No. 21-791

IN THE

Supreme Court of the United States

TIMOTHY H. EDGAR, ET AL.,
Petitioners,

v.

AVRIL D. HAINES, IN HER OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PROFESSOR JACK GOLDSMITH AND PROFESSOR OONA A. HATHAWAY AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors specializing in national security who have served in government positions that required them to agree to lifetime prepublication review. Jack Goldsmith is the Learned Hand Professor at Harvard Law School, having previously served as Assistant Attorney General in the Office of Legal Counsel in the Department of Justice and Special Counsel to the General Counsel of the Department of Defense. Oona Hathaway is the Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School, having previously served as Special Counsel to the General Counsel in the Department of Defense.[2]

Amici have experienced the chilling effect of the prepublication review processes. They have also studied and written on the history of prepublication review, the First Amendment harms inflicted by the processes, and how prepublication review should be fixed. *See, e.g.*, Jack Goldsmith & Oona Hathaway, *The Government's Prepublication Review Process Is Broken*, Wash. Post, Dec. 25, 2015[3]; Jack Goldsmith & Oona Hathaway, *More Problems with Prepublication Review*, Law-

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[1] No party's counsel authored any part of this brief; no party or party's counsel made a monetary contribution to fund this brief; no person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. Counsel for petitioner and respondent consented to the filing of this brief.

[2] Affiliations are provided for identification purposes only. The views of *amici* do not necessarily reflect the view of Harvard Law School or Yale Law School.

[3] http://wapo.st/1YTgg1j.

fare (Dec. 28, 2015)[4]; Jack Goldsmith & Oona Hathaway, *The Scope of the Prepublication Review Problem, And What To Do About It*, Lawfare (Dec. 30, 2015).[5]

Amici submit this brief to provide the Court with their unique perspective on these important issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

The prepublication review processes at issue in this case are part of the largest system of prior restraint in U.S. history, restricting the speech of millions of current and former government employees. There are more U.S. citizens who are subject to the prior-restraint regimes at issue in this case than there are citizens of many U.S. states. The type of content subjected to review is broadly and vaguely defined, covering even *non*-confidential material. The form of the constrained speech is limitless, covering everything from books to op-eds to academic syllabi. And the restrictions end only upon death. The result, as *amici* have experienced, is that many of those with the most to contribute to pressing debates about foreign affairs and national security are silenced—either directly, through unjustified delay or forced redaction of views unflattering to the government, or by making the preclearance processes so Kafkaesque that they deter those subject to them from trying to speak at all.

One would think that a prior restraint of this scale would have been subject to careful scrutiny from this

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[4] https://www.lawfareblog.com/more-problems-prepublication-review.

[5] https://www.lawfareblog.com/scope-prepublication-review-problem-and-what-do-about-it.

Court. "Any system of prior restraint," this Court has emphasized, "comes to this Court bearing a heavy presumption against its constitutional validity." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). It is "deeply etched in our law" that "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Id.* at 559.

In actuality, though, the federal government's publication-review edifice rests on the shakiest of judicial foundations: a footnote in the procedural history section of a case this Court decided without merits briefing or oral argument. *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980). At the time of that footnote, the relevant prior-restraint system applied to a small number of officers in the Central Intelligence Agency ("CIA") and National Security Agency ("NSA"). But, with *Snepp*'s footnote as support, the federal government has expanded prepublication review to become the massive prior-restraint system it is today.

Snepp's drive-by constitutional ruling should not be the last word on this vitally important issue. Regardless of how this Court ultimately comes out on the merits, a system that requires the government's blessing before millions of U.S. citizens can speak regarding matters of vital public importance warrants far more than a few sentences in a footnote in a case that was not even briefed or argued. *Amici*'s experience as subjects of this system—which is consistent with others' experiences in the public record—shows that the current prepublication review regimes are not just unfair to the millions of individuals who have dedicated their careers to public service, but also deprive the public of

the perspectives of those whose opinions may be the most valuable.

That is not to say, of course, that the government has no countervailing interest—to the contrary, its interest in protecting confidential information related to national security is indisputably a compelling one. The problem with the *Snepp* footnote is not that it recognized that interest, but that it provided what the government and lower courts have read as a blanket authorization of *any* prepublication review regime that invokes national security, without requiring meaningful consideration of the First Amendment interests at stake.

