20-1568

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TIMOTHY H. EDGAR; RICHARD H. IMMERMAN; MELVIN A. GOODMAN; ANURADHA BHAGWATI; MARK FALLON,

Plaintiffs–Appellants

v.

JOHN RATCLIFFE, in his official capacity as Director of National Intelligence; GINA HASPEL, in her official capacity as Director of the Central Intelligence Agency; MARK T. ESPER, in his official capacity as Secretary of Defense; PAUL M. NAKASONE, in his official capacity as Director of the National Security Agency,

Defendants–Appellees

On appeal from the United States District Court for the District of Maryland — No. 8:19-cv-00985 (Hazel, J.)

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Introduction

This case, brought by five individuals who between them have served in the intelligence community and the military for almost a century, involves a challenge to four federal agencies' "prepublication review" regimes, which require millions of former intelligence-agency employees and military personnel to obtain permission from the government before publishing works relating even tangentially to their government service.

These regimes are unconstitutional in multiple respects. They impose prepublication review obligations on former government employees without regard to whether those employees ever had access to sensitive information, and without regard to how long ago those employees left government service. Submission requirements and review standards are vague, confusing, and overbroad. In the absence of concrete deadlines, manuscript review frequently takes weeks or even months, which means that books, articles, and blog posts cleared for publication are published long after the debates they seek to engage have subsided. And Defendants' censorial decisions are often arbitrary, unexplained, unrelated to national security concerns, or influenced by authors' viewpoints.

Forty years ago, the Supreme Court held that the concept of prepublication review was compatible with the First Amendment. The Court did not, however, address the constitutional bounds of the government's authority to require former

employees to submit to such review—it did not, in other words, address the issues presented by this case. Moreover, in the decades since the Supreme Court's only confrontation with prepublication review, the prepublication review system has metastasized in every respect. Even if the Supreme Court had endorsed every feature of the prepublication review regime before it in 1980—and it did not—today's regimes cannot be squared with the First and Fifth Amendments. For the reasons below, Plaintiffs respectfully urge the Court to reverse the district court's decision granting Defendants' motion to dismiss.

Statement of Jurisdiction

This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291. The district court exercised jurisdiction over the underlying action under 28 U.S.C. § 1331. The district court granted Defendants' motion to dismiss in a memorandum opinion issued on April 16, 2020, and it entered a final order on May 7, 2020. JA146–202, 204, 206. Plaintiffs filed a timely notice of appeal. JA208–10.

Statement of Issues on Appeal

1. Did the district court err in holding that Defendants' prepublication review regimes do not violate the First Amendment?

2. Did the district court err in holding that Defendants' prepublication review regimes are not void for vagueness under the Fifth Amendment?

3. The district court held that Plaintiffs have standing because Defendants' prepublication review regimes chill constitutionally protected speech. Did the court err in rejecting the argument that Plaintiffs also have standing

because Defendants' prepublication review regimes are licensing schemes that give executive officers overly broad discretion to suppress speech?

Statement of the Case

Origins and Metastasis of the Prepublication Review System

The prepublication review system originated in a set of contractual obligations imposed on a very small number of intelligence officers with access to the nation's most sensitive secrets. Since its establishment in 1947, the CIA has required employees to sign secrecy agreements as a condition of employment and again upon their resignation from the agency. Compl. ¶ 17 (JA13). Although the terms of these agreements have varied over time, the agreements have generally prohibited former employees from publishing manuscripts without first obtaining the agency's consent. *Id.* In the 1950s and 1960s, when comparatively few former intelligence-agency employees sought to publish manuscripts, the agencies handled prepublication review informally. *Id.* ¶ 18 (JA13). In the 1970s, however, partly as a result of the Vietnam War and the abuses documented by the Church and Pike Committees, many more former intelligence-agency employees began writing, often critically, about the intelligence agencies and their activities. *Id.* One of the ways the CIA responded was by establishing a Publications Review Board. *Id.*

The decade that followed was a critical period in the evolution of prepublication review. In 1980, a divided Supreme Court decided *Snepp v. United States*, 444 U.S. 507 (1980), which affirmed the imposition of a constructive trust

on profits earned by a former CIA agent who had published a book without submitting it for review. *Id.* ¶ 19 (JA13–14). After the Supreme Court decided that case, the Reagan administration introduced Form 4193, a standard-form contract that intelligence agencies could use to impose a lifetime prepublication review requirement on employees with access to Sensitive Compartmented Information ("SCI"). *Id.* ¶ 22 (JA15). In 1983, President Reagan issued National Security Decision Directive 84, requiring all intelligence-agency employees to sign a similar form as a condition of access to SCI. *Id.* ¶ 20 (JA14). President Reagan ultimately suspended Directive 84's prepublication review mandate in response to congressional backlash, *id.* ¶ 21 (JA14–15), but agencies continued to require employees to sign Form 4193, *id.* ¶ 22 (JA15).

Over the past five decades, the prepublication review system has expanded on every axis. Today, all seventeen intelligence agencies impose lifetime prepublication review requirements on at least some subset of employees. *Id.*¶ 24 (JA15). These agencies impose review obligations on more categories of people—not just, as before, on individuals with access to SCI, but on employees who never had access to SCI or even (in some cases) to classified information of any kind. *Id.* ¶ 25 (JA15–16). At the same time, the amount of information that is classified has expanded dramatically. Whereas in 1980 original and derivative classification authorities made sixteen million classification decisions, in 2017 they made more than three times

that number. *Id.* ¶ 26 (JA16). Agency prepublication review regimes have also become increasingly complex. Whereas the CIA prepublication review obligations involved in *Snepp* were described only in employee contracts, today agencies impose review obligations through a confusing tangle of contracts, regulations, and policies. *Id.* ¶ 27 (JA16). In addition, submission and review standards, review timelines, and appeals processes vary widely across agencies. For a combination of all of these reasons, the amount of material submitted for review has steadily increased. For example, the number of pages reviewed by the CIA each year increased from about 1,000 in the mid-1970s to 150,000 in 2014. *Id.* ¶ 28 (JA17). And in part because so much more material is submitted to them, agencies now take much more time to complete their reviews. The CIA, for instance, estimates that its review of book-length manuscripts will take over a year. *Id.* ¶ 29 (JA18).

In sum, the prepublication review system that exists today bears little resemblance to the one that existed when the CIA first introduced prepublication review in the late 1940s, or even to the one that existed in 1980 when the Supreme Court decided *Snepp*.

Defendants' Prepublication Review Regimes

Defendants' prepublication review regimes differ in their particulars, but they share several important characteristics.

First, each of the regimes comprises a tangle of nondisclosure agreements, policies, and regulations. For example, the CIA's regime encompasses a classified information nondisclosure agreement (Standard Form 312), an SCI nondisclosure agreement (Form 4414), a secrecy agreement that all CIA employees must sign on joining the agency (Form 368), and an agency regulation (AR 13-10). *Id.* ¶ 32 (JA19–20).

Second, each of the regimes applies to broad categories of former employees, including to some who may never have had access to SCI or even to classified information. For example, the CIA's, NSA's, and ODNI's regimes apply to *all* former employees of those agencies. *Id.* ¶ 32 (JA19–20), ¶ 44 (JA25–26), ¶ 50 (JA27). The DOD's regime applies to all former DOD employees and all former active or reserve military service members. *Id.* ¶ 38 (JA22–23).

Third, each of the regimes requires former employees to submit for agency review a wide but vaguely defined range of material, including material that goes far beyond the category of material the government might have a legitimate interest in reviewing. For example, the ODNI's regime requires former employees to submit "all official and non-official information intended for publication that discusses the ODNI, the [Intelligence Community], or national security." *Id.* ¶ 50.d (JA28).

Fourth, each of the regimes permits the agencies to censor a wide but vaguely defined range of information, including information that the agencies have no

legitimate interest in censoring. For example, the DOD permits reviewers to censor not just properly classified information but any information "requiring protection in the interest of national security or other legitimate governmental interest." Abdo Decl. Ex. E. §1.2.d (JA90–91). The NSA and ODNI, for their part, fail to state any review criteria whatsoever. Compl. ¶ 45 (JA26), ¶ 51 (JA28).

Fifth, while the regimes contemplate inter-agency referrals, they fail to specify the terms under which referrals will be made. *Id.* ¶ 33 (JA20), ¶ 39 (JA23–24), ¶ 45 (JA26), ¶ 51 (JA28).

Sixth, the regimes fail to provide procedural safeguards to limit the risk of arbitrary or illegitimate censorship. Most significantly, they fail to impose firm deadlines for the completion of review. *Id.* ¶¶ 36–37 (JA21), ¶¶ 42–43 (JA24–25), ¶¶ 48–49 (JA27), ¶¶ 54–55 (JA29).

