No. 21-791

IN THE
Supreme Court of the United States

TIMOTHY H. EDGAR, ET AL.,

Petitioners,

v.

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

Respondents.

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

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND NINE MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are the Reporters Committee for Freedom of the Press, First Amendment Coalition, Freedom of the Press Foundation, Investigative Reporting Workshop at American University, The Media Institute, National Freedom of Information Coalition, National Press Photographers Association, New England First Amendment Coalition, The News Leaders Association, and Tully Center for Free Speech.

As organizations dedicated to protecting the First Amendment interests of journalists, amici have a pressing interest in ensuring that any system of prior restraint on speech be appropriately scrutinized by the courts given the "heavy presumption" against such a system's "constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Accordingly, amici write to highlight how the current national security prepublication review system burdens publishers of information subject to government censorship in advance of publication.

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[1] Pursuant to Supreme Court Rule 37, counsel for amici curiae state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the amici curiae, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief; counsel of record for all parties were given timely notice of the intent to file this brief; and counsel of record for all parties have provided written consent to the filing of the brief.

SUMMARY OF THE ARGUMENT

Black-letter law holds that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Few protections for a free press and an informed public are more fundamental. Still, the government supervises the publications of a vast class of current and former employees in just that way—notionally screening their contributions to public life for classified information, but in practice exercising a discretion so standardless it threatens any speech "embarrassing to the powers-that-be." *N.Y. Times Co. v. United States* (*"Pentagon Papers Case*"), 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

The government does so, as Petitioners describe, without observing the limits this Court has consistently imposed on prior restraints. *See generally Freedman v. Maryland*, 380 U.S. 51 (1965). And most egregiously, from amici's point of view, the government has repeatedly threatened to bootstrap that power over officials into a power over their publishers, attempting an end run around the foundational protections of the *Pentagon Papers Case.*

Those broad claims rest on the thinnest reed: a footnote in a *per curiam* opinion of this Court, issued without briefing or argument, addressed to a different set of facts entirely. *See Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980). Still, the lower courts believe themselves bound by that precedent to reject any and all challenges to the government's prepublication review policies. *See* Pet. 31. The government has

advanced that view of the decision not on the strength of what *Snepp* actually says but, in part, by reference to a brief that amicus Reporters Committee for Freedom of the Press filed before this Court in 1979.[2] The government's sweeping reading of the opinion is daring and unreasonable, and if *Snepp* cannot bear it—as amici do not believe it can—then only this Court can clarify as much. But if *Snepp* can, in the alternative, support the result the Fourth Circuit reached, then only this Court can repair *Snepp*'s break with bedrock precedent on prior restraints.

In either event this Court's intervention is needed—to cure the continuing harm these policies cause the public's right to know, and to prevent the government from further eroding the First Amendment's protections for publishers. Amici therefore offer two principal arguments in support of Petitioners and reversal.

First, the national security prepublication review system burdens the rights of members of the press and other publishers in addition to the First Amendment interests of officials who hope to speak. Indeed, the government has even argued that its review powers sometimes imply an entitlement to the most disfavored remedy imaginable: an injunction against publication of a book critical of the state. That threat to the First Amendment's core is intolerable.

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[2] *See* Brief for Appellees, *Edgar v. Haines*, No. 20-1568 (4th Cir. Oct. 23, 2020) (citing Br. of the Reporters Committee for Freedom of the Press at *3–4, *Snepp v. United States*, No. 78-1871, 1979 U.S. S. Ct. Briefs LEXIS 14 (U.S. June 25, 1979)).

Second, formal prepublication review emerged because of—and not despite—the importance of the public's right to understand the operations of its security agencies, a domain in which "the only effective restraint upon executive policy and power . . . may lie in an enlightened citizenry." *Pentagon Papers Case*, 403 U.S. at 728 (Stewart, J., concurring). Because of the secrecy that surrounds matters of national security, foreign policy, and intelligence gathering, current and former officials are often particularly or uniquely well-situated to provide the electorate with accurate information and valuable analysis. As such, it is of paramount importance that the prepublication review system operate within established constitutional boundaries.

Amici therefore respectfully ask this Court to grant the Petition and bring the modern system of national security prepublication review in line with the First Amendment.

