No. 20-1568

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,

Appeal from the United States District Court for the District of Maryland
(Case No. 8:19-cv-00985-GJH, Hon. George J. Hazel)

BRIEF OF PROFESSORS JACK GOLDSMITH AND OONA HATHAWAY AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1568 Caption: Timothy Edgar et al. v. John Ratcliffe et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Jack Goldsmith and Oona Hathaway
(name of party/amicus)

who is amici, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Brian M. Willen Date: 08/21/2020

Counsel for: Jack Goldsmith and Oona Hathaway

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STATEMENT OF IDENTIFICATION

Amici curiae are law professors specializing in national security who have served in government positions that required them to agree to lifetime prepublication review. Jack Goldsmith is the Learned Hand Professor at Harvard Law School, having previously served as Assistant Attorney General in the Office of Legal Counsel in the Department of Justice and Special Counsel to the General Counsel of the Department of Defense. Oona A. Hathaway is the Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School, having previously served as Special Counsel to the General Counsel in the Department of Defense.

Amici have experienced firsthand the delay, arbitrariness, and chilling effect of the prepublication review process. They have also studied and written on the history of prepublication review, the First Amendment harms inflicted by the broken process, and how prepublication review should be fixed. *See, e.g.*, Jack Goldsmith & Oona Hathaway, *The Government's Prepublication Review Process Is Broken*, Wash. Post, Dec. 25, 2015, http://wapo.st/1YTgg1j; Jack Goldsmith & Oona Hathaway, *More Problems with Prepublication Review*, Lawfare, Dec. 28, 2015, https://www.lawfareblog.com/more-problems-prepublication-review; Jack Goldsmith & Oona Hathaway, *The Scope of the Prepublication Review Problem, And What To Do About It*, Lawfare, Dec. 30, 2015, https://www.lawfareblog.com/scope-prepublication-review-problem-and-what-do-

about-it. *Amici* submit this brief to provide the Court with their unique perspective on these important issues and to urge this Court to allow this challenge to the current system of prepublication review to proceed.

All parties have consented to the filing of this brief.[1]

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparation or submission of this brief. No person other than *Amici* or their counsel contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The prepublication review regimes challenged in this case are broken and unconstitutional. As first conceived 70 years ago, at the dawn of the Cold War, prepublication review had only a limited impact on the speech of a small number of former government employees. But what began as a program at the Central Intelligence Agency reviewing a few dozen publications annually has metastasized across executive branch agencies and now requires millions of former government employees to preclear their speech for the rest of their lives. Today's prepublication review system operates on a scale and with an impact on protected speech that dwarfs the system considered by the Supreme Court's 40-year old *per curiam* decision in *Snepp v. United States*, 444 U.S. 507 (1980). The current system differs so materially that *Snepp*'s conclusory footnote rejecting a First Amendment challenge should not control this case.

As now enforced, the duty to submit works for prepublication review is overbroad and vague, requiring former officials to submit for review writings even on matters having nothing to do with any classified work they did in government. The process lacks binding deadlines and is plagued by delays, effectively depriving speakers of the ability to speak about current affairs. And the system's myriad flaws create perverse incentives that both chill protected speech and compromise the government's own interest: rather than confront this byzantine labyrinth, some

former government employees simply remain silent, even if what they had to say would not disclose any classified material, while others plunge ahead and publish without review, risking the inadvertent release of classified information.

There is no question that the government has a legitimate interest in protecting the secrecy of information essential to our national security, but no matter how strong that interest, prepublication review must comply with the First Amendment. The First Amendment requires prior restraints to have clear and uniform standards for review and adequate procedural safeguards so that speakers are not illegitimately censored. The regimes challenged in this case fail palpably on that score. Prepublication review today is unconstitutional, and the district court erred by dismissing Plaintiffs' complaint. This Court should reverse that decision and allow Plaintiffs' lawsuit to proceed.

