No. 21-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

All eighteen U.S. intelligence agencies, including the four that are party to this suit, impose lifetime "prepublication review" obligations on former employees, prohibiting them from writing or speaking publicly without first obtaining the government's approval. The agencies' prepublication review regimes have expanded dramatically since this Court decided *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), which held, in a cursory footnote, that the First Amendment did not preclude the Central Intelligence Agency from imposing a prepublication review obligation on a former CIA officer. The lower courts, including the Fourth Circuit in this case, have understood *Snepp* to mean that agencies' prepublication review regimes are exempt from meaningful scrutiny under the First Amendment. As a result, Petitioners here, and millions of former public servants like them, are subject to an onerous and far-reaching system of prior restraint that lacks the substantive and procedural safeguards that the Court has insisted on in all other contexts involving the licensing of speech. In addition, the public is routinely and unjustifiably denied access to speech that could inform public debate about foreign policy, national security, and war—issues as to which public opinion plays an especially important role in checking government power.

The questions presented are:

1. Whether *Snepp* should be overruled because it applied mere "reasonableness" scrutiny to an agency's prepublication review regime, and failed to require the substantive and procedural safeguards the Court has demanded in all other contexts involving the licensing of speech.

2. Alternatively, whether *Snepp* should be clarified because lower courts, including the Fourth Circuit in this case, have read it to preclude any meaningful scrutiny of prepublication review regimes under the First Amendment.

3. Whether Respondents' prepublication review regimes, which lack essential substantive and procedural safeguards, are constitutional.

PARTIES TO THE PROCEEDINGS

Petitioners in this Court (appellants in the court of appeals) are Timothy H. Edgar, Richard H. Immerman, Melvin A. Goodman, Anuradha Bhagwati, and Mark Fallon.

Respondents in this Court (appellees in the court of appeals) are Avril D. Haines, in her official capacity as Director of National Intelligence; William J. Burns, in his official capacity as Director of the Central Intelligence Agency; Lloyd J. Austin, III, in his official capacity as the Secretary of Defense; and Paul M. Nakasone, in his official capacity as Director of the National Security Agency.

RELATED PROCEEDINGS

There are no directly related proceedings.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Other Authorities

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at *Edgar v. Haines*, 2 F.4th 298 (4th Cir. 2021). The opinion of the district court granting a motion to dismiss (App. 39a) is reported at *Edgar v. Coats*, 454 F. Supp.3d 502 (D. Md. 2020). The order of the district court dismissing the case (App. 113a) is not reported.

STATEMENT OF JURISDICTION

The court of appeals issued its decision on June 23, 2021 (App. 2a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

In *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), this Court upheld the imposition of a constructive trust on the profits earned by a former Central Intelligence Agency ("CIA") officer who had published a memoir without first submitting it to the agency for review. In a single, brief footnote, with virtually no analysis, the Court rejected the officer's

First Amendment objections. Since *Snepp*, prepublication review regimes have expanded dramatically in every respect—in large part because the lower courts, like the Fourth Circuit in this case, have understood *Snepp* to exempt these regimes from meaningful scrutiny under the First Amendment. Today, millions of former public servants are subject to a sprawling system of prior restraint that lacks any of the substantive and procedural safeguards that the Court has otherwise required when the government licenses speech. And as a result, the public is deprived of the expertise and insights of former agency employees on matters of extraordinary public concern.

This case concerns four specific prepublication review regimes. These regimes subject Petitioners and other former employees to submission requirements that are sweeping and vague; invest agency reviewers with overbroad discretion to suppress speech; and fail to require agencies to complete the review of manuscripts within any specific timeframes. Respondents undoubtedly have a legitimate interest in preventing Petitioners and other former employees from disclosing classified information learned through their public service, but this interest can, and therefore must, be accommodated through a more tailored system that is faithful to First Amendment principles.

The permissible scope of Respondents' prepublication review regimes is a question of extraordinary importance. The Court should grant certiorari to overrule *Snepp*, which failed to scrutinize prepublication review as a prior restraint,

did not adequately account for former employees' or the public's interest in the speech suppressed by the system, and is inconsistent with the Court's more recent First Amendment jurisprudence. In the alternative, the Court should grant certiorari to clarify that *Snepp* does not foreclose meaningful judicial scrutiny of the adequacy of a prepublication review scheme's substantive and procedural safeguards.

I. Factual Background

A. The Origins and Growth of Prepublication Review

The prepublication review system originated in a set of contractual obligations imposed on a relatively small number of public servants with access to the nation's most sensitive secrets. Compl. ¶ 17. The CIA appears to have been the first agency to require its employees to submit their writings for review before publication. Through the 1950s and 1960s, the CIA handled prepublication review informally, as few former employees sought to publish manuscripts. *Id.* ¶ 18. This changed in the 1970s, as the abuses documented by the Church and Pike Committees spurred many more former employees to write, often critically, about the agency. *Id.* In 1976, the CIA established a Publications Review Board to review manuscripts submitted by current employees; the next year, its mandate expanded to cover submissions from former employees as well. *Id.*

What was once a narrow regime has grown into a sprawling system of prior restraint that restricts the speech of millions of people. In *Snepp*, the Court affirmed the imposition of a constructive trust on profits earned by a former CIA officer who had published a book without submitting it for review. The unsigned ruling was issued without the benefit of briefing on the merits or oral argument, and it drew widespread criticism, in part because it relegated First Amendment considerations to a single, cryptic footnote. *Id.* ¶ 19; 444 U.S. at 509 n.3. Over the next four decades, agencies interpreted *Snepp* as a blank check, establishing and extending prepublication review regimes without regard to the First Amendment limits that normally apply to government schemes that license speech.

Indeed, since *Snepp*, prepublication review has expanded on every axis. Each of the nation's eighteen intelligence agencies now imposes prepublication review requirements on at least some of its former employees. Compl. ¶ 24. Former employees are subject to these obligations for the rest of their lives. *Id.* Agencies also impose these requirements on more categories of people, including employees who never had access to classified information. *Id.* ¶ 25. Agency regimes have also become more complex, with most regimes implemented through a tangle of contracts, regulations, directives, and policies—a development that has made it increasingly difficult for former employees to understand and meet their obligations. *Id.* ¶ 27. Today's prepublication review regimes also extend to more material, in part because so much more information is classified. *Id.* ¶ 26. The CIA

received 43 submissions for review in 1977; in 2015, it received 8,400. *Id.* ¶ 28. The increase in the number of manuscripts submitted has led to substantial delays, with manuscript review now frequently taking many months or even years. *Id.* ¶ 29.

The expansion of the prepublication review system has had far-reaching implications for the free speech rights of former public employees, including Petitioners. It has also profoundly limited the public's access to their knowledge and expertise, impoverishing public debate about government policy. As two prominent law professors aptly put it, the contemporary prepublication review system is "racked with pathologies."[1] But this Court's summary footnote in *Snepp* has insulated the system from constitutional scrutiny and disincentivized reform. In 2017, the House and Senate Intelligence Committees instructed the Office of the Director of National Intelligence ("ODNI") to prepare a new prepublication review policy for all intelligence agencies within 180 days of passage of an appropriations bill, directing that the new policy should "yield timely, reasoned, and impartial decisions that are subject to appeal," and setting out guideposts with respect to which categories of individuals could be subjected to prepublication review requirements, what material they could be required to submit, and what procedural safeguards should be in place to prevent

[1] Jack Goldsmith & Oona A. Hathaway, *The Government's Prepublication Review Process is Broken*, Wash. Post (Dec. 25, 2015), https://perma.cc/YBC3-KEZA.

abuse. 115 Cong. Rec. H3300 (daily ed. May 3, 2017); 115 Cong. Rec. S2750 (daily ed. May 4, 2017). Almost five years later, however, no such policy has been promulgated. Compl. ¶ 30.

B. The Challenged Prepublication Review Regimes

This suit challenges the prepublication review regimes of four federal agencies—the ODNI, the CIA, the Department of Defense ("DOD"), and the National Security Agency ("NSA"). Although the regimes differ in some particulars, they have important characteristics in common.

First, each regime imposes lifetime prepublication review obligations on Petitioners and other former employees, compelling them to submit their speech for prior government review even decades after their service has ended. *Id.* ¶ 24.

Second, these obligations apply to broad categories of former employees, including some who never had access to classified information. All former employees of the CIA, NSA, and ODNI are subject to a prepublication review obligation. *Id.* ¶¶ 32, 44, 50. The same is true of all former DOD employees, including all former active-duty and reserve service members, regardless of whether they had access to classified information. *Id.* ¶ 38.

Third, each regime requires Petitioners and other former employees to submit for review a vaguely defined and sweeping range of material, including material that Respondents have no

legitimate interest in reviewing. For example, the ODNI requires former employees to submit "all official and non-official information intended for publication that discusses the ODNI, the IC [Intelligence Community], or national security." *Id.* ¶ 50.

Fourth, each regime vests the agency with censorship authority over Petitioners' speech that extends far beyond classified information. For example, the DOD allows reviewers to censor not just classified information but any information that the DOD deems to "requir[e] protection in the interest of national security or other legitimate governmental interest." App. 9a. The NSA and ODNI impose no substantive limits at all on the authority of agency reviewers, affording them unbridled discretion. Compl. ¶¶ 45, 51.

Fifth, all of the regimes to which Petitioners are subject lack procedural safeguards the Court has insisted on in other contexts involving the licensing of speech. For example, while some of the agencies state aspirationally that they will try to review manuscripts within specified time periods, none of them is legally bound to do so, and in practice they frequently do not. *Id.* ¶¶ 36, 42, 48, 54. The CIA's own records reveal that the agency expects the review of books to take "over a year." *Id.* ¶ 29. Delays are often compounded when agencies "refer" manuscripts to other agencies for review, because Respondents' regimes do not specify the terms on which those inter-agency referrals will be made. *Id.* ¶¶ 33, 39, 45, 51. In addition, none of the regimes

requires the government to initiate judicial review of' decisions to restrict speech. *Id.* ¶¶ 37, 43, 49, 55.

C. The Petitioners

Petitioners are five former employees of the ODNI, CIA, and DOD. Melvin A. Goodman spent forty-two years in government, beginning as a U.S. Army cryptographer, rising within the CIA from an analyst to a division chief, and eventually teaching at the National War College. *Id.* ¶¶ 81–82. Mark Fallon worked for more than three decades in the DOD as an expert on counterintelligence and counterterrorism. *Id.* ¶¶ 100–101. Anuradha Bhagwati served in the U.S. Marine Corps for five years, including as a platoon commander, and, after leaving the military, founded the Service Women's Action Network. *Id.* ¶¶ 94–95. Timothy H. Edgar worked for the ODNI from 2006 to 2013, serving in several roles, including as the Director of Privacy and Civil Liberties for the White House National Security team. *Id.* ¶ 58. Richard H. Immerman served from 2007 to 2009 as an Assistant Deputy Director of National Intelligence and Analytic Ombudsman for the ODNI. *Id.* ¶ 69.[2]

Each of Petitioners is subject to ongoing prepublication review obligations. Four of them have submitted materials for review in the past, and all of them intend to write manuscripts that

[2] The NSA was also named as a defendant because Mr. Edgar expects that any manuscripts he submits to the ODNI will be referred to the NSA, as they have been in the past. Compl. ¶ 65.

Respondents' regimes will require them to submit for review in the future. *Id.* ¶¶ 61–62, 65, 72–73, 79, 85–87, 93, 97–99, 112–113, 115. Petitioners' experiences navigating the review process highlight the defects in Respondents' regimes.

For example, because of the breadth and vagueness of Respondents' submission requirements, Petitioners must submit for review even manuscripts that are highly unlikely to contain classified information. Thus, Professor Immerman was required to submit to the ODNI a book manuscript surveying the CIA's history even though he relied exclusively on declassified and other public sources. *Id.* ¶ 73. He was also required to submit numerous academic syllabi, which similarly relied entirely on public sources. *Id.* ¶ 72.

Petitioners have also been compelled to redact information they learned from public sources after leaving government service. For example, when Mr. Goodman submitted a manuscript that discussed the government's use of armed drones overseas, the CIA required him to excise this discussion from his book even though it was based entirely on public reports and he had last worked for the agency in the 1980s, long before the drones had been developed, and could not possibly have had access to government secrets on the topic. *Id.* ¶ 82, 90. And when Professor Immerman submitted his manuscript about the history of the CIA, the agency required him to excise citations to news articles as well as assertions based on public sources concerning events that occurred long after he left government service. *Id.* ¶¶ 73–75.

Long delays in the review process have also required Petitioners to postpone the publication of manuscripts that were time-sensitive. As described below, delays in the review of one of his manuscripts prevented Mr. Fallon from contributing to public debate about interrogation policy at a time when his insights would have been especially valuable to the public. *Id.* ¶ 111. Similar delays have made it more difficult for Mr. Edgar and Professor Immerman—both academics—to participate in scholarly debates. *Id*. ¶¶ 66, 80. Delays have also created tensions between Petitioners and their publishers. Both Mr. Goodman's and Mr. Fallon's publishers threatened to cancel their book contracts, and Mr. Fallon's publisher, frustrated with the long delays in agency review, told him that working with former officials was "not worth it." *Id.* ¶¶ 89, 112.

In some cases, Petitioners have had to accept redactions they believed to be illegitimate because contesting the redactions would have resulted in further delay and would have compromised relationships with agency reviewers whom they could not afford to provoke or offend. For example, the ODNI demanded that Mr. Edgar redact a manuscript that was based entirely on unclassified documents. *Id.* ¶¶ 62–64. Although the agency had no legitimate basis for its demand, Mr. Edgar made the redactions because he feared that contesting them would cause further delay and compromise his relationships with the ODNI's reviewers, making future reviews even more difficult. *Id.*

The uncertainties associated with the prepublication review system have also led

Petitioners to censor themselves. *Id.* ¶¶ 66, 80, 92–93, 112, 118–119. For example, the possibility of delays and illegitimate redactions has dissuaded Professor Immerman and Mr. Fallon from writing articles and manuscripts they would otherwise have written. *Id.* ¶¶ 80, 112, 118. In addition, when Mr. Edgar and Mr. Goodman have written manuscripts, the fear of delay and illegitimate censorship has led them to avoid topics they would otherwise have addressed. *Id.* ¶¶ 66, 92.

II. Proceedings Below

Petitioners filed this suit on April 2, 2019, alleging that Respondents' prepublication review regimes violate their First and Fifth Amendment rights and seeking declaratory and injunctive relief, specifically identifying all of the above inadequacies in the safeguards associated with the regimes to which they are subject. On June 4, 2019, Respondents filed a motion to dismiss, which the district court granted on April 16, 2020. *See* App. 39a. The court held that Petitioners had standing because they plausibly alleged that Respondents' regimes chilled protected speech, but rejected their claims that the regimes violated the First and Fifth Amendments, relying on *Snepp*. *Id.* at 92a.

On June 23, 2021, the Fourth Circuit affirmed this judgment. It agreed that Petitioners' "self-censorship" in response to "an objectively reasonable chill" was sufficient to confer standing, *id.* at 20a, and that the case was "ripe for adjudication," *id.* at 23a. However, relying on *Snepp*, it held that, by voluntarily signing prepublication review

agreements, Petitioners had "waived their First Amendment rights to challenge the requirement that they submit materials for prepublication review and the stated conditions for prepublication review." *Id.* at 25a. The court stated that, "[f]or the most part, that could end the matter." *Id.* at 25a.

The court went on to address Petitioners' challenges to "the clarity of the stated conditions and their interpretive scope, as well as the manner in which defendant agencies have implemented prepublication review." *Id.* at 25a. The court found that *Snepp* supplied "[t]he relevant constitutional standard"—a "reasonableness test." *Id.* at 27a–28a (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). The court acknowledged that *United States v. National Treasury Employees Union* (*NTEU*), 513 U.S. 454 (1995), modified the standard of review where, as here, a regulation imposes "a prior restraint," but it held that, under *Snepp*, "the question in th[e] case reduce[d] to whether the defendant agencies' prepublication review regimes are a reasonable and effective means of serving" the government's compelling interest in the secrecy of information important to national security. App. 28a–29a. The court found that they were. *Id.* at 34a.

REASONS FOR GRANTING THE PETITION

I. The permissible scope of Respondents' prepublication review regimes is a matter of extraordinary importance.

Respondents' prepublication review regimes subject Petitioners, as well as millions of other

former government employees, to an onerous and far-reaching system of prior restraint lacking the substantive and procedural safeguards that the Court has required in other speech-licensing contexts. These regimes curtail the public's access to speech that could inform public debate about government policy—and do so through vague and overbroad terms that are not necessary to protect the government's legitimate interests, and that invite abuse. Absent this Court's intervention, the regimes will continue to impose these heavy costs on free speech and public discourse, without ever being subjected to meaningful scrutiny.

A. Respondents' prepublication review regimes subject Petitioners and millions of others to an unnecessarily onerous and far-reaching system of official censorship.

Respondents' prepublication review regimes severely restrict the speech rights of Petitioners and millions of other former public servants. Compl. ¶¶ 1, 24. They impose prepublication review obligations on these individuals for their entire lives. *Id.* ¶ 24. They require the submission of material that could not reasonably contain classified information. *Id.* ¶¶ 32, 38, 50. They authorize agencies, under vague standards, to redact far more than just classified information learned in the course of employment. *Id.* ¶¶ 39, 51. And they lack reasonable procedural safeguards, including, most notably, any legally binding deadlines for review. *Id.* ¶¶ 36, 42, 48, 54.

As an initial matter, these regimes vest Respondents with overly broad discretion to review and censor speech. Former employees must submit for review material that the government has no legitimate interest in reviewing; and the review standards permit the government to censor speech it has no legitimate interest in suppressing. For example, the ODNI's policy requires Mr. Edgar and Professor Immerman to submit all manuscripts discussing "national security," *id.* ¶ 50, even if the manuscripts are entirely unrelated to their past employment. And the DOD's policy that governs Mr. Fallon's and Ms. Bhagwati's writings allows reviewers to redact not just classified information, but any information that implicates any "legitimate governmental interest," a phrase the DOD does not define. App. 109a.

The regimes also effectively vest Respondents with total discretion to delay the publication of constitutionally protected speech through inaction. The challenged policies provide only aspirational deadlines, and the review process frequently stretches out for many months or even years. Compl. ¶¶ 36, 42, 48, 54. The result is that Petitioners and other former officials are often sidelined in debates over current events, because their materials are cleared for publication only after public attention has shifted. *Id.* ¶¶ 66, 80, 112. The system also deters publishers from working with former officials, because it is difficult to know in advance when, or even whether, an agency will complete its review. *Id.* ¶¶ 89, 112. And all of this chills former employees from trying to contribute to public debates in the first place. *Id.* ¶¶ 80, 112, 118.

The system is characterized by arbitrary and even viewpoint-discriminatory decisions, and unpredictable and lengthy delays. *Id.* ¶¶ 63–66, 74–78, 89–90, 108–111. Former public servants who express views critical of their former agencies must be prepared to face especially hostile reviews. *Id.* ¶ 34. And former high-level officials routinely receive preferential treatment, with reviews of their manuscripts conducted more expeditiously and more sympathetically. *Id.* ¶ 2.

The CIA has acknowledged concerns about the integrity of its reviews. In 2012, the agency launched an investigation to determine whether reviewers were using the prepublication review system to suppress criticism of the agency and its leadership. *Id.* ¶ 34. The agency has not released the result of that investigation, but a 2017 CIA Inspector General report found that CIA reviewers "lack[] a formal mechanism to objectively evaluate . . . classification determinations," increasing the risk of "arbitrary or poorly informed" decisions, and that the agency "does not always follow the prepublication review process outlined in [its regulation] during reviews of manuscripts authored by former CIA director-level officers."[3]

The chilling effect of these prior restraints is impossible to measure, but the experiences of

[3] *See* Inspector General, Central Intelligence Agency, Prepublication Review Process 7–8, 11 (Jan. 2017), https://perma.cc/G5YA-JJHP.

Petitioners and others highlight the heavy burdens Respondents' regimes impose on protected speech.

B. The challenged systems deprive the public of speech by former public servants, imposing an intolerable cost on public debate.

Respondents' prepublication review regimes also have far-reaching implications for public debate. *Id.* ¶¶ 66, 80, 92–93, 118. As this Court has recognized, "speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment." *Lane v. Franks*, 573 U.S. 228, 240 (2014). Respondents' prepublication review regimes deprive the public of this speech of "special value." *Id.*

This is of particular concern here for two reasons. First, the speech suppressed by the prepublication review system concerns, among other things, foreign affairs, national security, and war. As Justice Stewart observed in the *Pentagon Papers* case, government action in these areas is not subject to the checks that apply in other contexts. As a result, "the only effective restraint" on government action in these spheres is "an informed and critical public opinion." *N.Y. Times Co. v. United States* (*Pentagon Papers*), 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

Second, as noted above, the breadth and vagueness of Respondents' regimes invite viewpoint

and other illegitimate discrimination by agency reviewers. As the Court has noted, public employees "are often in the best position to know what ails the agencies for which they work," and accordingly, their criticisms are all the more vital for the public to hear. *Lane*, 573 U.S. at 236 (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion)). But it is precisely these criticisms that are most likely to be chilled or suppressed by Respondents' regimes.

The record in this case highlights the costs that Respondents' regimes can impose on public debate. To take one of many examples: In 2016, Mr. Fallon completed a book criticizing the U.S. government's use of torture in the aftermath of the September 11 attacks. Compl. ¶ 104. The book relied on declassified records in an effort to inform public debate at a time when torture had once again become a salient political issue. *Id.* ¶¶ 104, 107. Delays in the DOD's review, however, pushed back his publication date by seven months, forcing him to cancel speaking events. When he ultimately received the results of the DOD's review, some of the DOD's proposed redactions were intended to protect the DOD from embarrassment, not to protect legitimate secrets. The review had already taken so long, however, that he felt obliged to accept the redactions to avoid further delay. *Id.* ¶¶ 108–112. Former government employees who wrote manuscripts supportive of the torture policies, and addressing the same historical events, had not encountered the same difficulties. *Id.* ¶ 34.

More recently, media reports confirmed that the last administration abused the prepublication review process to delay the publication of a book critical of the president. *See* Complaint ¶¶ 46, 51, *United States v. Bolton*, No. 1:20-cv-01580, 2020 WL 3258058 (D.D.C. filed June 16, 2020). In 2020, the Justice Department filed suit in an effort to enjoin the book's publication, but a year later, the Department—operating under a new president—simply dropped the lawsuit. *See* Michael S. Schmidt & Katie Benner, *Justice Dept. Ends Criminal Inquiry and Lawsuit on John Bolton's Book*, N.Y. Times (June 16, 2021), https://perma.cc/5UA4-LBJN. This kind of politically motivated misuse is a predictable outcome of a regime that gives executive officers sweeping discretion without clear procedural or substantive safeguards.

