No. 21-791

IN THE

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

REPLY TO BRIEF IN OPPOSITION FOR PETITIONERS

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INTRODUCTION

Respondents' Opposition cannot obscure the fact that *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), is an extreme outlier in this Court's First Amendment jurisprudence. This case provides an excellent vehicle to reconsider *Snepp* as it squarely presents a challenge to the facial validity of Respondents' prepublication review regimes, each of which shares the same constitutional infirmities. And because Petitioners are currently—and forever—subject to these regimes and intend to write works subject to the schemes in the future, they plainly have standing to bring this challenge, as the district court and Fourth Circuit both recognized.

ARGUMENT

I. *Snepp* cannot be reconciled with this Court's other First Amendment cases.

Snepp cannot be reconciled with the Court's prior restraint and public employee speech cases, and warrants reconsideration. Pet. 21–29. Respondents' defense of *Snepp* fails.

A. *Snepp* is inconsistent with *Shuttlesworth* and *Freedman*.

Respondents argue that this Court's prior restraint caselaw is inapplicable to their prepublication review regimes because government employees forever waive their First Amendment rights when they agree to submit their publications for prior review, and accordingly prepublication review is not a prior restraint at all. Opp. 18–19. Respondents are wrong.

As an initial matter, prepublication review is a form of prior restraint. It is a classic licensing scheme: it prohibits individuals, for the rest of their lives, from writing or speaking publicly on a wide range of subjects unless they first obtain the government's approval. *Snepp* did not say otherwise. Rather, it held that the prior restraint on Snepp himself was not unconstitutional. Pet. 22–23. The *Snepp* Court's error was in evaluating that prior restraint under a "reasonableness" standard rather than the more demanding standards the Court has applied in other contexts involving the licensing of speech—specifically, the standards set out in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), and *Freedman v. Maryland*, 380 U.S. 51 (1965). Together, those cases make clear that licensing schemes are unconstitutional unless they include "narrow, objective, and definite standards to guide the licensing authority," *Shuttlesworth*, 394 U.S. at 151, and "procedural safeguards designed to obviate the dangers of a censorship system," *Freedman*, 380 U.S. at 58.

Respondents' argument that government employees permanently waive their First Amendment rights when they agree to submit their manuscripts for review, Opp. 18–19, is also misguided. This case involves *former* government employees, not current ones—and *Snepp* appears to be the only case in which this Court has ever applied a lower level of scrutiny to a prior restraint on the speech of government employees who have already left public service. Moreover, the restrictions on Petitioners' First Amendment rights are not only—or even principally—contractual. *See* Pet. 4; Compl. ¶¶ 27, 32, 38, 44, 50 (describing agency policies and regulations that

impose prepublication review obligations). In fact, the agreements that Petitioners signed do not spell out their prepublication review obligations or the prepublication review process in any detail. Rather, as Respondents concede, the regimes are established by agency policies that change periodically, *see, e.g.*, Opp. 7 n.1, 9 n.2, 32, which means that former employees are subject to shifting obligations not set out, much less waived, in any agreement they signed.[1]

Finally, Respondents' broader argument that *Snepp* was justified in abandoning traditional prior restraint analysis because of the strength of the government's interest in protecting classified information, Opp. 19–20, is also meritless. Respondents' interest here is admittedly significant, but so is the interest of former government employees in speaking publicly on matters of public concern, and the interest of the public in hearing that speech. Moreover, Respondents' interest could be accommodated, and Petitioners' rights safeguarded, within a system that cabined executive discretion

[1] Snepp's contract likewise did not spell out the CIA's prepublication review process or policies. But the Court in *Snepp* did not bless any particular constellation of prepublication review polices, let alone all conceivable constellations of them. It held only that the *review requirement* itself was constitutionally imposed, and that Snepp had violated it. *See* Pet. 20; *see also Snepp*, 444 U.S. at 510–11 (holding 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).

more narrowly and included basic procedural safeguards.

B. *Snepp* is inconsistent with *NTEU*.

Respondents are also wrong that *Snepp* can be reconciled with *United States v. NTEU*, 513 U.S. 454 (1995). As Petitioners have explained, *Snepp* applied a "reasonableness" test. Pet. 20. Respondents acknowledge this, tracing the standard to *Pickering v. Board of Education*, 391 U.S. 563 (1968). Opp. 19–20. But *NTEU* held that prospective restrictions on the speech of even *current* government employees must satisfy a significantly more demanding test—one akin to "exacting scrutiny." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018).