The absence of a circuit conflict should not deter the Court from granting certiorari because there is no meaningful chance such a conflict will develop. Few are willing to challenge the preclearance processes: the odds of success are low given *Snepp*, and there is significant risk of alienating the preclearance reviewers who must bless future publications. The few individuals who have brought challenges have, like Petitioners, found the courts of appeals unwilling to look past *Snepp*'s footnote.

In sum, there is almost no chance that, absent *Snepp*, the federal government could impose its current prepublication review system without careful First Amendment scrutiny from the courts of appeals and this Court. *Snepp*'s footnote should not short-circuit that much needed consideration.

ARGUMENT

I. The footnote in this Court's per curiam decision in *Snepp* has become the foundation of the largest system of prior restraint of speech in U.S. history.

This Court should reconsider or clarify its footnote in *Snepp*. That case involved a First Amendment question of enormous import—under what circumstances the government may impose a system of prepublication review that prohibits a citizen from publishing information, even if clearly unclassified, absent the government's prior blessing. Without the benefit of merits briefing or argument, this Court resolved that question in a cursory footnote that, at least as interpreted by the federal government and courts of appeals, gave the government almost unlimited authority to impose prepublication review. Relying on *Snepp*'s footnote, the federal bureaucracy has built an expansive system of prepublication review, spanning over a dozen agencies and covering millions of current and former employees and contractors. That system looks nothing like the limited regime that existed when *Snepp* was decided. This Court should grant certiorari to ensure that the First Amendment rights of millions of current and former government employees are given meaningful judicial consideration.

A. At the time of *Snepp*, prepublication review was a limited regime affecting a small number of CIA and NSA officials.

Prepublication review started in the 1950s as a small and largely informal process at the CIA and NSA. During the 1950s and 1960s, "few employees, current or former, were engaged in writing or speaking publicly on

intelligence [matters]," and so review of any publications could be effectively handled by existing agency components. *See* Charles A. Briggs, CIA Inspector General, *Inspection Report of the Office of Public Affairs* 1 (1981) (declassified Nov. 6, 2003) ("CIA Report").[6]

That began to change in the 1970s. "The Vietnam War, the Church and Pike Committee investigations and Watergate had created a climate which encouraged former [CIA] employees to write in a critical and revealing way" about the agency. CIA Report, *supra*, at 1. As a result, "[t]he 1970's saw a marked increase in the volume of writing and public speaking by active and former CIA officers on intelligence." *Id.* In response, the CIA "decided to … formalize the process" for reviewing "nonofficial books and presentations," and in 1976 the agency "formally established a [Publication Review Board] … to review nonofficial writings of current employees." *Id.* at 2. A year later, the CIA "expanded" the Board's authority "to review the writings of former Agency employees." *Id.*

Still, even as the CIA formalized and expanded its prepublication review process, the scope of prepublication review remained limited. In 1977, only 42 publications were submitted for review. CIA Report, *supra*, at 5. By 1980, the number still stood at fewer than 200. *Id.*

B. In a footnote in a summary disposition, this Court endorses prepublication review.

This limited system of prepublication review provided the backdrop for this Court's 1980 decision in *Snepp*.

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[6] https://www.justsecurity.org/wp-content/uploads/2015/12/prb1981.pdf.

As a condition for employment in the CIA, Snepp had signed "an agreement promising that he would 'not … publish … any information or material relating to the [CIA]" or its "intelligence activities generally, either during or after the term of [his] employment." 444 U.S. at 508. Nonetheless, Snepp published a book "without submitting it to the [CIA] for prepublication review." *Id*. at 507. The government sued to enforce the agreement and to obtain a constructive trust on all profits from Snepp's book. *Id*. The district court rejected Snepp's First Amendment challenge and imposed a constructive trust. *See United States v. Snepp*, 456 F. Supp. 176, 180, 182 (E.D. Va. 1978). The Fourth Circuit also rejected Snepp's First Amendment challenge to the prepublication review regime itself, but held that Snepp had a First Amendment right to publish *unclassified* information related to his employment at the CIA. *See United States v. Snepp*, 595 F.2d 926, 931-32 (4th Cir. 1979). Because the government had conceded that Snepp's book divulged no classified information, the Fourth Circuit vacated the constructive trust. *Id*. at 935-36.