II. The Court should overrule *Snepp*.

The court of appeals rejected Petitioners' challenge to Respondents' prepublication review regimes largely—if not entirely—on the basis of this Court's decision in *Snepp*. This Court should grant review to overrule *Snepp*, which failed adequately to account for the First Amendment interests implicated by agency prepublication review regimes, and failed even to address whether prepublication regimes should contain the substantive and procedural safeguards that this Court has insisted on in all other contexts involving the licensing of speech.

Snepp involved a former CIA officer, Frank Snepp, who had signed "an agreement promising

that he would 'not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency.'" 444 U.S. at 508. Shortly after resigning from the agency, he published a book without first submitting it for review. *Id.* at 507. When the government sued him for violating his contract, the district court found that Snepp had "willfully, deliberately and surreptitiously breached his position of trust with the CIA and [his] secrecy agreement," that he had deliberately misled CIA officials into believing that he would submit his book for review, and that publication of the book had "caused the United States irreparable harm and loss." *United States v. Snepp*, 456 F. Supp. 176, 179–80 (E.D. Va. 1978). Relying on these findings, the district court enjoined Snepp from violating his agreement in the future and imposed a constructive trust on the book's proceeds. *Id.* at 182. The Fourth Circuit affirmed the injunction but reversed the order imposing a constructive trust. *United States v. Snepp*, 595 F.2d 926, 929 (4th Cir. 1979).

Snepp and the government cross-petitioned for certiorari. The Court granted the cross-petitions but did not invite merits briefing or hold oral argument. Instead, in a per curiam opinion (over a lengthy dissent), the Court focused almost exclusively on the questions of fiduciary duty and remedy. It mentioned the First Amendment only twice, including once in its recitation of the decisions below. *Snepp*, 444 U.S. at 509 n.3, 510.

The Court held that when Snepp "deliberately and surreptitiously" refused to submit a manuscript "about CIA activities," derived from his "experiences as a CIA agent" and based on his "frequent access to classified information," he "breached a fiduciary obligation," and therefore the imposition of a constructive trust on "the proceeds of his breach" was proper. *Snepp*, 444 U.S. at 510–11.

In a footnote buried in the opinion's recitation of the case's procedural history, the Court cursorily disposed of Snepp's contention that the contract was unenforceable as a prior restraint. The Court wrote: "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. . . . The agreement that Snepp signed is a reasonable means for protecting this vital interest." *Id.* at 509 n.3.

Evaluating an agency's prepublication review regime under a "reasonableness" standard, without any assessment of whether the scheme incorporated adequate substantive or procedural safeguards, was wrong when *Snepp* was decided and is even more clearly wrong today. Prepublication review regimes are licensing schemes—quintessential prior restraints. The Court has long recognized that licensing schemes violate the First Amendment unless they include narrow and precise substantive standards to cabin official discretion, and robust procedural safeguards designed to limit the opportunity for abuse. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Freedman v.*

Maryland, 380 U.S. 51 (1965). To be sure, the regimes challenged here apply to former government employees, not the citizenry at large. But after *Snepp*, this Court has made clear that a prospective restriction on the speech of even *current* government employees must satisfy a test that "closely resembles exacting scrutiny"—a test far more demanding than the one the Court applied in *Snepp*. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018); *see also NTEU*, 513 U.S. 454, 468 (1995).

This Court should overrule *Snepp* because it is inconsistent with the Court's prior restraint cases and more recent cases concerning the speech of public employees.

A. *Snepp* is inconsistent with the Court's prior restraint cases.

1. This Court has long imposed rigorous procedural and substantive requirements on government licensing schemes.

Because they forbid would-be speakers from speaking without the prior approval of government officials, thereby prohibiting speech "before an adequate determination that it is unprotected," agency prepublication review regimes are classic prior restraints. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rel.*, 413 U.S. 376, 390 (1973); *see also Alexander v. United States*, 509 U.S. 544, 550 (1993). Agency officials are "empowered to

determine whether the applicant should be granted permission—in effect, a license or permit—on the basis of [their] review of the content of the proposed [speech]." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975). And the reviewers impose restrictions on speech "without a prior judicial determination" that their judgment is correct. *Alexander*, 509 U.S. at 551.

Yet, rather than apply the heavy presumption of unconstitutionality that attends every system of prior restraint, and without assessing whether the system contained the safeguards the Court requires where prior restraints are permissible, *see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), the *Snepp* Court concluded that it was "reasonable" for the CIA to require a former public servant to submit his manuscript for approval prior to publication. 444 U.S. at 509 n.3. The Court did not engage in, or attempt to justify its departure from, prior restraint analysis. Writing in dissent, Justive Stevens remarked that the majority "seem[ed] unaware" that its cursory First Amendment analysis had potentially "fashioned" a "drastic new remedy" to "enforce a species of prior restraint on a citizen's right to criticize his government." 444 U.S. at 526 (Stevens, J., dissenting). Justice Stevens warned that "[i]nherent in this prior restraint 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.* He continued: "The character of the covenant as a prior restraint on free speech surely imposes an especially

heavy burden on the censor to justify the remedy it seeks." *Id.*

Justice Stevens was right that the Court should have evaluated Snepp's prepublication review obligation as a prior restraint, and asked whether it contained adequate substantive and procedural safeguards. To be sure, recognizing that the CIA's requirement was a prior restraint would not necessarily have led to its invalidation. This Court's jurisprudence makes clear that prior restraints can be permissible in some circumstances. But evaluating the review obligation as a prior restraint would have required the Court to assess it against a different, and more stringent, body of law.

In particular, any system of prior restraint must include, at a minimum, "narrow, objective, and definite standards to guide the licensing authority," *Shuttlesworth*, 394 U.S. at 150–51, and "procedural safeguards designed to obviate the dangers of a censorship system," *Freedman*, 380 U.S. at 58. Even when a national security interest is invoked, the government must show that the system of prior restraint is no broader than necessary to accommodate its interest. *Pentagon Papers*, 403 U.S. at 730. Yet the Court in *Snepp* never even assessed the adequacy of the safeguards contained in the CIA's prepublication review scheme.

2. Respondents' prepublication review regimes lack the substantive and procedural protections required of licensing schemes.

Snepp's fundamental error has had the effect of insulating prepublication review regimes from meaningful First Amendment scrutiny. Regimes like the ones challenged in this case are the predictable result. It is plain that they would not survive scrutiny under the standards the Court has applied in other contexts involving the licensing of speech.

Respondents' regimes lack narrow, objective, and definite substantive standards to guide government officials and cabin their discretion when reviewing materials. *See Shuttlesworth*, 394 U.S. at 150–51. They permit officials to censor information that is not classified, and not learned in the course of an author's government employment, as Petitioners' experiences attest. Compl. ¶¶ 73–75, 90. As noted above, one of the regimes empowers reviewers to redact information whenever they determine that doing so would serve a "legitimate governmental interest," App. 9a, a phrase that is nowhere defined, and two of the regimes lack any substantive standards for redaction whatsoever, Compl. ¶¶ 45, 51.

The regimes also lack narrow, objective, and definite standards for what former employees must submit for review. The regimes impose an obligation to submit on all former employees, without regard to

whether they had access to classified information. *Id.* ¶¶ 32, 38, 44, 50, 90. They also require the submission of virtually anything Petitioners write about the government or national security, regardless of whether they rely on classified information they learned in the course of their employment. *Id.* ¶¶ 32, 38, 44, 50. For example, the ODNI requires Professor Immerman and Mr. Edgar to submit any information "that discusses the ODNI, the IC [Intelligence Community], or national security." *Id.* ¶ 50. The DOD requires Ms. Bhagwati to submit anything that "relates to information in the custody and control of the [DOD]" if it "pertains to . . . subjects of significant concern to [the agency]." *Id.* ¶ 38.

The challenged regimes also lack the procedural safeguards required to mitigate the risk of illegitimate censorship. *See Freedman*, 380 U.S. at 58–59; *Forsyth Cnty. v. Nat'list Movement*, 505 U.S. 123, 130–31 (1992); *Se. Promotions*, 420 U.S. at 560. Most critically, they lack *any* binding or enforceable deadlines that would make review predictable and fair. Compl. ¶¶ 36–37, 42–43, 48–49, 54–55.

To be clear, Petitioners do not contend that prepublication review regimes are *per se* unconstitutional. The government plainly has a legitimate interest in preventing inadvertent disclosures of classified information. App. 29a.[4] But

[4] This interest is served principally through laws that criminalize the mishandling and disclosure of classified information. Prepublication review serves the government's

it does not follow that any review regime is permissible, no matter how broad or vague its standards, no matter how much discretion it affords to government censors, and no matter its lack of procedural safeguards. Rather, because prior restraints strike at the core of the First Amendment, the government should have to demonstrate that it could not protect its legitimate interests under a more narrowly tailored regime.

This Court in *Snepp*, and the Fourth Circuit here, never put the government to that test. As a result, Respondents have never had to explain why they cannot commit, even presumptively, to completing review in a specific period of time, why reviewers must have the authority to censor information that is not classified, and why censors' decisions should be guided by nothing other than an undefined "legitimate governmental interest." App. 9a. But absent such a showing, the regimes challenged here cannot satisfy the exacting scrutiny the First Amendment demands.

B. *Snepp* is inconsistent with the Court's recent employee-speech jurisprudence.

Snepp is also inconsistent with this Court's decision in *NTEU*, 513 U.S. 454, which held that across-the-board prospective restrictions on the speech of even *current* employees are subject to more

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narrow and residual interest in preventing inadvertent disclosures that are not prevented by the threat of criminal penalties.

stringent scrutiny than the reasonableness standard *Snepp* applied, and which some courts have equated with traditional *Pickering* analysis. *See Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1439 (D.C. Cir. 1996) (noting that the *Snepp* Court "essentially applied *Pickering*"); *see also* App. 28a (same).

NTEU involved a statute that banned federal employees from accepting compensation for making speeches or writing articles. 513 U.S. at 457. Rejecting the government's invitation to apply the *Pickering* balancing test, the Court distinguished between cases that involve a "*post hoc*" challenge to "an isolated disciplinary action" and those that involve a challenge to a "wholesale deterrent to a broad category of expression by a massive number of potential speakers." *Id.* at 467–68. The latter, it observed, "give[] rise to far more serious concerns" because the regulation has a "widespread impact" and "chills potential speech before it happens." *Id.* at 468. For these reasons, the Court held that "the Government's burden [of justification for such a restraint] is greater" than it is under *Pickering*. *Id.*

Whereas the test under *Pickering* balances the interests of the government in punishing a particular speaker against the interests of the employee in engaging in that speech, the test under *NTEU* accounts for the interests of *all* employees whose speech is or will be restricted and of their audiences in hearing what they have to say. As the *NTEU* Court explained, the government must show "that 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." *Id.* at 468 (quoting *Pickering*, 391 U.S. at 571). Moreover, the government "must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 475 (cleaned up) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)). As this Court recently recognized, "the end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis." *Janus*, 138 S. Ct. at 2472.

The prepublication review regimes at issue here are far more onerous than that at issue in *NTEU*, as they wholly forbid speech absent prior government approval. Where, as here, the government imposes a lifelong prior restraint on citizens, *NTEU* demands that at a minimum the scheme include adequate substantive and procedural safeguards. As *NTEU* itself recognized, traditional prior restraint principles are relevant to evaluating prior restraints on employee speech. *NTEU*, 513 U.S. at 468 (citing *Near v. Minnesota ex rel Olson*, 283 U.S. 697 (1931)); *see also, e.g.*, *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995) ("[I]n the context of [*NTEU*] balancing, [the potential for censorship] justifies an additional thumb on the employees' side of [the] scales."); *Harman v. City of N.Y.*, 140 F.3d 111, 120 (2d Cir. 1998) (relying on *Freedman*, *Shuttlesworth*, and related cases to find a regulation of employee speech invalid under *NTEU*).

NTEU thus casts even further doubt on the continuing validity of *Snepp*. This Court should grant the Petition to make clear that licensing schemes like Respondents' should be subject to a far more exacting level of scrutiny than "reasonable[ness]," *Snepp*, 444 U.S. at 509 n.3, and properly apply that scrutiny to Respondents' regimes.

C. *Snepp*'s procedural irregularities are an additional reason to revisit the case.

Snepp's irregular procedural history supplies an additional reason to revisit the case.

In his petition for certiorari, Snepp argued that his secrecy agreement was unenforceable as a prior restraint. *Id.* The Court granted Snepp's petition, as well as a conditional cross-petition by the government that focused on the question of remedy. Very unusually, however, the Court decided the case summarily on the basis of the petitions, without inviting briefing on the merits or hearing oral argument. *Id.* at 526 n.17 (Stevens, J., dissenting). And it decided a major constitutional question in summary fashion, in a per curiam opinion, in a lone footnote, outside the substantive portion of its opinion. *Id.* at 509 n.3 (majority op.).

This Court has recognized that deference to precedent is less appropriate where there were procedural irregularaties in the generation of the decision in question. For example, in *Hohn v. United States*, 524 U.S. 236 (1998), the Court explained that

because "stare decisis is a principle of policy rather than an inexorable command, . . . we have felt less constrained to follow precedent where . . . the opinion was rendered without full briefing or argument." *Id.* at 251 (quotation marks and citation omitted) (citing *Gray v. Mississippi*, 481 U.S. 648, 651 n.1 (1987)); *cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981) (plurality op.) (explaining that summary decisions "do not present the same justification for declining to reconsider a prior decision as do decisions rendered after argument and with full opinion").

This observation in *Hohn* built upon what the Court, almost a half century ago, called "obvious[]": that the Court's prior summary treatment of (especially, constitutional) questions does not yield opinions "of the same precedential value" as do "opinion[s] of this Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *see also McCutcheon v. FEC*, 572 U.S. 185, 200 (2014) (determining that prior precedent did not control where the Court had "spent a total of three sentences analyzing" the First Amendment question at stake, and the parties had not "addressed [that question] at length" (quotation marks omitted)).

Snepp itself makes clear why these principles are important: its underanalyzed and underexplained result are a weak foundation for what has become a uniquely far-reaching system of prior restraint. This Court should grant certiorari to revisit and more fully address the important questions that lower courts have understood *Snepp* to have decided.

III. In the alternative, the Court should clarify that *Snepp* does not preclude meaningful scrutiny of Respondents' prepublication review regimes.

If the Court does not overrule *Snepp*, it should at least clarify that the case does not preclude meaningful judicial scrutiny of the adequacy of substantive and procedural safeguards associated with prepublication review regimes.

In the years following *Snepp*, lower courts, including the Fourth Circuit below, have effectively interpreted *Snepp* to hold that intelligence agencies' prepublication review regimes are *per se* constitutional. But *Snepp* did not so hold. Because of the posture in which *Snepp* came to the Court, the Court's opinion focused narrowly on a question of remedy and did not consider the questions presented here, including: the substantive scope of materials an agency may constitutionally require Petitioners to submit for review, on what bases an agency may constitutionally withhold permission to publish, and whether there must be strict presumptive time limits on agency review. *Snepp* cannot fairly be read to have silently endorsed every feature of the prepublication review system that existed in 1980, and it certainly cannot be read to have endorsed Respondents' much broader and much more speech-suppressive regimes. This Court should grant review to correct the contrary interpretation reached by the lower court here, and to consider the constitutional bounds of Respondents' authority to subject Petitioners and other former employees to prepublication review obligations.

Only two circuit courts, including the court below, have considered challenges to the constitutionality of agency prepublication review regimes since *Snepp*.

The Fourth Circuit in this case concluded that *Snepp* controlled the constitutionality of Respondents' prepublication review regimes, even though *Snepp* says nothing about the requisite procedural or substantive safeguards for prepublication review. The court reasoned that Petitioners had voluntarily signed nondisclosure agreements that required them to submit for prepublication review, and that *Snepp* had already held "such agreements are not 'unenforceable as prior restraint[s].'" App. 24a (quoting *Snepp*, 444 U.S. at 509 n.3). In effect, the court read *Snepp* as having announced a categorical rule barring government employees who sign such agreements from challenging "the requirement that they submit materials for prepublication review and the stated conditions for prepublication review." *Id.* at 25a. In the court's view, *Snepp* largely "end[ed] the matter." *Id.*[5]

While the court purported to consider Petitioners' challenges to "the clarity of the stated

[5] The Fourth Circuit's conclusion, based on *Snepp*, that Petitioners had "knowingly waived their First Amendment rights" is simply wrong. App. 25a. As both *Pickering* and *NTEU* make clear, contractual waivers of employee speech rights are subject to First Amendment scrutiny. *See McGehee v. Casey*, 718 F.2d 1137, 1147–48 (D.C. Cir. 1983); *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).

conditions and their interpretive scope, as well as the manner in which the defendant agencies h[ad] implemented prepublication review," its analysis of those challenges was cursory. *Id.* And despite claiming to evaluate Respondents' regimes against the test from *NTEU*, *id.* at 28a, the Fourth Circuit failed to consider *any* of the key elements of that test. It did not consider the interests of employees whose speech is or will be restricted, the interests of their potential audiences in hearing what they have to say, or whether the absence of meaningful substantive or procedural safeguards was "reasonably necessary" to address harms to the actual operation of government. Instead, in light of its interpretation of *Snepp*, the court asked merely whether the agencies' regimes were "a reasonable and effective means of serving that interest." *Id.* at 29a. The court did not engage in *any* balancing until the very the end of its opinion, where it stated summarily that the strength of the government's interest "require[d] some give in the plaintiffs' speech interests," and declared that Petitioners "freely gave their assent to this" state of affairs. *Id.* at 37a.

Years earlier, the D.C. Circuit committed a similar error in *Weaver v. U.S. Information Agency*, 87 F.3d 1429 (D.C. Cir. 1996). There, it concluded that the State Department's prepublication review regime, as it existed in 1996, did not violate the First Amendment, purportedly "[a]pplying . . . *Pickering* and *NTEU*." *Id.* at 1440. The government's insistence that the regime did not "authorize any form of punishment for publication of material disapproved by the agency," *id.* at 1435,

considerably narrowed the court's inquiry but did not end it. Permeating the court's analysis was its assumption that *Snepp* considered the CIA regime then in force to be "obviously constitutional." *Id.* at 1439.

For example, in considering the scope of the State Department's submission requirement, and its failure to provide a definite time limit for review, the court treated *Snepp* as effectively dispositive, paying only lip service to the balancing called for by *NTEU*. *See id.* at 1431–32 (approving requirement to submit any material related to the "employee's agency or U.S. foreign policy," and "any material that reasonably may be expected to affect the foreign relations of the United States," citing *Snepp* (internal quotations omitted)); *id.* at 1441 (approving application of requirement to "personnel without direct access to classified information," again citing *Snepp*); *id.* at 1443 (approving lack of definite time limit, reasoning that *Snepp* and other cases have "uniformly assessed prior restraints in the setting of government employment by standards less demanding than those used for traditional prior restraints").

Both the decision below and *Weaver* drastically overread *Snepp*. *Snepp* was a narrow opinion about the remedies available to the CIA against an author who "willfully, deliberately[,] and surreptitiously" flouted his obligations under a now-displaced review scheme. *United States v. Snepp*, 456 F. Supp. 176, 179–80 (E.D. Va. 1978). Virtually all of the analysis in *Snepp* focused on whether the agency was entitled to the proceeds of Snepp's book in light of his willful

violation of his agreement. The Court did not consider the constitutionality of the specific features of the CIA's prepublication review regime, let alone the features of any other regime.

Snepp did not, for example, consider the categories of speakers to whom a prepublication review requirement may constitutionally extend. Snepp himself was a former CIA officer who had been granted access to some of the government's most closely held secrets, and the Court emphasized that status in concluding that his prepublication review requirement was constitutional: "Few types of governmental employment involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties." *Snepp*, 444 U.S. at 511 n.6. Moreover, Snepp had left the CIA relatively recently. (He resigned in 1976 and published his book the following year. *Id.* at 508 n.1.) The Court did not consider (or have any reason to consider) whether the prepublication review obligation the CIA had imposed on Snepp could be imposed on other CIA employees, or on employees of other agencies, and it did not consider whether the First Amendment would bar the agency from enforcing a prepublication review requirement on someone who had left the agency's employ many years earlier.

Nor did *Snepp* consider what materials an agency can constitutionally require its former employees to submit for review, the grounds on which a government reviewer can constitutionally censor a manuscript, the length of time an agency may constitutionally spend reviewing a manuscript, or the other procedural protections that must be

afforded to former government employees in this context. The Court had no reason to reach these issues, because Snepp did not submit his manuscript for review, and because it was undisputed that the manuscript described CIA intelligence activities to which Snepp was privy during his official service. *Snepp*, 456 F. Supp. at 178.

To the extent that *Snepp* considered the specific features of the CIA's prepublication review regime at all, it considered those features as modified by the district court injunction Snepp challenged. That injunction included a number of safeguards that Snepp's secrecy agreement did not: it required Snepp to submit writings only if they contained information he "gained during the course of or as a result of his employment," it required the CIA to complete its review within thirty days, and it permitted the CIA to censor only information that was classified. *Id.* at 182. In approving this injunction, the Supreme Court retained these safeguards.

Even if *Snepp*'s footnote could tenably be read as a silent endorsement of every feature of the CIA's regime in 1980, it cannot reasonably be read as a categorical endorsement of the sprawling, byzantine, and multifariously dysfunctional prepublication review regimes that Petitioners have challenged here. As noted above, in 1977, the year Snepp published his book, the CIA received only forty-three submissions for prepublication review. Compl. ¶ 28. The processes and practices surrounding prepublication review were relatively new, and lifetime prepublication review was

confined to the CIA and NSA, the two agencies with the most direct role in intelligence gathering. *Id.* ¶ 24. As a result, prepublication review applied, in practice, to relatively few people and publications. *Id.* ¶¶ 27–28. Since then, however, the system has expanded on every axis, as described at length above. *See supra* Statement of the Case, Part I.A.

The Court should grant review to make clear that *Snepp* does not control the constitutionality of all systems of prepublication review, regardless of their substantive and procedural safeguards, and to evaluate the constitutionality of the specific regimes challenged here.

IV. This case provides an optimal vehicle for revisiting *Snepp* and clarifying the application of the First Amendment to prepublication review regimes.

This case affords the Court an optimal vehicle for overruling or clarifying *Snepp*, for two reasons.

First, litigation over prepublication review is extremely uncommon and rarely produces substantive decisions.[6] Authors rarely bring suits because they are expensive, *cf.* Compl. ¶ 112; because they prefer to publish manuscripts with redactions rather than wait for courts to resolve disputes, *id.* ¶ 78; because contesting agencies'

[6] *See* Kevin Casey, Note, *Till Death Do Us Part: Prepublication Review in the Intelligence Community*, 115 Colum. L. Rev. 416, 450 (2015) (collecting cases mooted by agencies).

censorship decisions is made difficult by the fact that agencies seldom provide reasons for them, *id.* ¶ 88; and because they fear aggravating agency reviewers who may have authority over other manuscripts they have to submit in the future, *id.* ¶ 64. And authors rarely foreground constitutional challenges in as-applied litigation because the courts have treated *Snepp* as having effectively exempted such regimes from ordinary constitutional scrutiny. It is unlikely that this Court will have another opportunity to revisit *Snepp* anytime soon.

