155 (3d Cir. 2020) (quoting Alexander v. United States, 509 U.S. 544, 550 (1993)); see also Google LLC v. United States, 443 F. Supp. 3d 447, 452 (S.D.N.Y. 2020); In re Search of Info. Associated with E-Mail Accts., 468 F. Supp. 3d 556, 560 (E.D.N.Y. 2020); Matter of Search Warrant for [redacted].com, 248 F. Supp. 3d 970, 979–80 (C.D. Cal. 2017) (collecting cases).

As for step two, the D.C. Circuit has assumed without deciding that NDOs like the one at issue here are content-based restrictions that call for strict scrutiny. In re Sealed Case, 77 F.4th at 829 (adopting this approach and explaining that NDOs "implicate two disfavored types of speech restrictions: prior restraints and content-based restrictions"); cf. In re Application of Subpoena, 947 F.3d at 155–56 (concluding that strict scrutiny is appropriate standard); In re Search of Info. Associated with E-Mail Accts., 468 F. Supp. 3d at 560 (same); In re Nat'l Sec. Letter, 33 F.4th 1058, 1063 (9th Cir. 2022) (same). Unsurprisingly, X asks the Court to cross that Rubicon and so hold. See X Mot. at 20–21. The Government posits that "there are good reasons not to apply such 'exacting' review." Redacted Gov't Mot. at 7–8 n.3; see also John Doe, Inc., 549 F.3d at 877 (concluding that NDO "is not a typical prior restraint or a typical content-based restriction warranting the most rigorous First Amendment scrutiny"). But it agrees that the Court can, nonetheless, walk the well-trodden path of at least assuming strict scrutiny applies. See Redacted Gov't Mot. at 8 n.3. The Court accepts that invitation.

The third step — *i.e.*, whether the NDO indeed survives strict scrutiny — is where the rubber meets the road. "Strict scrutiny requires the government to demonstrate that a speech restriction: (1) serves a compelling government interest; and (2) is narrowly tailored to further that interest." In re Sealed Case, 77 F.4th at 830. X mounts challenges to both prongs here .

As an initial matter, and painting with the same broad brush it employed with the SCA, the company contends that omnibus NDOs are *per se* unconstitutional under the First Amendment. See X Reply at 6. As X sees it, such NDOs by definition cannot survive either strict-scrutiny prong because "the government's showing necessarily depends on predictions about hypothetical legal process that is not before the court." Id. at 7; see also id. at 6 (speech restriction can pass muster only if government "specifically identif[ies] an 'actual problem' in need of solving" and "provide[s] 'proof' of 'a direct causal link between' the speech restricted by the Order and the feared harm that would result from disclosure") (quoting Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 799–800 (2011)). X's argument — which the Court considers over the Government's waiver-based protestations for the same reasons described above, see Section III.A.1.b, *supra* — would render any multi-subpoena or multi-provider NDO invalid.

In defense of its omnibus-NDO practice, the United States retorts that X "does not and cannot explain why a properly-drafted application for an omnibus NDO cannot provide [the requisite] justification covering more than one subpoena." Gov't Surreply at 5. By the Government's lights, the company's argument "ignores" that the NDO Application here did not "depend[] on predictions about hypothetical legal process" but rather was "unambiguous" that the NDO would cover "only legal process that satisfies certain requirements" — *i.e.*, "those contemplated by the Court and found to have met the standard imposed by Section 2705(b)." Id. at 6. And the subpoena that X received, the Government says, "is exactly the legal process the Court envisioned when it issued its NDO based on its independent judicial determination." Id.

The Court, as with the SCA, is not persuaded that the First Amendment prohibits all omnibus NDOs. X points to no authority suggesting that strict scrutiny should require the Government to submit a separate NDO Application for each subpoena and provider that it seeks

to bind to nondisclosure. But the Court will not attempt to analyze in the abstract whether all omnibus NDOs "serve[] a compelling government interest" and are "narrowly tailored to further that interest." In re Sealed Case, 77 F.4th at 830. Instead, as it did above, the Court will assess only whether this NDO passes muster.

