

1 Eric D. Miller, Bar No. 218416
EMiller@perkinscoie.com
2 Michael A. Sussmann, D.C. Bar No. 433100
(*pro hac vice to follow*)
3 MSussmann@perkinscoie.com
4 James G. Snell, Bar No. 173070
JSnell@perkinscoie.com
5 Hayley L. Berlin, D.C. Bar No. 1011549
(*pro hac vice to follow*)
6 HBerlin@perkinscoie.com
7 PERKINS COIE LLP
3150 Porter Drive
8 Palo Alto, CA 94304-1212
Tel: 650-838-4300
9 Fax: 650-838-4350

10 Attorneys for Plaintiff
11 Twitter, Inc.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15
16 TWITTER, INC.,

17 Plaintiff,

18 v.

19 ERIC HOLDER, Attorney General of the
20 United States,

21 THE UNITED STATES DEPARTMENT
22 OF JUSTICE,

23 JAMES COMEY, Director of the Federal
Bureau of Investigation, and

24 THE FEDERAL BUREAU OF
25 INVESTIGATION,

26 Defendants.

Case No. 14-cv-4480

**COMPLAINT FOR DECLARATORY
JUDGMENT, 28 U.S.C. §§ 2201 and 2202**

27
28 COMPLAINT FOR DECLARATORY JUDGMENT

1 **I. NATURE OF THE ACTION**

2 1. Twitter brings this action for declaratory judgment pursuant to 28 U.S.C. §§ 2201
3 and 2202, requesting relief from prohibitions on its speech in violation of the First Amendment.

4 2. The U.S. government engages in extensive but incomplete speech about the scope
5 of its national security surveillance activities as they pertain to U.S. communications providers,
6 while at the same time prohibiting service providers such as Twitter from providing their own
7 informed perspective as potential recipients of various national security-related requests.

8 3. Twitter seeks to lawfully publish information contained in a draft Transparency
9 Report submitted to the Defendants on or about April 1, 2014. After five months, Defendants
10 informed Twitter on September 9, 2014 that “information contained in the [transparency] report is
11 classified and cannot be publicly released” because it does not comply with their framework for
12 reporting data about government requests under the Foreign Intelligence Surveillance Act
13 (“FISA”) and the National Security Letter statutes. This framework was set forth in a January 27,
14 2014 letter from Deputy Attorney General James M. Cole to five Internet companies (not
15 including Twitter) in settlement of prior claims brought by those companies (also not including
16 Twitter) (the “DAG Letter”).

17 4. The Defendants’ position forces Twitter either to engage in speech that has been
18 preapproved by government officials or else to refrain from speaking altogether. Defendants
19 provided no authority for their ability to establish the preapproved disclosure formats or to
20 impose those speech restrictions on other service providers that were not party to the lawsuit or
21 settlement.

22 5. Twitter’s ability to respond to government statements about national security
23 surveillance activities and to discuss the actual surveillance of Twitter users is being
24 unconstitutionally restricted by statutes that prohibit and even criminalize a service provider’s
25 disclosure of the number of national security letters (“NSLs”) and court orders issued pursuant to
26 FISA that it has received, if any. In fact, the U.S. government has taken the position that service

1 national defense information under certain circumstances); nondisclosure agreements signed by
2 representatives of communications providers who receive FISA orders; and court-imposed
3 nondisclosure obligations in FISA court orders themselves.

4 **B. The Government’s Restrictions on Other Communication Providers’ Ability to**
5 **Discuss Their Receipt of National Security Legal Process**

6 19. On June 5, 2013, the British newspaper *The Guardian* reported the first of several
7 “leaks” of classified material from Edward Snowden, a former government contractor, which
8 have revealed—and continue to reveal—multiple U.S. government intelligence collection and
9 surveillance programs.

10 20. The Snowden disclosures have deepened public concern regarding the scope of
11 governmental national security surveillance. This concern is shared by members of Congress,
12 industry leaders, world leaders, and the media. In response to this concern, a number of executive
13 branch officials have made public statements about the Snowden disclosures and revealed select
14 details regarding specific U.S. surveillance programs. For example, the Director of National
15 Intelligence has selectively declassified and publicly released information about U.S. government
16 surveillance programs.

17 21. While engaging in their own carefully crafted speech on the issue of U.S.
18 government surveillance, U.S. government officials have relied on statutory and other authorities
19 to preclude communication providers from responding to leaks, inaccurate information reported
20 in the media, statements of public officials, and related public concerns regarding the providers’
21 involvement with and exposure to U.S. surveillance efforts. These authorities—and the
22 government’s interpretation of and reliance on them—constitute facial and as-applied violations
23 of the First Amendment right to engage in speech regarding a matter of extensively debated and
24 significant public concern.