ARGUMENT

I. SINCE *SNEPP*, PREPUBLICATION REVIEW HAS MORPHED INTO A BROKEN, BYZANTINE PROCESS THAT CENSORS SPEECH ON MATTERS OF PARAMOUNT PUBLIC IMPORTANCE

A. Prepublication Review At The Time of *Snepp* Was Limited

Prepublication review began in the 1950s as a small and largely informal process at the CIA. In the beginning, "few employees, current or former, were engaged in writing or speaking publicly on intelligence," and review could be handled by existing agency components. Charles A. Briggs, Inspector General of the

Central Intelligence Agency, *Inspection Report of the Office of Public Affairs* 1 (1981) https://www.justsecurity.org/wp-content/uploads/2015/12/prb1981.pdf [1981 CIA IG Report]. But in the 1970s, prompted by the Vietnam War, Watergate, and the Church and Pike Committee investigations into intelligence community, active and former CIA officers began speaking and writing publicly much more frequently. *Id.* at 1.

In response to the increased volume of public writings in need of review, the CIA in 1976 created a Publications Review Board ("PRB"), the membership and procedures of which were formalized in 1979. *Id.* at 2. But even as the CIA was beginning to develop a formalized process, the number of affected authors and works was still tiny. In 1977, the first full year of the PRB's existence, current and former CIA employees submitted only 42 publications. *Id.* at 5. In 1978, the number of submitted publications was 62. *Id.* It was in this context that the Supreme Court considered and approved prepublication review in *Snepp*.

Snepp was a former CIA officer 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. After leaving the CIA, he published a "book about CIA activities on the basis of this background and exposure" and "deliberately and surreptitiously violated his

obligation to submit all material for prepublication review." *Id.* at 507. The government sued to enforce its agreement, and the district court enjoined Snepp from violating his agreement and imposed a constructive trust on the book's proceeds. *United States v. Snepp*, 456 F. Supp. 176, 179–80 (E.D. Va. 1978). 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).

Snepp petitioned for certiorari, arguing that his agreement with the CIA was an unenforceable prior restraint. 444 U.S. at 509 n.3. The Supreme Court granted Snepp's petition and the government's conditional cross-petition concerning the constructive trust. Unusually, however, the Court ruled on the petitions summarily, without merits briefing or oral argument. *Id.* at 526 n.17 (Stevens, J., dissenting). The Court's *per curiam* opinion focused almost exclusively on the constructive trust (*see id.* at 507–16), disposing of Snepp's First Amendment argument in a cursory footnote (*id.* at 509 n.3). That footnote concluded that the CIA had "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 [wa]s a reasonable means for protecting this vital interest." *Id.*

The Supreme Court noted that Snepp had access to some of the government's most closely held secrets. 444 U.S. at 511. The Court emphasized that "[f]ew types of governmental employment involve a higher degree of trust than that reposed in a

CIA employee with Snepp's duties" and that "the appearance of confidentiality" protected by prepublication review was "essential to the effective operation of our foreign intelligence service." *Id.* at 511 n.6. The Court's limited First Amendment conclusion thus appears to have rested on Snepp's distinctive and unusual role within the CIA—a role few others in government serve. *Id.* at 509 n.3; *see also id.* at 512 n.7, 513 n.8.

B. In The Aftermath Of *Snepp*, Prepublication Review Began To Expand Even As Congress Resisted The Change

While *Snepp* was a limited ruling, in its wake came a massive expansion of prepublication review across the federal government. The Reagan Administration seized on *Snepp*'s reasoning to expand the scope of prepublication review far beyond its original narrow scope. President Reagan issued Executive Order 12,356 ("EO 12,356"), which ended automatic declassification of government records and lowered the standard that information must meet before being classified. He also issued National Security Decision Directive 84 ("NSDD-84"), which expanded the requirement to sign a nondisclosure agreement to *all* executive branch employees with access to classified information. *See* NSDD-84, Safeguarding National Security Information 1 (Mar. 11, 1983). Any employee could voluntarily submit works for prepublication review to ensure that they complied with their nondisclosure obligations. *Id.* But a subset of executive branch employees—those with access to Sensitive Compartmented Information—would be forced to agree to ***mandatory***

lifetime prepublication review. *Id.*[2] And the requirements of NSDD-84 were ***minimum*** requirements; agencies could (and soon would) impose mandatory lifetime prepublication review on broader categories of employees.

