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; CHRISTOPHER C. MILLER, in his official capacity as Acting 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.)

REPLY BRIEF FOR PLAINTIFFS–APPELLANTS

Counsel on next page

Brett Max Kaufman
Vera Eidelman
Shreya Tewari
Ben Wizner
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
T: (212) 549-2500
F: (212) 549-2654
bkaufman@aclu.org

David R. Rocah
American Civil Liberties Union Foundation of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
T: (410) 889-8555
F: (410) 366-7838
rocah@aclu-md.org

Jameel Jaffer
Alex Abdo
Ramya Krishnan
Lyndsey Wajert
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
T: (646) 745-8500
F: (646) 661-3361
jameel.jaffer@knightcolumbia.org

Attorneys for Plaintiffs–Appellants

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Introduction

Because Defendants' prepublication review regimes prohibit speech until the government approves its content, they are prior restraints and presumptively unconstitutional. The government disagrees, Opp. 30–31, but little turns on this dispute because the parties agree that the Court should evaluate Defendants' regimes under the framework the Supreme Court has used to evaluate restrictions on public employees' speech, Opp. 32; Pls.' Br. 23 n.4. Under that framework, the Supreme Court has distinguished *ex post* challenges by individual employees sanctioned for their speech, *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), from challenges to *ex ante* rules that operate as a "wholesale deterrent to a broad category of expression by a massive number of potential speakers," *United States v. Nat'l Treasury Emps. Union* (*NTEU*), 513 U.S. 454, 467 (1995). Because Plaintiffs' challenge is of the latter character, *NTEU* provides the appropriate analytical framework here. Under this framework—and, indeed, under *Pickering* as well—Defendants' regimes are unconstitutional.

In response to Plaintiffs' arguments, the government offers a single refrain: "*Snepp*." *Snepp v. United States*, 444 U.S. 507 (1980). To defend the constitutionality of prepublication review regimes that suppress the speech of millions of former public employees, it relies almost entirely on a single footnote in that forty-year-old case—in fact, on merely fourteen words of that footnote. But *Snepp* cannot bear the

weight Defendants ask it to. The footnote does not acknowledge the arguments advanced here, let alone address them. And it would be especially strange to read the footnote as Defendants do when the opinion as a whole is focused entirely on the question of remedy. If the Supreme Court had intended to hold that prepublication review regimes are *per se* constitutional—whatever their scope, and however deficient their procedural safeguards—it surely would have made this extraordinary statement more directly. The Court does not ordinarily "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) (making that observation of Congress).

Defendants' regimes cannot survive review under *NTEU* or any other plausibly applicable standard. Plaintiffs respectfully submit that this Court should vacate the decision below and remand for further proceedings.

Argument

I. Defendants' prepublication review regimes violate the First and Fifth Amendments.

A. *Snepp* does not control this case.

The government argues that *Snepp* resolves this case. Opp. 27. It argues that the prepublication review regime at issue in *Snepp* did not differ materially from the ones Plaintiffs challenge here, *id*. at 27; that *Snepp* rejected the arguments that Plaintiffs raise here, *id*. at 28; and that this Court lacks authority to consider the

metastasis of the prepublication review systems since *Snepp* was decided, *id*. at 29. None of these arguments has merit.

To begin, the government's argument that the regimes that Plaintiffs challenge here are "materially like the one" the Court blessed in *Snepp* is doubly mistaken. First, *Snepp* did not bless a specific prepublication review regime; rather, it blessed a particular remedy—specifically, the imposition of a constructive trust on a former CIA officer's book proceeds—for the "willful[], deliberate[], and surreptitious[]" violation of an agency secrecy agreement. *Snepp*, 444 U.S. at 508. The government relies on a single sentence in a footnote, placed in an exposition of procedural history, to argue that *Snepp* endorsed every facet of the regime that Snepp would have been subject to had he submitted his manuscript as he was required to do. But the Court did not address the specifics of that regime, as Snepp's actions made those specifics beside the point.[1]

The government's contention that *Snepp* rejected Plaintiffs' legal arguments is also misguided. As an initial matter, it is improper (and wishful thinking) for the

[1] Moreover, the injunction that *Snepp* reinstated required Snepp to submit writings for review only if they contained "information [he] gained during the course of or as a result of his employment"; required the CIA to complete its review within thirty days; and prohibited the CIA from censoring unclassified information. Order, *United States v. Snepp*, No. 78-92-A (E.D. Va. 1978), 1979 U.S. S. Ct. Briefs LEXIS 6, at *45–46. In other words, the injunction included constitutionally significant safeguards that Defendants' regimes lack.

government to read the Court's silence as an endorsement of arguments made in the parties' briefs. *See, e.g.*, *United States v. Horton*, 693 F.3d 463, 479 n.16 (4th Cir. 2012). Moreover, while some of the arguments that Plaintiffs advance here map on to arguments that Snepp and his amici advanced, it is clear from the opinion as a whole that the Court did not address these arguments because Snepp had not submitted his manuscript for review (as Plaintiffs have done in the past), or filed a pre-enforcement challenge to the review system (as Plaintiffs have done in this case). As a result, the case simply did not require the Supreme Court to confront the arguments that were directed to specific deficiencies of the CIA's regime.