1 A provider may report aggregate data in the following separate categories:

- 2 1. Criminal process, subject to no restrictions.
- 3 2. The number of NSLs received, reported in bands of 1000 starting
- 4 with 0-999.
- 5 3. The number of customer accounts affected by NSLs, reported in
- 6 bands of 1000 starting with 0-999.
- 7 4. The number of FISA orders for content, reported in bands of 1000
- 8 starting with 0-999.
- 9 5. The number of customer selectors targeted under FISA content
- 10 orders, in bands of 1000 starting with 0-999.
- 11 6. The number of FISA orders for non-content, reported in bands of
- 12 1000 starting with 0-999.
- 13 7. The number of customer selectors targeted under FISA non-
- 14 content orders, in bands of 1000 starting with 0-999.

15 Exhibit 1 at 2.

16 25. For FISA-related information, the DOJ imposed a six-month delay between the

17 publication date and the period covered by the report. In addition, it imposed

18 a delay of two years for data relating to the first order that is served on a company

19 for a platform, product, or service (whether developed or acquired) for which the

20 company has not previously received such an order, and that is designated by the

21 government as a “New Capability Order” because disclosing it would reveal that

22 the platform, product, or service is subject to previously undisclosed collection

23 through FISA orders.

24 *Id.* at 3.

25 26. Under Option Two,

26 [A] provider may report aggregate data in the following separate categories:

- 27 1. Criminal process, subject to no restrictions.
- 28 2. The total number of all national security process received,
- including all NSLs and FISA orders, reported as a single number in
- the following bands: 0-249 and thereafter in bands of 250.
3. The total number of customer selectors targeted under all national
- security process, including all NSLs and FISA orders, reported as a

1 FISA order, subsequent to January 27, 2014, certain communications providers have publicly
2 disclosed either that they have never received any FISA orders or NSLs, or any of a certain kind
3 of FISA order.

4 **C. The DOJ and FBI Deny Twitter’s Request to Be More Transparent**

5 31. Twitter is a unique service built on trust and transparency. Twitter users are
6 permitted to post under their real names or pseudonymously. Twitter is used by world leaders,
7 political activists, journalists, and millions of other people to disseminate information and ideas,
8 engage in public debate about matters of national and global concern, seek justice, and reveal
9 government corruption and other wrongdoing. The ability of Twitter users to share information
10 depends, in part, on their ability to do so without undue fear of government surveillance.

11 32. Twitter is an ECS as that term is defined at 18 U.S.C. § 2510(15) since it provides
12 its users the ability to send and receive electronic communications. As an ECS and, more
13 generally, as a third-party provider of communications to the public, Twitter is subject to the
14 receipt of civil, criminal, and national security legal process, including administrative, grand jury,
15 and trial subpoenas; NSLs; court orders under the federal Wiretap Act, Stored Communications
16 Act, Pen Register and Trap and Trace Act, and FISA; and search warrants. Compliance with such
17 legal process can be compelled through the aid of a court.

18 33. The ability to engage in speech concerning the nature and extent of government
19 surveillance of Twitter users’ activities is critical to Twitter. In July 2012, Twitter released its
20 first Transparency Report. Release of this Transparency Report was motivated by Twitter’s
21 recognition that citizens must “hold governments accountable, especially on behalf of those who
22 may not have a chance to do so themselves.” Jeremy Kessel, *Twitter Transparency Report*,
23 *Twitter Blog* (July 2, 2012 20:17 UTC), <https://blog.twitter.com/2012/twitter-transparency-report>.
24 This Transparency Report listed the number of civil and criminal government requests for
25 account information and content removal, broken down by country, and takedown notices

1 pursuant to the Digital Millennium Copyright Act received from third parties. The report also
2 provided information about how Twitter responded to these requests. The report did not contain
3 information regarding government national security requests Twitter may have received.
4 Subsequent biennial transparency reports have been released since then, including the most recent
5 on July 31, 2014.

6 34. In January 2014, Twitter requested to meet with DOJ and FBI officials to discuss
7 Twitter's desire to provide greater transparency into the extent of U.S. government surveillance of
8 Twitter's users through NSLs and court orders issued under FISA.