Under EO 12,356 and NSDD-84, the number of current and former employees subject to prepublication review increased exponentially. By the end of 1983, prepublication review procedures covered at least "3,423,481 agency employees," not including employees of the NSA or CIA. U.S. Gov't Accountability Office, No. GAO/NSIAD-84-134, *Polygraph and Prepublication Review Policies of Federal Agencies*, Enclosure I at 4 (1984), https://www.gao.gov/assets/210/207296.pdf. At many agencies, employees were subjected to prepublication review "regardless of whether they ha[d] access to classified information." Michael L. Charlson, *The Constitutionality of Expanding Prepublication Review of Government Employees' Speech*, 72 Calif. L. Rev. 962, 962 n.2 (1984). Prepublication reviewers were reviewing tens of thousands of publications. GAO, *Polygraph and Prepublication Review Policies of Federal Agencies*, Enclosure I at 5.

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[2] Sensitive Compartmented Information is "[c]lassified information concerning or derived from intelligence sources, methods, or analytical processes, which is required to be handled within formal access control systems established by the Director of National Intelligence." Nat'l Institute of Standards & Tech., *Security and Privacy Controls for Federal Information Systems and Organizations*, NIST SP 800-53 Rev. 4 at B-23 (2013), https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-53r4.pdf.

Congress, alarmed by the expansion of prepublication review, pushed back. At a hearing on NSDD-84, one senator declared that prepublication review was "that very prior restraint to which the framers of the Constitution were so hostile" and that it consigned public servants "to a virtual vow of silence on some of the crucial issues facing our Nation." *National Security Decision Directive 84: Hearing before the Sen. Comm. on Governmental Affairs*, 98th Cong. 2 (Sept. 13, 1983) (statement of Sen. Charles Mathias). Congressman Don Edwards, in introducing a subcommittee hearing in the House, stated that, "The President's directive appears to be yet another administration step toward curtailing the free flow of information in this country." *Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearing before the House Subcomm. on Civil and Constitutional Rights*, 98th Cong. 1 (Apr. 21, 1983) (statement of Rep. Don Edwards). Drawing on a Government Accountability Office study, the House Report explained that, "the prepublication review provision of [NSDD-84] is a massive policy response to what has been, in the recent past, a very limited disclosure problem. The extent of this policy imbalance is further realized when one considers the qualitative effects the prepublication review requirements will have on free speech in our nation." H.R. Rep. No. 98-578, at 15 (1983).

Members of Congress also attached amendments to various annual agency authorization bills in an attempt to delay implementation of the new prepublication

review rules. And in January 1984, members of Congress introduced the H.R. 4681, the Federal Polygraph Limitation and Anti-Censorship Act, to prohibit prepublication review of the sort included in NSDD-84.

Hammered by widespread criticism from both sides of the aisle and facing legislation that would end its draconian prepublication review requirements, the Reagan Administration suspended NSDD-84 in early 1984. Leslie M. Werner, *Aide Says Reagan Shifts on Secrecy*, N.Y. Times, Feb. 15, 1984, https://www.nytimes.com/1984/02/15/us/aide-says-reagan-shifts-on-secrecy.html. After the Administration relented, congressional efforts to ban the overuse of prepublication review stopped because, as one congressman noted, "[i]t appeared as if there would be no need for legislation prohibiting prepublication review contracts because the Administration had decided not to implement that policy." H.R. Rep. 100-911 at 5 (1988).