ARGUMENT

I. The current system of prepublication review erodes the First Amendment rights of publishers.

The harms of the current system on the public's right to know, ably described in the Petition, are exacerbated by its effect on the First Amendment interests of publishers. As Petitioners describe, for decades now, the government has imposed inconsistent reviews, lengthy delays, and viewpoint discrimination through the prepublication review process. *See* Pet. 13–16. These defects chill and

interfere with the author-publisher relationship that is so critical to putting officials' views before the public that hopes to hear them. *Cf. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (noting that speakers' and publishers' interests are two sides of the same First Amendment coin). To put it plainly, publishers are less likely to pursue titles that the government, at its standardless discretion, might well kill at any point in the process.

For instance, as this Court has recognized, "[t]he peculiar value of news is in the spreading of it while it is fresh." *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918). But intelligence agencies' frequent flouting of the timelines they themselves set forces publishers who choose to pursue a book or other project touching on national security and implicating the review system to engage in a months- or years-long battle to print, before receiving heavy redactions that further delay publication. Penguin Press, for instance, was forced to accept former CIA Director Leon Panetta's memoir prior to receiving final approval from the CIA after a "contentious" months-long showdown with the agency over redactions, imposing an impossible choice on the publisher: publish with unknown legal risk or pull the book. Greg Miller, *Panetta Clashed with CIA over Memoir, Tested Agency Review Process*, Wash. Post (Oct. 21, 2014), https://perma.cc/RCZ5-65A3. More recently, former Defense Secretary Mark Esper sued the Department of Defense for allegedly improperly holding up his book detailing his time leading the Pentagon during the Trump administration. Maggie Haberman, *Esper Claims Defense Dept. Is Improperly Blocking Parts of His Memoir*, N.Y. Times (Nov. 28,

2021), https://perma.cc/GFT7-XGGE. Esper's suit comes after six months of cooperation with the prepublication review process and approximately 60 pages of redactions without explanation. *See id.* Publishers are less likely to contract for a book that the government might delay long past "the time [the] audience would be most receptive," chilling the publication of titles on national security "as effectively . . . as if a deliberate statutory scheme of censorship [were] adopted." *Bridges v. California*, 314 U.S. 252, 269 (1941).

Adding to this onerous process are the multiple inconsistent reviews that intelligence agencies often put manuscripts through, further ratcheting up the uncertainties confronting a publisher who chooses to move forward with a book on national security issues. In one incident in 2012, St. Martin's Press moved towards publication on a book from Anthony Shaffer, a retired lieutenant colonel in the Army Reserve and former Defense Intelligence Agency officer, after Shaffer cooperated fully with the prepublication review process and had his manuscript approved by the Army in January. *Shaffer v. Def. Intel. Agency*, 901 F. Supp. 2d 113 (D.D.C. 2012). However, eight months later—after St. Martin's Press had already printed and distributed copies to third-party vendors—the Defense Intelligence Agency intervened and requested redactions of 250 of 320 pages of the book. Scott Shane, *Secrets in Plain Sight in Censored Book's Reprint*, N.Y. Times (Sept. 17, 2010), https://perma.cc/VN7E-XX3P. The dispute led to the government buying and *destroying* thousands of books that had already been printed (which inadvertently revealed information the government considered

dangerous through comparisons of the first leaked edition and second redacted edition). *Id*.

The specter of viewpoint discrimination also haunts publishers' decisionmaking. In 2011, for instance, W.W. Norton & Company was only able to publish former FBI special agent Ali Soufan's book with extensive redactions under black boxes in the text, added to demonstrate for readers the extent of the government's censorship. *See* Ali Soufan, The Black Banners: How Torture Derailed the War on Terror After 9/11 (2011). Meanwhile, publisher Threshold Editions was permitted to put out a book from a former CIA official defending the same tactics and detailing at length the previously redacted interrogation methods, raising the inference that the agencies' choice to censor Soufan's publication was more concerned with "trying to protect a narrative rather than protecting classified information." *See* Greg Miller & Julie Tate, *CIA Probes Publication Review Board over Allegations of Selective Censorship*, Wash. Post (May 31, 2012), https://perma.cc/P4WL-4PDG.[3]

Further, publishers are potentially at the mercy of simple favoritism. In 2019, Penguin Random House was forced to delay a book from Guy Snodgrass, a former Defense Department speechwriter for Secretary James Mattis, who sued the Department for allegedly violating his First Amendment rights by