On that question, much of X's argumentation may be characterized by Yogi Berra's immortal line, "It's *déjà vu* all over again." That is because the company mostly regurgitates the arguments that it made — which both this Court's predecessor and the D.C. Circuit rejected — just last year in a case involving the same parties. See In re Sealed Case, 77 F.4th 815, aff'g In the Matter of the Search; see also Redacted Gov't Mot. at 13 (asserting that X "knows [its arguments] are losing arguments — having just had the D.C. Circuit reject them last year when it challenged a different NDO"); see also id. at 1, 7–8. The NDO at issue in In re Sealed Case accompanied a search warrant directing Twitter to produce information related to former President Trump's account. See 77 F.4th at 821. Twitter challenged the NDO on much the same grounds that it does here, and the Circuit did not bite. Id. at 829–32. That said, because the Court of Appeals upheld only the particular NDO at issue and did not announce a "categorical rule" foreclosing First Amendment attacks on all NDOs, see X Reply at 1–2, the Court will analyze the challenged NDO afresh, drawing from In re Sealed Opinion where appropriate.

a. Compelling Interest

Turning first to the compelling-interest prong of strict scrutiny, the United States asserts that the NDO serves two critical goals: preserving the integrity and the secrecy of an ongoing grand-jury investigation. See *Ex Parte* Gov't Mot. at 9–10. There is no doubt that these interests are paramount. In fact, the Circuit deemed them as "unquestionably compelling" in In re Sealed Case, 77 F.4th at 830, and explained that they are "particularly acute where, as here, the

investigation is ongoing." Id. (quoting In re Application of Subpoena, 947 F.3d at 156). After all, "[i]nvestigating criminal activity is a 'core government function that secures the safety of people and property.'" Id. (quoting Google LLC, 443 F. Supp. 3d at 452). "[S]ecrecy is paramount to ensuring that ongoing investigations can proceed without interference from targets or interested parties," moreover, because "[b]reaching the investigation's confidentiality could open the door to evidence-tampering, witness intimidation, or other obstructive acts." Id.; see also SEC v. O'Brien, 467 U.S. 735, 750 (1984) (erosion of secrecy "substantially increase[s] the ability of persons who have something to hide to impede legitimate investigations").

To be sure, the Government's interest in In re Sealed Case "was particularly strong" because of the goal of the investigation at issue: "[T]o ferret out activity intended to alter the outcome of a valid national election for the leadership of the Executive Branch of the federal government . . . and to assess whether that activity crossed lines into criminal culpability." In re Sealed Case, 77 F.4th at 830. The United States does not purport to target election interference in this case. But it submits that its interests are nevertheless heightened here for another reason: [REDACTED] The Court wholly agrees based on the evidence outlined in the Government's *ex parte* briefing.

[REDACTED]

X last returns to its concerns about the omnibus nature of the NDO. In particular, it asserts that the Government obtained the NDO "without making <u>any</u> factual showing regarding the specific Subpoena served on X, let alone a showing that prohibiting disclosure of that Subpoena would serve a compelling interest." X Reply at 14–15; <u>see also</u> X Mot. at 21–22 (similar). Even if the United States had not drafted the specific subpoena by the time it sought the omnibus NDO, however, it still offered sufficient facts for the magistrate judge to determine that an NDO was warranted. She determined — and this Court agrees — that disclosure of any covered subpoenas, regardless of the exact subscriber information sought or service provider directed to produce that information, would undercut the integrity and secrecy of an ongoing grand-jury investigation. <u>See</u> Redacted Gov't Mot. at 14 ("As the government noted in its application, 'the exact . . . social media account . . . has little to no bearing on the Court's assessment of whether a nondisclosure order is warranted. In other words, the exact account identifiers are immaterial to whether disclosure of a subpoena will result in a target . . . destroying evidence, or otherwise seriously jeopardizing the investigation.'") (quoting *Ex Parte* NDO App. at 9).

b. Narrowly Tailored

X is equally adamant that the NDO is not narrowly tailored. "A restriction is narrowly tailored if less restrictive alternatives . . . would not accomplish the government's goals equally or almost equally effectively." In re Sealed Case, 77 F.4th at 830 (cleaned up); see also id. at 830–31 (restriction need only be "narrowly tailored," not "perfectly tailored") (quoting Williams-Yulee v. Fla. Bar, 575 U.S. 433, 454 (2015)). The United States believes that the NDO satisfies the requirement because the scope of speech it regulates is "extremely narrow" and it is "limited in duration." Redacted Gov't Mot. at 10. These two characteristics indeed evince narrow tailoring.

First, the NDO prohibits X from disclosing only the existence of the subpoena, which is, "[b]y any measure, . . . a narrow slice of speech." Williams-Yulee, 575 U.S. at 452; see NDO ("PROVIDER and its employees shall not disclose the existence of the attached subpoena to any other person (except attorneys for PROVIDER for the purpose of receiving legal advice)."). It does not, as the Government observes, "purport to regulate X Corp.'s ability to speak about any other topic, such as the issue of non-disclosure orders generally." Redacted Gov't Mot. at 10; see In re Sealed Case, 77 F.4th at 831 (noting that "[i]mportantly, Twitter remained free to raise general concerns about warrants or nondisclosure orders"). What is more, the sole speech that it regulates is "information that [X] obtained only by virtue of its involvement in the government's investigation," which courts have suggested "is entitled to less protection than information a speaker possesses independently." In re Sealed Case, 77 F.4th at 831 (citing Butterworth v. Smith, 494 U.S. 624, 636 (1990) (Scalia, J., concurring); Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984)).