The Plaintiffs

Plaintiffs Timothy H. Edgar, Richard H. Immerman, Melvin A. Goodman, Anuradha Bhagwati, and Mark Fallon are former national security professionals and former employees of the ODNI, CIA, and DOD. Between them, they served in the intelligence community and the military in a diversity of roles for almost a century. *Id.* ¶ 4 (JA10–11). All of them have drafted publications subject to prepublication review requirements, most have submitted works for review in the past, and all of

them intend to continue writing works that Defendants' regimes require them to submit for review. *Id.*

Plaintiffs' experience with Defendants' prepublication review regimes has underscored the regimes' defects. Plaintiffs have had to submit materials far afield from those that could reasonably be thought to contain classified information. *Id.* ¶ 62 (JA30–31). They have experienced lengthy and unexplained delays in the review process. *Id.* ¶ 64 (JA31), ¶ 74 (JA34), ¶ 89 (JA38), ¶ 110 (JA45). They have been compelled to redact information that was not classified, or that they learned from public sources after they left government service. *Id.* ¶ 64 (JA31), ¶ 78 (JA35), ¶ 110 (JA45). They have been forced to delay the publication of time-sensitive material. *Id.* ¶ 64 (JA31), ¶ 78 (JA35), ¶ 107 (JA44). They have had to accept redactions they believed to be illegitimate because contesting the redactions would have resulted in further delay, or would have compromised their relationships with agency censors whom they could not afford to provoke or offend. *Id.* ¶ 64 (JA31), ¶ 78 (JA35), ¶ 110 (JA45), ¶ 119 (JA47). And as a result of their experiences with Defendants' prepublication review regimes, they have self-censored in multiple ways. *Id.* ¶ 66 (JA32), ¶ 80 (JA36), ¶¶ 92–93 (JA39–40), ¶ 112 (JA45–46), ¶¶ 118–19 (JA47).

For example, Mr. Fallon, an expert on counterterrorism, counterintelligence, and interrogation who spent more than three decades in government service, waited

eight months for the DOD to review his book manuscript relating to the Bush administration's interrogation policies. *Id.* ¶ 110 (JA45). At the end of those eight months, the DOD informed him that he could publish his manuscript only if he made 113 separate excisions that Mr. Fallon believed were arbitrary, haphazard, inconsistent, and in some instances seemingly intended to protect the CIA from embarrassment. *Id.* Some of the excisions were of material that had been published in unclassified congressional reports; others were of material that had been published in news articles that Mr. Fallon had cited. *Id.*

Mr. Edgar's experience with the prepublication review system has been similarly vexing. After he submitted a book manuscript about privacy and surveillance, the ODNI referred his manuscript to the NSA and CIA for additional review, but despite multiple inquiries he was unable to contact those conducting that review. *Id*. ¶ 63 (JA31). Three months after he submitted the manuscript, the ODNI demanded that he excise material relating to events that had taken place, and issues that had arisen, after he left government. *Id.* ¶ 64 (JA31). Although he viewed these redactions as illegitimate and unnecessary, Mr. Edgar ultimately decided against challenging them because he worried that delay would make the book less relevant to ongoing public debates. *Id.* He also believed that maintaining a good relationship with his ODNI reviewers might be important to ensuring the timely review of future manuscripts, and that challenging the redactions could harm that relationship. *Id*.

Professor Immerman and Mr. Goodman have had comparable experiences with prepublication review. *Id.* ¶¶ 72–80 (JA33–36), ¶¶ 85–93 (JA37–40). Although Ms. Bhagwati has not submitted manuscripts for review, she recently learned that the DOD's prepublication review regime requires her to submit her manuscripts for review even though her writing regarding her experiences as a servicewoman could not plausibly necessitate review for classified information. *Id.* ¶¶ 96–99 (JA40–41).[1]

Procedural History

Plaintiffs filed this suit on April 2, 2019, alleging that Defendants' prepublication review regimes violate the First and Fifth Amendments. JA8–49. Plaintiffs sought declaratory and injunctive relief. JA48.

Defendants filed a motion to dismiss on June 4, 2019, and the district court granted the motion on April 16, 2020. JA146. The court held that Plaintiffs have standing because they plausibly alleged that Defendants' prepublication review regimes chill protected speech. JA176. It rejected Plaintiffs' claims, however, that the regimes violate the First and Fifth Amendments. JA194, 201.

Plaintiffs filed their notice of appeal on May 12, 2020. JA208–10.

[1] The Complaint provides a fuller account of the history of the prepublication review system, Defendants' prepublication review regimes, and Plaintiffs' experience with those regimes. JA9–47.

Summary of Argument

The district court correctly held that Plaintiffs have standing to challenge Defendants' prepublication review regimes. It erred, however, in dismissing Plaintiffs' claim that Defendants' prepublication review regimes violate the First Amendment. The crux of the court's decision was its holding that Plaintiffs' challenge is foreclosed by *Snepp*. But *Snepp* does not in fact control this case. Because the defendant in *Snepp* had deliberately disregarded his prepublication review obligations, the Supreme Court's opinion in that case focused narrowly on a question of remedy and simply did not consider the questions presented here. It did not address the categories of former employees who may be required to submit their writings for review; it did not address the materials the government may compel those individuals to submit; it did not address the scope of the government's authority to censor materials submitted for review; and it did not address the procedural safeguards that must attend a system of prior restraint of this kind.

Even if *Snepp* could be read to have categorically endorsed the CIA's prepublication review regime as it existed in 1980, the regimes that Defendants defend today are dramatically different from the one the Court dealt with in *Snepp*: they apply to many more people, they reach far more speech, and the absence of procedural safeguards means that they are far more susceptible to abuse.

Accordingly, while *Snepp* is certainly relevant to this case, it does not dictate its outcome.

Defendants' prepublication review regimes cannot survive constitutional scrutiny under the standards the courts have conventionally applied to prior restraints. Nor can they survive scrutiny under the employee-speech framework that the Supreme Court applied in *Snepp*. While the legitimacy of the government's interest in protecting national security by safeguarding properly classified information is obvious, the interest served by the prepublication review system in particular—preventing inadvertent disclosures of classified information by those who submit for review—is narrow. At the same time, the interest of former government employees in speaking publicly about matters of public concern is substantial, as is the interest of the public in hearing from former government employees who in many instances have unique insights into the operation of the agencies for which they worked.

Against this background, Defendants' prepublication review regimes are not reasonably tailored to the government's interest. The regimes apply too broadly, reaching individuals who were never given SCI or even classified information; they require former employees to submit nearly everything they write about their government service, including manuscripts that could not reasonably be thought to necessitate review for classified information; they permit the government to censor

far more than just properly classified information obtained in the course of government employment; and they fail to impose reasonable—or, indeed, any—firm deadlines for review. Perhaps more carefully tailored prepublication review regimes could withstand constitutional scrutiny, but these ones cannot.

The district court also erred in dismissing Plaintiffs' claim that Defendants' prepublication review regimes are unconstitutionally vague. Defendants' regimes rely on terms that are ill-defined and subjective, and the ODNI and NSA regimes lack any censorship standards whatsoever. These regimes fail to give former employees fair notice of what is required of them and invite arbitrary and discriminatory application by agency censors.

Standard of Review

This Court reviews the grant of a motion to dismiss de novo, "accept[ing] as true all well-pleaded facts in a complaint and constru[ing] them in the light most favorable to the plaintiff[s]." *Lucero v. Early,* 873 F.3d 466, 469 (4th Cir. 2017).

Argument

I. Defendants' prepublication review regimes violate the First Amendment.

A. *Snepp* does not control this case.

The linchpin of the district court's analysis—its conclusion that "this case is controlled by *Snepp*," JA185—was incorrect. Because of the posture in which *Snepp* came to the Supreme Court, the Court's opinion in that case focused narrowly on a

question of remedy and simply did not consider the questions presented here—including what universe of materials an agency may constitutionally require its former employees to submit to government censors, on what bases an agency can constitutionally withhold permission to publish, and whether there is a constitutional limit to the length of time an agency may take to complete its review. *Snepp* cannot fairly be read to have endorsed every feature of the prepublication review system that existed in 1980, and it certainly cannot be read to have endorsed the much broader and much more speech-suppressive system that exists today. The district court's holding to the contrary does not withstand scrutiny.