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[3] After nine years and a lawsuit, the CIA finally allowed the redactions to be lifted. *See* Charlie Savage & Carol Rosenberg, *C.I.A. Uncensors Memoir of F.B.I. Agent Who Protested Torture of Terrorists*, N.Y. Times (Aug. 29, 2020), https://perma.cc/XD9M-4G84.

purposefully delaying his book in prepublication review for months. Complaint at 1, *Snodgrass v. Dep't of Defense*, No. 19-2607 (D.D.C. Aug. 29, 2019) (ECF No. 1). Snodgrass claimed the Department deliberately slowed down his review to benefit Mattis, whose own book was scheduled to be published around the same time, and implicitly threatened him with potential retaliation for violation of a loyalty oath. Affidavit of Guy Snodgrass at 7*, Snodgrass v. Dep't of Defense*, No. 19-2607 (D.D.C. Sept. 3, 2019) (ECF No. 4-2). Just days after Snodgrass filed suit, the Department cleared his book for review and Snodgrass voluntarily dismissed his claim. Letter from George R. Sturgis, Jr. to Guy M. Snodgrass, Department of Defense Office of Prepublication and Security Review, No. 19-SB-0052 (Sept. 11, 2019); Notice of Voluntary Dismissal, *Snodgrass v. Dep't of Defense*, No. 19-2607 (D.D.C. Sept. 25, 2019) (ECF No. 9). Taken together, these outsized risks that the government will interfere with orderly publication of a former official's perspective have a predictable chilling effect on the publishers who would otherwise hope to work with them.

Finally—and most egregiously, from amici's perspective—the government has threatened legal action against publishers themselves to censor publication of books touching on national security. After the CIA threatened a senior Random House editor with an espionage prosecution for printing a "ground-breaking account of the CIA" by two reporters in 1964, editors operated under the understanding that intelligence agencies would threaten legal action against "any publisher who dared to print negative material about the Agency." *See* Christopher Moran,

Company Confessions: Secrets, Memoirs, and the CIA 188 (2016). By the same token, when Jeffrey Toobin sought to publish a book about his experience within the Office of Independent Counsel during the Iran-Contra Affair, the government not only attempted to deter Toobin himself but warned his publisher, Penguin Books, that "if Penguin published the manuscript, it would be Toobin's agent in the publication of illegal materials." *Penguin Books USA Inc. v. Walsh*, 756 F. Supp. 770, 779 (S.D.N.Y. 1991), *vacated as moot*, 929 F.2d 69 (2d Cir. 1991) (internal quotation marks omitted). (The district court found the government's efforts baseless, and the Office's prepublication processes deficient.)

And just last year, the government threatened to leverage the review process to bind a publisher in a transparent end run around the *Pentagon Papers Case*. As far back as the 1970s, the government had acknowledged—as settled law requires—that an author's obligations cannot casually be imputed to a publisher who "signed no secrecy agreement," and that any effort to obtain an injunction against the publisher "would have to meet the difficult standard of irreparable harm, which the U.S. Supreme Court raised in the celebrated case involving the New York Times and the Pentagon Papers." Charles R. Babcock, *Justice Weighing Action Against CIA Ex-Agent*, Wash. Post (Aug. 31, 1978), https://perma.cc/SKU7-7JWA. Otherwise, the bizarre result would be that publishers have more latitude to publish *leaked* classified information than they do the considered and unclassified reflections of former officials.

Nevertheless, in 2020, the Department of Justice sought an emergency order to block the publication and sale of former National Security Adviser John Bolton's book critical of the sitting President, *The Room Where It Happened*. Emergency Appl. for TRO & Mot. for Prelim. Inj., *United States v. Bolton*, No. 1:20-cv-1580 (RCL), 2020 WL 3401940 (D.D.C. June 17, 2020). And brazenly, the Department also sought to bind his publisher, Simon & Schuster, despite the private company's lack of privity in any agreement Bolton signed as an intelligence community official. *Id*. Without acknowledging the *Pentagon Papers Case*, and without naming the publisher as a party to the suit (thus limiting its ability to properly respond to the requested publication ban), the government argued that Federal Rule of Civil Procedure 65(d)(2) entitled it to an injunction not just against Bolton but also against his publisher and all "[c]ommercial resellers further down the distribution chain, such as booksellers," claiming these parties were in "active concert or participation" with Bolton. *Id.* at 27, 29 & n.6. The district court rightly held that for "reasons that hardly need to be stated, [it would] not order a nationwide seizure and destruction of a political memoir." *United States v. Bolton*, No. 1:20-cv-1580 (RCL), 2020 WL 3401940, at *4 (D.D.C. June 20, 2020). But the Department's effort underlines that the prepublication review system—as the government envisions and defends it today—poses the very same threats as the most classic prior restraint imaginable.

