No. 21-791

In the Supreme Court of the United States

TIMOTHY H. EDGAR, ET AL., PETITIONERS

v.

AVRIL D. HAINES,
DIRECTOR OF NATIONAL INTELLIGENCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In *Snepp* v. *United States*, 444 U.S. 507 (1980) (per curiam), this Court upheld the enforceability of a secrecy agreement signed by an employee of the Central Intelligence Agency, which required the employee to submit certain materials for the government's prepublication review to prevent the public dissemination of classified information. The Court stated that a "voluntarily signed" agreement requiring such review is "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.* at 509 n.3. The questions presented are:

1. Whether *Snepp* should be overruled.

2. Whether the court of appeals correctly rejected petitioners' facial challenge to the prepublication-review policies of four federal agencies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 2 F.4th 298. The opinion of the district court (Pet. App. 39a-112a) is reported at 454 F. Supp. 3d 502.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2021. The petition for a writ of certiorari was filed on November 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a facial First and Fifth Amendment challenge by former federal employees to the prepublication-review policies of four federal agencies within the Intelligence Community (IC): the Office of

the Director of National Intelligence (ODNI), Central Intelligence Agency (CIA), Department of Defense (DoD), and National Security Agency (NSA) (a DoD component). Prepublication review is designed to prevent such individuals who have enjoyed access to classified or otherwise protected national-security information from disclosing such information to the public.

1. The President's "authority to classify and control access to information bearing on national security * * * flows primarily from th[e] constitutional investment of power in the President * * * as head of the Executive Branch and as Commander in Chief." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988) (citation omitted). Executive Order No. 13,526, 3 C.F.R. 298 (2009 Comp.) (50 U.S.C. 3161 note), governs the current classification system.

Under that Order, an "original classification authority" may classify information owned by, produced by or for, or under the control of the United States government if he or she "determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" (*i.e.*, "the national defense or foreign relations of the United States") and can "identify or describe the damage." Exec. Order No. 13,526, §§ 1.1(a)(1), (2), and (4), 6.1(cc) and (gg). The information must pertain to one or more classification categories, which include "military plans, weapons systems, or operations"; "intelligence activities," "sources[,] or methods"; and "foreign relations or foreign activities of the United States." *Id.* §§ 1.1(a)(3), 1.4(a), (c), and (d). Information may not be classified to "conceal violations of law, inefficiency, or administrative error"; "prevent embarrassment"; or "prevent or delay the release of information that does not require

protection in the interest of the national security." *Id.* § 1.7(a).

Classified information is designated as "'Top Secret,'" "'Secret,'" or "'Confidential,'" based on the degree of "damage to the national security" that "the unauthorized disclosure of [the information] reasonably could be expected to cause." Exec. Order No. 13,526, § 1.2(a). Certain agencies may establish "special access program[s]" imposing enhanced safeguarding and access requirements for categories of classified information if the information is exceptionally threatened or vulnerable and the normal criteria governing access to classified information are "[in]sufficient to protect [it]." *Id.* §§ 4.3(a), 6.1(*oo*). The Director of National Intelligence (DNI) has authorized special access programs for Sensitive Compartmented Information (SCI), *i.e.*, "classified national intelligence [information] concerning or derived from intelligence sources, methods, or analytical processes" that the government "protect[s] within formal access controls systems established by the DNI." ODNI, *Intelligence Community Directive 906* §§ B.1, C.2, D.8 (Oct. 17, 2015), https://go.usa.gov/xtKQx; cf. 50 U.S.C. 3024(j).

Certain intelligence information is also protected from disclosure even if it is not itself classified. Congress has directed that the DNI "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. 3024(i). Congress has likewise protected from disclosure, *inter alia*, "the organization or any function of the [NSA]," "any information with respect to the activities thereof," and "the names, titles, salaries, or number of the persons employed by such agency," 50 U.S.C. 3605(a); as well as similar informa-

tion concerning the ODNI and CIA, 50 U.S.C. 3024(m), 3507.

A federal employee may be granted access to classified information if he has been determined to be eligible to receive national-security information at the relevant classification level, has a governmental "need-to-know" the information, and has "signed an approved nondisclosure agreement." Exec. Order No. 13,526, §§ 4.1(a), 6.1(dd). Individuals who choose to work in federal positions that require access to classified information must therefore sign one or more non-disclosure agreements as a condition of access. The government generally uses Standard Form 312 (C.A. App. 140-141) and IC Form 4414 (*id.* at 143-144) when a federal employee seeks access to, respectively, classified information and SCI. Various agencies have also utilized additional forms for certain contexts involving access to classified information. See, *e.g.*, *id.* at 54-56 (CIA Form 368); *id.* at 76-77 (DoD Form 1847-1); *id.* at 127-131 (Form 313). Petitioners do not argue that the agreements they signed to gain access to classified information were signed under duress or otherwise involuntarily entered. Pet. App. 24a; see C.A. App. 19, 22, 27. Petitioners also do not argue that "prepublication review regimes are *per se* unconstitutional." Pet. 25; see Pet. 2. Rather, as described below, petitioners challenge four agencies' policies governing prepublication review.

2. Petitioners—five former employees of the ODNI, CIA, and DoD—filed this action to challenge the prepublication-review policies of those agencies (and NSA). C.A. App. 8-49 (complaint). Petitioners do not, however, seek relief as to any past or pending prepublication review of any materials they submitted. Pet. App. 16a. They instead assert a facial First and Fifth

Amendment challenge to the agencies' prepublication-review policies generally. C.A. App. 9-11, 47-48. Their complaint seeks a declaratory judgment and an injunction prohibiting those agencies from "enforc[ing] [their] prepublication review regimes against [petitioners] or any other person," *id.* at 48.

a. *ODNI.* Petitioners Timothy Edgar and Richard Immerman are former ODNI employees who had access to Top Secret/SCI material as part of their federal employment. C.A. App. 29-30, 32-33.