Snepp involved a former CIA officer, Frank Snepp, who had signed "an agreement promising that he would 'not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency.'" 444 U.S. at 508. Shortly after resigning from the agency, however, he published a book without first submitting it for review. *Id*. at 507. When the government sued him for violating his contract, the district court found that *Snepp* had "willfully, deliberately and surreptitiously breached his position of trust with the CIA and [his] secrecy agreement," that he had deliberately misled CIA officials into believing that he would submit his book for review, and that publication of the book had "caused the United States irreparable harm and loss." *United States v. Snepp*,

456 F. Supp. 176, 179–80 (E.D. Va. 1978). Relying on these findings, the court enjoined *Snepp* from violating his agreement in the future and imposed a constructive trust on the proceeds of his book. The injunction included a number of safeguards that the secrecy agreement did not: Snepp was required to submit writings only if they contained "information [he] gained during the course of or as a result of his employment," the CIA was required to complete its review within thirty days, and the CIA could censor only information that was classified. 456 F. Supp. at 182. On appeal, this Court affirmed the injunction but reversed the order imposing a constructive trust. *United States v. Snepp*, 595 F.2d 926 (4th Cir. 1979).

In his petition for certiorari, Snepp challenged the injunction, arguing that his secrecy agreement was unenforceable as a prior restraint. 444 U.S. at 509 n.3. The Supreme Court granted Snepp's petition, as well as a conditional cross-petition by the government that focused on the question of remedy. Very unusually, however, the Court decided the case summarily on the basis of the petitions, without inviting briefing on the merits or hearing oral argument. *Id.* at 526 n.17 (Stevens, J., dissenting). Its per curiam opinion focused almost entirely on this Court's reversal of the order imposing a constructive trust. *See id.* at 507–16 (majority op.). It mentioned the First Amendment only twice, including once in its summary of the decisions below, and it disposed of Snepp's First Amendment argument in a cursory footnote. The footnote stated that the CIA has "a compelling interest in protecting

both the secrecy of information important to our national security" and the "appearance of confidentiality," and that the "agreement Snepp signed is a reasonable means for protecting this vital interest." *Id*. at 509 n.3.

Snepp was a narrow opinion about the remedies available to the CIA against an author who "willfully, deliberately, and surreptitiously" flouted his obligations under a now-displaced censorship scheme, and it does not control this case. Again, virtually all of the analysis in *Snepp* focused on whether the agency was entitled to the proceeds of Snepp's book. The Court did not consider the constitutionality of the specific features of the CIA's prepublication review regime, let alone the features of any other agency's regime. "[I]t would therefore be inaccurate to say that [Snepp] upheld [those] features." *Freedman v. Maryland*, 380 U.S. 51, 54 (1965) (observing that an earlier case had not decided the constitutionality of a particular prior restraint because the earlier case addressed only the "narrow" question of "whether a prior restraint was necessarily unconstitutional under all circumstances" and did not consider "the specific features" of the particular restraint).

Snepp did not, for example, consider the categories of speakers to whom a prepublication review requirement may constitutionally extend. Snepp himself was a former CIA officer who had been granted access to some of the government's most closely held secrets, and the Court emphasized that status in concluding that his prepublication review requirement was constitutional: "Few types of government

employment involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties." *Snepp*, 444 U.S. at 511 n.6. Moreover, Snepp had left the CIA relatively recently. (He resigned in 1976 and published his book the following year. *Id.* at 511 n.1.) The Court did not consider (or have any reason to consider) whether the prepublication review obligation the CIA had imposed on Snepp could be imposed on other CIA employees, or on employees of other agencies, and it did not consider whether the First Amendment would bar the agency from enforcing a prepublication review requirement on someone who had left the agency's employ many years earlier.[2]

Nor did *Snepp* consider what materials an agency can constitutionally require its former employees to submit for review, the grounds on which a government reviewer can constitutionally censor a manuscript, the length of time an agency may constitutionally spend reviewing a manuscript, or the other procedural protections that must be afforded to former government employees in this context. The Court

[2] To support its argument that prepublication review was necessary, the CIA relied on the declaration of its director, Admiral Stansfield Turner, who testified that Snepp's book had "seriously impaired the effectiveness of American intelligence operations." *Snepp*, 444 U.S. at 512. After Turner left the agency, he testified to Congress that "reviews as conducted by the CIA and NSA are susceptible to abuse and should be placed under some outside regulation," and that "there is greater danger than benefit in extending the prepublication review requirement to other agencies of our government." Letter from William M. Baker, CIA Director of Public Affairs (Aug. 12, 1988), https://perma.cc/3DWL-7WL6.

had no reason to reach these issues, because *Snepp* did not submit his manuscript for review, and because it was undisputed that the manuscript described CIA intelligence activities.

Even if *Snepp* could tenably be read as a categorical endorsement of every feature of the CIA regime that existed in 1980, it cannot reasonably be read to have categorically endorsed the sprawling, byzantine, and multifariously dysfunctional prepublication review system that exists today. In 1977, the year Snepp published his book, the CIA received only forty-three submissions for prepublication review. Compl. ¶ 28 (JA17). The processes and practices surrounding prepublication review were relatively new, and lifetime prepublication review was confined to the CIA and NSA, the two agencies with the most direct role in intelligence gathering. *Id.* ¶ 24 (JA15). As a result, prepublication review applied, in practice, to relatively few people and publications. *Id*. ¶¶ 27–28 (JA16–17).

Since then, prepublication review has expanded on nearly every axis: the number of agencies that impose prepublication review requirements on former employees, the categories of former employees subject to prepublication review, the amount of information that is classified, the complexity of prepublication review regimes, the amount of material that is submitted for review, and the time taken to complete reviews. *Id*. ¶¶ 23–29 (JA15–18). In 2015, the CIA received 8,400 submissions for review (about 150,000 pages)—about 195 times as many

submissions as it received in 1977. *Id.* ¶ 28 (JA17). The CIA's Inspector General predicted in 2015 that the review of book-length manuscripts by the agency would take more than a year, *id.* ¶ 29 (JA18), and today the agency's reviews sometimes take even longer, *id.* ¶ 36.

The district court reasoned that the differences between the 1980 system and the contemporary one have "little bearing" on the latter's constitutionality. JA189. Indeed, under its reading of *Snepp*, the specifics of today's prepublication review regimes are simply "irrelevant." JA188, 190. As the Supreme Court has emphasized, however, whether a system of prior restraint is constitutional depends entirely on "the specific features" of that system. *Freedman*, 380 U.S. at 54. *Snepp* cannot plausibly be read to mean that *any* system of prior restraint introduced in the name of national security, or in the name of prepublication review, is constitutional. *Cf. Riley v. California*, 573 U.S. 373, 393 (2014) (rejecting the government's argument that a principle announced in one factual context may be mechanically transposed to a new factual context: "any extension of that reasoning [to the new context] has to rest on its own bottom").

Snepp is surely relevant to this case, but the district court was wrong to conclude that *Snepp* decides it.

B. Defendants' prepublication review regimes impose a prior restraint on speech.

Because they require would-be speakers to submit their speech to government censors for prior approval, Defendants' prepublication review regimes are prior restraints. As prior restraints, they carry a heavy presumption of unconstitutionality. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Flowing from the First Amendment's "distaste for censorship," this presumption is "deeply etched in our law." *Se. Promotions v. Conrad*, 420 U.S. 546, 553, 559 (1975). As the Supreme Court has observed, "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Id.* at 559.

The characterization of prepublication review as a system of prior restraint should be uncontroversial. Prior restraints "t[ake] a variety of forms." *Id.* at 553. A federal law authorizing postal officials to seize obscene mail before it is delivered is a prior restraint. *Blount v. Rizzi*, 400 U.S. 410 (1971). So is an executive edict that bars the publication of information. *See N.Y. Times Co. v. United States* (*Pentagon Papers*), 403 U.S. 713, 714 (1971) (per curiam). So are court orders that "actually forbid speech activities." *Alexander v. United States*, 509 U.S. 444, 550 (1993). And so are restrictions that "chill[]" the potential speech of current public employees. *See United States v. Nat'l Treasury Emps. Union (NTEU)*, 513 U.S. 454 (1995).

One especially offensive form of prior restraint is the licensing scheme: any regime that forbids individuals from publishing without obtaining government permission in advance. Classic licensing schemes include municipal requirements that the public obtain permits to protest on public streets, *see Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969); local ordinances prohibiting public assembly in city parks without government sign-off, *see Hague v. CIO*, 307 U.S. 496, 516 (1939); state laws proscribing the solicitation of money absent an official's say-so, *see Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940); and laws regulating adult entertainment businesses, *see City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 776, 780 (2004).