Second, the NDO does not apply indefinitely; rather, its duration is limited to one year. See NDO (restriction lasts "one year from the date on which the Court signed this Order"); see also John Doe, Inc., 549 F.3d at 877 (calling "temporal limitation[s] . . . important in the balance of governmental versus free speech interests"). That renders "any concerns associated with indefinite [NDOs]" irrelevant here. In re Sealed Case, 77 F.4th at 831; cf. United States v. Apollomedia Corp., 2000 WL 34524449, at *3 (5th Cir. June 2, 2000) (noting "substantial constitutional questions raised by [an NDO] without any limitation as to time"); In re Grand Jury Subpoena for: [Redacted]@yahoo.com, 79 F. Supp. 3d 1091, 1093 (N.D. Cal. 2015) (a "common sense view" of § 2705(b) indicates the duration of NDO must be "less than infinity").

Even so, X insists that the NDO sweeps too broadly because it "imposes a blanket prohibition preventing X from notifying anyone about the Subpoena or the [NDO]." X Mot. at 23. The company believes that "[a] less restrictive means of furthering the government's interests . . . would be to permit X to disclose the Subpoena's existence to the targeted users, while prohibiting disclosure . . . to anyone else." Id. at 24. That is akin to asking for the donut minus the hole.

Indeed, the Circuit rejected an analogous alternative in In re Sealed Case. There, the company proposed notifying just Trump — the target of the warrant that the challenged NDO accompanied — of the warrant's existence. Yet the Circuit considered that alternative a "nonstarter[]" because it "would not have maintained the confidentiality of the criminal investigation and therefore risked jeopardizing it." In re Sealed Case, 77 F.4th at 831. Nor would it have "safeguarded the security and integrity of the investigation, as the whole point of the nondisclosure order was to avoid tipping off the former President about the warrant's existence." Id. at 832. X's proposal here falls flat for precisely the same reason: permitting it to

disclose the subpoena's existence [redacted] would neither protect the investigation's confidentiality nor safeguard its integrity. See Redacted Gov't Mot. at 12 n.4.

[redacted]

As a last resort, and as an attentive reader may well have predicted by now, X postulates that the omnibus nature of the NDO undermines its narrow tailoring. Specifically, the company insists that the NDO is not narrowly tailored because it "restricts the speech of an untold number of speakers about any legal process that the government decides to serve in connection with this investigation for up to a year." X Reply at 15. True, the NDO Application did not list the number of speakers whose speech would be restricted. It made perfectly clear, however, who the class of speakers was: ECS and RCS providers who received subpoenas issued as part of the investigation that seek basic subscriber information and share a factual justification for nondisclosure as set forth in the Application. See *Ex Parte* NDO App. at 2, 7–8. And it set forth what the restricted speech was: disclosure of the existence of covered subpoenas. Id.

X, for its part, cites no cases suggesting that a speech restriction must enumerate the persons whose speech it restricts in order to pass muster under the narrow-tailoring prong of strict scrutiny. In reality, most narrowly tailored speech restrictions — especially those contained in statutes or regulations — do no such thing. See, e.g., Nat'l Ass'n of Mfrs. v.

Taylor, 582 F.3d 1, 7, 29 (D.C. Cir. 2009) (upholding statute requiring registered lobbyists to disclose identity of organizations that made monetary contributions over a statutory threshold and that actively participated in planning, supervision, or control of registrant's lobbying activities); Williams-Yulee, 575 U.S. at 439, 448–56 (same for Canon 7C(1) of Florida's Code of Judicial Conduct, which provides that judicial candidates "shall not personally solicit campaign funds . . . but may establish committees of responsible persons" to raise money for election campaigns). The Court will not now impose such an enumeration requirement.

In sum, the NDO withstands strict scrutiny because it was a narrowly tailored means of achieving compelling government interests.