ODNI Instruction 80.04 (C.A. App. 133-138) explains that "ODNI has a security obligation and legal responsibility * * * to safeguard sensitive intelligence information and prevent its unauthorized publication." ODNI, *Instruction 80.04* § 6 (Aug. 9, 2016), https://go.usa.gov/xtBQN. The Instruction governs ODNI's prepublication-review process generally, while stating that, [i]n case of any conflict between th[e] Instruction and a [nondisclosure agreement], the [nondisclosure agreement] shall govern." *Ibid.* The Instruction provides that current and former ODNI employees must submit for prepublication review any "publication that discusses the ODNI, the [Intelligence Community], or national security." *Ibid.* 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." *Id.* § 6(C)(2)(b) (emphasis omitted). Dissatisfied authors may pursue an administrative appeal. *Id.* § 6(E).

Edgar alleges that, after leaving ODNI, he submitted multiple "blog posts and op-eds" for ODNI's review and then published them. C.A. App. 30. Edgar further alleges that with respect to one publication—a book about the NSA post-Edward Snowden—he submitted

his manuscript for review in October 2016; ODNI informed him in January 2017 that certain material must be redacted or excised; and he "disagreed" with "some" redactions but "decided against challenging them" because he was concerned about delaying publication. *Id.* at 30-31. Edgar alleges generally that the "delay and uncertainty associated with prepublication review has dissuaded him from writing some pieces" in the past, but that he "plans to continue writing about matters relating to intelligence and cybersecurity" and "anticipates" submitting "at least some of this writing" for prepublication review. *Id.* at 31-32.

Immerman alleges that, after leaving ODNI, he submitted for ODNI's prepublication review multiple "book manuscripts, articles, papers, public talks, and academic syllabi." C.A. App. 33. Immerman alleges that with respect to one such work—a book about the CIA's history—he submitted a manuscript to ODNI in January 2013; ODNI referred it to the CIA for additional review; and ODNI informed him in July 2013 that "extensive redactions" were required; but that "[s]everal weeks" after he filed an administrative appeal, the appeal was resolved largely in his favor when ODNI receded from a "significant portion" of the redactions. *Id.* at 34-35. Immerman further alleges that the CIA later reaffirmed the need for some redactions and approved "revised wording" to avoid problematic passages, and that, while he disagreed, he accepted those determinations to avoid "further delay." *Id.* at 35. Immerman alleges that he plans to continue publishing "articles, books, and op-eds" and believes that "at least some" such works will "trigger prepublication review obligations." *Ibid.*

b. *CIA*. Petitioner Melvin Goodman is a former CIA employee who had access to Top Secret/SCI material as part of his federal employment. C.A. App. 36-37.

CIA Regulation 13-10 (June 25, 2011) (C.A. App. 62-70) governed the CIA's review process.[1] That regulation provides that persons obligated under a secrecy agreement with the CIA must submit for prepublication review by a CIA review board (now known as the Prepublication Classification Review Board) all material that "mentions CIA or intelligence data or activities" and "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.* at 65 (§ 2(e)(1)); see *id.* at 63 (§ 2(b)(1)). The regulation states that because "[t]he purpose of [that] review is to ensure that information damaging to the national security is not disclosed inadvertently," prepublication review involving former employees is conducted "solely" to identify "any classified information," and permission to publish "will not be denied solely because the material may be embarrassing to or critical of the [CIA]." *Id.* at 63, 67 (§ 2(b)(2) and (f)(2)).

The regulation states that, "[a]s a general rule, the [Prepublication Classification Review Board] will complete prepublication review for nonofficial publications within 30 days." C.A. App. 65 (§ 2(d)(4)). "Relatively short, time-sensitive submissions" like op-eds "will be handled as expeditiously as practicable," while "[l]engthy or complex submissions may require a longer

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[1] The CIA later revised *Regulation 13-10* to make minor changes effective June 1, 2017 and subsequently updated a marking for one paragraph. See Gov't C.A. Notice (Apr. 13, 2022). The parties litigated, and the court of appeals decided, this case based on the 2011 version of *Regulation 13-10*. See Pet. App. 7a-8a, 29a, 31a.

period of time for review, especially if they involve intelligence sources and methods issues." *Ibid.* The regulation provides that an author may seek reconsideration of the Board's decision and may pursue an administrative appeal in which "[b]est efforts will be made" to render a decision "within 30 days." *Id.* at 70 (§ 2(h)(1)).

Goodman alleges that, after leaving the CIA, he "submitted multiple works to the CIA for prepublication review," nine of which were books for which "most" of the review processes lasted "less than two months." C.A. App. 37-38. Goodman alleges that review of one book—"an account of his experience as a senior CIA analyst"—"took eleven months" and that he "believes" that "all of the changes" identified were "intended to spare the agency embarrassment." *Id.* at 38-39.

c. *DoD*. Petitioners Anuradha Bhagwati and Mark Fallon are former DoD personnel who had access to, respectively, Secret and Top Secret/SCI material as part of their employment. C.A. App. 40, 42-43.

The Defense Office of Prepublication and Security Review conducts DoD's prepublication reviews. *DoD Instruction 5230.09*, § 2.2(c) (Jan. 25, 2019) (C.A. App. 92). Materials submitted by "former DoD employees" are reviewed "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) (C.A. App. 91). DoD's instructions advise authors to submit "papers and articles * * * at least 10 working days," and "[m]anuscripts and books * * * at least 30 working days," before their anticipated publication. *DoD Instruction 5230.29*, Encl. 3, § 3(a)(2) and (4) (Aug. 13, 2014, rev. Apr. 14, 2017) (C.A. App. 105). Authors dissatisfied with a determination may file an

administrative appeal, which DoD resolves "as quickly as possible." *Id.* Encl. 3, § 4(b) (C.A. App. 106).[2]

Bhagwati, a former Marine Corps officer, alleges that she published numerous op-eds and a memoir with policy recommendations based on her experiences with misogyny, racism, and sexual violence in the military. C.A. App. 40-41. She further alleges that "[s]he has no plans to submit any future work to prepublication review" and is "certain" that such work would "not contain classified information." *Id.* at 41.