Finally, the argument that the Court cannot consider the metastasis of the prepublication review system since *Snepp*, Opp. 29, is also misguided. *Snepp*, like every case, was decided in a particular factual context. This Court cannot extend *Snepp*'s rule to new factual contexts without considering whether the rationale of the rule still applies. *Riley v. California*, 573 U.S. 373, 393 (2014). In essence, the government asks this Court to hold that the Supreme Court decided in a single sentence in a footnote of a per curiam opinion that prepublication review regimes are constitutional *per se*—without regard to what they require people to submit, what power they give to censors, and what procedural protections they provide. But whether a system of restraints on speech is constitutional depends on the specific features of that system. *See, e.g.*, *Freedman v. Maryland*, 380 U.S. 51, 56 (1965).

Even if the government is correct that the Supreme Court blessed a prepublication review regime in *Snepp*, this Court cannot uphold the contemporary prepublication review regimes that Plaintiffs challenge here on the ground that the Supreme Court (arguably) blessed a very different prepublication review regime four decades ago.

B. Defendants' prepublication review regimes are subject to *NTEU*'s modified *Pickering* standard.

The government is wrong to argue that Defendants' prepublication review regimes do not impose prior restraints. Again, these regimes are prototypical prior restraints because they condition speech on government approval. *See* Pls.' Br. 20–21. Indeed, this Court held that prepublication review is a "system of prior restraint" in *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972). Defendants argue that *Snepp* superseded *Marchetti*, Opp. 31, but far from casting doubt on *Marchetti*, the Supreme Court in *Snepp* effectively endorsed it—by adopting its language to reject a former employee's challenge to a different CIA agreement. *Compare Snepp*, 444 U.S. at 509 n.3 (holding that *Snepp's* agreement was a "reasonable means" for protecting national security secrets), *with Marchetti*, 466 F.2d at 1317 (same with respect to Marchetti's agreement); *see also* Pls.' Br. 22.

This said, little turns on this dispute here, because the parties agree that this Court should assess Defendants' regimes under the framework the Supreme Court has used in employee-speech cases. *See* Pls.' Br. 23 & n.4; Opp. 32. As indicated above, that framework distinguishes between challenges to *ex post* disciplinary

actions and challenges to *ex ante* rules that deter broad categories of speech by multiple speakers. Pls.' Br. 24–26. This case falls into the second category. Accordingly, the questions the Court should ask here are the ones the Court asked in *NTEU*: "[whether] 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"; whether the asserted harms are "real, not merely conjectural"; and whether the regulation will "alleviate the[] harms in a direct and material way." 513 U.S. at 468, 475.

The government argues that this Court cannot apply *NTEU*'s framework here because the Supreme Court did not use that framework in *Snepp*. Opp. 33. It invokes the "*Agostini* principle," which holds that lower courts should not "overrul[e]" Supreme Court precedent that has "direct application in a case" even where the precedent "appears to rest on reasons rejected in some other line of decisions." *United States v. Danielczyk*, 683 F.3d 611, 615 (4th Cir. 2012) (quoting *Agostini v. Felton*, 521 U.S. 203, 207 (1997)). But this principle does not apply here. *Snepp* does not have "direct application" in this case for reasons Plaintiffs have already rehearsed. *See supra* Part I.A; Pls.' Br. 16–19.[2] Moreover, Plaintiffs do not ask the

[2] *See also, e.g.*, *Jefferson Cty. v. Acker*, 210 F.3d 1317, 1320–21 (11th Cir. 2000); *Kyle-Labell v. Selective Serv. Sys.*, 364 F. Supp. 3d 394, 417 (D.N.J. 2019); *United*

Court to "overrule" *Snepp*, or even to reject *Snepp*'s legal framework, based on later Supreme Court authority. Rather, they ask the Court to apply the employee-speech framework—the same framework the Court applied in *Snepp*—as the Supreme Court's later case law says it *must* be applied where public employees challenge a broad rule that restricts the speech of many people. Indeed, only two years ago, the Supreme Court emphasized again that the *Pickering* standard, which Defendants ask the Court to apply here, Opp. 33, "was developed for use in a very [specific] context—in cases that involve 'one employee's speech and its impact on that employee's public responsibilities,'" and not for contexts in which public employees challenge broader speech-restrictive rules. *Janus v. Am. Council of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018) (quoting *NTEU*, 513 U.S. at 467); *see also Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1439–40 (D.C. Cir. 1996) (applying *NTEU* to an agency prepublication review procedure after noting that *Snepp* "essentially applied *Pickering*").