Snepp's petition for certiorari primarily asked this Court to consider the "important" issue of whether the "system of prior restraint sanctioned by the court of appeals impermissibly burdens the First Amendment rights of thousands of government employees and the public." Pet. at 7, *Snepp*, *supra* (No. 78-1871). The government's principal response was to oppose certiorari. Br. in Opp., *Snepp*, *supra* (No. 78-1871). But the government also filed a five-page cross-petition. *See* Pet., *Snepp*, *supra* (No. 79-265). The government explained that, while "the contract remedy provided by the court of appeals appear[ed] to be sufficient … to protect the [CIA's] interest," it was filing a cross-

petition so the Court "may review the entire judgment of the court of appeals" *if* the Court granted Snepp's petition. *Id.* at 2, 5. The government made clear that, "[i]f [Snepp's] petition … is denied, this petition should also be denied." *Id.* at 5.

What this Court did next was highly irregular. The Court did not grant the petitions and set the case for briefing and argument. Nor did it deny both petitions, as the government had requested. Instead, this Court summarily reversed the Fourth Circuit's ruling on the constructive trust issue that, according to the government, did *not* warrant independent review. Presumably recognizing that it lacked jurisdiction to grant the government's petition without also granting Snepp's, the Court rejected Snepp's prior-restraint argument in a cursory footnote in the procedural history section of the opinion. *See Snepp*, 444 U.S. at 509 n.3. In other words, even though the Court plainly did not consider Snepp's petition cert-worthy, it granted that petition solely to reverse the lower court's remedy ruling on which the government did *not* independently seek certiorari.

Justice Stevens' three-Justice dissent highlighted the "unprecedented" manner in which this Court "summarily" disposed of the significant First Amendment question. *Snepp*, 444 U.S. at 524 (Stevens, J., dissenting). Justice Stevens noted that the Court had "in essence" taken the "highly inappropriate" step of "grant[ing] the Government's [conditional cross-petition] while denying Snepp's," given that "[t]he majority obviously [did] not believe that Snepp's claims merit … consideration" and it was "clear that Snepp's petition would not have been granted on its own merit." *Id.* at 524-25. Justice Stevens was "unable to discover

any previous case in which the Court ha[d] … reach[ed] the merits of a conditional cross-petition despite its belief that the petition does not merit granting certiorari." *Id.* at 524 n.15.

Justice Stevens also bemoaned the Court's "unprecedented" step of summarily sustaining a novel system of "prior restraint on a citizen's right to criticize his government." *Id.* at 524, 526. Rather than give prepublication review the same searching scrutiny as other forms of prior restraint, the Court's footnote blessed the CIA's prepublication review regime merely by describing it as a "reasonable means for protecting" classified information. *Id.* at 509 n.3 (majority opinion). Justice Stevens called the majority out on this double standard, explaining that prepublication review is a "prior restraint that would not be tolerated in other contexts." *Id.* at 526 n.17 (Stevens, J., dissenting). "Inherent in this prior restraint," Justice Stevens wrote, "is the risk that the reviewing agency will misuse its authority to delay the publication of a critical work or to persuade an author to modify the contents of his work beyond the demands of secrecy." *Id.* at 526. Even aside from direct censorship, "[t]he mere fact that the Agency has the authority to review the text of a critical book in search of classified information before it is published is bound to have an inhibiting effect on the author's writing." *Id.* at 526 n.17. Thus, deciding whether the government had met its "heavy burden" to justify "a prior restraint on free speech" "should not be resolved in the absence of full briefing and argument." *Id.* at 526 & n.17.

This Court's cursory treatment of a critical First Amendment issue did not go unnoticed. Archibald Cox, in his Forward in the *Harvard Law Review*, criticized

the "summary treatment" the Court had given Snepp's First Amendment claim, arguing that "judicial indignation" toward Snepp's actions was "not an acceptable substitute for a full hearing and a reasoned opinion." *See* Archibald Cox, *Forward: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 9, 10 (1980). Others, too, noted the "summary fashion" in which the Court "brushed aside" the important First Amendment issue. Jonathan C. Medow, *The First Amendment and the Secrecy State: Snepp v. United States*, 130 U. Pa. L. Rev. 775, 779 (1982); *see also* Diane F. Orentlicher, *Snepp v. United States: The CIA Secrecy Agreement and the First Amendment*, 81 Colum. L. Rev. 662, 665 n.23 (1981) (noting the Court's "summary treatment" of the novel "first amendment issue").