9 35. On January 29, 2014, representatives of the DOJ, FBI, and Twitter met at the
10 Department of Justice. At the meeting, Twitter explained why its services are unique and distinct
11 from the services provided by the companies who were recipients of the DAG Letter and why the
12 DAG Letter should not apply to Twitter, which was not a party to the proceedings that resulted in
13 the DAG Letter. Twitter also sought confirmation that it is not "similarly situated" to those
14 companies and that the limits imposed in the DAG Letter should not apply to Twitter. In
15 response, the DOJ and FBI told Twitter that the DAG Letter sets forth the limits of permissible
16 transparency-related speech for Twitter and that the letter would not be amended or supplemented
17 with additional options of preapproved speech.

18 36. In February 2014, Twitter released its Transparency Report for the second half of
19 2013, which included two years of data covering global government requests for account
20 information. In light of the government's admonition regarding more expansive transparency
21 reporting than that set forth in the DAG Letter, Twitter's February 2014 Transparency Report did
22 not include information about U.S. government national security requests at the level of
23 granularity Twitter wished to disclose.

24 37. In a blog post, Twitter explained the importance of reporting more specific
25 information to users about government surveillance. Twitter also explained how the U.S.

1 government was unconstitutionally prohibiting Twitter from providing a meaningful level of
2 detail regarding U.S. government national security requests Twitter had or may have received:

3 We think the government's restriction on our speech not only unfairly
4 impacts our users' privacy, but also violates our First Amendment right to
5 free expression and open discussion of government affairs. We believe
6 there are far less restrictive ways to permit discussion in this area while
7 also respecting national security concerns. Therefore, we have pressed the
8 U.S. Department of Justice to allow greater transparency, and proposed
9 future disclosures concerning national security requests that would be
10 more meaningful to Twitter's users.

11 Jeremy Kessel, *Fighting for more #transparency*, Twitter Blog (Feb. 6, 2014 14:58
12 UTC), <https://blog.twitter.com/2014/fighting-for-more-transparency>.

13 38. On or about April 1, 2014, Twitter submitted a draft July 2014 Transparency
14 Report to the FBI, seeking prepublication review. In its transmittal letter to the FBI, Twitter
15 explained:

16 We are sending this to you so that Twitter may receive a
17 determination as to exactly which, if any, parts of its Transparency
18 Report are classified or, in the Department's view, otherwise may
19 not lawfully be published online.

20 A copy of Twitter's letter dated April 1, 2014 is attached as Exhibit 3. Twitter's draft
21 Transparency Report, which will be submitted separately, is Exhibit 4.

22 39. Through its draft Transparency Report, Twitter seeks to disclose certain categories
23 of information to its users, for the period July 1 to December 31, 2013, including:

- 24 a. The number of NSLs and FISA orders Twitter received, if any, in actual
25 aggregate numbers (including "zero," to the extent that that number was
26 applicable to an aggregate number of NSLs or FISA orders, or to specific
27 *kinds* of FISA orders that Twitter may have received);
- 28 b. The number of NSLs and FISA orders received, if any, reported
separately, in ranges of one hundred, beginning with 1-99;
- c. The combined number of NSLs and FISA orders received, if any, in
ranges of twenty-five, beginning with 1-24;

- d. A comparison of Twitter’s proposed (i.e., smaller) ranges with those authorized by the DAG Letter;
- e. A comparison of the aggregate numbers of NSLs and FISA orders received, if any, by Twitter and the five providers to whom the DAG Letter was addressed; and
- f. A descriptive statement about Twitter’s exposure to national security surveillance, if any, to express the overall degree of government surveillance it is or may be subject to.

40. For five months, the FBI considered Twitter’s written request for review of the draft Transparency Report. By letter dated September 9, 2014, the FBI denied Twitter’s request. A copy of the FBI’s letter dated September 9, 2014 is attached as Exhibit 5. The FBI’s letter did not, as requested, identify exactly which parts of the draft Transparency Report may not lawfully be published. Instead, the letter stated vaguely that “information contained in the report” cannot be publicly released; it provided examples of such information in the draft Transparency Report; and it relied on a general assertion of national security classification and on the pronouncements in the DAG Letter as its bases for denying publication:

We have carefully reviewed Twitter’s proposed transparency report and have concluded that information contained in the report is classified and cannot be publicly released.

. . . Twitter’s proposed transparency report seeks to publish data . . . in ways that would reveal classified details about [government surveillance] that go beyond what the government has permitted other companies to report. . . . This is inconsistent with the January 27th framework [set forth in the DAG Letter] and discloses properly classified information.