The government insists that the Supreme Court's citation of *Snepp* in *United States v. Aguilar*, 515 U.S. 593 (1995), which post-dates *NTEU*, is incompatible with Plaintiffs' argument. Opp. 33. But *Aguilar* did not cite *Snepp* for its standard of review but rather for the uncontroversial proposition that restrictions on public

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States v. Bruno, 487 F.3d 304, 306 (5th Cir. 2007); *United States v. Acosta*, 502 F.3d 54, 60 (2d Cir. 2007).

employee speech "are not subject to the same stringent standards" that would apply to restrictions on other members of the public. 515 U.S. at 606. Similarly, the government's citation of cases from other circuits suggesting that prepublication review is not a prior restraint in the "classic" or "traditional" sense does nothing to change the analysis. Opp. 30–31. Those cases merely recognize what *Aguilar* said about *Snepp*: that the government has greater leeway in imposing restraints on government employees than on other citizens, *see Wilson v. CIA*, 586 F.3d 171, 183 (2d Cir. 2009); *see also Weaver*, 87 F.3d at 1439.[3]

The government's alternative argument—that *Snepp* effectively applied *NTEU*, Opp. 33—is also unpersuasive. *Snepp* addressed only the application of "Snepp's agreement" to Snepp. 444 U.S. at 765 n.3. Nowhere in its opinion did the Court consider the interests of a "vast group of present and future [CIA] employees" in speaking and of their "potential audiences" in hearing what they have to say. *NTEU*, 513 U.S. at 468. Defendants propose that *Snepp*'s conclusion that the CIA's secrecy agreement was "reasonable" was meant as a pronouncement on prepublication review "as a general matter," Opp. 34, somehow dispensing with the

[3] The government is also wrong to suggest that *NTEU* is inapplicable because this case involves an employment contract. Opp. 31–32. Courts regularly apply *NTEU* scrutiny to contractual restrictions on employee speech. *See, e.g.*, *Mansoor v. Trank*, 319 F.3d 133, 139 n.4 (4th Cir. 2003); *Barone v. City of Springfield*, 902 F.3d 1091, 1101 (9th Cir. 2018).

interests of *all* current and former employees as well as the public with nary a word. Again, this simply places more weight on the footnote than it can possibly bear.[4]

C. Defendants' prepublication review regimes are not sufficiently tailored to the government's interests, and they are impermissibly vague.

As Plaintiffs have explained, Pls.' Br. 26, and Defendants do not dispute, the prepublication review system is intended to address the problem of inadvertent disclosure. Even if one assumes, despite the dearth of evidence, that inadvertent disclosure would be a significant problem but for the system of prepublication review, Defendants' regimes are far broader than necessary to accommodate their interests. Especially given the other interests at stake—including the interest of former employees in speaking publicly about matters of public concern, and the interest of the public in hearing the speech of former public servants who have unique insight into the operations of government—Plaintiffs have adequately pled that Defendants' regimes are too broad, and too vague, to pass constitutional muster.

[4] Defendants' say that their policies "mitigate actual harms," Opp. 34, but their argument suggests, at most, that *some* system of prepublication is necessary, not that Defendants' current regimes are necessary. Moreover, at this stage in the case the Court must take as true Plaintiffs' allegations that Defendants' redactions to their manuscripts were arbitrary, haphazard, and in some cases motivated by viewpoint. Compl. ¶¶ 78–79 (JA35–36), 88 (JA38), 90 (JA39), 110 (JA45). The only systemic studies of prepublication review are broadly consistent with Plaintiffs' allegations—and inconsistent with Defendants' assertion that prepublication review plays a major role in preventing the disclosure of national security secrets. Pls.' Br. 27–28.

1. The submission standards are vague and overbroad.

Defendants' submission standards are vague and overbroad. Pls.' Br. 32–37. On their face, they require essentially all former employees to submit virtually anything they might write about government, even decades after leaving public service. With minor exceptions, the government does not deny the extraordinary breadth of Defendants' submission standards; instead, it contends that the breadth is "require[d]," Opp. 38. But it is plain—and certainly plain enough, given the procedural posture of this case—that Defendants' regimes could be narrowed in significant ways without materially compromising Defendants' interests.

First, Defendants' regimes could be narrowed to apply only to those former employees most likely to be in a position to disclose information that could cause serious harm. For example, they could be limited to individuals who had access to Defendants' most sensitive secrets, or to those who left government service recently and therefore can be assumed to have knowledge of secrets that have not become stale. If Defendants narrowed their regimes in these ways, they could permit employees who were exempt from mandatory prepublication review requirements to submit manuscripts for review voluntarily or to publish without review knowing that they must be especially cautious to avoid possible criminal liability or administrative sanction.