C. Relying on *Snepp*'s footnote, federal agencies build the largest system of prior restraint in U.S. history.

Snepp also did not go unnoticed in the federal government. The Attorney General was initially taken aback by *Snepp*'s footnote, describing it as having given the federal government "an extremely dangerous power." Anthony Lewis, *Abroad At Home; Smith's Official Secrets*, N.Y. Times, Sept. 17, 1981.[7] He promptly issued guidelines limiting enforcement of prepublication review requirements. *See* 45 Fed. Reg. 85,529 (Dec. 29, 1980). But the unexpected gift of *Snepp*'s footnote ultimately proved too hard to resist. The Department of Justice ("DOJ") largely revoked those guidelines less than a year later, and the federal government ultimately used the *Snepp* footnote as the foundation on which

[7] https://www.nytimes.com/1981/09/17/opinion/abroad-at-home-smith-s-official-secrets.html.

to construct a new system of prior restraint far different from the one at issue in *Snepp*—one that restricts the speech of millions of current and former government employees.

1. The growth of prepublication review began in earnest in March 1983, when President Reagan issued National Security Decision Directive 84 ("NSDD-84"). NSDD-84 required "[e]ach agency of the Executive Branch that originates or handles classified information" to "adopt internal procedures to safeguard against unlawful disclosures of classified information." NSDD-84, *Safeguarding National Security Information* 1 (Mar. 11, 1983).[8] One of these procedures required "[a]ll persons" with access to "Sensitive Compartmented Information [SCI] … to sign a nondisclosure agreement," which had to "include a provision for prepublication review to assure deletion of SCI and other classified information." *Id.*

The DOJ then issued a regulation to implement NSDD-84, which made clear that the non-disclosure and prepublication review requirements extended during "or subsequent to" employment, and covered not just "books" but also "all other forms of written materials." *See* 48 Fed. Reg. 39,313, 39,314 (Aug. 30, 1983); *see also* Michael L. Charlson, *The Constitutionality of Expanding Prepublication Review of Government Employees' Speech*, 72 Cal. L. Rev. 962, 969-71 (1984). DOJ also released a nondisclosure agreement, which imposed a lifetime prepublication review requirement on employees with access to SCI. *See* Charlson, *supra*, at 970-71. The Department expressly justified "[t]he obligation … to comply with agreements requiring pre-

[8] https://irp.fas.org/offdocs/nsdd/nsdd-84.pdf.

publication review" as having "been held by the Supreme Court [in *Snepp*] to be enforceable." 48 Fed. Reg. at 39,314.

NSDD-84 led to a significant expansion of the scope of prepublication review across other federal agencies. By 1984, nearly two dozen agencies required some form of prepublication review, and half of them subjected employees to this prior restraint "regardless of whether they ha[d] SCI access." *See* U.S. Gov't Accountability Off., GAO/NSIAD-84-134, *Polygraph and Prepublication Review Policies of Federal Agencies* 2-3 (1984).[9] Under this regime, potentially millions of current and former federal employees were subject to prepublication review. *Id*. at Encl. I at 4. Many agencies' employees were subject to prepublication review "regardless of whether they ha[d] access to classified information" at all. Charlson, *supra*, at 962 n.2. The upshot was that prepublication reviewers throughout the federal bureaucracy were exercising censorship authority over tens of thousands of publications. *See* U.S. Gov't Accountability Off., *Polygraph and Prepublication Review*, *supra*, Encl. I at 5.

2. This regime initially met opposition from Congress. At a hearing on NSDD-84, one Senator disparaged the prepublication review processes as "that very prior restraint to which the framers of the Constitution were so hostile," because it required public servants to take "a virtual vow of silence on some of the crucial issues facing our nation." *National Security Decision Directive 84: Hearing before the S. Comm. on Gov't Affs.*, 98th Cong. 2 (1983) (statement of Senator Mathias (R-MD)). A House report decried NSDD-84 as "requir[ing]

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[9] https://www.gao.gov/assets/nsiad-84-134.pdf.

the creation of a large bureaucracy to censor the writings and speeches" of government employees. "As with any government censorship of political speech," NSDD-84 created a "great" "potential for political abuse" and "pose[d] a serious threat to freedom of speech and national public debate." H.R. Rep. 98-578, at 20 (1983).