Fallon is a former DoD criminal, counterterrorism, and counterintelligence investigator who, after retiring from DoD, renewed his Top Secret/SCI clearance for his work on a research committee for the multi-agency High-Value Detainee Interrogation Group. C.A. App. 42-43; cf. FBI, *High-Value Detainee Interrogation Group*, https://go.usa.gov/xt53Y. Fallon alleges that he has published op-eds, shorter works, and one book, "many of [which]" he submitted for prepublication review, and that he plans to continue submitting for review "any [such works] that he writes in the future." C.A. App. 43, 46.

Fallon alleges that his book, entitled *Unjustifiable Means*, analyzes the Bush administration's "policies relating to the interrogation and torture of prisoners." C.A. App. 43. He alleges that he submitted the manuscript for DoD review in January 2017, DoD consulted with other agencies, and the review lasted eight months, until August 2017. *Id.* at 45. Fallon alleges that, in "[his] view," the 113 redactions were "unjustified" and

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[2] DoD revised both instructions after the court of appeals issued its decision. See *DoD Instruction 5230.09* (Jan. 25, 2019, rev. Feb. 9, 2022), https://go.usa.gov/xubUu; *DoD Instruction 5230.29* (Aug. 13, 2014, rev. Feb. 8, 2022), https://go.usa.gov/xtBUK.

"seemingly intended to protect the CIA from embarrassment," but that he did not challenge them to avoid further delay. *Ibid.* Fallon similarly "believes" that the redactions resulting from DoD's review of a book chapter that he authored about the High-Value Detainee Interrogation Group were "motivated by political disagreement" with his views. *Id.* at 46.

d. *NSA.* No petitioner worked at NSA. Petitioners nevertheless facially challenge NSA's prepublication-review process, relying on Edgar's allegation of one instance in which ODNI referred one of his numerous works—his book about the NSA post-Edward Snowden—for review by NSA. C.A. App. 30-31. Edgar states that he "expects" that any future manuscript that he submits for ODNI review "may" be referred by ODNI to "the NSA, the CIA, or other agencies." *Ibid.*

When petitioners filed their action, NSA's review process was guided by *NSA Policy 1-30* (rev. May 12, 2017) (C.A. App. 113-125), which implemented *DoD Instruction 5230.09*.[3] That policy stated that former NSA personnel could publish materials using unclassified information "approved for public release," C.A. App. 114, 123 (¶¶ 2.c, 22), but were required to submit proposed publications for review "where compliance with" that requirement "[wa]s in doubt," *id.* at 118, 120 (¶¶ 6.b, 10.a). Cf. *id.* at 124 (¶ 27.b) (indicating that certain unclassified information was not approved for public release in light of NSA's statutory authority to protect certain intelligence information regardless of classifica-

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[3] NSA's current *Policy 1-30*, issued February 2, 2021, https://go.usa.gov/xtBnz, supersedes prior versions of the policy. See Gov't C.A. Notice (Apr. 13, 2022). The parties litigated, and the court of appeals decided, this case based on the May 2017 version of *Policy 1-30*. See Pet. App. 9a-10a, 29a, 31a.

tion); p. 3, *supra*. The policy further provided that NSA would, "as practicable," complete its review "within 25 business days," C.A. App. 119 (¶ 6(b)(7)), and that dissatisfied authors could file an administrative appeal, *ibid.* (¶ 7).

3. The district court granted the government's motion to dismiss. Pet. App. 39a-112a. The court initially determined that petitioners had standing to seek prospective relief under a "'somewhat relaxed'" Article III standard based on their allegations that their expression is chilled by the agencies' review processes, *id.* at 74a-79a, 81a-82a. See *id.* at 70a-84a.

The district court then rejected petitioners' constitutional challenges on the merits. The court determined that *Snepp* v. *United States*, 444 U.S. 507 (1980) (per curiam), "controls" and forecloses petitioners' First Amendment claim, Pet. App. 90a, explaining that petitioners "voluntarily took on their [prepublication-review] obligations as a condition of their employment and their access to protected government information," *id.* at 73a, 91a, and that the agencies' review processes were reasonable means of furthering the government's "compelling interest in protecting classified information," *id.* at 90a. See *id.* at 85a-103a. The court likewise rejected petitioners' vagueness claim, *id.* at 103a-112a, observing that petitioners' "primary objection to the [prepublication-review] policies is their breadth rather than any difficulties [petitioners] have in understanding what they require," *id.* at 107a.

4. The court of appeals affirmed. Pet. App. 1a-38a.

a. The court of appeals first determined that petitioners had adequately alleged Article III standing. Pet. App. 18a-21a. The court stated that, under its precedent, it applies a "somewhat relaxed" standing test in

First Amendment cases because the "*risk* of punishment" could chill speech. *Id.* at 19a (citation omitted). The court also observed that petitioners did "not challenge the application of prepublication review to any specific work" and that they instead alleged that "the prepublication review 'regime' of each [of the four] agenc[ies]" was "facially" unconstitutional as a "system of prior restraints" on protected speech. *Id.* at 16a. Under its relaxed standard, the court concluded that petitioners could establish their standing by showing that they had been "chilled from exercising [their] right to free expression" if the chilling effect was "objectively reasonable," because the challenged action would be "likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *Id.* at 20a-21a (citations omitted). The court determined that petitioners had established an objectively reasonable chill and "self-censorship" with allegations that prepublication-review policies had previously dissuaded certain petitioners from writing certain works. *Id.* at 20a-21a.

b. The court of appeals rejected petitioners' facial challenge on the merits. Pet. App. 23a-38a.