Defendants' regimes are not tailored in any of these ways. Again, they apply to essentially all of their former employees. *See* Decl. of Antoinette B. Shiner Ex. A ¶¶ 3, 5 (JA54) (CIA secrecy agreement); NSA/CSS Policy 1-30 § 2, 6(b) (JA114, 117) (NSA's policy); ODNI Instruction 80.04 §§ 4, 6 (JA133, 134–37) (ODNI's policy); Instruction 5230.09 § 1.2(g) (JA91) (DOD's policy). The government does not dispute that the requirement of prepublication review applies to at least some former employees who never had access to classified information. Opp. 36–37. It says it is not "realistic" to think that these individuals will write manuscripts that fall within the submission requirements, *id.*, but the submission requirements are far broader than it acknowledges, as discussed below.[5]

Second, Defendants' regimes could be far more limited with respect to what must be submitted for review. Indeed, the congressional intelligence committees recently instructed the intelligence agencies that submission requirements should extend "to only those materials that might reasonably contain or be derived from

[5] The government claims that several of the DOD's prepublication review policies with which Plaintiffs take issue do not apply to former employees or employees who never had access to classified information, but the government's construction of the DOD's policies is inconsistent with the policies' plain text and the agency's public explanations of the policies. *See* Compl. ¶ 38(c) (JA22–23) (quoting *Frequently Asked Questions for Department of Defense Security and Policy Reviews*, DOD (Mar. 2012) (JA109), https://perma.cc/5AH3-S3RV (answering the "frequently asked question" of who must submit for review: "All current, former, and retired DoD employees, contractors, and military service members (whether active or reserve) who have had access to DoD information or facilities.")).

classified information obtained during the course of an individual's association with the [Intelligence Community]." 115 Cong. Rec. H3300 (daily ed. May 3, 2017); 115 Cong. Rec. S2750 (daily ed. May 4, 2017) (same). But, again, Defendants' regimes sweep more broadly, requiring the submission of virtually anything a former employee might write about government policy or national security. *See, e.g.*, Pls.' Br. 33–34 (ODNI: anything "that discusses the ODNI, the IC [Intelligence Community], or national security"; CIA: material "that contain[s] any mention of intelligence data or activities"). These submission standards are far broader than necessary to accommodate Defendants' interest in preventing inadvertent disclosures. Tellingly, the government defends the NSA's extraordinarily broad submission standard—"doubt" as to whether material is "approved for public release"—on the grounds that the NSA needs to be able to censor information that is *not* classified. Opp. 40–41.

The government contends that the intelligence committees' suggested limitation is unworkable, *id.* at 39 n.5, and that Defendants' maximalist submission requirements are necessary to allow them "to make [their] *own* judgments" about which materials warrant review, *id.* at 38. But even the broadest submission standard would require former employees to decide in the first instance whether their manuscripts fell within the scope of the standard. The intelligence committees' standard is an administrable one that would accommodate Defendants' legitimate

interests without needlessly compromising the constitutional interests of former employees and the public.

The government also insists that Defendants may constitutionally require submission of material learned outside a former employee's public service. Opp. 39–40. But this Court properly rejected that argument in *Marchetti*. 466 F.2d at 1317. The rationale for this limitation is obvious: intelligence-agency employees do not relinquish their right to discuss publicly what they know independently of their time in government. Of course, as this Court later stated, former employees may not confirm the authenticity of leaked information they "had access to" in government, *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1371 (4th Cir. 1975), but the government's arguments here reach far beyond that narrow caveat.

Third, and finally, any reasonable censorship regime would have submission standards that are clear. *See* Pls.' Br. 35–36. The government argues that "there is no problematic degree of ambiguity in the policies." Opp. 40. But Defendants' submission standards are filled with vague terms. *See* Pls.' Br. 35–36 (explaining the use of terms such as "pertains to," "relates to," "might be based upon"). The NSA's submission standards, for example, turn on whether material has been "approved for public release," without specifying by whom and without indicating how approval for public release relates to the question of classification. *Id.* The government's response to that point only further confuses matters: It claims that the

NSA's standard is meant to permit the agency to review and censor "certain intelligence information whether or not it is classified," Opp. 40–41, but the policy does not specify what information the NSA is referring to and pursuant to what criteria that information is "approved for public release." NSA/CSS Policy 1-30 §§ 2, 6(b) (JA114–15, 117–18).

