No. 17-94

IN THE

Supreme Court of the United States

STAGG, P.C.,

Petitioner,

v.

U.S. DEPARTMENT OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS, AND REX W. TILLERSON, SECRETARY OF STATE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case involves a content-based prior restraint on pure speech, as the Government asserts that the underlying law treats domestic publication as an automatic export, regardless of the speaker's intent. Because it is a content-based restriction, the law is presumptively unconstitutional and the burden shifts to the Government to rebut that presumption in a preliminary injunction proceeding. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Moreover, as a prior restraint, "courts must entertain an immediate facial attack on the law." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759 (1988).

Nevertheless, in conflict with this Court and ten other circuits, the lower courts refused to undertake the required consideration of the merits. They also ignored that invocation of the public interest cannot trump a facially unconstitutional law. Both errors deepen existing circuit splits.

The Government's Brief in Opposition confirms that this Court's review is necessary. The requested injunction only involves the Government's broad prior restraint on domestic pure speech, through a pre-publication requirement, the unconstitutionality and irreparable harm of which the Government does not contest. Indeed, the Government concedes that it applies the licensing scheme to pure speech, and it therefore requires First Amendment safeguards. *Freedman v. Maryland*, 380 U.S. 51 (1965); *Lakewood*, 486 U.S. 750. Because this pure speech-inhibiting restraint fails to provide those safeguards, it is facially unconstitutional.

In its Opposition, the Government critically does not and cannot refute that neither it nor the public has any interest in enforcing an unconstitutional law. This truth dooms the Government's arguments. It also demonstrates the blatant error of the courts below in improperly elevating the Government's stated national security assertions above all other factors, even though they do not rebut the law's presumptive unconstitutionality. By omitting any analysis of the merits, the Second Circuit joined the Fifth Circuit on the minority side of a clear circuit split. And, their acceptance of national security as a trump card conflicts with several courts, including decisions rejecting the Government's efforts to justify unconstitutional laws on national security grounds, which the Government does not deny.

Finally, the Government does not deny the importance and recurrence of the issues in the case, nor does it contest the strength of the case as a vehicle for resolving the questions presented.[1] Instead, the Government primarily analogizes to this Court's decision in *Winter v. NRDC*, 555 U.S. 7 (2008). But the Government's reliance on *Winter* does not withstand scrutiny: it did not involve the First Amendment or any other constitutional provision, but

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[1] The Petitioners in *Defense Distributed v. Dep't of State*, *cert. petition pending,* No. 17-190 (filed August 7, 2017), criticize this case as a vehicle for resolving the questions presented. *Id.* at 37-40. Notably, the government makes no such critiques. Moreover, the courts below plainly held that Stagg has a sufficient stake in the outcome of the case. Pet.App. 3a-5a & n.1. And *Defense Distributed*'s suggestion that Petitioner here had worked on the case there at issue is mistaken and irrelevant, as there is no conflict.

it did make clear that national security is not a trump card to other preliminary injunction considerations.

This Court's review is warranted.

ARGUMENT

I. THE GOVERNMENT UNPERSUASIVELY ATTEMPTS TO SIDESTEP THE SPLIT OVER WHETHER COURTS MUST ADDRESS THE MERITS OF A CONSTITUTIONAL CHALLENGE IN CONSIDERING WHETHER TO GRANT A PRELIMINARY INJUNCTION.

1. In denying a preliminary injunction, the Second Circuit relied on the Fifth Circuit's flawed decision in *Defense Distributed v. U.S. Dep't of State*, 838 F.3d 451 (5th Cir. 2016). In so doing, it held that courts need not decide whether a plaintiff is likely to succeed on the merits of a First Amendment claim (or to suffer irreparable harm) when the Government asserts a public interest in national security. The Second Circuit's decision is wrong, and it departs from the decisions of ten other circuits.

