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.

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

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-1568 Caption: Edgar v. Ratcliffe

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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/ Bruce D. Brown Date: August 28, 2020

Counsel for: Amicus Curiae

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The *Bolton* case demonstrates that the modern prepublication review process could operate as a prior restraint against the media. 5

A. The Court should consider whether the current prepublication review system's potential censorial effect on non-governmental actors, like the media, renders it a prior restraint. 5

B. The Court must consider the "specific features" of each agency's preclearance policies, and also consider the possible effect on third parties previewed by the government's position in *Bolton*. 8

II. The recent uptick in "leak" prosecutions over the last decade is relevant to this Court's vagueness analysis in *Morison*. 12

III. Rampant overclassification heightens the risk that the prepublication review regime will chill speech on public affairs. 17

CONCLUSION 19

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) 20

TABLE OF AUTHORITIES

Cases

Am. Civil Liberties Union v. U.S. Dep't of Defense,
389 F. Supp. 2d 547 (S.D.N.Y. 2005) 18

Bantam Books, Inc. v. Sullivan,
372 U.S. 58 (1963) 8, 12

Edgar v. Coats, No. GJH-19-985,
2020 WL 1890509 (D. Md. Apr. 16, 2020) 1

Freedman v. Maryland, 380 U.S. 51 (1965) 8, 11

Kolender v. Lawson, 461 U.S. 352 (1983) 13

McGehee v. Casey,
718 F.2d 1137 (D.C. Cir. 1983) 18

New York Times Co. v. United States,
403 U.S. 713 (1971) 4, 6

Snepp v. United States,
444 U.S. 507 (1980) 1, 8, 9

Steffel v. Johnson,
415 U.S. 452 (1974) 6

United States v. Bolton, No. 1:20-cv-1580 (RCL),
2020 WL 3401940 (D.D.C. June 20, 2020) 3, 6

United States v. Morison,
844 F.2d 1057 (4th Cir. 1988) ..... *passim*

United States v. Snepp,
595 F.2d 926 (4th Cir. 1979) 1

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 13

Other Authorities

Br. of Reporters Comm. for Freedom of the Press, Ass'n of Am. Publishers, Inc., Dow Jones & Co., Inc., N.Y. Times Co., and Wash. Post as Amici Curiae in Supp. of Def.'s Opp'n to Pl.'s Emergency App. for TRO and Mot. for Prelim. Inj., *United States v. Bolton*, No. 1:20-cv-1580 (RCL), 2020 WL 3401940 (D.D.C. filed June 19, 2020), https://perma.cc/CU6Q-FXL9. 7

Emergency Appl. for a TRO and Mot. for Prelim. Inj., *United States v. Bolton*, No. 1:20-cv-1580 (RCL), 2020 WL 3401940 (D.D.C. filed June 17, 2020) 5

Erwin N. Griswold, *Secrets Not Worth Keeping*, Wash. Post (Feb. 15, 1989), https://perma.cc/J6KD-FTD3 18

Frank Snepp, Decent Interval (1978) 8

Gabe Rottman et al., Federal Cases Involving Unauthorized Disclosures to the News Media, 1778 to the Present, Reporters Comm. for Freedom of the Press, https://www.rcfp.org/resources/leak-investigations-chart/ 15, 16

Gabe Rottman, *The Assange Indictment Seeks to Punish Pure Publication*, Lawfare (May 24, 2019), https://perma.cc/Z6YZ-U7VN. 16

Info. Sec. Oversight Office, Nat'l Archives and Records Admin., Report to the President (2017), https://perma.cc/SPZ9-KKMH 17

Jack Goldsmith & Oona A. Hathaway, *The Government's System of Prepublication Review is Broken*, Wash. Post (Dec. 25, 2015), https://perma.cc/8G3M-ZRKJ 9

Leonard Downie Jr., Comm. to Protect Journalists, The Trump Administration and the Media 23-29 (2020), https://perma.cc/9H7P-KF8Z 16

Letter from the Honorable Daniel Patrick Moynihan to President William Jefferson Clinton (Sept. 29, 1998) 15

Mark Fallon, *The Government Had to Approve this Op-Ed*, N.Y. Times (Apr. 2, 2019), https://perma.cc/6KFQ-AEYB 9