The court of appeals determined that petitioners' facial First Amendment challenge lacked merit. Pet. App. 23a-33a. The court observed that no petitioner had alleged the he or she was coerced into signing any nondisclosure agreement or was under any duress in doing so, and that, under *Snepp*, such agreements are not unenforceable "prior restraints" on speech. *Id.* at 24a (citation and brackets omitted). The court explained that by "voluntarily signing these agreements," petitioners had "knowingly 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 of appeals further determined that, to prevail in their "facial challenge," petitioners needed to show that each prepublication-review policy is "overbroad under the First Amendment" by showing that a "'*substantial number* of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep.'" Pet. App. 26a-27a (citation omitted). The court stated that, under *Snepp*, "the question in this case reduces 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," *id.* at 28a-29a, and concluded that they are. The court determined that the breadth of respondents' submission standards is "necessary to serve the government's compelling interest," *id.* at 29a-30a; the redaction standards are not overly broad or vague, *id.* at 30a-32a; and petitioners' limited allegations of undue delay were insufficient in this facial challenge because they failed to indicate that, "on the whole," the agencies "failed to abide by [the relevant] timelines," *id.* at 32a-33a.

The court of appeals similarly concluded that the policies and agreements at issue were not unconstitutionally vague. Pet. App. 33a-36a. The court stated that the relevant "submission standards," while "broad," are "anchored to discrete and identifiable categories of information," and that each agency's "redaction standards are guided by whether material discloses classified information or otherwise sensitive information." *Id.* at 34a-36a.

ARGUMENT

Petitioners contend (Pet. 18-30) that the Court should grant review to overrule its decision in *Snepp* v. *United States*, 444 U.S. 507 (1980) (per curiam), which upheld the use of prepublication review to protect classified information. Petitioners further contend (Pet. 31-38) that the Court should grant review to "clarify" that *Snepp* not does "preclude meaningful judicial scrutiny" of prepublication-review policies. No further review is warranted. Petitioners identify no sound basis to overrule *Snepp*; the court of appeals correctly rejected petitioners' facial challenges to the ODNI's, CIA's, DoD's, and NSA's prepublication-review policies; and the decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Moreover, this case would be a poor vehicle to consider petitioners' facial challenges because petitioners' allegations raise substantial questions about their Article III standing to challenge all four agencies' policies; because petitioners' limited factual allegations would make the Court's review of their facial challenges difficult; and because ODNI, pursuant to a congressional request, is undertaking a review of the Intelligence Community's prepublication-review policies. The Court should deny certiorari.

1. Petitioners primarily argue (Pet. 18-30) that the Court should grant review to overrule its decision in *Snepp*. But *Snepp* was correctly decided, and petitioners provide no sound basis to overrule it.

a. The Court in *Snepp* considered the CIA's use of a prepublication-review process based on a CIA secrecy agreement. In that agreement, Snepp acknowledged that he had accepted a "position of trust" as a government employee with access to classified information and

agreed that, in connection with his promise "not to disclose any classified information," he would not publish "any information" relating to the CIA, its activities, "or intelligence activities generally" without prior approval. *Snepp*, 444 U.S. at 508, 510 & n.5 (citations omitted). The government sued Snepp for breach of contract after he published a book about the CIA's activities in Vietnam without submitting it for review. *Id.* at 507-508. The court of appeals, like the district court, found that Snepp had "breached a valid contract" and that an injunction requiring him to submit future writings for prior review was warranted, but it reversed the grant of a constructive trust on Snepp's profits because the government had conceded that the "book divulged no classified intelligence." *Id.* at 509-510.

Snepp petitioned for certiorari to challenge the enforceability of his CIA contract, and the government conditionally cross-petitioned to challenge the rejection of a constructive-trust remedy. *Snepp*, 444 U.S. at 507 & n.*. Snepp's petition rested primarily on two contentions. First, Snepp argued that prepublication review was an unconstitutional "prior restraint" on protected expression. Pet. at 2, *Snepp*, *supra* (No. 78-1871); see *id.* at 4, 7-12. He argued that his contract and similar agreements affecting "thousands of other government employees" "establish[ed] a classic system of prior restraint" that was both "sweep[ingly]" broad and "impose[d] an intolerable burden on the right of * * * employees to publish their views on matters of great public concern and on the right of the public to rec[ei]ve such information." *Id.* at 7-8. The court of appeals' decision, he continued, was inconsistent with "the decisions of this Court concerning prior restraint," *id.* at 9, which required that any government "licensing" system for

speech "must be guided by 'narrow, objective and definite standards'" absent in his case, *id.* at 12 (quoting *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 151 (1969)). Second, Snepp argued that the court of appeals had erroneously concluded that he had "waived his First Amendment rights by signing [his] secrecy agreement." *Id.* at 11. Snepp argued that the requirement of such a contractual waiver as a condition of federal employment was invalid. *Ibid.* (citing, *e.g.*, *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968)).

This Court granted review and summarily resolved the questions in the petition and cross-petition in the government's favor. *Snepp*, 444 U.S. at 507, 516. First, the Court rejected Snepp's "primar[y]" argument that his contract was "unenforceable as a prior restraint on protected speech." *Id.* at 509 n.3. The Court explained that Snepp had "voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review" and did not claim the agreement was made under duress. *Ibid.*

Second, the Court rejected Snepp's contention that his contract was invalid as an unconstitutional condition of federal employment, agreeing with the court of appeals that the CIA's use of the secrecy "agreement [was] an 'entirely appropriate' exercise" of the CIA Director's authority to protect intelligence sources and methods from unauthorized disclosure. *Snepp*, 444 U.S. at 509 n.3 (citation omitted); see *id.* at 512-513. The Court explained that its First Amendment jurisprudence made "clear" that—"even in the absence of an express agreement"—the government may "impos[e] reasonable restrictions on [federal] employee activities" to "protect substantial government interests," even though the same activities "in other contexts might be

protected by the First Amendment." *Id.* at 509 n.3 (citing cases). The Court then determined that the requirement of prepublication review was "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." *Ibid.* (citing *id.* at 511-512).