Initially, the Government is wrong that the Petitioner has the burden of proof in this case. Opp. 14, 19-20. As a content-based speech regulation, the law is presumptively unconstitutional and the Government bears the burden in a preliminary injunction matter of rebutting that presumption. *Ashcroft*, 542 U.S. at 666. "[W]e require the Government to shoulder its full constitutional burden of proof . . . rather than excuse it from doing so." *Id.* at 671; *see also United States v. Steven*s, 559 U.S. 460, 468 (2010). Thus, the lower courts' error is compounded by their failure to allocate properly the

inescapable burden to the Government to rebut the law's presumptive unconstitutionality.

The Government is also wrong that the doctrine of constitutional avoidance applies in First Amendment prior restraint cases. Opp. 16. Rather, in such cases, "courts *must* entertain an *immediate* facial attack on the law." *Lakewood*, 486 U.S. at 759 (emphasis added). Moreover, the Court has repeatedly admonished lower courts to avoid "undue delay result[ing] in the unconstitutional suppression of protected speech." *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 782 (2004) (citation omitted).

2. Furthermore, a court cannot assess any of the other preliminary injunction factors in the context of a First Amendment challenge without first analyzing the merits of that challenge. In conceding that the factors *are* related, the Government is plainly wrong to suggest that the merits are only relevant to irreparable harm. Opp. 17. The impact of the merits analysis goes beyond that one factor, as the majority of circuits emphasize: "the determination of where the public interest lies [] is *dependent* on a determination of the likelihood of success on the merits of the First Amendment challenge." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (emphasis added); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (same); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012) (same).

As the First Circuit stated: "In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis. […] It was therefore incumbent upon the district court to engage with the merits *before* moving

on to the remaining prongs of its analysis." *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 10-11 (1st Cir. 2012) (per curiam) (emphasis added). Similarly, the D.C. Circuit recently addressed a preliminary injunction involving a facial constitutional challenge and awarded relief based solely on the merits. *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017) ("[H]ere the merits of the plaintiffs' challenge are certain and don't turn on disputed facts, so our analysis can stop at the first, merits prong of this inquiry.").

Most importantly, if the law is deemed unconstitutional, it eliminates the public's interest in enforcing the law altogether because "[t]he public has no interest in enforcing an unconstitutional [law]." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Indeed, similar to the D.C. Circuit's decision in *Wrenn*, this Court has found success on the merits sufficient for a preliminary injunction, because when a law "violates the First Amendment [it] cannot be sustained." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2332 (2013).

3. Although the Second Circuit did not cite this Court's decision in *Winter* in support of its decision to forego an analysis of the merits, the Government now asserts that *Winter* permits courts to do just that. Opp. 15. Importantly, though, *Winter* did not involve claims under the First Amendment or any other constitutional provision. There was thus no *constitutional* issue for the Court to address to ensure the Government was not enforcing an unconstitutional law contrary to the public interest.

The Court's First Amendment jurisprudence on preliminary injunctions before and after *Winter* make clear the primacy of the merits. *Ashcroft*, 542 U.S. at 666; *All. for Open Soc'y Int'l*, 133 S. Ct. at 2332. Moreover, the Court held that the plaintiff in *Winter* did not show irreparable harm, 555 U.S. at 22, which the Government correctly does not contest here. The Court also cautioned courts, even outside the constitutional context, that "military interests do not always trump other considerations, and we have not held that they do." *Id.* at 26. Nevertheless, the Government reads *Winter* as a trump card when it asserts national security—and in the First Amendment context.

Similarly, the Government's reliance on a single stay case, *Nken v. Holder,* 556 U.S. 418 (2009), is misplaced. Opp. 18-19. That case did not involve the First Amendment or any constitutional claim. The Government stubbornly treats this case as a run-of-the-mill injunction matter, while ignoring that it actually involves a First Amendment challenge to a prior restraint.

4. Tellingly, the Government entirely ignores this Court's decision in *Ashcroft*, which makes clear that as a part of any preliminary injunction analysis tied to a constitutional claim, the court "*must* consider whether the plaintiffs have demonstrated that they are likely to prevail on the merits." 542 U.S. at 666 (emphasis added).