But even as the old policy was abandoned, a new and very different one began to quietly take shape. The suspension of NSDD-84's lifetime prepublication requirement did not revoke the prepublication review provisions in the nondisclosure agreements that hundreds of thousands of federal employees had already signed. U.S. Gov't Accountability Office, No. GAO/T-NSIAD-88-44, *Classified Information Nondisclosure Agreements* at 3 (1988), https://www.gao.gov/assets/110/102256.pdf. The end of NSDD-84's mandate may

have cut off the head of the prepublication hydra, but far from ending the prepublication review system, it caused the hydra to expand and multiply, becoming far more expansive, complex, and draconian than the proposed program Congress had succeeded in defeating.

C. In The Past Three Decades, Prepublication Review Has Grown Into A Many-Headed Hydra That Bears Little Resemblance To The System Reviewed In *Snepp*

The sprawling and cumbersome prepublication review regimes that now exist across the federal government bear little resemblance to the narrow and limited regime considered in *Snepp*. What started as modest process affecting only a handful of government employees has evolved into a many-headed hydra that restricts and chills free speech of millions—a system that would have been virtually "unimaginable" at the time of *Snepp*. *Myths and Realities: CIA Prepublication Review in the Information Age*, 55 Studies in Intelligence 9, 21 (2011), available at https://nsarchive2.gwu.edu/NSAEBB/NSAEBB431/docs/intell_ebb_018.PDF.

To begin, today's prepublication review is no longer limited to a "[f]ew types of government employment." *Snepp*, 444 U.S. at 511 n.6. Instead, every U.S. intelligence agency and many other federal agencies now impose a lifetime prepublication review requirement on at least some subset of former employees.[3]

[3] *See, e.g.*, Central Intelligence Agency, Agency Prepublication Review of Certain Material Prepared for Public Dissemination (May 30, 2007), available at https://www.fas.org/irp/cia/prb2007.pdf; Nat'l Security Admin., *Review of NSA/CSS*

JA-15, Compl. ¶ 24. In 1979, roughly 250,000 government personnel had access to classified information and could apply derivative classification markings.[4] In 2014, *5,100,000* people held security clearances—or 1.5 percent of the entire U.S. population,[5] and more than the entire population of Norway.[6] Still, this far understates the reach of the modern prepublication review process, because *all* former government employees who have held classified access but who are no longer employed by the federal government (including *Amici*) are bound to comply with prepublication review for life. Hence today a significant portion of the U.S. population—certainly much more than 1.5%—are formally bound to submit their writings to the federal government for prior review.

Information Intended for Public Release (Oct. 2014), available at https://www.nsa.gov/Portals/70/documents/news-features/declassified-documents/nsa-css-policies/Policy_1-30.pdf; Def. Intelligence Agency, DIA Form No. 271, Conditions of Employment 5 (Nov. 20, 2008), available at https://www.dia.mil/Portals/27/Documents/Careers/Pre-employment%20Forms/ConditionsofEmploymentFillable.pdf.

[4] Information Security Oversight Office, *1979-1980 Annual Report to the President* 31 (1980), https://www.archives.gov/files/isoo/reports/1979-annual-report.pdf.

[5] Office of Management and Budget, *Suitability and Security Process Review: Report to the President* (Feb. 2014), available at https://fas.org/sgp/othergov/omb/suitsec-2014.pdf.

[6] Brian Fung, *5.1 Million Americans Have Security Clearances. That's More than the Entire Population of Norway*, Wash. Post (Mar. 24, 2014).

Every agency, moreover, has its *own* prepublication office and its *own* prepublication submission rules. When the uniform system proposed in the NSDD-84 was abandoned, at least *seventeen* separate systems sprung up in its place. *See* Knight First Amendment Institute at Columbia University, *Interactive Chart: Prepublication Review by Agency and Secrecy Agreement* (Aug. 27, 2019), available at https://knightcolumbia.org/content/prepublication-review-by-agency-and-agreement. The Department of Defense, for example, requires that, "former DoD employees … use the DoD prepublication review process to ensure that information they intend to release to the public does not compromise national security as required by their nondisclosure agreements." JA-91. When *Amici* asked what, if anything, this excludes, the prepublication review office declined to exclude any information from review. The State Department, meanwhile, requires prepublication review of "writings on foreign relations topics by former Department personnel [with security clearances], including contractors and detailees." 22 C.F.R. § 9.14. Unlike the Department of Defense, the State Department provides expected (albeit nonbinding) timelines for review.