Relying on *U.S. Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the government claims that the availability of agency guidance cures any vagueness in the submission standards, Opp. 41, but this argument has multiple flaws. As an initial matter, the availability of administrative clarification was secondary to the Court's holding that the challenged regulation contained "nothing impermissibly vague." *Letter Carriers*, 413 U.S. at 577. Here, though, the regulations in question *are* impermissibly vague. In addition, with one exception, Defendants' policies do not actually provide for agency guidance about submission requirements. Decl. of Alex Abdo Ex. A § 2(e)(6) (JA67). The CIA's policy does mention agency guidance, but it does not actually describe a clear procedure for obtaining that guidance. *See, e.g.*, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 738 (D.C. Cir. 2016) (process for obtaining "advisory opinion"); *Bellion Spirits, LLC v. United States*, 393 F. Supp. 3d 5, 33 (D.D.C. 2019) ("clear process"), *appeal docketed*, No. 19-5252 (D.C. Cir. Sept. 25, 2019); *see also* Compl. ¶ 106 (JA43–44) (conflicting advice from different DOD prepublication review officers).

Indeed, the CIA's policy is to refuse even to provide former employees with copies of their signed secrecy or nondisclosure agreements. Compl. ¶ 32(e) (JA20).

2. The review standards are vague and overbroad.

As Plaintiffs explained, several of Defendants' regimes fail to specify censorship criteria at all, and even the narrowest regimes permit the censorship of information whether or not (1) it would reveal or confirm anything learned by the author in the course of employment; (2) its disclosure would actually cause harm; (3) it is already in the public domain; and (4) the asserted interest in secrecy is outweighed by the public interest in its disclosure. Moreover, all of Defendants' review standards are "so standardless that they authorize or encourage seriously discriminatory enforcement." *FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2008) (cleaned up). The government's defense of these standards is unpersuasive.

First, the government is wrong to suggest that Defendants' review standards are constitutional because the purpose behind them is clear. Opp. 42. Even if the purpose behind the standards is clear, the standards themselves are not, and the lack of clarity in the standards invites "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In any event, the purpose animating the standards is *not* clear. For example, the government highlights language in the CIA Secrecy Agreement indicating that review is meant to give the agency the opportunity to determine whether a publication "contains any

information or material that [the employee has] agreed not to disclose." Opp. 42 (quoting Shiner Decl. Ex. A ¶ 6 (JA54)). Rather than *illuminate* the answer to that question, however, the CIA Agreement's "purpose" merely repackages it in circular fashion.

Second, the government ignores Plaintiffs' argument that neither the ODNI nor the NSA sets out any censorship standard at all. Pls.' Br. 38. The government points again to language that articulates the purpose of Defendants' review processes, Opp. 42, but this language does not meaningfully cabin reviewers' discretion. For example, the government argues that the NSA's "approved for public release" language gives the agency authority to censor "certain intelligence information whether or not it is classified," Opp. 42–43 (quoting NSA/CSS Policy 1-30 § 2(c) (JA114)), but neither that language nor the government's effort to clarify it cabins reviewers' discretion. Nor does the ODNI's purpose statement, which contemplates that the ODNI will "prevent the unauthorized disclosure of information[] and [] ensure the ODNI's mission and the foreign relations or security of the U.S. are not adversely affected by publication." ODNI Instruction 80.04 § 3 (JA133). With respect to ODNI, the government also points to what it describes as a "policy" governing ODNI's review process, but this policy only underscores the absence of meaningful limits on reviewers' authority. A policy that calls on censors to "to safeguard sensitive intelligence information" cannot fairly be said to constrain

discretion. Opp. 42–43 (quoting ODNI Instruction 80.04 § 6 (JA134)). Notably, the government makes no effort to explain why, if reviewers' discretion is meaningfully constrained, former employees who submitted manuscripts critical of a government policy had their work heavily redacted, while others who submitted supportive accounts of the same policies were published without similar excisions. *See* Compl. ¶ 34 (JA20–21); *see also* Br. of Professors Goldsmith & Hathaway 17–18, 20.[6]

Third, the government maintains that it is entirely "appropriate" for agencies to censor information "that has entered the public domain improperly, such as through leaks or hacking." Opp. 44. But the mere fact that information has entered the public domain "improperly" does not mean that Defendants have a legitimate interest in censoring it from former employees' manuscripts. In some narrow contexts—for example, where a former employee had access to the specific information when he or she was in government—Defendants may have an interest in censoring leaked information from a manuscript when doing so is necessary to prevent an author from seeming to have confirmed the authenticity of it. *Knopf*, 509

[6] Defendants argue that Plaintiffs' Complaint does not plead a sufficient factual basis for this allegation, Opp. 43, n.9 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)), but Plaintiffs plead specific instances of apparent viewpoint-based censorship of their own works, *see, e.g.*, Compl. ¶¶ 90 (JA39), 110 (JA45), and of the works of others, *id.* ¶ 34 (JA20–21) (describing CIA investigation into allegations of viewpoint-based censorship). Moreover, Plaintiffs point to these instances only to underscore the reasonableness of their argument that the breadth and vagueness of Defendants' regimes invites discriminatory enforcement.