In response, Congress amended the State Department Authorization Act to delay by 6 months that agency's implementation of NSDD-84 as to former employees. *See* Pub. L. No. 98-164 § 1010, 97 Stat. 1017, 1061 (1983); *see also* Charlson, *supra*, at 973-74. Then, in January 1984, legislation was introduced to prohibit prepublication review prospectively and rescind the provisions of then-existing agreements requiring prepublication review. *See* H.R. 4681, 98th Cong., 2d Sess. § 2 (1984).

Facing this legislative backlash, the Reagan Administration rescinded NSDD-84. *See* Kevin Casey, *Till Death Do Us Part: Prepublication Review in the Intelligence Community*, 115 Colum. L. Rev. 417, 429 (2015). And with the threat to the First Amendment apparently dissipated, congressional efforts to regulate prepublication review fizzled out.

But the end of NSDD-84 did not mean the end of prepublication review—not by a long shot. In fact, rescinding NSDD-84 "had little effect on prepublication review requirements." U.S. Gov't Accountability Off., GAO-T-NSIAD-88-44, *Classified Information Nondisclosure Agreements: Statement of Louis J. Rodrigues, Assoc. Dir. Nat'l Sec. & Int'l Affs. before the Subcomm. on Legis. & Nat'l Security, H. Comm. on Gov't Operations* 3 (1988).[10] For starters, rescinding NSDD-84 did

[10] https://www.gao.gov/assets/t-nsiad-88-44.pdf.

not void the prepublication review provisions in the nondisclosure agreements that thousands of federal employees already had signed. *See* Arthur M. Schlesinger, *The Cycles of American History* 298 (1986). Moreover, although the rescission of NSDD-84 meant that federal agencies were no longer *mandated* to require employees to sign non-disclosure agreements as a condition of employment, agencies across the government saw *Snepp*'s potential and jumped at the chance to control their employees' and former employees' speech. *See* Casey, *supra*, at 430 ("nondisclosure forms mandating prepublication review were still being utilized at the end of the Reagan Administration"); U.S. Gov't Accountability Off., *Classified Information Nondisclosure Agreements*, *supra*, at 3. If anything, the repeal of NSDD-84 led to a *more* expansive and confusing landscape of prior restraint regimes, as each federal agency developed its own prepublication review process without any "executive-branch-wide policy outlining what prepublication review should entail." Casey, *supra*, at 432-33.

3. The result of all of this is that the current sprawling prepublication review regimes bear no resemblance to the limited regime this Court ostensibly upheld in *Snepp*. The current system is notable in several key respects.

First, it impacts an incredibly large number of people. The system considered by *Snepp* was limited to a small number of federal employees in the CIA and NSA. Now *every* U.S. intelligence agency (and many other federal agencies) require prepublication review; in fact, there are currently at least seventeen separate prepublication review systems operating within the federal bureaucracy. *See* Knight First Amendment In-

stitute, *Interactive Chart: Prepublication Review by Agency and Secrecy Agreement* (Aug. 27, 2009).[11] "Many" of these regimes "require *lifetime* prepublication review as a condition of employment." *See* Casey, *supra*, at 431-32 & n.101. Agencies that do not condition employment on lifetime prepublication review still "require employees to sign additional nondisclosure agreements—usually as a precondition to accessing SCI—that *do* incur lifetime prepublication-review obligations." *Id*. at 432. The upshot is that more than 5 million current federal employees and contractors are presently subject to prepublication review. *See* Brian Fung, *5.1 Million Americans Have Security Clearances. That's More than the Entire Population of Norway*, Wash. Post, Mar. 24, 2014.[12] And that number does not include the millions of *former* employees, including *amici*, with obligations to submit materials for prepublication review for life.

Second, though each agency has its own rules regarding what materials may be submitted, the rules generally require review of very broad, and often quite vaguely defined, sets of subject matter. *See Myths and Realities: CIA Prepublication Review in the Information Age*, 55 Studies in Intelligence 9, 21 (Sept. 2011) (noting that agencies in the intelligence community "all abide by different standards" for prepublication review).[13] For example, the Department of Defense ("DOD") re-

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[11] https://knightcolumbia.org/content/prepublication-review-by-agency-and-agreement.

[12] https://www.washingtonpost.com/news/the-switch/wp/2014/03/24/5-1-million-americans-have-security-clearances-thats-more-than-the-entire-population-of-norway/.