The Court explained that if a former federal employee like Snepp were permitted to "rel[y] on his own judgment about what information is detrimental, 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." *Snepp*, 444 U.S. at 512. Thus, the Court continued, "[t]he problem" that prepublication review addresses is the government's need "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," the Court reasoned, "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." *Ibid.* And allowing each former employee to decide for himself what to disclose would, *inter alia*, jeopardize the government's continued ability to work with "the intelligence services of friendly nations"—work essential to the United States' ability "to make critical decisions about foreign policy and national defense"—because such cooperation depends on the United States' "ability to guarantee the security of information that might compromise [its

intelligence partners]." *Id.* at 512 & n.7; see *United States* v. *Zubaydah*, 142 S. Ct. 959, 968-969 (2022). The Court concluded that those considerations justifying prepublication review applied regardless "whether [Snepp's] book" was ultimately found to "contain[] classified material." *Snepp*, 444 U.S. at 511.

b. Petitioners' suggestion (Pet. 31) that *Snepp* "focused narrowly on a question of remedy" is incorrect. The court affirmed the imposition of a constructive-trust remedy, *Snepp*, 444 U.S. at 514-516, but it did so only after it rejected Snepp's arguments that the prepublication-review process (1) constituted a "prior restraint on protected speech" and (2) was an unconstitutional condition of federal employment, *id.* at 509 n.3, 511-513 & nn.7-8. Indeed, petitioners' own prior-restraint arguments (Pet. 20-26) based on pre-*Snepp* jurisprudence—including their argument that *Shuttlesworth*, *supra*, and similar decisions require "narrow, objective, and definite" standards for "the licensing of speech," Pet. 24—closely track the arguments raised and rejected in *Snepp*. See pp. 15-16, *supra* (discussing Snepp's arguments).

Petitioners' attempt to characterize prepublication review as a prior restraint on speech fails to account for a central point: In *Snepp*, the Court held that Snepp had waived his First Amendment right to publish without prepublication review when he agreed to such review as a condition of obtaining access to classified information. *Snepp*, 444 U.S. at 509 n.3. The principle that individuals may thereby waive constitutional rights neither is complicated nor, as *Snepp* reflects, warrants extended discussion. This Court has recognized that *Snepp* demonstrates that a federal employee's free-speech rights will be "limit[ed]" "by virtue of his contract

with the Government" providing for "prior clearance" before publication. *Haig* v. *Agee*, 453 U.S. 280, 284 & n.5, 309 (1981) (citing *Snepp*, *supra*). As a result, prepublication review based on such an agreement is not "a 'system of prior restraints' in the classic sense." *Wilson* v. *CIA*, 586 F.3d 171, 183 (2d Cir. 2009) (citing *McGehee* v. *Casey*, 718 F.2d 1137, 1147-1148 (D.C. Cir. 1983)). Once a government employee has "voluntarily assumed 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." *United States* v. *Aguilar*, 515 U.S. 593, 606 (1995) (citing *Snepp*, *supra*).

Agreements contemplating prepublication review made by federal employees in connection with their employment remain subject to constitutional "scrutiny" under the unconstitutional-conditions doctrine. Cf. Pet. 32 n.5. The government "may not deny a benefit" like "[federal] employment" "on a basis that infringes [an employee's] constitutionally protected interests—especially, his interest in freedom of speech." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (citing *Pickering, supra*, and other public-employment decisions). This Court applied that principle in *Pickering*, see *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994), explaining that the doctrine strikes "a balance between the interests of [the employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Snepp cited *Pickering* in support of his contention that his agreement with the CIA was invalid because it imposed an impermissible condition of federal employment. See p. 16, *supra*. The

Court, however, determined that, under the proper balance and in light of the government's "compelling interest" in this national-security context, the government could permissibly impose a "reasonable" restriction on employee speech through prepublication review to protect national-security information. *Snepp*, 444 U.S. at 509 n.3, 511-513 & n.8; see pp. 16-18, *supra*. That requirement, the Court explained, does not entail "'censor[ship]' [of] employees' publications"—it simply requires "a clearance procedure" that is itself "subject to judicial review." *Snepp*, 444 U.S. at 513 n.8 (citation omitted).

Petitioners argue (Pet. 26-29) that *Snepp* is inconsistent with this Court's subsequent decision in *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995) (*NTEU*). But *NTEU* specifically cited *Snepp* as a decision illustrating that "restraints on the job-related speech of public employees" that "would be plainly unconstitutional if applied to the public at large" may be imposed if they are supported by a "'balanc[ing]'" of the relevant interests. *Id.* at 465-466 (quoting *Pickering*, 391 U.S. at 568). Nothing in that decision rendered more than 25 years ago undermined *Snepp*'s ongoing validity. See *Weaver* v. *United States Info. Agency*, 87 F.3d 1429, 1439 (D.C. Cir. 1996), cert. denied, 520 U.S. 1251 (1997).

NTEU concluded that to sustain the forward-looking honorarium ban in that case, "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression [must be] outweighed by that expression's 'necessary impact on the actual operation' of the Government." 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571). In such a context, "the recited harms [must be]

real, not merely conjectural," and the restriction must "alleviate these harms in a direct and material way." *Id.* at 475 (citation omitted). *Snepp*'s analysis is consistent with those principles. The Court examined and approved the "reasonable[ness]" of prepublication review as a general matter, not just its retrospective application to a single employee, given the government's "compelling interest" in "ensur[ing] *in advance* * * * that information detrimental to national interest is not published" by former employees. *Snepp*, 444 U.S. at 509 n.3, 513 n.8. The Court also explained why such review is necessary—even if the material in any particular case is ultimately found upon review to be unclassified—in order to avoid the national-security harms that would result if former federal employees were allowed to rely on their "own judgment about what information is detrimental." *Id.* at 512-513 & nn.7-8; see pp. 17-18, *supra*.