II. Information suppressed under the national security prepublication review regime is of profound public interest.

"The freedoms of speech, press, and assembly, expressly guaranteed by the First Amendment, share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556 (1980). That function is especially crucial where matters of national security, foreign affairs, and intelligence are concerned. As this Court has often acknowledged, national security is an area in which judicial and legislative oversight have limited traction, due to the attendant secrecy. As a result, "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry." *Pentagon Papers Case*, 403 U.S. at 728 (Stewart, J., concurring). But that "informed and critical public opinion which alone can here protect the values of democratic government" depends on an adequate flow of information to the public. *Id*.

Former members of the military and intelligence community have therefore long played an indispensable role in educating the electorate on issues of war and national security generally. These professionals' speech "holds special value" based on years of experience "gain[ing] knowledge of matters of public concern through their employment." *See Lane v. Franks*, 573 U.S. 228, 240 (2014). Without their contributions, the public would have remained in the dark about important details of the fall of Saigon, the use of enhanced interrogation techniques in the aftermath of the September 11 attacks, and intelligence agencies' complicity in torture and misconduct abroad. *See, e.g.*, Frank Snepp, Decent

Interval (1978); Ali Soufan, The Black Banners: The Inside Story of 9/11 and the War Against Al-Qaeda (2011); Victor Marchetti, The CIA and the Cult of Intelligence (1974). These disclosures have often prompted important public debates and helped inform official oversight. *See, e.g.*, Seymour M. Hersh, *Ex-C.I.A. Man Assails Saigon Evacuation*, N.Y. Times (Nov. 18, 1977), https://perma.cc/Z84D-HTT4; S. Select Comm. on Intel., Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, S. Rep. No. 113-288 (2014).

The formal prepublication review process arose because of—not despite—the public interest in hearing those stories. For much of the intelligence community's early history, as one CIA official described the agency's experience, "review of manuscripts was pretty much on an ad hoc basis" because "very few employees or past employees" sought to write them. *Prepublication Review and Secrecy Agreements: Hearings Before the H. Permanent Select Comm. on Intel.*, 96th Cong. 2 (1980) (statement of Herbert E. Hetu). That changed sharply in the 1970s when, prompted by allegations linking the intelligence community to the Watergate scandal and controversy over domestic surveillance of groups like the Black Panthers and anti-Vietnam War demonstrators, dual congressional committees dubbed the Pike and Church Committees were appointed to investigate misconduct. *See* Christopher R. Moran, *Company Confessions: The CIA, Whistleblowers and Cold War Revisionism*, *in* The Cold War: Historiography, Memory, Representation 94 (Konrad H. Jarausch, Christian Ostermann & Andreas Etges eds., 2017).

The abuses uncovered by these committees motivated former officials to share their experiences in the intelligence community and drove public appetite for those accounts. *See id.* at 95. And, importantly, the officials hoping to share their stories were hardly of one mind. It was very much in the agencies' own interests to develop a process that could evenhandedly accommodate both dissenters and accounts by former officials defending their practices, the better to shore up the community's credibility. *See, e.g.*, Daniel L. Pines, *The Central Intelligence Agency's "Family Jewels": Legal Then? Legal Now?*, 84 Ind. L. J. 637 (2009); *see also* Frank J. Rafalko, MH/CHAOS: The CIA's Campaign Against the Radical New Left and the Black Panthers (2011) (defending the CIA's domestic spying in the 1970s). These are worthy debates, and the First Amendment requires that they be as open as possible.