Unopposed Br. of Amicus Curiae Reporters Comm. for Freedom of the Press Supporting Def.'s Mot. to Dismiss Indictment at 14-19, *United States v. Hale*, No. 1:19-cr-59 (E.D. Va. filed Sept. 23, 2019), https://perma.cc/TYW9-PWZW 16, 17

Rules

Fed. R. App. P. 32 20

Federal Rule of Civil Procedure 65(d)(2) 6

INTEREST OF AMICUS CURIAE

Amicus curiae Reporters Committee for Freedom of the Press (the "Reporters Committee") is an unincorporated nonprofit association. The Reporters Committee was founded by journalists and media lawyers in 1970, when the nation's press faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

As a representative of the news media, the Reporters Committee has a strong interest in the constitutionality of laws and regulations restricting the disclosure of newsworthy information about government activities to the press and public, including the national security prepublication review regime challenged by Appellants. Consequently, the Reporters Committee participated as amicus before this Court in *United States v. Snepp*, 595 F.2d 926 (4th Cir. 1979), and in support of the petition for certiorari by Snepp to the U.S. Supreme Court. The district court below erroneously found dispositive here the Supreme Court's divided per curiam decision in *Snepp v. United States*, 444 U.S. 507 (1980). Appellees cited the Reporters Committee's *Snepp* Supreme Court brief in their filings to the court below. Defs.' Reply Br. in Support of Mot. to Dismiss at *3-*4, *Edgar v. Coats*, No. GJH-19-985, 2020 WL 1890509 (D. Md. Apr. 16, 2020) ("Defs.' Reply").

The prepublication review system, particularly in its current incarnation, chills vast amounts of speech with no bearing on classified information, let alone bona fide national defense information. It is, therefore, a prior restraint, requiring the government's say-so before a former government official may discuss government affairs — even if that discussion could better inform the electorate without posing any danger to national security. Amicus has a strong interest in ensuring that prior restraints that restrict the flow of newsworthy information about government affairs to the public are held to the appropriate constitutional standard, which the court below failed to do.

All parties have consented to 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 amicus or its counsel contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The national security prepublication review regime today is significantly transformed from the system in *Snepp*, in ways that are directly relevant to the press. As Appellants and amici law professors detail at length, the regime has ballooned far beyond the limited process by which the Central Intelligence Agency sought to protect particularly sensitive intelligence in place when the courts considered *Snepp*. Today, the military and all elements of the Intelligence Community apply some form of a lifetime preclearance requirement on millions of former employees. Importantly, that preclearance requirement does not turn on whether the publication would include discussion of undisclosed classified matters.

The government has also recently taken aggressive steps to enforce preclearance agreements. Most notably, relying on a claimed breach of defendant's prepublication review obligations, the Justice Department in June sought emergency injunctive relief not just against an author, but a book publisher and all downstream "commercial resellers" to block the publication and sale of a political memoir about the President. *See United States v. Bolton*, No. 1:20-cv-1580 (RCL), 2020 WL 3401940 (D.D.C. June 20, 2020). Although the district court rightly denied that relief, *id.* at *4-5, the fact the government would even seek to circumvent the clear command of the *Pentagon Papers* case by using the prepublication review regime to ban a book is directly relevant to whether the

system operates as a prior restraint today. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) ("*Pentagon Papers*") (holding that, even in the national security context, prior restraints on publication come with a "heavy presumption against [their] constitutional validity").

Accordingly, amicus offers three arguments in support of Appellants and reversal.

One, the court below erred by not considering the specific features of the modern system of prepublication review in determining whether it constitutes a prior restraint. Further, the current system, if the government's position in *Bolton* were ever credited, would operate as a prior restraint not just on former government employees' speech, but on the speech of third parties like publishers or the media who have made no promise to keep government secrets.

Two, the district court relied in part on this Court's analysis in *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), in holding that "statutory language describing protected government information in broad or general terms presents a lessened vagueness concern when individuals responsible for understanding the statute's meaning are intelligence professionals," *Edgar*, 2020 WL 1890509, at *25 (citing *Morison*, 844 F.2d at 1074). The recent uptick in journalistic source "leak" prosecutions is of direct relevance to the continued force of the vagueness holding in *Morison*.