2. Petitioners ask (Pet. 31-37) the Court to "clarify" that *Snepp* does not preclude "meaningful" scrutiny of prepublication-review requirements. Petitioners assert (Pet. 31) that the court of appeals "effectively" read *Snepp* to hold that all "prepublication review regimes are *per se* constitutional." That is incorrect. The court scrutinized the prepublication-review policies that petitioners challenge to ensure that, as *Snepp* requires, they are a "reasonable and effective means" of advancing the "'compelling interest' in [protecting] the secrecy of information important to national security." Pet. App. 28a-29a. And in doing so, the court rejected petitioners' challenges. *Id.* at 29a-33a. Petitioners effectively acknowledge (Pet. 32-34) that no court of appeals has concluded otherwise. And neither their cursory assessment of the relevant policies nor their scattershot

assertions about application of the review process more generally provide any sound basis for further review.

a. Petitioners argue (Pet. 14) that the scope of materials that must be submitted for review is too broad, purportedly including "material that the government has no legitimate interest in reviewing." The court of appeals correctly rejected that contention, determining that the scope of the various policies that petitioners challenged "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." Pet. App. 29a (emphasis corrected to match opinion). That purpose would not be served if the policies were limited to materials that former employees themselves view as presenting a sufficient likelihood of containing classified information. Required submissions for agency review must necessarily include materials that "*might* contain, reveal, or confirm classified or sensitive information," and, as the court of appeals concluded, "that is what [respondents'] submissions standards do." *Ibid.*

Petitioners cite their complaint's allegations to argue that former DoD employees must submit anything that relates to DoD information covering subjects of "significant concern" to DoD. Pet. 14, 25 (citation omitted). Petitioners refer to a DoD provision addressing "official DoD information," *DoD Instruction 5230.09* § 1.2(b) (Jan. 25, 2019) (C.A. App. 90), but the government explained below that that provision applies only to current DoD personnel, see *id.* § G.2 (C.A. App. 93); *DoD Instruction 5230.29* Encl. 3 § 1 (Aug. 13, 2014, rev. Apr. 14, 2017) (C.A. App. 103); Gov't C.A. Br. 37, and petitioners do not respond to the court of appeals' deter-

mination regarding the necessity of DoD's submission requirement.

Petitioners also view (Pet. 14, 25) it as unreasonable for ODNI to ask former employees "to submit all manuscripts discussing 'national security.'" Pet. 14 (citation omitted). But that provision parallels the requirement in *Snepp* to submit writings concerning "intelligence activities generally." 444 U.S. at 508 (citation omitted). And it reflects the reasonable judgment that a publication concerning national security, authored by a former ODNI employee who had access to sensitive national-security information, could inadvertently compromise classified information—including by repeating select information in the public domain that the author views as credible in light of his background knowledge formed with classified information. Such "repetition of information that is already in the public domain but not yet unclassified" may "'lend[] credence' to that information" and injure national-security interests. Pet. App. 32a (citation omitted); cf. *Zubaydah*, 142 S. Ct. at 968-969.

b. Petitioners also assert (Pet. 14, 24) that review standards applied during prepublication review permit redaction of information that the government has "no legitimate interest in suppressing," stating that, based on "[p]etitioners' experiences," agency policies "permit[] officials to censor information that is not classified." Those contentions are misplaced.

Petitioners erroneously assert that DoD's instruction allows redaction of information affecting any "legitimate governmental interest." Pet. 14 (citation omitted). DoD's instruction provides that DoD reviews materials submitted by former employees only to ensure that the information "does not compromise national

security as required by their nondisclosure agreements." See p. 8, *supra*. Petitioners invoke (Pet. 24) prior "experiences" reflecting their subjective disagreement with past discrete agency decisions that certain information was properly classified.[4] But such disagreement with particular redaction decisions made under prepublication-review policies does not support a facial challenge to the policies themselves. Petitioners have not identified or pursued a challenge to those particular redactions. Their assertions regarding particular past redactions fail to show that the policies themselves are not reasonable and effective means of protecting the government's compelling interest in protecting classified information from disclosure—especially because the policies provide for administrative appeals of such redactions, which are then subject to judicial review. And even if assessed under a First Amendment facial overbreadth standard, petitioners' allegations concerning redactions are a far cry from the significant showing needed to demonstrate that, for each of the four agency policies, "a substantial number of its applications are unconstitutional, judged in relation to [its]

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[4] Petitioners allege that two book manuscripts about CIA activities were redacted even though one "cited public sources" for "factual propositions," C.A. App. 34, and the other cited "press accounts," *id.* at 39. But unofficial accounts that are publicly available do not necessarily eliminate the need for redaction. *CIA Regulation 13-10* (June 25, 2011) thus provides that "[w]hen otherwise classified information is also available independently in open sources [that] can be cited by the author," the CIA review board "considers th[at] fact in making its determination on whether that information may be published with the appropriate citations," but that the CIA may redact "certain open-source information or citations" if the author's government "affiliation or position" might "confirm the classified content." C.A. App. 68 (§ 2(f)(4)).

plainly legitimate sweep." *United States* v. *Stevens*, 559 U.S. 460, 473 (2010) (citation omitted). Petitioners provide no more generally applicable allegations beyond "'naked assertions' devoid of 'further factual enhancement,'" which are plainly insufficient to support their claims. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (citation and brackets omitted).

c. Petitioners contend (Pet. 14, 25) that the four agencies' review policies permit undue delay because they lack "binding" deadlines. But as the court of appeals concluded, the policies here all "fix target timelines for review," and petitioners' "few allegations" concerning the length of the review period in particular instances "do not, on the whole, indicate that [respondents] failed to abide by these timelines." Pet. App. 32a-33a. Those timelines are a reasonable and effective means of effectuating the compelling need to review publications for national-security information. It is a matter of common sense, for example, that the review of an entire book to identify and assess possible classified information would take longer than review of an op-ed or article and might exceed a target of 25 or 30 days. Again, if framed in facial overbreadth terms, petitioners' reliance on the timing of the reviews for only a small subset of even their own submissions cannot show that the absence of binding deadlines renders a "*substantial number*" of each policy's applications unconstitutional compared to its legitimate scope. *Id.* at 27a (citation omitted).