Exhibit 5 at 1. The FBI reiterated that Twitter could engage only in speech that did not exceed the preapproved speech set forth in the DAG Letter. It noted, for example, that Twitter could

explain that only an infinitesimally small percentage of its total number of active users was affected by [government surveillance by] highlighting that less than 250 accounts were subject to all combined national security legal process. . . . That would allow Twitter to explain that all national security legal process received from the United States affected, at maximum, only 0.0000919 percent (calculated by dividing 249 by 271 million) of Twitter’s

1 total users. In other words, Twitter is permitted to *qualify* its
2 description of the total number of accounts affected by all national
3 security legal process it has received but it cannot *quantify* that
4 description with the specific detail that goes well beyond what is
allowed under the January 27th framework and that discloses
properly classified information.

5 *Id.* at 1–2.

6 41. Since the FBI’s response does not identify the exact information in the draft
7 Transparency Report that can and cannot be published, Twitter cannot at this time publish any
8 part of the report. When the government intrudes on speech, the First Amendment requires that it
9 do so in the most limited way possible. The government has failed to meet this obligation.
10 Instead, Defendants simply impose the DAG Letter framework upon Twitter as Twitter’s sole
11 means of communicating with the public about national security surveillance.

12 **COUNT I**

13 **(Request for Declaratory Judgment under 28 U.S.C. §§ 2201 and 2202 and Injunctive Relief)**

14 42. Twitter incorporates the allegations contained in paragraphs 1 through 41, above.

15 43. Defendants have impermissibly infringed upon Twitter’s right to publish
16 information contained in Twitter’s draft Transparency Report, and Twitter therefore seeks a
17 declaration that Defendants have violated Twitter’s First Amendment rights. A case of actual
18 controversy exists regarding Twitter’s right to engage in First Amendment protected speech
19 following Defendants’ refusal to allow Twitter to publish information about its exposure to
20 national security surveillance that does not conform to either of the two preapproved formats set
21 forth in the DAG Letter. The fact that Defendants have prohibited Twitter from publishing facts
22 that reveal whether and the extent to which it may have received either one or more NSLs or
23 court orders pursuant to FISA, along with the other facts alleged herein, establish that a
24 substantial controversy exists between the adverse parties of sufficient immediacy and reality as
25 to warrant a declaratory judgment in Twitter’s favor. Twitter has suffered actual adverse and
26 harmful effects, including but not limited to, a prohibition on publishing information in the draft

1 Transparency Report to make it available to the public and Twitter’s users, the chilling effect
2 from Defendants’ failure to address specific content, and the threat of possible civil or criminal
3 penalties for publication.

4 44. The imposition of the requirements of the DAG Letter on Twitter violates the
5 Administrative Procedure Act because the DAG Letter represents a final agency action not in
6 accordance with law; the imposition of the DAG Letter on Twitter is contrary to Twitter’s
7 constitutional rights (namely the First Amendment) as alleged more specifically herein; the
8 imposition of the DAG Letter on Twitter is in excess of statutory jurisdiction, authority, or
9 limitations as alleged more specifically herein; and the requirements set forth in the DAG Letter
10 were imposed on Twitter without the observance of procedure required by law. Twitter is not
11 “similarly situated” to the parties addressed in the DAG Letter.

12 45. Upon information and belief, the restrictions in the DAG letter are based in part
13 upon the nondisclosure provision of 18 U.S.C. § 2709; FISA secrecy provisions, such as 50
14 U.S.C. § 1805(c)(2)(B); the Espionage Act, 18 U.S.C. § 793; nondisclosure agreements signed by
15 Twitter representatives, if any; and nondisclosure provisions in FISA court orders issued to
16 Twitter, if any.

17 46. The nondisclosure and judicial review provisions of 18 U.S.C. § 2709(c) are
18 facially unconstitutional under the First Amendment, including for at least the following reasons:
19 the nondisclosure orders authorized by § 2709(c) constitute a prior restraint and content-based
20 restriction on speech in violation of Twitter’s First Amendment right to speak about truthful
21 matters of public concern (e.g., the existence of and numbers of NSLs received); the
22 nondisclosure orders authorized by § 2709(c) are not narrowly tailored to serve a compelling
23 governmental interest, including because they apply not only to the content of the request but to
24 the fact of receiving an NSL and additionally are unlimited in duration; and the NSL
25 nondisclosure provisions are facially unconstitutional because the judicial review procedures do
26

1 not meet procedural safeguards required by the First Amendment because they place the burden
2 of seeking to modify or set aside a nondisclosure order on the recipient of an NSL, do not
3 guarantee that nondisclosure orders imposed prior to judicial review are limited to a specified
4 brief period, do not guarantee expeditious review of a request to modify or set aside a
5 nondisclosure order, and require the reviewing court to apply a level of deference that conflicts
6 with strict scrutiny.