Finally, ***three***, the universally acknowledged problem of overclassification is relevant to this facial challenge. While the government has an interest in safeguarding properly classified material, to the extent the prepublication review process stifles the flow of improperly classified information (or unclassified information) to the press or the public, it is not appropriately tailored to serve that interest.

For all of these reasons, the Court should reverse the decision below.

ARGUMENT

I. The *Bolton* case demonstrates that the modern prepublication review process could operate as a prior restraint against the media.

A. The Court should consider whether the current prepublication review system's potential censorial effect on non-governmental actors, like the media, renders it a prior restraint.

In June — forty-nine years to the month from when the *Pentagon Papers* case was before the federal courts in New York and Washington, D.C. — the Justice Department sought an emergency order to block the publication and sale of *The Room Where it Happened*, a book critical of the sitting President by John Bolton, a former national security advisor. Emergency Appl. for a TRO and Mot. for Prelim. Inj., *United States v. Bolton*, No. 1:20-cv-1580 (RCL), 2020 WL 3401940 (D.D.C. filed June 17, 2020). Bolton submitted the book for review by the White House, but he proceeded with publication without receiving a formal clearance letter. *Id.* at 6-7. While the government could not have sued the

publisher of the book directly under *Pentagon Papers*, it cited Federal Rule of Civil Procedure 65(d)(2) in seeking an injunction not just against Bolton, but against publisher Simon & Schuster and all "commercial resellers further down the distribution chain, such as booksellers," claiming that the publisher and resellers were in "active concert or participation" with Bolton. *Id.* at 27, 29 & n.6.

The district court rightly held that for "reasons that hardly need to be stated, [it would] not order a nationwide seizure and destruction of a political memoir." *Bolton*, 2020 WL 3401940, at *4. But, while the court in *Bolton* summarily rejected expanding injunctive relief to a publisher or booksellers, the government's decision to seek such relief sends a clear message that the government is willing to use the prepublication review scheme to restrain publication by third parties who are not bound by secrecy or preclearance obligations — and will do so again. *Cf. Steffel v. Johnson*, 415 U.S. 452, 459 (1974) ("The prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been chimerical.") (citation and quotation marks omitted).

It should be noncontroversial that such a system of direct censorship operates as a prior restraint on speech, one that is squarely governed and prohibited by *Pentagon Papers*. 403 U.S. at 726-27 ("[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea

can support even the issuance of an interim restraining order."). In other words, even if the Court were to find that some form of prepublication review system is permissible as applied to former government employees, it should also consider whether the system has or could have a censorial effect on third parties such as book publishers or the press. Put simply, as demonstrated by its recent actions, the government today plainly sees the prepublication review regime as an avenue to impose direct censorship on these third parties:

> The emergency injunctive relief sought by the Government, if awarded by this Court, would transform the Government's already vast classification authority into an impermissible system of prior restraint whereby, upon the unilateral assertion of the executive branch that material is classified, a court could stop a book publisher from publishing, a distributor from distributing, a seller from selling, and a reader from reading, political or expressive work critical of government agencies or officials.

Br. of Reporters Comm. for Freedom of the Press, Ass'n of Am. Publishers, Inc., Dow Jones & Co., Inc., N.Y. Times Co., and Wash. Post as Amici Curiae in Supp. of Def.'s Opp'n to Pl.'s Emergency App. for TRO and Mot. for Prelim. Inj., *United States v. Bolton*, No. 1:20-cv-1580 (RCL), 2020 WL 3401940 (D.D.C. filed June 19, 2020), https://perma.cc/CU6Q-FXL9.

In sum, the government's deployment of the prepublication review regime in an attempt to sidestep *Pentagon Papers* while banning a book globally clearly shows how the regime operates as a prior restraint on both government employees and third parties who seek to publish their speech.

B. The Court must consider the "specific features" of each agency's preclearance policies, and also consider the possible effect on third parties previewed by the government's position in *Bolton*.

It is well-settled that, even in the narrow context of unprotected obscenity, where the Supreme Court has permitted prior restraints on publication or performance, the Court will consider the "specific features" of a licensing regime, taken as a whole, to determine if it "presents a danger of unduly suppressing protected expression." *Freedman v. Maryland*, 380 U.S. 51, 54 (1965). Indeed, even informal systems of censorship in the obscenity context that have the practical effect of suppressing protected expression are impermissible under the First Amendment. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67-70 (1963) (finding official notices asking booksellers to voluntarily stop selling material deemed obscene by state unconstitutional prior restraint).