F.2d at 1370; Opp. 44–45. But this is a far narrower proposition than the government defends here.[7] Defendants' review standards prohibit *any discussion* of classified material in the public domain *regardless* of whether a former employee is "in a position to know of [that information] officially." *Knopf*, 509 F.2d at 1370; *see, e.g.*, ODNI Instruction 80.04 § 6(A)(2) (JA135).[8]

Finally, the government rejects Plaintiffs' argument that Defendants' regimes permit censorship of information regardless of whether its disclosure would cause harm and regardless of the public interest in the information. Opp. 45–46. But its explanation—that censorship of properly classified information is *always* in the public interest and *always* consistent with the First Amendment—is wrong. *See, e.g.*, *N.Y. Times Co. v. United States* (*Pentagon Papers*), 403 U.S. 713 (1971). The

[7] Likewise, the government insists that it may censor this kind of discussion because "readers may naturally assume that the former employee learned the information through her employment." Opp. 45. This is a concern that agencies could—and often do—address by requiring authors to add disclaimers to their manuscripts.

[8] Plaintiffs' Complaint bears this out: For example, the CIA censored a draft by Mr. Goodman—who has not had access to CIA information since 1986—discussing press accounts reporting on the agency's use of armed drones overseas, a program that commenced decades after he left the agency. Compl. ¶ 90 (JA39); *see* Compl. ¶ 75 (JA34) (similar for Mr. Immerman); Compl. ¶¶ 110, 114 (JA45, 46) (similar for Mr. Fallon). Even accepting the government's argument that *Knopf* requires courts to "presume[]" that former employees "have learned all the classified information to which they had access," Opp. 45, that does not address situations like Mr. Goodman's, where he pointedly *did not* have access to the information the agency censored.

government rejects the relevance of *Pentagon Papers* by insisting that the standard relied upon by Justice Stewart in his concurring opinion "does not apply where a secrecy agreement forbids the disclosure of classified information." Opp. 46 n.11. But standard aside, the point is that restraining the publication of even properly classified information is subject to First Amendment scrutiny.[9]

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

As Plaintiffs and amici have made clear, Pls.' Br. 43–45; Br. of Professors Goldsmith & Hathaway 15–20, Defendants' regimes lack adequate procedural safeguards to mitigate the risks inherent in censorship regimes. The government's defense of Defendants' regimes is unpersuasive.

First, the government points to Defendants' "target timeline[s] for review," Opp. 47, but a target is not sufficient to satisfy the First Amendment—indeed, this Court rejected such an approach in *Marchetti*. 466 F.2d at 1317. Moreover,

[9] In addressing Plaintiffs' argument that the practice of cross-agency referrals exacerbates the constitutional deficiencies of Defendants' regimes by subjecting Plaintiffs and other former employees to review standards developed by agencies for which they never worked, Pls.' Br. 43, the government simply insists that all agencies' prepublication review regimes are constitutional, Opp. 47. But the government has no answer to Plaintiffs' allegations that no agency specifies the terms under which referrals will be made. And for all the government's emphasis on Plaintiffs' contractual agreements, it fails to explain why such contracts authorize review by agencies with which former employees have never entered into agreements.

Defendants do not consistently meet these targets, *see, e.g.*, Compl. ¶ 36–40 (JA21–24) (Mr. Fallon), at least one estimates year-long reviews for books, *id*. ¶ 29 (JA18), and the absence of firm deadlines gives agencies discretion ripe for abuse, *see*, *e.g.*, *id*. ¶ 75 (JA34–35), ¶ 89 (JA38), ¶ 110 (JA45).[10]

Second, the government claims that "limited resources" and "the volume of submitted material" make firm deadlines "impossible." Opp. 48. But this argument proves far too much. If accepted, the constitutional limitations on licensing schemes would be illusory. *See, e.g.*, *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561 (1975). Of course, it may be true that different types of works might reasonably require different timelines, but the First Amendment requires that these timelines have real bite. *See, e.g.*, *Marchetti*, 466 F.2d at 1317 (citing *Freedman*, 380 U.S. 51); *Harman v. City of New York*, 140 F.3d 111, 121 (2d Cir. 1998); *Crue v. Aiken*, 370 F.3d 668, 679 (7th Cir. 2004). The alternative—that agencies may, without explanation or justification, extend review indefinitely until an author sues—is constitutionally impermissible because of the cost it imposes on First Amendment

[10] *See also* Cent. Intelligence Agency, *Report of Inspection by the Inspector General of the Prepublication Review Process* 1 (Jan. 2017), https://perma.cc/5KKP-UBYY ("The Publications Review Board [] is not meeting the 30-day completion guideline described in Agency Regulation (AR) 13-10 . . . in an increasing number of reviews of book manuscripts because of resource constraints and its prioritization of shorter-length manuscripts.").

freedoms. *Chesapeake B&M, Inc. v. Harford Cty.*, 58 F.3d 1005, 1011 (4th Cir. 1995); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226–27 (1990).