As a former Chairman of the CIA's Prepublication Review Board has described, "the marked increase in former employees writing on aspects of their Agency experience . . . made manifest the need to establish a more systematic review process"—not least because "[i]t seemed clear that the Federal courts presumed such a process was in place and that, if not, it had better be." John Hollister Hedley, *Reviewing the Work of CIA Authors: Secrets, Free Speech, and Fig Leaves*, Stud. Intel., Spring 1998, at 75, 77. It was no coincidence, then, that the Agency's board was formally established in 1976, just months after the Church Committee published its report. *See id.* And the number of manuscripts to be reviewed promptly swelled, nearly quadrupling

between the board's establishment and the Supreme Court's decision in *Snepp*. *See* Rebecca H., *The "Right to Write" in the Information Age: A Look at Prepublication Review Boards*, Stud. Intel., Dec. 2016, at 17. Further, the intelligence community, conscious of the public demand for transparency, insisted to Congress that the emerging process would be collaborative rather than combative: "Our ultimate goal is to help [the author] get the thing published, not only to help him in the publishing process, but to get it reviewed and help him publish." *Prepublication Review and Secrecy Agreements*, *supra*, at 16.

The system in force today, because of its size, complexity, and the lack of coherent standards, has become a hindrance to public visibility into intelligence and military policies and activities, not a help. While the government has a compelling interest in ensuring national security, that "broad, vague generality" cannot be allowed "to abrogate the fundamental law embodied in the First Amendment." *See Pentagon Papers Case*, 403 U.S. at 719 (Black, J., concurring). And for too long now, the government has seized on the slightest potential nexus to national security to muzzle the very people the public must hear from to educate debate on national security decisions. Prepublication review was formalized in the first instance to accommodate the insight that "[g]overnment employees are often in the best position to know what ails the agencies for which they work," and this Court must hold it to boundaries that respect that First Amendment interest. *Lane*, 573 U.S. at 236 (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994)).

III. *Snepp* does not bless the current system.

To say that *Snepp* authorized any of this, let alone all of this, distorts that decision beyond recognition. The analysis of any system of prior restraint requires considering its "specific features," taken as a whole, to determine if they "present[] a danger of unduly suppressing protected expression." *Freedman*, 380 U.S. at 54. But as Petitioners ably explain, *see* Pet. 35–37, there is little resemblance between Frank Snepp's particular obligations and the system that exists today. *Snepp* does not resolve every First Amendment question that might be raised by policies this Court never had occasion to consider.

The government has nevertheless taken to arguing that the Court in *Snepp*—without saying so in its opinion—comprehensively considered the relationship between First Amendment rights and prepublication review in any form. It has claimed, for instance, that because amicus Reporters Committee for Freedom of the Press urged the Court over forty years ago to hold the government to a showing that Snepp's book "pose[d] a clear and present danger to the national security of the United States," Br. of Reporters Committee, *supra* note 2, at *3–4, *Snepp*'s silence on that argument relieved the government of any obligation to tailor its prepublication review policies to true risks of national security harm. But the suggestion is a non sequitur.

It is the decision actually written—not a litigant's reconstruction of the Justices' "thoughts regarding an opinion"—that "authoritatively demonstrate[s] the meaning of that opinion." *Tome v.*

United States, 513 U.S. 150, 168 (1995) (Scalia, J., concurring in part and concurring in the judgment). And *Snepp* is, as far as it goes, clear on this particular question: The Court concluded only that "'[t]he agreement that Snepp signed [was] a reasonable means for protecting" the government's national security interests, such that Snepp could not raise its invalidity as a "defense[] to the enforcement of his contract" in the government's action to impose a constructive trust. 444 U.S. at 509 n.3. But the Court went no further than that—it did not, for instance, hold that the government could substantively censor the particular material at issue by "obtain[ing] an injunction against the publication of unclassified information." *Id.* at 521 n.11 (Stevens, J., dissenting). In practice, this Court effectively denied Snepp's petition for consideration of the First Amendment questions presented, *id.* at 524, answering only the minimum necessary to move on to the issue of remedy. Put simply, the *Snepp* decision was grounded in a particular dispute and the specifics of a particular contract; it cannot be read as resolving the constitutionality of any system of prepublication review, particularly one as potentially suppressive of protected speech as that which exists today.

This case, by comparison, required the courts below—and would require this Court—"to look through forms" to a substance that *Snepp* never addressed. *Bantam Books*, 372 U.S. at 67. As Petitioners explain, those questions are urgent, unanswered, and ripe for review. *See* Pet. 37–38. *Snepp* should have been no barrier. But if *Snepp* can mean what the lower courts took it to mean, then

Snepp should and must, for all of the reasons given above and in the Petition, be overruled.

CONCLUSION

For the foregoing reasons, amici curiae respectfully urge the Court to grant Petitioners' writ of certiorari.

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