Second, this case presents the issues for review squarely and cleanly. Both the district court and Fourth Circuit recognized that Petitioners have standing to challenge Respondents' regimes, and that Petitioners' claims are ripe for review. Because Petitioners are concerned in part about the application of Respondents' regimes to manuscripts they will submit in the future, there is no risk that the case will become moot while the Court considers it. And, as the Fourth Circuit's opinion makes clear, the case squarely presents the question of how *Snepp* should be reconciled with this Court's more recent caselaw concerning the free speech rights of public employees.

CONCLUSION

For reasons discussed above, Petitioners respectfully ask this Court to grant their petition.

Respectfully submitted,

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November 22, 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Docket No. 20-1568

TIMOTHY H. EDGAR; RICHARD H. IMMERMAN; MELVIN A. GOODMAN; ANURADHA BHAGWATI; MARK FALLON,

Plaintiffs – Appellants,

v.

AVRIL D. HAINES, in her official capacity as Director of National Intelligence; DAVID COHEN, in his official capacity as Director of the Central Intelligence Agency; LLOYD J. AUSTIN, III, in his official capacity as Secretary of Defense; PAUL M. NAKASONE, in his official capacity as Director of the National Security Agency,

Defendants – Appellees.

PROFESSOR JACK GOLDSMITH; PROFESSOR OONA A. HATHAWAY; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,

Amici Supporting Appellant.

Appeal from the United States District Court for the District of Maryland at Greenbelt.
George Jarrod Hazel, District Judge.
(8:19-cv-00985-GJH)

Argued: May 4, 2021
Decided: June 23, 2021

Before NIEMEYER and KEENAN, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Keenan and Judge Traxler joined.

ARGUED: Brett Max Kaufman, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellants. Daniel Lee Winik, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

ON BRIEF: Alexia Ramirez, Vera Eidelman, Ben Wizner, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; David R. Rocah, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND, Baltimore, Maryland; Jameel Jaffer, Alex Abdo, Ramya Krishnan, Meenakshi Krishnan, KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, New York, New York, for Appellants. Jeffrey Bossert Clark, Acting Assistant Attorney General, H. Thomas Byron III, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Robert K. Hur, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greenbelt, Maryland, for Appellees. Paul N. Harold, Washington, D.C., Brian M. Willen, Lauren Gallo White, Brian Levy, WILSON SONSINI

GOODRICH & ROSATI PROFESSIONAL CORPORATION, New York, New York, for Amici Professors Jack Goldsmith and Oona Hathaway. Bruce D. Brown, Katie Townsend, Gabe Rottman, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Washington, D.C., for Amicus Reporters Committee for Freedom of the Press.

NIEMEYER, Circuit Judge:

Five former employees of our Nation's security agencies who, during their employment, had clearances for access to classified and sensitive information, commenced this action against the Central Intelligence Agency (CIA), the Department of Defense (DoD), the National Security Agency (NSA), and the Office of the Director of National Intelligence (ODNI), facially challenging the agencies' requirements that current and former employees give the agencies prepublication review of certain materials that they intend to publish. These prepublication review requirements allow the agencies to redact information that is classified or otherwise sensitive to the national security. The employees alleged in their complaint that this prepublication review — which is implemented through "regimes" of policies, regulations, and individual employee agreements — violates their free speech rights guaranteed by the First Amendment and their rights under the Due Process Clause of the Fifth Amendment. Specifically, they alleged that the agencies' regimes "fail to provide former government employees with fair notice of what they must submit," "invest executive officers

with sweeping discretion to suppress speech[,] and fail to include procedural safeguards designed to avoid the dangers of a censorship system."

The district court, in a thorough and well-reasoned opinion, granted the defendant agencies' motion to dismiss, holding that their prepublication review regimes were "reasonable" measures to protect sensitive information and thereby did not violate the plaintiffs' First Amendment rights. The court held further that the regimes were not unduly vague under the Fifth Amendment because they adequately informed authors of the types of materials they must submit and established for agency reviewers the kinds of information that can be redacted.

We agree with the district court and affirm.

I.

Information related to national security has, since World War I, been graded according to sensitivity under a classification system. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988); *see also* Daniel Patrick Moynihan et al., *Report of the Commission on Protecting and Reducing Government Secrecy*, S. Doc. No. 105-2, app. A ("Secrecy: A Brief Account of the American Experience") (1997). And security agencies have, over the years, adopted policies and regulations to protect classified information from public disclosure. They have also required various employees to sign agreements, as a condition of employment or as a condition for receiving access to classified

information, requiring the employees to follow the agencies' policies and regulations. Currently, information that is subject to classification includes "military plans, weapons systems, or operations"; "foreign government information"; "intelligence activities"; "foreign activities of the United States"; and "vulnerabilities or capabilities of ... infrastructures ... relating to the national security"; as well as a few other categories of a similarly sensitive nature. Exec. Order No. 13,526, *Classified National Security Information*, 75 Fed. Reg. 707, 709 (Dec. 29, 2009).

Under current classifications, information that, if disclosed, "reasonably could be expected to cause damage to the national security" is classified as "Confidential"; information the disclosure of which "reasonably could be expected to cause serious damage to the national security" is classified as "Secret"; and information that, if disclosed, "reasonably could be expected to cause *exceptionally grave* damage to the national security" is classified as "Top Secret." Exec. Order No. 13,526, 75 Fed. Reg. at 707–08 (emphasis added). In addition, when information "concern[s] or [is] derived from intelligence sources, methods[,] or analytical processes" that require protection "within formal access control systems," it may be further designated as "Sensitive Compartmented Information," or "SCI." Intelligence Community Directive 703, *Protection of Classified National Intelligence, Including Sensitive Compartmented Information* § 2 (June 21, 2013).

Disclosing information involving national security can be detrimental to the vital national interest, and courts have recognized that the government has "a compelling interest in protecting ... the secrecy of [such] important" information. *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam). As a consequence, agencies involved in intelligence and national security currently have in place, through policies and regulations, a range of practices and procedures designed to protect against the inappropriate disclosure of information related to national security. One such practice and procedure is "prepublication review," which requires current and former employees to submit materials intended for publication to their agencies to enable the agencies to redact, in advance of publication, classified or otherwise sensitive information. This prepublication review process — which is the subject of the plaintiffs' challenge here — relies on the agency's judgment about what is sensitive and detrimental to the national security and therefore must be redacted, rather than on the employee's independent judgment. This is because the agency has a "broader understanding of what may expose classified information and confidential sources." *Id*. at 512.

Under the prepublication review process adopted by each of the defendant agencies, current and former employees are required to submit to their agencies a broad scope of materials that relate to their employment and experience with the agency and that they intend to publish. The agency reviews the materials for classified and sensitive information and, to protect against disclosure of that

information, directs that it be redacted, thereby ensuring that the information will not be inadvertently disclosed by the author. The details of the process for each defendant agency are as follows.

The CIA: CIA Agency Regulation 13-10, *Agency Prepublication Review of Certain Material Prepared for Public Dissemination* (June 25, 2011), provides that employees, former employees, "and others who are obligated by CIA secrecy agreement" must "submit for prepublication review" "any written, oral, electronic, or other presentation intended for publication or public dissemination, whether personal or official, that mentions CIA or intelligence data or activities on any subject about which the author has had access to classified information in the course of his employment or other contact with the" CIA. *Id*. § 2(b)(1), (e)(1). The CIA reviews proposed publications "solely to determine whether [they] contain[ ] any classified information." *Id*. § 2(f)(2). And "[a]s a general rule, the [CIA] will complete prepublication review ... within 30 days of receipt of the material." *Id*. § 2(d)(4). The regulation explains, however, that while "short, time-sensitive submissions ... will be handled as expeditiously as practicable," "[l]engthy or complex submissions may require a longer period of time for review." Id. Authors dissatisfied with the initial reviewer's decisions can appeal within the CIA. *Id*. § 2(h)(1). Consistent with this policy, CIA employees must also sign an agreement as a condition of employment, agreeing "to submit for review by the [CIA] any writing or other preparation in any form, including a work of fiction, which contains any mention of intelligence data or activities, or contains

any other information or material that might be based on" classified information or information the author knows is "in the process of a classification determination." The agreement explains that prepublication review is meant to give the CIA "an opportunity to determine whether the information or material ... contains any" classified information the employee received in the course of employment, which the employee, by signing the agreement, has "agreed not to disclose." The term of the agreement is indefinite.

The DoD: Current, former, and retired DoD employees, contractors, and military service members who have had access to DoD information and facilities must submit for prepublication review "[a]ny official DoD information intended for public release that pertains to military matters, national security issues, or subjects of significant concern to the DoD." DoD Instruction 5230.09, *Clearance of DoD Information for Public Release* § 1.2(b) (Jan. 25, 2019); *Frequently Asked Questions for Security and Policy Reviews of Articles, Manuscripts, Books, and Other Media Prior to Public Release*, DoD (Mar. 2012), https://perma.cc/5AH3-S3RV. "Official DoD information" is defined as "information that is in the custody and control of the DoD, relates to information in the custody and control of the DoD, or was acquired by DoD personnel as part of their official duties or because of their official status within DoD." DoD Instruction 5230.09, glossary § G.2. And prepublication review is defined as "[t]he process by which information ... is examined ... for compliance with established national and DoD policies and to determine whether it contains any

classified, export-controlled[,] or other protected information." *Id*. DoD policy explains that "[t]he public release of official DoD information is limited only as necessary to safeguard information requiring protection in the interest of national security or other legitimate government interest." *Id*. § 1.2(d). For former employees, prepublication review is meant "to ensure that information" they "intend to release to the public does not compromise national security as required by their nondisclosure agreements." *Id*. § 1.2(g). DoD regulations also provide that "security review protects classified information, controlled unclassified information, or unclassified information that may individually or in aggregate lead to the compromise of classified information or disclosure of operation security." DoD Instruction 5230.29, *Security and Policy Review of DoD Information for Public Release*, enclosure 3 § 1 (Apr. 14, 2017). The DoD advises authors to submit papers and articles "at least 10 working days" before the anticipated publication date and manuscripts and books "at least 30 working days" in advance. *Id*. enclosure 3 § 3(a)(2), (4). Dissatisfied authors are authorized to appeal within the DoD. *Id*. enclosure 3 § 4(b).

The NSA: Current and former NSA employees acting in a private capacity may publish materials using information that is "unclassified and approved for public release," but they must submit proposed materials for prepublication review where "compliance with" that requirement "is in doubt." NSA/CSS Policy 1-30, *Review of NSA/CSS Information Intended for Public Release*, §§ 2, 6(b), 10(a) (May 12, 2017) (cleaned up); *see also id.* § 30

(defining prepublication review as "[t]he overall process to determine that information proposed for public release contains no protected information"); 50 U.S.C. § 3605(a) (providing, subject to certain exceptions, that no law "shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency"). The NSA sets for itself a 25-day goal for reviewing a proposed publication. NSA/CSS Policy 1-30 § 6(b)(7). Dissatisfied authors are authorized to appeal within the NSA. *Id*. § 7.

The ODNI: ODNI regulations require current and former ODNI employees to submit any "publication that discusses the ODNI, the [Intelligence Community], or national security" to the ODNI for prepublication review. ODNI Instruction 80.04, Rev. 2, *ODNI Pre-Publication Review of Information to be Publicly Released* §§ 4, 6 (Aug. 9, 2016). "The goal of prepublication review is to prevent the unauthorized disclosure of information, and to ensure the ODNI's mission and the foreign relations or security of the U.S. are not adversely affected by publication." *Id*. § 3. The ODNI thus reviews submitted materials "to safeguard sensitive intelligence information and prevent its unauthorized publication." *Id*. § 6; *see* 50 U.S.C. § 3024(i)(1) ("The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure"). The ODNI's policy is to "complete a review of non-official publication requests no later than 30 calendar days from the receipt of the request, as priorities and resources

allow." ODNI Instruction 80.04 § 6(C)(2)(b). Dissatisfied authors are authorized to appeal within the ODNI. *Id*. § 6(E). Consistent with this policy, ODNI employees also sign an ODNI-specific nondisclosure agreement as a prerequisite for accessing classified information that is materially identical to the CIA's secrecy agreement.

All four agencies also authorize referrals of proposed publications to other agencies that have equities at stake in a proposed disclosure.

In addition to these agency-specific policies, the plaintiffs' complaint describes various nondisclosure agreements that employees are required to sign as a condition of accessing classified or sensitive information. Thus, when an employee signs Standard Form 312, entitled "Classified Information Nondisclosure Agreement," the employee agrees to "never divulge classified information to anyone" unless the employee has "officially verified that the recipient has been properly authorized ... to receive it" or has "been given prior written notice of authorization ... that such disclosure is permitted." The employee also agrees "to comply with laws and regulations that prohibit the unauthorized disclosure of classified information." And when an employee signs Standard Form 4414, entitled "Sensitive Compartmented Information Nondisclosure Agreement," which applies to employees who need access to SCI, the employee agrees similarly to "never divulge" SCI "to anyone who is not authorized to receive it without prior written authorization." The employee also agrees to "submit for security review," by the agency that

granted the employee SCI access, "any writing or other preparation in any form, including a work of fiction, that contains or purports to contain any SCI or description of activities that produce or relate to SCI or that [the employee] ha[s] reason to believe are derived from SCI." Both of these nondisclosure forms impose obligations that apply during employment "and at all times thereafter." Other general or agency-specific agreements referred to in the complaint, such as Form 313 and DD Form 1847-1, contain similar provisions.

In common, all four defendant agencies require — whether by policy, regulation, agreement, or a combination of them — that all current and former employees submit to the agency materials that they intend to publish to give the agency the opportunity to require redaction of classified or sensitive information. This prepublication review process may be analogized to a funnel. At the top end, a broad scope of materials intended for publication is called for and entered into the review process — materials that *might* contain classified or sensitive information. And at the bottom end, only a narrow scope of materials is selected for redaction — materials that *actually* contain classified or sensitive information.

I.

The plaintiffs are five former employees of three of the four defendant agencies. Because they alleged that the prepublication review process at these agencies is facially unconstitutional, their personal experiences with the publication of agency-related

materials in the past — which are detailed at some length in the complaint — are mostly relevant only to determine the plaintiffs' standing and the ripeness of their action (which the agencies challenge in this case).

Plaintiff Timothy Edgar was an ODNI employee from 2006 to 2013 and held a Top Secret/SCI clearance. In October 2016, Edgar submitted a manuscript for his book *Beyond Snowden: Privacy, Mass Surveillance, and the Struggle to Reform the NSA* to the ODNI for review. The ODNI referred the manuscript to both the CIA and the NSA for additional review, and review was completed in January 2017. Edgar alleged that some of the required redactions "related to events that had taken place, or issues that had arisen, after [he] had left government" and that others "related to facts that were widely discussed and acknowledged though perhaps not officially confirmed." He did not, however, challenge the mandated redactions because he did not want to delay publication of the book and because he wanted to maintain "a good relationship with reviewers at the ODNI." Edgar alleged that he plans to continue writing in this field and "anticipates submitting at least some" publications for review, but he also alleged that the review requirement "has dissuaded him from writing some pieces that he would have otherwise written[ ] and has caused him to write others differently than he would otherwise have written them."

Plaintiff Richard Immerman was an ODNI employee from 2007 to 2009 and held a Top

Secret/SCI clearance. In January 2013, he submitted a manuscript for the book *The Hidden Hand: A Brief History of the CIA* to the ODNI's prepublication review office. The ODNI referred the manuscript to the CIA, and review was completed in July 2013. Immerman alleged that some of the proposed redactions "related to information that had been published previously by government agencies"; that other redactions related to public information; and that several others "related to events that had taken place, or issues that had arisen, after [he] had left government." Immerman appealed those redactions within the ODNI, and the ODNI "informed him that he could publish a significant portion of the" redacted text, and the CIA agreed that "some of the [proposed] redactions were unnecessary." Immerman thereafter published his book, which included "roughly eighty percent of the material that the agencies had originally redacted." Immerman alleged that he plans to submit more articles and books in this field and that he "would publish more" if it were not for the "burdens and uncertainties associated with prepublication review."

Plaintiff Melvin Goodman was a CIA employee from 1966 to 1990 and held a Top Secret/SCI clearance. Upon joining the CIA, he signed the standard secrecy agreements. Since leaving the CIA, he "has published nine books and has submitted each manuscript to the CIA for prepublication review." While the review process "typically took less than two months," "the CIA took eleven months to review a manuscript of his latest book, *Whistleblower at the CIA*." Goodman "believes that

all of the" CIA's "changes ... were intended to spare the agency embarrassment, not to protect classified information." Moreover, Goodman alleged that some of the redactions concerned "widely reported aspects of U.S. government policy." As Goodman also alleged, he "intends to submit" for review "those portions of any future manuscripts that deal with intelligence matters," but he worries that the CIA "will demand that he redact material unwarrantedly ... and that the delay associated with prepublication review will jeopardize his book contracts and render his publications less relevant to quickly evolving public debates."

Plaintiff Anuradha Bhagwati is a former Marine Corps officer who was cleared to receive Secret information. She recently published *Unbecoming: A Memoir of Disobedience*, "a memoir that centers on her confrontation of misogyny, racism, and sexual violence in the military, as well as her advocacy on related issues after leaving the Marines." Bhagwati, however, did not submit that book for prepublication review and "has no plans to submit any future work to prepublication review." But she alleged that she remains concerned that the DoD might sanction her for failing to submit her work for review.

Plaintiff Mark Fallon is a former employee of the DoD and other agencies who held Top Secret and Top Secret/SCI clearances. In January 2017, Fallon submitted a manuscript of his book *Unjustifiable Means* to the DoD's prepublication review office, and review was completed in August 2017. Fallon alleged that the proposed redactions were "intended to protect the CIA from embarrassment" and that

"[s]ome of them related to material that had been published in unclassified congressional reports." Fallon also alleged that "he is unsure whether he is willing to embark on writing on another book" and "has declined offers to author op-eds and write articles on topics of public concern" because of "potential delays and unjustified objections by the agency." He has, however, recently "submitted numerous shorter works" and a book chapter for review.

While the plaintiffs have alleged their personal circumstances, they do not challenge the application of prepublication review to any specific work. Rather, their complaint alleged that facially the prepublication review "regime" of each agency is "a far-reaching system of prior restraints that suppresses a broad swath of constitutionally protected speech, including core political speech, by former government employees." After describing the regimes in some detail, their complaint concluded:

> Defendants' prepublication review regimes violate the First Amendment because they invest executive officers with sweeping discretion to suppress speech and fail to include procedural safeguards designed to avoid the dangers of a censorship system.

Also that:

> Defendants' prepublication review regimes are void for vagueness under the First and Fifth Amendments

> because they fail to provide former government employees with fair notice of what they must submit for prepublication review and of what they can and cannot publish, and because they invite arbitrary and discriminatory enforcement.

For relief, the plaintiffs sought a declaratory judgment that the defendants' "prepublication review regimes violate the First and Fifth Amendments to the Constitution"; an injunction prohibiting the defendants "from continuing to enforce [their] prepublication review regimes against Plaintiffs, or any other person"; and costs and attorneys fees.

The defendant agencies filed a motion to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), contending (1) that the plaintiffs lacked standing as required by Article III of the Constitution; (2) that the plaintiffs' claims were unripe; and (3) that, in any event, the plaintiffs failed to state a claim under either the First or Fifth Amendment.

The district court rejected the agencies' arguments for dismissal based on a lack of standing or ripeness. The court held that the plaintiffs had standing because they plausibly alleged that the defendant agencies' prepublication review regimes had "a chilling effect on protected speech." *Edgar v. Coats*, 454 F. Supp. 3d 502, 523, 525–27 (D. Md. 2020). And it ruled that the plaintiffs' claims were ripe because they were challenging policies to which

they "are currently subject ... that they reasonably allege require them to self-censor." *Id*. at 530. But the court granted the agencies' motion to dismiss on the merits, concluding that the plaintiffs had failed to state a plausible claim. The court explained that prepublication review regimes are not classic prior restraints and are instead consistent with the First Amendment so long as they are "reasonable." *Id*. at 530–32 (quoting *Snepp*, 444 U.S. at 509 n.3). It found that "Plaintiffs have failed to demonstrate that the regimes do not meet" that "low threshold." *Id*. at 537. The court also rejected the plaintiffs' vagueness claim, noting that the plaintiffs' primary issue with the regimes' submission requirements "is their breadth rather than any difficulties Plaintiffs have in understanding what they require." *Id*. at 539. The court then parsed the agencies' separate prepublication review regimes and concluded that they "appear to set out reasonable limitations and guidance" for reviewers. *Id*. at 541.

From the district court's order of dismissal dated April 16, 2020, the plaintiffs filed this appeal.

II.

We address first our jurisdiction, which the defendant agencies have challenged in arguing that the plaintiffs lack Article III standing to bring their action and that the issues are not ripe for adjudication. The district court rejected both arguments, and for substantially the same reasons given by the district court, we affirm its rulings on these issues.

A.

The defendant agencies contend first that the district court erred in finding standing. On that issue, the court concluded that the plaintiffs "plausibly alleged that features of the [prepublication review] regimes result in a chilling effect on the exercise of First Amendment rights" and therefore "have made a sufficient showing of an injury in fact to proceed." *Edgar*, 454 F. Supp. 3d at 527. The defendants argue, however, that the "Plaintiffs fail[ed] to show that the challenged features of defendants' policies would cause any objectively reasonable chill," as necessary to establish the injury-in-fact element for establishing Article III standing.

Article III's standing requirement centers "on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. FEC*, 554 U.S. 724, 734 (2008). At this stage, a party has such a stake when it is able to plausibly allege "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (cleaned up). These requirements are, however, "somewhat relaxed in First Amendment cases," given that even the *risk* of punishment could "chill[ ]" speech. *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013); *see also Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). Thus, "[i]n First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient

showing of 'self-censorship, which occurs when a claimant is chilled from exercising his right to free expression.' " *Cooksey*, 721 F.3d at 235 (cleaned up) (quoting *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011)). But this chilling effect "must be objectively reasonable." *Benham*, 635 F.3d at 135 (cleaned up). In short, while plaintiffs need not show that the government action led them to stop speaking "altogether," they must show that the action would be "likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *Id*. (cleaned up).

Here, the plaintiffs asserted that the vagueness and breadth of the defendants' prepublication review regimes required them "to submit far more than [they] should be required to submit"; allowed agency officials to "redact material unwarrantedly"; and caused them to write some pieces "differently than [they] would have otherwise written them." The plaintiffs further alleged that these infirmities, together with the delays created by the defendants' prepublication review regimes, have "dissuaded [them] from writing some pieces" they "would have otherwise written," and have made it more difficult to engage in "quickly evolving public debates."