[13] https://nsarchive2.gwu.edu/NSAEBB/NSAEBB431/docs/intell_ebb_018.PDF.

quires the submission of "official DoD information" that "pertains to military matters, national security issues, or subjects of significant concern to the DoD." *See* DoD Instruction 5230.09, *Clearance of DoD Information for Public Release* § 1.2(b) (Jan. 25, 2019)[14]; Pet. App. 8a. The CIA requires the submission of any material "that mentions CIA or intelligence data or activities or material on any subject about which the author has had access to classified information." CIA Agency Regulation 13-10, *Agency Prepublication Review of Certain Material Prepared for Public Dissemination* § 2(e)(1) (June 25, 2011)[15]; Pet. App. 7a. And the Office of the Director of National Intelligence ("ODNI") requires submission of "publication[s] that discuss[] the ODNI, the [Intelligence Community], or national security." ODNI Instruction 80.04, Rev. 2, *ODNI Pre-Publication Review of Information to be Publicly Released* § 6 (Aug. 9, 2016)[16]; Pet. App. 10a.

Third, although most prepublication review systems provide aspirational timelines for completing review, those deadlines are not enforceable. That is true of all four of the agencies in this case. *See* Knight First Amendment Institute, *supra*; *see also* Pet. App. 7a, 9a-11a. CIA regulations, for example, state that review will be complete within 30 days "[a]s a general rule," but that some publications "may require a longer period of time for review." CIA Regulation 13-10, *supra*, § 2(d)(4). Similarly, the NSA provides that prepublication review shall be completed "within 25 business days

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[14] https://irp.fas.org/doddir/dod/i5230_09.pdf.

[15] https://s3.documentcloud.org/documents/5767103/AR-13-10-Agency-Prepublication-Review-of-Certain.pdf.

[16] https://www.dni.gov/files/documents/instruction8004.pdf.

of receipt," but only "as practicable." NSA/CSS Policy 1-30, *Review of NSA/CSS Information Intended for Public Release* § 6(b)(7) (May 13, 2015).[17] A former employee has no meaningful recourse when the agency does not comply with these targets for completing review.

In sum, the result of *Snepp*'s footnote is that millions of current and former federal employees must submit much of their professional speech to prepublication review processes that have no enforceable timeline for completion.

4. *Amici* certainly do not dispute that the government needs flexibility to protect its vital national security interests, including the flexibility to implement some form of prepublication review. But *Snepp*'s footnote—at least as interpreted by the federal government and courts of appeals—goes beyond giving the government flexibility and provides a blanket authorization for almost *any* system of prepublication review that rests on claims of national security. It thus frees the government and the courts from the important task of balancing the government's legitimate interests against its citizens' First Amendment rights.

There are a number of possible alternative ways through which the government could achieve its legitimate interests without imposing such extensive prior restraints on speech. For instance, the government could impose criminal penalties on even inadvertent disclosure of classified information but offer voluntary prepublication review as a safe harbor. Or it might provide more meaningful protections for speech within

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[17] https://media.defense.gov/2021/Jul/02/2002755744/-1/-1/0/POLICY1-30.PDF.

a mandatory system of prepublication review, such as binding deadlines for review, greater clarity about who must submit and what must be submitted, meaningful protection against viewpoint discrimination, and limits on the length of time former employees are subject to prepublication review. But *Snepp*'s footnote freed the government (and the courts) from the need to consider these less restrictive alternatives, allowing the government to construct its current prepublication review system without meaningful consideration of the important First Amendment interests at stake.

II. The prepublication review regimes built on *Snepp*'s footnote impede public access to crucial, unclassified information and opinions regarding many of the most important issues facing the country.

The expansive system of prepublication review that has developed since *Snepp* chills a substantial quantity of speech. In fact, from the start agencies adopted prepublication review in part to "foster[] a climate which would discourage former employees from writing[.]" CIA Report, *supra*, at 18. As a result, the public has been prohibited from having timely access—or, in some cases, *any* access—to unclassified information and opinions regarding many of the most important issues facing our country. While the government is certainly entitled to significant leeway in protecting its vital national security interests, the current prepublication review system creates First Amendment issues that deserve serious consideration—consideration that *Snepp*'s footnote has short-circuited.

First, even without abuse, the system itself either prevents or deters valuable speech. The sheer volume of material potentially covered by the prepublication

review regimes chills First Amendment rights. Many prepublication review regimes define what must be submitted for review in such vague or extraordinarily broad terms that it is impossible to determine what (if anything) is excluded. *See* pp. 15-16, *supra*. As noted, the DOD requires submission of information that is "of significant concern to DOD"—a criterion that covers far more than materials containing classified information. But how is a former employee to know what is "of significant concern to DOD," especially years or even decades after working there? Moreover, agencies have shown no interest in clarifying what these standards cover. When *amici* asked what, if anything, DOD's requirement excludes, the prepublication review office declined to say.