On top of that, prepublication review obligations also are no longer limited to "voluntar[y]" nondisclosure "agreements" or fiduciary relationships with a specific agency. *Snepp*, 444 U.S. at 511 n.3. Agencies impose prepublication review

obligations through regulations, policies, and guidance documents that extend beyond the "express[]" terms of any "agreement [the former employee] signed." *Id.*

Amici's own experiences bear that out. When Professor Goldsmith submitted the manuscript for his 2007 book *The Terror Presidency* to the National Security Division of the Department of Justice for preclearance review in accord with his contractual and regulatory obligations, the Office of Legal Counsel, where Goldsmith once worked, asserted a separate authority as a matter of practice to review the manuscript for privileged information, even though the prepublication review process does not formally include review for privilege. The National Security Division determined that the manuscript contained no classified information and cleared it for publication. Nonetheless, the Office of Legal Counsel asked Goldsmith to change or remove many *non-classified* passages in the manuscript based on its view of the factual accuracy and privileged status of those passage. Goldsmith challenged the legal authority for the Office of Legal Counsel's review, as well as the substance of its criticisms, but he ultimately modified and deleted some passages.

Another way in which practice at the time of *Snepp* has dramatically changed is that it is now "standard procedure" that "each agency's reviewers forward manuscripts to sister agencies when it is determined that community equities are in play"—a chain of review that subjects former employees to a byzantine process of conflicting rules imposed by agencies for which they never worked. *See Myths and*

Realities, *supra*, at 21. Goldsmith's manuscript, for example, was reviewed by the Department of Justice, the Federal Bureau of Investigation, the Department of Defense, the Central Intelligence Agency, the National Security Agency, and the National Security Council.

Simply put, the system the Court approved in *Snepp* no longer exists. It has been replaced by a web-like system far more expansive in its demands and more restrictive of speech, which ensnares millions of people across tens of agencies. As further discussed below, *Snepp*'s holding should not govern the constitutionality of these incomparable regimes of prior restraints.

II. PREPUBLICATION REVIEW TODAY CHILLS FREE SPEECH

Even though the district court (incorrectly) felt bound by *Snepp* to reject Plaintiffs' claims, it acknowledged that Plaintiffs have "plausibly alleged that features of the PPR regimes result in a chilling effect on the exercise of First Amendment rights." JA-176. That is an understatement. Several features of today's prepublication review system work to deny free speech to millions of Americans.

The duty to submit manuscripts for prepublication review is broad and vague. Here again, *Amici*'s own experiences illustrate the problem. Several years ago, out of an abundance of caution, *Amici* submitted for prepublication review a draft Washington Post op-ed, entitled *The government's prepublication review process is broken*, that included no classified information. *See* Jack Goldsmith & Oona

Hathaway, *The Government's System of Prepublication Review Is Broken*, Wash. Post (Dec. 25, 2015). The prepublication reviewers at the Department of Defense cleared it, but only conditionally. The Department's letter stated, "The paper is cleared as amended for public release, subject to the inclusion of the following disclaimer statement: 'The views expressed in this article are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government.'" Jack Goldsmith & Oona Hathaway, *More Problems with Prepublication Review*, Lawfare, Dec. 28, 2015, https://www.lawfareblog.com/more-problems-prepublication-review. By clearing the piece with a condition that had nothing to do with classified information, the reviewers leveraged the threat of criminal penalties to impact the message of the op-ed and asserted jurisdiction over a manuscript with no classified information in a way that discourages future writings that also contain no classified information. Others have had similar experiences. *E.g.*, Mark Fallon, *The Government Had to Approve This Op-Ed*, N.Y. Times (April 2, 2019).