These are, we conclude, adequate allegations of an "objectively reasonable" chill sufficient to show that the defendants' prepublication review regimes are "likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *Benham*, 635 F.3d at 135 (cleaned up). Importantly, some plaintiffs alleged that they have decided not to write about certain topics because of the

prepublication review policies. Such self-censorship is enough "for an injury-in-fact to lie." *Cooksey*, 721 F.3d at 236.

The plaintiffs' allegations also satisfy the causation and redressability elements of the standing inquiry. *See Susan B. Anthony List*, 573 U.S. at 158. The chilling of the plaintiffs' speech was plainly alleged to have been caused by the particular prepublication review regimes at issue here. As the plaintiffs alleged, they would publish more but for those regimes. *See Cooksey*, 721 F.3d at 238 ("[C]ausation is satisfied where a causal connection between the injury and the conduct complained of ... is fairly traceable, and not the result of the independent action of some third party not before the court" (cleaned up)). And there is more than "a non-speculative likelihood that th[is] injury would be redressed by a favorable judicial decision." *Id.* (cleaned up). A favorable decision on the plaintiffs' behalf would deem the defendants' regimes unconstitutional and enjoin the defendants from enforcing them.

Accordingly, we reject the defendant agencies' argument that the plaintiffs lack Article III standing to challenge the prepublication review regimes.

B.

On ripeness, the defendant agencies argue that the plaintiffs' claims are "paradigmatically unripe" because they arise "in the absence of a concrete factual dispute." According to the defendants, courts require a specific application of prepublication

review to determine "whether plaintiffs' treatment has been unfair." The defendants also contend that requiring the plaintiffs "to litigate their claims in the context of a concrete dispute" would not cause them any material hardship; as they argue, the plaintiffs "who are dissatisfied with the review decisions can challenge them in court."

"Like standing, the ripeness doctrine originates in the 'case or controversy' constraint of Article III." *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019) (cleaned up). "The question of whether a claim is ripe turns on the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.' " *Id.* (ultimately quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Thus, while standing considers who may sue, ripeness considers when they may sue. There is, however, "obvious overlap between the doctrines." *Id.* (cleaned up). And "[m]uch like standing, ripeness requirements are also relaxed in First Amendment cases." *Cooksey*, 721 F.3d at 240.

The plaintiffs have challenged practices and procedures to which they are currently subject and which, they plausibly alleged, require them to self-censor. These are legal issues for which no "further factual development" is necessary. *Va. Soc'y for Hum. Life, Inc. v. FEC*, 263 F.3d 379, 390 (4th Cir. 2001), overruled on other grounds by *The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012)). And deciding them does not require us to interpret the agencies' policies and regulations in the "abstract"; we instead are called to decide what

conduct the plaintiffs "can engage in without threat of penalty." *Id*. Therefore, their claims are fit for judicial review. Moreover, the plaintiffs "will face a significant impediment if we delay consideration of the regulation's constitutionality." *Id*. As the plaintiffs allege, they are currently curbing their speech in light of the defendants' prepublication review regimes. *See Cooksey*, 721 F.3d at 240 ("First Amendment rights are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss" (cleaned up)). Thus, the plaintiffs have adequately demonstrated that refusing to reach their claims would cause them material hardship. For these reasons, we agree with the district court and conclude that the plaintiffs' claims are ripe for adjudication.

III.

On the merits, the plaintiffs contend first that the defendant agencies' prepublication review regimes — consisting of, as they characterize them, a "confusing tangle of contracts, regulations, and policies" — violate their First Amendment rights because the regimes "invest executive officers with sweeping discretion to suppress speech and fail to include procedural safeguards designed to avoid the dangers of a censorship system." More particularly, they argue that the regimes have overly broad and confusing submission requirements; include "confusing, subjective, and overbroad" review standards that "do not meaningfully limit [officials'] censorship authority"; and lack "any definite deadlines for decisions."

A.

Addressing first the employment agreements, the complaint alleged that as part of the regimes imposing prepublication review, the defendant agencies require employees to sign one or more forms of nondisclosure agreements "as a prerequisite to accessing classified information." The complaint describes numerous standard forms, including Form 312, Form 313, Form 4414, a "standard CIA secrecy agreement," and DD Form 1847-1, all allegedly containing employee promises not to disclose classified or sensitive information *without prior authorization*. The agreements make clear that this is a continuing obligation, applicable even after the employee leaves the agency. Moreover, some of the agreements, particularly Form 4414, describe the process of submitting intended writings for prepublication review.

No plaintiff has alleged that he or she was coerced into signing any agreement or was under any duress in doing so. Indeed, no plaintiff even contends that the agreements were, as contracts, invalid. They challenged only the agreements' contribution to the implementation of "prepublication review," which they contend violates their First Amendment rights as an unlawful prior restraint.

The Supreme Court, however, has already said that such agreements are "not unenforceable as [ ] prior restraint[s]." *Snepp*, 444 U.S. at 509 n.3. Indeed, the Court has blessed a similar agreement as a "reasonable means for protecting" the

government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Id*. And we have held that in signing such nondisclosure agreements, the employee "effectively relinquishe[s] his First Amendment rights" to the sensitive information those agreements protect. *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975); *see also Wilson v. CIA*, 586 F.3d 171, 183 (2d Cir. 2009) ("[O]nce a government employee signs an agreement not to disclose information properly classified pursuant to executive order, that employee simply has no first amendment right to publish such information" (cleaned up)); *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) (same).

Accordingly, by voluntarily signing these agreements, the plaintiffs knowingly waived their First Amendment rights to challenge the requirement that they submit materials for prepublication review and the stated conditions for prepublication review. For the most part, that could end the matter. Yet, because the plaintiffs challenge the clarity of the stated conditions and their interpretive scope, as well as the manner in which the defendant agencies have implemented prepublication review, such as its timeliness, we turn to address the challenges that they make.

B.

In challenging prepublication review, the plaintiffs identify four specific aspects that they

claim render the defendants' entire regimes unconstitutional under the First Amendment. *First*, they contend that the scope of matters subject to prepublication review is too broad, "sweep[ing] in virtually everything that former intelligence agency employees might write about the government." *Second*, they contend that the scope of persons subject to the submission requirements is too expansive, applying to "all former employees — not just those who had access to SCI." *Third*, they contend that the review standards are "confusing, subjective, and overbroad," allowing the defendants "to censor information ... whether or not it was obtained by the author in the course of employment; ... whether or not its disclosure would actually cause harm; ... whether or not it is already in the public domain; and ... whether or not the public interest in its disclosure outweighs the government's interest in secrecy." And *fourth*, they contend that the prepublication review process lacks firm or binding deadlines, allowing for inappropriate delays.

At the outset, we reiterate that the plaintiffs are mounting a facial challenge, meaning that their claim is that the policies and regulations are unconstitutional not as applied to their own conduct, but rather, *on their face*, as they apply to the population generally. *United States v. Miselis*, 972 F.3d 518, 530 (4th Cir. 2020). Such facial challenges "are disfavored" because they "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to

which it is to be applied." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (cleaned up). Accordingly, facial challenges typically require "a showing that no set of circumstances exists under which the [law] would be valid, *i.e.*, that the law is unconstitutional in all of its applications, or that the statute lacks any plainly legitimate sweep." *Miselis*, 972 F.3d at 530 (cleaned up). But given the "fear of chilling protected expression," *id.*, a facial challenge to a law on the ground that it is overbroad under the First Amendment can be successful "if a *substantial number* of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," *United States v. Stevens*, 559 U.S. 460, 473 (2010) (emphasis added) (cleaned up).

The relevant constitutional standard that we must apply in addressing this facial challenge derives from *Snepp*. That case concerned the remedy available to the CIA when a former agent, who agreed to prepublication review upon joining the CIA, nonetheless published a book about certain CIA activities without submitting it for prepublication review. *Snepp*, 444 U.S. at 507–08. The Court held that the agent's profits from the book should be subject to a constructive trust in favor of the CIA. *Id.* at 509–10. And, as critical here, in conducting its analysis, the Court rejected the agent's argument that the agreement was an unconstitutional prior restraint. It explained that the government can "impos[e] reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." *Id.* at 509 n.3. And the nondisclosure agreement that included

prepublication review was, the Court held, a "reasonable means for protecting" the government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Id*.

Snepp's analysis amounted, at its core, to an application of a reasonableness test that balances "the interests of the [employee], as a citizen, in commenting upon matters of public concern" with "the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *see also Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1439 (D.C. Cir. 1996) (noting that the *Snepp* Court "essentially applied *Pickering*"). And when this reasonableness test is applied to a regulation that operates *as a prior restraint* on employee speech, the government must show "that 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." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468 (1995) (quoting *Pickering*, 391 U.S. at 571).

Because *Snepp* determined that the government has a "compelling interest" in the secrecy of information important to national security, the question in this case reduces to whether the defendant agencies' prepublication review regimes

are a reasonable and effective means of serving that interest.

First, with respect to the plaintiffs' argument that the scope of materials subject to prepublication review is overly broad and therefore not reasonable in serving the government's interest, it is true that the defendants' submission standards do cover a broad range of materials. But this is necessary to serve the government's compelling interest because the aim of prepublication review is, as the parties agree, to prevent the inadvertent disclosure of sensitive information. Thus, the scope of materials subject to review must include materials that *might* contain, reveal, or confirm classified or sensitive information. And that is what the defendants' submissions standards do.

The CIA requests all material that "mentions CIA or intelligence data or activities on any subject about which the author has access to classified information." CIA AR 13-10 § 2(e)(1). The DoD, all material containing "official DoD information ... that pertains to military matters, national security issues, or subjects of significant concern to the DoD." DoD Instruction 5230.09 § 1.2(b). The NSA, any material that may not adhere to the NSA's requirement that employees not publish classified information or information not approved for public release. NSA/CSS Policy 1-30 §§ 2, 6(b), 10(a). And the ODNI requires that employees submit any "publication that discusses the ODNI, the [Intelligence Community], or national security." ODNI Instruction 80.04 § 6.

Distilled to their essence, these submission standards are designed to reach materials that reasonably could reveal classified information or information sensitive to the national security and thus are reasonably tied to the goal of avoiding the inadvertent disclosure of such information. And importantly, the scope of materials subject to review is not the same as the scope of materials that may not be published. The scope of materials for review simply identifies materials that are subject to the process. We conclude that these submission requirements are not overly broad.

Second, with respect to the plaintiffs' contention that the scope of persons covered by the submission is overly broad, we reject the argument for similar reasons. The requirement — that all current and former employees who have had access to certain types of information are covered by the policy — is reasonably tied, indeed necessary, to the government's interest. This is just another way of ensuring that certain types of information are not inadvertently disclosed. For instance, a low-level employee in a security agency who has received no clearances yet becomes aware of information that, if published, could lead to the disclosure of classified information presents the same interests justifying prepublication review as an employee with proper clearance. Because the scope of persons subject to review is cabined by the definition of the materials subject to review, it is therefore not unreasonable.

Third, the plaintiffs' argument that the standards for redaction are overly vague and broad is belied by the text of the policies and regulations,

all of which are geared to the redaction of classified information, information that is otherwise restricted or could lead to the disclosure of classified information, or information that the agencies are under a statutory requirement to protect. *See* CIA AR 13-10 § 2(f)(2) ("classified information"); DoD Instruction 5230.09 § 1.2(g) ("information" that "compromise[s] national security" in violation of the employees' "nondisclosure agreements"); *id*. glossary § G.2 ("classified, export-controlled or other protected information"); DoD Instruction 5230.29, enclosure 3 § 1 ("classified information, controlled unclassified information, or unclassified information that may individually or in aggregate lead to the compromise of classified information or disclosure of operation security"); NSA/CSS Policy 1-30 §§ 2, 6(b), 10(a) (classified information or information not approved for public release); ODNI Instruction 80.04 § 6 ("sensitive intelligence information").

While the plaintiffs claim that the scope of redaction authority includes information that was not obtained by the author in the course of his or her employment or information that is already in the public domain, those circumstances do not render unreasonable the criteria focused on classified or otherwise sensitive material. The plaintiffs all enjoyed positions of trust in the government, involving national security, and were granted access to classified or otherwise sensitive information while so employed. By virtue of those positions, the public is likely to view such officials as speaking with authority — indeed it is often *because* of that authority that former officials engage in public discussions about governmental affairs at all. But,

as we have explained, "[i]t is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so." *Alfred A. Knopf, Inc.*, 509 F.2d at 1370. That is because an official's repetition of information that is already in the public domain but not yet unclassified, or his speaking on information that is classified but post-dates his time in the respective agency, "lend[s] credence" to that information and could, in the eyes of the public, confirm the existence of such classified information. *Id*. Such confirmation, of course, can be as good as official disclosure to those who are paying attention.

Fourth and finally, we conclude that the plaintiffs' argument that the defendants' policies and regulations fail to establish firm or binding deadlines for the review — thereby unreasonably chilling speech — lacks merit in the circumstances presented. We recognize that a drawn-out process "might delay constitutionally protected speech to a time when its only relevance was to historians." *Weaver*, 87 F.3d at 1441 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990)). But considering the policies and regulations facially, as the plaintiffs request, the regimes here fix target timelines for review. Moreover, the plaintiffs' allegations do not, on the whole, indicate that the agencies failed to abide by these timelines. Instead, the plaintiffs pointed to a few specific book-length manuscripts that the defendants allegedly failed to review in a timely manner. But even if the time periods for those reviews were inappropriately long — something we

do not reach — those few allegations do not suffice to find the policies and regulations unconstitutional across the board. *See Stevens*, 559 U.S. at 472–73.

At bottom, we conclude that the defendant agencies' prepublication review regimes are a reasonable means of serving the government's compelling interest in keeping classified or otherwise sensitive information secret, and therefore they do not violate the plaintiffs' First Amendment speech rights.

IV

The plaintiffs also contend that the defendant agencies' prepublication review regimes are unconstitutionally vague under the Due Process Clause, as well as the First Amendment, because, as they argue, the regimes "fail to give former employees fair notice of what they must submit for review" and "fail to provide explicit standards for reviewers, thus inviting arbitrary and discriminatory enforcement."

A fundamental component of due process is that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see also Manning v. Caldwell*, 930 F.3d 264, 272 (4th Cir. 2019) (en banc). And a regulation that "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement," is impermissibly vague and must therefore be

invalidated. *Fox Television*, 567 U.S. at 253 (cleaned up); *see also Manning*, 930 F.3d at 272. "These twin concerns of inadequate notice and arbitrary or discriminatory enforcement are especially pronounced" when a regulation implicates speech "because ambiguity inevitably leads citizens to steer far wider of the unlawful zone than if the boundaries were clearly marked, thereby chilling protected speech." *Miselis*, 972 F.3d at 544 (cleaned up); *see also In re Murphy-Brown, LLC*, 907 F.3d 788, 800 (4th Cir. 2018). That said, however, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Miselis*, 972 F.3d at 544 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

The plaintiffs argue first that the defendant agencies' prepublication review regimes do not give them adequate notice of what must be submitted for review, advancing essentially the same reasons that they advanced for contending that the regimes violate the First Amendment. But in doing so, they focus more particularly on the use of "terms such as 'relates to,' 'pertains to,' 'subjects of significant concern,' and 'might be based upon,' " which they argue are "ambiguous terms" that "force former employees to guess at whether they must submit their speech for review."

This argument, however, misses the forest for the trees. To be sure, terms such as "pertains to" and "might be based upon" do result in broad submission standards, the exact contours of which could be hazy in the abstract. Indeed, there even may be "close cases" at the extreme edges, but close cases do not

make a regulation vague. *Williams*, 553 U.S. at 306; *see also Bruce & Tanya & Assocs., Inc. v. Bd. of Supervisors*, No. 19-1151, 2021 WL 1854750, at *6 (4th Cir. May 10, 2021) ("[D]ue process demands a measure of clarity, not exactitude"). But crucially, these abstract terms are all anchored to discrete and identifiable categories of information, thereby narrowing the scope of submission in such a way that employees of ordinary intelligence would know what needs to be submitted. *See Williams*, 553 U.S. at 304, 306. To take just one example, the DoD requires the submission of materials containing "official DoD information ... that pertains to *military* matters, *national security* issues, or subjects of *significant concern to the DoD*." DoD Instruction 5230.09 § 1.2(b) (emphasis added). Given that the goal of prepublication review is to prevent the accidental disclosure of information sensitive to the national security, requiring former employees of national-security and intelligence agencies to submit materials that, for instance, "pertain to" the national security is a sufficiently "sensible basis for distinguishing what" must be submitted for review and what can be published immediately. *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1888 (2018).

The plaintiffs also argue that the defendants' "censorship standards" for deciding what to redact "fail to provide 'explicit standards for those who apply them,' inviting 'arbitrary and discriminatory enforcement.' " (Quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). But this argument is largely a repackaging of the plaintiffs' First Amendment argument, and we reject it for the

same reasons, *i.e.*, because all the defendants' redaction standards are guided by whether material discloses classified information or otherwise sensitive information. Most of the categories of restricted information are binary: Either information is classified or it is not; either it is "controlled" or it is not; and it has either been "approved for public release" or it has not. And the few standards that are not binary provide "meaningful guidance" to reviewers. *Manning*, 930 F.3d at 275. For example, the DoD can restrict the publication of "unclassified information" only if it "may ... lead to the compromise of classified information or disclosure of operation security." DoD Instruction 5230.29, enclosure 3 § 1. In short, the defendants' review standards "adequately define the range of" information that cannot be published by authors and accordingly provide sufficient guidance to reviewers to prevent arbitrary censorship. *Miselis*, 972 F.3d at 545.

At bottom, we hold that the defendants' prepublication review regimes adequately define for authors the types of materials that they must submit for review and adequately establish for reviewers the types of information that cannot be published. Accordingly, they are not unconstitutionally vague.

V.

The national security agencies' policies and regulations that the plaintiffs challenge here are all directed at ensuring the Nation's security and maintaining security-related secrets, which go to the

core of the agencies' mission. And the plaintiffs' employment contributing to fulfilling that mission was especially important national service. For this, the plaintiffs can be proud, and the public is grateful.

But the plaintiffs' special employment carried with it a serious responsibility not to impair the agencies' work, which could be compromised irreversibly by the inadvertent disclosure of national secrets. While it is understandable that the plaintiffs, as former employees, now wish to share their experiences or, yet more, to comment on public policy as informed by those experiences, doing so in light of their exposure to numerous state secrets is fraught with danger to the national security. And it goes without saying that national security is one of the federal government's overarching responsibilities — one necessary to the protection of the liberties guaranteed by the Constitution — and therefore must be given a high priority. It is thus a compelling interest.

In this case, we conclude that in balancing the effective protection of national security secrets with the speech interests of former employees and the public, we must, as necessary to serve the national interest, require some give in the plaintiffs' speech interests. And indeed, in the employment agreements that the plaintiffs signed, they freely gave their assent to this.

Taking the defendant agencies' policies and regulations facially and as a whole, we therefore conclude that the prepublication review regimes

established by them do not violate the plaintiffs' rights under the First and Fifth Amendments. The judgment of the district court is accordingly

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

Case No. GJH-19-985

TIMOTHY H. EDGAR, *et al.*,

Plaintiffs,

v.

DANIEL COATS, *et al.*,

Defendants.

MEMORANDUM OPINION

Former national security professionals Timothy H. Edgar, Richard H. Immerman, Melvin A. Goodman, Anuradha Bhagwati, and Mark Fallon ("Plaintiffs") bring this action against the Director of National Intelligence, the Director of the Central Intelligence Agency, the Secretary of Defense, and the Director of the National Security Agency ("Defendants"), challenging the constitutionality of the agencies' prepublication review ("PPR") regimes, which require current and former employees to submit materials they intend to publish to the agencies if they concern certain subjects. The Complaint, ECF No. 1, alleges that the regimes are void for vagueness under the First and Fifth Amendments and violate the First

Amendment by investing the agencies with excessive discretion to suppress speech and failing to include necessary procedural safeguards. Defendants have moved to dismiss the Complaint. ECF No. 30. Also pending before the Court are a motion by three Plaintiffs to omit their home addresses from the caption in their Complaint, ECF No. 8, and a third party's Motion for Leave to submit an amicus brief, ECF No. 34. No hearing is necessary. *See* Loc. R. 105.6 (D. Md.). For the following reasons, all of the pending motions will be granted and the action will be dismissed.

I. BACKGROUND[1]

In reviewing the Complaint's allegations, the Court first discusses each of the Plaintiffs before turning to the structure and operation of Defendants' PPR regimes.

A. Plaintiffs

Plaintiff Edgar, a Rhode Island resident, is a cybersecurity expert who was employed by the Office of the Director of National Intelligence (the "ODNI") from 2006 until his resignation in June 2013. ECF No. 1 ¶¶ 56, 58. At various points during his time at ODNI, Edgar served in roles including Deputy for Civil Liberties and Senior Associate General Counsel. *Id.* ¶ 58. In 2009 and 2010, he was detailed to the White House National Security Staff as

[1] Unless otherwise stated, these facts are taken from the Complaint, ECF No. 1, and are presumed to be true.

Director of Privacy and Civil Liberties. *Id.* After signing a nondisclosure agreement with the ODNI, Edgar obtained a Top Secret/Sensitive Compartmented Information ("TS/SCI") security clearance in 2006, which he held continuously until June 2013. *Id.* ¶ 59.