In addition, the lack of fixed and enforceable deadlines for prepublication review renders it difficult for those subject to prepublication review to speak about current events in a timely manner. As described above, many agencies that impose prepublication review do not impose fixed and enforceable deadlines by which the agency must complete review of a particular publication. *See* pp. 16-17, *supra*. As a result, many of those who are best positioned to contribute to debates about current events are unable to do so because approval comes too late. For example, in 2015 Professor Hathaway submitted a 10-page paper describing and criticizing the national security lawyering process with the intent of presenting it to an academic conference, but the prepublication review office failed to clear it in time. Indeed, from *amici*'s own experience and that of their colleagues, the specter of prepublication review deters many former government employees from commenting on the current policy issues about which they have the most to contribute.

Even for books, many current and former employees may choose not to publish because they do not want to become entangled in cumbersome prepublication review processes. For example, Nada Bakos, a former CIA analyst, submitted a book manuscript for review in October 2015, but did not receive a response for nearly two years. *See Bakos v. CIA*, No. 18-cv-743, 2019 WL 3752883, at *1 (D.D.C. Aug. 8, 2019). Similarly, John Kiriakou, a former CIA agent, endured "nearly three years of endless haggling" with the prepublication review board "before officials finally agreed to the publication of his memoir, *The Reluctant Spy*." *See* Christopher Moran and Simon Willmetts, *Secrecy, Censorship, and Beltway Books: The CIA's Publication Review Board*, 24 Int'l J. of Intelligence & Counter Intelligence 239, 241 (Mar. 9, 2011).

Given these delays, and the other frustrations of the labyrinthine prepublication review processes, many former employees refuse to participate at all—either by giving up on speaking or by ignoring the processes and hoping they will not be punished. Rebecca H., *The "Right to Write" in the Information Age: A Look at Prepublication Review Boards*, 60 Studies in Intelligence 15, 21 (Dec. 2016) (noting that delays in approval increase the risk that authors "may become more inclined to ditch their projects altogether" or "attempt to buck the system, publishing without review and leaving themselves to the mercy of the courts").[18] For example, former CIA director Leon Panetta grew so frustrated with delays and proposed redactions from the agency's prepublication review that he "allowed his publisher to begin editing and making copies of [his memoir] before

[18] https://www.cia.gov/static/af165f3cbf968afbfa1116cc82caf15b/the-right-to-write.pdf.

he had received final approval from the CIA." *See* Greg Miller, *Panetta Clashed with CIA over Memoir, Tested Agency Review Process*, Wash. Post, Oct. 21, 2014.[19] And former National Security Adviser John Bolton published his book, *The Room Where It Happened*, before receiving final prepublication approval. *See* Maggie Haberman and Katie Benner, *Trump Administration Sues to Try to Delay Publication of Bolton's Book*, N.Y. Times, June 16, 2020.[20]

Second, as with other systems of prior restraint, government abuse of prepublication review is inevitable. As Justice Stevens recognized, "[i]nherent" within a regime of prepublication review "is the risk that the reviewing agency will misuse its authority to delay the publication of a critical work or to persuade an author to modify the contents of his work beyond the demands of secrecy." *Snepp*, 444 U.S. at 526 (Stevens, J., dissenting).

Justice Stevens's concern has proven prescient, as it is widely accepted among former government employees that agencies use prepublication review to limit or suppress unfavorable speech. One of the more egregious examples of this abuse occurred just last year, when political appointees took unprecedented steps to interfere with the prepublication review and approval of John Bolton's book. *See, e.g.*, Michael S. Schmidt and Charlie Savage, *White House Accused of Improperly Po-*

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[19] https://www.washingtonpost.com/world/national-security/panetta-clashed-with-cia-over-memoir-tested-agency-review-process/2014/10/21/6e6a733a-5926-11e4-b812-38518ae74c67_story.html.