The broader and vaguer the duty, the colder the chill. The Department of Defense asserts that there is a duty to submit "any work that relates to military matters, national security issues, or subjects of significant concern to the Department of Defense in general." JA-109. These are sweeping categories. And it is anyone's guess what subjects are "of significant concern to the Department of Defense in

general." *Id.* Apparently, in light of *Amici*'s experience with their op-ed, criticism of prepublication review is itself subject to prepublication review.

Adding to the chilling effect, the government uses prepublication review for purposes having nothing to do with protecting "the secrecy of information important to our national security" (*Snepp*, 444 U.S. at 509 n.3)—like attempting to suppress criticism. *Amicus* Goldsmith's book manuscript, as noted above, was reviewed not just for classified information, but also for "accuracy" and for supposedly non-classified privileged information. Most of the passages flagged by reviewers related to Goldsmith's criticisms of the government.

Similarly, *Amici* have submitted for prepublication review works containing criticism of the government—only to be contacted about the criticism by government employees outside the prepublication review process. Goldsmith's book manuscript *The Terror Presidency* was circulated to a prosecutor conducting an unrelated leak investigation. When Goldsmith appeared before the grand jury pursuant to a subpoena, he was surprised to find the prosecutor holding a copy of his manuscript and asking him about its contents, long before the book was published. In 2015, *amicus* Hathaway submitted a 10-page paper describing and criticizing the national security lawyering process, which she intended to share with an academic workshop. Despite assurances by the prepublication review office that the paper would be cleared in time, reviewers failed to clear the paper before the workshop

and Hathaway was unable to present the paper. Nevertheless, the paper was so widely shared inside government that she was approached at an academic conference by State Department employees about her "article"—which she had at that point shared with no one but the Defense Department's prepublication review office.

In addition, prepublication review often subjects speakers to interminable delays. The agencies each have guidelines about how long review of different kinds of manuscripts will take, but they are not binding—and they frequently are not followed. This introduces extreme uncertainty into the review process. Speech delayed may be speech denied of its impact, especially speech on current affairs.

Where speakers have deadlines in their publishing contracts, delays can prevent the publication or impose significant costs on the speaker and publisher. For example, Nada Bakos, a former CIA analyst, submitted a book manuscript for review in October 2015 and did not receive a response until August 2017, nearly two years later. *Bakos v. Cent. Intelligence Agency*, 2019 WL 3752883, at *1 (D.D.C. Aug. 8, 2019). Multiple intelligence agencies sought to require redactions of Bakos's manuscript and all but one of the agencies refused to meet with Bakos to discuss the redactions. *Id.* These agencies agreed to meet only after Bakos sued, and after she incurred thousands of dollars in attorneys' fees. *Id*. Brad Moss, a lawyer who has represented officials going through the process, explained that he has tried to battle the problem in the past by bringing an "Undue Delay Claim" as a "mechanism to get

them to finish the review," explaining that he's "had it take years in the past."[7] Faced with "long delays," some authors may decide "to ditch their projects altogether." Rebecca H., *The "Right to Write" in the Information Age: A Look at Prepublication Review Boards*, 60(4) Studies in Intelligence 15, 21 (2016), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol-60-no-4/pdfs/right-to-write.pdf.

The chilling effect of prepublication review is not accidental. Agencies often do not want former employees to speak about issues relating to their service and are often willing to "foster[] a climate which would discourage former employees from writing" at all. 1981 CIA IG Report at 18. That in turn works to deter speech from the very people "most likely to have informed and definite opinions" to contribute to public discussion on matters of public concern. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 572 (1968). In a system where every former government employee with access to classified information must obtain government approval to speak about "military matters" or "national security issues," public discourse on these matters is bound to be poorer. That leads to impoverished public discourse on these matters, making it more difficult for the American public to

[7] Natasha Bertrand, *'I've Had It Take Years': Bolton's Book Could Be Tied Up Past November*, Politico (Jan. 29, 2020), https://www.politico.com/news/2020/01/29/john-bolton-book-classified-information-109164.

understand the decisions the government is making on its behalf and thus to exercise effective democratic oversight over those decisions.