During his employment, Edgar submitted for PPR official material prepared for public appearances he made on behalf of the government and syllabi for Brown University and Georgetown University Law Center courses he taught in 2012 and 2013. *Id.* ¶ 60. Since his departure from the agency, Edgar has submitted to the ODNI blog posts and op-eds that have appeared in major publications, including the *Guardian*, the *Los Angeles Times*, and the *Wall Street Journal*, and on the *Lawfare* national security blog. *Id.* ¶ 61. On October 10, 2016, Edgar submitted to the ODNI's PPR office a book manuscript entitled *Beyond Snowden: Privacy, Mass Surveillance, and the Struggle to Reform the NSA*. *Id.* ¶ 62. Some portions of the manuscript were based on his personal experiences, but Edgar relied on and cited declassified documents "for pertinent details." *Id.*

After Edgar submitted the manuscript, the ODNI informed him that it was referred to the Central Intelligence Agency ("CIA") and the National Security Agency ("NSA") for additional review. *Id.* ¶ 63. Edgar was unable to communicate directly with reviewing officials at those agencies despite multiple inquiries. *Id.* On January 12, 2017, the ODNI informed Edgar that he could publish the manuscript only if he redacted or excised certain

material. *Id.* ¶ 64. Some of the redactions related to events that had taken place or issues that had arisen after Edgar had left government, while others related to facts that were widely discussed and acknowledged if not officially confirmed. *Id.*

Edgar disagreed with some of the redactions but decided not to challenge them. *Id.* He had already delayed his publication date, partly because of the three-month PPR process, and worried that delaying it further would make some of the analysis and insights in his book outdated or less relevant to ongoing public debates. *Id.* He also sought to maintain a good relationship with the ODNI reviewers because of concerns that future publications would be subject to greater delays if he did not. *Id.* In the future, Edgar plans to continue writing about intelligence and cybersecurity matters and anticipates submitting at least some of these materials for PPR. *Id.* ¶ 65. He expects that any manuscripts he submits may be referred to the NSA, CIA, or other agencies, as happened with *Beyond Snowden*, which has now been published. *Id.*

Edgar believes that the ODNI's PPR regime requires him to submit an excessive amount of material and finds the agency's submission requirements to be vague and confusing, leaving him uncertain of the exact scope of his submission obligations. *Id.* ¶ 66. He fears that the delay associated with PPR will hinder his career as an academic and impede his ability to participate effectively in public debates on matters involving his area of expertise. *Id.* He further alleges that the delay and uncertainty associated with PPR has

dissuaded him from writing some pieces that he otherwise would have written and caused him to write others differently than he otherwise would have. *Id.* Finally, he believes that the ODNI, CIA, and NSA might have taken longer to review his book if they had perceived it to be unsympathetic to the intelligence community. *Id.* He is also concerned that "government censors will be less responsive to him if he writes books that are perceived to be critical." *Id.*

Plaintiff Immerman, a Pennsylvania resident, is a historian with expertise in U.S. foreign relations who retired in 2017 after holding a series of distinguished academic posts. *Id.* ¶¶ 67–68. From 2007 to 2009, he took leave from his faculty position at Temple University to serve at the ODNI as the Assistant Deputy Director of National Intelligence, Analytic Integrity and Standards, and as the agency's Analytic Ombudsman. *Id.* ¶ 69. After signing a nondisclosure agreement with the ODNI, Immerman obtained TS/SCI clearance in 2007. *Id.* ¶ 71. In 2009, shortly after returning to Temple, Immerman accepted an invitation to serve on the U.S. Department of State's Advisory Committee on Historical Diplomatic Documentation (referred to as the "HAC"), of which he became chairman in 2010. *Id.* ¶ 70. In 2011 or 2012, Immerman signed a nondisclosure agreement with the CIA related to his HAC responsibilities. *Id.* ¶ 71.

Since leaving the ODNI, Immerman has submitted book manuscripts, articles, papers, public talks, and academic syllabi to the agency for PPR. *Id.* ¶ 72. On January 25, 2013, Immerman emailed

to the ODNI's PPR office a manuscript entitled *The Hidden Hand: A Brief History of the CIA*. *Id.* ¶ 73. The manuscript did not directly or indirectly refer to any classified information that Immerman obtained while employed with the ODNI or Department of State and cited public sources for all factual propositions. *Id.* The ODNI acknowledged receipt three days after Immerman's email. *Id.* ¶ 74. Nearly three months later, Immerman was informed that the agency had referred part of the manuscript to the CIA for additional review. *Id.* Several weeks after that, the ODNI informed him that the CIA was reviewing the entire manuscript. *Id.* Immerman contacted the CIA but was unable to obtain information about the review. *Id.*

On July 12, 2013, the ODNI informed Immerman that he could publish the manuscript only with extensive redactions mandated by the CIA, all of which related to information for which Immerman had cited public sources. *Id.* ¶ 75. Some redactions related to information that government agencies including the CIA had published previously, and many related to events that had taken place or issues that had arisen after Immerman left government. *Id.* In some instances, the ODNI directed Immerman to excise citations to newspaper articles, while in others the ODNI directed Immerman to delete passages relating to information he had obtained from public sources, including information about the CIA's use of drones. *Id.* The ODNI also instructed him to redact words communicating judgments and arguments he considered fundamental to his conclusions as a trained historian. *Id.* The agency did not provide

Immerman with any explanation for the mandated redactions. *Id.* ¶ 76.

Immerman appealed the PPR office's determination to the agency's Information Management Division, which several weeks later informed him that he could publish a significant portion of the text that the PPR office had directed him to redact. *Id.* ¶ 77. In September 2013, Immerman was able to meet with two reviewing officials from the CIA. *Id.* ¶ 78. The officials agreed with Immerman that some of the redactions were unnecessary and authorized him to publish additional text with revised wording but reaffirmed their view that other redactions were required. *Id.* ¶ 78. Immerman disagreed but decided to proceed with publishing with the redactions in place to avoid further delay. *Id.* The draft that was eventually published, after a ten-month review process, included approximately eighty percent of the material that the agencies had originally redacted. *Id.*

Immerman plans to continue publishing articles, books, and op-eds, some of which will trigger his PPR obligations under the ODNI's regime. *Id.* ¶ 79. At the time the Complaint was filed, Immerman was drafting an academic article on the influence of intelligence on the policymaking process and was conducting research on the contribution of intelligence to negotiations on strategic arms limitation from the Nixon through Reagan administrations, on which he intends to write a book that he will submit for PPR. *Id.* Immerman asserts that he would publish more "[b]ut for the

dysfunction of the [PPR] system." *Id.* ¶ 80. He believes that the regime requires submission of far more material than should be required, that the ODNI's and CIA's "arbitrary and unjustified redactions" will diminish the value of the work he submits, and that the time required for review will make it more difficult for him to contribute to public debates in a timely way. *Id.* Finally, he has been dissuaded by "[c]oncerns about the burdens and uncertainties associated" with PPR from writing academic articles and op-eds about research he has conducted for his book and the intelligence community and current administration. *Id.*

Plaintiff Goodman, a Maryland resident, is an expert on the former Soviet Union who spent 42 years in government, including 34 years at the CIA's Directorate of Intelligence on Soviet Foreign Policy and as a professor of international security at the National War College. *Id.* ¶¶ 81–82. Goodman held a TS/SCI clearance until he left government in 2006. *Id.* ¶ 83. When Goodman first joined the CIA in 1966 and gained his clearance, he signed a secrecy agreement that included a provision relating to PPR. *Id.* ¶ 84. Since leaving the CIA in 1986, Goodman has submitted multiple works to the agency for PPR, though in some cases he has not submitted shorter pieces, including op-eds, that were time-sensitive and that he was confident did not contain classified information or other information he obtained during his employment. *Id.* ¶¶ 82, 85–86. On at least six occasions after publishing an op-ed, Goodman received letters from the CIA reminding him of his PPR obligations, including a 2009 letter threatening to refer him to the Department of Justice. *Id.* ¶ 86.

Goodman has published nine books and has submitted each manuscript to the CIA for PPR. *Id.* ¶ 87. One of the manuscripts was referred to other agencies for additional review, including the Department of Defense ("DOD") and the Department of State. *Id.* Despite Goodman's requests, the CIA declined to provide contact information for reviewers at the other agencies, who operated more slowly than the CIA. *Id.* In general, the CIA has mailed Goodman's manuscripts back to him with redactions, edits, and suggestions for alternative language. *Id.* ¶ 88. Goodman has frequently believed the CIA's redactions were overbroad and unjustified and has often sent the agency requests known as "reclamas" asking the agency to reconsider their redactions and edits and explaining why publication should be allowed. *Id.*

The PPR process has taken less than two months for most of Goodman's books. *Id.* ¶ 89. In 2017, however, the CIA took eleven months to review a manuscript entitled *Whistleblower at the CIA* in which Goodman provided an account of his experience as a senior CIA analyst. *Id.* In part because of the delay, Goodman's publisher at one point threatened to cancel his contract. *Id.* All of the changes to the manuscript that the CIA eventually mandated, Goodman believes, were intended to protect the agency from embarrassment rather than to protect classified information. *Id.* ¶ 90. The manuscript discussed aspects of U.S. policy, including the use of armed drones overseas, of which Goodman has no personal knowledge; his commentary in the book was based on cited press accounts. *Id.* The CIA demanded that Goodman not

discuss these matters at all, however, and did not provide a written explanation. *Id.* Goodman met with a CIA official but was unable to persuade the agency to reconsider and thus decided to remove the passages to which the agency had objected. *Id.* ¶ 91.

Goodman recently submitted a manuscript in which he alleges that he self-censored and avoided discussing certain public source information about current CIA Director and Defendant Gina Haspel. *Id.* ¶ 92. Goodman learned the information at issue as a member of the public but chose not to include it in the manuscript to avoid delays and conflicts with the CIA's PPR office. *Id.* ¶ 92. Consistent with his past practice, Goodman intends to submit portions of any future manuscripts that deal with intelligence matters but remains concerned that the agency will redact material unwarrantedly and that the PPR delay will jeopardize his book contracts and render his publications less relevant to evolving public debates. *Id.* ¶ 93.

Plaintiff Bhagwati, a New York resident, is a writer, activist, and former Marine Corps officer. *Id.* ¶ 94. Bhagwati obtained a Secret security clearance in the early 2000s. *Id.* ¶¶ 95–96. As a former DOD employee, Bhagwati is subject to the PPR requirements imposed by multiple DOD policies. *Id.* ¶ 96. In March 2019, Bhagwati published a memoir discussing her experiences with misogyny, racism, and sexual violence during her military service, but only learned of her PPR obligations on the eve of publication through conversations with her counsel in this action. *Id.* ¶¶ 94, 96, 98. She has also published more than a dozen op-ed and opinion

pieces about her experiences in the Marine Corps and advocacy work she has performed on issues of sexual assault and discrimination in the military. *Id.* ¶ 97. She plans to continue her advocacy through written publications and public appearances but has no plans to submit any future work for PPR because she is certain that her future publications will not contain classified information. *Id.* ¶ 99.

Finally, Plaintiff Fallon, a Georgia resident, is a counterterrorism, counterintelligence, and interrogation expert who spent more than three decades in government service, primarily with the Naval Criminal Investigative Service ("NCIS"). *Id.* ¶ 100. Fallon served at the NCIS from 1981 to 2008, including in a number of senior leadership positions, before serving two years at the Department of Homeland Security, which he departed in 2010. *Id.* ¶ 101. Between 2011 and 2016, he served as the chair of the High-Value Detainee Interrogation Group ("HIG") Research Committee. *Id.* ¶ 100. Fallon obtained a Top Secret security clearance in 1981 when he joined the NCIS and held it continuously until 2010. *Id.* ¶ 102. He also obtained and held TS/SCI clearance during his career at NCIS, obtained it again in 2011 when he began work for the HIG, and obtained another in 2017 for consulting work he engages in with the U.S. government. *Id.*

Fallon has published op-eds, articles, columns, and a book since leaving government service, many of which he submitted to the DOD for PPR. *Id.* ¶ 103. In 2016, Fallon completed a book titled Unjustifiable Means about the George W. Bush administration's

policies relating to "interrogation and torture of prisoners" and the experiences of public servants, including Fallon, who had opposed the policies. *Id.* ¶ 104. The book relied on information the government had declassified and on public record materials relating to "the Bush administration's policies and their consequences." *Id.* Fallon "was confident that the book did not contain properly classified information." *Id.* When he began writing the book in 2014, Fallon consulted former NCIS colleagues about PPR, one of whom stated that he had not submitted his own manuscript and the rest of whom advised him that they did not believe he was required to submit his. *Id.* ¶ 105.

In June 2016, Fallon contacted the DOD's PPR office after discovering it through his own research and was advised that the PPR process was voluntary and intended to aid authors. *Id.* ¶ 106. On October 4, 2016, however, Fallon received an email from a DOD official stating that she had noticed Fallon's forthcoming book on Amazon.com, asking if he had submitted it for PPR, and informing him that he was required to submit his works for review. *Id.* The official attached the DOD's PPR policies. *Id.* On January 3, 2017, the official advised Fallon by email that while DOD policies provide that review will be completed within 30 to 45 working days, "the truth is that in most cases it takes a bit longer." *Id.* Fallon submitted his manuscript the following day. *Id.* ¶ 107. Given the expected length of the review, Fallon and his publisher agreed to a publication date of March 7, 2017. *Id.*

On January 11, 2017, the DOD PPR office informed Fallon that its review of the manuscript was complete but that review by other agencies was necessary as well, though the reviewing official would not identify the agencies. *Id.* ¶ 108. After Fallon noted his publication date, the official assured him that the DOD "would do everything it could to complete review by that date." *Id.* Fallon emailed the reviewing official at least eight times prior to the planned publication date, stressing that delay would force the date to be pushed back, which would require cancelling book tours and speaking engagements. *Id.* ¶ 109. The DOD did not inform Fallon that review was complete until August 25, 2017. *Id.* ¶ 110. It also required Fallon to make 113 separate excisions from the book if he wished to proceed with publication. *Id.*

In Fallon's view, "the excisions were arbitrary, haphazard, and inconsistent, and, at least in some instances, seemingly intended to protect the CIA from embarrassment." *Id.* Some related to material published in unclassified congressional reports while others concerned news articles Fallon had cited. *Id.* While Fallon believed that all of the excisions were unnecessary and unjustified, he decided not to challenge them to avoid delaying publication further. *Id.* ¶ 111. Fallon had originally intended to publish the book at the start of the Trump administration after torture became a major issue during the 2016 U.S. presidential campaign and it was important to him to publish "while it was still possible to influence the public debate on this subject." *Id.* ¶¶ 107, 111. Though Fallon was forced to cancel events and travel, and his publisher at one

point threatened to cancel his contract for non-delivery, the book was eventually published on October 24, 2017. *Id.* ¶¶ 111–12.

Fallon asserts that his PPR experience with *Unjustifiable Means* "was so time-consuming, costly, and exhausting that he is unsure whether he is willing to embark on writing another book." *Id.* ¶ 112. Cancellations of his travel and events cost him personally and he "paid a premium after the book was cleared in order for his editors to work to finalize publication on a tight timeframe." *Id.* Fallon also discontinued certain consulting work while waiting for review to be completed, and his publisher informed him that the delay in publication made it less likely that bookstores would choose to carry or promote the book. *Id.* Since the publication of *Unjustifiable Means*, however, Fallon and a co-author drafted and submitted a new manuscript entitled *The HIG Project: The Road to Scientific Research on Interrogations*, which will be a chapter in a forthcoming book. *Id.* ¶ 113.

Fallon submitted the piece for review by the DOD on August 10, 2018 and along with his co-author followed up with the PPR office repeatedly over several months. On January 14, 2019, Fallon's co-author was informed by the review board of the Defense Intelligence Agency that the DOD's review board was waiting for a response from the Federal Bureau of Investigation ("FBI"). *Id.* On February 11, 2019, PPR of the manuscript was completed and it was cleared for publication with redactions. *Id.* ¶ 114. All of the redacted material, however, was information that Fallon had heard at unclassified

public meetings with the HIG Research Committee. *Id.* Fallon believes that the redactions were motivated by political disagreement with his and his co-author's perspective on torture and the HIG Research Committee's work. *Id.*

In Fallon's experience, PPR "has been haphazard and opaque, and communication from the DOD has been sporadic and unhelpful." *Id.* ¶ 116. Fallon has come to believe that the DOD's PPR officials "have no control or influence over the other agencies to which they send authors' works for review" and that there is "a lack of accountability from those offices to the DOD." *Id.* ¶ 117. While Fallon plans to continue submitting to the DOD any op-eds, articles, columns, and books he writes in the future, he alleges that his experiences with PPR "continue to negatively impact him and deny him the opportunity to contribute to the public debate over breaking news." *Id.* ¶¶ 115, 118. Specifically, because of his concerns about potential delays and unjustified agency objections that arise with PPR, Fallon has declined offers to author op-eds and write articles on breaking news and topics of public concern because they require an immediate response. *Id.* ¶ 118. He also is unsure how his PPR obligations apply in academic settings, including whether he must submit edits and additions he makes to the work of others, which hinders his work and ability to engage with his colleagues. *Id.* Finally, Fallon worries that the government will retaliate against him by stripping his security clearance, which he requires for his consulting work, if he does not strictly comply with PPR requirements. *Id.* ¶ 119.

B. PPR Regimes

1. Historical Background

Plaintiffs assert that since its establishment in 1947, the CIA has required employees to sign secrecy agreements when they join and leave the agency that generally prohibit publication of manuscripts without obtaining agency consent. *Id.* ¶ 17. The number of such manuscripts increased markedly in the 1970s, leading the agency to create a Publications Review Board to review manuscripts by current employees. *Id.* ¶ 18. The Board's jurisdiction was expanded to reach submissions by former employees in 1977. *Id.*

In 1980, the Supreme Court decided *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), affirming the imposition of a constructive trust on proceeds earned by a former CIA officer who had published a book without submitting it for PPR. *Id.* ¶ 19. In 1983, President Reagan issued National Security Decision Directive 84, which mandated that intelligence agencies require all persons with access to Sensitive Compartmented Information ("SCI") sign a nondisclosure agreement with a PPR provision. *Id.* ¶ 20. The Directive received significant bipartisan criticism from Congress and was suspended after legislation that would have prohibited most agencies from imposing PPR requirements was considered in hearings by a House subcommittee. *Id.* ¶ 21. Agencies continued to require employees to sign a form imposing essentially the same PPR requirements, however. *Id.* ¶ 22.

Plaintiffs further allege that the PPR system "has expanded on every axis" over the past several decades. *Id.* ¶ 23. Specifically, every U.S. intelligence agency now imposes a lifetime PPR requirement on at least some subset of former employees, PPR obligations are imposed on broader categories of employees, including those who never had access to SCI or any other classified information, the amount of information that is classified has "expanded dramatically," PPR regimes have become increasingly complex and varied across agencies, and the amount of material submitted for PPR has steadily increased, as has the amount of time agencies take to complete their reviews. *Id.* ¶¶ 24–29.

Plaintiffs highlight that the DOD, for example, imposes PPR obligations on all 2.9 million of its employees, that classification authorities made 49.5 million classification decisions in 2017, that the CIA received 8,400 PPR submissions in 2015, including 3,400 manuscripts, and that a draft report by the CIA Inspector General suggested that book-length manuscripts were projected to require a year to review. *Id.* ¶¶ 25–26, 28–29. Plaintiffs assert that as a result of these expansions, "the prepublication review system has become dysfunctional." *Id.* ¶ 30. The Complaint notes that the House and Senate Intelligence Committees instructed the Director of National Intelligence ("DNI") in 2017 to prepare a new PPR policy that would apply to all intelligence agencies but that the DNI had not published or formulated such a policy as of the filing of the Complaint. *Id.*

2. Current Regimes

The Complaint then describes the PPR policy regimes of the CIA, the DOD, the NSA, and the ODNI, each of which Plaintiffs allege "restrains far more speech than can be justified by any legitimate government interest." *Id.* ¶ 31. According to the Complaint, each agency requires employees with access to classified information to complete Standard Form 312, "Classified Information Nondisclosure Agreement." *Id.* ¶¶ 32a, 38a, 44a, 50a. The form requires all covered employees who are "uncertain about the classification status of information" to "confirm from an authorized official that the information is unclassified before [they] may disclose it." *Id.* ¶ 32a (alteration in original). Employees with access to SCI must also complete Form 4414, "Sensitive Compartmented Information Nondisclosure Agreement," which requires all covered employees to submit for PPR "any writing or other preparation in any form, including a work of fiction, that contains or purports to contain any SCI or description of activities that produce or relate to SCI or that [the author has] reason to believe are derived from SCI." *Id.* ¶ 32b (alteration in original).[2]

Each agency also maintains additional secrecy and PPR policies. First, the CIA requires that all officers submit for PPR "any and all materials they intend to share with the public that are intelligence related," according to the agency's website. *Id.* ¶ 32c.

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[2] Plaintiffs allege that DOD alternatively or additionally requires employees with access to SCI to complete form DD Form 1847-1, which is similar to Form 4414. ECF No. 1 ¶ 38b.

Additionally, through Agency Regulation ("AR") 13-10, titled "Agency Prepublication Review of Certain Material Prepared for Public Dissemination," the CIA requires all "former Agency employees and contractors, and others who are obligated by CIA secrecy agreement," to submit for PPR 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 in the course of his employment or other contact with the Agency." *Id.* ¶ 32d. According to documents obtained through Freedom of Information Act litigation by Plaintiffs' counsel, the CIA "will not provide a copy of a secrecy agreement or nondisclosure agreement to an author who requests one they signed," even though such agreements "are typically not classified." *Id.* ¶ 32e.

The CIA's PPR authority is known as the Publications Review Board. *Id.* ¶ 33. Plaintiffs allege that Standard Form 312, Form 4414, the CIA secrecy agreement, and AR 13-10 collectively "give the Board discretion to censor information that it claims is classified without regard" to considerations including "whether disclosure of the information would actually cause harm to the nation's security, whether the former employee acquired the information in question in the course of employment, whether the information is already in the public domain, and whether any legitimate interest in secrecy is outweighed by public interest in disclosure." *Id.* ¶ 33. Plaintiffs also assert that when the Board refers manuscripts by former CIA employees to other agencies for review, other agencies censor the manuscripts on the basis of undisclosed review standards. *Id.*

Plaintiffs further allege that "the breadth and vagueness of the CIA's review standards invite capricious and discriminatory enforcement" and that "in practice the Board's censorship decisions are often arbitrary or influenced by the author's viewpoint." *Id.* ¶ 34. For example, Plaintiffs assert, former intelligence community employees "who wrote books criticizing the CIA's torture of prisoners apprehended in the 'war on terror' have complained publicly that their books were heavily redacted even as former CIA officials' supportive accounts of the same policies were published without significant excisions of similar information." *Id.* According to Plaintiffs, the CIA in 2012 opened an internal investigation into whether its PPR regime was being misused to suppress speech critical of the agency, but the agency has not released or publicly described its findings. *Id.* Finally, Plaintiffs allege that: the regime does not require the Board to provide authors with reasons for its decisions and that the Board generally does not do so; that deadlines for adjudication of appeals are merely aspirational and that the regime fails to assure prompt review; and that the regime fails to require the government to initiate judicial review of PPR decisions and to guarantee that such review is prompt. *Id.* ¶¶ 35–37.

Plaintiffs' general allegations about the DOD, NSA, and ODNI regimes are similar to those about the CIA's. Plaintiffs allege that each regime "imposes submission requirements that, taken together, are vague, confusing, and overbroad," *id.* ¶¶ 38, 44, 50; that each regime "fails to meaningfully cabin the discretion" of the agency's PPR authority and instead grants to the authority "discretion to

censor information" without regard to the same interests that Plaintiffs allege the CIA Publications Review Board is not required to consider, *id.* ¶¶ 39, 45, 51; that the agencies refer manuscripts to other agencies that do not disclose their review standards, *id.* ¶¶ 39, 45, 51; that the "breadth and vagueness" of the agencies' standards mean that the agencies' PPR decisions are often or frequently "arbitrary" or "invite capricious and discriminatory enforcement," *id.* ¶¶ 40, 46, 52; and that the regimes do not require the PPR authorities to provide authors with reasons for their decisions, *id.* ¶¶ 41, 47, 53; provide no assurance of prompt review, *id.* ¶¶ 42, 48, 54; and fail to require the government to initiate judicial review of PPR decisions or to guarantee that such review is prompt, *id.* ¶¶ 43, 49, 55.