As a preliminary matter, the prepublication review regime today applies to far more former government officials and far more material than that at issue in *Snepp*. Snepp was a former CIA officer who had been stationed in Saigon during Operation Frequent Wind, the evacuation of the remaining U.S. personnel and some South Vietnamese civilians in 1975. Snepp wrote a book critical of the U.S. withdrawal (which, the government conceded, did not contain classified information). Frank Snepp, Decent Interval (1978); *Snepp*, 444 U.S. at 516 n.2 (Stevens, J., dissenting). While amicus submits that the per curiam decision in

Snepp failed to properly consider whether the prepublication review system as it then existed presented an undue risk of suppressing protected speech, it is true that Snepp was the type of intelligence officer who would be privy to bona fide national defense information. *Cf. id.* at 526 (Stevens, J., dissenting) ("Inherent in this prior restraint is the risk that the reviewing agency will misuse its authority to delay publication of a critical work or to persuade an author to modify the contents of his work beyond the demands of secrecy.").

Today, however, the prepublication review system has grown to require preclearance of material that has no bearing on actual national defense information and by individuals that, in some cases, have no access to classified material at all. JA15-16. Troublingly, it also applies to advocacy by former government employees on matters of clear public interest unrelated to any classified information they may have been privy to in their employ. In just one example of relevance to amicus, former government employees have sought preclearance before publishing op-eds critical of the prepublication review process itself. *See, e.g.*, Jack Goldsmith & Oona A. Hathaway, *The Government's System of Prepublication Review is Broken*, Wash. Post (Dec. 25, 2015), https://perma.cc/8G3M-ZRKJ; Mark Fallon, *The Government Had to Approve this Op-Ed*, N.Y. Times (Apr. 2, 2019), https://perma.cc/6KFQ-AEYB.

At the very least, the district court here should have considered the specific features of *each* agency's prepublication review regime to determine if it passes constitutional muster. For instance, the Department of Defense's submission policy applies to *all* current and former employees and servicemembers (active or reserve) and requires preclearance for material that broadly relates to "subjects of significant concern to" the military, including "spy novels" and "biographical accounts of . . . wartime experiences." JA22, JA109. The Office of the Director of National Intelligence ("ODNI") requires former employees to submit for review any material that "discusses the ODNI, the IC [Intelligence Community], or national security." JA28. By contrast, the CIA's policy is more limited but still applies to "material on any subject about which the author has had access to classified information in the course of his employment" (and gives the CIA discretion to determine what material is classified). JA20. The National Security Agency requires submission whenever former NSA employees have any "doubt" as to whether information is unclassified or approved for release, JA25-26, JA118, though it also notes that NSA material in the public domain should not automatically be considered declassified, JA115.

The standards for review of submissions are likewise varied. *See* Appellants' Br. at 38. For instance, the CIA reviews submissions by former employees "solely to determine whether" they contain classified information,

JA67, while the ODNI states that the goal of review includes ensuring that "ODNI's mission and the foreign relations or security of the U.S. are not adversely affected by publication," JA28.

Each of these separate regimes imposes different submission requirements and censorship standards, which impose different levels of risk that they will "unduly suppress[] protected speech." *Freedman*, 380 U.S. at 54. The court below erred by not considering them on their specific terms.

Crucially, this Court should likewise consider the potential effect of the prepublication review regime on third parties who are not bound by any preclearance obligation. In the *Bolton* matter, the government did not name as parties the publisher of the memoir or the downstream resellers — because to do so would have plainly triggered the *Pentagon Papers* standard — but the government sought to "reach through" the author's claimed contractual obligation to bind them nonetheless. The government's claimed authority to bootstrap a prior restraint on third parties in this manner is likewise a "specific feature" of the prepublication review regime that must be considered in assessing its constitutionality under *Freedman* (and, indeed, would be a fatal feature under *Pentagon Papers*).