The current cumbersome, time-consuming, and seemingly arbitrary prepublication review process, by chilling free speech, drives talent away from government service because that talent has "declined to accept a security clearance and the employment possibilities it provided precisely because it entailed what they considered an intolerable limitation of their personal freedom to speak, write, and publish." Steven Aftergood, *Fixing Pre-Publication Review: What Should Be Done?* Just Security (Jan. 15, 2016), https://www.justsecurity.org/28827/fixing-pre-publication-review-done/. Any American might be wary of surrendering his or her free speech rights for life, but this is especially true for subject-matter experts like *Amici*, whose profession revolves around writing, teaching, and speaking about national security.

Moreover, the current prepublication process places former employees in the untenable position of deciding whether to abide by unreasonable prior restraints or replace the government's submission standard with a more reasonable one of their own making. To cite one high-profile example, former CIA director Leon Panetta grew so frustrated with the agency's prepublication review of his memoir that he "allowed his publisher to begin editing and making copies of the book before he had received final approval from the CIA." Greg Miller, *Panetta Clashed with CIA over*

Memoir, Tested Agency Review Process, Wash. Post (Oct. 21, 2014), https://www.washingtonpost.com/world/national-security/panetta-clashed-with-cia-over-memoir-tested-agency-review-process/2014/10/21/6e6a733a-5926-11e4-b812-38518ae74c67_story.html. As the frequency of "long delays" increases, so too does "the likelihood authors will attempt to buck the system, publishing without review." Rebecca H., *The "Right to Write," supra*, at 21.

III. FOR PREPUBLICATION REVIEW, THE FIRST AMENDMENT REQUIRES CLEAR, UNIFORM, AND NARROWLY TAILORED SUBMISSION AND CENSORSHIP STANDARDS, ALONG WITH ADEQUATE PROCEDURAL SAFEGUARDS

Despite all of this, the District Court effectively read *Snepp* to foreclose any First Amendment challenge to the present-day system of prepublication review. That was a mistake. Given the significant differences between the limited system addressed in *Snepp* and the sprawling, burdensome, and speech-chilling prepublication review system that exists today, a footnote in that 40-year old *per curiam* opinion should not prevent this Court from rendering a decision that addresses the important and novel First Amendment issues presented by this case's challenge to the modern prepublication review system. Neither *stare decisis* nor common sense requires reading *Snepp* to preclude those caught in the tangle of

today's prepublication review system from challenging the onerous prior restraints that they face.[8]

Once it is clear that *Snepp* does not control, prepublication review must be judged against the large body of caselaw holding that prior restraints are constitutional anathema. Prepublication review is a classic "prior restraint." *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972). It is undisputed (and beyond dispute) that prior restraints "bear[] a heavy presumption against [their] constitutional validity." *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). "A long line of cases … 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).

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[8] That is especially true because, as discussed above (*see supra* 6) *Snepp* was decided "summarily," without merits briefing or oral argument, in a *per curium* opinion, which addressed the First Amendment issue only in a short footnote. 444 U.S. at 511 n.3; *accord id*. at 524 (Stevens, J., dissenting). It may be true that the Supreme Court's cursory language "speaks broadly," but if anything, that broad language cuts against a "literal reading" of the footnote. *United States v. Wurie*, 728 F.3d 1, 7 (1st Cir. 2013) (rejecting a "literal reading" of search-incident-to-arrest exception of *United States v. Robinson*, 414 U.S. 218 (1973) that would have applied the exception to the warrantless search of an arrestee's cell phone), *aff'd sub nom. Riley v. California*, 573 U.S. 373 (2014). Like Congress, the Supreme Court "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

The government contends that these regimes are not prior restraints because government employees agree to a lifetime of prepublication review. But it has long "been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983). And so, as a prior restraint, prepublication review must be limited to "narrow, objective, and definite standards," *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969), and have "adequate procedural safeguards to ensure against unlimited suppression of constitutionally protected speech," *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226–27 (1990). The current regimes of prepublication review do not comply with these standards.