Those who accept the privilege of serving our country —and the responsibility that comes with access to classified information—do not "have a transcendent interest in instant publication of statements made on agency-related matters." *Weaver*, 87 F.3d at 1442. They have agreed as a condition of such access to prior agency

review necessary to serve the "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." *Snepp*, 444 U.S. at 509 n.3. And to the extent that a former employee believes that the time taken for review has been too long in a particular instance, he may attempt to expedite the process through judicial intervention in an as-applied, not facial, challenge. See, *e.g.*, *United States* v. *Bolton*, 468 F. Supp. 3d 1, 5 (D.D.C. 2020) (explaining that author "could have sued the government" rather than "opt[ing] out of the review process before its conclusion").

3. Finally, this case would be an unsuitable vehicle for the Court's review for multiple reasons.

a. Petitioners do not contend that prepublication review is *per se* unconstitutional, Pet. 2, 25, and yet they bring only a facial challenge to the four agency policies. The nature of petitioners' allegations to support that challenge, however, raises substantial threshold questions whether, or in what respects, petitioners have established Article III standing to challenge each of the agency policies with respect to the scope of its prepublication-review requirement or the standards for redactions in, or timing of, that review.

To establish Article III standing, a plaintiff must establish (1) an injury in fact that is "concrete, particularized, and actual or imminent," (2) a causal connection showing the injury to be "fairly traceable to the challenged action," and (3) a likelihood that the injury would be "redress[ed] by a favorable ruling." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted). The court of appeals acknowledged those standing elements, but it determined that, under its precedents,

it applies a "somewhat relaxed" version of them in First Amendment cases. Pet. App. 19a (citation omitted).

The Court's "standing inquiry has been especially rigorous"—not relaxed—"when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Amnesty Int'l*, 568 U.S. at 408 (citation omitted). And in national-security contexts like this involving "actions of the political branches in the fields of intelligence gathering and foreign affairs," the Court has "often found a lack of standing." *Id.* at 409.

Because petitioners seek only prospective relief, they must show that they are currently suffering an ongoing injury in fact, or are "immediately in danger of sustaining" such an injury in the future, "as the result of [the government's challenged] action." *Laird* v. *Tatum*, 408 U.S. 1, 13 (1972) (citation omitted). And with respect to any threatened future injury, the Court has "repeatedly" made clear that the "'injury must be *certainly* impending' * * * and that 'allegations of *possible* future injury' are not sufficient" because they are "'too speculative for Article III purposes.'" *Amnesty Int'l*, 568 U.S. at 409 (citation and brackets omitted). Furthermore, "standing is not dispensed in gross." *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted). Petitioners must "demonstrate standing for each claim [they] seek[] to press," *ibid.* (citation omitted), by establishing that at least one petitioner has an ongoing or imminent future injury caused by each challenged aspect of each of the four prepublication-review policies at issue.

Former government employees dissatisfied with the prepublication review of particular submissions can and

do challenge the review process and its results in federal courts, which adjudicate those claims in concrete contexts. See, *e.g.*, *Stillman* v. *CIA*, 319 F.3d 546 (D.C. Cir. 2003); *Shaffer* v. *Defense Intelligence Agency*, 102 F. Supp. 3d 1 (D.D.C. 2015); *Berntsen* v. *CIA*, 618 F. Supp. 2d 27 (D.D.C. 2009); *Boening* v. *CIA*, 579 F. Supp. 2d 166 (D.D.C. 2008). But petitioners have eschewed any challenge to any actual prepublication review of any of their works in favor of a broad facial challenge to the prospective operation of all four agencies' policies in the abstract. See Pet. App. 16. There are multiple flaws in their asserted bases for doing so.

i. *NSA*. No petitioner previously worked for the NSA and none alleges any sufficient ongoing or future injury from its prepublication-review procedures. Edgar, a former ODNI employee, alleges that he has authored numerous works, of which ODNI forwarded one—a book about the NSA—to NSA for NSA's review. C.A. App. 30-31. But even assuming *arguendo* that the prior review process of that single manuscript was deficient, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding [prospective] relief." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (citation omitted). Edgar alleges no concrete future plans to write works about NSA that might similarly result in NSA review. The possibility that future manuscripts "may" be referred to NSA, C.A. App. 31, is an "allegation[] of possible future injury" far "too speculative for Article III purposes." *Amnesty Int'l*, 568 U.S. at 409 (citations omitted; cleaned up).

ii. *DoD*. Fallon alleges that he has "published op-eds, articles, columns, and a book"—"many" of which he submitted "to the DoD for prepublication review"—and that he plans to submit works that he "writes in the

future" for DoD's review, C.A. App. 43, 46. Fallon also alleges that he has chosen not to "publish op-eds" and articles "about current affairs" and "breaking news" because he worries about "potential delays and unjustified objections." *Id.* at 47. But he alleges no past delays or disagreement with redactions in prior reviews of such shorter works; he alleges past issues only with respect to his book about the "Bush administration's policies relating to the interrogation and torture of prisoners," *id.* at 43-46, and a chapter for a book about interrogation and torture, *id.* at 46. Moreover, Fallon alleges no concrete intent to write future works likely to trigger more lengthy review. An "injury in fact requires an intent that is concrete." *Carney* v. *Adams*, 141 S. Ct. 493, 502 (2020). "'[S]ome day intentions'" lacking specificity and immediacy "do 'not support a finding of the "actual or imminent" injury that [this Court's] cases require.'" *Ibid.* (citation omitted). To the extent Fallon asserts a "chilling effect" on his "exercise of First Amendment rights," that too is insufficient. See *Amnesty Int'l*, 568 U.S. at 417-418 (citation omitted). "[A]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 418 (citation omitted). That is particularly true because, as noted above, petitioners do not deny that some "prepublication review" process is permissible.[5]