The difference between the *Pickering* test and the *NTEU* test is significant. As the Court explained in *NTEU*, *Pickering* involved a challenge to a disciplinary action—not a "wholesale deterrent to a broad category of expression," which raises "far more serious concerns." *NTEU*, 513 U.S. at 467–68. Where those concerns are present, "the government must shoulder a correspondingly 'heav[ier] burden,' and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights." *Janus*, 138 S. Ct. at 2472 (quoting *NTEU*, 513 U.S. at 466).[2]

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[2] The government tries to make hay of *NTEU*'s citation to *Snepp*, Opp. 20, but *NTEU* cited *Snepp* only for the unremarkable proposition that the government may impose

The *Snepp* Court did not subject Snepp's prepublication review obligations to anything resembling the scrutiny described in *NTEU*. It failed to consider "the interests of both potential audiences and a vast group of present and future employees" in the speech restricted by the CIA's scheme. *NTEU*, 513 U.S. at 468. And it did not consider whether that scheme could satisfy a test that "closely resembles exacting scrutiny." *Janus*, 138 S. Ct. at 2472. It simply concluded, without analysis, that the agency's review requirement was a "reasonable means" for safeguarding the government's interest in protecting national security secrets. *Snepp*, 444 U.S. at 509 n.3.

Even if *Snepp* was justified in abandoning traditional prior restraint analysis, *see* Part I.A *supra*; Pet. 21–26, it was wrong to apply a reasonableness test rather than the more exacting test the Court later set out in *NTEU*.

II. The Fourth Circuit upheld Respondents' prepublication review regimes only because it failed to apply the appropriate level of scrutiny.

Respondents argue that the Fourth Circuit subjected the challenged regimes to the kind of scrutiny contemplated by *NTEU*. Opp. 21. Respondents are incorrect. Although the Fourth Circuit cited *NTEU*, it treated *Snepp* as having limited its inquiry "to whether the defendant agencies' prepublication review regimes are a reasonable and effective means of serving [the government's]

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certain speech restrictions on public employees that it may not impose on the citizenry at large.

interest." Pet. App. 28a–29a. And the court did not consider the interests that were the focus of this Court's analysis in *NTEU*: the free speech rights of all current and future employees subject to the challenged policies, and the right of the public to hear what they have to say. Indeed, in its First Amendment analysis, the Fourth Circuit did not even *mention* these interests. *See id.* at 23a–33a.

Nor did the court of appeals meaningfully scrutinize the specific features of Respondents' regimes that Petitioners challenge. The government claims otherwise, *see* Opp. 22–26, but at each turn, the Fourth Circuit's analysis was perfunctory and dismissive of the substantial First Amendment interests implicated by Respondents' regimes. The result was that the Fourth Circuit upheld censorship regimes that could not have survived scrutiny under the appropriate constitutional test.

For instance, a central flaw of Respondents' regimes is that they require former employees to submit far more material than the government has an interest in reviewing. *See* Pet. 14. The court of appeals made the obvious point that the government has an interest in reviewing more than it may ultimately censor. *See* Pet. App. 29a–30a; Opp. 22. But the court did not consider whether the sweep of Respondents' submission requirements was sufficiently tailored to satisfy a standard akin to "exacting scrutiny." *Janus*, 138 S. Ct. at 2472; *NTEU*, 513 U.S. at 474; *cf.* Pet. App. 30a (finding only that the requirements were "reasonably tied" to the interest). It offered no serious justification, for example, for the ODNI's requirement that former employees submit any material relating to "national security," *see* Pet. 14—a standard that

would require a former employee who had narrow access in the 1990s to information about, say, China's cybersecurity capabilities, to submit for review an op-ed arguing that Russia's invasion of Ukraine is a threat to democracy around the globe.[3]

The Fourth Circuit also failed to consider that Respondents' regimes permit reviewers to censor information that is not classified. *See* Pet. 7. Petitioners do not take issue with the court's observation that the government has a legitimate interest in preventing former employees from inadvertently confirming the authenticity of classified information that has been leaked to the press. *See* Pet. App. 31a–32a. But Respondents' regimes extend much further. The ODNI's policy, for example, does not include any review criteria at all, effectively granting the agency carte blanche.

The court of appeals also failed to seriously grapple with the fact that Respondents' regimes lack any

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[3] The government appears to imply that *Snepp* blessed a similarly broad submission requirement, *see* Opp. 23, but as noted above and explained in the Petition, the Court did not address the precise contours of the CIA's submission requirement, *see* Pet. 35–36.

Additionally, the government claims that only *current* employees must submit "DoD information covering subjects of 'significant concern.'" Opp. at 22. The policy's plain text and the agency's public explanation of the policy state otherwise. *See* Compl. ¶ 38(c) (quoting Dept. of Def., Frequently Asked Questions for Department of Defense Security and Policy Reviews (Mar. 2012), https://perma.cc/5AH3-S3RV) (stating that "former" DOD employees must submit "DoD information," which "includes any work that relates to military matters, national security issues, or subjects of significant concern to DoD"); *see also* Pet. App. 8a, 29a.

binding timelines for review—a defect that would be fatal in any other licensing setting. The court asserted that Petitioners' allegations do not show that the agencies fail to abide by their aspirational deadlines, Pet. App. 32a, but it simply ignored Petitioners' allegations. *See* Pet. 14–15 (noting, with citations to the Complaint, that arbitrary delays are common); Compl. ¶ 29 (noting that the CIA's own documents show that the agency expects review of books to take more than a year). Again, the Fourth Circuit upheld these regimes because it evaluated them only for "reasonableness" rather than under *Freedman* and *Shuttlesworth*, or even *NTEU*.