The following precepts are necessary to bring the system into line with the First Amendment. ***First***, the criteria for prepublication review must be clear and uniform. Any prior restraint must have "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth*, 394 U.S. at 150–51. The prepublication review regimes challenged in this case are constitutionally deficient because they fail to provide narrow, objective, and definite standards with respect to what materials former employees must submit for review and what content agency officials may censor.

Second, only writings that might reasonably contain or be derived from classified information should be subject to review. The government has no

compelling interest in reviewing unclassified or publicly available information. *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"). For this reason, inspection for classified information should be the only basis for review. When reviewers scrutinize submissions for other reasons (like criticism of government policy, accuracy, or privilege), or when those reviewers circulate submissions so that third-parties in the government may use them for unrelated purposes, the government restricts speech in ways unrelated to protecting national security and thus not justified by its legitimate interests.

Third, prepublication review must have binding deadlines for completion—ideally no longer than 30 days. Prior restraints must yield a determination "within a specified brief period." *Freedman v. Maryland*, 380 U.S. 51, 59 (1965). Time limits are an "essential procedural safeguard," *Chesapeake B&M, Inc. v. Harford County.*, 58 F.3d 1005, 1011 (4th Cir. 1995), as delays in decision making "create[] the possibility that constitutionally protected speech will be suppressed … indefinitely," *FW/PBS*, 493 U.S. at 226–27. In *Marchetti*, for example, the Fourth Circuit concluded that prepublication review occur within 30 days. 466 F.2d at 1317. But

the challenged prepublication review regimes do not have any binding deadlines for review. *See* JA-21–JA-29, Compl. ¶¶ 36 (CIA), 42 (DOD), 48 (NSA), 54 (ODNI).

Fourth, when an agency censors materials, it must give clear reasons and permit swift appeals. When the government creates a prior restraint, it must ensure "expeditious judicial review" of its decisions, *FW/PBS*, 493 U.S. at 227, and bear the burden of initiating such review, *Freedman*, 380 U.S. at 59. Otherwise, "the [censor's] determination in practice may be final," especially for time-sensitive speech on matters of public interest. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561 (1975).

To be sure, the government has a legitimate interest in protecting "the secrecy of information important to our national security." *Snepp*, 444 U.S. at 509 n.3. But the government has a wide array of mechanisms for protecting classified information, including administrative and criminal penalties for former government employees who actually disclose classified information.[9] A properly designed system of prepublication review can be part of the government's toolkit, but any

[9] Many criminal statutes apply to the unauthorized disclosure of classified information. *E.g.*, 18 U.S.C. § 1924 (unauthorized removal and retention of classified documents or material); 18 U.S.C. § 793 (gathering, transmitting or losing defense information); 18 U.S.C. § 798 (disclosure of classified information); 18 U.S.C. § 641 (prohibiting theft or conversion of government property or records for one's own use or the use of another); 18 U.S.C. § 1030(a)(1) (willful retention and communication of classified information retrieved by means of a computer).

such regime of prior restraint requires careful scrutiny to ensure that it is not being abused. And, unfortunately, abuse is the situation here. The current system for prepublication review has grown so sprawling, cumbersome, and overbroad that it simply goes beyond what the First Amendment allows. In contrast, a more narrowly tailored system of the kind described here would achieve the government's legitimate aim of protecting classified information from unauthorized disclosure without impermissibly imposing on the free speech rights on former government employees.

CONCLUSION

For these reasons, the Court should reverse the district court's decision and allow Plaintiffs' challenge to proceed.

August 21, 2020

Respectfully submitted,

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This brief complies with the type-volume limitation of Rule 29(a)(5) of the Federal Rules of Appellate Procedure. The brief contains 5,125 words, excluding the parts of the brief exempted by Rule 32(f).

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August 21, 2020

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I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on August 21, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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