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[5] In contexts involving First Amendment overbreadth challenges, this Court has relaxed the "prudential" requirement that a plaintiff may assert only "'his own legal rights and interests,'" adopting instead the "doctrine of *jus tertii* standing" to allow a litigant to make the merits showing that a provision is "'substantially overbroad'" by demonstrating that it violates the First Amendment rights of others. *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947,

Bhagwati affirmatively disproves her own standing by failing to allege that she has ever previously submitted anything for prepublication review and alleging "no plans to submit any future work to [such] review," C.A. App. 41. Her observation that DoD "might" sanction her in some unspecified way for declining to invoke such review, *ibid.*, does not show any future injury is likely, much less imminent.

iii. *ODNI*. As noted, Edgar alleges that he submitted multiple works for ODNI's review and alleges difficulties only with his manuscript about the NSA post-Edward Snowden, which required referrals to the NSA and the CIA. C.A. App. 30-31. Edgar's vague allegation that he previously decided not to write "some pieces" and "wr[ote] others differently" due to the prospect of review, *id.* at 32, fails to show an ongoing injury as needed for prospective relief. And his allegation that he plans to submit "some" future writings for ODNI review that "may" be referred to the NSA, CIA, "or other agencies," *id.* at 31, is speculative.

Immerman likewise alleges that he submitted to ODNI various "book manuscripts, articles, papers, public talks, and academic syllabi." C.A. App. 33. But he complains about the review process for only one book about the CIA's history, where the review, Immerman's appeal, and a subsequent post-review meeting Immer-

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955-959 (1984) (citations omitted). But the plaintiff must still establish Article III's constitutional minimum of standing, including "the requirement of 'injury-in-fact.'" *Id.* at 954-955, 956, 958. The Court's decisions finding certain provisions unconstitutional on the merits as a result of a "chilling effect" on protected speech are similar. *Laird*, 408 U.S. at 11-13 (showing that chill cases involved plaintiffs who had been "denied admission to the bar," "discharged from employment," denied access to their mail, and required to take an "oath * * * as a condition of [their] employment").

man requested with CIA officials all allegedly occurred within about eight months in 2013. *Id.* at 34-35. Immerman states that he "plans to continue publishing academic articles, books, and op-eds" and anticipates submitting some for prepublication review but, apparently because of the single 2013 incident (years before the 2019 complaint in this case), he alleges that he "would publish more" but for prepublication review. *Id.* at 35-36. He vaguely adds that he "considered writing academic articles" and "op-eds" about intelligence issues but was "dissuaded" by his concerns about prepublication review. *Id.* at 36. Like Edgar's, those allegations fail to show an imminent future injury that supports standing for the challenge here.

iv. *CIA*. Goodman, a former CIA employee, alleges that he submitted nine book manuscripts for prepublication review, and that such review "typically took less than two months," but that the review of one of his books—"an account of his experience as a senior CIA analyst"—took 11 months and resulted in redactions that he "believes" were intended to spare the CIA of embarrassment. C.A. App. 38-39. Goodman alleges that other reviews resulted in redactions that he deems unwarranted and that, on one occasion, he "self-censored" to avoid discussing certain information about the then-CIA Director. *Ibid.* Goodman states that he "intends to submit those portions of any [of his] future manuscripts that deal with intelligence matters" for review but "remains concerned" about unwarranted redactions and delay. *Id.* at 39-40a. Those allegations and concerns do not demonstrate an ongoing injury or imminent future injury from the CIA's prepublication-review process.

b. Second, and for related reasons, the facial challenges that petitioners assert would present multiple difficulties for the Court's review. "Facial challenges are disfavored for several reasons," including that 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." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008) (citation and internal quotation marks omitted). And given petitioners' limited, scattershot, and often vague factual allegations and their challenge to four separate agency review policies, it would be difficult for the Court to evaluate the operation of the policies and formulate any sound rules of decision to govern future contexts. The Court, for instance, would have no basis to evaluate whether petitioners' disagreements with the timing or results of certain prior reviews are well-founded. Such questions can meaningfully be addressed only in concrete factual contexts, in which a court examines a proposed publication and an agency's treatment of it. But because petitioners elected not to challenge the validity of the redactions of any prior submission, Pet. App. 16a, this Court would be unable to examine whether those redactions were in fact justified. That is why the body of law governing prepublication review has arisen from challenges to concrete review determinations. See, *e.g.*, *Wilson*, *supra*; *McGehee*, *supra*; see also pp. 27-28, *supra* (citing cases).

c. Finally, agency policies governing prepublication review are subject to periodic revision. The NSA, for instance, has informed this Office that it is currently in

the process of revising its *Policy 1-30*. In addition, in 2017, the House and Senate intelligence committees, in a statement having the same effect as "a joint explanatory statement of a committee of conference," Intelligence Authorization Act for Fiscal Year 2017, Pub. L. No. 115-31, Div. N, § 3, 131 Stat. 807, expressed their "concern[] that current and former [Intelligence Community] personnel have published written material without completing mandatory pre-publication review procedures * * * , resulting in the publication of classified information." 163 Cong. Rec. H3300 (daily ed. May 3, 2017). The committees observed that "no binding, IC-wide guidance on the subject" exists and called for the DNI to issue "an IC-wide policy regarding pre-publication review" with "improve[ments] to better incentivize compliance and to ensure that personnel fulfill their commitments." *Ibid.* ODNI has informed this Office that its review of IC prepublication-review policies is ongoing and that it is in the process of responding to that congressional request. If this Court were inclined to entertain a facial challenge to agencies' prepublication-review processes, such review should await the completion of ODNI's review and any policy changes that the review may produce.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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