II. Plaintiffs have standing.

As the district court correctly recognized, Plaintiffs have standing because Defendants' prepublication review regimes chill their speech. Op. 25 (JA170). They also have standing because they cannot speak without first obtaining Defendants' permission, and because they face a credible threat of sanctions if they fail to comply with Defendants' regimes. Defendants' arguments misconstrue Plaintiffs' allegations, conflate standing with the merits, and ignore the fact that "standing requirements are somewhat relaxed in First Amendment cases," *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013).

A. Plaintiffs' injuries stem from the specific manner in which Defendants have implemented prepublication review.

The government argues that Plaintiffs lack standing because *Snepp* forecloses them from challenging the fact that they are required to submit manuscripts for review. *See, e.g.,* Opp. 16–17, 18, 19–20. But Plaintiffs are *not* challenging the mere fact that they are required to submit manuscripts for review. Rather, they are challenging the constitutionality of Defendants' regimes, which implement the prepublication review requirement through specific standards and processes.

Put another way, Plaintiffs are challenging Defendants' *implementation* of the prepublication review requirement. For example, they allege that Defendants'

submission standards have injured them by requiring them to submit more material for review than can be justified and by leaving them confused about whether they must submit. *See, e.g.*, Compl. ¶ 66 (JA32) (Mr. Edgar); ¶¶ 105–06 (JA43–44) (Mr. Fallon); ¶ 96 (JA40–41) (Ms. Bhagwati). They allege that Defendants' review standards have injured them by permitting the agencies to censor their words arbitrarily, without justification, and solely to avoid embarrassment. *See, e.g.*, *id.* ¶ 64 (JA31) (Mr. Edgar), ¶¶ 75–76, 78 (JA34–35) (Mr. Immerman), ¶¶ 90–91 (JAXX) (Mr. Goodman), ¶¶ 110–11, 114 (JA45, 46) (Mr. Fallon). And they allege that the absence of clear deadlines has injured them by deterring them from writing time-sensitive publications, delaying other publications, and forcing them to cancel events, incur travel costs, or pay more for expedited publishing. *See, e.g.*, *id.* ¶ 80 (JA36) (Mr. Immerman), ¶ 92 (JA39) (Mr. Goodman), ¶¶ 107–110, 112 (JA44–46) (Mr. Fallon).

B. Plaintiffs have standing because they are subject to government licensing schemes that invest executive officers with overly broad discretion to suppress speech.

The government also argues that Plaintiffs do not have standing to challenge prepublication review as a licensing scheme because Defendants' regimes are not licensing schemes and do not give government officials unbridled discretion. Opp. 18. Both arguments miss their mark. As discussed above, prepublication review is a prior restraint, and the clearance Plaintiffs must seek from Defendants is the

functional equivalent of a license to speak. *See supra* Part I.B.; Pls.' Br. Part I.B. "In the area of freedom of expression it is well established that one has standing to challenge a [regime] on the ground that it delegates overly broad licensing discretion to an administrative office." *Freedman*, 380 U.S. at 56; *see also Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992). Plaintiffs have sufficiently alleged that Defendants' regimes invest government censors with overly broad discretion. *See, e.g.*, Compl. ¶¶ 4, 33, 39, 45, 51, 120 (JA10–11, 20, 23–24, 26, 28, 47). The government, of course, disagrees with this characterization of the regimes, but this disagreement goes to the merits, not standing.

The government's argument that Plaintiffs waived their First Amendment rights by agreeing to submit their manuscripts for review is equally unavailing. As the D.C. Circuit recognized in *McGehee*, contractual waivers of employee speech rights are subject to First Amendment scrutiny "whether the government seeks to restrict the speech rights of its employees by individual contract or by a broad rule applicable to a class of employees." *McGehee v. Casey*, 718 F.2d 1137, 1147–48 (D.C. Cir. 1983); *see also Mansoor*, 319 F.3d at 139 n.4.

C. Plaintiffs have standing because Defendants' prepublication review regimes chill protected speech.

The district court correctly held that Plaintiffs have standing because they have plausibly alleged that Defendants' prepublication review regimes cause them to self-censor. Op. 31 (JA176); *see also Cooksey*, 721 F.3d at 235. Defendants

concede that "[a]n author might plausibly choose to avoid the need for review by avoiding subjects that would trigger her review obligation, or by not publishing at all," but they contend that such chill cannot establish Plaintiffs' standing because it arises from the fact, rather than the specific implementation, of prepublication review. Opp. 20. This is incorrect. As the district court correctly held, Plaintiffs' self-censorship arises from specific features of Defendants' regimes: the vagueness and breadth of the submission and censorship standards, the absence of firm timelines for review, and the severity of the sanctions for failing to submit material for review. Op. 28–29 (JA173–74); *see also* Compl. ¶¶ 66, 80, 92–93, 112, 118–19 (JA32, 36, 39–40, 45–46, 47).