Separately, Appellees cited the Reporters Committee's Supreme Court brief in *Snepp* in support of its argument that *Snepp* controls because the "*Snepp* courts considered the exact same arguments that Plaintiffs present here." Defs.' Reply at

5. Again, each restraint on speech must be taken on its own terms, with regard to how it operates in practice. *Cf. Bantam Books*, 372 U.S. at 67 ("We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."). In 1978 and 1979, Snepp, amicus Reporters Committee, and other amici presented arguments in the context of Snepp's case. More than 40 years have passed and *this* case is not *that* case, particularly given the possibility that the government could again seek to deploy prepublication review agreements to restrain speech by third parties, like the press.

II. The recent uptick in "leak" prosecutions over the last decade is relevant to this Court's vagueness analysis in *Morison*.

In finding that the terms of the various prepublication review policies are not unconstitutionally vague, the district court relied in part on this Court's decision in *Morison*, the first successful media leak prosecution under federal spying laws. *Edgar*, 2020 WL 1890509, at *25 ("[B]road or general terms present[] a lessened vagueness concern when individuals responsible for understanding the statute's meaning are intelligence professionals.") (citing *Morison*, 844 F.2d at 1074)). *Morison* does not, however, sweep that expansively. Rather, in his opinion for the Court, Judge Russell observed that, as applied to Morison, the term "related to the national defense" was not unconstitutionally vague because Morison subjectively knew that disclosing documents with a prominent "Secret" classification stamp

violated the relevant section of the Espionage Act. *Morison*, 844 F.2d at 1073-74. Further, Morison's "own expertise in the field of government secrecy and intelligence operations" "bulwarked" the jury's determination that the material at issue, if disclosed, was "potentially damaging" to national defense. *Id.* Put simply, Judge Russell was satisfied that the Espionage Act, as applied to Morison himself, was not unconstitutionally vague because Morison personally knew that he had acted unlawfully.

The discussion in *Morison* does not stand for the proposition that vague descriptions of protected government information are more permissible under the First Amendment when construed by intelligence professionals, and, indeed, it is well-settled that vague laws should be scrutinized more closely when they restrict free speech. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983).

Further, the *Morison* case actually supports the vagueness arguments presented by Appellants here. Both Judge Wilkinson and Judge Phillips wrote concurrences, Judge Phillips concurring specially, to discuss the First Amendment considerations in using the federal spying laws to criminalize the disclosure of government secrets to the press. While both agreed that the conviction in *Morison*

comported with the First Amendment, both also rested their concurrences on the understanding that "the espionage statute has no applicability to the multitude of leaks that pose no conceivable threat to national security, but threaten only to embarrass one or another high official." *Morison*, 844 F.2d at 1085 (Wilkinson, J., concurring); 1086 (Phillips, J., concurring specially).

With respect to the vagueness inquiry in the instant case, the concurrences by Judges Wilkinson and Judge Phillips are relevant for two reasons. First, to cure the conceded vagueness in the Espionage Act, they would both import a requirement that the relevant information, if disclosed, would have some probability of causing harm to national security, not merely embarrassment. Here, the prepublication submission and censorship policies by their terms go far beyond material meeting that criterion. None are limited to publications that the author believes may contain or discuss properly classified information, and many extend to publications that discuss wholly unclassified information, including information that is indisputably in the public interest (such as critiques of the prepublication review regime itself).

Second, and importantly, both Judges Wilkinson and Phillips rested their concurrences on how the "practical dynamics of the developed relationship between press and government officials" would prevent the use of the Espionage Act to prosecute leak cases from "significantly inhibit[ing] needed investigative

reporting about the workings of government in matters of national defense and security." *Id.* at 1086 (Phillips, J., concurring specially); *see id.* at 1084 (Wilkinson, J. concurring).

Recent events, however, counsel in favor of a reassessment of that determination. As noted, *Morison* was the first successful Espionage Act prosecution of a press "leak" in U.S. history. *See* Gabe Rottman et al., Federal Cases Involving Unauthorized Disclosures to the News Media, 1778 to the Present, Reporters Comm. for Freedom of the Press, https://www.rcfp.org/resources/leak-investigations-chart/ (last visited Aug. 27, 2020). Prior to *Morison*, the government had only contemplated prosecutions in a handful of cases, with the failed *Pentagon Papers* trial of Daniel Ellsberg and Anthony Russo as the most prominent. *Id.* Morison's case was so singular at the time, and controversial from a First Amendment perspective, that Senator Daniel Patrick Moynihan (D-NY), the foremost expert in Congress on government secrecy, successfully persuaded President Clinton to pardon Morison in 2001. *Id.*; *see also* Letter from the Honorable Daniel Patrick Moynihan to President William Jefferson Clinton (Sept. 29, 1998), https://perma.cc/W5MC-QXUC ("What is remarkable is not the crime, but that he is the only one convicted of an activity which has become a routine aspect of government life: leaking information to the press in order to bring pressure to bear on a policy question.").