B. *Ex Parte* Application

Next up: X's request that the Court order the Government to produce its *ex parte* NDO Application and permit the company to supplement its arguments based on the reasoning and evidence therein. See X Mot. at 25–27; see also ECF No. 4-1 at 12 (Redacted NDO App.) (redacting entire Application but for caption and title). X seems to think that due process demands as much in light of the D.C. Circuit's pronouncement that "[i]t is . . . the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions." Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986), aff'd, 484 U.S. 1 (1987); X Mot. at 25 (citing Abourezk, 785 F.2d at 1060–61); see also United States v. Microsoft Corp., 56 F.3d 1448, 1464 (D.C. Cir. 1995) ("*Ex parte* communications generally are disfavored because they conflict with a fundamental precept of our system of justice: a fair hearing requires a reasonable opportunity to know the claims of the opposing party and to meet them.") (cleaned up). The problem is that, as even X acknowledges, see X Mot. at 26, the "firmly held main rule" admits of exceptions. Abourezk, 785 F.2d at 1061. This is one of them.

Ex parte submissions may be used "where a compelling interest exists," and preserving the "ongoing interest in grand jury secrecy" counts. In re Sealed Case No. 98-3077, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (citation omitted); In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1150 (D.C. Cir. 2006) ("[T]his circuit has recognized that a district court can ensure that grand jury secrecy is protected by provisions for sealed, or when necessary *ex parte*, filings.") (cleaned up); Clifford v. United States, 136 F.3d 144, 149 (D.C. Cir. 1998) ("[N]ot all ex parte communications must be disclosed, particularly when there is a countervailing need for confidentiality."); In re Sealed Case, 199 F.3d 522, 526 (D.C. Cir. 2000) ("There is a plethora of authority recognizing that the grand jury context presents an unusual setting where privacy and secrecy are the norm."); contra X Reply at 9. For instance, our Court of Appeals has held that "[a]lthough *in camera, ex parte* submissions generally deprive one party to a proceeding of a full opportunity to be heard on an issue, and thus should only be used where a compelling interest exists, . . . the nature of a Rule 6(e)(2) hearing, particularly when conducted during an ongoing grand jury investigation, involves such a compelling interest." In re Sealed Case No. 98-3077, 151 F.3d at 1075 (cleaned up); see also, e.g., id. at 1074–75 (collecting cases reaching same conclusion regarding "*in camera* review of grand jury material requested under Rule 6(e)(3)(C)(i)"); id. at 1075 (same for "*ex parte* proceedings to determine the propriety of a grand jury subpoena or the existence of a crime-fraud exception to the attorney-client privilege").

In this proceeding, which is collateral to a grand-jury investigation, there can be little doubt that *in camera* review of the Government's *ex parte* submission is the most appropriate — perhaps the only — means of protecting grand-jury secrecy. Cf. id. at 1074; Matter of Application of United States of Am., 45 F. Supp. 3d at 7 ("There is neither a First Amendment right nor a common law right of access to the government's non-disclosure application and

proposed [nondisclosure] order."). That method, moreover, is nothing new. See In the Matter of the Search (following it in analogous procedural posture); In re Sealed Case, 77 F.4th at 831 (same); see also In re Grand Jury Proc., Thursday Special Grand Jury Sept. Term, 1991, 33 F.3d 342, 353 (4th Cir. 1994) (blessing "*in camera* proceedings in the context of grand jury proceedings and on-going investigations requiring secrecy"); In re John Doe, Inc., 13 F.3d 633, 636 (2d Cir. 1994) ("[W]here an *in camera* submission is the only way to resolve an issue without compromising a legitimate need to preserve the secrecy of the grand jury, it is an appropriate procedure."); In re Grand Jury Subpoena, 438 F.3d at 1180 (Tatel, J., concurring) ("[*E*]*x parte* review protects [a party's] interests, as it allows the government to present — and the court to demand — a far more extensive showing than would otherwise be possible given the need for grand jury secrecy . . . ."). In fact, X cites no case — from this district or elsewhere — in which a court has compelled the Government to disclose an *ex parte* application for an order like the NDO here. Instead, the company relies on a plethora of due-process cases that are plainly inapposite. See X Mot. at 25–27.

For example, take United States v. Abuhamra, 389 F.3d 309 (2d Cir. 2004), which involved a criminal defendant who applied for release on bail. Id. at 314. The Government there submitted *ex parte* evidence in opposition, which the district court subsequently relied on as the basis for denying bail. Id. The defendant appealed, arguing that his due-process rights had been violated, and the Second Circuit concluded that "a court should generally not rely on evidence submitted by the government *ex parte* and *in camera* in ruling on a criminal defendant's application for release on bail." Id. at 332. In the course of reaching that conclusion, which required "balancing the competing interests affected by *ex parte* submissions in opposition to bail release," the Second Circuit said that "[p]articularly where liberty is at stake, due process

demands that the individual and the government each be afforded the opportunity not only to advance their respective positions but to correct or contradict arguments or evidence offered by the other." Id. at 322. Specifically, in cases "in which the government's opposition to bail is presented entirely *ex parte*, . . . [t]he government must either apprise the defendant of the substance of its sealed submission or forego [*sic*] the court's consideration of the evidence." Id. at 331. By plucking those quotes out of context, X misreads the cabined reasoning and holding of Abuhamra to stand for a much broader proposition than it does. See X Mot. at 25.