The Complaint also makes additional specific allegations about each agency. According to the Complaint, the DOD maintains two relevant policies: Directive 5230.09, "Clearance of DoD Information for Public Release," and Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release." *Id.* ¶ 38c. Together, the policies require all former agency employees and all former active or reserve military service members to submit for PPR "any official DoD information intended for public release that pertains to military matters, national security issues, or subjects of significant concern to [the agency]." *Id.* (alteration in original). "[O]fficial DoD information" is defined broadly to include "[a]ll information that is in the custody and control of the Department of Defense, relates to information in the custody and control of the Department, or was acquired by DoD

employees as part of their official duties or because of their official status within the Department." *Id.* (alteration in original).

Such information must be submitted if, for example, it "[i]s or has the potential to become an item of national or international interest"; "[a]ffects national security policy, foreign relations, or ongoing negotiations"; or "[c]oncerns a subject of potential controversy among the DoD Components or with other federal agencies." *Id.* (alterations in original). PPR is performed at the agency by the Defense Office of Prepublication and Security Review ("DOPSR"), which the agency's policies indicate conducts both "security review" for protecting classified information and "policy review" to ensure that materials do not conflict with DOD or government policies or programs. *Id.* ¶ 39. Plaintiffs allege that DOD components "often disagree as to what must be censored," and that review "frequently takes many weeks or even months" and can result in required redactions of readily available public information. *Id.* ¶ 40.

With respect to the NSA, Plaintiffs allege that the agency has adopted NSA/CSS Policy 1-30, "Review of NSA/CSS Information Intended for Public Release," which requires all former NSA employees to submit for PPR any material, other than a resume or job-related document, "where [it] contains official NSA/CSS information that may or may not be UNCLASSIFIED and approved for public release." *Id.* ¶ 44c (alteration in original). "Official NSA/CSS information" is defined to include "[a]ny NSA/CSS, DoD, or IC information that is in

the custody and control of NSA/CSS and was obtained for or generated on NSA/CSS' behalf during the course of employment or other service, whether contractual or not, with NSA/CSS." *Id.* (alteration in original). Plaintiffs further allege that "the censorship decisions" of "the agency's censors, known as Prepublication Review Authorities," are "often arbitrary" and can result in required redactions of publicly available facts, and that "review frequently takes many weeks or even months." *Id.* ¶¶ 45–46, 48.

Finally, with respect to the ODNI, Plaintiffs allege that the agency requires employees to sign Form 313, titled "Nondisclosure Agreement for Classified Information," as a prerequisite to accessing information or material that is classified or in the process of a classification determination. *Id.* ¶ 50c. The form directs employees to submit for PPR "any writing or other preparation in any form" that "contains any mention of intelligence data or activities, or which contains any other information or material that might be based upon [information or material that is classified, or is in the process of a classification determination, and that was obtained pursuant to the agreement]." *Id.* (alteration in original).

PPR at the ODNI is conducted by the Director of the Information Management Division. *Id.* ¶ 51. The ODNI has also adopted Instruction 80.04, "ODNI Pre-publication Review of Information to be Publicly Released," which "requires all former agency employees, regardless of their level of access to sensitive information, to submit 'all official and non-

official information intended for publication that discusses the ODNI, the IC [Intelligence Community], or national security." *Id.* ¶ 50d (alteration in original). The Instruction, Plaintiffs allege, "imposes no limitations whatsoever on the Director's power to censor," stating only that "the goal of pre-publication review is to prevent the unauthorized disclosure of information, and to ensure the ODNI's mission and the foreign relations or security of the U.S. are not adversely affected by publication." *Id.* Plaintiffs finally allege that review under the ODNI regime "frequently takes many weeks or even months." *Id.* ¶ 54.

Plaintiffs filed their Complaint on April 2, 2019. ECF No. 1. The Complaint asserts two causes of action. *Id.* ¶¶ 120–21. First, Plaintiffs assert that Defendants' PPR regimes "violate the First Amendment because they invest executive officers with sweeping discretion to suppress speech and fail to include procedural safeguards designed to avoid the dangers of a censorship system." *Id.* ¶ 120. Plaintiffs then allege that the regimes "are void for vagueness under the First and Fifth Amendments because they fail to provide former government employees with fair notice of what they must submit for prepublication review and of what they can and cannot publish, and because they invite arbitrary and discriminatory enforcement." *Id.* ¶ 121. For relief, the Complaint seeks a declaration that the PPR regimes violate the First and Fifth Amendments and an injunction barring Defendants and individuals associated with them from

continuing to enforce the regimes "against Plaintiffs, or any other person." *Id.* at 41.[3]

Concurrent with the filing of their Complaint, three of the five Plaintiffs filed a Motion to omit their home addresses from the caption of the Complaint, ECF No. 8, and a supporting memorandum, ECF No. 8-1. On June 14, 2019, Defendants filed a Motion to Dismiss the Complaint. ECF No. 30. Plaintiffs filed a response in Opposition on July 16, 2019. ECF No. 33.[4] A third party, the Center for Ethics and the Rule of Law, submitted a Motion for Leave to file an amicus brief in support of Plaintiffs on July 23, 2019, ECF No. 34, accompanied by a copy of the proposed brief, ECF No. 34-1. Finally, Defendants filed a Reply in support of dismissal on August 2, 2019. ECF No. 36. Defendants have not opposed any of the pending motions.[5]

II. STANDARD OF REVIEW

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[3] Pin cites to documents filed on the Court's electronic filing system (CM/ECF) refer to the page numbers generated by that system.

[4] Plaintiffs also concurrently filed a consent motion for leave to file an opposition that exceeds the page limit set by the Local Rules. ECF No. 32. The motion will be granted.

[5] The Court notes that neither Plaintiffs nor Defendants have raised that some of the named Defendants no longer hold their positions. The issue is immaterial to disposition of the pending motions, however, because all Defendants are sued in their official capacities and substitution of a public official party's successor is automatic under Federal Rule of Civil Procedure 25(d). *See Maryland v. United States*, 360 F. Supp. 3d 288, 318 (D. Md. 2019).

"A district court should grant a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) 'only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.' " *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 645 (4th Cir. 2018) (quoting *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999)). "The burden of establishing subject matter jurisdiction rests with the plaintiff." *Demetres v. East West Constr.*, 776 F.3d 271, 272 (4th Cir. 2015). "When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), 'the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.' " *Evans*, 166 F.3d at 647 (quoting *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). Article III standing is a prerequisite to subject matter jurisdiction. *See Beyond Sys., Inc. v. Kraft Foods, Inc.*, 777 F.3d 712, 715 (4th Cir. 2015).

To state a claim that survives a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The "mere recital of elements of a cause of action, supported only by conclusory statements, is not sufficient to survive a motion made pursuant to Rule 12(b)(6)." *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012). To determine whether a claim has crossed "the line from conceivable to plausible," the Court

must employ a "context-specific" inquiry, drawing on the court's "experience and common sense." *Iqbal*, 556 U.S. at 679–80 (quoting *Twombly*, 550 U.S. at 570). The Court accepts "all well-pled facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009). The Court must "draw all reasonable inferences in favor of the plaintiff." *Id.* at 253 (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)). "[B]ut [the Court] need not accept the legal conclusions drawn from the facts, and ... need not accept as true unwarranted inferences, unreasonable conclusions or arguments." *Id.* (first alteration in original) (quoting *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008)).

III. DISCUSSION

Before addressing Defendants' Motion to Dismiss the Complaint, the Court first considers the other pending motions, neither of which Defendants have opposed. First, the Motion to Omit Home Addresses from Caption filed by Plaintiffs Edgar, Bhagwati, and Fallon ("Movants") asks the Court to waive the requirement of this District's Local Rule 102.2(a) that a complaint include the names and addresses of all parties. ECF No. 8. As the Court noted in *Casa de Maryland, Inc. v. Trump*, the Fourth Circuit has held that while the public has an important interest in open judicial proceedings, "compelling concerns relating to personal privacy or confidentiality may warrant some degree of anonymity." No. GJH-18-845, 2018 WL 1947075, at *1 (D. Md. Apr. 25, 2018)

(quoting *Doe v. Pub. Citizen*, 749 F.3d 246, 273 (4th Cir. 2014)).

The Fourth Circuit has identified several factors for courts to consider in balancing the need for open proceedings against litigants' privacy concerns, including:

> Whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent nonparties; the ages of the person whose privacy interests are sought to be protected; whether the action is against a governmental or private party: and, relatedly, the risk of unfairness to the opposing party from allowing an action against it to procced anonymously.

Pub. Citizen, 749 F.3d at 273 (quoting *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993)). In *Casa de Maryland*, the Court found that these factors favored allowing the plaintiffs, who challenged a federal immigration policy decision that resulted in rescission of their lawful immigration status, to omit their addresses. 2018 WL 1947075 at *1–*2. The Court also found that the plaintiffs' addresses had no bearing on the merits of their action and that

shielding them from public view would not prejudice the government defendants. *Id.* at *2.

Here, Movants assert that they reasonably fear for their physical safety and that of their family members "in light of the passion that may be inflamed by this lawsuit against high-ranking government actors." ECF No. 8-1 at 2. Bhagwati notes that she is an activist who conducts public advocacy on issues of misogyny, racism, and sexual violence in the military and has been subject to stalking and repeated online attacks, which she asserts are common responses to advocacy on such issues. *Id.* at 2–3. Fallon states that his professional history as a senior official investigating al-Qaeda members and terrorist attacks creates heightened dangers of physical harm to him and his family if his home address is made public. *Id.* at 3. Finally, Edgar asserts that he resides with young children and fears for their safety if his address is disclosed. *Id.*

While the Movants' rationales for withholding their addresses align with the *Public Citizen* factors to varying degrees, the Court finds that granting the motion is warranted given the limited countervailing public interests at play. As in *Casa de Maryland*, Plaintiffs' addresses "are of minimal import to furthering the openness of judicial proceedings." 2018 WL 1947075 at *2. Given that the Complaint extensively describes each Movant's professional background and identifies their state of residence, there can be little if any confusion about their identities, and any ambiguity that did exist would not be remedied by ordering disclosure of their home addresses. Further, there is no indication

of any prejudice to Defendants from allowing Movants to withhold their addresses, which is underscored by Defendants' lack of any opposition to the motion. Nor is it apparent that the addresses are relevant to any questions before the Court. *See Casa de Maryland*, 2018 WL 1947075, at *2. For these reasons, the Court will grant the motion.

Also pending is the unopposed motion by non-party the Center for Ethics and the Rule of Law ("CERL") for leave to file an amicus brief in support of Plaintiffs. ECF No. 34. "Decisions about whether and how to allow amicus participation in federal district court are left to the discretion of the trial judge." *Md. Restorative Justice Initiative v. Hogan*, No. ELH-16-1021, 2017 WL 467731, at *8 (D. Md. Feb. 3, 2017) (citing *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780 (D. Md. 2014)). "Amicus briefs have been 'allowed at the trial level where they provide helpful analysis of the law, they have a special interest in the subject matter of the suit, or existing counsel is in need of assistance.' " *Wheelabrator Balt., L.P. v. Mayor & City Council of Balt.*, No. GLR-19-1264, 449 F.Supp.3d 549, 555 n.1 (D. Md. Mar. 27, 2020) (quoting *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 728 (D. Md. 1996)).

CERL states that it is a non-partisan institute at the University of Pennsylvania Law School "dedicated to preserving and promoting ethics and the rule of law in national security, democratic

governance, and warfare." ECF No. 34 at 2.[6] Among other activities, it holds conferences and events and publishes various academic materials "at the intersection of national security and ethics." *Id.* CERL asserts that these activities and others demonstrate that it has a "special interest in the outcome of [this] suit" and expertise in the subject matter at issue. *Id.* (alteration in original) (quoting *Bryant*, 923 F. Supp. at 728). Finally, CERL states that its brief "would provide the Court with important background information about the chilling effect of Defendants' prepublication regimes on academics, national security professionals and the general public." *Id.* at 3–4.

CERL's motion for leave is compliant with this Court's Standing Order 2018-07, which prescribes that such motions must state the movant's interest, the reason why the brief is desirable and why the matters asserted are relevant to disposition of the case, and whether a party's counsel authored the brief in whole or in part or contributed money to fund its preparation or submission. The proposed brief is also compliant with the requirements of the Standing Order in that it is fewer than 15 pages, complies with other applicable Local Rules, and was filed within seven days after the principal brief of the party being supported. For these reasons, and because the motion is unopposed, the Court will grant the Motion for Leave and accept the proposed amicus brief, ECF No. 34-1. Having considered the

[6] CERL states that Plaintiff Fallon is a member its Advisory Council but was not involved in drafting the proposed amicus brief. ECF No. 34 at 2 & n.2.

non-dispositive motions, the Court now turns to Defendants' Motion to Dismiss.

A. Standing

Defendants first move to dismiss the Complaint under Rule 12(b)(1) on the ground that Plaintiffs lack standing and that the Court therefore lacks subject matter jurisdiction. "Article III of the U.S. Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.' " *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017) (quoting U.S. Const. art. III, § 2). "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013)). "To invoke federal jurisdiction, a plaintiff bears the burden of establishing the three 'irreducible minimum requirements' of Article III standing." *Id.* (quoting *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013)). The plaintiff must demonstrate "(1) an injury in fact (i.e., a 'concrete and particularized' invasion of a 'legally protected interest'); (2) causation (i.e., a 'fairly ... trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is 'likely' and not merely 'speculative' that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit)." *David*, 704 F.3d at 333 (alterations in original) (quoting *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273–74 (2008)). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Bostic v. Schaefer*, 760 F.3d 352, 370

(4th Cir. 2014) (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

The parties dispute standing in somewhat divergent terms. Defendants argue that Plaintiffs have failed to identify any future concrete harm that they are likely to encounter as a result of the deficiencies they claim exist in the PPR regimes at issue. ECF No. 30-1 at 23–24. Discerning two theories of standing in the Complaint – one based on potential for publication delays and the other based on chill to Plaintiffs' speech – Defendants assert that neither identifies an adequately concrete harm. *Id.* at 24. Plaintiffs' Opposition makes clear that Plaintiffs do not pursue a theory based entirely on delayed publication, however, and the Court therefore does not discuss it further. Plaintiffs instead advance three theories of standing: that they are subject to government licensing schemes that invest executive officers with overly broad discretion, which by itself confers standing; that Defendants' PPR regimes have a chilling effect on protected speech; and that Plaintiffs face a credible threat of sanctions if they refuse to submit their work for PPR. ECF No. 33 at 13–14.

Plaintiffs' licensing scheme theory argues that the PPR regimes are akin to prior restraint statutes that place "unbridled discretion in a government official over whether to permit or deny expressive activity" and are thus subject to facial challenges. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755 (1988). Under that doctrine, "a facial challenge lies whenever a licensing law gives a

government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.* at 759. Such schemes give rise to "two major First Amendment risks": "self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." *Id.* On the basis of this doctrine, the Supreme Court has permitted facial challenges to, for example, an ordinance giving a mayor "unfettered discretion" to deny or condition permits for newspaper display racks on public property, *id.* at 772, and a Maryland statute requiring submission of films to a state review board before exhibiting them, *Freedman v. Maryland*, 380 U.S. 51, 56 (1965).

While there is some superficial resemblance between the provisions challenged in these cases and the PPR regimes at issue here, Plaintiffs' attempt to fit their Complaint under this doctrine in order to demonstrate standing is unconvincing. First, PPR as Plaintiffs have described it cannot plausibly be understood as a licensing scheme. Plaintiffs have not alleged that the PPR schemes at issue require them to obtain licenses to engage in any expressive conduct at all, as is the case in the typical licensing challenge that tests "the states' and municipalities' longstanding authority to license activities within their borders." *Am. Entertainers, L.L.C. v. City of Rocky Mount*, 888 F.3d 707, 719 (4th Cir. 2018). Rather, they must submit for review materials that discuss the subjects of their work as

former federal intelligence professionals pursuant to agreements they have signed. While Plaintiffs might validly question whether the scope and extent of that requirement is proper, the established concept of a "licensing scheme" does not capture the constraints under which Plaintiffs allege that they operate.

Underscoring this point is that Plaintiffs are not plausibly comparable to the paradigmatic newspaper publishers and theater owners that have brought challenges to licensing regimes. *See Midwest Media Prop., L.L.C. v. Symmes Township*, 503 F.3d 456, 473 (6th Cir. 2007) (noting the Supreme Court's observation that "newspapers, radio stations, movie theaters and producers" are "often those with the highest interest and the largest stake in a First Amendment controversy" (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 n.11 (1981)). Such entities would have no interaction with the government with respect to their expressive activities but for the challenged regulations. In contrast, Plaintiffs here are former government employees who voluntarily took on their PPR obligations as a condition of their employment and their access to protected government information. *Cf. John Doe, Inc. v. Mukasey*, 549 F.3d 861, 877 (2d Cir. 2008) (rejecting an analogy between PPR requirements for former CIA employees and a statute barring telecommunications firms from disclosing that they received subpoenas from the FBI, explaining that unlike the former employees the firms "had no interaction with the Government until the Government imposed its nondisclosure requirement

upon [them]"). And Plaintiffs do not dispute the government's basic power to restrict release of classified information by those entrusted with it. For these reasons, Plaintiffs' attempt to fit PPR under licensing scheme doctrine for standing purposes is unavailing.

Plaintiffs' chilling effect theory, in contrast, stands on firmer ground. As a key initial note, because Plaintiffs seek prospective relief, their standing burden is different from the typical case. "Because '[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects,' a plaintiff seeking 'declaratory or injunctive relief ... must establish an ongoing or future injury in fact.' " *Davison v. Randall*, 912 F.3d 666, 677 (4th Cir. 2019) (alterations in original) (quoting *Kenny v. Wilson*, 885 F.3d 280, 287–88 (4th Cir. 2018)). Plaintiffs' burden is lessened here, however, because of the nature of their claims. "Significantly, [the Fourth Circuit]—along with several other circuits—has held that 'standing requirements are somewhat relaxed in First Amendment cases,' particularly regarding the injury-in-fact requirement." *Id.* at 678 (quoting *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013)).

"In First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient showing of 'self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression.' " *Cooksey*, 721 F.3d at 235 (alterations in original) (quoting *Benham v. City of Charlotte*,

635 F.3d 129, 135 (4th Cir. 2011)). "Although '[s]ubjective or speculative accounts of such a chilling effect are not sufficient ... a claimant need not show he ceased those activities altogether to demonstrate an injury in fact.' " *Kenny*, 885 F.3d at 289 n.3 (alterations in original) (quoting *Cooksey*, 721 F.3d at 236). "Instead, '[g]overnment action will be sufficiently chilling when it is likely to deter a person of ordinary firmness from the exercise of First Amendment rights,' " rendering the chilling effect "objectively reasonable." *Id.* (alterations in original) (quoting *Cooksey*, 721 F.3d at 236). If the government conduct meets that threshold, "there is an ongoing injury in fact." *Kenny*, 885 F.3d at 288.

Plaintiffs assert that the alleged breadth and vagueness of the PPR regimes, "the absence of time limits for completion of review, and the severity and variety of sanctions for failure to submit" would likely lead an objectively reasonable speaker "to submit more material than the government has constitutional authority to require authors to submit, avoid writing about subjects that the government might regard as sensitive ... and write about these subjects differently in order to avoid provoking the government's censors." ECF No. 33 at 18. Plaintiffs further claim that uncertainty about the time required for review "would also be likely to deter a reasonable speaker from attempting to write manuscripts meant to respond to breaking news, or meant to engage with fast-moving public debates," and from writing longer pieces for commercial publishers that require authors to commit to deadlines. *Id.* at 18–19.

These allegations are facially plausible. Importantly, beyond mere hypotheticals, Plaintiffs partly premise the likelihood of such objective effects on the fact that some of them have self-censored in precisely these ways. Most notably, as Plaintiffs describe, the Complaint alleges that some Plaintiffs, including Edgar, Immerman, Goodman, and Fallon, have simply decided not to write about certain topics as a result of their past experiences with PPR. *Id.* at 19 (citing ECF No. 1 ¶¶ 66, 80, 92–93, 112, 118–19). They have also elected to accept required redactions and publish their work in altered and limited form rather than proceed with appeals of the redactions out of concern for further delaying publication or risking their relationships with PPR officials whom they may encounter again in the future. *Id.* (citing ECF No. 1 ¶¶ 64, 78, 110, 119). These allegations demonstrate that Plaintiffs have been deterred from exercising their First Amendment rights in ways persons of ordinary fitness who are subject to the PPR regimes at issue plausibly would be.

Defendants respond that Plaintiffs' claims of chill are belied by the fact that Plaintiffs have published extensively and intend to continue doing so despite the inadequacies they allege in the PPR regimes. *Id.* (citing ECF No. 1 ¶¶ 61, 65, 72, 79, 85, 93, 103, 115). This argument is unpersuasive. As the Court has noted, "a claimant need not show [he] ceased [First Amendment] activities altogether to demonstrate an injury in fact" as long as the claimed chill to those activities is objectively reasonable. *Cooksey*, 721 F.3d at 236 (first alteration in original) (quoting *Benham*, 635 F.3d at 135). Defendants next argue that Plaintiffs' claims of chill are not objectively

reasonable because Plaintiffs' decisions not to write about certain topics or to accept redactions they disagree with are "based on a mere preference to avoid potential disagreement, the possibility of delays in the publication process, or uncertainty." ECF No. 30-1 at 28. Plaintiffs contend that their decisions are reasonable responses to the breadth and vagueness of the PPR regimes, uncertainty about the time required for manuscript review, and the risk of sanctions for failure to submit. ECF No. 33 at 20.

Defendants rely on *The Baltimore Sun Co. v. Ehrlich*, in which the Fourth Circuit affirmed the dismissal of a First Amendment claim by two reporters challenging the Governor of Maryland's ban on state staff speaking with them. 437 F.3d 410, 413 (4th Cir. 2006). The ban in that case was imposed because the Governor's press office felt the reporters were not "objectively" reporting on the administration. *Id.* at 413. The court explained that "[i]t would be inconsistent with the journalist's accepted role in the 'rough and tumble' political arena to accept that a reporter of ordinary firmness can be chilled by a politician's refusal to comment or answer questions on account of the reporter's previous reporting." *Id.* at 419 (quoting *Eaton v. Meneley*, 379 F.3d 949, 956 (10th Cir. 2004)). It is unclear how that reasoning bears on Plaintiffs' claims here. Plaintiffs are not journalists claiming viewpoints in their reporting will be "chilled" because politicians refuse to engage with them in response to perceived unfair criticisms. *Id.* at 417. Rather, Plaintiffs allege that they are former public servants who seek to engage in public discourse

surrounding the topics of their expertise but whose writings are subject to redactions and who face threats to their livelihood and potentially severe sanctions for failure to comply with PPR requirements. Their decisionmaking therefore is plausibly premised on more than a preference to avoid mere "disagreement[s]." ECF No. 30-1 at 28.