III. This case presents an optimal vehicle for revisiting *Snepp*.

This case presents an optimal opportunity to revisit *Snepp*. Pet. 37–38. Many of Respondents' arguments to the contrary are simply repackaged versions of the standing arguments they made below, which both the district court and appellate court properly rejected.

As the court of appeals explained:

> 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. 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. Therefore, their claims are fit for judicial review.

Pet. App. 22a–23a (cleaned up).

Respondents suggest that this case is a poor vehicle because it involves four different agencies' prepublication regimes. Opp. 32. But the constitutional infirmities that Petitioners identify are common to all four regimes: (1) the submission requirements are overbroad and vague; (2) the review standards invest executive officials with unbridled discretion to censor speech; and (3) the regimes lack adequate procedural safeguards, including firm deadlines for the completion of review. *See* Pet. 6–7, 14. The question of what standard of review applies is also common to all four regimes.

Respondents are also wrong to argue that the issues presented here would be better resolved in an as-applied challenge. *See* Opp. 32. "[I]t is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, . . . whether or not [one has] applied for a license." *Freedman*, 380 U.S. at 56. Respondents' argument simply ignores that the very existence of these regimes imposes immediate and ongoing costs on Petitioners' First Amendment rights. Pet. 13–18. Further, as-applied challenges to prepublication-review decisions are expensive and therefore infrequent, rarely produce substantive decisions, and often become moot before reaching the appeals courts. *See* Pet. 37–38.

Respondents' characterizations of Petitioners' factual allegations as "vague" and "scattershot" are likewise incorrect. *See* Op. 32. Petitioners advance specific challenges to the facial validity of four agencies' prepublication review regimes, all of which share the same central infirmities. There is no dispute that these policies apply to Petitioners, or that the regimes have had the effect of delaying, chilling, and suppressing what Petitioners contend is constitutionally protected speech. While Petitioners' past experiences illustrate the regimes' problems, their challenge is prospective and facial.

Respondents' arguments challenging Petitioners' standing fare no better. There is no serious question that Petitioners have standing to sue, because they are subject to government licensing schemes that invest executive officers with overly broad discretion and that lack adequate procedural safeguards. *See Freedman*, 380 U.S. at 56; *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (noting that standing to challenge licensing schemes under the First Amendment is permissive, because overly broad licensing schemes threaten speech by their "very existence"); *see also* Pet. App. 19–21; Compl. ¶¶ 36, 42, 48, 54. Petitioners also have standing, as both courts below recognized, because Respondents' prepublication review regimes chill Petitioners' protected speech. *See* Pet. App. 20a–21a, 74a–79a; Compl. ¶¶ 80, 112, 118. And Petitioners have standing because they face a credible threat of enforcement for non-compliance. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014); *see also, e.g.*, Compl. ¶¶ 86, 119.

Respondents' more specific objections to standing are equally unpersuasive. They claim it is

"speculative" that any of Petitioners' works will be referred to the NSA. Opp. 28, 30 (quotation marks omitted). But each of Respondents' prepublication review regimes specifically allows inter-agency referrals. *See* Compl. ¶¶ 33, 39, 45, 51. Further, Mr. Edgar, who is an expert on NSA activities, has written about such activities in the past, has been subjected to at least one NSA prepublication review referral, and "plans to continue writing about matters relating to intelligence and cybersecurity"—core NSA functions—in the future. *Id.* ¶ 65. That his works will be subject to the NSA's prepublication review regime is not speculative.

Second, Respondents contend that Petitioners cannot challenge DOD's prepublication review regime because no Petitioner, including Mr. Fallon, has "allege[d any] concrete intent to write future works likely to trigger more lengthy review." Opp. 29. But Mr. Fallon is unquestionably subject to DOD's regime, and he has plausibly alleged that DOD's regime chills his desire to write additional books, has imposed monetary and professional costs upon him, and raises the specter of sanctions for noncompliance. *See* Compl. ¶¶ 112, 119.

Third, Respondents claim that Mr. Edgar's and Mr. Immerman's injuries with respect to ODNI's prepublication review regime—and Mr. Goodman's with respect to CIA's—are speculative and not imminent. Opp. 30–31. Again, they miss the point. Respondents do not dispute that both Mr. Edgar and Mr. Immerman are currently subject to ODNI's regime, and that Mr. Goodman is subject to CIA's. This, combined with their undisputed intention to write works that would have to be submitted, is

sufficient to establish standing under this Court's licensing scheme cases.

Finally, Respondents argue that the Court should deny review because "agency policies governing prepublication review are subject to periodic revision." Opp. 32. That argument could be offered in *any* case challenging an executive branch policy. And it is particularly unpersuasive here. As Respondents note, Congress called on them to update their policies *five years ago*, and even today Respondents cannot say when their review will be completed. *Id.* at 33. That the executive branch may change its policies in some unspecified way at some unspecified time in the future is not a good reason for the Court to deny certiorari—especially in a context in which the challenged policies are causing ongoing and irreparable harm to Petitioners' First Amendment rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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