Changing its tune, the company tries to substantiate its request for the *ex parte* NDO Application by pointing to the First Amendment. It posits that "[t]he robust strict scrutiny analysis mandated by [United States v. Playboy Ent. Grp., Inc., 529 U.S. 803 (2000),] and In re Sealed Case cannot function without access to the 'specific evidence' the government must provide — or at a minimum a 'substitute disclosure' providing a summary of the evidence — so it can be tested in the adversarial process." Id. at 26. If the Government does not produce the NDO Application, the company says, "it cannot sufficiently analyze whether its less-restrictive alternatives would adequately address the government's concerns." Id.

That line of reasoning confuses the role of X with that of the court. When strict scrutiny applies to a speech restriction under the First Amendment, "the burden is on the government to prove that the restriction is the least restrictive alternative to achieve its compelling interest," and the court — not the opposing party — assesses whether it has done so. Am. Freedom Def. Initiative v. Washington Metro. Area Transit Auth., 898 F. Supp. 2d 73, 81 (D.D.C. 2012); see also Ashcroft v. ACLU, 542 U.S. 656, 669 (2004) (opposing party does not "bear a burden to introduce, or offer to introduce, evidence that their proposed alternatives are more effective"; rather, "[t]he Government has the burden to show they are less so").

At the end of the day, although it is entirely understandable that X would prefer to review the full NDO Application itself and then file a supplemental brief, the "indispensable secrecy of grand jury proceedings" counsels otherwise. United States v. R. Enters., Inc., 498 U.S. 292, 299 (1991) (cleaned up); cf. In re John Doe Corp., 675 F.2d 482, 490 (2d Cir. 1982) ("We recognize that appellants cannot make factual arguments about materials they have not seen and to that degree they are hampered in presenting their case. The alternatives, however, are sacrificing the secrecy of the grand jury or leaving the issue unresolved at this critical juncture.").

* * *

There is one wrinkle to this *ex parte* analysis: as X observes, although the United States redacts the entire substance of the NDO Application attached to its Motion, the Motion itself "quotes from that same application in multiple places." X Reply at 11; see, e.g., Redacted Gov't Mot. at 12 ("In addition, in its application, the government committed that '[s]hould the court-ordered non-disclosure under Section 2705(b) become no longer needed because of the closure of the investigation, or because all of the subjects have been arrested, the government will make best efforts to notify the Court promptly and seek appropriate relief.'") (quoting *Ex Parte* NDO App. at 11); Redacted Gov't Mot. at 14 ("As the government noted in its application, 'the exact . . . social media account . . . has little to no bearing on the Court's assessment of whether a non-disclosure order is warranted. In other words, the exact account identifiers are immaterial to whether disclosure of a subpoena will result in a target . . . destroying evidence, or otherwise seriously jeopardizing the investigation.'") (quoting *Ex Parte* NDO App. at 9).

Seeing no reason why portions of the NDO Application that the United States has already quoted in its Motion should remain redacted, the Court will order the Government to produce a version of the NDO Application with such sentences unredacted. It understands that such

production may offer little succor to X, but that is neither here nor there. Cf. Hettena v. CIA, 2024 WL 1239705, at *6 (D.D.C. Mar. 22, 2024) (noting in context of official-acknowledgement doctrine under Freedom of Information Act that a plaintiff will "have little need for undisclosed information," since it presumably matches "precisely information previously disclosed," but that is a "feature, not a bug" of the caselaw) (cleaned up).

C. Enforcement of Subpoena

One last thing. Because X has not challenged the validity of the subpoena, the Government urges the Court to order the company to comply. See Redacted Gov't Mot. at 15. Beyond its position that compliance should be stayed until the resolution of its other arguments, see X Mot. at 10–16; X Reply at 16–20, which is now moot in light of the Court's disposition, the company offers no counter. The Court will, accordingly, order compliance.

IV. Conclusion

For the foregoing reasons, the Court will grant the Government's Motion to Compel and deny X's Motion to Vacate or Modify the NDO except insofar as it will require the Government to produce a version of the NDO Application that unredacts any sentences that it has already quoted in its Motion. A separate Order so stating will issue this day.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
Chief Judge

Date: March 29, 2024