Defendants next assert that because of the presumption that government officials properly discharge their duties absent clear evidence to the contrary, Plaintiffs' alleged concerns about PPR reviewers being less responsive if Plaintiffs' writings criticize the government are misplaced. While such a presumption exists in some contexts, *see Nardea v. Sessions*, 876 F.3d 675, 680 (4th Cir. 2017), its application here would not undermine Plaintiffs' other alleged reasons for self-censorship, which stem from the structure of the PPR regimes rather than conduct by individual reviewers. Finally, Defendants make the peculiar argument that Plaintiffs are not chilled but rather benefitted by PPR because review of their work prior to publication protects them from punishment for having published classified information. ECF No. 30-1 at 29. Even if Defendants were correct that the existence of a PPR system provides this counterintuitive incidental benefit to authors, however, that does not negate the other sources of chill caused by the alleged flaws in the specific PPR regimes at issue here.

Because Plaintiffs have plausibly alleged that features of the PPR regimes result in a chilling effect on the exercise of First Amendment rights, Plaintiffs

have made a sufficient showing of an injury in fact to proceed.[7] With respect to the redressability prong of standing, Defendants' only argument is that a judicial order could not set time limits for review in a way that would remedy the harms Plaintiffs allege. ECF No. 30-1 at 28. This claim is unconvincing for two reasons. First, the redressability requirement is met "when the court's decision would reduce 'to some extent' plaintiffs' risk of additional injury." *Carter v. Fleming*, 879 F.3d 132, 138 (4th Cir. 2018) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007)). Additionally, the lack of certainty about the duration of review is only one factor contributing to the chill Plaintiffs allege, the remainder of which Defendants do not directly address.

To be sure, Plaintiffs' arguments supporting redressability are somewhat nebulous. In their

[7] Because Plaintiffs' theory based on chilling effect is sufficient to demonstrate standing, the Court need not consider at length Plaintiffs' alternative "credible threat of enforcement" theory. Under such a theory, plaintiffs can demonstrate standing by showing that "they intend to engage in conduct at least arguably protected by the First Amendment but also proscribed by the policy they wish to challenge, and that there is a 'credible threat' that the policy will be enforced against them when they do so." *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018) (quoting *Kenny*, 885 F.3d at 288). The Court notes, however, that like Plaintiffs' licensing scheme argument, credible threat of enforcement is an awkward fit for this case because Plaintiffs do not state a desire to engage in conduct that is specifically proscribed by government policy, but rather express confusion and uncertainty about PPR policies with which Plaintiffs are willing to comply but for the regimes' alleged vagueness and other flaws.

Opposition, Plaintiffs assert that they seek a declaration that the PPR regimes violate the First and Fifth Amendments and "an injunction prohibiting Defendants from sanctioning them for failure to comply with these regimes." ECF No. 33 at 22.[8] Plaintiffs then state that "[i]f the Court were to afford Plaintiffs this relief, Defendants would presumably revise their prepublication review regimes to bring these regimes into alignment with the First and Fifth Amendments." ECF No. 33 at 22. Unspecified as that prediction is, a declaration that features of the PPR regimes are unconstitutional would necessitate that Defendants implement reforms to the regimes to remedy their potential constitutional defects. Because the court's decision need only reduce " 'to some extent' plaintiffs' risk of additional injury" to satisfy the redressability prong, Plaintiffs' allegations are generally sufficient to proceed. *Carter*, 879 F.3d at 138 (quoting *Massachusetts*, 549 U.S. at 526).

The speculative nature of Plaintiffs' redressability arguments, however, relates to other alleged deficiencies that Defendants raise in Plaintiffs' claims and the relief Plaintiffs request. Defendants first argue that Plaintiffs lack standing to assert that PPR must apply only to narrow categories of former employees and only to material reasonably likely to contain "the most closely held government secrets" because Plaintiffs and their

[8] That statement notably differs from the Complaint's request for injunctive relief barring enforcement of the regimes against anyone, an issue to which the Court returns below. *See* ECF No. 1 at 41.

written work fall into those categories and therefore would not be impacted by the limitations Plaintiffs seek. ECF No. 30-1 at 30–31. Elsewhere in their brief, however, Defendants argue that *all* classified information is considered "closely held" under Executive Orders establishing the classification system. *Id.* at 38. This apparent conflict indicates that Defendants' argument here is essentially an attempt to derail Plaintiffs' standing through a grammatical technicality rather than a substantive objection.

Defendants then assert that Plaintiffs' works are reasonably likely to contain classified information, as indicated by the fact that Plaintiffs' past works have been redacted. *Id.* at 31. A core claim of Plaintiffs' suit, however, is that those redactions were frequently without basis, and further that the regimes require submission of more than just materials likely to contain classified information. Defendants' argument is therefore unpersuasive. Next, Defendants argue that Plaintiffs lack standing to challenge features of the regimes that apply only to current employees. *Id.* at 32. Plaintiffs make clear in their Opposition that they do not intend to do so, though they acknowledge Defendants' correct assertion that one of the DOD policies the Complaint cites, Directive 5230.09, has been replaced by a new policy, Instruction 5230.09. ECF No. 33 at 16 n.3, 17 n.4. Finally, Defendants assert that Plaintiffs lack standing to challenge a provision of the NSA policy relating to information "in the custody and control of NSA/CSS," because none of the Plaintiffs alleges that they were employed by the NSA. ECF No. 30-1 at 33. Given that the ODNI has referred Plaintiff

Edgar's writings to the NSA in the past, however, *see* ECF No. 1 ¶¶ 63–65, Plaintiffs have adequately alleged that they are impacted by that agency's PPR regime.

Defendants also argue that Plaintiffs lack standing to bring their vagueness claim because Plaintiffs have identified no circumstance in which uncertainty about the scope of their PPR obligations has caused or is likely to cause them any tangible harm, and that they rather are well aware of their need to submit materials for PPR and have adhered to those obligations. *Id.* at 33. As the merits portion of Plaintiffs' brief notes, however, a provision may be impermissibly vague "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *Chicago v. Morales*, 527 U.S. 41, 56–57 (1999)). Plaintiffs allege that their works have been arbitrarily redacted and excised, in part because of discrimination against the viewpoints they contain. *See* ECF No. 1 ¶¶ 75, 77, 90, 110–11, 114. Because Plaintiffs have plausibly alleged a resulting chilling effect on future expression, Plaintiffs have drawn a sufficient link between the harms they assert and their vagueness claim.

Defendants' final standing argument is that Plaintiffs lack standing to seek an injunction barring enforcement of the PPR regimes "against Plaintiffs, or any other person." ECF No. 30-1 at 34 (quoting ECF No. 1 at 41). As Defendants note, the Supreme Court has recently reaffirmed that "a plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury in fact.' " *Gill v. Whitford*, 138

S. Ct. 1916, 1930 (2018) (alteration in original) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). That "a plaintiff [has] demonstrated harm from one particular inadequacy in government administration" does not authorize a court "to remedy all inadequacies in that administration." *Lewis*, 518 U.S. at 357. Defendants also raise the separation of powers concerns inherent in reviewing government policies for protecting national security. Generally, "[a]bsent a clear expression by Congress to the contrary, courts should not 'intrude upon the authority of the Executive in military and national security affairs.' " *Clarke v. DynCorp Int'l, LLC*, No. JFM-12-03267, 2014 WL 4269075, at *3 (D. Md. Aug. 28, 2014) (quoting *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988)).

In response, Plaintiffs note several cases in which courts have nonetheless reviewed executive action concerning national security when the government's conduct has implicated fundamental individual liberties. ECF No. 33 at 23 (citing *Boumediene v. Bush*, 553 U.S. 723, 797 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *United States v. U.S. Dist. Court* (*Keith*), 407 U.S. 297 (1972); *United States v. Moussaoui*, 382 F.3d 453, 469 (4th Cir. 2004)). The Court need not wade into the interplay between these weighty principles, however, because as noted previously, Plaintiffs have retreated from the maximal relief requested in their Complaint and now characterize the remedy they seek as a declaration that the PPR regimes are constitutionally flawed and "an injunction prohibiting Defendants from sanctioning [Plaintiffs] for failure to comply with these regimes." *Id.* at 22.

Equitable relief that barred penalties solely against these Plaintiffs and that granted Defendants time to address any constitutional deficiencies the Court identified with the PPR regimes would not substantially implicate the separation of powers concerns Defendants raise. The Court will accordingly proceed.

B. Ripeness

Before addressing the merits of Plaintiffs' Complaint, Defendants also raise the additional justiciability challenge that Plaintiffs' claims are unripe. "The question of whether a claim is ripe 'turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.' " *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019) (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983)). "As with standing, ripeness is a question of subject matter jurisdiction." *Id.* (citing *Sansotta v. Town of Nags Head*, 724 F.3d 533, 548 (4th Cir. 2013)). Defendants here assert that "Plaintiffs do not take issue with any current prepublication review decision, and their abstract fears about how the system might operate in the future are therefore divorced from any immediate, concrete factual setting." ECF No. 30-1 at 35–36. Defendants' argument thus essentially reduces to the claim that no challenge to PPR should be allowed to proceed except for after-the-fact appeals in individual cases of agency review.

As the Fourth Circuit has explained, however, "[m]uch like standing, ripeness requirements are

also relaxed in First Amendment cases." *Cooksey*, 721 F.3d at 240 (citing *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1500 (10th Cir. 1995)). "Indeed, 'First Amendment rights ... are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any inhibiting chill.' " *Id.* (quoting *Gonzales*, 64 F.3d at 1500). Plaintiffs' standing here is premised on precisely such a chill, and "standing and ripeness should be viewed through the same lens." *Id.* As discussed previously, Plaintiffs have plausibly alleged that they have declined to write about certain topics as a result of past experiences with PPR and have accepted redactions rather than challenged them in the interest of timely contributing to public debates. *See* ECF No. 1 ¶¶ 64, 66, 78, 80, 92–93, 110, 112, 118–19. In other words, Plaintiffs are currently subject to PPR regimes that they reasonably allege require them to self-censor. Accordingly, Plaintiffs' claims challenging the alleged constitutional infirmities in those regimes are ripe for adjudication.

C. Merits

1. First Amendment Claim

The Court thus turns to the merits of Plaintiffs' claims, beginning with the primary claim that features of Defendants' PPR regimes violate the First Amendment. While Plaintiffs discuss several ways in which they allege the regimes contravene

constitutional speech protections, the overarching theme is that the regimes constitute "a far-reaching system of prior restraints" that invest reviewing agencies with excessive discretion, allowing them to require submission of materials that do not include classified information and unwarrantedly demand redactions and excisions. ECF No. 33 at 8; see *also* ECF No. 1 ¶ 120. Defendants argue that the PPR regimes are not prior restraints and that the sole reason PPR authorities require changes to submissions is that they contain classified material. ECF No. 30-1 at 44. To the extent that the regimes require submission and redaction of materials that may not include classified information, Defendants contend, the Supreme Court in *Snepp v. United States* found such requirements fully consistent with the First Amendment. *See id.* at 38–39 (citing *Snepp*, 444 U.S. at 511–13). The Court first discusses *Snepp* before turning to its implications for Plaintiffs' claim.

Snepp involved a former CIA agent who published a book about his experiences without submitting it to the agency for PPR, violating agreements he had signed when he joined and departed the agency. 444 U.S. at 507–08. In the first agreement, Snepp promised "that he would 'not ... publish ... any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment ... without specific prior approval by the Agency." *Id.* at 508. In the departure agreement, Snepp "reaffirmed his obligation 'never' to reveal 'any classified information, or any information concerning intelligence or CIA that has not been

made public by CIA ... without the express written consent of the Director of Central Intelligence or his representative.' " *Id.* at 508 n.1.

The government brought suit to enforce the agreements after Snepp published his book. *Id.* at 508. In ruling for the government, the trial court "enjoined future breaches of Snepp's agreement" and "imposed a constructive trust on Snepp's profits," finding that Snepp had breached fiduciary obligations to the agency. *Id.* (citing 456 F. Supp. 176, 180–82 (E.D. Va. 1978)). The Fourth Circuit affirmed in part and reversed in part, lifting the imposition of the trust based on the government's concession that the book contained no classified intelligence and the court's finding that Snepp had a First Amendment right to publish unclassified information. *Id.* at 509–10 (citing 595 F.2d 926, 935–36 (4th Cir. 1979)). "In other words," the Supreme Court explained, the Fourth Circuit "thought that Snepp's fiduciary obligation extended only to preserving the confidentiality of classified material." *Id.* at 510.

The Supreme Court ruled in favor of the government and reinstated the constructive trust, concluding that the agreement Snepp signed when he joined the CIA made clear that he "was entering a trust relationship" and "specifically imposed the obligation not to publish any information relating to the Agency without submitting the information for clearance." *Id.* at 510–11 (emphasis in original). Whether Snepp violated that trust, the Court explained, did not depend on "whether his book actually contained classified information." *Id.* at

511. The Court noted that the lower courts "found that a former intelligence agent's publication of unreviewed material relating to intelligence activities can be detrimental to vital national interests even if the published information is unclassified." *Id.* at 511–12.

"When a former agent relies on his own judgment about what information is detrimental," the Court further noted, "he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful." *Id.* at 512. In view of these principles, and unchallenged evidence in the record that "Snepp's book and others like it [had] seriously impaired the effectiveness of American intelligence operations," the Court approved the lower courts' conclusions that "Snepp's breach of his explicit obligation to submit his material—classified or not—for prepublication clearance has irreparably harmed the United States Government." *Id.* at 512–13. The Court concluded that in order to deter future breaches of trust similar to Snepp's, a constructive trust was the appropriate remedy. *Id.* at 515–16.

While it was not the primary focus of its opinion, the Court also addressed and rejected Snepp's argument that the agreement he signed when he joined the CIA was "unenforceable as a prior restraint on protected speech." *Id.* at 509 n.3. The Court agreed with the Fourth Circuit that the agreement was "an 'entirely appropriate' exercise of the CIA Director's statutory mandate to 'protec[t] intelligence sources and methods from unauthorized

disclosure, 50 U.S.C. § 403(d)(3)." *Id.* (alteration in original) (citing 595 F.2d at 932).[9] The Court also explained that "even in the absence of an express agreement ... the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." *Id.* (citing *U.S. Civil Serv. Comm'n v. National Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 565 (1973)).

Finally, the Court declared that "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service," and concluded that "[t]he agreement that Snepp signed is a reasonable means for protecting this vital interest." *Id.* In responding to arguments made in a dissent, the Court described the logic of PPR, explaining that while "neither the CIA nor foreign agencies would be concerned" if information that "in fact ... is unclassified or in the public domain" is published, "[t]he problem is to ensure in advance, and by proper procedures, that information detrimental to national interest is not published." *Id.* at 513 n.8. "Without a dependable prepublication review procedure, no intelligence agency or responsible Government official could be assured that an employee privy to sensitive information might not conclude on his own—innocently or otherwise—that

[9] That statutory duty is now vested in the Director of National Intelligence and codified at 50 U.S.C. § 3024(i)(1).

it should be disclosed to the world." *Id.* The Court finally rejected the suggestion that its holding would "allow[ ] the CIA to 'censor' its employees' publications," finding that Snepp's agreement "requires no more than a clearance procedure subject to judicial review." *Id.*

Defendants argue persuasively that *Snepp* controls this case. ECF No. 37 at 8–11. In short, Defendants maintain that *Snepp* established a reasonableness standard for evaluating federal employee speech restrictions that further the government's compelling interest in protecting classified information, and that the PPR regimes here satisfy that standard in both their scope and the procedures they utilize. ECF No. 30-1 at 36–37; ECF No. 37 at 8–9. Defendants' position is supported by case law from the D.C. and Second Circuits recognizing that *Snepp* confirmed both the constitutionality of PPR generally and that federal employees' agreements not to disclose classified information waive First Amendment rights to publish that material. *See Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) (holding that a former employee of a federal laboratory who signed a PPR agreement had "no first amendment right to publish" classified information"); *Wilson v. CIA*, 586 F.3d 171, 183–84 (2th Cir. 2009) (accepting and applying the holding of *Stillman* to a former CIA agent).

Both Circuits have also held, echoing *Snepp*, that the CIA's PPR requirement "is not ... a 'system of prior restraints' in the classic sense." *Wilson*, 586 F.3d at 183 (quoting *N.Y. Times Co. v. United States*,

403 U.S. 713, 714 (1971)); *McGehee v. Casey*, 718 F.2d 1137, 1147–48 (D.C. Cir. 1983) (holding that "neither the CIA's administrative determination nor any court order in this case constitutes a prior restraint in the traditional sense upon [the plaintiff] or any other party"). The Second Circuit in *Wilson* also noted two key additional Supreme Court precedents, both of which cite generally to *Snepp* in discussing the permissibility of restrictions on government employee speech. *See* 586 F.3d at 183. In *United States v. Aguilar*, the Court stated that when a government employee "voluntarily assume[s] a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." 515 U.S. 593, 606 (1995) (citing *Snepp*, 444 U.S. 507). Similarly, in *United States v. National Treasury Employees Union* ("*NTEU*"), the Court noted that it has "recognized that Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." 513 U.S. 454, 465 (1995) (citing *Snepp*, 444 U.S. 507).

Plaintiffs ask the Court to disregard this body of case law and treat Defendants' PPR regimes as presumptively unconstitutional prior restraints under the framework established by the Supreme Court in 1965 in *Freedman v. Maryland*. ECF No. 33 at 24–25. As mentioned previously, the Court in that case rejected a Maryland statute that required approval from a state board before publicly exhibiting films but set no time limit for the board's review and did not assure prompt judicial review.

380 U.S. at 54–55, 58. The Court held that to comply with the First Amendment, a system requiring prior submission of films must include "procedural safeguards" that both place on the censoring authority the burden of proving the film is unprotected expression and require the censor to either grant a license or file a court action to "assure a prompt final judicial decision." *Id.* at 58–59. Plaintiffs also argue, citing the Supreme Court's rejection of a parade permit ordinance in *Shuttlesworth v. City of Birmingham*, that the PPR regimes must include "narrow, objective, and definite standards to guide the [reviewing] authority." ECF No. 33 at 25 (citing 394 U.S. 147, 150–52 (1969)).

Plaintiffs' position is simply untenable in light of *Snepp*. The Court there unquestionably rejected the argument that the CIA's PPR regime was a prior restraint and upheld the validity of Snepp's agreements "not to divulge *classified* information and not to publish *any* information without prepublication clearance." 444 U.S. at 508, 509 n.3. Multiple courts of appeals have recognized and applied that holding, *see Wilson*, 586 F.3d at 183; *McGehee*, 718 F.2d at 1147–48 (D.C. Cir. 1983); *see also Stillman v. CIA*, 517 F. Supp. 2d 32, 38 (D.D.C. 2007) (citing *Snepp* and stating that "[t]he Supreme Court has already decided that a prepublication review requirement imposed on a government employee with access to classified information is not an unconstitutional prior restraint."). Plaintiffs make several arguments here to attempt to persuade the Court to depart from these precedents. None are persuasive.

First, Plaintiffs observe that the Fourth Circuit characterized the CIA's PPR regime as a "prior restraint" in *United States v. Marchetti*, a 1972 decision upholding the secrecy agreement of a former CIA employee and affirming an injunction barring him from violating it by publishing materials discussing his work without submitting them for PPR. 466 F.2d 1309, 1311–13 (4th Cir. 1972). While that is an accurate summary of the decision, it is at best doubtful whether *Marchetti*'s reasoning survived *Snepp*, given the Supreme Court's rejection of Snepp's argument to that effect and its conclusion that the CIA could have imposed restrictions on disclosure "even in the absence of an express agreement." 444 U.S. at 509 n.3. Moreover, even if *Marchetti* does remain intact, the court there upheld the CIA's PPR system, noting that under *Freedman*, "some prior restraints in some circumstances are approvable of course" and that "the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure." 466 F.2d at 1316–17 (citing *Freedman*, 380 U.S. 51).

Plaintiffs next attempt to distinguish the D.C. and Second Circuit cases that Defendants cite on the ground that they involved as-applied challenges to PPR while Plaintiffs' challenge here is facial. ECF No. 33 at 26. Plaintiffs neglect to explain the significance of that distinction, however, and as Defendants correctly observe, plaintiffs bringing facial challenges have a *greater* burden than those merely challenging application of a provision to themselves. *See United States v. Stevens*, 559 U.S. 460, 472–73 (2010); *see also Wash. State Grange v.*

Wash. State Republican Party, 552 U.S. 442, 449–50 (2008) (citing *United States v. Salerno*, 481 U.S. 739 (1987)). Plaintiffs also attempt to undermine *Snepp* by characterizing its First Amendment analysis as "a cursory footnote" and by noting that the Court decided the case without oral argument or briefing on the merits. ECF No. 33 at 40–41. This Court will decline to discard a controlling Supreme Court precedent on such grounds.

More substantively, Plaintiffs argue that *Snepp* was decided on narrow grounds specific to Snepp's role as a former CIA agent with access to "some of the government's most closely held secrets," thus leaving open questions about whether PPR requirements could constitutionally be applied to other CIA employees or employees of other agencies. *Id.* at 40–41. Plaintiffs further argue that the Court in *Snepp* "had no occasion to consider the constitutionality of the specific features of the CIA's regime at issue here, let alone the specific features of the other agencies' regimes," nor "the scope of the CIA's submission requirement" or of its "review standards." *Id.* at 40. In essence, Plaintiffs ask the Court now to limit *Snepp* to its facts. The Court will decline to do so for three reasons.

First, it is apparent that for the Court in *Snepp*, the structure of the CIA's PPR regime and the scope of its requirements were irrelevant in light of the obligations contained in the agreements Snepp had voluntarily signed, both of which the Court took care to quote in their entirety. *See* 444 U.S. at 507–08 & n.1. The Court was plainly aware that Snepp's secrecy agreements barred him from publishing *any*

information about the CIA or his employment there, classified or not, but nonetheless found those requirements consistent with the First Amendment. *Id.* at 508. The Court emphasized that the government's concessions that Snepp had a general right to publish unclassified information and that his book contained no classified material did not "undercut[ ] [the government's] claim that Snepp's failure to submit to prepublication review was a breach of his trust." *Id.* at 511. In short, the Court's analysis indicates that it took into account the broad scope of the agency's submission and review requirements and found they created no obstacle to enforcing the PPR agreements Snepp had entered.

Second, Plaintiffs offer little basis to distinguish between Snepp and other CIA employees or employees of other agencies. Plaintiffs assert that in his role at CIA, Snepp had access to some of the government's "most closely held secrets," a phrase Plaintiffs use repeatedly in their briefing but fail to define. ECF No. 33 at 40. While Plaintiffs correctly note the Court's statement that "[f]ew types of governmental employment involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties," that statement served to support the possibility that Snepp's trust relationship with the CIA would exist even without a written agreement. ECF No. 33 at 40 (quoting 444 U.S. at 511 n.6). The primary focus of the decision, however, was Snepp's breach of his secrecy agreements, and there is no indication that the ruling was intended to be limited to CIA employees in Snepp's position. *See Nat'l Fed'n of Fed. Emps. v. United States*, 695 F. Supp. 1196, 1201 (D.D.C. 1988) ("That the

agreement in *Snepp* covered only 'secret' information and was executed only by CIA employees does not change the gravity of the government's interest in assuring the secrecy of national security information, nor do these distinctions render the [federal employee nondisclosure] agreements [challenged in this action] a less reasonable means for protecting that interest").