5. The Government incorrectly claims that merits analysis is required only in the context of a decision to *grant* injunctive relief and suggests that the requirement does not extend to cases in which a court

ultimately *denies* injunctive relief. Opp. 21. But that's not true.

In *Fortuno*, for example, the First Circuit reversed a district court's decision to *deny* a preliminary injunction because the court failed to consider the plaintiffs' likelihood of success on the merits. 699 F.3d at 16. There, without limitation, the First Circuit explicitly characterized the merits analysis as "the most important part of the preliminary injunction assessment." *Id.* at 7 (quoting *Jean v. Mass. State Police*, 492 F.3d 24, 27 (1st Cir. 2007)).

Importantly, none of the cases cited by the Petitioner or Government state that the need to address the merits turns on whether the court grants or denies the injunction. Indeed, many circuits make clear from the outset that the public interest depends on the merits, thus requiring its consideration. Pet. 16-18.

6. Finally, the Government cites no case before this one and *Defense Distributed* where a court has refused to consider the merits in a First Amendment case. The Government also points to no case where a plaintiff was likely to prevail on the merits on a First Amendment claim but denied relief because of the public interest.

Contrary to the decisions in *Ashcroft* and ten other circuits, the Second Circuit declined to address the merits of the First Amendment claim, involving a content-based prior restraint on pure speech. Accordingly, the court did not consider the impact of the likelihood of success on the merits on the other preliminary injunction factors, and thereby

erroneously lifted the Government's burden of overcoming the law's presumptive unconstitutionality.

II. THE GOVERNMENT IGNORES WHETHER THE PUBLIC'S INTEREST IN NATIONAL SECURITY CAN JUSTIFY AN UNCONSTITUTIONAL LAW.

1. The Government does not contest the unconstitutionality of the prior restraint here and does not deny that the public has no interest in enforcing an unconstitutional law. The Government's silence on these issues is telling, and a tacit acknowledgment it is "obvious" that "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *see also All. for Open Soc'y Int'l*, 133 S. Ct. at 2332; Pet. 22, 27 (listing circuits that follow same standard). The Second Circuit thus caused a circuit-split in holding otherwise.

While national security is important, it cannot be justified by the enforcement of an unconstitutional law. That is particularly the case where, as here, the Government's purpose for regulating domestic pure speech is dubious and highly-attenuated: that foreign persons *might* benefit from such publications. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010) ("[W]e in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations."); *United States v. Posey*, 864 F.2d 1487, 1497 (9th Cir. 1989) ("It would hardly serve First Amendment values [for] the government to purge the public libraries of every scrap

of data whose export abroad it deemed for security reasons necessary to prohibit.").

2. In this context, the opening burden is on the Government to rebut the facial unconstitutionality of the law itself. *Ashcroft*, 542 U.S. at 666. Thus, a plaintiff has no obligation to rebut the Government's secondary national security assertions, which are only relevant if the Government can rebut the law's unconstitutionality. Here, the Government does not dispute that its prior restraint on pure speech regulates domestic publication, including the republication of publicly available information that has been published since the 1950s.[2] *But see Bartnicki v. Vopper,* 532 U.S. 514, 534-35 (2001) (prohibiting punishment of republication of publicly-available information). The government also does not attempt to show that such a facial restriction can pass constitutional muster. Indeed, the Justice Department's Office of Legal Counsel has repeatedly advised that the prior restraint violates the First Amendment. *See, e.g.*, Office of Legal Counsel, U.S. Dep't of Justice, *Constitutionality Under the First Amendment of ITAR Restrictions on Public Cryptography* (May 11, 1978).