Prepublication review regimes fit comfortably into this group. Like other licensing schemes, prepublication review regimes share the "special vice" of all prior restraints: they suppress speech "before an adequate determination that it is unprotected," rather than punishing unprotected speech after it is uttered. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973). Agency censors are "empowered to determine whether the applicant should be granted permission—in effect, a license or permit—on the basis of [their] review of the content of the proposed [speech]." *Se. Promotions*, 420 U.S. at 554. And these censors impose these restrictions without a "prior judicial determination" that their judgment is correct. *Alexander*, 509 U.S. at 551.

Relying on *Snepp*, the district court rejected the argument that Defendants' prepublication review regimes are prior restraints, Op. 41 (JA186)—but its reading of that case was manifestly incorrect. In fact, the *Snepp* Court never contested the characterization of prepublication review as a prior restraint; it just determined that the restraint at issue in that case was a constitutional one. *See* 444 U.S. at 509 n.3 (holding that Snepp's secrecy agreement was a "reasonable means for protecting th[e government's] vital interest" in protecting national security secrets). In doing so, the Supreme Court borrowed this Court's language from *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), and essentially endorsed its conclusion. In *Marchetti*, this Court repeatedly characterized the CIA's prepublication review regime as "a system of prior restraint." *Id.* at 1317; *see id.* at 1313 ("readily agreeing" with Marchetti that the CIA's secrecy agreements established "a system of prior censorship"). And, just as the Supreme Court did years later in *Snepp*, it held that the restraint on speech was constitutional, as a "[r]easonable [m]eans" of protecting agency secrets, *id.* at 1316 (emphasis removed)—so long as the agency acted promptly upon receiving submissions and censored only classified information obtained in the course of employment that was not already in the public domain, *id.* 1317–18.[3]

[3] In *United States v. Snepp*, 897 F.2d 138, 143 (4th Cir. 1990), the Fourth Circuit confirmed that *Marchetti*'s reasoning survived *Snepp*. Asked to consider whether the "the Supreme Court [in *Snepp*] intended to overrule *Marchetti*," it held that "the Supreme Court did not so intend." *Id.*

Defendants' prepublication review regimes are prior restraints, and nothing in *Snepp* suggests they should be understood otherwise.

C. Whatever standard of review applies, Defendants' prepublication review regimes fail.

In a series of seminal cases, the Supreme Court explained that a content-based system of prior restraint is consistent with the First Amendment only if it has (1) narrow, objective, and definite standards to guide government censors and cabin official discretion, *Shuttlesworth*, 394 U.S. at 150–51, and (2) robust procedural safeguards designed to mitigate the dangers of illegitimate censorship, *Freedman*, 380 U.S. at 58–59; *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130–31 (1992); *Se. Promotions*, 420 U.S. at 560. As explained below, Defendants' regimes have neither. As a result, these regimes cannot survive the scrutiny that the Court has given licensing schemes in most contexts.[4]

Defendants' regimes fail First Amendment scrutiny even if evaluated using the framework the Supreme Court has used to assess restrictions on the speech of government employees—the framework the Court relied on in *Snepp.* As discussed

[4] Plaintiffs believe that *Snepp* should have analyzed the CIA's prepublication review regime under this framework, rather than under the employee-speech framework discussed below, because, among other things, Snepp was not a government employee when he published his book. In light of *Snepp*, Plaintiffs ask this Court to apply the employee-speech framework here, but they respectfully preserve for further review the argument that *Snepp* was wrong in this respect.

above, *Snepp*'s First Amendment analysis was very brief. The Court was unequivocal, however, about the framework it was applying. In its footnote addressing Snepp's First Amendment claim, the Court wrote that its "cases make clear that" the government may "act[] to protect substantial government interests by imposing reasonable restrictions on employee activities," 444 U.S. at 509 n.3, and in support it cited principally its earlier decision in *U.S. Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973). That case involved a straightforward application of *Pickering v. Board of Education*, 391 U.S. 563 (1968) to the Hatch Act's prohibition against federal employee participation in political campaigns. Quoting *Pickering*, the *Letter Carriers* Court explained: "the problem in any case is to arrive at a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees." *Letter Carriers*, 413 U.S. at 564 (cleaned up). The *Snepp* Court also cited five other opinions, each of which applied either *Pickering* or some form of heightened First Amendment scrutiny. *See* 444 U.S. at 509 n.3 (citing cases); *see also Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1439 (D.C. Cir. 1996) (noting that, in *Snepp*, the Court "essentially applied *Pickering*").

Since *Snepp* was decided, the Supreme Court has bifurcated its doctrine relating to restrictions on the speech of government employees, drawing a distinction

between cases that involve a "*post hoc*" challenge to a disciplinary action and those that involve a challenge to a "wholesale deterrent to a broad category of expression by a massive number of potential speakers." *NTEU*, 513 U.S. at 467. The latter, the Court has observed, "give[] rise to far more serious concerns than could any single supervisory decision" in part because they "chill[] potential speech before it happens," *id.* 468, and accordingly, "the Government's burden [in justifying such a restraint] is greater," *id.*; *accord Liverman v. City of Petersburg*, 844 F.3d 400, 407 (4th Cir. 2016).

Whereas the test under *Pickering* balances the interests of the government in punishing particular speech against the interests of the employee in engaging in that speech, the test under *NTEU* accounts for the interests of *all* employees whose speech is or will be restricted and of their audiences in hearing what those employees have to say. As the Court explained in the latter case, the government must show "that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468. Moreover, the government "must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 475 (cleaned up) (quoting *Turner*

Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994)); *see also Liverman*, 844 F.3d at 409 ("A stronger showing of public interest in the speech requires a concomitantly stronger showing of government-employer interest to overcome it." (quoting *McVey v. Stacy*, 157 F.3d 271, 279 (4th Cir. 1998) (Murnaghan, J., concurring)).

Applying *NTEU*, Defendants' prepublication review regimes are unconstitutional.

1. The government's interests are narrow.

While the government plainly has a strong interest in protecting national security secrets, Defendants' interest in prepublication review is ultimately quite narrow. Prepublication review does not serve the government's interest in deterring former employees from *intentionally* disclosing classified information; those individuals will not submit the information for review in the first place. Instead, the narrower interest served by the prepublication review system is the prevention of *inadvertent* disclosures by former employees whose goal is to publish their writing without jeopardizing the government's secrets. That interest is served most directly not by prepublication review, but by the laws criminalizing the disclosure of classified and national defense information, *see, e.g.*, 18 U.S.C. §§ 793–799, which provide a strong incentive for former employees to be exceedingly careful in deciding what information to include in their manuscripts. *See, e.g.*, Compl. ¶ 66 (JA32), ¶ 80 (JA36), ¶ 92 (JA39), ¶ 118 (JA47); *see Carroll v. President & Comm'rs*

of Princess Anne, 393 U.S. 175, 180–81 (1968) ("Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment."). The government may have a residual interest in protecting against inadvertent disclosures by former employees who have every reason to be careful with the government's secrets and every intention of doing so, but as explained below that narrow interest could be served by a regime far more tailored than the ones challenged here.

It also bears emphasis that there is no evidence that inadvertent disclosure of classified information by former employees would be a significant problem in the absence of prepublication review. As the Supreme Court underscored in *NTEU*, the government cannot justify a restraint on broad categories of protected speech without establishing that the restraint is necessary to address an actual harm. 513 U.S. at 475; *see also Liverman*, 844 F.3d 408–09. In 1983, when Congress carefully studied the question with the benefit of statistical studies conducted by the General Accounting Office, the House concluded that prepublication review "is a massive policy response to what has been, in the recent past, a very limited disclosure

problem." H. Rep. No. 98-578, at 15 (1983). In 1987, the House pointed to an updated study by the General Accounting Office once again showing that inadvertent disclosure of classified information was a marginal concern. H. Rep. No. 100-991, at 14 (1988). The House's report quoted former CIA director Admiral Stansfield Turner as having confirmed that the intelligence agencies' prepublication review agreements were "not critical" to national security. *Id.*

Just three years ago, Congress directed the intelligence agencies to streamline and narrow the prepublication review system after concluding that the system sweeps too broadly. In 2017, the House and Senate Intelligence Committees instructed the Director of National Intelligence to prepare, within 180 days of the Intelligence Authorization Act for that year, a new prepublication review policy that would apply to all intelligence agencies and that would "yield timely, reasoned, and impartial decisions that are subject to appeal." 115 Cong. Rec. H3300 (daily ed. May 3, 2017); 115 Cong. Rec. S2750 (daily ed. May 4, 2017) (same). The new policy, the committees said, should require each intelligence agency to develop and maintain a prepublication review policy that identifies the individuals whose work is subject to prepublication review, provides guidance on what must be submitted for review, requires "timely responses," establishes "a prompt and transparent appeal process," and includes guidelines for the assertion of "interagency equities." *Id.* More than

three years have passed, however, and the DNI has not published or formulated such a policy.