Finally, even if Plaintiffs were correct that *Snepp* was a narrow decision that concerned only high-level CIA employees, the considerations that Plaintiffs assert the Court failed to address in the case have little bearing on the constitutionality of other PPR regimes unless they qualify as prior restraints under *Freedman* and its progeny. Those considerations include the permissible scope of a submission requirement, permissible purposes of review, and "procedural protections that might be constitutionally required." ECF No. 33 at 41. Because Plaintiffs derive those concerns from prior restraint doctrine, and because Snepp found that doctrine does not apply in this context, that *Snepp* did not raise them is not a distinguishing limitation of the decision but rather an expected feature.

Because none of Plaintiffs' arguments distinguishing *Snepp* or limiting its reach are persuasive, Plaintiffs remain bound by its holding that prior restraint doctrine does not apply to PPR regimes imposed to prevent publication of classified information. Accordingly, Plaintiffs' arguments that the regimes at issue here do not meet the requirements of prior restraint doctrine must fail.

Such arguments constitute the majority of Plaintiffs' Opposition to Defendants' Motion to Dismiss: Plaintiffs assert that Defendants' "submission and censorship standards are vague, subjective, and overly broad" – as opposed to the "narrow, objective, and definite" requirement set by the Supreme Court in *Shuttlesworth* – and "lack constitutionally required procedural safeguards" that the Court established in *Freedman*. *See* ECF No. 33 at 26–27, 36. Because those requirements are inapplicable or irrelevant in light of *Snepp*, Plaintiffs' many arguments relying on them cannot support their First Amendment claim.

Plaintiffs are therefore left with demonstrating that the PPR regimes fail the reasonableness test that the Court established in *Snepp*. They attempt to do so unconvincingly and in conclusory fashion by citing to considerations discussed in *Marchetti*, the continued viability of which this Court has already questioned. *Id.* at 43–44. Plaintiffs alternatively turn to a separate body of First Amendment doctrine concerning restrictions on the speech of public employees. In *Pickering v. Board of Education of Township High School District 205*, the Supreme Court explained that if the speech of public employees "is of public concern, courts [assessing such restrictions under the First Amendment] must balance 'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Liverman v. City of Petersburg*, 844 F.3d 400, 406–07 (4th Cir. 2016)

(second alteration in original) (quoting 391 U.S. 563, 568 (1968)).

In its subsequent decision in *NTEU*, the Court "addressed how courts should apply Pickering when a generally applicable statute or regulation (as opposed to a post-hoc disciplinary action) operates as a prior restraint on speech." *Id.* at 407. As the Fourth Circuit has explained,

> NTEU involved a statute that prohibited federal employees from accepting any compensation for giving speeches or writing articles, even when the topic was unrelated to the employee's official duties. See [513 U.S.] at 457. Emphasizing that the honoraria ban impeded a "broad category of expression" and "chills potential speech before it happens," the Court held that "the Government's burden is greater with respect to this statutory restriction on expression than with respect to [the] isolated disciplinary action[s]" in Pickering and its progeny. Id. at 467, 468. Accordingly, "[t]he Government must show that 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." Id. at 468, (quoting Pickering, 391 U.S. at 571). Further, the government "must

> demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Id. at 475.

Id.

Citing case law from the Seventh and Second Circuits, Plaintiffs here assert that *NTEU* "effectively limits *Snepp* to its facts" and that Defendants' PPR regimes fail the test that case establishes. ECF No. 33 at 43. Plaintiffs' arguments fail on both counts. First, both of the cases on which Plaintiffs rely specifically note *Snepp* and the distinct concerns at play with the speech of individuals who have access to classified information and are subject to PPR, such as Plaintiffs in this case, as opposed to government personnel generally. *In Wernsing v. Thompson*, the Seventh Circuit noted that *Snepp* was decided in a "context[ ] where the government presumably has a heightened interest in preempting certain types of speech." 423 F.3d 732, 749 (7th Cir. 2005). While the court noted that *Snepp* "predated the Supreme Court's more exacting pronouncements on prior restraints in *NTEU*" and another case, that dictum does not purport to make a definitive statement about how *Snepp* may have been modified in a way that would support Plaintiffs' claim. *Id.*

Plaintiffs also point to the Second Circuit's decision in *Harman v. City of New York*, in which that court held that a city policy restricting public comments by certain agency employees was

inconsistent with *Pickering* and *NTEU*. 140 F.3d 111, 124–25 (2d Cir. 1998). In rejecting the defendants' claim that the challenged policies were necessary to protect the confidentiality of the agencies' cases and clients, the court distinguished *Snepp*, stating "that case concerned materials 'essential to the security of the United States and—in a sense—the free world.' " *Id.* at 122 (quoting 444 U.S. at 512 n.7). The court also observed that "[c]ourts traditionally grant great deference to the government's interests in national defense and security." *Id.* (citing *Brown v. Glines*, 444 U.S. 348 (1980)). Because the issues at play here deal with matters of national defense and security and not local agencies, *Harman* provides little support for Plaintiffs' position.

Plaintiffs' argument that the PPR regimes fail the *NTEU* test is similarly unpersuasive. Quoting from *NTEU*, Plaintiffs state that the regimes implicate the core political speech of "a vast group of present and future employees," although incidentally no Plaintiff here is a member of that group. ECF No. 33 at 44 (quoting *NTEU*, 513 U.S. at 468). Plaintiffs then draw on a D.C. Circuit opinion adding detail to the *NTEU* test, stating that "the public's interest in hearing this speech is 'manifestly great,' because 'government employees are in a position to offer the public unique insights into the workings of government.' " *Id.* (quoting *Sanjour v. EPA*, 56 F.3d 85, 94 (D.C. Cir. 1995) (en banc)). Finally, Plaintiffs state that "Defendants' regimes are not 'narrowly tailored to serve the government's asserted interest,' " noting that courts have applied such a requirement in *NTEU* analysis. *Id.* (quoting

Wolfe v. Barnhart, 446 F.3d 1096, 1106–07 (10th Cir. 2006)).

In support of this tailoring claim, Plaintiffs argue that "[t]he only legitimate interest served by [PPR] is the prevention of inadvertent disclosures by employees who submit to review," which Plaintiffs assert would be "served most directly" by statutes criminalizing disclosure of sensitive information and by "the availability of administrative and civil sanctions for those who mishandle such information." *Id.* at 44–45. "Any residual need for prepublication review can be served by a system far more tailored than Defendants' current regimes," Plaintiffs conclude. *Id.* at 45. Plaintiffs fail to describe the nature of such a system, however, except perhaps by unstated reference to their prior restraint arguments. Moreover, this argument appears to at least suggest, if not outright assert, that no PPR regime could be sufficiently narrowly tailored to satisfy the First Amendment. That claim cannot be correct unless *NTEU* effectively abrogated *Snepp*, a holding that the Court has no basis to reach here.

Further, Plaintiffs' argument that Defendants have only a narrow interest in preventing inadvertent disclosure ignores the Supreme Court's pronouncements in *Snepp* about the government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality" that justifies PPR. 444 U.S. at 509 n.3; *see also Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1441 (D.C. Cir. 1996) (upholding a PPR regime for employees of the State

Department and related agencies and noting this component of *Snepp* as speaking to the government's interests). Plaintiffs' assertion that penalties for unauthorized disclosures are adequate to serve the government's interest similarly ignores *Snepp*'s explanation that "[t]he problem is to ensure *in advance*, and by proper procedures, that information detrimental to national interest is not published" and that "[w]ithout a dependable prepublication review procedure, no intelligence agency or responsible Government official could be assured that an employee privy to sensitive information might not conclude on his own—innocently or otherwise—that it should be disclosed to the world." 444 U.S. at 513 n.8 (emphasis in original); *see also Weaver*, 87 F.3d at 1442 (citing *Snepp* and stating that "advance review is plainly essential to preventing dissemination" of classified information).

In short, as with their prior restraint arguments, accepting Plaintiffs' position under *NTEU* requires the Court to essentially treat *Snepp* as obsolete. Plaintiffs' desire for the Court to do so is clear in their additional argument that the Court should look past *Snepp* because of the expansion and evolution of PPR over the last four decades. *See* ECF No. 33 at 41. But as Plaintiffs are of course aware, while the Supreme Court may question and reexamine its precedents in light of societal change and the passage of time, this Court has no such power. While the allegations Plaintiffs have made about the inadequacies and breadth of the challenged PPR regimes do not appear inaccurate or implausible, *Snepp* remains the precedent governing the Court's evaluation of Plaintiffs' First

Amendment claim, and Plaintiffs have failed to demonstrate that the regimes do not meet its low threshold of reasonableness. Accordingly, Plaintiffs' First Amendment claim will be dismissed.[10]

2. Vagueness Claim

The Court finally turns to Plaintiffs' vagueness claim, which asserts that the PPR regimes are void for vagueness under the First and Fifth Amendments because they fail to provide former government employees with fair notice of what they must submit for PPR and what they can and cannot publish, and because they invite arbitrary and discriminatory enforcement. ECF No. 1 ¶ 121. "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox Television Stations,*

[10] It also bears mention that the wholesale reforms to PPR that Plaintiffs seek to obtain from the Court in this claim strain at the limits of the judiciary's role, particularly given the national security context. *See Egan*, 484 U.S. at 530 (1988). Both that concern and the Court's inability to sidestep *Snepp* limit the force of arguments made in the amicus brief submitted by CERL, which describes how lengthy PPR delays chill contributions to public discourse by former officials and discourage national security experts from entering the government. ECF No. 34-1. Whatever the merits of these assertions, they are more properly directed to the branches of government empowered to create and execute public policy rather than to simply evaluate its consistency with the Constitution.

Inc., 567 U.S. 239, 253 (2012) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.*

Plaintiffs assert that the PPR regimes at issue here fail on both counts because language used in describing what former employees must submit for review is ambiguous and because the regimes "are vague with respect to what the agencies may censor," which "has facilitated arbitrary and discriminatory application to the writings of Plaintiffs and others." ECF No. 33 at 45–46. The Court considers these arguments in turn. First, in arguing that the regimes fail to give fair notice of former employees' PPR obligations, Plaintiffs point to several phrases in the agency policies at issue that they allege are impermissibly vague in describing the subjects or content that render a work subject to PPR. ECF No. 33 at 27–29. For the CIA, these include the requirement in its AR 13-10 policy mandating submission of materials: that are "intelligence related;" that "mention[ ] CIA or intelligence data or activities; or that are "on any subject about which the author has had access to classified information in the course of his employment." *Id.* at 27 (citing ECF No. 1 ¶¶ 32c, 32d); *see* ECF No. 33-1 at 8.

For the DOD, Plaintiffs quote submission requirements for any information that "relates to information in the custody and control of the [DOD], or was acquired ... as part of their official duties within [DOD]" if the information "pertains to

military matters, national security issues, or subjects of significant concern to [the agency]." ECF No. 33 at 28 (alterations in original) (quoting ECF No. 1 ¶ 38c); *see* ECF No. 33-1 at 23, 29, 41.[11] Plaintiffs next raise the NSA's Policy 1-30, pointing to the requirement that former NSA/CSS affiliates "acting in a private capacity" must submit material for PPR whenever there is "doubt" as to whether "NSA/CSS information" in the material is "UNCLASSIFIED" and "approved for public release." ECF No. 33 at 28 (quoting ECF No. 1 ¶ 44c); *see* ECF No. 33-1 at 57, 61. Plaintiffs note that the policy states that "Official NSA/CSS information appearing in the public domain shall not be automatically considered UNCLASSIFIED or approved for public release." ECF No. 33 at 28 (quoting ECF No. 1 ¶ 44c); *see* ECF No. 33-1 at 58.

Plaintiffs also raise two ODNI policies. The agency's Instruction 80.04 requires former employees to submit "all official and non-official information intended for publication that discusses the ODNI, the IC, or national security." ECF No. 33 at 28 (quoting ECF No. 1 ¶ 50(d)); *see* ECF No. 33-1 at 76–77. Additionally, the ODNI's Form 313 requires former employees who had access to classified information to submit any material that

[11] As mentioned previously, Plaintiffs acknowledge that one of the two DOD policies quoted by the Complaint was replaced and superseded in January 2019. ECF No. 33 at 28 n.9. Plaintiffs have included both versions of the policy, as well as copies of each of the other policies at issue, as exhibits to their Opposition. *See* ECF No. 33-1 at 21–39. The DOD language at issue, however, has not changed between the prior and current policies. *Compare id.* at 23, 29 *with id.* at 33, 36.

"might be based upon [information that is classified or is in the process of a classification determination]." ECF No. 33 at 28–29 (alteration in original) (quoting ECF No. 1 ¶ 50(c)); *see* ECF No. 33-1 at 70–71. Finally, Plaintiffs point to the obligations in Form 4414, in which all of the agencies require former employees who had access to SCI to submit any material "that contains or purports to contain any ... description of activities that ... relate to SCI." *Id.* at 29 (alterations in original) (quoting ECF No. 1 ¶¶ 32b, 38b, 44b, 50b); *see* ECF No. 33-1 at 86.

Plaintiffs assert that phrases in these policies, including "intelligence related" in the CIA policy, "relates to," "pertains to," "subjects of significant concern to [the agency]" in the DOD's policies, "might be based upon" and "in the process of a classification determination" in the ODNI's policy, and "relate to" in Form 4414, are impermissibly vague. ECF No. 33 at 29–31, 45. Beyond case law generally describing vagueness doctrine, Plaintiffs cite only one controlling authority in support of their position, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). The Supreme Court there rejected a state professional responsibility rule on pretrial publicity, which allowed lawyers to speak only to the "general" nature of a claim or defense "without elaboration," on the ground that "general" and "elaboration" were "both classic terms of degree." 501 U.S. at 1048–49, 1061–62. Plaintiffs' contention that the phrases at issue here are similarly vague terms of degree is simply incorrect as a grammatical matter.

Instead of case law, Plaintiffs focus on describing the wide body of material that the policies currently require Plaintiffs to submit and on offering hypothetical examples of works by former employees that would be subject to the submission requirements despite a low likelihood of containing classified information. *See* ECF No. 33 at 30–32. These arguments indicate that Plaintiffs' primary objection to the policies is their breadth rather than any difficulties Plaintiffs have in understanding what they require. While the policies do appear to reach a wide range of publications by Plaintiffs and other former employees, Plaintiffs fail to persuasively demonstrate how that leads to a constitutional concern outside of the prior restraint context.[12] Plaintiffs' objections thus appear best directed at efforts to amend the policies administratively or legislatively rather than to invalidate them under the First or Fifth Amendments.

Two further points raised by Defendants further demonstrate the lack of merit to Plaintiffs' claim. First, courts have recognized that a regulated party's ability to obtain prospective guidance from an agency before penalties are imposed mitigates concerns about a policy's "allegedly unconstitutional vagueness." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 738–39 (D.C. Cir. 2016) (citing *DiCola v. FDA*,

[12] The Court notes Defendants' arguments with respect to overbreadth doctrine, ECF No. 36 at 14–21, but aside from a brief footnote, ECF No. 33 at 36 n.1, the Court does not read Plaintiffs' Opposition to assert such a theory separate from Plaintiffs' prior restraint argument.

77 F.3d 504, 508 (D.C. Cir. 1996)). As Plaintiffs' own allegations demonstrate, Plaintiffs have such an ability by contacting the PPR office of their former employing agency to inquire about submission requirements. *See* ECF No. 1 ¶ 106; *see also* ECF No. 33-1 at 7–8, 16, 53. Second, the Fourth Circuit has found that statutory language describing protected government information in broad or general terms presents a lessened vagueness concern when individuals responsible for understanding the statute's meaning are intelligence professionals. *See United States v. Morison*, 844 F.2d 1057, 1074 (4th Cir. 1988) (rejecting a vagueness challenge to the phrase "relating to the national defense" in an Espionage Act prosecution on the ground that the defendant was an "experienced intelligence officer" who had "expertise in the field of governmental secrecy and intelligence operations" and had been instructed on "regulations concerning the security of secret national defense materials"). That principle squarely applies to Plaintiffs here.

In support of their second claim that the regimes' vagueness facilitates arbitrary and discriminatory enforcement, Plaintiffs cite provisions from agency policies describing standards for review of submissions. The CIA's AR-10 policy provides that the agency's review board will review material "solely to determine whether it contains any classified information." ECF No. 33 at 32; *see* ECF No. 33-1 at 10. It is difficult to see how that clear standard invites arbitrary and discriminatory enforcement given its narrowness and specificity. With respect to the DOD, Plaintiffs note provisions of Instruction 5230.09 and Instruction 5230.29,

which according to Plaintiffs together provide that DOD will conduct PPR of former employees' submissions through both "security review," which "protects classified information, controlled unclassified information, or unclassified information that may individually or in aggregate lead to the compromise of classified information or disclosure of operations security," as well as through an additional review for information "requiring protection in the interest of national security or other legitimate governmental interest" and for "any classified, export-controlled or other protected information." ECF No. 33 at 32; *see* ECF No. 33-1 at 33–34, 37, 46.

As the Court noted in discussing Plaintiffs' standing, Defendants contend that some of these requirements apply only to current DOD personnel, while Plaintiffs insist that they apply to former employees as well. ECF No. 30-1 at 32; ECF No. 33 at 28 n.9, 32; ECF No. 36 at 16–17. The Court need not settle this dispute, however, because if Plaintiffs are correct, their vagueness argument is in fact weakened because the disputed policies give additional guidance to DOD PPR reviewers and further cabin their discretion. In other words, if these provisions indeed apply to Plaintiffs and other former employees as Plaintiffs ask the Court to conclude, the risk of "arbitrary and discriminatory enforcement" is reduced because the policies increase the degree to which the DOD has "provide[d] explicit standards for those who apply them." *Hill v. Coggins*, 867 F.3d 499, 513 (4th Cir. 2017) (quoting *Grayned*, 408 U.S. at 108–09).

Plaintiffs then assert that neither the NSA nor the ODNI policies provide any standard of review for submissions by former employees, though they note the statement in ODNI's policy that "[t]he goal of [PPR] is" not only to "prevent the unauthorized disclosure of information" but also to "ensure the ODNI's mission and the foreign relations or security of the U.S. are not adversely affected by publication." ECF No. 33 at 32 (quoting ECF No. 1 ¶ 51); *see* ECF No. 33-1 at 76. Plaintiffs appear to overlook, however, that a section of the ODNI policy titled "Policy" states that "[t]he ODNI has a security obligation and legal responsibility" under Executive Orders governing intelligence and classification "to safeguard sensitive intelligence information and prevent its unauthorized publication." ECF No. 33-1 at 77. Also, as Defendants observe and Plaintiffs reference elsewhere in their filings, the ODNI nondisclosure agreement for classified information, Form 313, states that the purpose of PPR is "to give the U.S. Government an opportunity to determine whether the information or material that I contemplate disclosing publicly contains any information" that "is marked as classified or that I have been informed or otherwise know is classified" or "is in the process of a classification determination." ECF No. 36 at 22 (quoting ECF No. 33-1 at 70–71). Taken together, these materials appear to set out reasonable limitations and guidance for PPR by the ODNI.

Plaintiffs also appear to overlook NSA policy language. The first paragraph of NSA/CSS Policy 1-30 states that "[t]he public release of official NSA/CSS information shall be limited only as

necessary to safeguard information requiring protection in the interest of national security or other legitimate Government interest," which is followed by a citation to DOD Directive 5230.09. ECF No. 33-1 at 57, 66. The paragraph further explains that PPR "includes both a classification review" and a review for consistency with NSA "policies and programs" and specifically identified "information security standards" and "corporate messaging standards." *Id.* To be sure, these policies set out an expansive scope of considerations for PPR reviewers to consider. But given their relative specificity, they cannot plausibly be read as so vague that they impermissibly facilitate arbitrary and discriminatory enforcement. Finally, Plaintiffs cite the fact that all of the agencies review submissions for the presence of SCI if the author had access to it as an employee. ECF No. 33 at 33.[13] In no way can that requirement be construed as vague or allowing for the unchecked exercise of discretion.

Plaintiffs have thus fallen short of plausibly demonstrating that the challenged policies raise constitutional concerns under either of the two vagueness frameworks. The Court notes that they have also failed to link the redactions and excisions from their own works that they allege were arbitrary

[13] While Plaintiffs do not cite the specific policy imposing this requirement, Defendants appear to be correct in speculating that Plaintiffs are referring to Form 4414, the SCI nondisclosure agreement, which provides that "the purpose of [PPR] ... is to give the United States a reasonable opportunity to determine whether the preparation submitted ... sets forth any SCI." ECF No. 36 at 22 (quoting ECF No. 33-1 at 86).

and discriminatorily motivated to a challenge to the PPR regimes as a whole. *See* ECF No. 1 ¶¶ 66, 80, 88, 89, 110, 114. Nor have they responded to Defendants' observation that no Plaintiff has pursued judicial review of a PPR decision, as they are entitled to do. *See, e.g.*, *Berntsen v. CIA*, 618 F. Supp. 2d 27 (D.D.C. 2009). While the Court appreciates the delay in publication that judicial review could entail, Plaintiffs have not demonstrated that such a delay on its own renders the PPR regimes constitutionally infirm, nor that review in a specific case would not be a more effective means of reviewing the alleged vagueness of a given PPR policy than a facial challenge. In any event, because none of the avenues that Plaintiffs have pursued for their vagueness claim are viable, the claim will be dismissed.

IV. CONCLUSION

For the foregoing reasons, the Court will grant Plaintiffs' Motion for Permission to Omit Home Addresses From Caption, ECF No. 8, Defendants' Motion to Dismiss, ECF No. 30, Plaintiffs' Unopposed Motion for Leave to File Excess Pages, ECF No. 32, and CERL's Motion for Leave to File Brief as Amicus Curiae, ECF No. 34. A separate Order shall issue.

Date: April 15, 2020 /s/
GEORGE J. HAZEL
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

Case No. GJH-19-985

TIMOTHY H. EDGAR, *et al.*,

Plaintiffs,

v.

DANIEL COATS, *et al.*,

Defendants.

ORDER

In its April 15, 2020 Order in this case, ECF No. 47, the Court granted Defendants' Motion to Dismiss, ECF No. 30, and directed Plaintiffs to notify the Court within 14 days if they intended to submit a Motion for Leave to Amend the Complaint.

That period having passed without Plaintiffs providing such notice to the Court, it is **ORDERED** by the United States District Court for the District of Maryland that:

1. Plaintiffs' Complaint for Declaratory and Injunctive Relief, ECF No. 1, is **DISMISSED WITH PREJUDICE**; and

2. The Clerk **SHALL CLOSE** this case.

Date: May 6, 2020 /s/
GEORGE J. HAZEL
United States District Judge