Since 2009, however, news media leak prosecutions have become, relatively speaking, far more commonplace. The Obama administration brought more Espionage Act prosecutions than all other presidencies combined, and the Trump administration has matched that record. *See* Federal Cases, *supra*. In total, the Justice Department has brought 18 cases against journalistic sources for the unauthorized disclosure of government secrets and two more based on the public disclosure of such information by non-sources. *See id.* In 2019, the Justice Department secured the first grand jury indictment based, in part, on the legal theory that the sole act of publicly disclosing classified information can support an Espionage Act prosecution. *See* Gabe Rottman, *The Assange Indictment Seeks to Punish Pure Publication*, Lawfare (May 24, 2019), https://perma.cc/Z6YZ-U7VN. This proliferation of leak prosecutions — much like the dramatic expansion in the scope and sweep of the prepublication review regime — has caused a palpable chill on the willingness of sources to speak with national security investigative reporters, even on unclassified matters. *See* Leonard Downie Jr., Comm. to Protect Journalists, The Trump Administration and the Media 23-29 (2020), https://perma.cc/9H7P-KF8Z (surveying reporters and editors on chilling effect from ongoing leak prosecutions); Unopposed Br. of Amicus Curiae Reporters Comm. for Freedom of the Press Supporting Def.'s Mot. to Dismiss Indictment at

14-19, *United States v. Hale*, No. 1:19-cr-59 (E.D. Va. filed Sept. 23, 2019), https://perma.cc/TYW9-PWZW (collecting evidence of chilling effect).

With respect to vagueness, the more a vague law or regulation could trench on protected speech, the closer the scrutiny a court should apply. Here, it is undisputed that the prepublication review process limits the ability of former government officials to speak on public affairs. Consequently, the district court's reliance on *Morison* to support its determination that the vagueness inquiry should be less stringent in this facial challenge was error.

III. Rampant overclassification heightens the risk that the prepublication review regime will chill speech on public affairs.

There is broad agreement among both transparency advocates and government experts in the classification system that overclassification continues to be a profound challenge. *See, e.g.*, Info. Sec. Oversight Office, Nat'l Archives and Records Admin., Report to the President (2017), https://perma.cc/SPZ9-KKMH ("Too much classification impedes the proper sharing of information necessary to respond to security threats, while too little declassification undermines the trust of the American people in their Government."). Or, as Dean Erwin Griswold, who argued the *Pentagon Papers* case as solicitor general, put it:

> It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another. There may be some basis for

> short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past.

Erwin N. Griswold, *Secrets Not Worth Keeping*, Wash. Post (Feb. 15, 1989), https://perma.cc/J6KD-FTD3; *see also Am. Civil Liberties Union v. U.S. Dep't of Defense*, 389 F. Supp. 2d 547, 562 (S.D.N.Y. 2005) ("The danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods.").

While the government may have an interest in protecting properly classified material from public disclosure, any measure it undertakes to do so must be appropriately tailored to serve that interest. *Cf. McGehee v.* Casey, 718 F.2d 1137, 1143 (D.C. Cir. 1983) (holding that CIA's censorship authority in reviewing employees' publications requires the information be properly classified). Overclassification means that any prepublication review system will necessarily chill or outright block the disclosure of improperly classified material. The worse the overclassification, the more acute this concern. Accordingly, the universally recognized fact that the government overclassifies is directly relevant to, among other things, the First Amendment overbreadth analysis of the current system of prepublication review. This Court should consider the extent of the

overclassification problem in assessing the danger that the prepublication review regime will, in practice, suppress protected speech under *Freedman*.

CONCLUSION

For these reasons, the Court should reverse the district court's decision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because this brief contains 4,092 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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