[20] https://www.nytimes.com/2020/06/16/us/politics/john-bolton-book-publication.html.

liticizing Review of John Bolton's Book, N.Y. Times, Sept. 24, 2020.[21] The Trump Administration then initiated a criminal investigation into Mr. Bolton and sought to seize royalties from the book's sale after Mr. Bolton published without authorization, but the Biden Administration has since terminated both. Michael S. Schmidt and Katie Benner, *Justice Dept. Ends Criminal Inquiry and Lawsuit on John Bolton's Book*, N.Y. Times, June 16, 2021.[22]

More subtle (but no less problematic) examples abound, as *amici*'s experience shows. When Professor Goldsmith submitted the manuscript of his book, *The Terror Presidency*, for review, the Office of Legal Counsel asked Professor Goldsmith to change or remove many *unclassified* passages from the manuscript based on its view of the accuracy or privileged status of those passages, most of which were critical of the government. Professor Goldsmith ultimately modified or deleted some of the passages to avoid getting bogged down in a prolonged dispute.

Amici had a similar experience when trying to publish their op-ed, *"The government's prepublication review process is broken.*" It was bad enough that DOD's prepublication reviewers insisted on the right to review an op-ed criticizing the prepublication review process itself—an op-ed that did not remotely touch on classified information. But, making matters worse, the reviewers forced *amici* to include the following disclaimer as a condition for granting permission to publish: "The

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[21] https://www.nytimes.com/2020/09/23/us/politics/john-bolton-book-review-process.html.

[22] https://www.nytimes.com/2021/06/16/us/politics/john-bolton-book-justice-department.html.

views expressed in this article are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government." That disclaimer, of course, had nothing to do with protecting classified information; it was designed to discredit disfavored speech.

Also inherent is the risk—recognized for decades—that prepublication review offices will give preferential treatment to favored writers. In 1981, the CIA Inspector General noted the "perception of unfairness" "fueled by the widely held belief that the [CIA] ha[d] not sought redress against certain former employee authors who have seemingly broken the rules …, whereas it has encouraged government suits against others[.]" CIA Report, *supra*, at 10. At that time, for example, the CIA's prepublication review office refused to take legal action against a former-CIA official-turned-journalist who refused to submit any of his articles to prepublication review, while encouraging legal action against Frank Snepp. *Id*. at 11-12. The risk of a double standard persists today. Leon Panetta, for example, suffered no legal repercussions for allowing his book to go to the publisher before it had been approved. *Rebecca H.*, *The "Right to Write," supra*, at 18. By contrast, John Bolton was the target of a civil lawsuit for doing the same. *See* pp. 21-22, *supra*.

III. This Court should grant review now.

If this Court does not take on the important First Amendment questions raised by prepublication review in this case, it may not get another chance. Few are willing to challenge the government on this issue, and those that do have run headlong into *Snepp*'s footnote. There will thus never be a circuit split—but that does not undermine the need for this Court's intervention.

There are multiple factors that deter current and former employees from challenging the constitutionality of prepublication review. Current employees face the prospect of retaliation in the form of adverse employment action, increased difficulties navigating the prepublication review processes themselves, or being blacklisted from subsequent employment. Former employees, too, fear jeopardizing their chances of obtaining later employment and getting future publications approved by challenging the lawfulness of prepublication review. With little chance at success given *Snepp*'s footnote, and much to lose, it is hardly surprising that this issue has rarely arisen—despite its enormous importance.

The result is that the courts of appeals have been unable to meaningfully consider the proper constitutional balance between the government's legitimate national security interests and the First Amendment rights of millions of U.S. citizens. In the more than 40 years since *Snepp*, only two circuits have considered a First Amendment challenge to a prepublication review scheme—the court below and the D.C. Circuit. *See Weaver v. U.S. Information Agency*, 87 F.3d 1429 (D.C. Cir. 1996); *see also* Pet. 32. And both circuits predictably rejected those challenges based almost entirely on *Snepp*. *See* Pet. App. 6a, 24a-25a, 27a-28a; *Weaver*, 87 F.3d at 1439, 1441-42; *see also* Pet. 33-34 (explaining how *Weaver*'s reliance on *Snepp* "[p]ermeat[ed] the court's analysis").

Absent action from this Court, none of that will change. Few will risk the expense and reputational harm of bringing a suit that is in tension with *Snepp*'s footnote. And the courts of appeals are bound to follow what they apparently view as *Snepp*'s across-the-board

blessing of federal prepublication review systems. Granting certiorari here may be one of the last opportunities for this Court to take on perhaps the most far-reaching system of prior restraint ever constructed in this country.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted.

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