Recycling an argument that the district court found "peculiar," Op. 31 (JA176), the government contends that, far from chilling Plaintiffs' speech, Defendants' regimes enable speech by ensuring that authors can publish manuscripts without having to fear that they will be sanctioned, after the fact, for disclosure of classified information. This argument proves too much. Indeed, it would justify the imposition of virtually *any* prior restraint—whether on films to allow review for obscenity, or on protests to allow review for incitement. This argument is also beside the point. As explained above, Plaintiffs challenge not the existence of review but Defendants' implementation of it. The supposed benefit the government invokes

could be achieved with a more carefully drawn system of review, or even a voluntary one.

The government's reliance on *McGehee* is also misplaced. In *McGehee*, the D.C. Circuit held only that review for "[i]nformation properly classified as 'secret'"—a standard the court determined was not "unconstitutionally vague" and which was limited to disclosures that would "pose[] a reasonable probability of 'serious harm'"—could "alleviate[] a former agent's fear that his disclosure of non-sensitive information might result in liability." 718 F.2d at 1143, 1147. In contrast, where, as here, the government's review is not so limited, the court recognized that it could constitute "an intolerable burden." *Id.* at 1145.

D. Plaintiffs have standing because they face a credible threat of enforcement for non-compliance.

Finally, the government argues that Plaintiffs do not face a credible threat of sanctions because they "do not allege any intention to engage in the proscribed conduct of defying their review obligations" and fail to point to any penalties that could result even if they did. Opp. 22. This argument similarly falls flat. To establish standing, Plaintiffs must show that they intend to engage in conduct that is arguably proscribed by law or policy and that they face a credible threat of sanctions. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 303 (1979). Here, the government concedes that Plaintiffs are subject to Defendants' prepublication review regimes and that these regimes proscribe Plaintiffs' speech. Moreover, this Court

presumes that a regulation "that facially restricts expressive activity by the class to which the plaintiff belongs presents . . . a credible threat." *Cooksey*, 721 F.3d at 237 (quotation marks omitted). This presumption is supported by Plaintiffs' alleged fear of incurring sanctions for non-compliance. *See, e.g.*, Compl. ¶ 119 (JA47) (Mr. Fallon's fear of security clearance revocation); *id.* ¶ 86 (JA31–31) (Mr. Goodman's receipt of letters threatening the imposition of legal remedies for noncompliance). Absent Defendants' disavowal of "any intention of invoking . . . penalties," *Babbitt*, 442 U.S. at 302, this is sufficient to establish standing.

III. Plaintiffs' claims are ripe.

Plaintiffs' claims are ripe because Defendants' regimes are chilling their speech, and because the dispute between the parties is real and concrete. The government argues that Plaintiffs ask this Court to resolve their claims "in the abstract," Opp. 23, and that Plaintiffs would suffer no material hardship if this case were dismissed because they could instead challenge specific censorship decisions in individual cases, *id.* at 24. But this again misconstrues Plaintiffs' claims. It also ignores this Court's instruction that "[m]uch like standing, ripeness requirements are also relaxed in First Amendment cases." *Cooksey*, 721 F.3d at 240.

The Complaint makes clear, through detailed factual allegations, that delaying review of Plaintiffs' claims would cause substantial hardship. Moreover, the facts and claims presented here are different from those that would be presented in an as-

applied challenge. Here, Plaintiffs do not challenge Defendants' review (or failure to review) a specific manuscript, but rather the injuries that result from constitutional deficiencies in the standards and processes that comprise Defendants' regimes. They describe those deficiencies in detail, and they describe their injuries in detail, too. Accordingly, this case is ripe for the same reasons that other First Amendment pre-enforcement challenges are routinely found to be ripe.

Conclusion

Respectfully, this Court should reverse the district court's grant of the government's motion to dismiss.

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Respectfully submitted,

/s/ *Jameel Jaffer*

Jameel Jaffer
Alex Abdo
Ramya Krishnan
Lyndsey Wajert
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
T: (646) 745-8500
F: (646) 661-3351
jameel.jaffer@knightcolumbia.org

Brett Max Kaufman
Vera Eidelman
Shreya Tewari
Ben Wizner
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
T: (212) 549-2500
F: (212) 549-2654
bkaufman@aclu.org

David R. Rocah
American Civil Liberties Union Foundation of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
T: (410) 889-8555
F: (410) 366-7838
rocah@aclu-md.org

Attorneys for Plaintiffs–Appellants

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Dated: November 13, 2020

/s/ *Jameel Jaffer*
Jameel Jaffer

Counsel for Plaintiffs–Appellants

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I, Jameel Jaffer, certify that on November 13, 2020, I electronically filed the foregoing brief with the Clerk of the Court of 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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/s/ *Jameel Jaffer*
Jameel Jaffer

Counsel for Plaintiffs–Appellants