2. The interests of former employees subject to prepublication review, and of their audiences, are substantial.

On the other side of the balance, former employees and their audiences have a substantial interest in the speech restrained by Defendants' prepublication review regimes. As the Supreme Court has recognized, "speech by public employees on subject matter related to their employment holds special value" in our democracy. *Lane v. Franks*, 573 U.S. 228, 240 (2014). Public employees "are often in the best position to know what ails the agencies for which they work," *id.* at 236 (quotation marks omitted) (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994)), and "[t]here is considerable value . . . in encouraging, rather than inhibiting, [this] speech," *id.* These observations have special force here because Plaintiffs are *former* public employees, who—unlike current employees—always speak "in their capacity as citizens." *NTEU*, 513 U.S. at 465.

Defendants' prepublication review regimes place an extraordinary burden on this core political speech. The obligations they impose are lifelong—they remain in place even years after a person has left government service. They bind millions of people. Compl. ¶ 1 (JA9), ¶ 24 (JA15). They reach an untold number of manuscripts every year, *id.* ¶ 28 (JA17), and they chill an unknowable number more. When the prepublication review system significantly delays the publication of former

employees' manuscripts, the manuscripts may have lost much of their value by the time they finally reach the public. *Id.* ¶ 66 (JA32). When authors are told they cannot publish at all, the public is denied those authors' insights forever.

As with most prior restraints, it is impossible to tally the full damage done by prepublication review to public understanding because manuscripts never written leave no trace. *See NTEU*, 513 U.S. at 470 (recognizing that courts have "no way to measure the true cost of [such] burden[s]"); *see also* Brief of Amicus Curiae Center for Ethics and Rule of Law, *Edgar v. Coats*, No. 8:19-cv-00985, 2020 WL 1890509 (D. Md. 2020) (arguing that Defendants' prepublication review regimes chill national security dialogue and discourage national security experts from entering government service). However, in recent months, some of the costs of the system have become unusually visible, with the media reporting that the government has used prepublication review as a mechanism to delay the publication of books critical of the president.[5] Perhaps most notably, after President Trump directed his staff to prevent the publication of former national security advisor John Bolton's book prior to the 2020 presidential election, the White House used the prepublication review process to delay the book's publication.[6] As explained below, cases like these are the

[5] *See* Chris Mills Rodrigo, *McCabe Concerned About 'Unfair Treatment' After Book Release Delayed by FBI*, Hill (Oct. 11, 2018), https://perma.cc/XM95-AXQ5.

[6] *United States v. Bolton*, Complaint ¶¶ 46, 51, No. 1:20-cv-01580, 2020 WL 3401940 (D.D.C. filed June 16, 2020); Josh Dawsey et al., *Trump Wants To Block*

predictable result of regimes that invest executive officers with sweeping discretion, and that fail to include procedural safeguards to mitigate the risk that this discretion will be abused.

3. The current system of prepublication review is not reasonably tailored to the government's interests.

The First Amendment demands that a regulation of core political speech be tightly drawn to the interests it is meant so serve, yet Defendants' regimes are anything but. The standards for what materials must be submitted are vague, and they reach far beyond the speech that the government could plausibly claim must be reviewed for the presence of information whose disclosure would cause harm. The standards for what may be censored are similarly vague and overbroad. And the regimes lack reasonable procedural safeguards that would mitigate the risk of abuse or chill. Defendants' regimes, in other words, are not "reasonably necessary" to serve the government's interests. *NTEU*, 513 U.S. at 474.

The district court held that, given *Snepp*, the details of Defendants' prepublication review regimes were simply "irrelevant" to their constitutionality, JA190, but the district court erred. In applying *NTEU* to a particular prepublication review regime, courts must consider the scope and specificity of submission and

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Bolton's Book, Claiming Most Conversations Are Classified, Wash. Post (Feb. 21, 2020), https://perma.cc/V5DL-M8HT.

review criteria as well as the procedural safeguards that are in place. In considering a particular version of prepublication review in *Marchetti*, for example, this Court cited *Freedman* multiple times, ultimately holding that the First Amendment requires that an agency's review of a manuscript be concluded within a definite period of time—thirty days. 466 F.2d at 1317. Other circuits have similarly applied traditional prior-restraint principles—including from *Shuttlesworth* and *Freedman*—to prior restraints on government employees.[7]

a. The submission standards are vague and overbroad.

Defendants' regimes are vague and overbroad with respect to who must submit what for review. The regimes impose prepublication review requirements on all former employees—not just those who had access to SCI. And the regimes subject these employees to submission requirements that extend far beyond material that could plausibly be expected to contain classified information obtained in the course of government employment. Indeed, the regimes sweep in virtually everything that former intelligence agency employees might write about the

[7] *See, e.g.*, *Sanjour v. E.P.A.*, 56 F.3d 85 (D.C. Cir. 1995) ("[I]n the context of *Pickering* balancing, [the potential for censorship] justifies an additional thumb on the employees' side of [the] scales."); *Harman v. City of New York*, 140 F.3d 111, 118 (2d Cir. 1998) ("However, the concerns that lead courts to invalidate a statute on its face may be considered as factors in balancing the relevant interests under *Pickering*."); *Weaver*, 87 F.3d at 1440 ("*Pickering* can readily count those [prior-restraint] concerns in the course of the balance.").

government. Moreover, the submission standards use terms that are vague, undefined, and subjective. *See Harman*, 140 F.3d at 120 (finding that the absence of "narrow, objective, and definite" standards weighs against the government in the *NTEU* balance (quoting *Shuttlesworth*, 394 U.S. at 151)).

1. **The CIA's submission standards.** The CIA requires all former employees to submit for review any materials that "contain[] any mention of intelligence data or activities" or "any other information that might be based on [information obtained in the course of their employment that is classified or they know is in the process of a classification determination]," Decl. of Antoinette B. Shiner Ex. A ¶¶ 3, 5 (JA54), as well as "material on any subject about which the author has had access to classified information in the course of his employment," Compl. ¶ 32(d) (JA20).

2. **The DOD's submission standards.** The DOD requires all former employees and service members to submit for review any information that "relates to information in the custody and control of the [DOD], *or* was acquired . . . as part of their official duties or because of their official status within [DOD]" if that information "pertains to military matters, national security issues, or subjects of significant concern to [the agency]." *Id.* ¶ 38(c) (JA22) (emphasis added). In addition, the DOD requires them to submit any "information they intend to release to the public" to ensure that it "does not compromise national security as required by their nondisclosure agreements." Instruction 5230.09 § 1.2(g) (JA91).

3. **The NSA's submission standards.** The NSA requires all former "NSA/CSS affiliates acting in a private capacity" to submit material for review whenever there is "doubt" as to whether "NSA/CSS information" in the material is "UNCLASSIFIED" *and* "approved for public release." Compl. ¶ 44(c) (JA25–26); NSA/CSS Policy 1-30 § 2, 6(b) (JA114, 117) (emphasis added). The NSA's policy states that "NSA/CSS information appearing in the public domain shall not be automatically considered UNCLASSIFIED or approved for public release." NSA/CSS Policy 1-30 § 3(a) (JA115).

4. **The ODNI's submission standards.** The ODNI requires all former employees to submit for review "all official and non-official information

intended for publication that discusses the ODNI, the IC [Intelligence Community], or national security." Compl. ¶ 50(d) (JA28). Pursuant to Form 313, the ODNI also requires former employees who had access to classified information to submit any material that "might be based upon [information that is classified or is in the process of a classification determination]." *Id.* ¶ 50(c) (JA27–28); Form 313(5) (JA127–28).

5. **Defendants' shared submission standards.** Through Form 4414, all Defendants require former employees who had access to SCI to submit any material "that contains or purports to contain any . . . description of activities that . . . relate to SCI." Compl. ¶ 32(b) (JA19), ¶ 38(b) (JA22), ¶ 44(b) (JA25), ¶ 50(b) (JA27). In addition, all of the Defendants' regimes contemplate that the agencies will coordinate review with other agencies—but none of them specifies when they will do so and what censorship standards the other agencies will apply. *Id.* ¶ 33 (JA20), ¶ 39 (JA23–24), ¶ 45 (JA26), ¶ 51 (JA28).