The Government incorrectly suggests, however, that Stagg made no attempt to respond to its asserted

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[2] In a footnote, the Government explains that the Department of State is currently developing a proposed rule that, if put into effect, would remove "certain commercially available firearms and ammunition" from the Munitions List. Opp. 11, n.3. Although this affects *Defense Distributed*, which only publishes information on those topics, the proposed rule is not relevant here as Stagg's publications extend beyond that one category.

interest in protecting national security. Opp. 14. Quite the contrary, Stagg clearly addressed the Government's claim that it must control domestic pure speech as an "export" for national security purposes. Pet. 34. For instance, the Commerce Department also regulates the export of items for national security reasons—but it specifically does not regulate publishing such information. 15 C.F.R. § 734.7; 81 Fed. Reg. 35586, 35589 (June 3, 2016) (affirming it does not regulate publication and expressing no concerns it will harm national security). Furthermore, Stagg has repeatedly emphasized that the Government itself stated until 2015 that it did not control such domestic pure speech, Pet. 8-9, and yet the Government has proffered not even one example where information published in that 30-year period caused any harm to national security.[3]

3. The Government does not deny that the single reliance on national security to justify a presumptively unconstitutional law is in conflict with the Court's decision in *New York Times Company v. United States*, 403 U.S. 713 (1971) ("Pentagon Papers"). Even though in Pentagon Papers the Government put on *substantial* evidence to demonstrate harm to national security if classified information were republished, Pet. 29-30, the Court noted the "heavy presumption" against the constitutional validity of a prior restraint and invalidated the Government's restraint regardless

[3] In a footnote, the Government incorrectly suggests that the law limits its controls on republication. Opp. 4 n.1. The quoted limitation, however, is only a *proposed* "new provision," as clearly stated in the 2015 Federal Register notice, and there is no indication it will ever take effect. Current law imposes strict civil liability on any unlicensed republication. 22 C.F.R. § 127.1.

of its stated public interest in national security. 403 U.S. at 714. Here, by stark contrast, the Government relies on a *single* official who provides only a few paragraphs speculating about what *might* or *could* happen if it cannot enforce a facially unconstitutional law. Pet. App. 6a-7a. With virtually no evidence, the Government cannot obtain more than it did in Pentagon Papers.

4. The Government does not even address the "immigration ban" cases in which courts have repeatedly rejected the Government's recent efforts to justify Executive Orders challenged as unconstitutional on national security grounds. The holdings in those cases directly conflict with the Second Circuit's decision below and deepen the circuit split on this issue. Pet. 31-32. Importantly, the courts have reasoned that even if national security is considered among "the most compelling of government interests," it does not follow that national security concerns "will always tip the balance of the equities in favor of the government." *See, e.g., Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 603-04 (4th Cir. 2017) (en banc), *cert. granted*, 137 S. Ct. 2080 (2017), *vacated and dismissed as moot*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017); *see also Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017), *cert. granted, judgment vacated*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017), *vacated and dismissed as moot*, No. 17-15589, 2017 WL 5034677 (9th Cir. Nov. 2, 2017). Even though some of these cases are now moot, the underlying rationale still stands. Indeed, the courts deciding the cases that continue to percolate have applied the same key principles in stopping the enforcement of the unconstitutional

orders. *See, e.g., Int'l Refugee Assistance Project v. Trump*, No. CV TDC-17-0361, 2017 WL 4674314, at *39 (D. Md. Oct. 17, 2017) (concluding that national security interests were not "paramount" where the protection of First Amendment rights is at stake).

5. The Government also suggests that the Second Circuit was justified in concluding that national security concerns must trump all other preliminary injunction factors in part because Stagg sought categorical relief rather than identifying the specific information it planned to publish. Opp. 14-15. But the Court has repeatedly made "clear" that case-by-case relief is inappropriate because *only* categorical relief from a facially unconstitutional prior restraint is appropriate. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). That is because the Government cannot enforce a facially unconstitutional prior restraint on an as-applied basis. *Id.* It would have been evident to the Second Circuit that categorical relief was appropriate if it had addressed the presumptive unconstitutionality of the prior restraint, as it was required to do.

CONCLUSION

The petition for a writ of certiorari should be granted. At the least, this case should be consolidated with *Defense Distributed*, and certiorari granted in each, or held for the Court's consideration of *Defense Distributed*.

Respectfully submitted,

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