7 47. The nondisclosure provisions of 18 U.S.C. § 2709(c) are also unconstitutional as
8 applied to Twitter, including because Defendants' interpretation of the nondisclosure provision of
9 18 U.S.C. § 2709(c), and their application of the same to Twitter via the DAG Letter, is an
10 unconstitutional prior restraint, content-based restriction, and viewpoint discrimination in
11 violation of Twitter's right to speak about truthful matters of public concern. This prohibition on
12 Twitter's speech is not narrowly tailored to serve a compelling governmental interest, and no such
13 interest exists that justifies prohibiting Twitter from disclosing its receipt (or non-receipt) of an
14 NSL or the unlimited duration or scope of the prohibition.

15 48. Section 2709 is also unconstitutional because 18 U.S.C. § 3511, which sets forth
16 the standard of review for seeking to modify or set aside a nondisclosure order under 18 U.S.C. §
17 2709, restricts a court's power to review the necessity of a nondisclosure provision in violation of
18 separation of powers principles. The statute expressly limits a court's ability to set aside or
19 modify a nondisclosure provision unless the court finds that "there is no reason to believe that
20 disclosure may endanger . . . national security." 18 U.S.C. § 3511(b)(2), (3). This restriction
21 impermissibly requires the reviewing court to apply a level of deference to the government's
22 nondisclosure decisions that conflicts with the constitutionally mandated level of review, which is
23 strict scrutiny.

24 49. The FISA statute, the Espionage Act, and other nondisclosure authorities do not
25 prohibit service providers like Twitter from disclosing aggregate information about the number of
26

1 FISA orders they receive. Instead, these authorities protect the secrecy of particular *targets* and
2 ongoing investigations, and do not impose an obligation on service providers such as Twitter to
3 remain silent about the receipt or non-receipt of FISA orders generally, nor do they impose an
4 obligation on service providers not to disclose the aggregate numbers of specific ranges of FISA
5 orders received. To the extent that the Defendants read FISA secrecy provisions, such as 50
6 U.S.C. § 1805(c)(2)(B), as prohibiting Twitter from publishing information about the aggregate
7 number of FISA orders it receives, however, the FISA secrecy provisions are unconstitutional
8 including because they constitute a prior restraint and content-based restriction on speech in
9 violation of Twitter’s First Amendment right to speak about truthful matters of public concern.
10 Moreover, this restriction on Twitter’s speech is not narrowly tailored to serve a compelling
11 governmental interest, and no such interest exists that justifies prohibiting Twitter from disclosing
12 its receipt (or non-receipt) of a FISA order.

13 50. The FISA secrecy provisions are also unconstitutional as applied to Twitter,
14 including because Defendants’ interpretation of the FISA secrecy provisions and their application
15 with respect to Twitter is an unconstitutional prior restraint, content-based restriction, and
16 viewpoint discrimination in violation of Twitter’s right to speak about truthful matters of public
17 concern. Moreover, this prohibition imposed by Defendants on Twitter’s speech is not narrowly
18 tailored to serve a compelling governmental interest.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Twitter prays for the following relief:

- 21 A. A declaratory judgment that:
- 22 i. The draft Transparency Report that Twitter submitted to the FBI may be
23 lawfully published in its entirety or, alternatively, certain identified
portions may be lawfully published;
 - 24 ii. Imposition of the requirements set forth in the DAG Letter on Twitter
violate the Administrative Procedure Act;
 - 25 iii. The nondisclosure provisions of 18 U.S.C. § 2709 and the review
26 mechanisms of 18 U.S.C. § 3511 are facially unconstitutional under the
First Amendment;

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PERKINS COIE LLP

3 By: /s/ Eric D. Miller

Eric D. Miller, Bar No. 218416

EMiller@perkinscoie.com

Michael A. Sussmann, D.C. Bar No.
433100

(pro hac vice to follow)

MSussmann@perkinscoie.com

James Snell, Bar No. 173070

JSnell@perkinscoie.com

Hayley L. Berlin, D.C. Bar No. 1011549

(pro hac vice to follow)

HBerlin@perkinscoie.com

PERKINS COIE LLP

3150 Porter Drive

Palo Alto, CA 94304-1212

Telephone: 650.838.4300

Facsimile: 650.838.4350

Attorneys for Plaintiff
Twitter, Inc.