Even a constitutional prepublication review regime would sweep in *some* speech that goes beyond what the government may constitutionally punish after the fact, but the submission criteria summarized here reach a vast amount of material that Defendants have no legitimate interest in reviewing, as the House and Senate Intelligence Committees recently recognized. *Cf.* 115 Cong. Rec. H3300 (daily ed. May 3, 2017) (recommending that agencies "limit[] the information subject to pre-publication review . . . to only those materials that might reasonably contain or be derived from classified information obtained during the course of an individual's association with the [Intelligence Community]"); 115 Cong. Rec. S2750 (daily ed. May 4, 2017) (same). For example, under the CIA's requirement, a former agency employee must submit for review virtually anything related to the CIA or other intelligence agencies—even if the manuscript in question has no relation at all to

anything the former employee learned in government. The DOD's submission requirement similarly mandates that former employees submit for review anything that "relates to information in the [agency's] custody and control" if it "pertains to . . . subjects of significant concern to" the agency. The NSA's submission requirement turns on whether information has been "approved for public release," but the agency does not say who decides whether something is approved for public release, when, or according to what standards. And the ODNI's regime requires former employees to submit anything that "discusses" the agency, the intelligence community, or national security. These submission requirements show no serious effort to tailor prepublication review to the government's asserted interest in preventing the inadvertent disclosure of classified information.

Many of these submission requirements also use terms that are subjective or ill-defined. The CIA requires that former employees submit any material "that might be based on" information obtained in the course of employment that is classified or pending classification. JA54. The DOD's submission requirement reaches anything that "*relates to* information in the custody and control of the [DOD]" if it "*pertains to* military matters, national security issues, or subjects of significant concern to [the agency]." Compl. ¶ 38(c) (JA22–24) (emphasis added). Similarly, the ODNI requires submission of any materials that "might be based upon" information that is classified, or in the process of being classified. *Id.* ¶ 50(c) (JA27–28). And, through

Form 4414, all Defendants require the submission of materials that "relate to" SCI. *Id.* ¶ 32(b) (JA19), ¶ 38(b) (JA22), ¶ 44(b) (JA25), ¶ 50(b) (JA27).

The Supreme Court has held that terms such as these "provide[] insufficient guidance because [they are] classic terms of degree" and offer "no principle for determining when remarks pass from the safe harbor . . . to the forbidden sea." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–49 (1991) (holding that standard for what lawyer can discuss hinging on "relates to" is unconstitutionally vague); *see also Nat'l Fed'n of Fed. Emps. v. United States*, 695 F. Supp. 1196, 1202–03 (D.D.C. 1988) ("On its face, 'classifiable' has not readily discernible meaning" and could ensnare "information that does not become classified until its disclosure piques the concerns of the Executive.").

The vagueness and overbreadth of these submission standards cannot survive *NTEU* balancing. For example, under these standards, a CIA officer employed for one month in the 1970s to analyze U.S. foreign policy toward Vietnam would today have to submit for review any pieces concerning the CIA's assessment of Russian interference in the 2016 election, the NSA's bulk collection of Americans' call records, or even the artistic merit of the popular television show "The Americans"—even if these pieces had no connection whatsoever to the author's service half a century ago. A former DOD employee would similarly have to submit for review a piece exposing racial discrimination in the agency's hiring practices. And a former

ODNI employee would have to submit literally every piece of public writing discussing the ODNI or national security.

The complaint explains the implications of all of this for Plaintiffs themselves. For example, because Mr. Goodman's work at the CIA several decades ago focused on the former Soviet Union and its Cold War foreign policy, he must submit to the CIA for approval anything he writes about Russia and large parts of the Middle East, Asia, and Africa—all "subject[s] about which [he] has had access to classified information in the course of his employment"—no matter how unlikely it is that his writings contain classified information. *See* Compl. ¶ 32(d) (JA19–20), ¶¶ 81–82 (JA36–37). The DOD's standards would encompass Ms. Bhagwati's writings about her experiences with misogyny, racism, and sexual violence in the military, even though this work does not discuss classified information, *id.* ¶ 94, 99 (JA40–41), and Mr. Fallon's writings about the interrogation and torture of prisoners, even if scrupulously sourced to declassified information and materials in the public record, *id.* ¶ 104 (JA43).

b. The review standards are vague and overbroad.

The review standards of Defendants' regimes are confusing, subjective, and overbroad. Several of Defendants' regimes do not specify censorship criteria at all. Even the narrowest of them invests agency officials with the power to censor information (1) whether or not it was obtained by the author in the course of

employment; (2) whether or not its disclosure would actually cause harm; (3) whether or not it is already in the public domain; and (4) whether or not the public interest in its disclosure outweighs the government's interest in secrecy.

1. **The CIA's censorship standards.** The CIA reviews submissions by former employees "solely to determine whether [they] contain[] any classified information." AR 13-10 § 3(f)(2) (JA67); *see also* Compl. ¶ 33 (JA20).

2. **The DOD's censorship standards.** The DOD subjects the submissions of former employees to "security review," which "protects classified information, controlled unclassified information, or unclassified information that may individually or in aggregate lead to the compromise of classified information or disclosure of operations security." Instruction 5230.29, Encl. 3 § 1 (JA103); *see also* Compl. ¶ 39 (JA23–24). The DOD also appears to review submissions for information "requiring protection in the interest of national security or other legitimate governmental interest," Instruction 5230.09 § 1.2(d) (JA90–91), and for "any classified, export-controlled or other protected information," JA94.

3. **The NSA's censorship standards.** The NSA's policies do not set forth any censorship standard for submissions by former employees. Compl. ¶ 45 (JA26).

4. **The ODNI's censorship standards.** The ODNI's policies do not set forth any censorship standard for submissions by former employees. However, they state that "the goal of pre-publication review is" not only to "prevent the unauthorized disclosure of information," but also to "ensure the ODNI's mission and the foreign relations or security of the U.S. are not adversely affected by publication." *Id.* ¶ 51 (JA28).

5. **Defendants' shared censorship standards.** All Defendants review submissions of former employees who had access to SCI for the presence of SCI. *Id.* ¶ 33 (JA20), ¶ 39 (JA23–24), ¶ 45 (JA26), ¶ 51 (JA28).

Defendants' policies do not meaningfully limit their censorship authority. First, the NSA's and the ODNI's policies do not set out a censorship standard at all,

effectively giving censors carte blanche. *Id.* ¶ 45 (JA26), ¶ 51 (JA28).This deficiency is fatal. "A long line of cases in th[e Supreme] Court makes it clear that [the government] cannot require all who wish to disseminate ideas to present them first to [government] authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be disseminate[d]." *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) (quotation marks and emphasis omitted) (collecting cases); *see also Sanjour*, 56 F.3d at 97 (invalidating employee-speech regulation that vested "broad discretion" in agency to censor speech); *Harman*, 140 F.3d at 120–21 (similar).

Second, Defendants' review standards reach an immense amount of material that the government has no legitimate interest in censoring. The DOD, for example, asserts the authority to censor several categories of unclassified information. Instruction 5230.29, Encl. 3 § 1 (JA103); *see also* Compl. ¶ 39 (JA23–24) ("controlled unclassified information"); JA94 ("export-controlled or other protected information"). The ODNI asserts the categorical authority to censor information that is already in the public domain, even if further disclosure would cause no harm. *See* ODNI Instruction 80.04 § 6(A)(2) (JA135) (stating that former employees must in all circumstances "not use sourcing that comes from known leaks, or unauthorized disclosures of sensitive information"). And all Defendants assert the authority to censor information that former employees learned after they left government, even

if the employees' discussion of that information would neither reveal nor confirm anything they learned while they were government employees.

The government has no legitimate interest in censoring this information, unless its publication would reveal properly classified information that the employee learned in the course of employment. *See, e.g.*, *Marchetti*, 466 F.2d at 1316–17 (noting that "the Government's need for secrecy in this area lends justification" to censorship only of "information obtained during the course of employment"); *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983) (explaining that "[t]he government may not censor [information obtained from public sources]" and "has no legitimate interest in censoring unclassified materials").

Third, Defendants' standards do not limit censorship to information that is properly classified, ignoring Plaintiffs' "strong first amendment interest in ensuring that [the] censorship of [their writings] results from a *proper* classification." *McGehee*, 718 F.2d at 1148. Moreover, the standards permit the government to censor information even when its disclosure would not cause harm—though the government lacks any legitimate interest in censoring this information. *Pentagon Papers*, 403 U.S. at 730 (Stewart, J., concurring) (Even where questions of allegedly urgent national security interests are involved, the government must show that "disclosure . . . will surely result in direct, immediate, and irreparable damage to our Nation or its people."). In addition, Defendants' standards do not limit censorship to

instances in which the government's interest in secrecy outweighs the public's interest in disclosure. But as the Supreme Court has held, restraints on public employee-speech are permissible only where the interests of prospective speakers and their audiences are outweighed by the expression's actual impact on the government's interests. *See NTEU*, 513 U.S. at 468.

Fourth, while the CIA's and Form 4414's censorship standards are limited to classified information, *see* AR 13-10 § 3(f)(2) (JA67); *see also* Compl. ¶ 33 (JA20); *id.* ¶ 33 (JA20), ¶ 39 (JA23–24), ¶ 45 (JA26), ¶ 51 (JA28), they reach a sweeping amount of protected speech by, as summarized above, permitting censorship of information without regard to whether it was obtained by the author in the course of employment, whether disclosure would actually cause harm, whether it is already in the public domain, and whether the public interest in its disclosure outweighs the government's interest in secrecy. Thus, the CIA's standards permit it to censor a former employee's writings about a major news story based on an unauthorized disclosure of classified information, even if the employee had no access to that information while at the CIA and even if she expressly disclaims any such knowledge in her writings. It was presumably pursuant to this authority that the CIA demanded that Mr. Goodman redact publicly available information from his writing about the CIA's drone program even though he left the CIA decades before that program was established, Compl. ¶ 90 (JA39), and demanded that Professor

Immerman redact information that was derived from public sources, that concerned issues that arose after he left government, and that the CIA itself had published previously, *id.* ¶ 75 (JA34–35); *see also id.* ¶ 110 (JA45), ¶ 114 (JA46) (similar for Mr. Fallon).

Fifth, the DOD's censorship criteria are impermissibly vague and subjective—as are the ODNI's, to the extent the ODNI has a censorship standard at all. For example, the DOD asserts the authority to censor not just classified information but also information "requiring protection in the interest of national security or other legitimate governmental interest," Instruction 5230.09 § 1.2(d) (JA90–91), and the ODNI seems to assert the authority to censor information whose disclosure is "unauthorized" or whose disclosure might "adversely affect[]" the ODNI's mission, ODNI Instruction 80.04 § 3 (JA133). These terms are unconstitutionally vague. *See McGehee*, 718 F.2d at 1143; *cf. United States v. U.S. Dist. Court for E.D. Mich., S. Div. (Keith)*, 407 U.S. 297, 320 (1972), (noting the "inherent vagueness of the domestic security concept"); *Pentagon Papers*, 403 U.S. at 719 (Black, J., concurring) (noting that "security" is a "broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment"); *Zweibon v. Mitchell*, 516 F.2d 594, 653 (D.C. Cir. 1975) (similar with respect to "affecting foreign relations"); *Sanjour*, 56 F.3d at 96–97 (similar with respect to "within the mission of the agency").

Finally, Defendants' practice of cross-agency referrals exacerbates the system's constitutional deficiencies, because the agencies refer publications to other agencies without specifying the standards according to which the works will be shared and reviewed. Compl. ¶ 33 (JA20), ¶ 39 (JA23–24), ¶ 45 (JA26), ¶ 51 (JA28); *see also id*. ¶ 63 (JA31), ¶ 74 (JA34), ¶ 87 (JA38), ¶ 108 (JA44) (describing Plaintiffs' experience with cross-agency referrals).

c. The regimes lack reasonable procedural safeguards to mitigate the risk of abuse and chill.

Defendants' regimes lack reasonable procedural safeguards that would mitigate the risk of abuse and chill. As an initial matter, the regimes lack any definite deadlines for decision. In *Marchetti*, this Court held that the prepublication review of a former employee's speech should take place within thirty days. 466 F.2d at 1317. Other circuits have similarly insisted on definite deadlines in employee-speech restrictions. *See, e.g.*, *Harman*, 140 F.3d at 121 (invalidating employee-speech restrictions in part because "[t]hey provide no time limit for review to ensure that commentary is not rendered moot by delay"); *Crue v. Aiken*, 370 F.3d 668, 679 (7th Cir. 2004) (similar with respect to preclearance policy that "does not have a schedule for the review of proposed communications").

Here, however, Defendants' prepublication review regimes do not require that submissions be reviewed within any specific time period at all. They provide at most aspirational (and unenforceable) timeframes within which Defendants will seek to

complete review. *See supra* Statement of the Case. The government argued in the district court that these "benchmarks" satisfy constitutional requirements, Gov't Br. 32–24, ECF No. 30, but aspirational time limits are no substitute for binding ones; that government officials "might" make decisions within reasonable time frames is insufficient. *Chesapeake B & M, Inc. v. Hartford Cty., Md.*, 58 F.3d 1005, 1011 (4th Cir. 1995) (holding that a licensing scheme must "*ensure* a prompt administrative decision" (emphasis added)).

The lack of any firm deadlines in Defendants' regimes has routinely resulted in delays of many months or even years. *See, e.g.*, Compl. ¶ 36 (JA21). Plaintiffs themselves have experienced delays of many months and would have faced further delays had they contested redactions that they believed to be unjustified. *See, e.g.*, *id.* ¶ 75 (JA34–35), ¶ 89 (JA38), ¶ 110 (JA45).

Defendants' prepublication regimes also fail to ensure "expeditious judicial review" of adverse determinations, *FW/PBS v. City of Dallas*, 493 U.S. 215, 227 (1990), or to impose on the government the burden of initiating such review, *Freedman*, 380 U.S. at 59; *see* Compl. ¶ 37 (JA21), ¶ 43 (JA25), ¶ 49 (JA27), ¶ 55 (JA29). Thus, "the [censor's] determination in practice may be final," *Se. Promotions*, 420 U.S. at 561, particularly when the intended speech is time-sensitive. Plaintiffs' experiences are illustrative: All who have submitted pieces for review

have accepted censorship decisions they believe were unjustified to avoid further delays. *See* Compl. ¶ 64 (JA31), ¶ 78 (JA35), ¶ 91 (JA39), ¶ 111 (JA45).

To be sure, this Court has rejected the need for government-initiated judicial review of prepublication review decisions, but it did so based upon the assumption that "in most instances, there ought to be no practical reason for judicial review," given the "limited nature" of the government's power to censor—a power that, on the Court's description in that case, extended only to classified information obtained in the course of employment that was not already in the public domain. *Marchetti*, 466 F.2d at 1317. The regimes at issue here, however, extend much further, and Defendants rely on those regimes to censor much more.[8]

For these reasons, Defendants' prepublication review regimes fail the First Amendment standard of review invoked by the Supreme Court in *Snepp*.

II. Defendants' prepublication review regimes are void for vagueness under the Fifth Amendment.

The vagueness doctrine addresses "two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they

[8] In other contexts involving national security, some courts have endorsed a "reciprocal notice" procedure, in which the would-be speaker bears the burden of notifying the government that she intends to challenge the restraint on her speech, but the government bears the burden of initiating judicial process. *See John Doe, Inc. v. Mukasey*, 549 F.3d 861, 879 (2d Cir. 2009); *see also* 28 C.F.R. § 17.18(i) (2019) (DOJ reciprocal notice procedure for prepublication review).

may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). When First Amendment rights are at stake "rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* Defendants' prepublication review regimes fail to satisfy either.

A. Defendants' prepublication review regimes fail to give former employees fair notice of what they must submit for review.

As explained above, Defendants' submission standards are vague. *See supra* § Part I.C.3.a. They rely on terms such as "relates to," "pertains to," "subjects of significant concern," and "might be based upon," which are ambiguous terms of degree. *See Gentile*, 501 U.S. at 1048–49; *see also In re Murphy-Brown, LLC*, 907 F.3d 788, 800 (4th Cir. 2018) (finding a gag order using language such as "the general nature of" and "elaboration" was unconstitutionally vague because it forced individuals to "guess at its contours"). The standards force former employees to guess at whether they must submit their speech for review, unsurprisingly causing many to over-submit in an abundance of caution. Compl. ¶ 66 (JA32), ¶ 80 (JA36). Defendants' submission standards thus fail to give former employees fair notice of what they must submit for review.

The district court dismissed Plaintiffs' vagueness claim for several reasons, but none has merit. First, the district court construed Plaintiffs' claim to concern the "breadth [of Defendants' regimes] rather than any difficulties Plaintiffs have in understanding what they require." JA197. Here, however, Defendants' regimes are overbroad *and* vague. They use terms that sweep far too broadly as well as terms of indefinite reach.

Second, the district court also found it relevant that Plaintiffs may obtain "prospective guidance from an agency." JA198. In the case the court relied on, however, the D.C. Circuit rejected the plaintiffs' claim that an agency rule was vague because the agency had articulated the goals the rule was meant to serve, specified the factors that would inform the rule's application, and included a description of how each factor would be interpreted and applied. *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 736–37 (D.C. Cir. 2016) The availability of prospective guidance was relevant only because it would address any "potential lingering" doubt about the rule's application. *Id.* at 738. Here, however, Defendants' submission and review standards are fundamentally vague, and the availability of prospective guidance cannot cure that deficiency. While former employees can ask agency reviewers whether or not they must submit a particular manuscript for review, it is entirely up to those reviewers—subject to vague standards—to decide. Unlike in *U.S. Telecom*, these decisions are not "publicly available," 825 F.3d at 738,

and so the system is never clarified, but instead applied arbitrarily time and time again. *Cf. Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) ("the more important aspect of vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern [government actors]" (internal marks and citation omitted)).

Third, the district court misapplied *United States v. Morison*, 844 F.2d 1057, 1071–73 (4th Cir. 1988), in concluding that Defendants' regimes "present[] a lessened vagueness concern" because those subject to the regimes "are intelligence United States v. Morison, 844 F.2d 1057, 1071–73 (4th Cir. 1988) professionals." JA198. In *Morison*, the Fourth Circuit considered a vagueness challenge to the Espionage Act brought by an intelligence employee who stole photographs from his workplace that were prominently stamped "Secret" and mailed them to a reporter. *Id.* at 1061, 1073–74. Morison argued that the provisions of the Espionage Act under which he was convicted were unconstitutionally vague, but this Court rejected that claim in a lengthy analysis focused on the Act's scienter requirement and the jury instructions given in the case. *Id.* at 1073. Only then did the Court go on to observe that, in Morison's case in particular, there was no cause for concern about vagueness, because Morison in fact knew that his conduct violated the Espionage Act. *Id.* at 1073–74. *Morison* is inapposite here, however, because the point of Plaintiffs'

challenge is that the terms of Defendants' regimes are vague and Plaintiffs do not know their meaning.

B. Defendants' prepublication review regimes fail to provide explicit standards for reviewers, thus inviting arbitrary and discriminatory enforcement.

As explained above, Defendants' censorship standards also fail to provide "explicit standards for those who apply them," inviting "arbitrary and discriminatory enforcement," *Grayned*, 408 U.S. at 108. *See supra* § Part I.C.3.b. For example, under the DOD's policy, reviewers may censor not just classified information but also information "requiring protection in the interest of national security or other legitimate governmental interest." Instruction 5230.09 § 1.2(d) (JA90–91). Likewise, ODNI asserts the authority to "safeguard sensitive intelligence information," ODNI Instruction 80.04 § 6 (JA134), and to censor information whose disclosure is "unauthorized" or whose disclosure might "adversely affect[]" the ODNI's mission, ODNI Instruction 80.04 § 3 (JA133). In evaluating other regulatory standards, courts have found similar language unconstitutionally vague. *See, e.g.*, *Zweibon*, 516 F.2d at 653; *Sanjour*, 56 F.3d at 96–97. The district court addressed the agencies' review standards one-by-one, but it erred in its consideration of each.

With respect to the DOD, the court held that the multiplicity of the agency's censorship standards "reduced" their vagueness. JA199. In other words, the court appeared to view the DOD's many standards as somehow constraining the agency's

discretion to censor, when in fact they increase it. *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 601–02 (1967) (noting that a complex system of rules for public employees to parse is "a highly efficient in terrorem mechanism" and suggesting it presents a vagueness problem). With respect to the NSA, which has not set out any censorship standards, Compl. ¶ 45 (JA26), the court mistakenly looked to the first paragraph of NSA/CSS Policy 1-30 to suggest that the NSA policy provides clear guidance on former employee submissions. JA200. But the language the court quoted is located within a section of the policy entitled "Public release in an official capacity," making it inapplicable to Mr. Edgar and other former employees who are not publishing in an official capacity. And with respect to the ODNI, the district court attempted to cobble together multiple disparate pieces of the agency's regime into a coherent censorship standard, JA199–200, but the fact remains that the piecemeal censorship standard nevertheless permits ODNI to censor material pursuant to the vague criteria quoted above.

While the district court concluded that Defendants' policies "cannot plausibly be read as so vague that they impermissibly facilitate arbitrary and discriminatory enforcement," JA200, experience demonstrates otherwise. For example, former intelligence-agency employees who wrote books criticizing the CIA's torture of prisoners detained in the "war on terror" have had their books heavily redacted while former CIA officials' supportive accounts of the same policies were published

without significant excisions of similar information. Compl. ¶ 34 (JA20–21). And in the ODNI's and CIA's review of Professor Immerman's manuscript, all of the mandated redactions related to information that came from public sources or that had been published previously by the government itself. *Id.* ¶ 75 (JA34–35).

III. The district court correctly concluded that Plaintiffs have standing to challenge Defendants' prepublication review regimes.

As the district court correctly concluded, Plaintiffs have standing because "features of [Defendants' prepublication review] regimes result in a chilling effect on the exercise of First Amendment rights." JA176. The Fourth Circuit has recognized that plaintiffs satisfy the injury-in-fact requirement if they make a "sufficient showing of 'self-censorship, which occurs when . . . claimant[s are] chilled from exercising [their] right to free expression.'" *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (quoting *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011)); *see also Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018). As the district court properly concluded, Plaintiffs have plausibly alleged that key features of Defendants' prepublication review regimes have chilled their speech. JA173–74.

Contrary to the district court's ruling, however, Plaintiffs also have standing because they are subject to Defendants' regimes, which, as explained above, are licensing schemes. *See supra* Part I.B. In "the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or

not [the speaker's] conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Freedman*, 380 U.S. at 56; *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988). The Supreme Court has affirmed this rule repeatedly, *see, e.g.*, *Forsyth Cty.*, 505 U.S. at 129; *Shuttlesworth*, 394 U.S. at 150–51; *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940), and this Court has made clear that those who are subject to such schemes may "bring an immediate facial challenge," *11126 Balt. Boulevard, Inc. v. Prince George's Cty.*, 58 F.3d 988, 994 (4th Cir. 1995); *see also City of Lakewood*, 486 U.S. at 758. Plaintiffs' central allegation here is that Defendants' "exercise of [censorship] authority" is "not bounded by precise and clear standards." *Se. Promotions*, 420 U.S. at 553; *accord* Compl. ¶ 4 (JA10–11), ¶ 120 (JA47). This is sufficient to establish their standing.

In rejecting this argument, the district court purported to distinguish Defendants' regimes from "typical" licensing schemes that "require [individuals] to obtain licenses to engage in any expressive conduct at all." JA171. But that supposed distinction is not real: Licensing schemes governing parade permits or the showing of obscene films do not prohibit *all* expressive activity—indeed, they almost always target specific types of expression. *See Billups v. City of Charleston, S.C.*, 961 F.3d 673, 677 (4th Cir. 2020) (licensing for tours in Charleston's historic districts); *Chesapeake B & M, Inc.*, 58 F.3d at 1007 (licensing for adult bookstores). And

whether or not it is formally called a "license," the clearance former employees must seek under Defendants' regimes is the functional equivalent of a license to engage in speech.

The district court also viewed Defendants' regimes as distinct from licensing schemes because Plaintiffs "must submit [materials] for review . . . pursuant to agreements they have signed" voluntarily. JA172. But *how* a prior restraint is imposed—by statute, court order, executive decree, or contract—has never been understood to alter a plaintiff's ability to challenge it. *See supra* Part I.B. Indeed, courts (including this one) have repeatedly recognized prior restraints in the employee-speech context even where those restraints were imposed in "voluntary" agreements. *See, e.g.*, *Marchetti*, 466 F.2d at 1317 ("Marchetti by accepting employment with the CIA and by signing a secrecy agreement did not surrender his First Amendment right of free speech."); *Mansoor v. Trank*, 319 F.3d 133, 139 n.4 (4th Cir. 2003) (holding that a written plan created by county officials operated as a prior restraint on a police officer's speech even though the officer had agreed to the plan); *see also Connick v. Myers*, 461 U.S. 138, 142 (1983) ("[I]t has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." (collecting

cases)). In any event, Defendants' prepublication review regimes are not creatures only of contract, but of formal government policies and regulations, too.[9]

Conclusion

Respectfully, this Court should reverse the district court's grant of the government's motion to dismiss and remand for further proceedings.

August 14, 2020

Respectfully submitted,

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[9] Though the district court did not address it, Plaintiffs also have standing because they face a credible threat of sanctions for non-compliance. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014).

Certificate of Compliance

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g) because it contains 12,904 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Microsoft Word in Times New Roman 14-point font, a proportionally spaced typeface.

Dated: August 14, 2020

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Certificate of Service

I, Jameel Jaffer, certify that on August 14, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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